Part I
Constitutionalised International Adjudication

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Chapter 1
Interpretation of Conventionality Control Parameters

The first aspect of the constitutionalisation of international adjudication is that human rights courts are authorised to interpret the parameters through which the compatibility of national legislation with the Conventions is assessed. In this respect, human rights courts develop a *bloque de convencionalidad* just as a constitutional court interprets a *bloque de constitucionalidad*.[88] More concretely, like other powerful constitutional courts, human rights courts perform an *oracular* function: the nature and scope of Convention rights are identified, clarified and expanded through the Court's pronouncements, over time as circumstances change.[89] The oracular function of human rights courts is primarily based on the *living instrument* doctrine of the *evolutionary interpretation* of treaties.[90] Pierre-Marie Dupuy sharply distinguished the evolutionary interpretation supported by past-oriented memory from the evolutionary interpretation towards future-oriented prophecy.[91] In the latter case, an international judge 'brings to mind the constitutional judge in domestic legal orders' and 'uses individualized disputes to remind all parties of the route that each one of them must follow in order to achieve the collective goal'.[92]

In the practice of human rights courts, it is noteworthy that external international instruments are referred to for the purpose of expanding Convention rights and freedoms. Originally, human rights courts were limited to the interpretation and application of the provisions of the Conventions (and relevant protocols) (Article 32(1) ECHR/Article 62(3) ACHR). Notwithstanding these *formal* limits, the ECtHR and the IACtHR have broken away from the *closed* position of adhering to the regional

88 Burgorgue-Larsen (n 24) 441.
89 Stone Sweet (n 24) 930.
90 See in general, Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014); Katharina Böth, *Evolutive Auslegung völkerrechtlicher Verträge: Eine Untersuchung zu Voraussetzungen und Grenzen in Anbetracht der Praxis internationaler Streitbeilegungsinstitutionen* (Duncker & Humbolt 2013).
91 Pierre-Marie Dupuy, 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy' in Enzo Cannnizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press 2011) 123–137, 131–132.
92 *Ibid*. (both quations).

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framework. Instead, both human rights courts demonstrate an *open-minded* attitude towards integrating human rights standards with more protective *substance* established at the universal level. Such a human-centric interpretative method is based on the *pro homine* approach, which offers high priority to the most favourable protection of persons.[93]

Taking this recent trend as a backdrop, the chapter begins by describing recent interpretative practices that bridge regional conventions as living instruments with human rights standards accumulated at the universal level (Section 1-A). It goes on to prove that this practice that extends beyond state consent requires a shift in the source of legitimacy from regional consensus to universal consensus (Section 1-B). To normatively justify such practices, the following section invokes the *pro homine* principle that is reflected in 'more favourable' clauses of human rights conventions. As the horizontal functions regulating regional and universal human rights standards, the *pro homine* principle contributes to the global constitutionalist unification (Section 2-A) and to the legal pluralist diversification (Section 2-B) of international human rights law.

1. Relationship between Regional Conventions and Universal Standards

A. Evolutionary Interpretation of Regional Conventions

(i) Evolutionary Interpretation of Living Instruments

General rules of treaty interpretation are codified in Section 3 (Articles 31–33), Part III of the VCLT. In the metaphor of *playing the game of interpretation*, '[t]he rules contained in the VCLT, and the cluster of concepts therein – including "ordinary meaning", "context", and "object and purpose" – have long provided a focal point for interpretation in international law, and a source of constancy for the international legal profession'.[94] These game rules of treaty interpretation enshrined in the VCLT are characterised as either *volontariste* or *objectiviste*. Alternatively, the voluntarist

93 Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Shelton (n 1) 739–771, 765–767.

94 Daniel Peat and Matthew,' Windsor, Playing the Game of Interpretation: On Meaning and Metaphor in International Law' in Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds), *Interpretation in International Law* (Oxford University Press 2015) 3–33, 3–4.

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position emphasises Article 31(3)(a) and (b) that permit interpreters to take into account States Parties' subsequent agreement and practice respectively; and Article 31(4) that provides that '[a] special meaning shall be given to a term if it is established that the parties so intended'.[95] Conversely, the objectivist approach focuses on the terms 'object and purpose'; and the hierarchy between Article 31 and Article 32, the latter of which prescribes the recourse to 'subjective' *supplementary* means of interpretation, that is, the preparatory work of the treaty and the circumstances of its conclusion.[96]

In contrast to the voluntarist approach prioritising the original intent of States Parties, the objectivist approach leads to an evolutionary or dynamic interpretation on the basis of temporal changes in societies. Famously, in *Namibia*, which concerned the self-determination and independence of the people and the *corpus iuris gentium*, the ICJ was 'bound to take into account the fact that the concepts embodied in Article 22 of the Covenant [of the League of Nations – "the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned] – were not static, but were by definition evolutionary'.[97] Evolutionary interpretation is also recognised in the ILC's topic in the Conclusions on *Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties*. Conclusion 8 stipulates that subsequent agreements and subsequent practice under Articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a used term a meaning that is capable of evolving over time.[98]

The objectivist evolutionary interpretation has been widely accepted in the context of human rights conventions as living instruments. The Human Rights Committee in *Judge v. Canada* states that the ICCPR 'should be interpreted as a *living instrument* and the rights protected under it

95 Olivier Corten, 'Les techniques reproduites aux aritlces 31 à 33 des conventions de Vienne : approche objectivistte ou approche volontariste de l'interprétation?' (2011) 115 *Revue Générale de Droit International Public* 351–366, 352–359.

96 Ibid.

97 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971*, para 53. See also, *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, ICJ Reports 2009, para 64.

98 *Report of the International Law Commission*, 70th sess, UN Doc A/73/10, 64–70.

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should be applied in context and in the light of present–day conditions'.[99] As is well known, the ECtHR in *Tyrer* characterised that the Convention as '*a living instrument* which [...] must be interpreted in the light of present–day conditions', and therefore, could not 'but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field'.[100] The subsequent *Loizidou v. Turkey* ruling further clarified that the living instrument doctrine 'is not confined to the substantive provisions of the Convention, but also applies to those provisions, such as Articles 25 and 46, which govern the operation of the Convention's enforcement machinery'.[101] In Advisory Opinion OC-16/99 regarding the right to information on consular assistance, the Strasbourg jurisprudence was cited by the IACtHR to articulate that 'human rights treaties are living instruments whose interpretation must consider the changes over time and present–day conditions'.[102]

(ii) Regional Consensus

Within the traditional framework, the legitimate authority of international law has derived from the international system having been composed of the *voluntary association* among States under the *state consent* model.[103] Because such a voluntarist approach to international law may encounter the natural objection that the consent of some states does not reflect the interests of most people in those states, another alternative *democratic association* is currently being pursued under the *democratic state consent* model.[104] The collective systems of human rights protection are based on international law; therefore, human rights bodies necessarily encounter

99 *Judge* v *Canada*, HRC, Communication No 829/1998, UN Doc CCPR/C/78/D/829/1998, View of 13 August 2003, para 10.3 (emphasis added).
100 *Tyrer v the United Kingdom*, ECtHR, App No5856/72, Judgment on Merits of 25 April 1978, para 31.
101 *Loizidou v Turkey*, ECtHR (Grand Chamber), App No 15318/89, Judgment on Preliminary Ojbections of 23 March 1995, para 71.
102 *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, IACtHR, Series A No 16, Advisory Opinion OC-16/99 of 1 October 1999, para 114.
103 Thomas Christiano, 'Democratic Legitimacy and International Institutions' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* 119–138, 122–126.
104 Ibid 126–137.

