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#### ABSTRACT

This work intends to present an approximation between the concept and the nature of the right to a cultural identity for indigenous peoples and national minorities, and to subsequently look at the ways international regulations protect this right in its distinct modalities. Finally, there is an intent to construct this right from the treaties of the Inter-American System for the promotion and protection of Human Rights, with the purpose of contributing to the justiciability of at least a part of this right.

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#### KEYWORDS

Cultural Identity – Indigenous Peoples – National Minorities – Inter-American System – Justiciability



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# THE RIGHT TO CULTURAL IDENTITY OF INDIGENOUS PEOPLES AND NATIONAL MINORITIES: A LOOK FROM THE INTER-AMERICAN SYSTEM

Oswaldo Ruiz Chiriboga

*It is difficult to see how a civilization can hope to benefit from the lifestyle of another, unless it is willing to renounce its own individuality.<sup>1</sup>*

## Introduction

I have agreed to locate within one concept the ethnic-cultural groups, the indigenous peoples and the national, ethnic, religious or linguistic minorities (in the future referred to as “national minorities”). I am aware of some differences among them, which should have deserved the adoption of differentiated international regulation. Nevertheless, as far as this paper is concerned, they will be considered indistinctively, and their similarities will be emphasized, leaving the reader the task of making opportune distinctions.

## An approximation of the concept and nature of the right to a cultural identity

In order to discuss and elaborate on the right to cultural identity, it is necessary to resort to definitions that have been given for culture; both traditional and popular culture; diversity of culture; cultural pluralism and cultural patrimony; and to first recognize that none of these concepts has been amply defined and they continue to be debated by cultural identity specialists.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) has defined culture as:

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*See the notes to this text as from page 64.*

*the distinctive traits, including the total spiritual, material, intellectual and emotional traits that characterize a society or social group, and that include, in addition to arts and literature, their ways of life, the manner in which they live together, their value systems, and their traditions and beliefs.*<sup>2</sup>

The culture of a society or group is no longer uniquely an accumulation of their works and knowledge, and it is not limited to their cultural heritage but encompasses the demands on their way of life, which include their educational system, their means of diffusion, their cultural skills and their right to information.<sup>3</sup>

In a UNESCO recommendation for the safekeeping of traditional and popular culture (1989), it was further defined by as

*the total of the creations that emanate from a cultural community founded on their traditions, as expressed by a group or individuals and which respond to the expectations of the community, while giving expression to their cultural and social identity; the standards and values that are transmitted orally, whether by imitation or other methods. Their forms include, among others; the language, the literature, the music, the dance, the games, the mythology, the rites, the customs, the handicrafts, the architecture and other arts.*

In the Preamble of the aforementioned Recommendation it was affirmed that traditional or popular culture “is part of humanity’s universal heritage and forms a powerful measure of approximation among existing peoples and social groups as an assertion of their cultural identity.”

Cultural diversity refers to “the manifold ways in which cultures or groups and societies find expression. These expressions are transmitted among groups and societies as well as within them.”<sup>4</sup> Such cultural diversity “is as necessary to humankind as biodiversity is to all living organisms, and constitutes a common patrimony of humanity which should be recognized and consolidated for the benefit of present and future generations.”<sup>5</sup>

In this sense, States have an obligation to protect and promote cultural diversity and to adopt “policies that favor the inclusion and participation of all citizens to ensure, in this way, the cohesion of the society; peace, and the vitality of civil society.”<sup>6</sup> In this way, “cultural pluralism constitutes a political response to the realities of cultural diversity.”<sup>7</sup>

Cultural identity itself has been conceptualized as the entirety of the cultural references by which a person or a group can be defined, manifested, and wishes to be known; it implies liberties that are inherent to individual dignity in a permanent way, and integrates cultural diversity, both individually and universally, in memory and in plan.<sup>8</sup> It is “an inter-subjective representation which orients the way people feel, comprehend and act in the world.”<sup>9</sup>

Cultural heritage is an integral part of cultural identity, and must be understood as “everything that forms part of the characteristic identity of a people, and which, if desired, can be shared with other peoples.”<sup>10</sup> Cultural heritage is subdivided into tangible and intangible heritage. The first one relates to “the property, both movable and immovable, which has great importance to the cultural patrimony of the people”;<sup>11</sup> while the second includes the

*uses, representations, expressions, knowledge and techniques – together with the instruments, objects, artifacts and the cultural spaces that are inherent to them – that communities, groups and, in some cases, even individuals are recognized as an integral part of the cultural heritage. This is intangible cultural heritage, which is transmitted from generation to generation, and is constantly being recreated by communities and groups in the function of their surroundings, and in their interactions with nature and their history, and infuses them with a sense of identity and continuity, thus promoting respect for cultural diversity and the creativity of humankind.*<sup>12</sup>

Also included are traditions and oral expressions, customs and languages, as well as the performing arts such as music, theatre, festivities and dance; social and ritual customs; knowledge and customs related to nature and the universe, such as traditional medicine and pharmacopoeia; cuisine, the common law, clothing, philosophy, values, code of ethics and all the other special abilities and material aspects related to the culture, such as tools and habitat.<sup>13</sup>

It can be concluded from all that has been said that the right to cultural identity (from here on RCI) basically consists of the right of all ethnic-cultural groups and their members to belong to a determined culture and to be recognized as different; to maintain their characteristic culture and their cultural patrimony, both tangible and intangible; and not be forced to belong to a different culture or to be unwillingly assimilated by it.

Nevertheless, the cultural identity of a group is not static; it possesses a heterogeneous conformation. Its identity flows and has a dynamic process of reconstruction and reevaluation that is produced by continual discussions on both an internal level and through the contact with—and the influence of—other cultures. Within each ethnic-cultural group, there is a confusion of subgroups (ancestors, young people, women, people with disabilities) that continually retake, readapt or reject certain features and cultural traditions of their group, together forming “an integral part of the processes of ethnic reorganization that is made possible through their persistence.”<sup>14</sup> In the same way, when they come into contact with other cultures, cultural groups may adopt certain practices or features of the alien culture, and then incorporate these features in their own identity.<sup>15</sup>

In this sense, the RCI also consists of change, adaptation and incorporation of cultural elements from other cultures and peoples, provided that this takes

place with the intelligence of the whole group, willingly, and with absolute freedom. Difficulty or impossibility of access to these mechanisms could lead the group into stagnation and exclusion, placing their physical and cultural survival in danger. It is because of this that some authors hold that the strengthening of cultural identity doesn't have as its only objective the conservation of cultures, but impels them to display their potentialities in both the present and the future, permitting the exercise of their cultural rights, the establishment of fairer channels for dialogue and participation in decision-making, and preventing a process of dominating interaction among different cultures.<sup>16</sup>

It should be obvious, that due to its own nature, RCI is an autonomous right, unique in its own way (at least conceptually), but at the same time it is a "synthesizer right", encompassing (and permeating) all the individual as well as collective rights, and requires the fulfillment and effective exercise of all human rights; and, reciprocally, their fulfillment is dependent upon the enforcement of many other internationally protected human rights.<sup>17</sup>

As much as the subject matter is rights, the Colombian Constitutional Court (from here on CCC) acknowledged that the RCI "is projected in two dimensions[:] one collective and the other individual", but, according to the Court, the subject matter is endowed with an appropriate singularity. This is not to say that "under the guarantees of individual manifestations such identity should not be safeguarded, since individual protection could be necessary for the materialization of the collective rights of indigenous people to which the individual belongs." "As has been said" (adds the Court) "this embraces two types of protection for cultural identity[,] one is direct, as it pertains to the protection of the community on the subject matter of rights; the other is indirect, and protects the individual in order to safeguard the identity of the community (Decision T-778/05)."<sup>18</sup>

