INDIGENOUS RIGHTS BEFORE THE INTER-AMERICAN COURT OF HUMAN RIGHTS: A CALL FOR A *PRO INDIVIDUAL* INTERPRETATION

Valerio De Oliveira Mazzuoli[1]
Dilton Ribeiro[2]

ABSTRACT

In its traditional conception, international law regulates relations between sovereign states. This definition is challenged by current developments of international law, especially in the area of human rights. The human person is arguably a bearer of rights and duties under international law. However, recognizing this individual legal personality is not enough. International bodies and treaties need to acknowledge that individuals are subjects of international law within a pluralistic world. In other words, the law of nations must crystalize the idea that individuals are, with all their cultural differences, subjects of international law. The Inter-American Court of Human Rights recognizes this view through its *pro homine* principle, which informs that human rights instruments must seek the best possible protection for the human person. In this interpretative framework, the Inter-American Court crystalized a body of norms protecting indigenous rights and their cultural and historical backgrounds within the general protection system of the American Convention. The extensive interpretation of rights articulates a new view on the individual legal personality. Accordingly, this article seeks to understand this approach based on key decisions of the Inter-American Court of Human Rights on indigenous cases.

Keywords: International Law, International Human Rights; Indigenous Rights, Inter-American Court Of Human Rights.

RESUMO

Na sua concepção tradicional, o direito internacional regula as relações entre Estados soberanos. Esta definição é desafiado por desenvolvimentos atuais do direito internacional, em especial na área dos direitos humanos. A pessoa humana é, sem dúvida, um portador de direitos e deveres sob o direito internacional. No entanto, reconhecendo essa personalidade jurídica individual não é suficiente. Órgãos e tratados internacionais devem reconhecer que os indivíduos são sujeitos de direito

[1]International Law and Human Rights Professor (Federal University of Mato Grosso, Brazil), Postdoctoral Fellow in Law and Political Sciences (University of Lisbon, Portugal), PhD Holder *summa cum laude* in International Law (Federal University of Rio Grande do Sul, Brazil), LLM (São Paulo State University, Brazil). *E-mail*: mazzuoli@ufmt.br.
[2] PhD Candidate (Queen's University, Canada), LLM (University of Manitoba, Canada), LLB (Southwest Bahia State University, Brazil). *E-mail*: 11drfr@queensu.ca.

internacional dentro de um mundo pluralista. Em outras palavras, o direito das nações deve cristalizar a idéia de que os indivíduos são, com todas as suas diferenças culturais, sujeitos de direito internacional. A Corte Interamericana de Direitos Humanos reconhece essa visão através do seu princípio pro homine, que informa que os instrumentos de direitos humanos devem buscar a melhor protecção possível para a pessoa humana. Neste quadro interpretativo, a Corte Interamericana cristalizado um conjunto de normas de proteção dos direitos indígenas e de suas origens culturais e históricas dentro do sistema da Convenção Americana de proteção geral. A interpretação extensiva dos direitos articula uma nova visão sobre a personalidade jurídica individual. Assim, este artigo procura compreender esta abordagem com base em decisões importantes da Corte Interamericana de Direitos Humanos sobre casos indígenas.

Palavras-Chave: Direito Internacional, Direitos Humanos Internacionais; Direitos Indígenas; Corte Interamericana De Direitos Humanos.

INTRODUCTION

The recognition of multiculturalism is unquestionably one of the most significant post-Second World War movements stemmed from the notion of individual personality and human centrality. It is intrinsically linked to the conception of the human person as a bearer of cultural characteristics that are indispensable to a full and useful existence and that, consequently, must always be observed and respected. Political philosophy, especially after the 1980s, made room for debate and the development of multiple conceptions of multiculturalism. This debate, which soon later became a concern of law and for lawyers, was strongly rooted in a divergence between communitarians and liberals, and many questions and different philosophical theories and perspectives still surround this discussion.[3]

[3] In political philosophy, the debate on multiculturalism, which relates to a body of ideas concerning legal accommodation and policies of ethnic diversity, is strongly divided between the liberal and communitarian approaches. Liberals essentially argue that individuals must be free to decide their own concept of good life and not be constrained by any enforced or inherited condition. Conversely, communitarians affirm that every human being is connected through roles in social relations. Kymlicka argues differently by asserting that debates concerning individuals and groups reach a consensus on liberalism and democracy, but disagree on the interpretation of these principles in multiethnic and multinational societies. For a general view on the concept of multiculturalism, on the liberal and communitarian dichotomy, and on the characteristics or argument of multiculturalism, *see*, *e.g.*, Charles Taylor, *Interculturalism or Multiculturalism*?, 38 PHILOSOPHY & SOCIAL CRITICISM 413 (2012); JOHN ARTHUR, THE OXFORD HANDBOOK OF PRACTICAL ETHICS (Hugh LaFollette ed., 2005); BHIKHU PAREKH, RETHINKING MULTICULTURALISM (2000); MICHAEL MURPHY, MULTICULTURALISM: A CRITICAL INTRODUCTION (2012); Interview by Verena Risse and Martin Vezér with Will Kymlicka,

In the area of public policy, this topic bears considerable importance. States and the international community as a whole look to better accommodate national minorities and foreign individuals. Yet, they face a modern world where technology facilitates immigration and with territories that are occupied, peacefully or not, by peoples with diverse cultural characteristics. These characteristics go beyond the territorial boundaries where these individuals reside and include a mosaic of features, such as language, religion, philosophical views, and social conditions, that constitute an intrinsic part of these individuals. Accordingly, this reality generates heated public debates that are part of states' political agenda, especially after the Second World War.[4]

Due to its practical, political, legal and philosophical relevance, multiculturalism is in a central stage in many different areas of study, such as education, philosophy and political science. Furthermore, it is a key aspect in debates concerning minorities, foreign population, immigration and diversity in general.[5] But paradoxically, multiculturalism is not a central aspect of the literature of public international law, especially in the area of international human rights. This does not mean that international courts do not seriously discuss the accommodation of foreign population and the respect of minority rights, such as indigenous rights. This also

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Multiculturalism in Theory and Practice, 1 RERUM CAUSAE 3, 62 (2008); WILL KYMLICKA, MULTICULTURALISM: SUCCESS, FAILURE, AND THE FUTURE (2012); THE ASHGATE RESEARCH COMPANION TO MULTICULTURALISM (Duncan Ivinson ed., 2010); WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1996); Jeremy Waldron, *Minority Cultures and the Cosmopolitan Alternative*, 25 U.MICH. J.L. REFORM 751 (1992); Michael McDonald, *Liberalism, Community, and Culture*, 42 U. TORONTO L. J. 113 (1992); Will Kymlicka, *The Rights of Minority Cultures: Reply to Kukathas*, 20 POLITICAL THEORY 140 (1992); Chandran Kukathas, *Cultural Rights Again: A Rejoinder to Kymlicka*, 20 POLITICAL THEORY 674 (1992); and CHARLES TAYLOR, MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (1994).

