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# Índice

# Presentación

El Instituto Interamericano de Derechos Humanos (IIDH) presenta el número 61 de su Revista IIDH, que se ha alimentado, especialmente, de las colaboraciones que han hecho llegar algunos/as de sus lectores/as. Esta edición cuenta con los artículos académicos de Gerardo Cerabona (Argentina); Guillermo R. Gómez (México); Luis Miguel Gutiérrez (Francia) y Jorge Rodríguez (España); Raquel Herrera (Costa Rica); Carlos López (Chile); Valerio Mazzuoli y Dilton Ribeiro (Brasil); Vítor Monteiro (Brasil); Ana María Rodino (Argentina-Costa Rica); Carlos Manuel Rosales (Chile); Annabella Sandri (Argentina), y Andrés Vásquez (Paraguay).

Los aportes que hemos recibido se presentan en tres secciones temáticas: derechos políticos y derecho electoral; derechos económicos, sociales y culturales y personas en situación de vulnerabilidad, e interacción del Derecho Internacional con el derecho interno.

En la primera sección se analizan los derechos políticos desde su dimensión electoral. En un primer texto se reconoce la necesidad de fortalecer las medidas para que los partidos políticos puedan combatir los actos de corrupción en los que a veces se ven involucrados, para lo que se presenta una propuesta que podría ser adoptada en el marco de la Ley General de Partidos Políticos de México. En un segundo aporte se hace un diagnóstico situacional del sistema democrático chileno a partir del restablecimiento de las autoridades electorales en 1989. En este artículo se analizan elementos tales como la legislación

y la jurisprudencia electoral, la naturaleza, fundamento y competencias del Tribunal Calificador de Elecciones y algunos aspectos del debido proceso electoral. Finalmente, a través del estudio de dos casos específicos tramitados ante el Sistema Interamericano (Caso López Mendoza vs. Venezuela y Caso Gustavo Francisco Petro Urrego vs. Colombia), en una tercera contribución se identifican una serie de medidas que pueden y deben ser tomadas para reparar y prevenir violaciones a derechos humanos en materia electoral.

En la segunda sección, uno de los aportes contextualiza el problema que se enfrenta con la movilidad creciente de las personas menores de edad y adolescentes no acompañadas y separadas en Centroamérica, que acarrea múltiples violaciones a los derechos humanos. Para ello, se analizan los mecanismos de protección internacional y se plantean algunas conclusiones relevantes para la formulación de políticas públicas y/o programas de la cooperación internacional sobre la materia.

Un segundo texto analiza la pobreza como un fenómeno multidimensional y la violación de derechos humanos que conlleva, con especial énfasis en las obligaciones que tienen los Estados de implementar medidas eficaces para la erradicación de la pobreza de niños y niñas.

Otro estudio permite analizar el concepto de exclusión social y discriminación y la forma en la que ha sido abordado en el ámbito internacional y académico, con el fin de identificar algunas contribuciones y aspectos a resolver para la construcción de políticas públicas que den respuestas a la exclusión social y cultural en Latinoamérica.

Con ánimo de impulsar la inclusión social, un cuarto artículo de esta sección analiza la educación con enfoque de

derechos humanos como una práctica constructora de inclusión y para alcanzar el desarrollo de las sociedades humanas y de las personas. Para ello, se examinan los vínculos e influencias mutuas entre educación, derechos humanos e inclusión social, los progresos recientes de la doctrina y la práctica de la educación y, finalmente, se muestra que, al concebir la educación con enfoque de derechos humanos, se descubren distintos espacios de acción político-pedagógica desde los cuales se puede y debe construir inclusión social.

También en relación con la materia educativa, el siguiente estudio de esta sección analiza si la educación debe ser gratuita, subvencionada o con financiamiento compartido, desde la óptica que se discute tanto en el ámbito académico como político en el Estado chileno. Lo anterior, bajo la premisa de que la garantía del derecho a la educación por parte del Estado, tal y como está consagrado constitucionalmente y en tratados internacionales, sólo será completa al avanzar en la progresiva implementación de la enseñanza gratuita a nivel superior.

El último artículo de esta sección nos permite repasar la actuación del Sistema Interamericano en un mundo multicultural, en especial a través de la interpretación y aplicación que ha hecho la Corte Interamericana de Derechos Humanos sobre el principio *pro homine* para garantizar la protección de los derechos de los pueblos indígenas, tomando en cuenta sus antecedentes históricos y culturales.

La tercera sección presenta casos concretos en que, para garantizar el acceso a la justicia, se hace necesaria la aplicación de los criterios del Derecho Internacional de los Derechos Humanos en la esfera nacional o en que dicha interacción ha permitido avances importantes para la garantía de derechos. El primer artículo se refiere al Caso Ríos Montt de Guatemala,

y muestra un análisis de las contradicciones y dilemas aún no resueltos en el procedimiento penal, a la luz de la obligación de investigar, juzgar y sancionar el crimen de genocidio de acuerdo a la jurisprudencia interamericana.

En un segundo aporte se analiza la reforma del sistema de justicia militar argentino de 2009 que, motivada por el cumplimiento de las obligaciones y estándares de protección que surgen de la Convención Americana sobre Derechos Humanos, ha incorporado, entre otros, el carácter excepcional de la justicia militar.

Aprovecho esta presentación para agradecer en nombre del IIDH a las autoras y autores que han hecho llegar al IIDH sus contribuciones académicas para esta edición. Con cada revista, el IIDH renueva su compromiso de fomentar la discusión de temas de relevancia para la comunidad internacional de derechos humanos y de continuar explorando y valorando formas novedosas para atender los desafíos en el actual contexto regional e internacional.