The case of the Inter-American Court of Human Rights is distinct, as even though it interpreted the social dimensions of certain human rights individually recognized at the American Convention on Human Rights (from here forward the IACHR),<sup>19</sup> it declared that damages can be solely against "members of the community" and not against the community as a whole. This derives from the provision stated in the IACHR article 1.2),<sup>20</sup> "which clarifies in this international instrument the management of a connotation for the concept of 'person': human being, the individual, the holder of rights and freedoms".<sup>21</sup>

I consider, nevertheless, that there should be a reformulation in the interpretation of the aforementioned article in order to accept the community as holder of the right. Finally, the reason for the adoption of this article was to impede the exclusion of any individual from the protection of the IACHR

through exposing the character of the person; a situation which has no connection to the communal conception of the rights held by ethnic-cultural groups, and which sustains and moderates individual rights. Moreover, we should consider that the limited conception of IACHR article 1.2 presents a range of practical difficulties in litigation on the rights of these ethnic-cultural groups before the bodies of the Inter-American System. For example, it is necessary to individualize and register every member of the community before a case is submitted (a procedure that falls upon the victims themselves or their representatives); a catalogue that can never be complete, due to marriages, deaths, births, displacements, and others; a list which is produced each day in the heart of the community, all of which makes the individualization difficult, costly and, in the long run, useless. Also, individualization of victims can go against their own culture, as, for example, ancestors and future generations are not counted as “members”, although included by some groups as part of their communities. A further problem arises as only those listed members are considered as victims of violations of individual rights,<sup>22</sup> excluding those who, for whatever reason, do not appear on the list. Finally, individualization is also useless because of the kind of reparations that can be obtained. For instance, the indigenous community Yakye Axa was required to individualize their members, so later they could obtain recognition of their right to communal property from the International Court of Human Rights, which would have been perfectly feasible without individualization. Summing up, individualization of the members of a community is not useful or adequate, neither is it just.

Now then, the principal guarantee of RCI, as of any other human right, is the State in which we encounter the respective ethnic-cultural group. However, as cultural diversity “constitutes the common patrimony of humanity”,<sup>23</sup> the international community also has responsibility for its protection. This was clearly evident, for example, with the adoption of the Hague Convention for the Protection of Cultural Property in the Case of Armed Conflict (1954) and its two Protocols, and by the Convention for the Protection of World Cultural and Natural Patrimony (1972). In the same way, there is a growing concern regarding third person aliens and of state authorities found to be in control or possession of property that is important to the identity of a culture. In that respect and within the framework of the 31<sup>st</sup> General Conference of UNESCO, held in Paris in 2001, the Director General suggested the adoption of a declaration to point out that “the authorities which are effectively in control of a territory, whether recognized or not by the other States of the international community, as well as the people and institutions that are in either temporary or long-term control of important cultural sites and movable cultural property, are apparently responsible for their protection.”

For the purpose of the present work, we concentrate on the obligations of

the State, whose noncompliance, by action or omission, imparts international responsibility. Because of this it is necessary to remember that:

*[this is] a basic principle of the law of international responsibility of the State, sheltered by the International Law on Human Rights, that this responsibility can be generated by the acts or omissions of whichever organ, power or agency of the state, regardless of its hierarchy, that violates internationally recognized rights. Moreover, [...] any unlawful act which violates human rights and which is not initially directly imputable to a State, for example, if the author of the transgression is a private citizen, or cannot be identified, this can impart international responsibility to the State, not for the deed itself, but for the lack of due diligence to prevent the violation.<sup>24</sup>*

However, the State cannot be compelled to protect and promote the cultural identity of every group encountered within its territories. This right is uniquely applied to ethnic-cultural groups and excludes immigrants, for example. Kymlicka<sup>25</sup> offers a reason for this separation, when he supposes that, although national minorities and indigenous peoples may wish to continue being distinct from the main culture in which they live, they have not infrequently been incorporated into other societies against their will, and therefore demand diverse forms of autonomy as well as self-government, to ensure their survival as a group. Besides, immigrants, apart from the fact that they are generally dispersed, have left their respective cultures of their own free will,<sup>26</sup> and, therefore, have voluntarily renounced part of their culture. “Even though they sometimes work to obtain greater recognition of their ethnic identity, their objective is not to become a separate, self-governing nation, parallel to the society of which they form a part, but to modify the institutions and laws of this society, so that it becomes more permeable to cultural differences.”<sup>27</sup> Briefly, while the right to cultural identity and, consequently, the right to be different do apply to the national minority group, there should also be a search for fairer integration terms on the part of the main culture, in a beneficial manner, to permit the minority group to maintain certain characteristics of their own cultural identity.

In summation, RIC is the right of indigenous peoples and national minorities, as well as their members, to conserve, adapt and even voluntarily change their own culture; it includes all internationally recognized human rights, which it both depends upon and to which it gives sense, and it deserves the protection of individuals, the international community, and above all, the State.

## **Inter-American System of Human Rights**

As previously mentioned, the principal focus of this article is the protection of the RCI since it forms part of the Inter-American System of Human Rights,

integrated by the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights, organs principally entrusted with the application and interpretation of the ACHR and the American Declaration of Rights and Duties of Man (ADRDM).

One of the considerations that characterize and at the same time reveal the importance of IASHR is the capability to receive petitions and denunciations on human rights violations from individuals or groups. As we can see, many indigenous communities have gained protection through the organs of the System, and recognition of the violations committed against them. However, the System is still limited because it doesn't have an instrument linked specifically to the dedication of the differentiated rights of ethnic-cultural groups. The rights that have a direct reference to culture appear in Article XIII of the ADRDM and in Article 14 of the Additional Protocol to the American Convention on Human Rights regarding Economic, Social and Cultural Rights, the "San Salvador Protocol" (hereafter SSP).

These two instruments present some difficulties in international lawsuits on cultural rights. In the first place, the Inter-American Court of Human Rights lacks the authority to directly apply the ADRDM within its contradictory competence.<sup>28</sup> Secondly, the SSP does not grant jurisdiction to either the Inter-American Court of Human Rights or the IACHR to recognize contentious cases involving the violation of economic, social and cultural rights that are so dedicated, excepting the right to education and the right to syndical liberty.<sup>29</sup> For these reasons, we should restrict the dispute to the IACHR decisions. In the following, some ideas will be outlined on how to use this treaty to protect the RCI.

### *Interpretation of the IACHR*

The rules of interpretation of the IACHR are contained in its own article 29, which states:

*no provision of this Convention may be interpreted in a sense to:*

- a. permit any party of the State, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized by this Convention, or to restrict them to a greater extent than is herein provided for;*
- b. limit the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of any other convention to which one of the said states is a party;*
- c. exclude other rights or guarantees that are inherent to human beings or that are derived from a representative democratic form of government; and*
- d. exclude or limit the effect that the American Declaration of the Rights and Duties of Man may have, as well as other international acts of the same nature.*



The interpretation principles contained in this article, as well as those established by the Vienna Convention on the Law of Treaties (1969), allow the IACHR bodies to make an evolutionary interpretation of international instruments, since “treaties on human rights are living instruments, the interpretation of which should be part of the evolution of time and actual life conditions.”<sup>30</sup>

In this respect, the Inter-American Court of Human Rights has stated that:

*the corpus juris of the International Human Rights Law is formed by aggregating international instruments with a variety of legal contents and effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on International Law, in the sense that it affirms and develops the expediency of the latter to regulate the relationships among States and human beings under their respective jurisdictions. Therefore, this Court must adopt a criterion that is adequate for consideration of the questions under analysis and that marks the evolution of the fundamental rights of human beings in contemporary International Law.*<sup>31</sup>

We must also take into account that the formulation and scope of rights should be widely interpreted, while limitations to them require a restrictive interpretation.