[4] Ideas about the accommodation of minorities in multiethnic, multinational states have been part of policies for more than forty years. For a general view on the debate on multiculturalism and human rights or public policy, *see* MICHAEL KENNY, THE POLITICS OF IDENTITY: LIBERAL POLITICAL THEORY AND THE DILEMMAS OF DIFFERENCE (2004); SARAH SONG, JUSTICE, GENDER AND THE POLITICS OF MULTICULTURALISM (2007); WILL KYMLICKA, LA POLÍTICA VERNÁCULA: NACIONALISMO, MULTICULTURALIMO Y CIDADANIA [POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM, AND CITIZENSHIP] (2003), 30 [KIMLICKA, LA POLÍTICA]; SEYLA BENHABIB, THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA (2002) 59-67 [BENHABIB, THE CLAIMS OF CULTURE]; COURTNEY JUNG, MULTICULTURALISM AND LAW (Shabani Omid Payrow ed., 2007), 263-79; Melissa Williams, *Justice Towards Groups: Political not Juridical*, 23 POLITICAL THEORY 75 (1995); and Michael Murphy, *The Limits of Culture in the Politics of Self-Determination*, 1 ETHNICITIES 367 (2001).

[5] *See supra* note 2. *See also* JEFF SPINNER-HALEV, SURVIVING DIVERSITY: RELIGION AND DEMOCRATIC CITIZENSHIP (2000); COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE (1998); ANNE PHILLIPS, THE POLITICS OF PRESENCE (Kwame A. Appiah & Amy Gutmann eds., 1995); YASMIN ALIBHAI-BROWN, AFTER MULTICULTURALISM (2000); Vernon Van Dyke, *The Individual, the State, and the Ethnic Communities in Political Theory*, 29 WORLD POLITICS 343 (1977); and WILL KYMLICKA, LIBERALISM, COMMUNITY AND CULTURE (1989) [Kimlicka, *Liberalism, Community*].

does not mean that human rights scholars have not written on the importance to legally uphold cultural diversity and the recognition of the human person as a central aspect of international human rights law.[6]

There is, however, a lack of writing on how international human rights courts accommodate minorities. More specifically, there is no or limited literature on how the Inter-American Court of Human Rights, the principal judicial human rights body of the Organization of American States, accommodates minorities within the scope of the American Convention, the Court's main treaty that almost exclusively establishes civil and political rights.[7] This lack of existing literature weakens the legal debate and impedes an effective argument in favor of recognizing minority and vulnerable groups' rights, which could ground future decisions of domestic and international courts. Consequently, academic writings could work as subsidiary references that help judges accommodate individuals' rights within the international legal system.[8]

This article thus seeks to understand the approach of the Inter-American Court of Human Rights and how judges, by applying an extensive interpretation of its treaty, further recognized the individual legal personality under international law. The article also seeks to review how judges crystalized the view that individuals not only are bearers of rights and duties, but can also have different cultural and historical backgrounds from one another, which requires international courts to acknowledge this idea when interpreting and applying treaties. This reasoning, the *pro homine* principle, is the key pillar in truly recognizing the human person as a subject of international law.

I. THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS IN A MULTICULTURAL WORLD

International law traditionally refers to a group of norms and principles created by states in order to regulate their relations with one another.[9] However, this traditional approach has met some practical and theoretical problems, especially in

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[6] *See, e.g.,* HUGH THIRLWAY, MULTICULTURALISM AND INTERNATIONAL LAW: ESSAYS IN HONOUR OF EDWARD MCWHINNEY (Sienho Yee & Jacques-Yvan Morin eds., 2009), 166. As Mariko pointed out, international courts such as the International Court of Justice currently face a wide range of disputes reflecting different cultural backgrounds, which require solid and well-founded court decisions addressing such multicultural diversities. *See* MARIKO KAWANO, MULTICULTURALISM AND INTERNATIONAL LAW: ESSAYS IN HONOUR OF EDWARD MCWHINNEY (Sienho Yee & Jacques-Yvan Morin eds., 2009), 300.

[7] The American Convention on Human Rights has one general provision on economic, social and cultural rights. *See* Organization of American States, American Convention on Human Rights, art. 26, Nov. 22, 1969, O.A.S.T.S. Nº 36, 1144 U.N.T.S. 123.

[8] United Nations, *State of the International Court of Justice, annex to the Charter of United Nations*, art. 38, Jun. 26, 1945, Can. T.S. Nº 7.

[9] *See* J. L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE (1963), 1. *See also* L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE (PEACE) (1912), 3.

international human rights law. This article argues that human rights, as a particular system that is part of the broader realm of international law, differs from the latter in one central aspect: it recognizes the human person as a central element and acknowledges its international personality. This particularity forces judges and the international community as a whole to consider the interests and rights of individuals when interpreting and applying human rights norms. In accepting individuals as bearers of rights and duties distinct from those of states, the international sphere not only recognizes the individual's legal personality at the international level, but also acknowledges more extensively that all the particularities of the "human family"[10] need to be important elements in the evolution and application of international law of human rights. The Inter-American Court of Human Rights[11] seeks to recognize this multiculturalist and pluralist approach through the *pro homine* or *pro individual* interpretation. Accordingly, there is an intrinsic connection between the individual legal personality and an interpretation of human rights treaties that takes into consideration the wide variety of cultures of its individual subjects.

States, as the traditional subjects of the law of nations, occupy a dominant position among the actors on the international level. Notwithstanding states' dominant position, human rights instruments arguably confer rights and interests to individuals and change the hermeneutics of international law in order to accommodate the human person and acknowledge her status as the weak link in a state/individual dichotomy.[12]

International human rights law instruments arguably seek to reconcile natural law concepts with legal positivism: they attempt to acknowledge in treaties and declarations the centrality of the individual in human rights. The American Declaration of Rights and Duties of Man, following the precepts of legal positivism, acknowledges in its preamble the importance of domestic legislation and the necessity for more cooperation between the American states to protect human rights.[13] At the same time, this regional declaration takes a natural law perspective by acknowledging that states recognize that "the essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of

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[10] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), preamble [hereinafter Universal Declaration of Human Rights].

[11] American Convention on Human Rights, *supra* note 5, Chapter VIII.

[12] VALERIO MAZZUOLI, CURSO DE DIREITO INTERNACIONAL PÚBLICO [TEXTBOOK ON PUBLIC INTERNATIONAL LAW] (2013), 433-34, 451-53.

[13] Organization of American States, *American Declaration of the Rights and Duties of Man*, preamble, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992) [hereinafter American Declaration of the Rights and Duties of Man] (stating that the "affirmation of essential human rights by the American States together with the guarantees given by the internal regimes of the states establish the initial system of protection considered by the American States as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly strengthen that system in the international field as conditions become more favorable ….").

his human personality."[14] This is a shift from the predominant positivist view that rights only stem from state agreements. Accordingly, members of the Organization of American States codify through the Declaration that states do not simply grant, but rather recognize, international human rights. This acknowledgement is based on the idea that human rights stem from the individual legal personality.[15]

As a human rights declaration, the American Declaration was not initially envisaged to be a legally binding instrument. However, the Inter-American Court of Human Rights faced the question of whether this declaration had normative force when Colombia requested an advisory opinion on this issue.[16] The Court found that to determine the legal status of the American Declaration, it is necessary to examine the evolution that the Inter-American System has undergone since the adoption of this regional instrument.[17] The Court set out its basic argument that:

> [T]o determine the legal status of the American Declaration it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948. … The evolution of the here relevant "inter-American law" mirrors on the regional level the *developments in contemporary international law and especially in human rights law, which distinguished that law from classical international law* to a significant extent.[18]

In this advisory opinion, the Inter-American Court pointed out that the regional development of international law, especially of human rights, differs from the classical view of international law. Although the Court did not explicitly discuss the basis of this difference, the recent evolution of international human rights law – especially after the Second World War[19] – and the nature of the American Declaration, which combines natural law and legal positivism, suggest that a significant change in contemporary international human rights law is precisely the

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[14] *Id.*

[15] For a discussion on this non-positivistic approach based on individual legal personality, *see* ANTONIO AUGUSTO CANÇADO TRINDADE, INTERNATIONAL LAW FOR HUMANKIND (2010), 213-273; HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS (1950), 27-60, 69-72 and 111-113.

