THE *PRO HOMINE* FRAMEWORK AND THE ROMAN LAW
SPIRIT OF INTERNATIONAL HUMAN RIGHTS LAW

by

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A thesis submitted to the Faculty of Law
In conformity with the requirements for
the degree of Doctor of Philosophy

Queen’s University
Kingston, Ontario, Canada
(October, 2015)

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Abstract

The Romans were the first civilization that envisaged an international legal system rooted in the human person and for all humankind. The innovation of this concept was precisely its universality centered on the human conscience, which, different from past approaches to international law, was not theoretically limited to a group of people or a religion. Although still deprived of universal de facto application, the Roman concept of the law of nations or jus gentium guided, to a greater or lesser extent, all subsequent writings on the subject until its complete limitation to a law between states and its current revival within the theoretical framework of international human rights law. The general framework of human rights is the Roman notion that international law flows from an universal reason of all humankind and is equally observed by all peoples and used as law by all peoples or nations. It is this definition, looked through the perspective of modern times, which forms the pro homine framework. Both the European and Inter-American human rights courts unconsciously follow the precepts of the Roman jus gentium. They contribute to the reaffirmation that international human rights is indeed centered on the human person as the end and source of law. This individual-centric and Roman-based conception guide the transformation, application and interpretation of international human rights law setting the basic parameters of individuals as bearers of rights, duties, capacity and interests at the international level. Accordingly, declarations, treaties and courts merge traditional elements of international law (the language of declarations and treaties) with the core elements of the Roman law of nations (universality, the human person as the source and end of law, international law setting guidelines to change and adapt domestic law and the importance of written instruments and magistrates). Adapting to different historical, legal, economical, social and political contexts, international human rights law is in theory and method part of a truly corpus juris gentium romani (body of the Roman law of nations).
Acknowledgements

My time at Queen’s University was so significant and had such an impact on my life that I cannot express it in words. It excelled my expectations. The challenging of completing a doctorate program is nonetheless enormous. I could not have done it without the assistance, companionship, guidance and friendship of a number of special people. First, I would like to thank my supervisor, Professor Sharryn Aiken. I was lucky to have a great supervisor who helped me and always believed I could accomplish all my objectives. She allowed me to be a free thinker and develop all my potential. I also had indispensible assistance, guidance and help from Professors Daryl Robinson, Mark Walters, Joshua Karton, Leslie Green and Stan Corbett. They were constantly part of my life and helped me in so many ways that thank each and every one of them from the bottom of my heart. I also want to thank my friends and colleagues from Queen’s law who became friends for a lifetime, especially Saki, Adelina, Kerri, Tom, Jie, Manoj, Gillian, Chris and Tobi. I would also like to thank Phyllis who is always so helpful and friendly. Specially, I would like to thank Professor Valerio Mazzuoli who is such an inspiration and was an indispensible source of knowledge and guidance. Kingston would not be such a special place if I did not have so many friends here. I would like to thank Ricardo, Carolina, Stuart, Lili, Tanya, Ciera and Hyo. I would also like to thank my family, Avany, Danniel and my father, Eliziario, who passed away during my doctoral studies but is always in my thoughts. I would like to thank my grandmother, Ana Luiza, who is such an indelible presence in my life. I would like to thank my friends and family from Brazil. Last but not least I would like to thank my defense committee for agreeing to me part of my journey and for all the assistance.

Thank you all!
Statement of Originality

I hereby certify that all of the work described within this thesis is the original work of the author. Any published (or unpublished) ideas and/or techniques from the work of others are fully acknowledged in accordance with the standard referencing practices.

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Chapter 1

Introduction

This thesis seeks to contextualize the discourse and underpinnings of international human rights law based on international law’s concept, the decisions of international courts and the phraseology of treaties and declarations. It places the phraseology enshrined in human rights treaties and declarations and the reasoning of international courts in human rights cases within a theoretical framework connecting them with the concept of the law of nations established by the Roman *Corpus Juris Civilis*.

Accordingly, this thesis addresses two interconnected points establishing a contextual framework that explains the current definition and application of international human rights law. First, the phraseology enshrined in human rights declarations and treaties is human-centered and dates back to the Roman concept of the law of nations. The definition of the law of nations, focusing on the human person as a source and end of law, established by Roman jurists and later codified in the *Corpus Juris Civilis* is part of the discourse of modern international human rights. The post-Second World War paradigm focused on human rights is not a new framework underpinning international law. Conversely, the current international human rights system is an adoption of the Roman theoretical concept of international law adapted to contemporary society.