José Thompson J.
*Director Ejecutivo, IIDH*

# Indigenous Rights before the Inter-American Court of Human Rights: a Call for a *Pro Individual* Interpretation

*Valerio de Oliveira Mazzuoli*[*]
*Dilton Ribeiro*[**]

## 1. Introduction

Multiculturalism is, unquestionably, one of the most significant movements stemmed from the notion of individual personality and human centrality which took place after the Second World War. It is intrinsically linked to the conception of the human person as a bearer of cultural characteristics which are indispensable to a full and useful existence and, consequently, must be always observed and respected. Political philosophy, especially after the 1980s, made room for debates and development of multiple conceptions on multiculturalism. This debate, which soon later became a concern of law and lawyers, was strongly rooted in a divergence between communitarians

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and liberals and is still surrounded by many questions and different philosophical theories and perspectives.[1]

In the area of public policies, this topic bears considerable importance. States and the international community as a whole, looking to better accommodate national minorities and foreign individuals, face the notion that the modern world is based on multiples ways of immigration and on the fact that territories are occupied, peacefully or not, by peoples with diverse cultural characteristics. These characteristics, furthermore, go beyond the territorial boundaries where these individuals reside in the world and include a mosaic of inherent conditions (e.g. language, religion, philosophical views, and social condition) which constitute an intrinsic part of these individuals wherever they might be. Accordingly, this reality generates heated public debates which are part of the political agenda of States and their leaders.[2]

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1 See Charles Taylor, "Interculturalism or multiculturalism?"(2012) 38 Philosophy & Social Criticism; John Arthur, "Multiculturalism" in Hugh LaFollette, *The Oxford Handbook of Practical Ethics (Oxford: Oxford University Press, 2005); Bhikhu Parekh, Rethinking Multiculturalism (Palgrave Macmillan, 2000); Michael Murphy, Multiculturalism: A critical introduction (London: Routledge, 2012); Will Kymlicka, "Multiculturalism in Theory and Practice" (2008) 1 Rerum Causae 3 at 8; Will Kymlicka, Multiculturalism: Success, Failure, and the Future (Washington: Migration Policy Institute, 2012); Duncan Ivinson, ed, The Ashgate Research Companion to Multiculturalism (London: Ashgate, 2010); Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford: Oxford University Press, 1996); Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative" (1992) 25 University of Michigan Journal of Law Reform 751; Michael McDonald, "Liberalism, Community, and Culture" (1992) 42 University of Toronto Law Journal 113; Will Kymlicka, "The Rights of Minority Cultures" (1992) 20 Political Theory 140; Chandran Kukathas "Cultural Rights Again: A Rejoinder to Kymlicka" (1992) 20 Political Theory 674; and Charles Taylor, Multiculturalism: Examining the Politics of Recognition (Princeton: Princeton University Press. 1994).*

2 Ideas about the accommodation of minorities in multiethnic, multinational States have been part of their concern and policies for

Multiculturalism, due to practical, political, legal and philosophical relevance is in a central stage in many different areas of study as, for example, in education, philosophy and political science. Furthermore, it is a key aspect in debates concerning minorities, foreign population, immigration and diversity in general.[3] However, paradoxically, multiculturalism is not a central aspect of public international law, especially

more than forty years. However, according to some authors, they became the focus of political theory in the mid-80s. For more details see Jeff Spinner Halev, "Multiculturalism and its Critics" in John S. Dryzek, Bonnie Honig & Anne Phillips, The Oxford Handbook of Political Theory (Oxford: Oxford University Press. 2008) at 12. For a general view on the debate of multiculturalism and human rights or public policy see Michael Kenny, *The Politics of Identity: Liberal Political Theory and the Dilemmas of Difference (Cambridge: Policy Press, 2004); Sarah Song, Justice, Gender and the Politics of Multiculturalism (Cambridge: Cambridge University Press, 2007); Will Kymlicka, La Política Vernácula: Nacionalismo, Multiculturalimo y Cidadania [Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship] (Barcelona: Ediciones Paidós, 2003) at 30 [Kimlicka, La Política]; Seyla Benhabib, The Claims of Culture: Equality and Diversity in the Global Era (Princeton: Princeton UP, 2002) 59-67 [Benhabib, The Claims of Culture]; Courtney Jung, "Democratic Engagement with Ethnic Minority Claims: A Methodological Intervention into a Normative Debate" in Shabani Omid Payrow, ed, Multiculturalism and Law (U. Wales Press, 2007) at 263-79; Melissa Williams, "Justice Towards Groups: Political not Juridical." (1995) 23 Political Theory 75; and Michael Murphy "The Limits of Culture in the Politics of Self-Determination" (2001) 1 Ethnicities 367.*

3 See above. See also Jeff Spinner-Halev, *Surviving Diversity: Religion and Democratic Citizenship (Baltimore: Jonh Hopkins University Press, 2000); K. Appiah & Amy Gutrmann, ed, Color Conscious: the Political Morality of Race (Princeton: Princeton University Press, 1998); Anne Phillips, The Politics of Presence (Oxford: OUP, 1995);* Yasmin Alibhai- Brown, *After Multiculturalism* (London:The Foreign Police Center, 2000); Vernon Van Dyke, "The individual, the state, and the ethnic Communities in Political Theory" (1977) 29World Politics 343; and Will Kymlicka, *Liberalism, Community and Culture*. (Oxford: Oxford University Press, 1989) [Kimlicka, *Liberalism, Community*].

in the area of international human rights. This does not mean that the accommodation of foreign population and the respect of minority rights, as indigenous rights, are not seriously discussed by international courts. Moreover, this 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.[4]

There is, however, a lack of writings on understanding of how international human rights courts, in our case the Inter-American Court, accommodates legal minority within the scope of its main treaty, the American Convention, which almost exclusively establishes civil and political rights.[5] This lack, we believe, weakens the legal debate and impedes an effective argument in favour of the recognition of minority and vulnerable groups' rights which could ground future decisions of domestic and international courts.