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the conflict of *interpretación extensiva versus el consentimiento del Estad*.[105] It is therefore necessary to strike an appropriate balance between evolutionary interpretation and *the principle of consent* that has been enshrined as the 'cornerstone' of international law.[106] In practice, when adopting an evolutionary interpretation in the previously mentioned *Judge* case, the HRC was 'mindful of the fact that the above-mentioned jurisprudence was established some 10 years ago, and since that time there has been a broadening international consensus in favour of abolition of the death penalty, and in States which have retained the death penalty, a broadening consensus not to carry it out'.[107]

In Europe, the Strasbourg Court has also justified the adoption of evolutionary interpretation by proving the existence of *consensus* among States Parties. As a paradigmatic explanation, the judgement in *A, B and C v Ireland* stated that '[t]he existence of a consensus has long played a role in the development and evolution of Convention protections beginning with *Tyrer v the United Kingdom* the Convention being considered a "living instrument" to be interpreted in the light of present–day conditions. Consensus has therefore been invoked to justify a dynamic interpretation of the Convention'.[108] Thus, consensus may be conceptualised as an 'updated state consent' that reflects the current state of practice and law in States Parties, and as another legitimising factor for the Court's activities.[109] Judge Ineta Ziemele suggests the interchangeability between *opinio juris* and consensus by noting that the ECtHR is in fact exploring a particular regional custom and subsequent practice when it examines domestic laws and practices.[110]

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105 Álvaro Franciscco Amaya Villarreal, 'El principio *pro homine*: Interpretación extensiva vs. el consentimiento del Estado' (2005) *Revista Colombiana de Derecho Internacional* 337–380.

106 Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 10–11.

107 *Judge* (n 99) para 10.3.

108 *A, B and C v Ireland*, ECtHR, App No 25579/05, Judgment on Merits and Just Satisfaction of 10 December 2010, para 234.

109 Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015) 149–155.

110 Concurring Opinion of Judge Ziemele, *Rohlena v Czech Republic*, EctHR (Grand Chamber), Appl. no. 59552/08, Judgment on Merits and Just Satisfaction of 27 January 2015, para 2. See also, Ineta Ziemele, 'European Consensus and International Law' in Anne van Aaken and Iulia Motoc (eds), *The European Convention on Human Rights and General International Law* (Oxford University Press 2018) 23–39.

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In contrast, the IACtHR has been reluctant to emphasise the existence of consensus among States Parties in attempting to spell out an evolutionary interpretation of the ACHR. Antonio Augusto Cançado Trindade, former president of the San José Court, insists that 'the majority of the cases before the Court have involved alleged violations to non-derogable rights where no invocation of a margin of appreciation could be conceived'.[111] Gerald Neuman describes the particular situation of Latin America as follows: 'One evident reason for the less frequent reliance on "regional consensus" in the Americas is the comparative prevalence of systematic human rights abuses directed against the core of the protected rights. Setting international standards by reference to actual national practice would risk the adoption of very low targets'.[112] In recent cases, however, the IACtHR has occasionally examined the consensus or generalised practices of States Parties, particularly in cases involving sensitive political decisions, such as access to public information,[113] healthcare[114] and refugees.[115]

B. Interpreting Regional Conventions Through Universal Standards

(i) Evolutionary Interpretation through Universal Standards

A recent remarkable trend in the jurisprudence of human rights courts as regards evolutionary interpretation is that the standards of regional conventions are elevated according to those of external legal sources. In the European system, the ECtHR has robustly established that the provisions of the ECHR are never considered as the sole framework of reference for

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111 Antonio Augusto Cançado Trindade, *Reflexiones sobre el Futuro del Sistema Interamericano de Protección de los Derechos Humanos*, in Juan E Méndez and Francisco Cox (eds), El futuro del sistema interamericano de protección a los derechos humanos (IIDH 1998) 573–603, 582.

112 Gerald L Neuman, 'Import, Export and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 *European Journal of International Law* 101–123, 107–108.

113 *Claude Reyes v Chile*, IACtHR, Series C No 151, Judgment on Merits, Reparations and Costs of 19 September 2006, para 78.

114 *Artavia Murillo and Othres ('in vitro Fertilization') v Costa Rica*, IACtHR, Seiries C No 257, Judgement on Preliminary Objections, Merits, Reparations and Costs of 28 November 2012, paras. 254–256.

115 *The Pacheco Tineo Family v Plurinational State of Bolivia*, IACtHR, Series C No 272, Judgment on Preliminary Objections, Merits, Reparations and Costs of 25 November 2013, para 158.

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the interpretation of the rights and freedoms enshrined therein.[116] One of the most prominent instances in this context is the *Demir and Baykara v Turkey* judgement concerning the rights of municipal civil servants under Article 11 of the ECHR. As a starting point, the ECtHR confirmed the necessity not only to 'promote internal consistency and harmony between its various provisions' but also to 'take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties'.[117] The Court then examined in detail the precedents where other international instruments were relied on for illuminating the content of Convention rights.[118] Eventually, the following passage was presented as a conclusion:

> The Court, 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.[119]

Based on this statement, the Court induced the general principles concerning the substance of the right of association in light of international law, including ILO Conventions, the ESC (which Turkey had not ratified) and the European Union's Charter of Fundamental Rights.[120]

The *Demir and Baykara* ruling stimulated scholars to reconsider the relationship between the ECHR and other sources of international law in the name of *interprétation globalisante*[121] or *globalisation des sources.*[122] As a particularly notable view, Laurence Burgorgue-Larsen coined the term *décloisonnement des sources* to express the dichotomy between regionalism and universalism:

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116 *Cyprus v Turkey*, ECtHR (Grand Chamber), App No 25781/94, Judgment on Just Satisfaction of 12 May 2014, para 23.

117 *Demir and Baykara* v. *Turkey*, ECtHR (Grand Chamber), App No 34503/97, Judgment on Merits and Just Satisfaction of 12 November 2008, paras 65–68.

118 Ibid paras 69–84.

119 Ibid para 85.

120 Ibid paras 140–170.

121 Patrick Wachsmann, 'Réflexions sur l'interprétation 'globalisante' de la Convention européenne des droits de l'homme' in *Mélanges en l'honneur de Jean-Paul Costa* (n 81) 667–676.

122 Frédéric Sudre, 'L'interpretation constructive de la liberté syndicale, au sens de l'article 11 de la Convention EDH' (2009) 5 *JCP/La semaine juridique, édition générale* 30–33.

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> The use of universal trends generally leads to enrichment of the Convention in relation to its stated objective and purpose; in other words, interpretive enrichment results in benefits for individuals. Interpretation is systematically *pro homine*. [...] *Decompartmentalisation of sources* is far distant from such a static, if not to say conservative, approach. The Convention is, now more than ever, a 'living instrument'. Individual rights are reinforced and *universalism is revisited*.[123]

The IACtHR adopted a more radical approach of evolutionary interpretation. A passage from *Advisory Opinion OC-16/99* in the context of consular assistance manifestly shows the Court's sympathy towards international instruments outside the regional framework:

> The *corpus juris* of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law.[124]

The pursuance of evolutionary interpretation in terms of *corpus juris* of international law is especially significant for people or groups in a situation of *vulnerability*.[125] In the context of migration, for example, *Vélez Loor v Panama*, in line with Advisory Opinion OC-16/99, gave 'essence to the rights enshrined in the Convention, according to the evolution of the international *corpus juris* existing in relation to the human rights of migrants, taking into account that the international community has recognized the

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123 Laurence Burgorgue-Larsen, '*Nothing is Perfect* : Libres propos sur la méthodologie interpretative de la Cour européenne' in *L'homme et le droit : En hommage au Professeur Jean-François Flauss* (Pedone 2014) 129–143, 131–134.