Secondly, the current understanding that individuals have rights under international law, especially in human rights cases, and the decision-making approach of international human rights courts can be contextualized within the Roman concept of international law. International human rights courts are not isolated from each other or from international law. The reasoning of international human rights courts and the acceptance of the individual personality by
international courts are consequences of the phraseology and human rights discourse states adopted in treaties and declarations, which is embedded in Roman law. It is, thus, possible to contextualize the current decision-making process of international human rights courts and the phraseology of treaties and declarations under a theoretical framework that is focused on the human person as the source and end of law and is fundamentally based on the Roman concept of the law of nations.

Accordingly, the Roman concept of the law of nations is human-centered or *pro homine*, that is, primarily focused on the human person as the source and end of international law of human rights. This is a universal concept. In other words, the notion that the human person possesses international legal personality places international courts under the responsibility to consider the interests of individuals in human rights cases. Therefore, the universal element of human rights is precisely the necessity to acknowledge the human person as a subject of international law with rights, duties, capacity and interests different from that of states. This is a shift from the traditional definition of international law.

International law is usually envisaged as a group of norms and principles that guide the relations of the international community comprised of sovereign states and international organizations. ¹ It is a system of cooperation whereby law is created by states to regulate themselves and international institutions. ² This conception, however, is challenged by current developments of the law of nations, especially with the increasing importance of international law of human rights, which added another central element to the equation: the human person.

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The purpose or objective of international human rights law is to protect the human person. This goal is reached based on a rationale that starts with cooperation between states and reaches a vertical approach when an individual argues, before an international body, that a state breached international norms of human rights. The traditional view of international law is not suited to explain this complex system. Accordingly, the problem posed to scholars and academics is to understand and explain the theoretical underpinnings of international human rights law. Furthermore, the connections between human rights and international law in general are still unclear. Indeed, the history of the law of nations as a whole is vague and permeated with contradictions.

The legal literature is unsure in pointing the precise birth of the law of nations and of the crystallization of international human rights law. At first glance, international law (which concerns states) and human rights (which are preoccupied with the human person) can seem completely unattached to each other and without historical connections. Furthermore, current international legal literature fails to follow the examples of notables as Hugo Grotius, Francisco Suarez and Alberico Gentili and turn to Roman law as a fount of comparison and knowledge in understanding an guiding the evolution of the law of nations.

Accordingly, this thesis seeks to address the following questions: how did human rights develop as a central aspect of international law? Is there an individual-centric discourse in international human rights law? What is the binding element of human rights declarations? Can individuals be envisaged as subjects of international law? What is the position of international courts? If individuals can be subjects of international law, what would this legal personality entail? Which society developed the law of nations? Could Roman law provide some guidance in understanding modern human rights? Is there a connection between human rights and the ancient
law of nations? What is the theoretical framework of the extensive interpretations of the Inter-American Court of Human Rights and the European Court of Human Rights?

After this brief introduction, in chapter one, I analyze the history of international human rights law from the 19th century to before the Second World War from the standpoint of an increasing focus on the human person. Human rights were part of the law of nations of the 19th and early 20th centuries. However, this human protection was limited by the predominant view of state voluntarism as the theoretical source of international law. In other words, human rights were limited in scope and application.

In the second chapter, I analyze the transformation of international human rights law after the Second World War. In my view, the new paradigm set by the crystallization of human rights after the Second War is the human-centrality crystalized with normative force in declarations and treaties, which I call the “general normative force”. States themselves in treaties and declarations accorded rights and duties to individuals and, consequently, established an individual-centric and universal system at the heart of international law of human rights.

The codification of essential human rights in treaties and declarations sought to establish a core set of individual rights rooted in and flowing from the human person. This reasoning was enshrined in human rights treaties and declarations with normative force. The general normative character of human rights declarations is the international personality of individuals, that is, the recognition that the human person has rights, duties and interests at the international level independently of his or her state of nationality or residence. I call this international human rights system the pro homine framework.

In chapter three, I focus on the individual legal personality rooted in the Roman concept of the law of nations. I seek to explain and prove the inefficacy of the classical positivistic
approach to international law (voluntarist positivism), which relegates it to an inter-state legal system in which individuals are its objects, or are, at the most, its beneficiaries. As compelling as it may seem, this theory is not supported by relevant case law from courts as the International Court of Justice, which recognized that international law might grant direct rights to individuals.

Furthermore, theories denying the international legal personality of individuals are not in accordance with the existence of an international human rights system. To accept that individuals are a thing or a beneficiary of international law, who only possess rights and duties under municipal law, is to sustain that individuals have rights and duties under domestic law in accordance with, consistent with and in consequence of international law. Accordingly, to admit that individuals have rights and duties in accordance with international law is to agree that the human person is the possessor of legally protected interests at the international plane. Consequently, the possession of legally protected interests and the performance of legally prescribed conducts are qualities of legal persons and not objects.

