

## THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND REGIONAL CONSENSUS: A SYSTEMIC APPROACH.

Thomaz Fiterman Tedesco<sup>1</sup>

19

**ABSTRACT:** This article examines the Inter-American System of Human Rights (especially the Inter-American Court of Human Rights – IACHR) and the Latin-American national legal systems as open legal sets that can interact by using the regional consensus. The Inter-American Court of Human Rights, however, tends to rely uniquely on the conventionality control on this inter-relationship, imposing itself as the “final interpreter” of the American Convention on Human Rights (ACHR). This essay argues that this interpretation considers the Latin-American national legal systems as subsystems of a unique one, whereas use of consensus implies that every national legal set is an autonomous system, and this method can function as a meta-system between the two sets (international and national), with the potential to enhance the legitimacy of the IACHR.

**KEY-WORDS:** Regional consensus. Conventionality control. General System Theory. Inter-American Court of Human Rights. Human Rights International Law.

**RESUMO:** Este artigo examina o Sistema Interamericano de Direitos Humanos (especialmente a Corte interamericana de Direitos Humanos) e os ordenamentos jurídicos nacionais latino-americanos como ordens abertas que podem interagir pelo uso do consenso regional. A Corte Interamericana, no entanto, tende a utilizar apenas o controle de convencionalidade nesta relação, colocando-se como a “intérprete final” da Convenção Americana de Direitos Humanos. Este trabalho argui que esta forma de agir considera os ordenamentos nacionais latino-americanos como subsistemas de um sistema único, enquanto que o uso do método do consenso regional implica considerar cada ordenamento nacional como um sistema autônomo, sendo que este método interpretativo pode funcionar como um metassistema entre os dois, com potencial para aumentar a legitimidade da Corte Interamericana.

**Palavras-Chave:** Consenso Regional. Controle de Convencionalidade. Teoria Geral do Sistema. Corte InterAmericana de Direitos Humanos. Direito Internacional dos Direitos Humanos.

---

<sup>1</sup> Public Defender of the State of São Paulo. Master student of Constitutional Law at the Pontifical Catholic University of São Paulo. E-mail: tftssa@gmail.com.

## **A BRIEF INTRODUCTION TO THE GENERAL SYSTEM THEORY AND NECESSARY DEFINITIONS FOR THIS PAPER**

A general system theory is born when science becomes aware of the need to overcome its ever-increasing specialization, which characterizes its modern self. This excessive specialization obscures great portions of reality and therefore embarrass scientific research as a whole. So, this new approach – a methodological turn – occupies a great deal of scientific interest today; there are systems everywhere, and they became an object of scientific work (BERTALANFFY, 1968, pp. 03-10).

This methodological turn is contrasted with classical, analytical and mechanic approaches – which focused on the study of components themselves, disregarding its interactions with other objects nearby (PUGLIESI, 2009). The idea is to ascertain greater slices of reality, the intrinsic relations between elements, instead of studying only the elements themselves (more and more decomposed), in order to obtain more data and more knowledge. According to Morin, the complex thought underlying system theory refuses to reduce and thereby mutilate reality (MORIN, 2015). Instead of focusing on each variable at a time, the systemic approach seeks a global view, searching for models applicable to reality (PUGLIESI, 2009).

The idea of a system includes two main ideas: relationship and organization; its elements are linked and so they acquire an organization (PUGLIESI, 2009).

Although there are systems everywhere, with different elements and from different areas of knowledge, Bertalanffy explains the possibility of a general theory through the concept of isomorphism:

Rather, we can ask for principles applying to systems in general, irrespective of whether they are of physical, biological or sociological nature. If we pose this question and conveniently define the concept of system, we find that models, principles, and laws exist which apply to generalized systems irrespective of their particular kind, elements, and the "forces" involved.

A consequence of the existence of general system properties is the appearance of structural similarities or isomorphisms in different fields. There are correspondences in the principles that govern the behavior of entities that are, intrinsically, widely different. To take a simple example, an exponential law of growth applies to certain bacterial cells, to populations of bacteria, of animals or humans, and to the progress of scientific research measured by the number of publications in genetics or science in general. The entities in question, such as bacteria, animals, men, books, etc., are completely different, and so are the causal mechanisms involved. Nevertheless, the mathematical law is the same (1968, p. 33).

Thus, notwithstanding the scientific field, the general system theory can be applied, because there are some general rules that govern the relationship of the components.

In the present work, the model implicates Latin American legal orders and the Inter-American System of Human Rights (especially its judicial organ), to determine if the relation can be better described as one between a system and a subsystem or between two autonomous systems that communicate through a meta-system.

As stated by PUGLIESI (2009), it is possible to define the necessary concepts for the present essay:

**System:** the entire system which manifests autonomy and emergency in regard to what is external;

**Subsystem:** any system that expresses subordination relative to a system in which it is integrated as a part;

**Meta-system:** the system resulting from mutually transformative and encompassing interactions of two previously independent systems.