Paragraph (b) of IACHR article 29 has particularly literal importance, which has been interpreted by the Inter-American Court of Human Rights in the sense that:

*if both the American Convention and another international treaty are applicable to the same situation, the rule that most favors the human being should prevail. If the Convention itself states that its regulations have no restrictive effect over other international instruments, least of all should such restrictions—present in those other instruments but not in the Convention—limit the exercise of the rights and liberties that the Convention recognizes.*<sup>32</sup>

Due to these previous considerations, the Court considered it useful and appropriate to utilize other international treaties distinct from ACHR to interpret its provisions at the present time, considering the evolution that had occurred in the international law on human rights.<sup>33</sup>

Similarly, interpretation of regulations contained in ACHR should also rely on the contributions offered by the internal jurisprudence of member States of IASHR, especially in cases concerning the rights of ethnic-cultural groups, still in gestation in the international arena, but with a broader unfolding in internal legislations and jurisprudence.

Finally, the doctrines of the most competent authors of the diverse nations also constitute, according to article 38 of the International Court of Justice Statute, auxiliary measures for international law, and a source for the interpretation of the ACHR.

The Inter-American Court of Human Rights and IACHR cannot omit to incorporate these advances, since only in this way will full sense be given to the rights they guard, and the protective rules of human rights reach their full effect. In the words of Medina:<sup>34</sup>

*the national and international contributions to human rights are divulged in a melting pot, where they produce a synergy with a result in which human rights reappear, enlarged and more complete. It is here, in this melting pot, that the interpreters of the rules of human rights must come to fulfill their labor.*

On the basis of what has been said so far, let us analyze the ACHR to construct through its provisions the protections of the RCI for ethnic-cultural groups.

### *The RCI in the American Convention on Human Rights*

The RCI is not expressly declared by the ACHR, but requires of its construction a departure from the rights to which this body of standards is declared. The first intention of such a construction of the RCI is found in the Partially Dissident Vote of Judge Abreu Burelli in the Case of the Indigenous Community of the Yakye Axa vs. Paraguay:

*With respect to the American Convention, the right to cultural identity, even if not expressly established, is found to be protected in the treaty due to the evolutionary interpretation of the contents of the rights codified in its articles 1.1 [an obligation to respect rights], 5 [the right to personal integrity], 11 [protection of reputation and dignity], 12 [freedom of conscience and religion], 13 [liberty of thought and expression], 15 [the right to assembly], 16 [freedom of association], 17 [protection of the family], 18 [the right to have a name], 21 [the right to private property], 23 [political rights] and 24 [equality before the Law] in the aforementioned treaty, depending on the facts of the specific case. That said, the right to cultural identity was not necessarily affected every time there was an injury to reputation.*

To this list, let me add Articles 8 [legal guarantees] and 14 [the right of rectification or reply] from this same instrument.

### **The right to personal integrity**

*There are times when nothing can be done, but I still attend my patients out of consideration, because they weep with me to be cured when they have no money, and when I see them so sad, I treat them with my whole heart.*<sup>35</sup>

The RCI is supported by the protection offered by article 5 of the ACHR (right to personal integrity), according to which personal integrity includes physical, psychological and moral integrity.

Regarding physical integrity, article 5 of the ACHR, together with article 10 (the right to health care) of the SSP relate to the RCI as they both embrace the right of ethnic-cultural groups and their members to preserve, use and protect their traditional medicines and healing practices, and demand that public health services be appropriate from a cultural point of view, that is, that treatments alien to their culture should not be given without their free and informed consent, and preventive care should take into account their traditional healing practices and medicines.

With respect to psychological and moral integrity, we convert and refer to the ICHR decision in the case of the *Moiwana Community vs. Suriname*, relating to the massacre of 39 of their members during a military operation in 1986. Investigations carried out by State justice did not produce the results expected for the crimes, which remain unpunished. According to their Community customs, if one of their members has been offended, their relatives are obligated to search for justice for the committed offense. If the offended party has died, it is believed that his/her spirit will not be able to rest until justice has been done.<sup>36</sup> In addition, due to the facts of this case, the *Moiwana Community* were not able to appropriately honor their dead, which is considered a “profound moral transgression”, and this would offend their ancestors and provoke “illnesses of a spiritual origin”.<sup>37</sup>

The ICHR took these elements into account, and considered that the right to personal integrity of the members of the Community had been violated, due to the “shame and indignation of having been abandoned by the Suriname criminal justice system and the anger they must feel due to their relatives having died so unjustly in the attack”.<sup>38</sup>

Another exemplary result is in the case of the *Guarani-Kiowah*, a village with 26,000-members in the State of *Matto Grosso do Sul* in Brazil, in which a continuous phenomenon of suicides occurred, and in a proportion 30 times higher than the national average, caused by the deep depression suffered by the natives after they had been deprived of their traditional territories.<sup>39</sup>

As we can observe, for many indigenous communities the rupturing of bonds with their ancestors, the fragmentation of their relationship with the land and its natural resources, and the forced desertion of their cultural practices, produces severe suffering which, undoubtedly, has affected their rights of psychiatric and moral integrity.

### **Freedom of conscience and religion**

*I offer five male beings [...] we must know. The first is God, Three in One, who are four, whom one calls the Creator of the Universe. Is this, by chance, the same that we have*

*named Pachacámac and Viracocha? [...] The second is the one known as “Adam”, the Father of all other men. The third is called “Jesus the Christ” (on whom we heap all our sins) [...] the fourth is called the ‘Pope’. The fifth is Carlos, and he is the prince and lord “of the entire world”. And then, what authorization can Carlos require from the Pope, who is no greater lord than he?<sup>40</sup>*

The quoted paragraph cited evidence of the contradictions that Atahualpa discovered in the reasoning of an opinion imposed upon him by the representative of a religion different from his own. From that time until today, a process of destruction of the religions of the indigenous people has unfolded and, consequently, of their cultural identity as well.

A symbolic form of imposition of power that was very useful for the Europeans during their invasion of the American continent was the destruction of the temples and sacred places of the indigenous peoples, followed by the erection of great churches and cathedrals in the same place. The Europeans intended to destroy the symbols of the indigenous communities, along with their self-esteem and their culture, and in this way convert them into concentrations of slave-workers in the service of their torturers.

The negation/elimination of religion disrupts the perceptions of origin that each person has about themselves, including their conception of the world. It weakens bonds among members of the group, dilutes the influence of traditional authorities, and facilitates the unlawful appropriation of sacred objects or places.