124 *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law* (n 102) para 115.

125 On the concept of vulnerability in the IACtHR jurisprudence, see in general Romina I Sijniensky, 'From the Non-Discrimination Clause to the Concept of Vulnerability in International Human Rights Law: Advancing on the Need for Special Protection of Certain Groups and Individuals' in Yves Haeck, Brianne MacGonigle Leyh, Clara Burbano-Herrera and Diana Contreras-Garduño (eds), *The Realization of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwaak* (Intersentia 2013) 259–272.

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need to adopt special measures to ensure the protection of the human rights of this group'.[126] Another pertinent example is *Pacheco Tineo Family v Bolivia*, in which the San José Court took 'into account the significant evolution of the principles and regulation of international refugee law, based also on the directives, criteria and other authorized rulings of agencies such as United Nations High Commissioner for Refugees'.[127]

A similar trend occurred in the development of social, economic and cultural rights of indigenous people. At the early stage in *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, the IACtHA deduced an evolutionary interpretation that 'Article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua'.[128] Subsequently, this decision was reaffirmed in *Yakye Axa Indigenous Community v Paraguay*, with explicit reference to ILO Convention No 169 and the respondent's legislation for its national implementation.[129] *Saramaka People v Suriname* further extended Article 21 to include safeguards (consultation and benefit-sharing) against restrictions on the right to property that deny survival, on the basis of the 2007 United Nations Declaration on the Rights of Indigenous Peoples.[130]

Advancement as regards internally enforced displacement that deserves to be mentioned here. Initially, the IACtHR in *'Mapiripán Massacre' v Colombia* simply adopted an evolutive interpretation that 'Article 22(1) of the ACHR protects the right to not be forcefully displaced within a State Party to the Convention'.[131] In *Ituango Massacres v Colombia*, however, the San José Court explicitly referred to the Guiding Principles on

126 *Vélez Loor v Panama*, IACtHR, Series C No 218, Judgment on Preliminary Objections, Merits, Reparations, and Costs of 23 November 2010, para 99.
127 *The Pacheco Tineo Family* (n 115) para 143.
128 *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*, IACtHR, Series C No 79, Judgment on Merits, Reparations and Costs of 31 August 2001, para 148.
129 *The Yakye Axa Indigenous Community v Paraguay*, IACtHR, Series C No 125, Judgment on Merits, Reparations and Costs of 17 June 2005, para 130; Sawhoyamaxa Indigenous Community v Paraguay, IACtHR, Series C No 146, Judgment on Merits, Reparations and Costs. Judgment of 29 March 2006, para 117.
130 *The Saramaka People v Suriname*, IACtHR, Series C No 172, Judgment on Preliminary Objections, Merits, Reparations and Costs of 28 November 2007, paras 129–140; *Kichwa Indigenous People of Sarayaku v. Ecuador*, IACtHR, Series C No. 245, Judgment on Merits and Reparations 27 June 2012, paras. 159–176.
131 *The Mapiripán Massacre v Colombia*, IACtHR, Series C No 134, Judgment on Merits, Reparations and Costs of 15 September 2005, para 188.

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Internal Displacement issued by the Representative of the United Nations secretary-general and Protocol II to the 1949 Geneva Conventions as an especially useful instrument for defining the content and scope of Article 22 of the ACHR concerning internal displacement.[132] As a recent example, *Operation Genesis v Colombia* added Article 3, which is common to the Geneva Conventions and customary international humanitarian law, as relevant rules in this context.[133]

The *corpus juris* of international law has been a driving force to enhance the status of economic, social and cultural rights enshrined in Article 26 of the ACHR. In practice, the content of the relevant rights to just and favourable conditions of work[134] and the right to social security[135] were determined in light of special standards, such as the ILO Conventions and the ICESCR's and the CESCR's general comments. In *Indigenous Communities of the Lhaka Honhat Association*, the Inter-American judges again invoked the international *corpus juris* to demarcate the scope of the rights to a healthy environment, adequate food and water, and participation in cultural life under Article 26 of the ACHR.[136]

As these decisions show, the IACtHR, as one of 'regional drivers of the universal',[137] has raised regional Convention standards against the yardstick of the universal *corpus juris* of international law in question.

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132 *The Ituango Massares v Colombia*, IACtHR, Series C No 148, Judgment on Preliminary Objections, Merits, Reparations and Costs of 1 July 2006, paras 207–210.

133 *The Afro-descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v Colombia*, IACtHR, Series C No 270, Judgment on Preliminary Objections, Merits, Reparations and Costs, Judgment of 20 November 2013, paras. 217–226.

134 *The Employees of the Fireworks Factory of Santo Antônio de Jesus v Brazil*, IACtHR, Series C No 407, Judgment on Preliminary Objections, Merits, Reparations and Cost of July 15, 2020, para 156. See also, *Lagos del Campo v Peru*, IACtHR, Series C No 340, Judgment on Preliminary Objections, Merits, Reparations and Costs of 31 August 2017, para 145.

135 *The National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v Peru*, IACtHR, Series C No 394, Judgment on Preliminary Objections, Merits, Reparations and Costs of 21 November 2019, para 158.

136 *The Indigenous Communities of the Lhaka Honhat Association (Our Land) v Argentina*, IACtHR, Series C No 400, Judgment on Merits, Reparations and Costs of 6 February 2020, paras 194–198.

137 Chaloka Beyani, 'Reconstituting the Universal: Human Rights as a Regional Idea' in Conor Gearty and Costas Douzinas (eds), *The Cambrdige Companion to Human Rights Law* (Cambridge University Press 2012) 173–190.

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From a different angle, Hélène Tigroudja argues convincingly that 'even if the Inter-American Court was established to control the implementation of a specific treaty, the ACHR, its task is *formally* bound by this regional Convention, but from a *material* point of view the Court perceives itself as a *Human Rights* Tribunal before being a *Regional* Body'.[138] It should be reminded that even in the initial Advisory Opinion OC-1/82, the San José Court showed the inherent sign of such an approach of bridging regional and universal standards. This opinion contained two conflicting interpretations about the meaning of 'other treaties' subject to the Court's consultative jurisdiction under Article 64: the narrowest interpretation that leads to the conclusion that only those treaties adopted within the framework or under the auspices of the Inter-American system are deemed within the scope; and the broadest interpretation that includes within the Court's advisory jurisdiction any treaty concerning the protection of human rights in which one or more American States are Parties.[139] The Court itself favoured the latter interpretation as follows:

> The nature of the subject matter itself, however, *militates against a strict distinction between universalism and regionalism*. Mankind's universality and the universality of the rights and freedoms which are entitled to protection form the core of all international protective systems. In this context, it would be improper to make distinctions based on the regional or non-regional character of the international obligations assumed by States, and thus deny the existence of the common core of basic human rights standards.[140]

In sum, both regional courts, when invoking the living instrument doctrine of evolutionary interpretation, have abandoned the *closed* and *formal* regional paradigm and taken an *open-minded* stance seeking *substantively* more favourable protection at the universal level of human rights protection.

138 Hélène Tigroudja, 'The Inter-American Court of Human Rights and International Humanitarian Law' in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook of Human Rights and Humanitarian Law* (Edward Elgar 2013) 466–479, 473–474 (emphasis in the original text).

139 *'Other Treaties' Subject to the Consultative Jurisdiction of the Court* (n 80) para 32.