## **I. THE IACHR AND THE CONVENTIONALITY CONTROL. THE IACHR'S MONIST APPROACH.**

The ACHR is an international human rights treaty, adopted at the Inter-American Specialized Conference on Human Rights (San José, Costa Rica, 22 November 1969), and the most important instrument of the Inter-American Human Rights system. It is currently in effect in 23 member states of the Organization of American States (OAS).<sup>2</sup> It basically ensures civil and political rights, in a similar way to the Covenant on Political and Civil Rights (United Nations).<sup>3</sup>

About the Inter-American System history, Hunneus details:

The Inter-American Human Rights System was formally created in 1948, with the adoption of the OAS Charter and the American Declaration on the Rights of Man and Citizen by the Ninth International Conference of American States. During its first decade, however, it was more aspiration than reality. While the OAS Charter provided for the creation of a Commission, and the idea of a Court

<sup>2</sup> In: <[http://www.oas.org/dil/treaties\\_B32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B32_American_Convention_on_Human_Rights_sign.htm)>. Access: 10 oct 2017.

<sup>3</sup> The sole indication of social, economic and cultural rights is enshrined in article 26 of the ACHR.

was already under discussion, the Inter-American Commission, based in Washington D.C., began its work only in 1959. The Commission construes its mission to include monitoring states through on-site visits, shaming through country reports, and vindicating claims through a system of individual petitions. Although the Commission's reports are advisory, the act of publicizing egregious state practices has played an important role in the region. During the 1970s in particular, the Commission emerged as an authoritative counterpoint to military dictatorships engaged in practices of disappearance, torture, and extra-judicial killings. Today, it receives roughly 1,400 complaints, holds 100 hearings, and issues 20 reports on particular cases (reports on the 26 merits) per year. Garnering support for the creation of the LAS's second main institution, a court with binding jurisdiction, took two decades longer. In 1969 the OAS States adopted the American Convention on Human Rights, which in addition to giving legal force to states' rights commitments, provides for the creation of a Court. The Court's first set of judges was elected in 1979, in an era of acute state repression and open U.S. intervention in the region. The Court has both advisory and contentious jurisdiction. Under the advisory jurisdiction, OAS bodies or member states can request an interpretation of regional human rights instruments, or opinions on the compatibility of specific laws with the American Convention. Under the contentious jurisdiction, the Court decides cases between States Parties, or between individuals and a State Party. Individual petitions, however, cannot be filed directly with the Court, but must first go through the Commission. The Commission investigates individual claims and guides the claimant and state towards a friendly settlement. If that fails, the Commission issues a report in which it advises the state to take certain actions. If the state does not comply, the Commission may refer the case to the Court (HUNNEUS, 2011, pp. 499-500).

The ACHR establishes, therefore, as means of protection, two major competent organs for monitoring the fulfillment of the treaty: the Inter-American Commission on Human Rights (the Commission) and the Inter-American Court of Human Rights.<sup>4</sup>

The IACHR is the jurisdictional organ of the system. Only member states and the Commission can submit a case to its examination.<sup>5</sup> According to Article 62 of the ACHR, the IACHR jurisdiction is optional and requires a declaration of acceptance of the member state.<sup>6</sup>

As a court competent to decide individual cases,<sup>7</sup> its task was to define if a state action or omission constituted a violation of the Convention and the consequent

---

<sup>4</sup> Chapters VII and VIII of the ACHR detail their competences and powers.

<sup>5</sup> Article 61 – ACHR.

<sup>6</sup> The European Human Rights System, on the contrary, includes a mandatory clause about the ECtHR jurisdiction – article 32. Ratifying the European Convention means, automatically, to adhere to the Court's binding judgments.

<sup>7</sup> Section 2 of Chapter VIII – ACHR.

international responsibility, but, in the last two decades, the Court expanded its reach (DULITZKY, 2015, p. 49).

For example, its remedial measures are extremely detailed and extensive, going beyond the individual victim. About them, Antkowiak and Gonza state that:

The Inter-American Court's contemporary remedial approach comprises measures of restitution, rehabilitation, satisfaction, and guarantees of non-repetition, in conjunction with pecuniary and nonpecuniary damages. [...] The Court's potent approach to redress pursues the *restitution in integrum* principle of the Permanent Court of International Justice's landmark *Factory at Chorzów* judgement, which held that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (ANTKOWIAK; GONZA, 2017, p. 287).

23

And specifically, about the evolution of the non-monetary remedies, they point out:

One of the defining characteristics of the Inter-American Court's contemporary case law is its emphasis upon non-monetary remedies, in direct response to victim's repeated petitions. The Court is the only international body with binding jurisdiction that has consistently ordered the full range of such measures, in conjunction with cash compensation. [...] By the end of 2001, the Tribunal's current approach to expansive non-monetary redress was nearly developed. Up until the late 1990's, however, the Court generally limited its non-monetary remedies, with the exception of the judgment *Aloeboetoe v. Suriname* (ANTKOWIAK; GONZA, 2017, p. 301).

This approach is completely different from its European counterpart (the European Court of Human Rights – ECtHR), whose reparative model is frequently limited to pecuniary compensation (ANTKOWIAK; GONZA, 2017, p. 288).<sup>8</sup> As it will be demonstrated, that is not the only difference of approach between the two regional human rights courts.

