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The *Pro Homine* principle as a fundamental aspect of International Human Rights Law

O Princípio *Pro Homine* como um aspecto fundamental do Direito Internacional dos Direitos Humanos

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Abstract

The pro homine principle is a core element of international human rights law. It is not an abstract and philosophical term. Rather, it was envisaged by states, enshrined in human rights instruments and strengthened by international courts. This principle sets an imperative rule to all international law actors.

Resumo

O princípio pro homine é um elemento central do direito internacional dos direitos humanos. Não é um conceito abstrato e filosófico, mas sim um princípio criado pelos próprios Estados, estabelecido por instrumentos de direitos humanos e fortalecido pelas cortes internacionais. Esse princípio estabelece uma regra imperativa a todos os atores do direito internacional.

Keywords: Pro Homine Principle; International Human Rights Law; Global Impact
Palavras-chave: Princípio Pro Homine; Direito Internacional dos Direitos Humanos; Impacto Global.

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1 Introduction

Human rights can be defined as rights of humans, that is, a special class of rights “that one has simply because one is a human being” (DONNELLY, 1989: 12). Although of controversial definition, human rights are intrinsically connected with the human person as a subject of both domestic law and international law. This human-centrality of human rights or the *pro homine* principle, by paving its way through the state-based international law, is an increasing feature of a once state-only club.

The *pro homine* principle is not a creation of human rights scholars. It is not a deviance without any explanation or connection to reality. Rather, as a response to the horror and atrocities that happened during the Holocaust, this principle is at the core of the post-Second World War international human rights law. Accordingly, human rights instruments, created by states themselves, establish a system centered on the human person. This system was then interpreted and strengthened by international courts and described and analyzed by scholars.

This article is divided in three parts. The first part focuses on the source of the *pro homine* principle. The second part discusses how regional human rights courts interpret this principle. The last part closes the circle back to the United Nations affirming that the *pro homine* principle is at structural framework of international human rights law.

2 The *Pro Homine* Principle: General Introduction

After Second World War (1939-1945), states designed an international system of human rights centered on individuals and approximating international law to moral values. To that end, a great number of human rights treaties were concluded seeking to better protect individuals (HENKIN, 1993: 375-376; SOHN, 1983:14-15).

Although the Universal Declaration of Human Rights¹ is one of the main instruments stemming from the UN system, it was adopted as a recommendation without imposing any legal obligation on states. However, a number of new constitutions and many revised old ones borrowed, copied or made direct reference to the Universal Declaration (HENKIN, 1999). This overwhelming acceptance demonstrates that states are committed to the ideology that this instrument represents (MERON, 1989: 88; CANÇADO TRINDADE, 1998: 513; DEFEIS, 2004: 263-264; BUERGENTHAL, 2009: 41-46). This overwhelming impact of the Universal Declaration, crystalizing the values needed for a peaceful and harmonious international society, led to a gradual change of its status from soft norm to an imperative norm of general international law (*jus cogens*).

Arguably, to acknowledge its binding force is to recognize its universal values centered on individuals. The human person, as an entity with legal personality, has universal interests diverse of those of states and can have direct rights, duties and capacity at the international level. This is the main aspect of the normative character of the Universal Declaration. Its provisions and preamble guide states and the international community as a whole in developing more effective system of protection centered on the human person. In other words, the Universal Declaration is structured based on the *pro homine* principle.

Treaty preambles are not legally binding, but can provide interpretative support. The preambles of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights established that individuals' "rights derive from the inherent

1 *Universal Declaration of Human Rights*, GA Res 217 (III), UN GAAOR, 3d Sess, Supp N° 13, UN Doc. A\810 (1948).

dignity of the human person” and fall within a system that recognizes rights and dignity to individuals under international law.² Moreover, even during the drafting of both Covenants “it was generally agreed that rights and duties were correlative and every right carried with it a corresponding duty”.³

Notwithstanding the importance of states as the main subjects of international law, the protection of human rights is centered on individuals as addressees and right holders of these rights. Moreover, the *corpus juris* of international law of human rights crystalizes the individual protection through norms and principles enshrined in treaties and declarations (CANÇADO TRINDADE, 2007: 210-211) and informs that individuals are subjects of international human rights law and, consequently, have interests that need to be taken into consideration developing and applying international law. This is the core aspect of the *pro homine* principle.