[16] Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶ 2 (July 14, 1989) [hereinafter Interpretation of the American Declaration].

[17] *Id.* ¶ 37.

[18] *Id.* ¶¶ 37-38 (emphasis added).

[19] With the creation of the United Nations, the "international bill of rights" and the regional human rights treaties established a human rights system part of general international law, which seeks to protect individuals. *See* John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527 (1976); *see also* Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1 (1988).

codification of the individual legal personality and its centrality in the legal system. This view departs from the "classical" international law system grounded in the Westphalian paradigm, which placed complete power into the hands of states as the only subjects of international law.[20] In other words, the main aspect of international human rights law is the protection of individuals as bearers of rights and duties and not the protection of mutual state interests.

Thus, this regional instrument was created as a list of fundamental interests of individuals that flow from their legal personality and that the American states should take into consideration on the international and domestic levels. These "interests" could later become legally binding norms if domestic legislation or international treaties codified them. Moreover, this Declaration became even more important as these "interests," or "soft" rights and duties, changed status and acquired a normative character.[21] This normativity can be divided into broad and specific. Rights crystallized in the American Declaration acquired specific normative status either by way of custom or general principles of law, or due to the interpretation of the Charter of American States.[22] Furthermore, the American Declaration acquired broad normative status because it recognizes that individuals have interests at the international level, that is, they have rights and duties under international law that need the international community's consideration.

In considering whether the American Declaration possessed normative force, the Inter-American Court stated that the OAS Charter refers to fundamental rights in its preamble and a number of provisions, but the Court did not list or define them.[23] Furthermore, the Court pointed out that the Inter-American Commission on Human Rights[24] protects rights "enunciated and defined in the American Declaration"[25] based on Article 1 of the Inter-American Commission's Statute.[26] Moreover, it acknowledged that the OAS General Assembly has "repeatedly recognized that the American Declaration is a source of international obligations for the member States of the OAS."[27]

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[20] For a Westphalian view of international law *see* OPPENHEIM, *supra* note 7, at 362-369.

[21] THOMAS BUERGENTHAL ET AL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL (4TH ed. 2009), 262-263.

[22] MALCOLM SHAW, INTERNATIONAL LAW (5th ed. 2003), 260 (arguing, in the context of the Universal Declaration of Human Rights, that a non-binding declaration may come to acquire normative force in these ways).

[23] Interpretation of the American Declaration, *supra* note 14, ¶ 39.

[24] Organization of American States, Charter of the Organization of American States arts. 112, 150, Apr. 30, 1948, O.A.S.T.S. No. 1, 119 U.N.T.S. 3 [hereinafter OAS Charter].

[25] Interpretation of the American Declaration, *supra* note 14, ¶ 41.

[26] Organization of American States, *Statute of the Inter-American Commission on Human Rights*, art. 1. Res. 447 adopted by the General Assembly at its 9th Regular Session, La Paz, Bolivia (Oct. 1979), reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 133 (1992).

[27] Interpretation of the American Declaration, *supra* note 14, ¶ 42.

Based on these arguments, the Inter-American Court held that "the member states of the Organization have signaled their agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter."[28] The Court thus unanimously decided that although the Declaration is not a treaty, and the American Convention remains the first source of obligations to its members:[29]

> For the member States of the Organization, the Declaration is the text that defines the human rights referred to in the Charter. Moreover, Articles 1(2) (b) and 20 of the Commission's Statute define the competence of that body with respect to the human rights enunciated in the Declaration, with the result that to this extent the American Declaration is for these States a source of international obligations related to the Charter of the Organization.[30]

Accordingly, the Inter-American Court recognized that international human rights law needed to be interpreted in light of subsequent developments, without necessarily referencing to the authors of an international instrument. Based on this theoretical foundation, the Court acknowledged the binding status of the American Declaration as the authoritative definition of the expression "human rights" in the OAS Charter. The Court thus recognized the normative status of the American Declaration based on reasoning similar to that commonly accepted for the Universal Declaration of Human Rights, which is generally considered to hold the authoritative interpretation and definition of the references to human rights and fundamental freedoms contained in the Charter of the United Nations.[31] However, the Court did not elaborate on the differences between human rights declarations with normative force and human rights treaties.

As previously explained, human rights declarations can have a broad or specific normativity. Specific normativity occurs when a right enshrined in the declaration becomes a general principle of law or a customary norm of international law. The normativity is broad when the instrument expresses the intrinsic elements of human rights: it establishes rights, rights holders and duty bearers. The broad or general normativity of declarations is not the same as that of treaties. In declarations, the right establishes that individuals are, generally speaking, right holders and

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[28] *Id.* ¶ 43.

[29] *Id.* ¶¶ 46-47.

[30] *Id.* ¶ 45.

[31] *See* Humphrey, *supra* note 17, at 529 (stating that the Universal Declaration "provides the framework for the international recognition of those human rights and fundamental freedoms that were left undefined by the Charter"); SHAW, *supra* note 20, at 260 (discussing the influence and significance of the Universal Declaration, including as an interpretation of the UN Charter); BUERGENTHAL, *supra* note 19, at 41–46 (discussing different bases for the Universal Declaration's binding force); Antônio Augusto Cançado Trindade, *The Interdependence of All Human Rights – Obstacles and Challenges to Their Implementation*, 50 INT'L J. SOC. SCI. 513, 513 (1998) [hereinafter Cançado Trindade, *Interdependence*] (stating that "the Universal Declaration is widely recognized today as an authoritative interpretation of human rights provisions of the United Nations Charter.").

addressees of rights, while states have the duty to acknowledge these individuals' status.

In general terms, human rights have three intrinsic elements: a right, a right holder and a right to a claim. When "*A* has a right to *x* with respect to *B*," one can point out the existence of a right holder (*A*) and a duty bearer (*B*). Consequently, *A*'s entitlement to *x* in relation to *B* indicates that *B* has a correlative obligation to *A*, and thus, *A* can make "special claims upon *B* to discharge these obligations."[32] Thus, a right holder, that is, an individual, has a human right against states, *quasi*-state entities or even against other individuals. If this right is breached, the right holder possesses a right of claim against the violator of his fundamental right. Accordingly, the sentence "*A* has a right to *x* with respect to *B*" captures the basic intrinsic elements of human rights: right holders, claims, and duty bearers.

In international law, this philosophical theory of human rights encompassing the existence of right holders, claims, and duty bearers applies to human rights treaties. Unlike treaties, declarations do not establish specific binding obligations but only propositions that states must follow when conducting their domestic and international affairs. However, they can *crystalize* general normative obligations, especially through the codification of customary international law, that grant the obligations mandatory force. In certain cases they can even acquire *jus cogens* status.[33] However, the American Declaration was not envisaged as an instrument crystalizing specific obligations whereby a breach of right can lead to a claim against the party that violated the right holder's fundamental right. Nonetheless, the Declaration establishes a general normativity, that is, the view that individuals possess a general right to be right holders of human rights and states have the duty to acknowledge this characteristic as part of the international human rights system. The American Declaration upholds that individuals are the bearers of rights and duties at the international level and have interests different from those of states. Furthermore, states have the duty to acknowledge this status.