This article, thus, seeks to understand the approach of the Inter-American Court of Human Rights and on how judges, by applying an extensive interpretation of its treaty, further

4 See *e.g.* Hugh Thirlway, "Reflections on Multiculturalism and International Law" in Sienho Yee & Jacques-Yvan Morin, *Multiculturalism and International Law: Essays in Honour of Edward McWhinney* (Leiden: Martinus Neijhoff, 2009) at 166. As Mariko pointed out, international courts as the International Court of Justice currently faces a wide range of disputes reflecting different cultural backgrounds which require solid and well-founding Court decisions addressing such multicultural diversities. See Mariko Kawano, "The Administration of Justice by the International Court of Justice and the Parties" in Sienho Yee & Jacques-Yvan Morin, *Multiculturalism and International Law: Essays in Honour of Edward McWhinney* (Leiden: Martinus Neijhoff, 2009) at 300.

5 The American Convention on Human Rights has one general provision on economic, social and cultural rights. See *American Convention on Human Rights*, 1969, 1144 UNTS 123, OASTS nº 36 at Article 26.

recognized the individual legal personality under international law and, moreover, crystalized the view that individuals are not only bearers of rights and duties but also have intrinsically different from one another and international courts must acknowledge this notion when interpreting and applying their treaty. This reasoning, the *pro homine* principle is the key pillar in truly recognizing the human person as a subject of international law.

## 2. Inter-American System of Human Rights in a Multicultural World

International law can be traditionally defined as a group of norms and principles created by States in order to regulate their relations with each other.[6] However, this traditional approach met some practical and theoretical problems, especially in international human rights law. The argument set forth in this article is that human rights, as a particular system part of general international law, differentiate from the latter in one central aspect: the recognition of the human person as a central aspect and with international personality. This particularity forces judges and the international community as a whole to consider the interest and rights of individuals when interpreting and applying human rights norms. To accept individuals as bearers of rights and duties, and with interests in the international sphere is not solely connected to a general recognition of the individual legal personality at the international level, but more extensively

6 See J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (Oxford: Clarendon Press, 1963) at 1. See also L. Oppenheim, *International Law: A Treatise,* vol. I (Peace) (New York: Longman, Green and Co., 1912) at 3.

acknowledges that all the particularities of the "human family"[7] need to be important elements to the evolution and application of international law of human rights. The Inter-American Court of Human Rights[8] 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 the interpretation of human rights treaties in a multicultural *perspective.*

States as the traditional subjects of the law of nations occupy a dominant position among the actors at the international level. Notwithstanding this preponderance of States, 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.[9]

International human rights law instruments arguably seek to conciliate natural law concepts with legal positivism, that is, acknowledge in treaties and declarations the individual centrality in human rights. The American Declaration of Rights and Duties of Man, following the precepts of legal positivism, informs in its preamble the importance of domestic legislation and the necessity of an increasing cooperation between the

7 The Universal Declaration of Human Rights, in its preamble, refers to the group of individuals as "the human family". See *Universal Declaration of Human Rights,* GA Res 217 (III), UN GAAOR, 3d Sess, Supp Nº 13, UN Doc A\810 (1948) at preamble [hereinafter the "Universal Declaration" or "Universal Declaration of Human Rights"].

8 *American Convention on Human Rights*, *supra* note 5 at Chapter VIII [hereinafter "Inter-American Court of Human Rights" or "Inter-American Court" or "Court"].

9 Valerio Mazzuoli, *Curso de Direito Internacional Público* [Textbook on Public International Law] (São Paulo: Revista dos Tribunais, 2010) at 363.

American States to protect human rights.[10] Moreover, in a natural law perspective, this regional declaration acknowledges that the American States recognize that "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 his human personality".[11] Accordingly, the members of the Organization of American States crystalize through this instrument that international human rights are not rights simply granted by States but rather recognized by them. Furthermore, the American Declaration acknowledges that human rights stem from the individual legal personality.

This reasoning should not be taken for granted. It represents an amalgamation of two different concepts of international law – a natural and a positivistic – as central to the regional view of international human rights law. Accordingly, the American Declaration enshrines the traditional view that enacted legislation and general instruments are important elements in the protection of rights. Furthermore, it recognizes that rights flow from the individual personality which can encompass domestic and international ambits.

10 OAS, General Assembly, 3rd Sess, *American Declaration of the Rights and Duties of Man,* OAS Res XXX, adopted by the Ninth International Conference of American States (1948), OR OEA/Ser LV/II82 Doc. 6, rev.1 (1992) at preamble [hereinafter "American Declaration of the Rights and Duties of Man" or "American Declaration"]. It States 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".

11 *Ibid*.

The American Declaration, as human rights declaration was not initially envisaged to be a legally binding instrument. However, the Inter-American Court of Human Rights[12] faced the question whether this declaration have *normative force*.[13] The Court, analyzing this request for an advisory opinion from Colombia, asserted 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.[14] Accordingly, 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 specially in human rights law, which distinguished that law from classical international law* to a significant extent.[15]

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 inform what would characterize this difference, the recent evolution of international

12 *American Convention on Human Rights, supra note 5.*

13 *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* (1989), Advisory Opinion OC-10/89, Inter-Am Ct HR (Ser A) Nº 10, at para 2.

14 *Ibid. at para 37.*

15 *Ibid.* at paras 37-38 [italics added].

human rights law – especially after the Second World War[16] – and the structure of the American Declaration, which combines natural law and legal positivism, give elements to conclude that a significant change in the contemporary international law of human rights is precisely the codification of the individual legal personality and its centrality in the legal system. This view differs from the "classical" international law system grounded in the Westphalian paradigm. 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 (the Westphalian paradigm).

Thus, this regional instrument was arguably created to inform a list of fundamental interests of individuals which flow from their legal personality and should be taken into consideration by the American States at the international and domestic levels. These "interests" could later become legally binding norms if enacted by domestic legislation or international treaties. Moreover, this Declaration became even more important. These "interests", that is, these "soft" rights and duties changed status and acquired normative character.[17] This normativity can be divided into broad and specific. Certain rights crystalized in the American Declaration or the Universal 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.[18] Furthermore, the American Declaration

16 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 seek to protect individuals. See John P. Humphrey, "The International Bill of Rights: Scope and Implementation" (1976) 17 Wm & Mary L Rev 527. See also Thomas Buergenthal, "International Human Rights Law and Institutions: Accomplishments and Prospects" (1988) 63 Wash L Rev 1.