3 The *Pro Homine* Principle within the European and Inter-American Systems of Human Rights

The European human rights system, created by the European states forming the Council of Europe,⁴ currently comprises a court, the European Court of Human Rights⁵ and a treaty, the Convention for the Protection of Human Rights and Fundamental Freedoms (later complemented by additional protocols).⁶

Article 55 of the European Convention informs that it must not be “construed as limiting or derogating from any of the human rights and fundamental”. The obligations enshrined in the European Convention must not be interpreted restrictively based on the argument that they derogate from state sovereignty (OVEY & WHITE, 2002: 34-35).

This extensive interpretation and application of the European Convention flow from two considerations. First, it stems from the objective of this regional treaty, which is to “protect fundamental rights of individual human beings”.⁷ Furthermore, this view flows from the general rule of the Vienna Convention on the Law of Treaties, which establishes that treaties are interpreted in the light of their ordinary meaning based on their contexts and light and purpose.⁸ The European Court, thus, seeks an interpretation, which is not centered on states but rather on the human person⁹ based on the principle of effectiveness in a way to contribute to an increasing protection of the human person.

2 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, 1976, preamble; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, preamble.

3 United Nations' Secretary General, *Draft International Covenants on Human Rights*, UNGAOR, 10th Sess, UN Doc A/2929 (1955), 36.

4 *Statute of the Council of Europe*, 5 May 1949, Eur TS 1/6/7/8/11.

5 *Ibid.* [hereinafter “European Court of Human Rights” or “European Court”].

6 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, 223, Eur TS 5 [Hereinafter “the European Convention” or “ECHR”]. See The Council of Europe, Treaty Office, *List of the Treaties Coming from the Subject-Matter: Human Rights (Convention and Protocols Only)*, online: <http://conventions.coe.int>. Accessed on 19 November 2015.

7 *Austria v. Italy* (1962), 4 YB Eur Conv HR 116, 138.

8 *Vienna Convention on the Law of Treaties*, 1969, 1155 UNTS 331, 1980 [Vienna Convention of 1969], Article 31(1).

9 See *Wemhoff Case* (1968), 1 EHRR 55, para 8.

In the *Söering case*, for example, the European Court dealt whether to extradite a German national, who was detained in England, to the United States to face murder charges.¹⁰ The applicant argued that his extradition to the United States and a risk of facing the death penalty would be in breach of Article 3 of the European Convention.¹¹

The European Court acknowledged the “special character” of the European Convention as a human rights treaty, which must be interpreted and applied in the light of its object and purpose “so as to make its safeguards practical and effective”, that is, international human rights law has a human-centered framework that sets effective guidelines and parameters to the states. These are the ideals and values that form the “spirit” of the Convention.¹² Analyzing Article 3 of the European Convention, the Court recognized the *pro homine* principle affirming that the “inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment” as an implicit right within Article 3.¹³ The European Court, in *Wemhoff v. Germany* held that it is “necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties”.¹⁴ The Court recognized the human centrality of international human rights law as its Convention works as “an instrument for the protection of individual human beings”.¹⁵

The American Declaration on the Rights and Duties of Man is the backbone of the inter-American human rights system.¹⁶ This regional instrument declares, in its preamble, 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”.¹⁷ Thus, American Declaration spells out rights recognized by states, but that flow from the human person. The will of states enshrined in this declaration is the recognition of the human person’s central position in this regional system. This same system consequently imposes on these states the duty to protect the human person regardless of any requirement (political, social, economical, nationality etc.).

The Inter-American Court set its individual-centric view based on Article 29 of the American Convention,¹⁸ which expressly discards interpretations that could limit the enjoyment and exercise of human rights crystalized under this treaty, or under municipal law, or under other international human rights instrument (CANÇADO TRINDADE, 2000: 12). This individual-centered or *pro homine*

10 *Söering vs the United Kingdom* (1989), 11 EHRR 439, para 11.

11 *Ibid.*, para 80. Article 3 spells out that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”. See *Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* n. 06, Article 3.

12 *Ibid.*, para 87.