140 Ibid para 40 (emphasis added).

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(ii) Universal Consensus

In parallel with the recent practice of connecting the regional Conventions in light of universal standards, human rights courts have sought an *emerging consensus*, rather than that among States Parties, as the legitimate source of evolutionary interpretation.[141] In *Demir and Baykara*, the ECtHR placed emphasis on emerging consensus and *common ground in modern societies* beyond the European region:

> 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. In more concrete terms, the Court clarified that 'it 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*'.[142]

As Burgorgue-Larsen points out, '[t]he "common ground" that the Court referred in [this] paragraph [...] of its judgment was unquestionably universal in scope'.[143] Indeed, the Court made a caveat against the respondent's claim, stating that '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'.[144]

Another significant instance being placed in the same stream is the evolution of case law concerning the rights of sexual minorities. In the first stage *Rees v the United Kingdom*, the ECtHR could find little 'common

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141 For the criticisms and problems of this approach, see Shai Dothan, *International Judicial Review: When Should International Courts Intervene?* (Cambridge University Press 2020) 41–60.

142 *Demir and Baykara* (n 117) para 86 (emphasis added).

143 Laurence Burgorgue-Larsen, 'Interpreting the European Convention: What Can the African Human Rights System Learn from the Case Law of the European Court of Human Rights on the Interpretation of the European Convention?' (2012) 5 *Inter-American and European Human Rights Journal* 90–123, 100.

144 *Demir and Baykara* (n 117) para. 78 (emphasis added).

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ground between the Contracting States in this area', and therefore, it granted a national margin of appreciation.[145] In the subsequent *Sheffield and Horsham* case, the Court similarly concluded that there was neither a 'generally shared approach among the Contracting States' nor a 'common European approach', notwithstanding a survey by the human rights NGO Liberty that demonstrated 'an unmistakably clear trend in the member States of the Council of Europe towards giving full legal recognition to gender re-assignment'.[146] The momentum to reverse these decisions came from the *Christine Goodwin v the United Kingdom* judgement, in which the Strasbourg Court, relying on an updated survey by Liberty that indicated 'a continuing international trend towards legal recognition',[147] prioritised universal consensus over European consensus:

> The Court accordingly attaches less importance to *the lack of evidence of a common European approach* to the resolution of the legal and practical problems posed, than to *the clear and uncontested evidence of a continuing international trend* in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.[148]

George Letsas did not overlook the shift from regional consensus to universal consensus: 'the new Court has moved away from placing decisive weight on the absence of consensus amongst Contracting States and from treating it as the ultimate limit on how far it can evolve the meaning and scope of Convention rights'.[149] The newly transformed Strasbourg Court,

145 *Rees v the United Kingdom*, ECtHR (Plenary), App. No. 9532/81, Judgment on Mertis of 17 October 1986, para 37.

146 *Sheffield and Horsham v the United Kingdom*, ECtHR (Grand Chamber), App Nos 22985/93 and 23390/94, Judgment on Merits of 30 July 1998, paras. 35, 58.

147 For the role of NGOs in building consensus, Laura Van den Eynde, 'The Consensus Argument in NGOs' *Amicus Curiae* Briefs Defending Minorities Through A Creatively Used Majoritarian Argument' in Panos Kapotas and Vassilis P Tzevelekos (eds), *Building Consensus on European Consensus: Judicial Interpretation of Human Rights in Europe and Beyond* (Cambridge University Press 2019) 96–119.

148 *Christine Goodwin v the United Kingdom*, ECtHR (Grand Chamber), App No 28957/95, Judgment on Merits and Just Satisfaction 11 July 2002, para 85 (emphasis added).

149 George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press 2013) 106–141, 122 (emphasis in the original text).

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in his view, 'treats the ECHR as a living instrument by looking for *common values* and *emerging consensus* in international law'.[150]

A more universality-oriented interpretative practice may be found in the IACtHR jurisprudence. In *Juridical Condition and Human Rights of the Child*, the Court equated consensus of States Parties with *opinio juris communis*, which has been utilised as a term indicating the subject element of customary international law:

> The Convention on the Rights of the Child has been ratified by almost all the member States of the Organization of American States. The large number of ratifications shows *a broad international consensus* (*opinio iuris comunis*) in favor of the principles and institutions set forth in that instrument, which reflects current development of this matter. It should be highlighted that the various States of the hemisphere have adopted provisions in their legislation, both constitutional and regular, regarding the matter at hand; the Committee on the Rights of the Child has repeatedly referred to these provisions.[151]

Opinio juris communis means here 'the expression of the *universal juridical conscience* through the observance, by most of the members of the international community, of a determined practice because it is obligatory'.[152] Antonio Augusto Cançado Trindade, a proponent of these concepts who presided over the San José Court at that time and currently is a World Court judge, regards universal juridical conscience as the material source of international law functions, beyond the formal sources anchored by state consent, for 'an in-depth examination of the legal foundations, and, ultimately, of the validity [or *substratum*] itself, of the norms of International Law'.[153] According to his Hague Academy lecture, juridical conscience may be practically observed 'in the elaboration of adopted texts of international treaties, in the proceedings before international tribunals and in international case law, and in the works of international legal doctrine'.[154]

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150 Ibid.

151 *Juridical Condition and Human Rights of the Child*, IACtHR, Series A No17, Advisory Opinion OC-17/02 of 28 August 2002, para 29. See also, Georg Nolte, *Treaties and Subsequent Practice* (Oxford University Press 2013) 274.

152 *Baena-Ricardo Others v Panama*, IACtHR, Series C No 104, Judgment on Preliminary Objections of 28 November 2003, para 102.

153 Antonio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (Brill 2010) 139.

154 Ibid.

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Atala Riffo and Daughters v Chile serves as a typical example in which the sexual orientation of persons was recognised as a category protected under Article 1(1) of the ACHR despite the absence of regional consensus. In this case, while the Chilean Supreme Court ruled that there was a lack of consensus regarding sexual orientation as a prohibited category for discrimination, the IACtHR did not consider the alleged lack of consensus as a valid argument to deny or restrict these individuals' human rights or to perpetuate and reproduce the historical and structural discrimination that these minorities have suffered.[155] At the same time, the Inter-American judges rejected the closed interpretative approach, sticking to the formal framework of the ACHR:

> The fact that this is a controversial issue in some sectors and countries, and that it is not necessarily a matter of consensus, cannot lead this Court to abstain from issuing a decision, since in doing so it must refer solely and exclusively to the stipulations of the international obligations arising from a sovereign decision by the States to adhere to the American Convention.[156]

The San José Court adopted the dynamic interpretation of Article 1(1) of the ACHR by what should be called juridical conscience extensively evidenced by the universal and regional practices beyond the will of individual states.[157] The subsequent cases followed the Inter-American 'consistent jurisprudence that the presumed lack of consensus within 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 reproduce and perpetuate the historical and structural discrimination that such minorities have suffered'.[158] This universalist approach was furthermore recalled in the 2017 Advisory Opinion concerning gender identity, and equality and non-discrimination with regard to same-sex couples.[159]

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155 *Atala Riffo and Daughters v Chile*, IACtHR, Series C No 239, Judgment of Merits, Reparations and Costs of 24 February 2012, para 92.

156 Ibid.

157 Ibid paras 83–93.

158 *Duque v Colombia*, IACtHR, Series C No 310, Judgment on Preliminary Objections, Merits, Reparations and Costs of 26 February 2016, para 123.

159 *Gender Identity, and Equality and Non-discrimination with Regard to Same-sex Couples, State Obligations in Relation to Change of Name, Gender Identity, and Rights Deriving from a Relationship between Same-sex Couples*, IACtHR, Series A No 24, Advisory Opinion OC-24/17 of 24 November 2017, para 219.