The American Declaration thus sets the parameters of a human-centered or a *pro homine* interpretation of international law. The regional instruments of human rights of the Organization of American States must be interpreted and applied taking into consideration that individuals are the bearers of rights and duties at the international level and have interests of their own without the tutelage of states. The American Convention on Human Rights supplemented this reasoning by specifying the rights and claims of individuals. This crystalized an effective dichotomous relation between states and individuals, whereby the violation of a right can lead to a

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[32] JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE (1989), 10 and 11.

[33] On the force of customary norms to grant normativity to declarations, see Comm. on Human Rights, Rep. on the Human Rights Situation in the Islamic Republic of Iran by the Special Representative of the Commission, Mr. Reynaldo Galindo Pohl, ¶ 22, U.N. Doc. E/CN.4/1987/23 (Jan. 28, 1987); SHAW, *supra* note 20, at 260. Hannum affirms that the Universal Declaration, for example, has acquired *jus cogens* status. *See* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 326 (1996).

right to claim before the Inter-American Commission on Human Rights[34] and the Inter-American Court of Human Rights.[35] Moreover, regarding the interpretation of the Convention, Article 29 precluded restrictive interpretation of rights and consequently set in motion the extensive interpretative approach of the Inter-American Court.[36]

This position diverges from the classical view of international law centered on the interests of states.[37] As the Inter-American Court pointed out in its advisory opinion on the *Interpretation of the American Declaration*, international human rights differs from classical international law to a significant extent. The main divergence concerns the centrality of individual humans in international human rights, as reflected through the *pro individual* or *pro homine* system in the American Declaration. Article 29 of the American Convention further develops this premise in the scope of legal interpretation. In a *pro homine* system, rights recognized in human rights instruments flow from the human person and therefore cannot be limited by states "to a greater extent than is provided for" in the instrument itself.[38] Accordingly, judges must apply the American Convention based on a *pro individual* system with the possibility of extensive application of rights.

States themselves designed an inter-American human rights system grounded on the human person as a subject of rights and duties stemming from their legal personality. Thus, international human rights law is based on an individual-centered or *pro homine* system. The Inter-American Court of Human Rights extensively discussed and applied this notion of an individual-centered or *pro individual* interpretation arguably because of two main practical considerations. First, international human rights law concerns the well being of the human person either on the individual or collective level. Second, the American continent comprises a diverse group of individuals with different social, political, historical, cultural and religious backgrounds, all of them equally entitled to international protection.

Accordingly, the *pro homine* system accommodates the diversity of the American continent based on an extensive application of rights focusing on and flowing from the human person. The Inter-American Court is often called to settle disputes that require an extensive, individual-centric interpretation. Judge Sergio Garcia Ramirez asserted that:

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[34] American Convention on Human Rights, *supra* note 5, ch. 7.

[35] *Id.* ch. 8.

[36] Article 29 spells out that "[n]o provision of this Convention shall be interpreted as: a. permitting any State Party, group, or person to suppress 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 herein; b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have." *Id*. art. 29.

[37] *See* OPPENHEIM, *supra* note 7.

[38] American Convention on Human Rights, *supra* note 5, art. 29 (a).

> When exercising its contentious jurisdiction, the Inter-American Court is duty-bound to observe the provisions of the American Convention, to interpret them in accordance with the rules that the Convention itself sets forth . . . . It must also heed the principle of interpretation that requires that the object and purpose of the treaties be considered (article 31(1) of the Vienna Convention), referenced below, and the principle *pro homine* of the international law of human rights - frequently cited in this Court's case-law - which requires the interpretation that is conducive to the *fullest protection of persons, all for the ultimate purpose of preserving human dignity, ensuring fundamental rights and encouraging their advancement*.[39]

Following this line of thought, Henderson also asserts that the *pro homine* framework, which he calls "principle," is a logical element of international human rights law.[40] He argues that international human rights norms must always be in favor of individuals: the hermeneutical criterion informing that the interpretation of protected rights must always be extensive is an essential part of international human rights law.[41] This is the position of the Inter-American Court itself. For instance, the Court stated that it could compare the American Convention with other international instruments in order "to stress certain aspects concerning the manner in which a certain right has been formulated."[42] Moreover, the Court found that this approach to legal interpretation cannot be used restrictively to limit rights enshrined in the Convention.[43] Consequently, grounding its view on Article 29 of the American Convention that forbids restrictive interpretation, the Court held that:

> [I]f in the same situation both the American Convention and another international treaty are applicable, the rule most favorable 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

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[39] Sergio Garcia Ramirez, *Concurring Opinion of Judge Sergio Garcia Ramirez in the Judgment on the Merits and Reparations in the "Mayagna (Sumo) Awas Tingni Community Case,"* 19 ARIZ. J. INT'L & COMP. L. 449, 449 (2002) (emphasis added).

[40] Humberto Henderson, *Los Tratados Internacionales de Derechos Humanos en el Orden Interna: La Importancia del Principio Pro Homine* [International Human Rights Treaties in Domestic Law: the Importance of the Pro Homine Principle] 39 REVISTA I.I.D.H. 71, 87-88 (2004).

[41] *Id.* at 88.

[42] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 of the American Convention on Human Rights), Advisory Opinion OC-5/85, Inter-Am. Ct. H.R. (ser. A) No. 5, ¶ 51 (Nov. 13, 1985).

[43] *Id.*

> found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.[44]

This approach intends to advance human protection beyond the initial set of rights spelled out by the American Convention in order to meet social needs and aspirations. The approach also seeks to better protect human dignity by taking into account natural law and legal positivism, two parts of a system that recognizes the individual legal personality in a pluralistic world. By adopting an expansive interpretation in favor of individuals, the Inter-American Court is thus able to refer to different human rights instruments and render decisions that extend beyond the traditional scope of the American Convention and that pertain to other areas of international law, such as international humanitarian law, environmental law and indigenous rights.[45]

II. THE APPLICATION OF A MULTICULTURAL AND INDIVIDUAL-CENTERED INTERPRETATION BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS.

Based on Article 29 of the American Convention, the Vienna Convention on the Law of Treaties,[46] and the human-centralization of human rights, the Inter-American Court, can constantly refer to different treaties or instruments in general in order to render decisions that escape the traditional scope of the provisions of the American Convention and originally belonged to indigenous rights, international humanitarian law, investors' rights, and environmental law as well as economic, social and cultural rights.[47] The American Convention contains no specific provision enshrining indigenous rights. The Court has advanced the protection of indigenous rights in a series of cases by applying this pro-individual principle that recognizes individual beings as international legal subjects endowed with diverse cultural backgrounds.

Indeed, the application of this *pro homine* approach has substantially increased the protection of indigenous rights in the American continent.[48] For instance, the

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[44] *Id.* ¶ 52.

[45] Lucas Lixinski, *Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law*, 21 EUR. J. INT'L L. 585, 603 (2010).

[46] Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

[47] Lixinski, *supra* note 43, at 603.