17 Thomas Buergenthal *et al*, *International Human Rights in a Nutshell* (St.Paul: West Group, 2009) at 262.

18 Malcolm Shaw, *International Law (New York: Cambridge University*

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 to be taken under consideration by the international community.

The Inter-American Court argued that the OAS Charter refers to fundamental rights in its preamble and in a number of provisions without, however, listing or defining them.[19] Furthermore, the Court pointed out that the Inter-American Commission on Human Rights[20] protects rights "enunciated and defined in the American Declaration"[21] based on Article 1 of the Inter-American Commission's Statute.[22] 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".[23]

Based on the arguments mentioned above, the Inter-American Court argued that the American Declaration "contains and defines

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*Press, 2003) at* 260. Shaw, however, is concerned with the universal declaration of human rights.

19 *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, supra* note 13 at para 39.

20 *Charter of the Organization of American States*, 30 April of 1948, 1609 UNTS 119, OASTS nos 1-C and 61 at articles 112 and 150 [hereinafter "Charter of the Organization of American States or OAS Charter"].

21 *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*, *supra* note 13 at para 41.

22 OAS, General Assembly, *Statute of the Inter-American Commission on Human Rights, OAS Res 447 (IX-0/79), OR OEA/Ser.P/IX.0.2/80, vol. 1 at 88, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/11.50 Doc.13, rev. 1 at 10 (1980) at Article 1.*

23 *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, supra note 13 at para 42.*

the fundamental human rights referred to in the Charter".[24] 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:[25]

> 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.[26]

Accordingly, the Inter-American Court recognized that international human rights law needs to be interpreted in the light of current developments without mandatory references 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" contained in the Charter of American States. The Court, thus, recognized the normative status of the American Declaration based on a similar reason than that accepted for the Universal Declaration of Human Rights which is unanimously considered to hold the authoritative interpretation and definition of the expression "human rights and for fundamental freedoms" contained in the Charter of the United Nations.[27] However, this advisory opinion of the Inter-

24 *Ibid. at para 43.*

25 *Ibid. at paras 46-47.*

26 *Ibid. at para 45.*

27 See Humphrey, supra note 16 at 529; Malcolm Shaw, International Law (New York: Cambridge University Press, 2003 at 260; Thomas Buergenthal et al, International Human Rights in a Nutshell (St.Paul:

American Court fails to mention the consequence and meaning of such normativity.

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, that is, the international community believes that the protection of this right is mandatory. The normativity is broad when the instrument expresses the intrinsic elements of human rights, that is, when it establishes rights, rights holders and duty bearers. The broad or general normativity is not the same of that of treaties, that is, in declarations, it informs that individuals are, generally speaking, right holders and addressees of rights and States have the duty to acknowledge this individuals' status.

In general terms, human rights have three intrinsic elements: a *right*, a *right holder* and a *right to a claim*. Accordingly, in the sentence "*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, the relation of *A* entitled to *x* with relation to *B*, informs that *B* has a correlative obligation to *A* and, thus, *A* can make "special claims upon *B* to discharge these obligations".[28] 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 his fundamental right. Accordingly, the sentence "*A* has a right to *x* with respect to *B*"

West Group, 2009) at 41-46; and Antonio Augusto Cançado Trindade, "The Interdependence of All Human Rights - Obstacles and Challenges to Their Implementation" (1998) 50 International Social Science Journal 513 at 513 [Cançado Trindade, "Interdependence"].

28 Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca: Cornell University Press, 1989) at 10 and 11.

informs the basic intrinsic elements of human rights, namely, right holders, claims and duty bearers.

This philosophical theory of human rights encompassing the existence of right holders, claims and duty bearers applies, in international law, to human rights treaties. Declarations, differently from treaties, do not establish specific binding obligations, but only propositions that States must follow in the conduction of their domestic and international affairs. However, they can *crystalize* general normative obligations, especially through the codification of customary international law which grant them mandatory force (in certain cases they can even acquire *jus cogens* status).[29] 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 one that violated his fundamental right. Nonetheless, the Declaration establish 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. In other words, the American Declaration informs that individuals are the bearers of rights and duties at the international level and have interests different from that of States. Furthermore, States have the duty to acknowledge this status.

29 On the force of customary norms to grant normativity to declarations see: Commission on Human Rights, "Report on the Human Rights Situation in the Islamic Republic of Iran by the Special Representative of the Commission Mr. Reynoldo Galindo Pohl", UNESCOR, 43rd Sess, UN Res 1986/41, UN Doc E/CN 4/1987/23 (1987) at para 22; and Shaw, *supra 23 note 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" (1996) 25 Ga J Int'l & Comp L 287 at 326.*

The American Declaration 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. This reasoning was supplemented by the American Convention on Human Rights, which, further specified rights and claims of individuals crystalizing an effective dichotomous relation between States and individuals whereby a breach of a right can lead to a right to claim before the Inter-American Commission on Human Rights[30] and the Inter-American Court of Human Rights.[31] 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.[32]

This position diverges from the classical view of international law centered on the interests of States. As the Inter-American Court pointed out in the advisory opinion on the *Interpretation of the American Declaration*, international human rights

30 *American Convention on Human Rights, supra note 5 at Chapter VII*

31 *Ibid. at Chapter VIII.*

32 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" (*ibid. at Article 29).*

distinguish from classical international law to a significant extent. The main divergence concerns the human centrality of international human rights, that is, the *pro individual* or *pro homine* system crystalized by the American Declaration. Article 29 of the American Convention arguably 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, consequently, cannot be limited by States to a greater extent than is provided for in the instrument itself.[33] Accordingly, judges must apply the American Convention based on a *pro individual* system and with the possibility of extensive application of rights.