This activist approach can be partially explained by its origins. In the beginning, the Inter-American System had to deal with massive and gross violations of human rights, during periods of state terrorism and dictatorships – most of the region was under the influence and control of undemocratic governments during the 1970's. The Commission and the Court was the last resort for victims, which encouraged an expansive modus

---

<sup>8</sup> It is worth noticing that while the IACHR has a 34 percent compliance rate, the ECtHR has a 49 percent compliance rate (HILLEBRECHT, 2014).

operandi (ABRAMOVICH, 2009).<sup>9</sup> Piovesan as well draws a line between a first period – dictatorships – and a second one – democratic transition – in the region (2017, pp. 143-145). Since in the first phase the most basic fundamental rights were severely violated, the Commission and Court had reasons to be less deferential to States – the gross violations had to be confronted.

However, the democratic transition in the region is in progress. It implies a change of agenda and case-law – the Court now holds decisions about brand new issues, such as gay rights,<sup>10</sup> consent in medical procedures,<sup>11</sup> social security,<sup>12</sup> anti-terrorism

---

<sup>9</sup> “At the beginning, the ISHR dealt with cases involving massive and systematic human rights violations perpetrated under systems of state terrorism, or in the context of violent internal armed conflict. Its role was, in short, a last resort of justice for the victims of these violations, as they could not look to national systems of justice that had been devastated or corrupted. In this initial phase of political gridlock within the member nations, the Commission’s Country Reports served to document situation with technical precision, to legitimate complaints by victims and their organizations, and to expose and erode the image of the dictators in the local and international spheres. Later, during the post-dictatorial transitions in the 1980’s and the beginning of the 1990’s, the ISHR had a broader purpose, as it sought to monitor the political processes aimed at dealing with the authoritarian past and its scarring of democratic institutions. During this period, the ISHR began to delineate core principles about the right to justice, truth, and reparations for gross, massive, and systematic human rights violations. It set limits on the amnesty laws. It laid the foundation for the strict protection of freedom of expression and the prohibition on prior restraint. It forbade the military courts from judging civilians and hearing human rights cases, limiting the space in which the military could operate, as they continued to have veto power during the transition and sought impunity for past crimes. It protected habeas corpus, procedural due process, the democratic constitutional order and the division of state powers, in light of the latent regression possibility to an authoritarian state and the abuses of states of emergency (IACHR COURT, 1986, 1987a, 1987b). It interpreted the scope of the limitations imposed by the Convention as regards the death penalty, invalidating it for minors and the mentally ill, allowing it to be applied only in cases where a crime was committed, and establishing strict standards of due process, as a safeguard against the arbitrariness of the courts in imposing the death penalty. It also addressed regional social issues which showed a discriminatory bias by, for example, affirming equality before the law for women asserting their familial and matrimonial rights, and the rights of inheritance for children born out of wedlock, which the American civil codes still considered ‘illegitimate’. During the 1990’s, moreover, it also confronted with firmness state terrorist regimes, such as the Peruvian regime of Alberto Fujimori, documenting and denouncing violations that had also been committed in South America in the 1970’s, such as systematic forced disappearances and torture, and the subsequent impunity for these state crimes. It was also an important player in addressing the gross human rights violations and violations of international humanitarian law committed in the context of internal armed conflict in Colombia. The present regional landscape is undoubtedly more complex. Many countries in the region made it through their transitional periods, but were not able to consolidate their democratic systems. These representative democracies have taken some important steps, by improving their electoral systems, respecting freedom of the press, the abandonment of political violence; but they show serious institutional deficiencies, such as an ineffective judicial system and violent police and prison systems. These democracies also have alarming levels of inequality and exclusion, which cause a perpetually unstable political climate (ABRAMOVICH, 2009, p. 9).

<sup>10</sup> Cases Atala Riffo v. Chile, Flor Freire v. Ecuador.

<sup>11</sup> Case I.V. v. Bolivia.

<sup>12</sup> Case Aguado Alfaro and others v. Peru

legislation,<sup>13</sup> etc. Many countries now have democratic governments and are under the rule of law – at least formally.<sup>14</sup>

The IACHR's expansive functioning, nevertheless, does not seem to refrain even so. Its interventionist performance goes on despite the political change in the region's landscape,<sup>15</sup> drawing criticism and distrust from State parties.<sup>16</sup>

Thus, Roberto Gargarella censures the little concern about democratic legitimacy shown in the Court's case-law, especially in *Gelman v. Uruguay* (2017).<sup>17</sup> Similarly, Malarino identifies an undemocratic trend in the Court's case-law, because its interpretation of the ACHR is increasingly creating rights not expressly written in the Convention<sup>18</sup> - often in favor of victims and against written rights of criminally accused persons<sup>19</sup> (such as articles 7, 8 and 25 of the Convention) –, and often steps into

---

<sup>13</sup> Case *Norín Catrimán and others v. Chile*.

<sup>14</sup> “This extremely simplified version of the IAHRs rests upon the assumption that Latin American states have historically harbored regimes that violate human rights more or less pervasively. Of course, this was true in the early years of the Inter-American Court, when, throughout Latin America, military dictatorships persecuted political dissidents through massive, large-scale, human rights violations. Today, the situation is different. Several recent cases, discussed below, demonstrate a shift in the region's political and social landscape and in the nature of rights being violated. The current IAHRs often addresses claims of human rights infringement by democratic—rather than authoritarian—governments, with the violations alleged therein of a less extreme and less obvious nature (CONTESSÉ, 2016, p. 127).