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In sum, in line with the dynamic interpretation of regional conventions in light of universal standards, its legitimacy source has been gradually shifted from regional consensus to universal consensus. Consequently, individual states can no longer block the establishment of consensus between States Parties. Nor can they discourage universal consensus built through material sources that reflect juridical conscience. The foregoing analysis cannot immediately abolish traditional state-centrism and voluntarism, both of which have been closely intertwined with international legal positivism.[160] However, as Francisco Pascual Vives rightly noted, the recent interpretative practices of human rights courts certainly produce a *sensible erosión o*f the principle of sovereign equality.[161]

2. *Pro Homine Principle's International Functions for Conventionality Control*

A. Unified Interpretation of Conventionality Control Parameters

(i) Unification through Interpretative Rules

The recent interpretative practices examined above thoroughly indicate the *pro homine* approach seeking the most favourable way to persons in regional and universal experiences. Raising regional standards in accordance with more favourable universal criteria contribute to the *unity* of international human rights law by constructing a *constitutionalist* hierarchy between norms. The tendency of *constitutionalisation* of international law has been advocated to provide an answer to the so-called *fragmentation* phenomena in international law resulting from increased specialisation. The vocabularies of constitutionalisation and fragmentation suggest 'a vision of unity that the earlier international law vocabulary, with its insistence on sovereignty and independence, could never provide'.[162] Paraphrasing it with postmodern philosophers Gilles Deleuze and Félix Guattari, in-

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160 For the correlation among the three positions, Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011) 21–24.

161 Francisco Pascual Vives, 'Consenso e interpretación evolutiva de lots tratados regionales de derechos humanos' (2014) 66 *Revista Española de Derecho Internacional* 113–153, 129–134.

162 Jan Klabbers, 'International Legal Positivism and Constitutionalism', in Jean d'Aspremont and Jörg Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (Cambridge University Press 2014) 264–290, 266.

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ternational lawyers who problematise fragmentation in a constitutional sense presuppose the 'arborescent' unity of international law as a system and struggle to control the 'rhizomatic' network of human consciousness leading to the appearance of new institutions, new regimes and new disciplines.[163] As identified by Sahib Singh, the 2006 ILC report titled *Fragmentation of International Law*, issued under the initiative of Martti Koskenniemi, reflects *plausible constitutionalism*: it is both a *positivist* statement and a description of international law as a system, and an *ethical* project of resistance to the current state of affairs in international law.[164]

The integralist ambition towards the unity of international law was implied in the 2010 *Ahmadou Sadio Diallo* judgement on the merits. The ICJ made the following statement in assessing the alleged violation of Article 13 of the ICCPR and Article 12(4) of the African Charter:

> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty. The point here is to achieve the *necessary clarity* and the *essential consistency* of international law, as well as *legal security*, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled.[165]

Subsequently, the World Court for the first time in its history expressly took into account the contribution of the jurisprudence of the ECtHR and IACtHR to achieve 'their common mission – the realization of international justice – in a spirit of respectful dialogue, learning from each other'.[166] It thus follows that the ICJ seemed to perform a 'quasi-constitutional role in the international order by identifying those elements which ensure the

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163 David Koller, '... and New York and The Hague and Tokyo and Geneva and Nuremberg and...: The Geographies of International Law' (2012) 23 *European Journal of International Law* 97–119, 114.

164 Sahib Singh, 'The Potential of International Law: Fragmentation and Ethics' (2011) 24 *Leiden Journal of International Law* 23–43, 38.

165 *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo*, Merits, Judgment, ICJ Reports 2010, para 66 (emphasis added).

166 Separate opinion of Judge Cançado Trindade, *ibid*, paras 232–245. See also, Sir Nigel Rodley, 'The International Court of Justice and Human Rights Treaty Bodies' in James A Green and Christopher PM Waters (eds), *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi* (Martinus Nijhoff Publishers 2014) 12–33, 20–22.

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unity and coherence of the international legal system'.[167] As expressed in the ILC's Conclusion 13 titled *Subsequent Agreements and Subsequent Practice in Relation to Interpretation of Treaties*, '[a] pronouncement of an expert treaty body may give rise to, or refer to, a subsequent agreement or subsequent practice by parties under article 31, paragraph 3, or subsequent practice under article 32'.[168]

In the context of regional human rights protection, as indicated in the previous section, universal standards are taken into account in dynamically interpreting regional conventions to ensure the unity of international law.[169] Given that the Strasbourg jurisprudence interprets the ECHR by resorting to public international law including universal human rights instruments, Adamantia Rachovista observes a positive potential for combating the fragmentation of international law: that the ECtHR interprets the ECHR by taking a great variety of relevant international law norms into account, suggests, in principle, that the Court employs a policy of embedding the ECHR into international law and, hence, avoids taking any kind of isolationist or fragmented approach towards international law.[170] Similarly, Lucas Lixinski points out that the San José Court, by acting in the way it does, performs a service that favours the 'defragmentation' of international law, while not unauthorisedly expanding its mandate, and therefore, promotes the unity of international law, while preserving its own institutional constraints.[171]

As a justification for such regional interpretative practices, the present volume rather focuses on the *pro homine* principle reflected in the so-called more favourable provisions (Article 53 of the ECHR and Article 29(b) of the ACHR). Their main function is to prohibit an interpretation that restricts the existing human rights standards established by other international and national legal instruments. As these provisions prohibit the

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167 Oriol Casanovas y La Rosa, *Unity and Pluralism in Public International Law* (Martinus Nijhoff The Hague 2001) 246–247.

168 Report of the International Law Commission (n 98) 106–116.

169 Anne van Aaken 'Defragmentation of Public International Law through Interpretation: A Methodological Proposal' (2009) 16 *Indiana Journal of Global Legal Studies* 483–512, 487.

170 Adamantia Rachovitsa, 'Fragmentation of International Law Revisited: Insights, Good Practices and Lessons to be Learned from the Case Law of the European Court of Human Rights' (2015) 28 *Leiden Journal of International Law* 863–885, 878.

171 Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21 *European Journal of International Law* 585–604, 604.

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restriction of *external* criteria by the Conventions, Article 17 of the ECHR and Article 29(a) of the ACHR prevent the limitation of *internal* standards by other Convention rights 'to a greater extent than is provided for' therein. A large number of universal and regional human rights instruments include such 'more favourable' clauses, such as Article 5(2) of the ICCPR and the ICESCR, and Article 53 of the CFREU.[172] These 'more favourable' provisions are also found in other branches of international law,[173] including international environmental law,[174] international humanitarian law,[175] international labour law[176]and international cultural heritage law.[177]

(ii) Unification by Prioritising Most Favourable Standards

One aspect of such 'more favourable' provisions is the standard unification by determining the relative, not absolute, priority between legal norms. In practice, 'more favourable' clauses are often utilised for aggregating regional and universal human rights criteria. This is evident in 'the Inter-American Court […] interpret[ing] Article 29 as the formal admittance by

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172 See in general, Jean Dhommeaux, 'Hiérarchie et conflits en droit international des droits de l'homme' (2009) 4 *Annuaire international des droits de l'homme* 55–62. Other examples are the International Convention on the Elimination of All Forms of Racial Discrimination (Article 1(3)); the Convention on the Elimination of All Forms of Discrimination against Women (Article 23); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (Article 1(2)); the Convention on Rights of the Child (Article 41); the International Convention for the Protection of All Persons from Enforced Disappearance (Article 37); the Convention on the Rights of Persons with Disabilities (Article 4(4)).

173 Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Brill 2004) 163–168.

174 For example, Article 11 of the Basel Convention on the Control of Transboundary Movements of Hazardous and their Disposal; Article 2(4) of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity.