## 3. The Application of a Multicultural and Individual-Centered Interpretation by the Inter-American Court of Human Rights.

States themselves designed an international human rights system grounded on the human person. Thus, international human rights law is based on a individual-centered system or *pro homine*. This notion of an individual-centered or *pro individual* interpretation was extensively discussed and applied by the Inter-American Court of Human Rights based on practical considerations. International law of human rights concerns the human person, individually or collectively considered. Furthermore, the American continent is comprised of a diverse group of individuals from different social, political, historical, cultural and religious backgrounds, all of them equally entitled to international protection and all of them equally forming this system.

33 *Ibid. at Article 29 (a).*

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

> 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*.[34]

Henderson, following this line of thought, asserts that *pro homine* framework, which he calls "principle", is a logical element of international human rights law.[35] He argues that international human rights norms must be always in favor of individuals, that is, the hermeneutical criterion informing that

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34 Sergio Garcia Ramirez, "Joint Separate Opinion of Judges A.A. Cancado Trindade, M. Pacheco Gomez and A. Abreu Burelli" (2002) 19 Ariz J Int'l & Comp Law 443 at para 6 [italics added].

35 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 IIDH 71 at 87-88.

the interpretation of protected rights must be always extensive is an essential part of international human rights law.[36] This is the position of the Inter-American Court itself. The Court stated that it can 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".[37] Moreover, the Court argued that this approach to legal interpretation cannot be used restrictively, that is, it cannot limit rights enshrined in the Convention.[38] Consequently, grounding its view on Article 29 of the American Convention which 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 found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.[39]

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, and to better protect human dignity taking into account natural law and legal

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36 *Ibid*. at 88.

37 *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights) (1985), Advisory Opinion OC-5/85, Inter-Am Ct HR (Ser A) Nº 5, at para 51.*

38 *Ibid.*

39 *Ibid. at 52.*

positivism part of a system which recognizes the individual legal personality in a pluralistic world. Accordingly, the Inter-American Court by adopting an expansionist interpretation in favor of individuals or *pro homine* is able to refer to different human rights instruments and, consequently, render decisions that extended beyond the traditional scope of the American Convention and originally belonged to other areas of international law such as international humanitarian law, environmental law and indigenous rights.[40] Arguably, the application of the *pro homine* approach substantially increased the protection of indigenous rights in the American continent.[41]

In the case of *Mayagna (Sumo) Awas Tingni Community*, the Inter-American Commission argued that Nicaragua had not demarcated the communal lands of the Awas Tingni Community, nor had it adopted effective measures to ensure the property rights of the Community to its ancestral lands and natural resources.[42] The notion of communal lands is vital in

40 Lucas Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law" (2010) 21 EJIL 585 at 603.

41 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 The Inter-American Court of Human Rights, *Information and History,* online: <http://www.corteidh.or.cr/historia.cfm>. See also Organization of American States, Press Releases, *CHR Regrets Decision of Venezuela to Denounce the American Convention on Human Rights*, online: <http://www.oas.org/en/iachr/media_center/PReleases/2012/117.asp>. Accessed on 9 April 2013.

42 *Case of Mayagna (Sumo) Awas Tingni Community vs. Nicaragua (2001) Inter-Am Ct HR (Ser C) N° 79 at para 2. In this case, the Inter-*

the protection of indigenous rights.[43] The Inter-American Court interprets and applies the American Convention.[44] However, this regional human rights treaty mainly protects civil and political rights, and there is no provision directly concerning indigenous rights. Accordingly, the Inter-American Court recognized the *pro individual* framework which merges natural law with legal positivism under the teleological hermeneutics of the "*pro homine* principle" in order to provide an effective response to social demands and acknowledge that the protection of the human person in a pluralistic and diverse world is the main purpose and objective of international law of human rights.

In the *Mayagna (Sumo)* case, the Inter-American Court argued that indigenous peoples' customary law must be especially taken

*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 concern". See Antonio Augusto Cançado Trindade, "The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights" in Sienho Yee & Jacques-Yvan Morin, Multiculturalism and International Law: Essays in Honour of Edward McWhinney (Leiden: Martinus Neijhoff, 2009) at 485 [Cançado Trindade, "The Right to Cultural Identity"].*

43 See Inter-American Commission on Human Rights, "Special Feature: Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System" (2011) 35 Am Indian L Rev 263.

44 *American Convention on Human Rights, supra note 5 at Article 62 (3). The Inter-American Court may also interpret and apply paragraph a) of Article 8 and Article 13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights if these provisions are "violated by action directly attributable to a State Party to this Protocol". Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador*", 69 OASTS 1988, OR OEA/Ser.L.V/II.82 Doc 6, rev1 at 67 (1992) at Article 19 (6).

under consideration.[45] Consequently, the Court reached the conclusion that, due to customary practices, possession of the land "should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration".[46] Accordingly, based on Article 29 of the American Convention, the Inter-American Court extended the application of the right to property enshrined in this regional treaty[47] to cover the protection of communal property and the recognition of the close ties of indigenous communities with the land.