[48] The following states have ratified the American Convention and accepted the Court's jurisdiction: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Ecuador, El Salvador, Granada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad and Tobago, Uruguay and Venezuela. However, Trinidad and Tobago denounced the American Convention on Human Rights and Venezuela denounced the American Convention. *See I/A Court History*, The Inter-American Court of Human Rights, http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh (last visited April, 9, 2013); *see also* Press Release, Organization of American States, IACHR Regrets Decision of Venezuela to Denounce the American Convention on Human Rights (Sept. 12, 2012), *available at* http://www.oas.org/en/iachr/media_center/PReleases/2012/117.asp.

notion of communal lands is vital for the protection of indigenous rights.[49] In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Court protected this notion by holding that Nicaragua had neither demarcated the communal lands of the Awas Tingni Community, nor adopted effective measures to ensure the Community's property rights to its ancestral lands and natural resources.[50] The Inter-American Court stated that indigenous peoples' customary law must be especially taken under consideration.[51] It concluded that due to customary practices, land possession "should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration."[52] Based on the teleological *pro homine* principle enshrined in Article 29 of the American Convention, the Inter-American Court extensively interpreted the application of the right to property enshrined in this regional treaty[53] to cover the protection of communal property and the recognition of indigenous communities' close ties with the land. The protection of communal lands flows from the *pro homine* interpretation, which on its turn is possible due to a mix of positivism – state agreement – with the natural law view that rights and duties stem from the human personality and not solely from state creation.

The Court used this individual-based approach to decide that the right to property enshrined in Article 21 also includes the rights of members of the indigenous communities to communal property.[54] The Court reached this decision taking into account that indigenous peoples have a communitarian tradition, in which land ownership is not focused on an individual person but on the group and its community.[55] This connection to the land, according to the Court, is material and spiritual in a way that it is part of "the fundamental basis of their cultures, their

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[49] *See* Inter-Am. Comm'n H.R., *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 35 AM. INDIAN L. REV. 263, 304–05 (2011).

[50] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 173 (Aug. 31, 2001). In this case, the Inter-American Court, in the words of Cançado Trindade, "went into depth in an integral interpretation of the indigenous cosmovision, insofar as the relationship of the members of the community with their ancestral lends was concerned." Antônio Augusto Cançado Trindade, *The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter- American Court of Human Rights*, *in* MULTICULTURALISM AND INTERNATIONAL LAW: ESSAYS IN HONOUR OF EDWARD MCWHINNEY, 477, 485 (Sienho Yee & Jacques-Yvan Morin eds., 2009) [hereinafter Cançado Trindade, MULTICULTURALISM].

[51] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 48, ¶ 151.

[52] *Id.*

[53] *See* American Convention on Human Rights, *supra* note 5, art. 21. This provision establishes that: "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law." *Id.*

[54] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 48, at ¶ 148.

[55] *Id*. ¶¶ 148-149.

spiritual life, their integrity, and their economic survival."[56] Although there is no explicit provision regulating the relationship of indigenous communities with their land, the Court adopted a *pro individual* interpretation of the American Convention and decided that Nicaragua must adopt the measures necessary to establish "an effective mechanism for delimitation, demarcation and titling of the property of indigenous communities, in accordance with their customary law, values [and] customs."[57]

The Court confirmed the right to communal property as a group right – which embodies the right of claim and natural resources – in subsequent cases. The following paradigmatic case was *Yakye Indigenous Community v. Paraguay* in which the Court applied an extensive interpretation of Article 21 of the American Convention with the aid of exogenous legal instruments.[58] In this case, the Inter-American Commission affirmed that Paraguay did not ensure the ancestral property rights of the Yakye Axa Indigenous Community and that this situation made it impossible for the Community to own and possess its territory, placing the Community in a vulnerable situation in terms of food, medical and public health care.[59] In light of the particularities of the case, Paraguay asserted that "[d]omestic legislation does not encompass a means to acquire the right to property based on a historical right."[60] Furthermore, Paraguay added that "while there is a generic recognition of the traditional ownership right of indigenous peoples to their land[,] it is necessary for them to actually possess it and live as a community on that land."[61]

In response, the Inter-American Court applied a *pro individual* interpretation. It mentioned Article 14(3) of ILO Convention No. 169,[62] incorporated into Paraguayan domestic legislation by Law No. 234/93, which spells out that "[a]dequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned."[63] The Court used this provision to extend the scope of the American Convention: it reasoned that Article 14 of the ILO Convention, in combination with Articles 8 and 25 of the American Convention, obligated Paraguay to provide effective means of claims – with due process

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[56] *Id*.

[57] *Id.*, ¶ 164.

[58] Yakye Indigenous Community v. Paraguay, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, 2, ¶ 2 (Jun. 17, 2005). For a brief comment on the relation between the Yakye case and multiculturalism, *see* Cançado Trindade, MULTICULTURALISM, *supra* note 48, at 488–90

[59] Yakye Indigenous Community, *supra* note 56, ¶ 2.

[60] *Id*. ¶ 94.

[61] *Id*.

[62] International Labour Organisation, Convention concerning Indigenous and Tribal Peoples in Independent Countries, Jun. 27, 1989, ILO No. 169, 1650 U.N.T.S. 383 [hereinafter "ILO Convention No. 169"].

[63] Yakye Indigenous Community, *supra* note 56, ¶ 95.

guarantees – to the members of the indigenous communities, as part of their right to communal property.[64]

Again, the Inter-American Court of Human Rights analyzed the American Convention and acknowledged that indigenous communities have a special relation, which states must respect and effectively protect, to acknowledge the right of claim to communal lands.[65] The Inter-American Court, mentioning the European Court of Human Rights, held that human rights treaties are living instruments, and that their interpretation must go hand in hand with the evolution of international law and current living conditions.[66] This evolutionary interpretation is consistent with the general rules of interpretation embodied in Article 29 of the American Convention,[67] as well as those set forth in the Vienna Convention on the Law of Treaties.[68] In other words, the Inter-American Court expressly acknowledges that treaty interpretation should take into account instruments directly related to it (paragraph two of Article 31 of the Vienna Convention) and the system of which it is a part (paragraph three of Article 31 of said Convention)[69] in a pro-individual approach.

The Court thus takes the position that "in its analysis of the scope of Article 21 of the Convention, mentioned above, the Court deems it useful and appropriate to resort to other international treaties, aside from the American Convention, such as ILO Convention nº 169, to interpret its provisions in accordance with the evolution of the inter-American system, taking into account related developments in International Human Rights Law."[70] By referring to the need to interpret and apply the American Convention in the context of evolving human rights in contemporary international law, the Court argued that the indigenous provisions of the ILO Convention No. 169 could "shed light on the content and scope of Article 21 of the American Convention."[71] Applying this criterion, the Court found that "the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations."[72]

The Court also mentioned Article 13 of ILO Convention No. 169, which establishes that states must respect "the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in

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[64] *Id.* ¶ 96.

[65] *Id.* ¶¶ 96, 124 and 126.

[66] *Id.* ¶ 125.

[67] *See* American Convention on Human Rights, *supra* note 5, art. 29.

[68] Article 31 (1) of the Vienna Convention provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *See* Vienna Convention on the Law of Treaties, *supra* note 44, art. 31.

[69] Yakye Indigenous Community, *supra* note 56, at ¶ 126.

[70] *Id.* ¶ 127.

[71] *Id.* ¶ 130.