175 For example, Art 6(2) of the Geneva Convention (GC) I, GC II and GC III; Art 7(2) GC IV; Arts 34(1), 45 (3), 75(7)(b), (8) of Protocol Additional to GC (Protocol I). See also, Anne-Laurence Graf-Brugère, '*A lex favorabilis*? Resolving Norm Conflicts between Human Rights and Humanitarian Law' in Kolb and Gaggioli (n 138) 251–270, 258–260.

176 Art 19(8) of the Constitution of the International Labor Organization. See also, Nicolas Valticos and Gerald W von Potobsky, *International Labour Law*, 2nd ed (Kluwer 1995) 79.

177 Art 21 of the Convention on the Protection of the Architectural Heritage of Europe.

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States of such references to other International Rules' and consequently, 'as an authorization to enlarge the content of the rights protected by the Convention'.[178] In the 2014 *RMT v the United Kingdom* ruling, in which it was contested whether secondary action by the National Union falls within the scope of Article 11 of the ECHR, the Strasbourg Court likewise stipulated '[i]t would be inconsistent with this method for the Court to adopt in relation to Article 11 an interpretation of the scope of freedom of association of trade unions that is much narrower than that which prevails in international law'.[179] In this sense, 'more favourable' provisions are analogous to 'consistent interpretation' provisions, both of which enable an *open-minded* interpretation in light of external legal sources.[180]

Exploring the essence of 'more favourable' provisions, we find the so-called *pro homine* or *pro persona* principle that prioritises the most beneficial interpretation and application of norms for individuals. This principle has already been developed in domestic legal systems, such as *in dubio pro reo*, *in dubio pro operario*, *favor debilis*, *favor libertatis* and *pro actionae*.[181] At the international level, the IACtHR explicitly recognises that Article 29 of the ACHR includes the *pro homine* principle, which serves not only for substantive rights but also for procedural regulations. For example, *Advisory Opinion OC-13/93* demonstrated that the decision of the IACHR on whether to submit the case to the Court in accordance with Article 51 of the ACHR 'is not discretionary, but rather must be based upon the alternative that would be *most favorable for the protection of the rights established in the Convention*'.[182] Because the Inter-American system adopts 'a true *actio popularis*' that permits any legally recognised non-governmental

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178 Tigroudja (n 138) 471–472 (both quotations).

179 *The National Union of Rail, Maritime and Transport Workers (RMT) v. the United Kingdom*, ECtHR, App No 31045/10, Judgment on Merits and Just Satisfaction of 8 April 2014, para 76. See also, Concurring Opinion of Judge Wojtyczek, *Ibid* para. 3.

180 Burgorgue-Larsen (n 24) 443–452.

181 Ximena Medellín Urquiaga, *Principio pro persona* (Comisión de Derechos Humanos del Distrito Federal, Suprema Corte de Justicia de la Nación y Oficina en México del Alto Comisionado de las Naciones Unidas para los Derechos Humanos 2013) 16–17.

182 *Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)*, IACtHR, Advisory Opinion OC-13/93 of 16 July 1993, para 50 (emphasis added).

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entity to lodge petitions with the commission (Article 44 of the ACHR),[183] such a procedural advancement based on the *pro homine* principle would operate in favour of juridical persons as well as natural persons.[184]

With regard to its validity beyond Latin America, HRC members Helen Keller and Fabián Salvioli referred to the *pro homine* principle in noting that '[i]nternational bodies have a responsibility to make sure that they do not end up adopting a decision that weakens standards already established in other jurisdictions'.[185] It should also be reminded here that 'more favourable' provisions allegedly embodying the *pro homine* principle are prescribed in almost all universal and regional human rights treaties. Taking these doctrinal and normative supports into account, it may be convincingly argued that the *pro homine* principle is enshrined as 'the backbone of the post–Second World War international law of human rights'.[186]

As the origin of the unifying function of 'more favourable' provisions, the *pro homine* principle also operates to elevate Convention criteria in terms of other international legal instruments. Connecting the 'living instrument' doctrine of evolutionary interpretation, the *pro homine* principle in fact dramatically raises the ACHR standards.[187] As previously examined in detail, the IACtHR indeed took an evolutionary approach to interpretation in *Atala Riffo* to include the sexual orientation of persons as the categories of 'any other social condition' protected from discrimination under Article 1(1) of the ACHR.[188] The same reasoning was repeated in *Norín Catrimán v. Chile* with regard to the ethnic origin of an individual, in terms of juridical conscience evinced by several international and domestic

183 Héctor Faúndez Ledesma, *The Inter-American System for the Protection of Human Rights: Institutional and Protection Aspects*, 1st ed in English, trans of 3rd ed in Spanish (Inter-American Institute of Human Rights 2007) 231.

184 Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System (Interpretation and scope of Article 1(2), in relation to Articles 1(2), 8, 11(2), 13, 16, 21, 24, 25, 29, 30, 44, 46 and 62(3) of the American Convention on Human Rights, as well as of Article 8(1)(A) and (B) of the Protocol of San Salvador), IACtHR, Series A No 22, Advisory Opinion OC-22/16 of 26 February 2016, para 42.

185 Individual Opinion of Helen Keller and Fabián Salvioli, *Elgueta v. Chile*, HRC, Comm No 1536/2006, CCPR/C/96/D/1593/2006, Decision of 28 July 2009, para 11.

186 Valerio De Oliveira Mazzuoli and Dilton Ribeiro, 'The *Pro Homine* Principle as an Enshrined Feature of International Human Rights Law' (2016) 3 *Indonesian Journal of International & Comparative Law* 77–99, 78.

187 Medellín Urquiaga (n 181) 25.

188 *Atala Riffo and Daughters v Chile* (n 155) paras 83–93.

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documents including soft law such as the 2007 United Nations Declaration on the Rights of Indigenous Peoples.[189] *Advisory Opinion OC-22/16* also endorses the unifying approach in determining the entitlement of legal entities, particularly trade unions, under Article 8 of the Protocol of San Salvador, to hold rights under the Inter-American human rights system. Emphasising the *pro persona* principle's role of not excluding or limiting the effect of other instruments, the IACtHR interpreted the provision in light of Article 45(c) of the OAS Charter, Article 10 of the Inter-American Democratic Charter and the ILO Declaration on Fundamental Principles and Rights at Work.[190]

B. Diversified Interpretation of Conventionality Control Parameters

(i) Diversification through Interpretative Rules

Despite the tendency of constitutionalisation, different bodies granted different powers may take the opposite direction to promote the *diversity* of international human rights law through reaching *fragmented* interpretations. We therefore need to pay attention to the adverse effect of the constitutionalisation of international law, namely, the *fragmentation* of international law. In the words of Jan Klabbers, '[f]ighting fragmentation by constitutionalism will, likewise, only result in deeper fragmentation, as the various competing regimes and organizations will be locked firmly in constitutional place – and in battle with each other'.[191] Gunther Teubner made a similar claim that 'in the discrepancy between globally established social subsystems and a politics stuck at inter-state level, the constitutional totality breaks apart and can then only be replaced by a form of *constitutional fragmentation*'.[192]

In this respect, we need to acknowledge that 'the development of international law through specialized mechanisms is seen sometimes as healthy

189 *Norín Catrimán and Others (Leaders, Members and Activist of the Mapuche Indigenous People) v Chile*, IACtHR, Series C No 279, Judgment on Merits, Reparations and Costs of 29 May 2014, paras 202–206.

190 *Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System* (n 184) para 95.

191 Jan Klabbers, 'Constitutionalism Lite' (2004) 1 *International Organizations Law Review* 31–58, 53.

192 Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press 2012) 51 (emphasis added).