Chapter four focuses on the evolution of the application and concept of the law of nations from ancient civilizations to the position of modern scholars. A number of old civilizations dating back to ancient China and Egypt maintained certain practices that arguably belong to the current notion of international law. However, the Romans were the first civilization to envisage a universal legal system rooted in the human person and for all humankind. The innovation of this concept was precisely its universality centered on the human conscience, which, different

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4 See LaGrand Case (Germany v. United States of America) [2001] ICJ Rep 466; Case Concerning Ahmadou Sadio Diallo (Guinea v Republic Democratic of Congo), Preliminary Objections [2007] ICJ Reports 582.
5 See Georg Manner, “The Object Theory of the Individual in International Law” (1952) 46 AJIL 428 at 441.
7 See Inst I.2.I (translated by Paulus Krueger); and Dig 1.1.1 §3 (Gaius).
from past approaches to law, was not theoretically limited to a group of people or to a religion. Although still constrained and deprived of universal *de facto* application, the Roman concept of the law of nations or *jus gentium* guided, to a greater or lesser extent, all subsequent writings on the subject until its complete limitation to a law between states or a *jus inter gentes*.

After the personality rule lost currency in Europe, all subsequent work on the law of nations were in conformity or moving away from the Roman notion of the law of nations. Gaius’s definition of the law of nations has influenced the so-called fathers of international law as Vitoria, Suarez and Grotius. Indeed, Vitoria’s law of nations was based on the Roman notion of natural reason. Furthermore, Grotius’s view of the individual as a subject of rights in a system above the “reason of state” fits and is better explained by the Roman concept of *jus gentium* applied to different groups of individuals and nations flowing and based on the human person.

Voluntarist positivism proved ineffective to explain and define the current system of international law, especially in human rights. Contrary to Lauterpacht or Cançado Trindade, I believe the concept of international human rights law is not rooted in the so-called founding fathers, but in the Roman concept of the law of nations enshrined in treaties and declarations and later reaffirmed by the European and Inter-American courts of human rights. Accordingly, the

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general normative character of human rights declarations is the Roman definition of an
ternational law observed by all peoples and nations and flowing from all humankind. It is
precisely this definition, looked through the perspective of modern times, which forms the
general normative character of human rights instruments and crystallizes the pro homine
framework.

In the final chapter, I analyze international human rights law’s Roman-based priority of
persons through the Inter-American and the European courts of human rights. The European
Court was the first to recognize that international human rights law, different from general
international law, is centered on individuals and based on current developments of law. In 1978,
for example, the European Court recognized that the European Convention is a living instrument,
which must be interpreted in the light of present-day conditions.\textsuperscript{13} In the Sunday Times v UK, the
European Court, analyzing limitations on the freedom of expression, argued that exceptions to
rights must be restrictively interpreted, which in my view informs that states have less “power of
control” in human rights norms.\textsuperscript{14} In Loizidou v Turkey, the European Court of Human Rights
arguably advanced the practical recognition of the individual-centric framework asserting that
the European Convention is a constitutional instrument of European public order (ordre
public).\textsuperscript{15}

The Inter-American Court, influenced by its European counterpart, further acknowledged
the existence of a pro homine system as a modern interpretation of the Roman concept of the law
of nations. The Inter-American Court, by referring to a “pro homine principle” rooted on Article
29 of the American Convention and on the Vienna Convention on the Law of Treaties,

\textsuperscript{13} Tyler v United Kingdom (1978) 21 ECHR (Ser A) 612 at para 31.
\textsuperscript{14} Sunday Times v UK (1980) 2 EHRR 245 at paras 59 and 65.
\textsuperscript{15} Loizidou v Turkey (1995), 20 ECHR (Ser A) 99 at paras 70-75.
established an extensive method of interpretation and application for its main human rights instrument focused on the human person.

In the *Yakye Indigenous Community Case*, for example, the Inter-American Court applied an extensive individual-centered interpretation to, based the American Convention and other human rights instruments outside of the regional context, place the state under the obligation to provide effective means with due process guarantees for the members of the indigenous communities to claim traditional lands, as a guarantee of their right to communal property. In procedural law, the Inter-American Court, again based on an individual-centered interpretation of law, reversed the onus of proof deciding that the state “claiming non-exhaustion has an obligation to prove that domestic remedies remain to be exhausted and that they are effective”. The Inter-American Court acknowledged this reasoning in its early days arguing that, based on Article 29 of the Convention “the rule most favorable to the individual must prevail”.