In a case submitted before the CCC<sup>41</sup> it was denounced that the Yanacona Indigenous Community was preventing certain members of the Iglesia Pentecostal Unida de Colombia (Colombian United Pentecostal Church - IPUC) from the performance of religious rites within the Community. The plaintiffs alleged a violation of their right to freedom of conscience and religion. The majority of the Community members were members of the cult of Catholicism, and only a few had embraced the Evangelic cult proclaimed by the IPUC. The latter had begun to ignore the traditional Community rules and authorities. When making a decision, the CCC pointed out that:

The jurisprudence of the Court has recognized the right of ethnic and cultural integrity, in the sense that it is also fundamental to the right of cultural survival, because of which, if the members of the indigenous community who profess an evangelical religion ignore the authority of the town’s Council and refuse to continue with the production and development practices established by the community, they go against the way of life that the indigenous authority is trying to preserve; each time they extend their religious beliefs to other fields of the social life there is an evident conflict and a rupture of the pacific relationships of the members being defended [...].

It is in this dimension, that the exercise of the autonomy recognized by

the Constitution makes indigenous authorities take preventative and corrective measures – the expected consequence - when confronting the aforementioned religious incident, so that it does not acquire the transcendence to disarrange the values or the essence of the Yanacona culture. [...] Catholicism has been assimilated and accepted by the majority of the native defense, because it does not oppose their rules, customs or the ways of life they have developed since the year 1700. Neither has it constituted a factor of ignorance by the traditional authorities. That was the low extreme against the case of the propagation of the evangelical protestant religion.

The veneration or admiration towards the idea of God is an assemblage of individual conviction, and cannot violate the consensual social order that the community has secularly established. Including, together with the mobility and vitality enjoyed by the development of any social group, is a valid estimate for a possible future where the way of thinking of the IPUC could be recognized by the Yanacona majority, who will bend to the culture and the identity of the Yanacona community and not vice versa, as it was claimed in this case. In other words, the cultural values, uses, customs and traditions of this people, in the measure that they are not fixed or immutable, can be filtered, affected, and transformed by both endogenous and exogenous evolutionary forces, signaling that, collectively, it is possible to have a spirit open to all possibilities, when preserving the dynamic identity which constitutes the cornerstone of the indigenous community.<sup>42</sup>

As we can observe in this extensive quotation, two facets of the RCI have been presented. On one side, we recognize that the Community and its members have the right to preserve their own culture, form of organization and religion (threatened by the evangelical religious practices), and on the other side, we cannot deny that evangelicalism could be accepted and assimilated by the Community, if this is their proposal of identity and not the reverse, as happened with Catholicism, which was adapted and incorporated by the Community as its own identity.<sup>43</sup>

Therefore, the protection that is offered by article 12 of the ACHR (freedom of conscience and religion) to the RCI, is rooted in the right of ethnic-cultural groups and their members to preserve, express, divulge, develop, teach and exchange their practices, ceremonies, traditions and spiritual customs, both in public as well as in private. It also covers the right that they not be induced or forcefully converted and that no beliefs should be imposed on them against their will. This article, interpreted together with articles 21 (the right to private property) and 22 (the right of circulation and residence) of the same Convention, grants them the right to maintain and accede to their religious, sacred and cultural places, and to use, keep watch over and to recuperate their objects of worship. Finally, in conjunction with article 24 (equality before the law) of the ACHR

they are entitled to demand from the State the same possibilities and benefits that are received by the religion of the majority; for example, recognition of religious holidays, and permission for their members to be absent to take part in religious ceremonies when employed by public or private organizations, or when interned in institutions of health or in penal centers.

### Freedom of expression and the right to reparations

*One of the little paradoxes of history is that no multi-lingual empire of the old world ever dared to be so despotic as to impose a single language on its united population, something that is done by the liberal republic 'which defends the principle that all men are created equal'.<sup>44</sup>*

According to article 13 of the ACHR, freedom of thought and expression includes the right to “research, receive and divulge information and ideas of all genius, without regard to frontiers, whether by speech, writing, or in printed or artistic form, or by any other proceeding”. This right we can interpret as the faculty to manifest one’s own culture and identity.

One of the principal forms of the expression of culture is language, so much so that our liberal States for many years now have adopted the motto: one solitary nation, one single language. That axiom signified a slow loss, by degrees, of indigenous languages and the consequent undermining of their cultural identities. In the same way, “the choice of one language as the national and official language necessarily placed those whose mother tongue had not been selected at a disadvantage, while it conferred a privilege on those who spoke the chosen idiom”.<sup>45</sup>

The ICHR had the opportunity to make a pronouncement on the protections of the right that freedom of expression offered to speak one’s mother tongue in the Case of López Álvarez vs. Honduras. In this case, the victim was an indigenous garífuna in the custody of a Honduran penitentiary center. The authorities of that penitentiary had forbidden all the imprisoned garífunas from conversing in their mother tongue “for security reasons”. The ICHR declared that the State had violated the right to freedom of expression and the right of equality to Mr. Lopez, and that such prohibition had “affect[ed] his personal dignity as member of the [garífuna] community”, seeing that the “mother tongue represents an element of identity”.<sup>46</sup> In the same manner, the Court considered that “language is one of the most important elements of identity to a people, precisely because it guarantees the expression, dissemination and transmission of their culture”.<sup>47</sup>

But freedom of expression is not reduced only to the spoken word; article 13 of the ACHR mentions “artistic forms” of expression and leaves this right

open “to any proceeding” by which a person expresses themselves. This is of vital importance to indigenous people, because if “occidental man thinks in words, indigenous men think in symbols, acts and rites”.<sup>48</sup> Therefore, all forms by which a culture expresses its identity are valid and merit international protection.

On the other hand, the protection the ACHR offers in article 14 (the right to rectification) is rooted in the right of ethnic-cultural groups to correct or solicit correction of any imprecise or incorrect information about their culture and history that appears in any educational text, electronic page, private or public document, periodical publication, cinematic production, radio or television broadcast, inclusive of official history records.

### Political rights

*We know the laws, but, for a good solution, we had better consult with the indigenous people.*<sup>49</sup>

According to article 23 of the ACHR, political rights are divided into three extensive groups: (a) participation in the management of public affairs, (b) the right to choose and be chosen within free and democratic conditions, and (c) the right to have access, in conditions of equality, to the public offices of the country.

The guarantee of such rights does not exclusively depend on the facility of the rules by which they are formally recognized, but requires the State to adopt the necessary measures that attain their actual force and exercise, and which take into account the special features of each population group.

In this sense, States should take into account that indigenous peoples need a great degree of self-determination and control over their political destiny for the preservation of their culture. The right to choose their representatives and to participate in every type of decision that affects them (or could affect them) signifies a means of cultural survival to indigenous peoples, and requires measures by the state necessary to guarantee that such participation is significant and effective. In this respect, the Committee for the Elimination of Racial Discrimination (CERD) of the U.N. pointed out that States should take the necessary measures to enable members of indigenous populations to be elected by their comitias,<sup>50</sup> since indigenous populations have very low rates of political representation<sup>51</sup> and do not have equality of possibilities to participate at every level of power.<sup>52</sup> Therefore, the CERD recommended the creation of distinct mechanisms to coordinate and evaluate the diverse policies of protection for the rights of the indigenous communities, to permit their actual and adequate participation in the public life of the nation.<sup>53</sup>

The absence of political representation has had a direct effect on decisions at the state level regarding the use and administration of public resources. Actually,

one of the main reasons indigenous peoples suffer from marginality and poverty is precisely because of the violation of their right to self-determination and participation at local, regional and national levels.<sup>54</sup>