In this aforementioned case, the Court decided that, based on an evolutionary interpretation of human rights in accordance with Article 29 of the American Convention, the right to property enshrined in Article 21 "includes, among others, the rights of members of the indigenous communities within the framework of communal property".[48] The Court reached this decision taking into account that indigenous peoples have a communitarian tradition, that is, the ownership of the land is not focused on an individual person, but differently on the group and its community.[49] This connection to the land, according to

45 *Case of Mayagna (Sumo) Awas Tingni Community vs. Nicaragua, supra note 42 at para 151.*

46 *Ibid.*

47 See *American Convention on Human Rights, supra note 5 at Article 21 (1), (2), and (3). 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" (ibid).*

48 *Case of Mayagna (Sumo) Awas Tingni Community vs. Nicaragua, supra note 42 at para 148.*

49 *Ibid. at paras 148-149.*

the Court, is material and spiritual in a way that it is part of "the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival".[50]

Accordingly, although there is not explicit provision regulating the relationship of indigenous communities with their land, based on a *pro individual* interpretation of the American Convention, the Court decided that Nicaragua must adopt the measures necessary to establish an effective mechanism for delimitation, demarcation and titling of the property of indigenous communities taking into consideration their customary law, values and customs.[51]

Similarly, in the case of *Yakye Indigenous Community*, the Inter-American Commission affirmed that Paraguay did not ensure the ancestral property rights of the Yakye Axa Indigenous Community and this situation has made impossible for the Community to own and possess their territory, which placed them in a vulnerable situation in terms of food, medical and public health care.[52] 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".[53] Furthermore, the South American country 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".[54]

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50 *Ibid.*

51 *Ibid. at 164.*

52 *Case of Yakye Indigenous Community vs. Paraguay (2005) Inter-Am Ct HR (Ser C) N° 125 at 2, para 2. For a brief comment on the relation between the Yakye Case and multiculturalism see Cançado Trindade, "The Right to Cultural Identity", supra note 42 at 488-490.*

53 *Ibid. at para 94.*

54 *Ibid.*

The Inter-American Court, applying a *pro individual* interpretation, mentioned Article 14(3) of ILO Convention nº 169[55] – 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".[56] This provision was used to extend the scope of the American Convention. Thus, the Court's reasoning was that Article 14 of the ILO Convention in combination with Articles 8 and 25 of the American Convention place Paraguay under the obligation to provide effective means of claims – with due process guarantees – to the members of the indigenous communities, as part of their right to communal property.[57]

Accordingly, the Inter-American Court of Human Rights was again asked to analyze the American Convention and acknowledge that indigenous communities have a special relation to their land and that States must respect this right and make it effective domestically. Thus, the Inter-American Court, by reference to Article 29 of the American Convention and Article 31 of the Vienna Convention of the Law of Treaties (which States that treaties must be interpreted taking into account their objective and purpose) extended the understanding of the general right to property – Article 21 of the American Convention – to acknowledge the special meaning of communal property of ancestral lands for the indigenous peoples, including the preservation of their cultural identity, its transmission to future generations, and the State duty to assure the full effectiveness of this right.[58]

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55 *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), 27 June 1989, 1650 UNTS 383 [hereinafter "ILO Convention nº 169"].

56 *Ibid. at para 95.*

57 *Ibid. at para 96.*

58 *Ibid. at at paras 124 and126.*

The Inter-American Court, mentioning the European Court of Human Rights, held that human rights treaties are living instruments, and their interpretation must go hand in hand with the evolution of international law and with current living conditions.[59] This evolutionary interpretation is consistent with the general rules of interpretation embodied in Article 29 of the American Convention,[60] as well as those set forth in the Vienna Convention on the Law of Treaties.[61] Accordingly, 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).[62]

The Court thus argues 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".[63] By referring to the need to interpret and apply the American Convention in the context of the evolution of 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

59 *Ibid. at para 125.*

60 See *American Convention on Human Rights, supra note 5 at Article 29.*

61 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*, 23 May 1969, 1155 UNTS 331, Can TS 1980 nº 37 at Article 31 (1).

62 *Case of Yakye Indigenous Community, supra note 52 at para 126.*

63 *Ibid. at para 127.*

Convention"[64] and, applying this criteria, "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".[65]

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 particular the collective aspects of this relationship".[66] 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.[67]

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. Moreover, this article comprises the right of indigenous communities to their territory and natural resources in accordance with the indigenous culture, customs and spiritual life in a democratic and pluralistic society. These two views, however, are harmoniously interpreted, that is, they do not conflict. Accordingly, 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

64 *Ibid. at paras 130.*

65 *Ibid. at paras 130 and 131.*

66 *ILO Convention nº 169*, *supra* note 55 at Article 13. See also *Case of Yakye Indigenous Community, supra note 52 at para 136.*

67 *Case of Yakye Indigenous Community, supra note 52 at paras 136 and 137.*

(or of a State) and those of indigenous communities, the latter necessarily prevails over the former.[68] However, when States are justifiably unable to adopt measures to return the traditional territory and communal resources to indigenous communities, the compensation granted must not only be guided by a State discretionary criteria, but rather there must be a consensus with the indigenous peoples involved, in accordance with their own mechanisms of consultation, values, customs and customary laws.[69] This reasoning is reached based on a *pro homine* or *pro individual* interpretation of the American Convention assisted by Convention 169 of the International Labor Organization taking into consideration a pluralistic world comprised of different peoples with different cultures, backgrounds and views.[70]

Analyzing whether Paraguay breached Article 4(1)[71] of the American Convention, the Inter-American Court sought to apply an extensive *pro individual* interpretation. It referred to 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,[72] to decide that indigenous peoples can be placed on a situation of vulnerability if the access to their ancestral lands are threatened and, consequently, due to the close link, it is not possible to obtain food and clean water.[73]

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68 *Ibid. at 149.*

69 *Ibid. at paras 149 and 151.*

70 *Ibid. at 149-151.*

71 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 at Article 4(1).*

72 *Case of Yakye Indigenous Community, supra note 52 at para 166.*

73 *Ibid. at para 167.*

Based on a *pro individual* interpretation of the American Convention, the Court established that the State concerned breached Article 4(1) of the American Convention in combination with Article(1) of that same treaty to the detriment of the members of the Yakye Axa Community.[74] Furthermore, Paraguay violated Articles 8, 25 and 21 of the American Convention on Human Rights.[75] Moreover, among other orders, 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; must take the steps necessary to guarantee an effective exercise of the right to property of the members of the indigenous community; must pay pecuniary damages and costs and expenses; and must conduct a public act of acknowledgment of its responsibility.[76]