[72] *Id.* ¶ 131.

particular the collective aspects of this relationship."[73] Consequently, the Court concluded that Article 21 of the American Convention safeguards the close ties of indigenous peoples with their traditional lands and the natural resources associated with the indigenous culture, including the components derived from them.[74]

Ultimately, the Inter-American Court recognized that there is a dual right embodied in Article 21. First, there is the traditional view of the right to private property. Second, this Article comprises the right of indigenous communities to their territory and natural resources in accordance with their indigenous culture, customs and spiritual life. These two views, however, are interpreted as not being in conflict with another. As the Inter-American Court pointed out, this teleological interpretation of the American Convention does not entail that every time a conflict emerges between the territorial interests of private individuals (or of a state) and those of indigenous communities, the latter necessarily prevail over the former.[75] Nevertheless, when states are justifiably unable to adopt measures to return the traditional territory and communal resources to indigenous communities, the state must not only grant compensation based on a discretionary criteria, but there must be a consensus with the indigenous peoples involved, in accordance with the peoples' own mechanisms of consultation, values, customs and customary laws.[76] This reasoning uses a *pro homine* or *pro individual* interpretation of the American Convention assisted by Convention No. 169 of the ILO and takes into consideration the existence of a pluralistic world comprises different peoples with different cultures, backgrounds and views.[77]

Analyzing whether Paraguay breached the American Convention's Article 4,[78] which grants people the right to life, the Inter-American Court sought to apply an extensive *pro individual* interpretation. It referred to views of the United Nations Committee on Economic, Social, and Cultural Rights, in General Comment 14 on the right to enjoy the highest attainable standard of health,[79] to decide that indigenous peoples can be placed in a situation of vulnerability if access to their ancestral lands, and consequently, access to food and clean water, are at stake.[80] Based on a *pro individual* interpretation of the American Convention, the Court established that the state concerned breached Article 4(1) and Article 1(1) to the detriment of the Yakye

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[73] ILO Convention No. 169, *supra* note 60, art. 13. *See also* Yakye Indigenous Community, *supra* note 56, ¶ 136.

[74] Yakye Indigenous Community, *supra* note 56, ¶¶ 136–37.

[75] *Id.* ¶ 149.

[76] *Id.* ¶¶ 149, 151.

[77] *Id.* ¶¶ 149–151.

[78] Article 4 (1) of the American Convention spells out that "[e]very person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life." *See* American Convention on Human Rights, *supra* note 5, Article 4(1).

[79] Yakye Indigenous Community, *supra* note 56, ¶ 166.

[80] *Id.* ¶ 167.

Axa Community.[81] Among other orders, the Court decided that Paraguay must take the necessary steps to guarantee the property rights of the Yakye Axa Indigenous Community and must publicly acknowledge its responsibility.[82]

Similarly, in *Sawhoyamaxa Indigenous Community v. Paraguay*, the Court followed the *pro homine* approach established in previous cases and advanced the understanding that communal property is attached to the indigenous community's worldview and cultural identity as subjects of law.[83] In this case, the Inter-American Commission filed a complaint that Paraguay did not ensure the ancestral property rights of the Sawhoyamaxa Community and its members.[84] The Inter-American Court applied an extensive *pro individual* interpretation of the case by analyzing the content and scope of Article 21 along with Convention No. 169 of the ILO, since Paraguay had previously ratified the ILO Convention and incorporated its provisions into domestic legislation.[85] The Inter-American Court followed the precedent set by previous cases on the evolutionary individual-centered legal reasoning extending the scope of Article 21 of the American Convention in the light of exogenous treaties.[86] Based on this interpretation, the Court decided that the close ties indigenous communities have to their traditional lands, including their natural resources and incorporeal elements, "must be secured" under the American Convention.[87] The Court added that this close relation with their traditional lands and natural resources exists not only because the resources are the Community's main means of survival, but also because they "form part of [the Community's] worldview, of their religiousness, and consequently, of their cultural identity."[88]

The Inter-American Court hence affirmed that it must interpret and apply international human rights law while considering the "evolution of the Inter-American system." The Court did not define nor give the general characteristics of this evolution, but as its case laws suggest, this system encompasses an amalgamation of a natural law and legal positivism in a *pro individual* framework. In other words, individuals are subjects of international law and have interests that the Inter-American human rights bodies need to take into account. These interests do not form a unified group of rights and duties granted to individuals as the American continent includes a diverse group of individuals with different cultural, political and

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[81] *Id.* ¶ 176. Furthermore, Paraguay violated Articles 8, 25 and 21 of the American Convention on Human Rights. *Id.* ¶ 103

[82] *Id.* ¶¶ 225–26. The Court decided that Paraguay must identify the traditional territory of the members of the Yakye Axa Indigenous Community and grant it to them free of cost and must pay pecuniary damages and costs and expenses. *Id.* ¶ 233.

[83] Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, (Mar. 29, 2006).

[84] *Id.* ¶ 2. *See also* Cançado Trindade, MULTICULTURALISM, *supra* note 48, at 490.

[85] *Id.* ¶ 117.

[86] *Id.*

[87] *Id.* ¶ 118.

[88] *Id.*

historical backgrounds, and the Inter-American Court needs to acknowledge this pluralistic system. This general rule is crystallized by the preambles and normative characters of the human rights instruments of the inter-American system as a whole and, specifically, by Article 29 of the American Convention.[89]

In *Saramaka People v. Suriname*, the Court held that indigenous communities have the right of participation in the exploration of natural resources as part of the communal right to property.[90] Again, analyzing questions out of scope of the literal meaning of the Convention, the Court extended the interpretation of the Convention's provisions favoring the human person with the aid of previous cases and external legal instruments and reference to other tribunals. In this case, the Inter-American Commission adopted a similar tone as in other cases and affirmed that Suriname failed to recognize the Saramaka People's right to use and enjoy their territory; that the State allegedly violated the right to judicial protection by failing to provide an effective access to justice, particularly the right to property in accordance with communal traditions; and that Suriname allegedly failed to adopt the necessary domestic provisions to provide such rights to the Saramakas.[91] To reach these conclusions, the Inter-American Court analyzed possible restrictions on the right to property regarding concessions for the exploration and extraction of certain natural resources, and informed that Suriname needed to follow three safeguards in order to protect indigenous rights.[92] First, states need to guarantee an effective participation of the members of the indigenous community, in conformity with their customs and traditions. Secondly, states need to ensure the indigenous community's right to receive a reasonable benefit from the exploration and extraction of natural resources within their territory. Finally, independent and technically capable entities, with the state's supervision, must perform a prior environmental and social impact assessment of the indigenous community's territory.[93]

To find that Suriname had indeed breached Article 21 of the American Convention,[94] the Court mentioned foreign instruments and decisions. Referring to the Human Rights Committee in *Apirana Mahuika et al v. New Zealand*, the Court decided that the right to culture of an indigenous community under Article 27 of the ICCPR could be restricted if it was able to partake in the decision to restrict such right.[95] Moreover, the Court mentioned Article 32 of the United Nations Declaration

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[89] The preambles of the American Declaration and Convention arguably acknowledge the individual legal personality. Article 29, providing the possibility of an extensive individual-centered interpretation complement the recognition of this legal personality and allow for a *pro homine* interpretation and application of rights leading to the recognition of indigenous rights even though there is no provision in both instruments making explicit reference to indigenous peoples. *See* American Declaration, *supra* note 11, at preamble; and American Convention of Human Rights, *supra* note 5, preamble.

[90] Saramaka People v. Suriname, Judgment, Inter-Am. Ct. H.R. (Ser. C) Nº 146 (2006).

[91] *Id*. ¶ 2.

[92] *Id.* ¶ 129.

[93] *Id*.

[94] *Id.* ¶¶ 60-61.