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pluralism ("diversification"), sometimes as perilous division ("fragmentation")'.[193] As a matter of fact, the proliferation of international courts and tribunals does not necessarily cause the negative phenomenon of fragmentation, but rather positively promotes 'creative diversity, the potential for cross-fertilisation of ideas, and a chance to see established categories, preferences and hierarchies challenged or revisited'.[194] With such a healthy aspect, the pluralist (or fragmenting) approach can complement the constitutionalist approach: 'If constitutionalisation is coupled with global legal pluralism or fragmentation it may support the proposition that constitutionalisation can occur at different paces within different sectors of international law'.[195]

The danger of fragmentation through interpretation would be more aggravated within the constitutional sectors that co-exist within different regional human rights systems. Gérard Cohen-Jonathan and Jean-François Flauss did not overlook this symptom appearing in the Strasbourg Court's interpretative practices: A sufficiently rationalised and controlled appeal to external sources of inspiration with a view to enriching Convention law can in fact have two unintended consequences. First, the European Court might contribute, despite appearances, to the fragmentation of international human rights law, to the extent that it would 'independently' interpret the external standard. Second, and most importantly, the fragmentation of international human rights law (which is unfortunately a reality) could, to the extent that the latter was purely and simply received, undermine the consistency of Convention rights.[196]

The theoretical risk was actually triggered by the ECtHR in the *Correia de Matos v. Portugal* case, which was identical to the individual communication brought by the applicant before the HRC.[197] In light of Article 31(3)(c) of the VCLT, the ECtHR confirmed that the Convention cannot be interpreted in a vacuum and should as far as possible be interpreted in alignment with other rules of international law concerning the inter-

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193 Anne-Charlotte Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' (2009) 22 *Leiden Journal of International Law* 1–28, 2.

194 Mario Prost, *The Concept of Unity in International Law* (Hart 2012) 11.

195 Aoife O'Donoghue, *Constitutionalism in Global Constitutionalisation* (Cambridge University Press 2014) 144.

196 Jean-François Flauss and Gérard Cohen-Jonathan, 'Cour européenne des droits de l'homme et droit international général' (2008) 54 *Annuaire français de droit international* 529–546, 533–534.

197 *Correia de Matos v Portugal*, HRC, Comm No 1123/2002, UN Doc CCPR/C/86/D/1123/2002, Views of 28 March 2006.

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national protection of human rights.[198] Nonetheless, despite the almost identical character of the opinions, the Strasbourg judges denigrated the views from Geneva as 'not determinative' in that the interpretation of the same fundamental right by the Committee and by the Court may not always correspond.[199] The Court concluded that while there might be 'a tendency amongst the Contracting Parties to the Convention' to recognise the relevant right, there was no consensus as such, and therefore, afforded the State Party the margin of appreciation.[200] The majority opinion's overemphasis on the exceptional 'outlier' rather than the 'tendency' (thirty-one out of thirty-five member States), and its plea for the fragmentation of international law without engaging in a dialogue with the HRC were harshly criticised in the dissenting opinions.[201]

Another scenario of fragmentation between Strasbourg and Geneva concerns the prohibition on wearing the burqa in France. In the *SAS v France* judgement, the ECtHR supported the French law because individual freedom in religious practice should be sacrificed in order to protect 'the rights and freedoms of others', that is, the majority's rights, in terms of Article 9(2) of the ECHR. In leading to this conclusion, the Strasbourg judges supported the French government's position by holding that 'the impugned ban can be regarded as justified in its principle solely in so far as it seeks to guarantee the conditions of "living together [*vivre ensemble*]" deriving from the very *fraternité* culture'.[202] The partly dissenting opinion, however, doubted whether the general, abstract notion of living together directly falls under any of the rights and freedoms guaranteed within the Convention.[203] In the *Yaker* and *Hebbadi* cases, the Committee members in Geneva cast the same doubt, asserting that the concept of living together

198 *Correia de Matos v Portugal*, ECtHR (Grand Chamber), App no 56402/12, Judgment on Merits and Just Satisfaction of 4 April 2018, para 134.

199 Ibid para 137.

200 Ibid.

201 Joint Dissenting Opinion of Judges Tsotsoria, Motoc and Mits, para 18; Dissenting opinion of Judge Pinto de Albuquerque joined by Judge Sajó, para 17.

202 *SAS v France*, ECtHR (Grand Chamber), App No 43835/11, Judgment on Merits and Just Satisfaction of 1 July 2014. See also, *Dakir v Belgium*, ECtHR, App No 4619/12, Judgment on Merits and Just Satisfaction of, paras 121–122; *Belcacemi v Belgium*, ECtHR, App No 37798/13, Judgment on Merits and Just Satisfaction of 11 July 2017. See also, Ilias Trispiotis, 'Two Interpretations of "Living Together" in European Human Rights Law' (2016) 75 *Cambridge Law Journal* 580–607.

203 Partly Dissenting Opinion of Judges Angelika Nußberger and Helena Jäderblom in *SAS v France* (n 202) paras 3–12.

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is 'very vague and abstract', and therefore, cannot provide the basis for permissible restrictions.[204]

The risk of fragmentation, however, should not be unnecessarily exaggerated. In its first advisory opinion concerning the scope of 'other treaties' subject to its advisory jurisdiction, as has been noted above, the IACtHR rejected the narrowest interpretation that only those treaties adopted within the framework or under the auspices of the Inter-American system are deemed to be within its advisory scope.[205] The Court instead, by endorsing the broadest interpretation that its advisory jurisdiction extends to any treaty concerning the protection of human rights in which one or more American States are Parties, discouraged the overreaction against the fragmenting trend of international law:

> The Court believes that it is here dealing with one of those arguments which proves too much and which, moreover, is less compelling than it appears at first glance. It proves too much because the possibility of conflicting interpretations is a phenomenon common to all those legal systems that have certain courts which are not hierarchically integrated. Such courts have jurisdiction to apply and, consequently, interpret the same body of law. Here it is, therefore, not unusual to find that on certain occasions courts reach conflicting or at the very least different conclusions in interpreting the same rule of law.[206]

Such ambivalence between the unifying and diversifying approaches is certainly common in the practice of international adjudication. In the *Diallo* case cited above, Judges Kenneth Keith and Christopher Greenwood tackled the question of whether Article 13 of the ICCPR imposes a general substantive non-arbitrariness limit on the power of expulsion over and above the procedural guarantees which they contain.[207] Having closely examined the HRC interpretations, as opposed to the majority opinion, the two judges asserted that Article 13 does not impose a substantive 'arbitrariness' criterion but provides procedural protections.[208] As one observ-

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204 *Yaker v France*, HRC, Comm No 2747/2016, UN Doc CCPR/C/123/D/2807/2016, View of 17 July 2018 UN Doc. CCPR/C/123/D/2747/2016, para 8.10; *Hebbadi v. France*, Communication No. 2807/2016, View of 17 July 2018, UN Doc CCPR/C/123/D/2807/2016, para 7.10.

205 *"Other Treaties" Subject to the Consultative Jurisdiction of the Court* (n 80) para 32.