Similarly, in case of *Sawhoyamaxa Indigenous Community*, the Inter-American Commission filed a complaint arguing that Paraguay did not ensure the ancestral property rights of the Sawhoyamaxa Community and its members.[77] The Inter-American Court applied an extensive *pro individual* interpretation by analyzing the content and scope of Article 21 in the light of Convention nº 169 of the ILO taking into account that Paraguay had previously ratified the ILO Convention and incorporated its provisions to domestic legislation.[78] The Inter-American Court, in the light of the rules established by Article 29 of the American Convention, "in order to construe the provisions of the aforementioned Article 21 in accordance with the evolution

74 *Ibid. at para 176.*

75 *Ibid. at 103.*

76 *Ibid. at 104-105.*

77 *Case of Sawhoyamaxa Indigenous Community vs. Paraguay (2006) Inter-Am Ct HR (Ser C) Nº 146, at para 2. See also Cançado Trindade, "The Right to Cultural Identity", supra note 42 at 490.*

78 *Ibid. at para 117.*

of the Inter-American system considering the development that has taken place regarding these matters in international human rights law",[79] decided that the close ties indigenous communities have to their traditional lands, including their natural resources and incorporeal elements, "must be secured" under Article 21 of the American Convention.[80] The Court added that this close relation with their traditional lands and natural resources exist not only because they represent their main means of survival, but also because they "form part of their worldview, of their religiousness, and consequently, of their cultural identity".[81]

Accordingly, the Inter-American Court affirmed that international human rights law must be interpreted and applied taking into consideration the "evolution of the Inter-American system". However, it does not define or give the general characteristics of this evolution. This system, in our view, encompasses the nature of human rights instruments which comprises natural law and legal positivism in a *pro individual* framework, that is, individuals are subjects of international law and have interests which need to be taken into account by the inter-American human rights bodies. This interest is not a unison group of rights and duties acknowledged to individuals. The American continent is formed by a diverse group of individuals with different cultural, political and historical backgrounds. The Inter-American Court needs to acknowledge this pluralistic system. This general rule is normally crystalized 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.

79 *Ibid.*

80 *Ibid. at para 118.*

81 *Ibid.*

In the case of *Saramaka People*, the Inter-American Commission, in a similar tone with other cases, affirmed that Suriname failed to recognize the Saramaka People's right to use and enjoy their territory; that the State has 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 has allegedly failed to adopt the necessary domestic provisions to provide such rights to the Saramakas.[82]

Accordingly, the Inter-American Court, analyzing possible restrictions on the right to property regarding concessions for the exploration and extraction of certain natural resources, informed that Suriname needed to follow three safeguards in order to protect indigenous rights.[83] First, States need to guarantee an effective participation of the members of the indigenous community, in conformity with their customs and traditions. Secondly, they 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.[84]

In order to reach the decision that Suriname indeed breached Article 21 of the American Convention,[85] the Court mentioned foreign instruments and decisions. The Court referred to the Human Rights Committee affirming that in *Apirana Mahuika et al vs. New Zealand* it decided that the right to culture of an

82 *Case of Saramaka People vs. Suriname (2006) Inter-Am Ct HR Ser C N° 146, at para 2.*

83 *Ibid. at para 129.*

84 *Ibid.*

85 *Ibid. at 60-61.*

indigenous community under Article 27 of the ICCPR could be restricted if this indigenous community was able to partake in the decision to restrict such right.[86] Moreover, the Court mentioned Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples, which was approved by the UN General Assembly with the support of Suriname.[87]

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".[88] Moreover, the Court mentioned the U.N. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people who has reached a similar decision by affirming that that "[f]ree, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects".[89] 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."[90] 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.[91]

86 *Ibid. at para 130.*

87 *Ibid. at para 131.*

88 *Ibid. at para 133.*

89 *Ibid. at para 135.*

90 *Ibid. at para 140.*

91 *Ibid. at 60-61.*

In the case of *Moiwana Community*, 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.[92] Moreover, those who were able to escape the attack allegedly fled into exile or internal displacement.[93] 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.[94] Consequently, the indigenous peoples were allegedly "unable to return to their lands and to their traditional way of life".[95] 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.[96]

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.[97] 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

92 *Case of the Moiwana Community vs. Suriname (2005) Inter-Am Ct HR (Ser C) No. 124 at para 3. See also Cançado Trindade, "The Right to Cultural Identity", supra note 36 at 491.*

93 *Ibid.*

94 *Ibid.*

95 *Ibid.*

96 *Ibid.*

97 *Ibid. at para 43.*

normally a source of suffering and anguish for victims and their family members.[98] Moreover, the Court argued 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.[99]

The Court pointed out that due to the impunity of the 1986 attack the members of the community are deeply concerned that they could once again face grave hostilities if they were to return to their traditional lands.[100] Furthermore, they are unaware of what has happened to the remains of their loved ones[101] and that is a cause of great suffering because, according to their tradition, it is deeply important 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".[102] Moreover, the abandonment of the Moiwana community's traditional lands disrupts the especial relationship they have with their ancestral territory.[103] Taking into account these facts, the Court

98 *Ibid. at para 94.*

99 *Ibid. at para 95.*

100 *Ibid. at para 97.*

101 *Ibid. at para 100.*

102 *Ibid. at para 98.*

103 *Ibid. at para 102.*

affirmed that Suriname breached Article 5 of the American Convention.[104] 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 nº27, 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.[105]

104 *Ibid. at para 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 at Article 5.