The direct participation of indigenous peoples in the management of public affairs should be done from their own institutions and in accordance with their values, uses, customs and ways of organization. In a case presented to the ICHR, the indigenous organization of the Yatama on the Nicaraguan Atlantic Coast presented a violation claim to the ACHR for, among other reasons, a legal restriction stipulating that participation in elections could only be done through political parties. The international Tribunal considered that the concept of a political party was alien to the uses, customs and traditions of the indigenous organizations of that country, and implied “an impediment to the full exercise of the right to be elected” (par. 218).<sup>55</sup> In addition, the ICHR disputed the restriction that political participation could only be fulfilled by parties, and not through groups with a different organization, among which are those of indigenous peoples. This restriction is contrary to the right to equality as well as political rights, “as they limit, more than is strictly necessary, the full scope of political rights and become an impediment for the effective participation of citizens in the management of public affairs” (par. 220).<sup>56</sup>

In the cited case, the issue of electoral districts was also discussed. Nicaraguan Electoral Law directed that every political group must present candidates at least in 80% of circumscribed municipal electoral districts. In that way, the Yatama were forced to present candidates in municipalities where an indigenous population didn't exist, and with which it had “no connection or interest” (par. 222).<sup>57</sup> The ICHR considered this a disproportionate requisite, as it was “unjustly limiting political participation”, and that it did not take into account that the indigenous could not rely on support for presenting candidates in certain municipalities or would have no interest in seeking support. (par. 223).<sup>58</sup>

To avoid the problem just mentioned, (and several other similar problems), it is thought that States should draw their electoral districts in such a way that ethnic-cultural minorities would constitute a majority within their territories. Several indigenous populations are not only divided among national borders, but also by different provinces, departments or municipalities within the same State and, in each such division, they are a minority.

Some effort has been made to avoid this. The U.S. has drawn districts (a little inappropriately in certain cases) with the sole purpose of creating majorities of Latin or African descendents. The U.S. Supreme Court accepted these districts “in consideration of the political discrimination historically suffered by Blacks and Mexican-Americans [...] and of the residual effects of such discrimination on those groups”.<sup>59</sup>

Other countries have reserved political seats to assure representation and



participation in their parliaments for specific minority groups. For example, in Jordan, for Christians and Circassian populations; in Pakistan, for non-Muslim minorities; in New Zealand, for the Maoris; in Colombia, for the indigenous as well as for African descendants; in Slovenia, for Hungarians and Italians, among others.

Moreover, there must be guaranteed representation of ethnic-cultural groups in every social organization that has the power to interpret or modify the extent of their rights. In this sense, the CERD demonstrated concern for the insufficient representation of the indigenous and other minorities within the police, the judicial system and other public institutions of Argentina.<sup>60</sup>

Finally, the political participation of indigenous peoples and their members is not limited to representation (through designation or election) in the social organizations of the State. It is clear that such representation (while necessary) is, to a greater or lesser extent, insufficient for the protection of their interests and rights. Because of this, indigenous peoples also have the right to obtain previous free and informed consent on every matter that concerns them; only in this way are they permitted “to speak for themselves [,] to take part in decision-making processes [...] and to [make] useful contributions to the country in which they live”.<sup>61</sup>

The CERD connected the right to consultation with that of political participation,<sup>62</sup> and urged States to “guarantee that members of indigenous communities enjoy equal rights regarding their effective participation in public life and that no decision directly related to their rights and interests should be taken without their informed consent”.<sup>63</sup> Likewise, the CCC pointed out that the right to consultation constitutes “the measure through which [...] their physical and cultural integrity shall be protected”.<sup>64</sup>

Consequently, the RCI of ethnic-cultural groups and their members, as seen through article 23 (political rights) of the ACHR, is rooted in the recognition of their right to take part freely at every level of decision-making within public institutions, regarding policies and programs that concern them; to be consulted in each case of new legislative, or administrative, or any other kind of measure that may affect them; to decide on their own priorities for development, as well as on any question related to their internal affairs; to maintain and develop their own political and economic systems; and maintain and develop their own decision-making institutions. Together with article 13 (freedom of thought and expression) of the ACHR, this protects their right to receive clear, true and timely information on every aspect of their concern, permitting their deliberation, both individually and collectively.

## The right to property

*My people venerate each nook of the Earth, each brilliant pine needle, each sandy beach, each cloud of mist in the jungle shadows, each clearing in the forest, each insect that buzzes; the thoughts and customs of my people, all of these things are sacred.*<sup>65</sup>

The earth and the natural resources that exist on the earth are the essence of the cultural identity of indigenous peoples and their members, to the point that a Special Report on indigenous communities by the United Nations indicated that “The very concept of “indigenous” embraces the notion of a distinct and separate culture and way of life, based upon ancient knowledge and traditions which are fundamentally linked to a specific territory.”<sup>66</sup> The Report added that:

*the protection of cultural and intellectual property is fundamentally linked to the realization of the territorial rights and self-determination of indigenous peoples. The traditional knowledge, as much as the values, autonomous or self-governing, social organization, the management of ecosystems, the maintenance of harmony among the people and respect for the land is based upon the arts, songs, the poetry and literature that each generation of indigenous children must learn and renew. These rich and varied expressions of the specific identity of each indigenous population provide the necessary information to maintain, develop and, if necessary, restore indigenous societies in all of their aspects.*<sup>67</sup>

Likewise, in the following account, an official Report indicated that the gradual deterioration of indigenous societies could be attributed to the lack of recognition for their relationship with the lands, air, water, the coastal seas, frost, flora, fauna and the other natural resources linked to their culture.<sup>68</sup>

Many other specialists of the distinct supranational organisms (both universal and regional), as well as diverse treatise authors and experts have extensively analyzed the implications that the land has to indigenous peoples. Therefore (and due to the brevity of the present work), this theme is not profoundly dealt with here. However, due to its relevance, some Inter-American System decisions should be reviewed.

The ICHR had the possibility to analyze the cases of the communities *Awas Tingni vs. Nicaragua*, *Yakye Axa vs. Paraguay* and *Moiwana vs. Suriname*, in which it was recognized that the close relationship the indigenous people maintain with the land and its natural resources, and which qualified as the fundamental base of their culture, spiritual life, integrity and economic survival, and was necessary to preserve their cultural heritage and transmit it to future generations. This conclusion was reached soon after the evolutionary interpretation of article 21 (the right to private property) of the ACHR. The Court, in the cases that have been cited, considered that this article did not only refer to the civil conception of property, but that it also could (and must) be interpreted in such a way that it protected the communal property of the land and its natural resources. Moreover, in the case of the *Yakye Axa*, the ICHR interpreted that article 21 of the ACHR also safeguarded “embodied elements” that arise from the relationship of the

indigenous with their territories, as well as every piece of furniture or object, material or immaterial, susceptible to have value (not solely economical value). Within these categories basically enter every tangible or intangible element of cultural patrimony of the indigenous peoples.

In this way, the protection offered by article 21 of the ACHR to the right of cultural identity could be interpreted as embracing the rights to both use and enjoyment of property, material as well as immaterial, and implies the right to maintain, use, control, recover and protect their cultural patrimony, both material and immaterial, as well as every type of product or fruit of their cultural and intellectual activity, their own procedures, technologies and instruments, as well as the places where their culture is expressed and developed.

The protection offered by ACHR article 21 is seen to reinforce that of article 12 (freedom of conscience and religion), if the cited property had religious or spiritual significance; and by articles 5 (the right to personal integrity) of the ACHR and article 10 (the right to health care) of the SSP, if they were used in addition to the traditional medicine or healing practices.