[95] *Id.* ¶ 130.

on the Rights of Indigenous Peoples, which was approved by the UN General Assembly with the support of Suriname.[96]

Accordingly, the Inter-American Court acknowledged the necessity to "ensure an effective participation of members of the Saramaka people in development or investment plans within their territory."[97] Moreover, the Court mentioned the U.N. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people reaching a similar decision by affirming that "[f]ree, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects."[98] Furthermore, the Inter-American Court, besides referring to Article 15(2) of the ILO Convention No. 169, informed that the Committee on the Elimination of Racial Discrimination has stressed the necessity of prior informed consent of indigenous communities when major exploitation activities are planned in their territories and "that the equitable sharing of benefits to be derived from such exploitation be ensured."[99] Thus, the Court concluded that Suriname breached, to the detriment of the members of the Saramaka people, the right to property crystalized in Article 21 of the American Convention on Human Rights and the right to judicial protection under Article 25.[100]

In the case of *Moiwana Community v. Suriname*, the Court dealt with displaced indigenous communities, the protection of refugees within the scope of indigenous rights and the special relation that indigenous groups have with the dead in the light of the cultural and spiritual particularities.[101] Again, seeking to ensure an effective protection of indigenous rights even without explicit treaty provisions, the Court applies the *pro homine* principle to interpret its Convention in the light of previous cases, exogenous treaties and decisions from other tribunals. In this case, the Inter-American Commission sustained that members of the Surinamese armed forces attacked the N'djuka Maroon village of Moiwana and murdered over 40 men, women and children, and destroyed their village.[102] Moreover, those who were able to escape the attack allegedly fled into exile or internal displacement.[103] The Commission pointed out that there was no adequate investigation of the situation, nobody was prosecuted or punished and the survivors remained displaced from their lands.[104] Consequently, the indigenous peoples were allegedly "unable to return to

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[96] *Id.* ¶ 131.

[97] *Id.* ¶ 133.

[98] *Id.* ¶ 135.

[99] *Id.*¶ 140.

[100] *Id.* ¶¶ 60-61.

[101] Moiwana Community v. Suriname, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 124, ¶ 3 (2005). *See also* Cançado Trindade, MULTICULTURALISM, *supra* note 48, at 491.

[102] Moiwana Community v. Suriname, *supra note 99*, ¶ 3.

[103] *Id.*

[104] *Id.*

their lands and to their traditional way of life."[105] The Commission thus argued that although the attack itself occurred before Suriname's ratification of the American Convention and its recognition of the Court's jurisdiction, the denial of justice and the displacement of the Moiwana community fall under the subject to the Court's jurisdiction.[106]

The Inter-American Court reminded that Suriname's duties to investigate, prosecute and punish the responsible individuals are not restricted to the calendar year of 1986. Accordingly, the Court can assess Suriname's obligations from the date when it recognized the Court's competence.[107] Moreover, it acknowledged the lack of effort from Suriname to provide effective remedies and its disregard for the communities' traditions. The Court pointed out that the long-standing lack of effective remedies is normally a source of suffering and anguish for victims and their family members.[108] Moreover, the Court found that:

> [T]he ongoing impunity has a particularly severe impact upon the Moiwana villagers, as a N'djuka people. As indicated in the proven facts (supra paragraph 86(10)), justice and collective responsibility are central precepts within traditional N'djuka society. If a community member is wronged, the next of kin – which includes all members of his or her matrilineage – are obligated to avenge the offense committed. If that relative has been killed, the N'djuka believe that his or her spirit will not be able to rest until justice has been accomplished. While the offense goes unpunished, the affronted spirit – and perhaps other ancestral spirits – may torment their living next of kin.[109]

The Court found that due to the impunity of the 1986 attack, community members were deeply concerned that they could once again face grave hostilities if they were to return to their traditional lands.[110] Furthermore, they were unaware of what has happened to the remains of their loved ones,[111] a cause of great suffering since it is deeply important under their tradition to possess "the physical remains of the deceased, as the corpse must be treated in a particular manner during the N'djuka death ceremonies and must be placed in the burial ground of the appropriate descent group."[112] Moreover, the abandonment of the Moiwana community's traditional lands disrupted the especial relationship they have with their ancestral territory.[113]

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[105] *Id.*

[106] *Id.*

[107] *Id.* ¶ 43.

[108] *Id.* ¶ 94.

[109] *Id.* ¶ 95.

[110] *Id.* ¶ 97.

[111] *Id.* ¶ 100.

[112] *Id.* ¶ 98.

[113] *Id.* ¶ 102.

Taking into account these facts, the Court affirmed that Suriname breached Article 5 of the American Convention.[114] Evaluating whether Suriname breached Article 22 of the American Convention, the Court referred to the UN Human Rights Committee:

> [T]he Tribunal shares the views of the United Nations Human Rights Committee as set out in its General Comment nº 27, which States that the right to freedom of movement and residence consists, *inter alia*, in the following: a) the right of all those lawfully within a State to move freely in that State, and to choose his or her place of residence; and b) the right of a person to enter his or her country and the right to remain in one's country. In addition, the enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move or to stay in a place.[115]

In order to extend the scope of Article 22(1) of the American Convention[116] to account for the situation of refugees and displaced individuals, the Court mentioned the guiding principles of the UN Secretary General's Special Representative on Internally Displaced Persons.[117] As for the question of Article 22 of the Convention, the Court referred again to the UN Human Rights Committee and

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[114] *Id.* ¶ 103. Article 5 of the American Convention spells out that: "1. every person has the right to have his physical, mental, and moral integrity respected; 2. no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person; 3. punishment shall not be extended to any person other than the criminal; 4. accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons; 5. minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors; 6. punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners." *See* American Convention on Human Rights, *supra* note 5, Article 5.

[115] Moiwana Community v. Suriname, *supra* note 99, ¶ 110.

[116] This provision provides that "[e]very person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law." *See* American Convention on Human Rights, *supra* note 5, Article 22(1).

[117] The Tribunal stresses the following principles: "1(1). Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced. 5. All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons. 8. Displacement shall not be carried out in a manner that violates the rights to life, dignity, liberty and security of those affected. 9. States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands. 14(1). Every internally displaced person has the right to liberty of movement and freedom to choose his or her residence. 28(1). Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons." Moiwana Community v. Suriname, *supra* note 99, ¶ 111.

cited the case of a Colombian civil rights attorney who, after receiving death threats and suffering an attempt against his life, was forced into exile in the United Kingdom, which, according to the Committee, breached his right of movement and residence.[118] Accordingly, the Inter-American Court concluded that Suriname breached Article 22(1) of the American Convention by failing to establish conditions and "provide the means that would allow the Moiwana community members to return voluntarily, in safety and with dignity, to their traditional lands."[119]

Furthermore, the Court asserted that although the Moiwana community members are not indigenous to the region,[120] they "lived in the area in strict adherence to N'djuka custom and they are inextricably tied to these lands and the sacred sites."[121] In the light of these considerations, the Court concluded that Suriname breached Article 21 of the American Convention.[122] Moreover, the Court sustained that Suriname's "manifest inactivity" clearly failed to follow the principle of due diligence.[123] It affirmed that it shares the same view of the United Nations Human Rights Committee, which pointed out the lack of effective remedies available for victims of human rights violations in Suriname.[124] The Court thus held the State breached Articles 8 (right to a fair trial)[125] and 25 (right to judicial protection)[126] of the American Convention.[127]

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[118] *Id*. ¶ 116. *See also* Luis Asdrúbal Jiménez Vaca v. Colombia, U.N. Human Rights Committee, Communication Nº 859/1999 (15 April 2002), ¶ 7.4.

[119] Moiwana Community v. Suriname, *supra* note 99, ¶ 120.

[120] The Moiwana Village was settled by N'djuka clans in the 19th century. *Id.* ¶ 132.