<sup>15</sup> “*Porém, é igualmente verdadeiro que a ação intervencionista do Sistema e da Corte não refluíu pari passu a redemocratização dos regimes políticos dos Estados-membros a ela submetidos. Ou seja: se num primeiro momento a Comissão Interamericana mostrou-se militante, e a Corte Interamericana soube construir estratégias para ‘speak law to politics’, nos anos recentes, um conjunto substancial de objeções vem sendo levantado quanto ao eventual caráter ‘anti-democrático’ e ‘antiliberal’ de sua atuação*” (TORELLY, 2016, p. 238). Free translation: However, it is equally true that the interventionist action of the System and the Court did not refrain *pari passu* the redemocratization of political regimes of member-states. In other words: if at first the Commission was militant and the Court was able to set up strategies to ‘speak law to politics’, in recent years, a substantial set of objections has been opposed to its ‘antidemocratic’ and ‘iliberal’ modus operandi.

<sup>16</sup> “It is unsurprising that the system today faces resistance from states that see it as an unwelcome intrusion into their domestic affairs. When the system started handing down decisions, many states had no democratic credentials. Consequently, they had little credibility to push back against the Court. The Court embraced a standard and an almost-mechanical form of deference by citing to the rules of prior exhaustion of remedies and the general complementary character of international authority. The newly established democracies, in contrast, want to participate and actually do take part in the regional governance. The Court is now within their reach” (CONTESSÉ, 2016, p. 133).

<sup>17</sup> The Court held that Uruguay's amnesty law, approved by two different referenda – so, by the people directly –, was also unconventional and null, notwithstanding the popular approval.

<sup>18</sup> “A veces, la Corte intenta encubrir la creación judicial de derecho ‘derivando’ reglas jurídicas concretas de conceptos absolutamente abstractos, como la ‘idea de justicia objetiva’, las ‘leyes de humanidad’, el ‘clamor universal’, o la ‘conciencia jurídica universal’. Este tipo de justificación es recurrente en los votos del juez Cançado Trindade y el caso *Barrios Altos* nos ofrece un ejemplo. *Cançado Trindade* sostuvo allí que las leyes de amnistía lesionaban la “conciencia jurídica de la humanidad” y por ello carecían de efectos jurídicos. Es probable que el recurso a este tipo de justificaciones iusnaturalistas esté preordenado a evitar la crítica de que la solución propiciada (en el caso, una regla que prohíbe el dictado de leyes de amnistía) no puede sustentarse en el texto de la Convención Americana” (MALARINO, 2010, p. 31-32).

<sup>19</sup> “La justificación que ella esgrime para anular derechos fundamentales del imputado consagrados explícitamente en la Convención es la especial necesidad de protección de las víctimas basada en la gravedad del delito. La Corte está creando jurisprudencialmente un derecho de excepción para las graves violaciones de los derechos humanos, en el cual no solo no hay ‘ne bis in ídem’, ni irretroactividad de la ley penal, ni plazo razonable de duración del

domestic affairs, mostly through its remedial measures,<sup>20</sup> for example when it imposes the implementation of public policies, the investigation, judgement and punishment of individuals, or requires the creation of criminal legislation (MALARINO, 2010).

About this, for the purposes of this essay, emphasis must be placed on the conventionality control theory, a tool created and used by the IACHR that has been the principal target of critics.<sup>21</sup>

Ferrer Mac-Gregor, judge of the IACHR, defines the theory as follows:

This doctrine creates the international obligation on all state parties to the ACHR to interpret any national legal instruments (the constitution, law, decrees, regulations, jurisprudence etc.) in accordance with the ACHR and with the Inter-American corpus juris more generally (also called the “block of conventionality”). Wherever a domestic instrument is manifestly incompatible with the Inter-American corpus juris, state authorities must refrain from application of this law, in order to avoid any violation of internationally protected rights. State authorities should exercise this conventionality control ex officio, whilst ensuring they always act within the framework of their respective competences and the corresponding procedural rules, as defined internally by states (MAC-GREGOR, 2017, p. 01).

Thus, the doctrine in question puts a burden on national judges, who must assess whether the national law or practice is compatible with the ACHR (as interpreted by the IACHR) and, in case they are not, banish the legislation or administrative measure. If this criterion is not matched, the member state might be considered internationally responsible for a human rights violation.

---

*proceso, sino tampoco plazo de prescripción, ni amnistía posible. El viejo y conocido principio del derecho medieval ‘in atrocissima licet iudici iura transgredi’ aparece nuevamente para justicar lesiones de los derechos humanos en nombre de los derechos humanos” (MALARINO, 2010, p. 48)*

<sup>20</sup> “La Corte Interamericana subestima el valor que representa el principio democrático para una sociedad cuando ordena a un Estado como reparación de la violación de un derecho protegido en la Convención que el poder legislativo suprima una ley o bien la sancione o reforme de acuerdo con lo establecido en su sentencia.<sup>53</sup> Es cierto que la ratificación de la Convención Americana y la aceptación de la competencia de la Corte Interamericana necesariamente suponen restricciones de la soberanía estatal, pero ¿tales restricciones llegan a tanto como para permitir que un tribunal internacional, compuesto por siete jueces ‘part time’ no elegidos popularmente, tenga la última palabra sobre la necesidad de regular conductas con una ley y sobre el contenido concreto de esa ley? La respuesta debe ser negativa y esto se ve muy claro cuando la ley que la Corte Interamericana ordena suprimir, crear o modificar afecta posiciones jurídicas de las personas. Paradigmático es el caso de la condena a reparar consistente en introducir un nuevo delito penal en el ordenamiento interno, medida muy frecuente en la jurisprudencia de la Corte” (MALARINO, 2010, p. 51).