Finally, if article 11 (the protection of honor and dignity) of the ACHR, which confers the right to suffer no arbitrary interference in private life, in the family and in the domicile, in conjunction with article 21 of the same instrument, it can be concluded that indigenous peoples would have the right to prevent in their territories the presence of third parties alien to their communities, but all the more if they change or affect the indigenous culture, identity, way of life or resources. This interpretation is summarized in articles 4 (the right to life) and 5 (the right to personal integrity) of the ACHR and article 10 (the right to health care) of the SSP, if the presence of strangers puts at risk the health and life of the members of the communities.<sup>69</sup>

## Judicial guarantees

*Our production is called arts and crafts, yours as industry.*

*Our music is known as folklore, yours as art.*

*Our standards are called customs, yours as law.<sup>70</sup>*

Article 8 (judicial guarantees) of the ACHR sets the guidelines for what is called “due legal process”, which consists of the right of every person to be heard, with all due guarantees and within a reasonable period of time, by a competent, independent and impartial judge or tribunal, previously established by Law, for the substantiation of any accusation made against any person or to determine the persons rights and obligations.

Until now, the ICHR has interpreted the cited article, in which reference is made to indigenous peoples, signaling that “it is essential that States grant an

effective protection, one that takes into account their particular features, while considering their economic and social characteristics, as well as their special situation of vulnerability, their customary law, values, practices and customs”.<sup>71</sup> However, for the purposes of the present study, we will interpret article 8 of the ACHR in such a way that it protects the indigenous RCI through the recognition of the customary indigenous law.

This law is an integral part of the culture of these people and a key element of their ethnic identity, to the point that authors such as Sierra<sup>72</sup> come to and affirm that: “a community which has lost its law has lost an important part of its identity”.

The indigenous law embraces systems of regulations, procedures and authorities that regulate the social life of their communities, and that permit them to resolve their conflicts in accordance with their own world vision, values, necessities and interests.<sup>73</sup> It takes into consideration, in addition, that indigenous cultural practices (such as the system of cognition, religious conceptions and the link to the land) are present when it is time for justice to be administered.

The lack of attention of the indigenous peoples to their customary laws and the submission of their cases to the justice of the State could lead to the violation of several judicial guarantees established through article 8 of the ACHR. Also, for example, this article includes the right to be heard by a competent court. Competence refers to the special circumference, secular, material and personal, as defined previously by the Law, within which a judge can exercise his faculties. The customary law of various indigenous peoples previously defined which authorities are to be charged with resolving the conflicts that are presented, on whatever subject, among members of each community. To ignore this would be to submit indigenous people to a court that is different from their “natural arbitrator”.

Finally, the lawsuit against an indigenous person who has already been judged by the indigenous justice system would constitute a violation of the right not to be judged twice for the same crime. In fact, a case in Ecuador in which three members of the indigenous La Cocha Community who had assassinated another member of the same community were judged by an indigenous council. This council found the three accused men guilty and imposed punishment by nettle upon them,<sup>74</sup> banishment from the community for two years, an indemnification of six thousand state dollars as well as requiring them to walk on stones. Some time later, the Public Ministry learned of the murder that had been committed by the three indigenous men and, ignoring the fact that the three men had been judged and punished previously, presented an accusation before a penal judge. However, the State judge considered that the penal process had no merit, since the maxim of [non bis in idem] not to be tried for the same crime twice principle would be violated, and decreed the nullification of the entire criminal process against the men.<sup>75</sup>

## Equality before the Law

*I no longer know if this is discrimination, because I've suffered it for as long as I can remember. Surely even in the belly of my mother I was discriminated against.*<sup>76</sup>

The right to equality, according to the criteria of the ICHR,

*is deduced directly from the united yet personified nature of mankind and is inseparably linked to the essential dignity of the individual, in front of which it is incompatible in every situation that a given group has the right to privileged treatment because of supposed superiority. It is equally incompatible to the notion that a group may be considered inferior or be treated with hostility or in any way that jeopardizes the enjoyment of rights which are accorded to others and recognized in one way or the other as liable to punishment. It is not admissible to create differences of treatment among human beings that do not correspond with their unique identical nature.*<sup>77</sup>

In the same way, in its recent 18<sup>th</sup> Advisory Opinion, the Court considered that “the principle of equality before the law, equal protection before the law and non-discrimination belong to the *jus cogens*, because the whole legal structure of national and international public order rests on this, and this is a fundamental principle that permeates all laws”.<sup>78</sup>

On the part of the IACHR it was found that

*Within international law generally, and inter-American law specifically, a special protection for indigenous peoples may be required if they are to exercise their rights fully and equitably with the rest of the population. Additionally, it may be necessary to establish special measures and protections for indigenous peoples to guarantee their physical and cultural survival, a right protected in various international instruments and conventions.*<sup>79</sup>

Such “protections” or “special measures” are intended to overcome the specific obstacles and the conditions that logically hinder the effective achievement of equality for ethnic-cultural groups in a way that ensures their physical and cultural survival.<sup>80</sup> For this reason, “legislation alone cannot ensure human rights”, since, even if there is a favorable legal framework, it is “not enough to acknowledge protection of their rights, if not accompanied by the policies and actions of the State”.<sup>81</sup>

Regarding the RCI, article 24 of the ACHR obligates all States to offer the same possibilities for preserving each of their own cultures to every existing cultural group within its borders. As already discussed, the choice of an official

language entails disadvantages to those who do not speak the chosen language; the same disadvantages apply to other aspects, such as the law, wearing apparel, religion, the model of development, etc. The majority culture is what is reflected in the native country symbols, national holidays, public institutions and methods of communication. The rest of the cultures are obscured.

It must be acknowledged that there have been advances in recent years as at least now inter-cultural relationships are subjects of discussion, but such relationships are still asymmetric, and it isn't enough to recognize the existence of a different culture if it is a false recognition and doesn't permit the development of conditions of equality.

### Other rights

Briefly, the RCI of ethnic-cultural groups and their members can also find protection in articles 17 (the right to a family) and 18 (the right to a name) of the ACHR.

The protection of article 17 (the right to a family) of the ACHR is based on the right of these groups and their members to preserve their own forms of family organization and kinship; and not to be the object of arbitrary influences on the cultural life of their family and community; and to demand that States carry out "special programs of family formation to contribute towards the creation of a stable and positive environment in which children [whether indigenous or not] can perceive and develop the values of understanding, solidarity, respect and responsibility".<sup>82</sup>

For its part, the protection of article 18 of the Convention (the right to a name) includes the right to give communities, places and persons names in their own language, and to preserve them. The attribution or the unwanted exchanging of traditional names for others that belong to a different culture "constitutes, at least, acts of imposition and cultural aggression".<sup>83</sup>

### Final thoughts

I am aware that the catalogue of human rights secluded in the ACHR is not sufficient to accommodate all the transgressions to indigenous peoples and national minorities; but realistically, I believe that we have not yet linked a treaty within the circumference of the Americas to justly develop these rights. The Project of the American Declaration on the Rights of Indigenous Peoples, as well as the similar document of the United Nations, are yet under discussion, and it looks as if it will be thought about for a long time. Moreover, even if - from an optimistic point of view- cited Declarations were passed promptly, they would be a mere enunciation (certainly very valid, although insufficient)

of rights, still far from constituting a binding treaty or agreement. In summation, the 169<sup>th</sup> WHO Covenant goes on being the only binding instrument linked to indigenous peoples. A similar situation is presented with the rights of national minorities and their members, solely recognized in Declarations (with the exception of article 27 of the ICCPR – the International Covenant on Civil and Political Rights).