206 Ibid para 50.

207 Joint Declaration of Judges Keith and Greenwood, *Ahmadou Sadio Diallo* (n 165) paras 3–13.

208 Ibid.

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er commented, extending the meaning determined by the HRC 'would be wrong in principle as it would risk "fragmentation" in the interpretation'.[209]

(ii) Diversification by Prioritising Most Favourble Standards

Whereas we observed the constitutionalist function of 'more favourable' provisions in practice, their original purpose is to prohibit an interpretation that restricts the existing human rights standards established by other international and national legal instruments. This logic does not mean that treaty criteria and national standards are unified as a single right answer.[210] Rather, treaty criteria are 'essentially seen as a floor of protection' giving States Parties the freedom to set their own higher national standards than the treaty minimum standards.[211] As long as these 'more favourable' provisions are relied upon, conventionality control of domestic law is based on the pluralist *diversifying* approach.[212]

These 'more favourable' clauses are of particular significance with regard to certain treaty mechanisms, such as derogation and reservation, by which States Parties may escape from the full application of treaty provisions. Typically, Articles 5(2) of the ICCPR and the ICESCR provide a safeguard against derogation measures which restrict the existing rights in States Parties 'on the pretext that the present [treaty] does not recognize such rights or that it recognizes them to a lesser extent'. In *Advisory Opinion OC-8/87* concerning *habeas corpus* in emergency situations, the IACtHR interpreted the derogation clause (Article 27(2) of the ACHR) in light of 'the need to prevent a conclusion that could give rise to the suppression of "the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for therein" (Article 29(a))'.[213] In the case law on the reservation of the death

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209 Sandy Ghandhi, 'Human Rights and the International Court of Justice: The Ahmadou Sadio Diallo Case' (2011) 11 *Human Rights Law Review* 527–555, 545.

210 Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487–502, 493.

211 Federico Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (Oxford University Press 2014) 35–44.

212 Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (Oxford University Press 2012) 58 and 112.

213 *Habeas Corpus in Emergency Situations (Arts 27(2), 25(1) and 7(6) ACHR)*, IACtHR, Series A No 7, Advisory Opinion of 30 January 1987, para 18.

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penalty, the San José Court also held that 'the application of Article 29(a) compels the conclusion that a reservation may not be interpreted so as to limit the enjoyment and exercise of the rights and liberties recognized in the Convention to a greater extent than is provided for in the reservation itself'.[214]

With the *diversifying* aspect, 'more favourable' provisions promote the heterarchy, or at least deny the formal hierarchy, between regional and universal decision-making. In the above-cited *RMT v the United Kingdom* judgement, although the Strasbourg Court declined to adopt 'a much narrower than that which prevails in international law', it carefully discerned that the negative assessments made in the more general terms by the relevant monitoring bodies of the ILO and the ESC were 'not of such persuasive weight for determining' the case-specific evaluation under Article 11 of the ECHR.[215] In the last paragraph laying out its reasoning, the Strasbourg judges offered a caveat that it has no competence to assess the respondent State's compliance with the relevant standards of the ILO or the ESC, 'the latter containing a more specific and exacting norm regarding industrial action'.[216]

As a pluralist account of Article 29(b) of the ACHR, the IACtHR stated in *Pacheco Tineo Family* that 'by using the sources, principles and criteria of international refugee law as a special normative applicable to situations concerning the determination of the refugee status of a person and their corresponding rights in a way that is complementary to the provisions of the Convention, *the Court is not assuming a ranking* [*jerarquización*] *between norms*'.[217] The same approach was adopted in *The Disappeared from the Palace of Justice* in rejecting the Respondent's preliminary objection alleging the lack of the Court's material competence due to the need to apply international humanitarian law: '[B]y using international humanitarian law as a norm of interpretation that complements the Convention, *the Court is not ranking* [*jerarquización*] *the different laws*, because the applicabil-

214 *Restrictions to the Death Penalty (Arts 4(2) and 4(4) American Convention on Human Rights)*, IACtHR, Series A No 8, Advisory Opinion of 8 September 1983, para 66; *Constantine and Ohters v Trinidad and Tobago*, IACtHR, Judgment on Preliminary Objections of 1 September 2001, para 66.

215 RMT (n 179) para 98.

216 Ibid para 106.

217 *The Pacheco Tineo Family* (n 115) para 143 (emphasis added).

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ity and relevance of international humanitarian law in situations of armed conflict is not in doubt'.[218]

Reflecting the pluralist diversifying approach of 'more favourable' clauses, the *pro homine* principle prohibits the restrictive interpretation to the detriment of existing human rights standards. In fact, the IACtHR recognised in *Advisory Opinion OC-5/85* the *pro homine* principle to forbid the external restriction of ACHR rights:

> Hence, if in the same situation both the American Convention and another international treaty are applicable, *the rule most favourable to the individual* must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.[219]

In *Advisory Opinion OC-21/14* concerning children's rights in the context of migration, the IACtHR invoked the *pro homine* principle reflected in Article 29(b) as regards the principle of *non-refoulement* as follows:

> [T]he principle of non-refoulement is an integral part of these different branches of international law in which it has been developed and codified. However, in each of these contexts, the content of the principle of non-*refoulement* has a particular sphere of application *ratione personae* and *materiae*, and specific correlative obligations, which must be understood to have a complementary nature in the terms of Article 29 of the American Convention and the pro persona principle. Overall, this entails making the most favorable interpretation for the effective enjoyment and exercise of the fundamental rights and freedoms by

218 *Rodríguez Vera and others (the Disappeared from the Palace of Justice) v Colombia*, IACtHR, Series C No 287, Judgment on Preliminary Objections, Merits, Reparations and Costs of 14 November 2014, para 39 (emphasis added); *Vásquez Durand and Others v Ecuador*, Series C No. 332, Judgment on Preliminary Objections, Merits, Reparations and Costs 15 of February 2017, para 31.

219 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, IACtHR, Series A No 5, Advisory Opinion of 13 November 1985, para 52 (emphasis added).

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> applying the norm that accords the greatest protection to the human being.[220]

In this context, the *pro homine* principle, by requiring the Inter-American judges to select the *substance* most favourable to *individuals* among the *openly* interacted sources, contributed not only to the *unity of* the principle of *non-refoulement* enshrined in 'different branches of international law' but also to its pluralistic diversity of 'a particular sphere of application *ratione personae* and *materiae*, and specific correlative obligations'.

Another example is *Advisory Opinion OC-25/18* regarding the institution of asylum and human rights under the Inter-American system, in which the IACtHR was asked by Ecuador to give an authoritative interpretation on the right to seek and receive asylum 'in a foreign territory' under Article 22(7) of the American Convention. The answer was given in favour of 'the will of the States' to exclude the concept of diplomatic asylum on the understanding that it constitutes a State prerogative.[221] In concluding, while recognising the applicability of the *pro homine* principle, the Court took a conservative position as follows:

> However, the application of this [*pro homine*] principle cannot displace the use of the other methods of interpretation, nor can it ignore the results achieved as a result of them, since all of them must be understood as a whole. Otherwise, the unrestricted application of the *pro homine* principle would lead to the delegitimisation of the interpreter's actions. Therefore, based on the analysis of the preceding paragraphs, for this Court, both from the literal interpretation of Article 22(7) of the Convention and from the interpretation of its context, in particular the conditions established in the Latin American conventions that clearly define the meaning of the terms 'in foreign territory', it is clear that the purpose of the configuration of the right to seek and receive asylum is the protection of persons in foreign territory who have been forced to flee for certain reasons, which translates into the protection of territorial asylum. This is because it is not possible to assimilate

220 *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection*, IACtHR, Series A No 21, Advisory Opinion OC-21/14 of 19 August 2014, para 234.

221 *The Institution of Asylum, and Its Recognition as a Human Right under the Inter-American System of Protection (interpretation and scope of Arts 5, 22(7) and 22(8) in Relation to Art 1(1) of the American Convention on Human Rights)*, IACtHR, Series A No. 25, Advisory Opinion OC-25/18 of 3 May 2018, para 153.

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> legations to foreign territory. This interpretation is confirmed by the preparatory work of the American Declaration, [...].[222]

This pronouncement demonstrates that the *pro homine* principle does not only function for constitutional unification but also admits the existence of other interpretative methods to create an environment in which interpreters may flexibly adopt the best solution depending on the problems and contexts in question.

222 Ibid 149.

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