<sup>21</sup> As it is discussed below, the Court’s conventionality control is drastically different from the European Court’s margin of appreciation, which gives State-members some margin of maneuver to interpret the European Convention on human rights. For further information on the margin of appreciation, LEGG, 2012.



The expression first appears (outside individual votes) in *Almonacid Arellano v. Chile*,<sup>22</sup> one of the amnesty cases. The Court decided that, when the legislative branch fails to abolish a law incompatible with the ACHR, the judiciary must do the conventionality control and abolish the law by itself. A short time ago, in the *Dismissed Congressional Employees* case, the IACHR refined its criteria, prescribing that the conventionality control should be exercised even *ex officio* and respecting national procedural rules. It also stated that not only judges, but all national authorities are obliged by the ACHR, so, they must implement conventionality control as well (MACGREGOR, 2017).

The evolution of this regional judicial review proceeded. In *Boyce v. Barbados* and *Cabrera García v. Mexico*, the Court stated the obligation of all national judges, from all judicial levels, to implement the conventionality control, considering the IACHR's interpretation when doing it (TORELLY, 2016, pp. 252-255).

By doing so, the IACHR case law does not give much leeway to domestic courts to decide how to implement the ACHR; instead, it imposes direct applicability of this international instrument (DULITZKY, 2015, p. 55). Moreover, it demands that domestic judges evaluate the compatibility of national law and practice with the ACHR as interpreted by itself – the IACHR considers itself the final interpreter of the Convention, in a monopolist fashion. Apparently, no national margin of appreciation is allowed as a rule.

There are some evident problems concerning the theory. The most notable is the complete absence of a firm legal basis in the ACHR (on the contrary, article 2 of the ACHR establishes the obligation of member states to adapt their legislation, not the IACHR's power to declare it null and void).<sup>23</sup> Thus, the conventionality control is not contemplated at all in the ACHR, and besides, poses serious procedural problems for

---

<sup>22</sup> *Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 154, para. 124 (Sep. 26, 2006). Holding its inConventionality (incompatibility with the ACHR), the Court declared a Chilean decree – which prevented any investigation about crimes committed between 11 September 1973 and 10 March 1978 – null and void.

<sup>23</sup> “Because the American Convention itself does not contain any rule requiring national judges to carry out this type of review, the first concern raised by the doctrine is it may lack an actual basis in law. With the Inter-American Court deciding cases since the late 1980s, it is hard to explain why it took it twenty years to ‘discover’ that domestic judges have an obligation to override laws that conflict with the Convention” (CONTESSÉ, 2016, p. 138).

states whose judges do not have the power to control the constitutionality of norms (BINDER, 2011, p. 1216).<sup>24</sup>

Although the ACHR has explicitly adhered to the subsidiarity principle,<sup>25</sup> the doctrine in question is the opposite of subsidiary. The conventionality control approach, as explained here, tends to consider each national legal set as a subsystem of a unique system, with the IACHR being on the vertex. So, the final interpreter – the Court – is on top of every subsystem – the national legal orders in Latin America.

The monist view of the IACHR is evident – national and international law composes a unique set, and international law has the upper hand. In a system like this, the Court has the final word, which it is exercised by the conventionality control doctrine.

That is not the case within the Council of Europe, as discussed below.

## **2. THE REGIONAL CONSENSUS METHOD. THE META-SYSTEM APPROACH.**

The European System of Human Rights is a direct consequence of the Second Great War. The Council of Europe is born then, the main regional body dedicated to the protection of human rights in the continent. Its core values are the rule of law and the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms. The European Convention for the protection of human rights and fundamental freedoms came into force in 1953, and since then it has been described as the most advanced human rights treaty system in the world. The Convention established two main institutions, the European Commission on Human Rights and the European Court of Human Rights. Later on, because of its dramatically increased caseload,

---

<sup>24</sup> “Nevertheless, it is unclear how, out of a prohibition on using domestic norms to justify noncompliance with international obligations—which can, of course, trigger international responsibility on the state’s part—arises a specific requirement to reassign court jurisdiction at the domestic level, thus endowing judges with powers that the domestic legal system may not grant them. This problem becomes evident when considering the diverse models of constitutional review found in Latin America” (CONTESE, 2016, p. 140).

<sup>25</sup> The preamble is pretty clear: “recognizing that the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states”. Article 2 is similarly straightforward: “Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms”.

Protocol n. 11 came into action and unified both institutions into one permanent regional Court, eliminating the need of a bifurcated structure – which was seen as a source of unnecessary delay (BRAUCH, 2005, p. 114).<sup>26</sup>

Although the European regional system has a complex set of interpretation techniques in its case-law, for the purposes of this article, the regional consensus method is the one focused.<sup>27</sup> Dzehtsiarou conceptualizes the European consensus as a

presumption that favors the solution to a human rights issue which is adopted by the majority of the Contracting Parties. This presumption can be rebutted if the Contracting Party in question offers a compelling justification. Such a conceptualisation implies that European consensus has a strong persuasive effect and its rebuttal should be supported by convincing and lucid reasons (2015, p. 09).