105 *Case of the Moiwana Community vs. Suriname, supra note 92 at para 110.*

In order to extend the scope of Article 22(1) of the American Convention[106] in the light of refugee and displaced individuals, the Court mentioned the guiding principles of the UN Secretary General's Special Representative on Internally Displaced Persons.[107] Furthermore, to argue a continuing breach of Article 22 of the Convention, the Court referred again to the UN Human Rights Committee citing 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

106 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 at Article 22(1).*

107 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". See *Case of the Moiwana Community vs. Suriname, supra note 92 at para 111.*

of movement and residence.[108] 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".[109]

Furthermore, the Court asserted that although the Moiwana community members are not indigenous to the region (Moiwana Village was settled by N'djuka clans in the 19th Century), they "lived in the area in strict adherence to N'djuka custom and they are inextricably tied to these lands and the sacred sites".[110] In the light of these considerations, the Court concluded that Suriname breached Article 21 of the American Convention.[111] Moreover, the Inter-American Commission argued in its application that Suriname breached Articles 8 and Article 25 of the American Convention.[112] The Court sustained that Suriname's "manifest inactivity" clearly failed to follow the principle of due diligence.[113] 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.[114] The Court, thus, held the State breached Articles 8(1) and 25 of the American Convention.[115]

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108 *Ibid. at para 116. See also Luis Asdrúbal Jiménez Vaca vs. Colombia, U.N. Human Rights Committee, Communication Nº 859/1999 (15 April 2002) at para 7.4.*

109 *Case of the Moiwana Community vs. Suriname, supra note 92 at para 120.*

110 *Ibid. at paras 132 and 133.*

111 *Ibid. at para 135.*

112 *Ibid. at 136.*

113 *Ibid. at para 156.*

114 *Ibid. at para 156. See also U.N. Human Rights Committee, Concluding Observations: Suriname, CCPR/CO/80/SUR, (2004).*

115 *Case of the Moiwana Community vs. Suriname, supra note 92 at para 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.[116] The Court mentioned its own jurisprudence and declared that no domestic law or regulation can evade compliance with the Court's orders to investigate and punish those who committed human rights violations.[117]

Accordingly, in this case, the Inter-American Court, following previous decisions, strengthened the protection of human rights in four different areas. First, following the reasoning of previous cases, it acknowledged the status of individuals as subjects of international law, including indigenous peoples. Second, the Court recognized that the individual legal personality includes an interpretation which takes into account the pluralistic world comprised of different individuals with different cultural, historical and religious backgrounds. The Court broadened the scope of the American Convention to cover special indigenous situations by reference to previous judgements and to other human rights instruments (in this case, to global instruments of protection). Fourth, the Court kept the tradition of advancing the reparations system of the American Convention moving beyond the recognition of the three generation of rights (civil and political; economic, social and cultural; and environmental and collective rights) to cover the right of international justice and the right of memory.

The Court ordered Suriname to issue an apology to its citizens and, moreover, to build a monument in the name of those who

116 *Ibid. at para 165.*

117 *Ibid. at para 167.*

lost their lives.[118] These actions are aimed at preserving an idea of justice and to give hope to a population who suffered and almost lost their hope that a judicial system would ever hear their claims for help. Furthermore, it represents a message to future generations that justice can be reached at domestic and international levels with a work in coordination and a continuous development of human rights.

Accordingly, this pro individual interpretation of the Inter-American Court of Human Rights is basically rooted in Article 29 of the American Convention taking into account a teleological view of human rights based on the current evolution of international law. However, the Court does not define or go into details regarding a "current evolution". This article, thus, seeks to show that the interpretation of the Inter-American Court, deeper than rooted in Article 29, 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 at the international level.[119]

Human rights bodies of the Organization of American States must recognize that individuals, bearers of rights and duties at the international plane, are not equal, but rather, they have different historical, religious, philosophical and cultural backgrounds. Individuals have the right to be acknowledged as different, as possessing their own views and particularities. The

118 *Ibid. at 83.*

119 On the elements of the international legal personality see Shaw, *supra note 18 at 195-196. See also Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion), [1949] 174 ICJ Reports at 178-179.*

Inter-American Court in acknowledging this system furthers the paradigm of the human rights instruments of the OAS itself and crystalize the position that individuals are subjects of international law in a multicultural aspect.

Cançado Trindade, acknowledged the special nature of human rights treaties, which not only regulate State-State interests.[120] Indeed, human rights treaties are sui generis, that is, 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 taking into account their multicultural backgrounds.

## 4. Conclusion

Different individuals with different cultural, ethnic and philosophical backgrounds commonly share the same physical space. Some of those individuals could belong to the majority of this State's population and others would invariably fall within the minority section. Multiculturalism, as part of a human rights idea, acknowledges this diversity. Every human, individual or collectively considered, as part of a majority or minority section of society possesses rights and duties and must be acknowledged as a bearer of a legal personality by States' institutions and policies.

Cultural, ethnic and religious diversity can be accommodated within the universal system of international human rights

120 See Antônio Augusto Cançado Trindade, *Tratado de Internacional dos Direitos Humanos* [Treatise on International Law of Human Rights] (Porto Alegre: Sergio Fabris, 1997).

law. There is, thus, no conflict between the recognition of a multicultural society and the generally-vague provisions of the American Convention. Human rights treaties can be interpreted taking into account the diversity intrinsically part of the individual legal personality. 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".[121]

Based on a multicultural perspective, States need to acknowledge and accommodate diversity. Accordingly, plurality impacts international human rights law in two different ways. First, it reaffirms that individuals, with all their particularities and cultural diversities, are subjects of international law. Second, international human rights courts have to ensure that States are indeed accommodating the cultural and ethnic groups within their territory.

In our view, the Inter-American Court of Human Rights, based on the pro homine principle, acknowledged the multicultural reasoning that individuals need to have their cultural particularities uphold by States. Accordingly, this regional court, based on a legal hermeneutical tool, accepted, at least to some extent, the pluralistic concept of the individual legal personality, especially in the case of indigenous peoples. Notwithstanding the fact that the Inter-American Court avoids mentioning words as multiculturalism or pluralistic personality, it acknowledged that indigenous peoples have a different culture which needs to be taking into account by States. The Court moved away from the initial traditional reasoning of the American Convention on Human Rights to extend its framework of protection to cultural

121 Cançado Trindade, "The Right to Cultural Identity", *supra note 42 at 498.*

and ethnic minorities. This, in our view, represents an acceptance of the individual legal personality within a new multicultural framework.