With this panorama, we must seek alternative ways at an international level to guard the validity of the rights of ethnic-cultural groups. The way analyzed in this work is, in my judgment, the closest we have in our Americas, as well as the one to so far yield the best results (as far as litigious cases are concerned), both in the juridical discussions as well as in the reparations that have been ordered. Nevertheless, nothing provides the necessary guarantees that the organs of the System will go on “stretching” the ACHR and the rest of the American treaties (or are disposed to), in order to cover every dimension of the RCI, and so we can’t really consider this a solid and finished process. We should therefore go on constructing differentiated rights according to each group since each of the national legislations utilize, as far as possible, the international human rights organisms, and demand their universal implementation. The right to a cultural identity will not be fully recognized until this process is concluded.

## NOTES

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1. C. Lévi-Strauss, «Raza e historia» in *Raza y cultura*, ERCIiones Cátedra, Madrid, [1952], 2000, p. 96. [http://64.233.187.104/search?q=cache:GrEPcSpoH4EJ:www.findarticles.com/p/articles/mi\\_m1310/is\\_2001\\_Dec/ai\\_82066713+Levi-Strauss+how+civilization+benefit&hl=en&ct=clnk&cd=1](http://64.233.187.104/search?q=cache:GrEPcSpoH4EJ:www.findarticles.com/p/articles/mi_m1310/is_2001_Dec/ai_82066713+Levi-Strauss+how+civilization+benefit&hl=en&ct=clnk&cd=1)
2. Preamble to UNESCO’s Universal Declaration on Cultural Diversity (2001).
3. UNESCO, Recommendation concerning mass participation and contribution to cultural life, in Janusz Symonides, “Derechos culturales: una categoría descuidada de derechos humanos”, *Revista Internacional de Ciencias Sociales*, n. 158, December, 1998, available at <<http://www.unesco.org/issj/rics158/titlepage158spa.html>>, access on August 12, 2006.
4. UNESCO, Convention on the Protection and Promotion of Diversity of Cultural Expression, Art. 4.1, 2005.
5. UNESCO, Universal Declaration of UNESCO on Cultural Diversity, 2001, Art. 1.
6. *Ibid.*, Art. 2.

7. Ibid., Art. 2
8. Draft Declaration on Cultural Rights, 1998, Art. 1.
9. Villoro quoted by A. Donoso Romo, «Comunicación, identidad y participación social en la educación intercultural bilingüe», in *Revista Yachaykuna*, Instituto Científico de Culturas Indígenas, 2004, No. 5, Quito, p. 6-38, available at <<http://icci.nativeweb.org/yachaikuna/>>, consulted on Aug. 17, 2006.
10. E.I. Daes, *Estudio sobre la protección de la propiedad cultural e intelectual de los pueblos indígenas*, Subcomisión de Prevención de Discriminaciones y Protección a las Minorías, Comisión de Derechos Humanos, E/CN.4/Sub.2/1993/28, 1993, par. 24.
11. Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954, Art. 1.
12. Convention for the Safeguarding of the Intangible Cultural Heritage 2003, Art. 2.1.
- 13 See, the Recommendation on the Safeguarding of Traditional Culture and Folklore (1989) and the Convention to Safeguard Intangible Cultural Heritage (2003).
14. W.Assies, «Pueblos indígenas y reforma del Estado en América Latina», in Assies, Willem, van der Haar, Gemma y Hoekema, André, *El reto de la diversidad*, Colegio de Michoacán, México, 1999, p. 26.
- 15 Accordingly, Lévi-Strauss's warnings should be considered (Strauss, "Raza y cultura" en *Raza y cultura*, Ediciones Cátedra, Madrid, [1983] 2000, p. 105-142), in the sense that every culture should offer some resistance to the exchange with other cultures, since, otherwise, it would soon have nothing of its own to exchange.
16. L. Villapolo Herrera, "Indígenas modernos. La identidad cultural frente a la interculturalidad y la globalización", in *Encuentro Sudáfrica-Guatemala. Sociedades en transición, experiencias en salud mental, niñez, violencia y post conflicto*, ECAP, Guatemala, First edition., 2001.
17. Accordingly, article 4 of UNESCO's Universal Declaration on Cultural Diversity states that "the defense of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples." In the same sense, the ICHR considered that "so that an ethnic group can survive, preserving its cultural values, it is essential that their members can enjoy each and every right acknowledged by the American Convention on Human Rights, as their effective operation as a group can be thus ensured, all of which includes the preservation of a cultural identity of its own." (Informe sobre la población nicaragüense de origen miskito, par. 14). Finally, article 2.1 of the Convention on the Protection and Promotion of Diversity of Cultural Contents (UNESCO, 2005) states: "Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are ensured."
18. In a case on aboriginals' exemption from military service, the Colombian Court declared that with reference to military service "aboriginals are not protected individually but within their territorial and identity context. It is therefore concluded that the protection introduced by the Law addresses the ethnical community." The Court pointed out that the purpose of the exemption was "to protect



the ethnical group as such, and to subsequently protect the aboriginals who live among aboriginals and as aboriginals." (Sentence C-058/95).

19. See for example, the social dimension of the right to freedom of speech in IACHR Case *Canese vs. Argentina*, Sentence August 31, 2004, Series C N° 111 par. 77; Case *Herrera Ulloa vs. Costa Rica*, Sentence July 2, 2004, Series C N° 107, par. 108, and Case *Ivcher Bronstein vs. Perú*, Sentence September 4, 2001, Series C N° 84, par. 146; and the collective dimension of freedom of association in IACHR, case *Huilca Tecse vs. Perú*, Sentence March 3, 2005, Series C N° 121, par. 69.

20. Art. 1.2 of the IACHR- "To the effects of this Convention, every human being is considered a person."

21. Case *Yatama vs. Nicaragua*, Judge García Ramírez vote, Sentence June 23, 2005, Series C N° 127, par. 6.

22. This has forced the IACHR to "leave the door open" so that other members of the community can be individualized in the future.

24. Inter-American Court of Human Rights, Case 19 *Comerciantes vs. Colombia*, Sentence June 12, 2002, Series C N° 93, par. 140.

25. W. Kymlicka, *Ciudadanía multicultural*, Buenos Aires, Paidós, 1995/1996.

26. The quoted author admits there are cases like those of refugees, who have left their homeland against their will. Regarding this, he states: "the best refugees can expect, being realistic, is to be treated as immigrants [...] This means that, in the long run, refugees are victims of an injustice, as they did not reject their national rights voluntarily. But this injustice was committed by the government of their country, and it is not clear whether we can ask, on a realistic basis, redress from the hosting governments." (W. Kymlicka, *Ciudadanía multicultural*, Buenos Aires, Paidós, 1995/1996, p.140).

27. W.Kymlicka, op. cit., p. 26.

28. Although it can be used to interpret the rights dealt with in the ACHR (treaty on which it has full jurisdiction).

29. See SSP article 19.6. However, there are certain litigation strategies, such as the ones examined by Melish (T. Melish, *La protección de los Derechos Económicos, Sociales y Culturales en el Sistema Interamericano de Derechos Humanos: Manual para la presentación de Casos*, Orville H. Schell, Jr. Center for International Human Rights, Yale Law School, Centro de Derechos Económicos y Sociales, Quito, 2003.), which will not be dealt with here due to space reasons.