Basically, the regional consensus method intends to enhance the legitimacy of a regional human rights court, making its decision-making more clear and predictable. The ECtHR ascertains the law of the European countries in order to identify a majority, or at least a trend, which is considered relevant to decide the case.

Furthermore, Lixinski identifies five functions for this method: to increase the legitimacy of the international courts; to persuade States about it, making judgements more acceptable; to avoid arbitrary decision-making; to circumscribe the scope of subsidiarity; and to help the court in dealing with new issues or controversial matters (LIXINSKI, 2017, p. 67).

It is important to highlight that the ECHR does not use consensus in its literal sense: the Court does not wait for unanimity, because it can be satisfied with a trend in a particular direction among the laws and practices of the contracting States. The goal is to identify a convergence (DZEHTSIAROU, 2015, p. 12).

About the consensus method typology, Dzehtsiarou explains:

The ECtHR deploys four types of consensus: 1. consensus based on comparative analysis of the laws and practices of the Contracting Parties; 2. consensus based on international treaties; 3. internal consensus in the respondent Contracting Party; 4. expert consensus. Only the first type can be truly called European consensus. Consensus based on comparative analysis is a summary of the laws and practices of the Contracting Parties and therefore represents the common standards adopted by the European States. Consensus based on international treaties is usually identified through analysis of the treaties ratified, or at least signed, by the Contracting Parties. In

<sup>26</sup> For further information, SHELTON; CAROZZA, 2013.

<sup>27</sup> For further information about interpretive methods in European regional human rights law, RAMOS, 2015.

establishing this type of consensus, the Court can also rely on soft law mechanisms adopted by international organizations. [...] Internal consensus and expert consensus are clearly not European types since they represent the attitudes of the public to a particular issue within a sole respondent State or expert opinion (DZEHTSIAROU, 2015, pp. 39-40).

The first two types are of interest here – consensus via comparative law and consensus based on international law ratified by States. While the first is the principal type used by the ECtHR,<sup>28</sup> the second is the preferred one by the IACHR.

How exactly can this method enhance the legitimacy of an international judicial body? Lixinski elucidates:

The adjudication of international human rights law by regional courts is for the most part considered to be subsidiary to States' own efforts in internalizing these norms and following them. Therefore, at the crux of the debate between evolutionary interpretation and consensus is the respect that regional human rights courts owe to the principle of subsidiarity, and therefore respect to States' rights to implement their own international human rights obligations. It is only when subsidiarity fails that consensus comes into operation, as a means to bring the human rights court to a point that simultaneously respects its own subsidiary role by paying respect to States' discretion as a first step of its reasoning, but at the same time advancing human rights protection (using other States' discretionary application of human rights norms to impose responsibility on a non-complying State). [...] Evolutionary interpretation is a counterpoint to subsidiarity that can undermine the legitimacy of a human rights court, at least in that it may require a human rights court to undermine its own judgments, thus reducing the predictability of outcomes. Consensus, or more specifically the change in consensus, can work as a shield to help a court justify a change of position (2017, p. 91).

So, if human rights norms are open to intense interpretive disagreements<sup>29</sup> (like the right to life, or the right to privacy), given its open texture, using regional consensus can signalize to member States that there is predictability in an international court case-law. If subsidiarity fails and an evolutive interpretation is required, even so the regional court can act without exceeding its judicial mandate, channeling regional consensus for advancing human rights protection, though not as fast as one could hope for.

---

<sup>28</sup> For European case-law around regional consensus, DZEHTSIAROU, 2015, pp. 40-45.

<sup>29</sup> For instance, what the right to privacy entails? Is abortion included? If so, in which conditions? The U.S. Supreme Court, in *Roe v. Wade*, held that privacy encompasses the right to abortion, but the same reasoning is not followed everywhere. Brazil still struggles about this hard question, although the right to privacy here is also written on the Constitution. Disagreement about rights and its contents, of course, is a serious philosophical and juridical question, and good faith debaters are allowed to discord on solid grounds (WALDRON, 2004).

The ECtHR largely uses consensus via comparative law, ascertaining national laws within European borders to find a minimum common denominator (aligning itself with the requirements of the Vienna Convention on the Law of Treaties, article 31.3.b). Its american counterpart, conversely, uses at most consensus via international law, by systematically invoking treaties ratified by the State under scrutiny to evaluate its international commitments.

For instance, the case *Yean and Bosico Children v. Dominican Republic*, involving statelessness issues (paragraph 143). Lixinski points out that the Dominican Republic had signed, but had not ratified the Convention on the Reduction of Statelessness, but even so the IACHR had used the treaty as proof of international consent on the matter (2017).

As for consensus via comparative law, the IACHR tends to rely on it only to reinforce its expansive mandate. In the case *Atala Riffo v. Chile*, the Court rebutted Chile's argumentation about the lack of consensus at the moment of the decision on Chile using the *pro homine* principle, and by taking in consideration the actual state of the art on the issue in Latin America.<sup>30 31</sup> In *Artavia Murillo v. Costa Rica*, since the regional consensus was in favor of the most protective decision – most countries already allowed *in vitro* fertilization at the moment of Costa Rica prohibition (paragraphs 255 and 256) –, this argument of consensus was applied by the IACHR to demolish the veto on the matter.