[121] *Id.* ¶¶ 132, 133.

[122] *Id.* ¶ 135.

[123] *Id.* ¶ 156.

[124] *Id.* ¶ 156. *See also* U.N. Human Rights Committee, *Concluding Observations: Suriname*, CCPR/CO/80/SUR, (2004).

[125] Article 8(1) spells out that: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature" (American Convention on Human Rights, *supra* note 5, at Article 8 (1).

[126] Article 25 (1) establishes that: "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties (*Id*., at Article 25(1)).

[127] Moiwana Community v. Suriname, *supra* note 99, ¶ 164. The Inter-American Court also pointed out that in 1992, the President of Suriname promulgated the "Amnesty Act 1989", which grants amnesty to individuals who have committed certain criminal acts from January of 1985 to August of 1992, with the exception of crimes against humanity. The Court mentioned its own jurisprudence and declared that no domestic law or regulation can be used to evade compliance with the Court's orders mandating the investigation and punishment of those who committed human rights violations (*Id.* ¶¶ 165, 167); *see also* "Amnesty Act 1989", August 19, 1992, Statutes of the Republic of Suriname No. 68 (exhibits to the application, vol. II, exhibit 28, at 476-483).

In this case, the Inter-American Court thus followed previous decisions and strengthened the protection of human rights in four different areas. First, following the reasoning of previous cases, it acknowledged the status of individuals – including indigenous peoples – as subjects of international law. Second, the Court recognized that the individual legal personality includes an interpretation that takes into account the fact that the world comprises different individuals with diverse cultural, historical and religious backgrounds. Third, the Court broadened the scope of the American Convention to cover situations specifically affecting indigenous communities by referring to previous judgments and other human rights instruments or global instruments of protection. Fourth, the Court kept the tradition of advancing the reparations system of the American Convention by adding to the mere recognition of three kinds of rights (civil and political; economic, social and cultural; and environmental and collective rights) the other rights of access to international justice and the right of memory.[128]

The Court ordered Suriname to issue an apology to its citizens and, moreover, to build a monument in the name of those who lost their lives.[129] These actions aim to preserve an idea of justice and to give hope to a population that suffered and almost lost all hope that a judicial system would ever hear its claims for help. Furthermore, the ruling is a message to future generations that justice can be reached on domestic and international levels. Public apologies or monuments have symbolic importance. They arguably convey the idea that if domestic courts or policy makers are unable or unwilling to establish an effective system to protect minority rights, the victims or alleged victims know that there is the possibility of recourse to international law in order to finally have their claims heard.

This *pro individual* interpretation of the Inter-American Court of Human Rights is also found in Article 29 of the American Convention and takes into account a teleological view of human rights that is based on the current evolution of international law. However, the Court does not define or detail what this "current evolution" means. The Inter-American Court's approach thus has deeper roots than Article 29. It is based on the whole inter-American human rights system established by the American Declaration and Convention, which seek to bring together natural law and legal positivism in a framework that recognizes the individual legal personality in a pluralistic world. In other words, individuals are subjects of international law beyond the traditional sense of possessing rights and duties on the international level.[130]

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[128] The Inter-American Court can determine that states must build a monument or make some kind of statement in memory of the victims of human rights violations. For more on reparations, *see* Bridget Mayeux and Justin Mirabal, *Collective and Moral Reparations in the Inter-American Court of Human Rights*, Human Rights Clinic, The University of Texas School of Law, Nov. 2009, at 31, on the Court's reparation for monuments and memorials.

[129] *Id.* at 83.

[130] On the elements of the international legal personality *see* SHAW, *supra* note 20, at 195-96. *See also* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep., 174, 178-79 (Apr. 11).

Human rights bodies of the Organization of American States must recognize that individuals, who bear rights and duties on the international plane, are not identical but rather have different historical, religious, philosophical and cultural backgrounds. Individuals have the right to be acknowledged as different and as possessing their own views and particularities. In acknowledging this system, the Inter-American Court furthers the paradigm of the human rights instruments of the OAS itself and crystalizes the position that individuals are subjects of international law endowed with diverse cultural backgrounds.

Cançado Trindade pointed out the special nature of human rights treaties, which do not solely regulate state interests.[131] Indeed, human rights treaties are *sui generis*, or with unique characteristics, because they set *erga omnes* obligations to the whole international community and not only to states. Consequently, human rights treaties cannot be developed, interpreted, or applied without taking into consideration their special nature, which protects individuals by accounting for their multicultural backgrounds.

CONCLUSION

Different individuals with different cultural, ethnic, and philosophical backgrounds share the same physical space. Some of these individuals are part of a state's social or political majority while others invariably fall in the minority. Multiculturalism, as part of a human rights idea, acknowledges this diversity, and states must also recognize all individuals as bearers of a legal personality, regardless of whether they belong – individually or collectively – to a social majority or minority.

The universal system of international human rights law can accommodate this cultural, ethnic, and religious diversity: human rights treaties can be interpreted taking into account the diversity that is intrinsically part of the individual legal personality. There is thus no conflict between the recognition of a multicultural society and the generally vague provisions of the American Convention. As Cançado Trindade pointed out, "[a]ll cultures and religions are to foster respect for others, are open to *minimum* universal standards of respectful behavior, and to human solidarity, and acknowledge the human dignity of the human person."[132]

This plurality of cultures, which states need to acknowledge, impacts international human rights law in two different ways. First, it reaffirms that individuals, who are subjects of international law, possess particularities and cultural diversities. Second, international human rights courts have to ensure that states are indeed accommodating the cultural and ethnic groups within their territory.

The Inter-American Court of Human Rights, based on the *pro homine* principle, acknowledged this multicultural approach that requires states to uphold individuals' cultural particularities. Based on a legal hermeneutical tool, the Court

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[131] TRINDADE, INTERNATIONAL LAW FOR HUMANKIND, *supra* note 13.

[132] CANÇADO TRINDADE, MULTICULTURALISM, *supra* note 48, at 498 (emphasis added).

accepted, at least to some extent, the pluralistic concept of the individual legal personality, especially in the case of indigenous peoples. Although the Inter-American Court avoids mentioning the specific terms of "multiculturalism" or "pluralistic personality," it acknowledged that indigenous peoples have a different culture that states need to consider. The Court thus moved away from international law's solely liberal – focusing only on individual rights – or restrictive approaches – focusing only on state consent– to treaty interpretation and application to extend the American Convention's framework of protection to cultural and ethnic minorities. This move represents an acceptance of the individual legal personality within a new multicultural framework.

The Inter-American Court aims to accommodate different views within a framework of protection that is increasingly human-centered. Liberal or individualistic approaches to human rights, such as the "traditional" right to property, stand with equal weight as the communal or collective right to property.[133] The Court interprets the provisions of the American Convention in the light of both the traditional or liberal understanding of rights enshrined in human rights declarations and treaties and the collective, cultural, and sociological views of rights. These interpretations are focused on the human person as a subject of rights and duties, that is, as an international actor different than states.

[133] On the ground rights *see* DONNELLY, *supra* note 30, 149; Michael Freeman, *Are There Collective Human Rights?*, 43 POLITICAL STUDIES 25, 38 (1995); Vernon Van Dyke, *Human Rights and the Rights of Groups*, 18 AMERICAN JOURNAL OF POLITICAL SCIENCE 725, 741 (1974); Yoram Dinstein, Collective Human Rights of Peoples and Minorities, 25 INT'L & COMP. L.Q.102, 105-06 (1976).