13 *Ibid.*

14 *Wemhoff v. Germany*, *supra* n. 09, para 8.

15 *Ibid.*, 134.

16 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) [hereinafter “American Declaration”].

17 *Ibid.*, preamble.

18 See *American Convention on Human Rights*, 1969, 1144 UNTS 123, OASTS n° 36, Article 29.

view is connected to the object and purpose of human rights treaties (MONTALVO, 2001: 290). That is, in a teleological approach, human rights instruments, including the American Convention, address the human person (SALVIOLI, 2003: 8-9). The Inter-American Court, analyzing Article 29 of the American Convention in the advisory opinion on *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, asserted that “if in the same situation both the American Convention and another international treaty are applicable, the rule most favourable to the individual must prevail”.¹⁹

Furthermore, in an interpretation prioritizing the human person, the Inter-American Court can refer to different instruments to render decisions that escape the traditional scope of the American Convention in order to better protect the human person (LIXINSKI, 2010: 603).²⁰ The Inter-American Court, for example, faced numerous cases of serious human rights violations concerning indigenous peoples and rendered decisions extending the application of the American Convention, a treaty without any specific provision protecting indigenous rights.²¹ This individual-centered approach work as a theoretical framework to allow a stronger participation of indigenous peoples in their countries’ governmental institutions, to provide a fairer treatment in relation to other ethnic groups and to interpret Article 21 of the American Convention in a way that includes idea of communal property.

The *pro homine* principle, in recognizing the preponderance of the human person, sets two interpretative rules in international law. First, human rights norms must be extensively interpreted. Second, in case of doubt or conflict between different human rights norms, the most protective norm to the human person – the victim of human rights violations – must be adopted (GONENC & ESEN, 2006: 494; HENDERSON, 2004: 91-92).

4 The Global Impact of the *Pro Homine* Principle: The ICJ

This *pro homine* principle, that is, the notion that international human rights law must first and foremost take into account the protection of the human person is not a creation of human rights lawyers or typically human rights courts. Even at the global level, adjudicative bodies should take into account the human person. The International Court of Justice, for example, a traditional court of the United Nations,²² is slowly recognizing that individuals have direct rights at the international level

19 *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, para 52.

20 *Case of Apitz Barbera et al (“First Court of Administrative Disputes”) v. Venezuela* (2008) Inter-Am Ct HR (Ser C) No 182, paras 217-219.

21 See generally *Case of Aloeboetoe et al. v. Suriname* (1991), Merits, Inter-Am Ct HR (Ser C) No 11; *Case of Mayagna (Sumo) Awas Tingni Community (Nicaragua)* (2001) Inter-Am Ct HR (Ser C) No 79; *Case of Yakye Indigenous Community (Paraguay)* (2005) Inter-Am Ct HR (Ser C) No 125; *Case of Sawhoyamaya Indigenous Community (Paraguay)* (2006) Inter-Am Ct HR (Ser C) No 146; *Case of Saramaka People (Suriname)* (2006) Inter-Am Ct HR Ser C No 146; *Case of Xákmok Kásek Indigenous Community (Paraguay)* (2010) Inter-Am Ct HR (Ser C) No 214; *Case of the Moiwana Community (Suriname)* (2005) Inter-Am Ct HR (Ser C) No 124; *Case of Yatama (Nicaragua)* (2005) Inter-Am Ct HR (Ser C) No. 127.

22 *Statute of the International Court of Justice*, annex to the Charter of United Nations, 26 June 1945, Can. T.S. N°7 (entered into force 24 October 1945) [hereinafter “International Court of Justice” or “ICJ”].

and states should take this into account when applying and interpreting treaties. The approach of the ICJ might not be as human rights-based as that of regional human rights courts just mentioned, but nonetheless accepts to some degree the *pro homine* character of international law in human rights issues. Two brief examples might show the difference in approach from the traditional state-centric view of the ICJ.²³

In the *LaGrand Case*,²⁴ Karl and Walter LaGrand, two German nationals, were arrested in Arizona and were sentenced to death for first-degree murder.²⁵ Germany affirmed that the United States, by breaching Article 36 of the Vienna Convention on Consular Relations, violated the rights of Germany as a member-state of the Convention and the individual rights of the LaGrand brothers.²⁶ The United States asserted that rights of consular notification are rights of states and not of individuals.²⁷ The ICJ, however, decided that this provision establishes certain individual rights, which were breached by the United States.²⁸ Accordingly, the ICJ explicitly acknowledged that individuals could be direct bearers of international rights in a decision that takes into account the protection of the human person.