Although Dzehtsiarou suggests that regional consensus should remain within European borders, Lixinski is right when defines the Americas as an ideal context for the use of consensus. After all, there are similar linguistic and legal traditions (2017, p.

---

30 “With regard to the State’s argument that, on the date on which the Supreme Court issued its ruling there was a lack of consensus regarding sexual orientation as a prohibited category for discrimination, the Court points out that the alleged lack of consensus in some countries regarding full respect for the rights of sexual minorities cannot be considered a valid argument to deny or restrict their human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered” (paragraph 92).

31 The Court has taken in consideration latin american supreme court’s decisions about LGBTI rights to demonstrate a trend among States in favor of gay rights: “*Acá la Corte cita directamente desarrollos constitucionales de países de América Latina, lo que permite enraizar su decisión en interpretaciones locales, siguiendo, más que liderando, el avance de una nueva jurisprudencia sobre la materia. Trae a colación decisiones de la Corte Constitucional colombiana y de la Suprema Corte de México para objetar, primero, cómo es que a personas homosexuales se les ha privado de sus derechos de manera sistemática. [...] Tanto para el país condenado, como para los demás que reconocen la competencia de la Corte Interamericana, el mensaje es que la ampliación de la doctrina sobre igualdad no solo proviene de nociones globales sobre los derechos, sino también de las interpretaciones locales de dichos países que hacen parte de una asociación regional*” (CONTESSÉ, 2017, pp. 19-20).

68), and the IACHR could use the legitimacy boost. Its actual cherry-picking usage does not obliterate this conclusion.

For the purposes of this essay, the regional consensus can be seen as a meta-system between the national legal sets and the international human rights tribunal. Using Pugliesi's example, regional consensus could be like the forest trail: its results from the interaction between the cited legal systems (nationals and international) and the path resulting from the interaction becomes most likely to be used by other national legal orders (PUGLIESI, 2009). In other words, the Court, when considers the national legal orders and practices in its decision-making, can create a new interpretive path, that is likely to be followed by other countries which still do not adopt that particular solution in a human rights matter (in their attempt to avoid international responsibility).

That is how the ECtHR works. By regarding european consensus as a relevant interpretive technique, it implies that each national legal set is an autonomous system – so much so that subsidiarity principle plays a larger role there than here in the IACHR –, which interacts with the European System of Human Rights on equal terms. There could be no surprise that the margin of appreciation doctrine was born in the european soil.

The interaction between the two systems – the ECtHR and the national legal orders – by the usage of european consensus tends to create a “path”, a minimum common denominator, that eventually is “tread” by resisting european countries, who wish to avoid international responsibility. Therefore, these resisting countries shall modify their state practices.

By doing so, the ECtHR gains legitimacy from European States, because its rationale becomes predictable and clear, and, as a consequence, encourages reluctant countries to follow the legal solution of the majority of the continent.

## **CONCLUSION.**

The ECtHR, as demonstrated, relies heavily on regional consensus, in order to avoid contestation from european countries, specially when using evolutive interpretation.

The IACHR, on the other hand, does not consistently resorts to the consensus method. According to Lixinski, its troubled relationship with the subsidiarity principle

and the fact that it draws legitimacy not from the States, but from other stakeholders (such as NGOs) and from abstract universal ideas of human rights, makes regional consensus a tool in favor of the expansion of its mandate (LIXINSKI, 2017), so, only when it is convenient, not on a consistent fashion. Consensus is useful if amplifies the rights enshrined on the ACHR, as perceived by the Court; if not, it is rebutted.

The author emphasizes:

This attitude of the IACtHR can have deep impacts on its legitimacy *vis-à-vis* States Parties. Even if this legitimacy is not a primary concern for the IACtHR, it ultimately affects its ability to promote the change it seeks to implement across the Americas. The IACtHR should thus consider the possibilities of consensus interpretation more seriously, at least inasmuch as it can create pathways for entrenchment of the ACHR, as interpreted by the IACtHR (2017, p. 95).

33

Thus, the legitimacy-building process seems to be ignored by the IACHR, which may not be the best path to trail, since compliance lies within state parties consent and aid – it is an inherently domestic affair, hinging on the political will of domestic actors (HILLEBRECHT, 2014). Partnership with national States might be a good idea to increase power and effectiveness, as Hunneus argues in relation to national justice systems and the Court (HUNNEUS, 2011).

To persuade States into complying is something that should be on the Court's radar; engaging in a bidirectional dialogue can create a meta-system (originated from the consensus interpretation), enhancing human rights protection, by operating communicating vessels between the legal orders, therefore facilitating compliance, which should be an actual concern of the IACHR.