30. ICHR, Advisory Opinion OC-16/99, par. 114.

31. Advisory Opinion OC-18/03, par.120.

32. Advisory Opinion OC-5/85, par. 52.

33. The ICHR has particularly used WLO Agreement No. 169 (*Yatama vs. Nicaragua*, *Yakye Axa vs. Paraguay* and *Moiwana vs. Suriname* Cases), the Convention on the Rights of the Child (*Villagrán*

*Morales and others vs. Guatemala* and *Gómez Paquiyauri vs. Peru* Cases), Minimum Rules for the Treatment of Prisoners (*Tibi vs. Ecuador* and *Instituto de Reeducción del Menor vs. Paraguay* Cases), among other international instruments that do not form part of the ISHR.

34. C. Medina Quiroga, *La Convención Americana: Teoría y jurisprudencia. Vida, integridad personal, libertad personal, debido proceso y recurso judicial*, Centro de Derechos Humanos, Facultad de Derecho, Universidad de Chile, Santiago, 2003.

35. Galdino Hernández Castellanos, traditional mixteco doctor. Available at < [http://cdi.gob.mx/index.php?id\\_seccion=743](http://cdi.gob.mx/index.php?id_seccion=743)>, consulted on September 21, 2005.

36. ICHR legal decision, Case of the *Moiwana Community vs. Suriname*, Sentence February 8, 2006, Series C, N° 145, par. 95.

37. *Ibid.*, par. 99.

38. *Ibid.*, par. 96.

39. IACHR, Report on Brazil, 1997.

40. Atahualpa addresses Priest Valverde through his interpreter Felipillo, Gracilazo de la Vega quoted in Ruiz, 2004.

41. Sentence T-1022/01.

42. *Ibid.*

43. For instance, The Virgin Mary is dressed as a Community woman, she has a house, cattle and property managed by an administrator, she goes out to work on the backs of her followers and "raises money for her own celebration" (CCC, Sentence T-1022/01).

44. Jonson quoted in W. Kymlicka, *Ciudadanía multicultural*, Buenos Aires, Paidós, 1995/1996, p. 31.

45. J. Martínez Cobo, *Conclusiones, propuestas y recomendaciones del estudio del problema de la discriminación contra los pueblos indígenas*, United Nations, New York, 1987, par. 125.

46. ICHR, Case of *López Álvarez vs. Honduras*, Sentence February 1, 2006, Series C, N° 141, par. 169.

47. *Ibid.*, par. 171.

48. N. Pacari, "Pluralidad jurídica: una realidad constitucionalmente reconocida", in *Justicia indígena. Aportes para un debate*, Judith Salgado comp., Universidad Andina Simón Bolívar, Quito, 2002.

49. Esteban López, Community leader, ICHR, Case of *Yakye Axa vs. Paraguay*, Sentence June 17, 2005, Series C, N° 125, par. 152.

50. The Committee for the Elimination of Racial Discrimination (CERD), 50th Session, Mexico, A/52/18, 1997, par. 319.

51. The Committee for the Elimination of Racial Discrimination (CERD), 52nd Session, New York, Panama, A/52/18, 1997, par. 342.
52. The Committee for the Elimination of Racial Discrimination (CERD), 46th Session, Guatemala, A/50/18, 1995 par. 305.
53. The Committee for the Elimination of Racial Discrimination (CERD), 51st Session, New York, Colombia, A/51/18, 1996, par. 51.
54. Minority Rights. *Indigenous Peoples and Poverty: The Cases of Bolivia, Guatemala, Honduras and Nicaragua*, available at <[http://www.minorityrights.org/Dev/mrg\\_dev\\_title12\\_LatinAmerica/mrg\\_dev\\_title12\\_LatinAmerica\\_pf.htm](http://www.minorityrights.org/Dev/mrg_dev_title12_LatinAmerica/mrg_dev_title12_LatinAmerica_pf.htm)>, accessed on September 22, 2005.
55. Case of *Yatama vs. Nicaragua*, Sentence June 23, 2005, Series C, N° 127.
56. Ibid. Something similar happened in a case presented to CCC, in which it was alleged that exclusion of an indigenous candidate due to age was incompatible with the cultural identity of the indigenous people she represented, since within her people's world vision her age was sufficient for the exercise of her rights, including that of political representation (Sentence T-778/05).
57. Ibid.
58. Ibid.
59. *White v. Register* (412 U.S. 755), citado en IACHR, Informe anual, 1973.
60. CERD/C/65/C0/1, 10/12/2004, par. 17.
61. Guía para la aplicación del Convenio 169 de la OIT.
62. Botswana A/57/18, 01/11/2002, par. 292-314.
63. (Recomendación General XXIII relativa a los derechos de las poblaciones indígenas, 1997, A/52/18).
64. C-169-01.
65. Quoted by F. Zohra Ksentini in, "Human Rights and Environment", Special Rapporteur's Report, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, E/CN.4/Sub.2/1994/9, 1994.
66. E. I. Daes, *Study on the Protection of Cultural and Intellectual Property of Indigenous Peoples, enas*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, E/CN.4/Sub.2/1993/28, 1993, par. 1.
67. Ibid., párr.4.
68. E. I. Daes, *Indigenous Populations and their Relationship with the Land*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, E/CN.4/Sub.2/2000/25, 2000.
69. For example, in 1967, in Brazil it was made public that 15% of the Yanomami population (15

thousand aboriginals) died due to illnesses introduced by miners, against which they had no natural defenses (IACHR, Report on Brazil, 1997).

**70.** Quoted in O. Correas, "La Teoría General del derecho frente al derecho indígena" in *Crítica Jurídica*, Instituto de Investigaciones Jurídicas, UNAM, 14, 1994.

**71.** Case of the Yakye Axa vs. Paraguay, Sentence June 17, 2005, Series C, N° 125, par. 63.

**72.** M.T. Sierra, "Autonomía y pluralismo jurídico: el debate mexicano", in *América Indígena*, Instituto Indigenista Interamericano, Volume LVIII, No. 1-2, Mexico, 1998, p. 25.

**73.** R. Yrigoyen Fajardo, Raquel "El debate sobre el reconocimiento constitucional del derecho indígena en Guatemala", in *América Indígena*, Instituto Indigenista Interamericano, Volume LVIII, No. 1-2, Mexico, 1998, pp. 81-114.

**74.** Nettle is a plant that causes itching and burning when in contact with the skin; it is frequently used as punishment among Ecuadorian aboriginals.

**75.** Cotopaxi Third Criminal Court, September 10, 2002.

**76.** Testimony of an indigenous Wichi woman. Available in Aranda D., "el apartheid del Impenetrable", available at <<http://argentina.indymedia.org>>, accessed on June 21, 2004.

**77.** Advisory Opinion, OC-4/84, par. 55.

**78.** OC-18/03, par. 101.

**79.** Report on Ecuador, 1997, p. 122.

**80.** The International Convention on the Elimination of Every Form of Racial Discrimination (1965) acknowledges this when it point out in article 2(2): "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of ensuring them the full and equal enjoyment of human rights and fundamental freedoms [...]". Art. VI.1 of the American Declaration Project on the Rights of Indigenous peoples, gets to the same conclusion, together with articles 6.3 and 9.2 of the Declaration on Race and Racial Prejudices (1982).

**81.** IACHR , 2001 Report on Paraguay, par. 28. See also, Committee on Economic, Social and Cultural Rights, General Observation No. 3: "the adoption of legislative measures, as explicitly foreseen in [PIDESC], is not, by itself, a limit to the obligations of the State Parties" (par. 4).

**82.** SSP, article 15.

**83.** J. Martínez Cobo, *Conclusions, Proposals and Recommendations of the Study on the problem of discrimination against indigenous populations*, United Nations, New York, 1987, par. 470.