In 2010, in the *Case Concerning Ahmadou Sadio Diallo*²⁹ Guinea filed a complaint to the ICJ against the Democratic Republic of the Congo (DRC) affirming that the DRC by arresting, detaining and expelling Mr. Diallo breached the International Covenant on Civil and Political Rights,³⁰ the Vienna Convention on Consular Relations³¹ and the African Charter of Human and Peoples' Rights.³² Furthermore, the conditions in detention were "comparable to forms of inhuman or degrading treatment that are prohibited by international law".³³ The ICJ held that the DRC violated Mr. Diallo's "individual personal rights" and his direct rights as a shareholder³⁴ and recognized that "substantive development of international law over recent decades in respect of the rights it accords to individuals" included the doctrine of diplomatic protection.³⁵ Perhaps for the first time in its history,³⁶ the ICJ analyzed human rights provisions and decided that DRC breached certain rights of Mr. Diallo and Guinea could exercise the diplomatic protection in his national's name.³⁷

23 The ICJ followed a more state-centered approach. It has affirmed, for example, that "[d]iplomatic protection and protection by means of international judicial proceedings constitute measures for the defense of the rights of the state" (*Nottebohm Case (Liechtenstein v. Guatemala)*, [1995] ICJ Rep 4, 24). See also *Statute of the International Court of Justice*, *supra* note 22, Articles 34 and 36.

24 *LaGrand Case (Germany v. United States of America)* [2001] ICJ Rep 466.

25 *Ibid.*

26 *LaGrand Case (Germany v. United States of America)*, *supra* n. 24, para 75.

27 *Ibid.*, para 76.

28 *Ibid.*

29 *Case Concerning Ahmadou Sadio Diallo* [2010] ICJ Rep 639.

30 See *International Covenant on Civil and Political Rights*, *supra* n. 2 at Article 9, paras 1 and 2 and Article 13.

31 *Vienna Convention on Consular Relations*, 24 April 1963, 569 UNTS 262, Article 36, para 1 (b).

32 See *African Charter on Human and Peoples' Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 at Article 6 and Article 12, para 4 and *Case Concerning Ahmadou Sadio Diallo*, *supra* n. 29, para 63.

33 *Ibid.*

34 *Case Concerning Ahmadou Sadio Diallo (Guinea v. Republic Democratic of Congo)*, Preliminary Objections [2007] ICJ Reports 582, 29.

35 *Ibid.*, para 39.

36 *Case Concerning Ahmadou Sadio Diallo* [2010], Separate Opinion of Judge Cañado Trindade, ICJ Rep 639, 95.

37 *Ibid.*, para 160.

Consequently, the ICJ cannot only be a state-centric court. The complexity of international law requires multiple approaches in accordance with its framework and principles. In human rights, the ICJ must stress its “justice” element and focus on the human person as the source and end of law.

5 Conclusion

International law was once defined as the law between sovereign states. However, states themselves decided to add the human person as one of the main elements of international human rights law. Declarations and treaties that followed the creation of the United Nations focused on the human person as a central aspect of human rights. This *pro homine* structure was furthered strengthened by international human rights courts and acknowledged by the ICJ.

Consequently, the *pro homine* principle must be taken into account by all international law actors in all aspects directly concerning the human person. Following the directives established by virtually all human rights instruments and decisions of international courts, it is not possible to disregard the interests of the human person. The examples mentioned in this article seek to demonstrate that international human rights law is in constant change, but following one direction: the recognition of the human person as central aspect of international human rights law. This area of law flows from the human person and must be applied and interpreted in the light of the best protection possible to them. States, international organizations and NGO's cannot hold back to traditional state-centric values in order to disregard the *pro homine* principle. This principle was envisaged by states, strengthened by courts, analyzed by lawyers and scholars and now fully recognized by the international community.

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