## REFERENCES

ABRAMOVICH, Víctor. **From massive violations to structural patterns: new approaches and classic tensions in the inter-american human rights system.** Sur, Rev. int. direitos human., São Paulo, v. 6, n. 11, p. 639, pp. 6-39 Dec. 2009. Available from <[http://www.scielo.br/scielo.php?script=sci\\_arttext&pid=S180664452009000200002&lng=en&rm=iso](http://www.scielo.br/scielo.php?script=sci_arttext&pid=S180664452009000200002&lng=en&rm=iso)>. Access on: 19 Nov. 2017

ANTKOWIAK, Thomas; GONZA, Alejandra. **The American Convention on Human Rights: essential rights.** New York: Oxford University Press, 2017.

BERTALANFFY, Ludwig von. **General system theory: foundations, development, applications**. New York: George Braziller, 1969.

BINDER, Christina. **The Prohibition of Amnesties by the Inter-American Court of Human Rights**. German Law Journal. v. 12, n. 05, pp. 1203-1230, 2011. Available from: <<http://www.germanlawjournal.com/volume-12-no-05/>>. Access on: 22 sep. 2017.

BRAUCH, Jeffrey A. **The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law**. Columbia Journal of European Law, Vol. 11, pp. 113-150, 2005.

CONTESE, Jorge. *¿La última palabra? Control de convencionalidad y posibilidades de diálogo con la Corte Interamericana de Derechos Humanos*, in SELA, Yale Law School, Available at: [https://law.yale.edu/system/files/documents/pdf/sela/SELA13\\_Contesse\\_CV\\_Sp\\_20130401.pdf](https://law.yale.edu/system/files/documents/pdf/sela/SELA13_Contesse_CV_Sp_20130401.pdf). Access on: 25 apr. 2017.

\_\_\_\_\_. **Contestation and Deference in the Inter-American Human Rights System**. in: Law and Contemporary Problems, v. 79, 2016. Available from: <https://scholarship.law.duke.edu/lcp/vol79/iss2/6>. Access on: 08 apr 2017.

DULITZKY, ARIEL. **An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights**. Texas International Law Journal. v. 50, n. 01, pp. 45-93, 2015. Available from: <<https://law.utexas.edu/faculty/adulitzky/69-inter-amer-constitutional-court.pdf>>. Access: 09 oct. 2017.

DZEHTSIAROU, Kanstantsin. **European Consensus and the Legitimacy of the European Court of Human Rights**. Cambridge: Cambridge University Press, 2015

GARGARELLA, Roberto. **No Place for Popular Sovereignty? Democracy, Rights, and Punishment in Gelman v. Uruguay**. Available from [https://law.yale.edu/system/files/documents/pdf/sela/SELA13\\_Gargarella\\_CV\\_Eng\\_20121130.pdf](https://law.yale.edu/system/files/documents/pdf/sela/SELA13_Gargarella_CV_Eng_20121130.pdf). Access on: 19 aug. 2017.



HUNEEUS, Alexandra. **Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights.** Cornell International Law Journal. v. 44, n. 3, pp. 494-533, 2011.

HILLEBRECHT, Courtney. **Domestic politics and international human rights tribunals: the problem of compliance.** New York: Cambridge University Press, 2014.

LEGG, Andrew. **The Margin of Appreciation in International Human Rights Law.** Oxford: Oxford University Press, 2012

LIXINSKI, Lucas. **The Consensus Method of Interpretation by the Inter- American Court of Human Rights.** Canadian Journal of comparative and contemporary law. V. 03, n. 01, pp. 65-95, 2017.

MAC-GREGOR, Eduardo Ferrer. **Conventionality Control: the New Doctrine of the Inter-American Court of Human Rights.** Available: <[https://www.cambridge.org/core/services/aop-cambridge/core/content/view/CC71A5517CAF78AA4F73FECECIA04IEC/S2398772300001240a.pdf/conventionality\\_control\\_the\\_new\\_doctrine\\_of\\_the\\_interamerican\\_court\\_of\\_human\\_rights.pdf](https://www.cambridge.org/core/services/aop-cambridge/core/content/view/CC71A5517CAF78AA4F73FECECIA04IEC/S2398772300001240a.pdf/conventionality_control_the_new_doctrine_of_the_interamerican_court_of_human_rights.pdf)>. Access on: 18 out. 2017.

MALARINO, Ezequiel. *Activismo judicial, punitivización y nacionalización: tendencias antidemocráticas y antiliberales de la corte interamericana de derechos humanos.* in: **Sistema interamericano de protección de los derechos humanos y derecho penal internacional.** Montevideo: Konrad Adenauer, 2010.

MORIN, Edgard. **Introdução ao pensamento complexo.** 5. ed. Porto Alegre: Sulina, 2015.

PIOVESAN, Flavia. **Direitos humanos e justiça internacional: um estudo comparativo dos sistemas regionais europeu, interamericano e africano.** 7. ed. São Paulo: Saraiva, 2017.

PUGLIESI, Marcio. **Teoria do direito.** 2. ed. São Paulo: Saraiva, 2009.

RAMOS, André de Carvalho. **Teoria geral dos direitos humanos na ordem internacional.** 5. ed. São Paulo: Saraiva, 2015.

SHELTON, Dinah; CAROZZA, Paolo. **Regional protection of human rights.** 2. ed. New York: Oxford University Press, 2013.

TORELLY, Marcelo. **Governança transversal dos direitos fundamentais**. Rio de Janeiro: Lumen Juris, 2016.  
WALDRON, Jeremy. **Law and disagreement**. New York, Oxford University Press, 2004.