The European Court of Human Rights grounds its individual-centric decisions and teleological interpretations on the principle of effectiveness and the notion of implicit rights. The Inter-American Court of Human Rights applies a similar interpretation but stresses the importance of the human person (the *pro homine* principle). In my view, these are elements that recognize the individual-centric or *pro homine* framework crystallized in human rights treaties and declarations, which codify the Roman conception of the law of nations. Accordingly, Gaius’s definition of the law of nations found its way into the modern conception of international

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16 *Yakye Indigenous Community Case (Paraguay) (2005) Inter-Am Ct HR (Ser C) No 125 at paras 95 and 118.*
17 *Fairén Garbi and Solís Corrales Case (Honduras) (1994), Preliminary Objections, Inter-Am Ct HR (Ser D) N° 2 at para 78.*
human rights law. First, it was part of declarations and treaties, but was soon after recognized by regional human rights courts.

Moving away from a solely voluntarist and state-centered system, the structure, that is, the concept, reasoning and framework of Post-Second World War international human rights law is Roman-based. Notions such as the margin of appreciation and the restrictive interpretation of law must be in accordance with the individual-centric framework. States are the primary subjects of international law. However, they acknowledged an individual-centric framework in order to create a truly universal human rights system. If states have already accepted this general self-limitation of power as part of the international human rights system, they cannot, in specific cases, claim this unlimited sovereignty back. The restrictive interpretations in general must be within the boundaries of a *pro homine* view of international law.

I seek to demonstrate that the concept of international law is not a recent creation. Ancient civilizations followed rules and philosophical doctrines regulating relations with other civilizations and foreigners. International law, however, was limited in scope and application. This limitation only changed with the Roman concept of the law of nations. Although still restricted in praxis, Romans lawyers and magistrates envisaged a universal legal system flowing from the human person and for all humankind. It arguably still encompassed the traditional areas of international law but it sought to influence and provide guidelines to domestic law as well.

The Roman view of international law lost space first to personality law and after to legal positivism focused on states. This state-centered system, which started with the emergence of modern states, became the main international law theory in the 19th century. Human rights were only marginally part of international law before 1945. Moreover, the state-centered theory hindered all the efforts to grant importance to the human person. This only changed after the
Second World War. The international community rebuilt the international legal system based on the previous pre-War structure but with deep changes. The language of human rights declarations and treaties acknowledge the universality and human-centrality in international law. Furthermore, international courts reaffirmed the individual-centered and universal aspects of international law of human rights. In my view, the Roman concept of the law of nations, adapted to modern perspectives, is the best definition of international human rights law.

International human rights law is not only based on the Roman definition of jus gentium, but, furthermore, on how this system operates. The Roman jus gentium changed the reasoning and some elements of jus civile establishing a more humane system.\(^{19}\) Certain aspects of the jus gentium were subsumed by jus civile. Consequently, the Roman law of nations regulated topics intrinsically connected to international law and provided guidelines or parameters to change or be incorporated into domestic law.\(^{20}\) This same understanding applies to international law of human rights. This subdivision of the law of nations is intrinsically connected to domestic law. The Universal Declaration, for example, was created based on existing domestic bill of rights but, after it was approved, influenced the elaboration of a diverse number of constitutions.\(^{21}\) Consequently, international human rights system is part of the juris gentium romani or the Roman law of nations.

This work is, thus, divided in four interconnected conceptual categories. First, I analyze the human rights discourse in treaties and declarations before and after the Second World War. In the second part, I focus on the individual legal personality asserting a limited applicability of voluntarist positivism in human rights. The third part of this thesis focuses on the evolution of

the concept of the law of nations based on Roman law. In the last part, I analyze the Roman *jus gentium* in modern international human rights law comparing it with case laws from the Inter-American Court of Human Rights and the European Court of Human Rights. Finally, I determine the existence of this individual-centric system of international law rooted in a Roman notion of the law of nations adapted to modern perspectives and challenges.

### 1.2. Contribution to the Science of Law

The main purpose of this thesis is to contextualize the phraseology of human rights treaties and declarations and the reasoning of international courts in human rights cases based on the Roman concept of the law of nations. It thus seeks to show that the post-Second World War paradigm of international law based on the human person is not a new creation. Rather, the current international human rights law system adopts in treaties and declarations the Roman concept of the law of nations, which is reaffirmed and extended in the jurisprudence of international courts.

In other words, international human rights law is based on the individual as a subject of international law with rights, duties, capacity and interests at the international level. This system approximates international human rights to the Roman law of nations, which prioritized the human person as a source and end of law. Furthermore, the Roman law of nations guided the interpretation and evolution of *jus civile* (domestic law) in a way similar to the modern relationship between international human rights and municipal law. Accordingly, the universal element of international human rights law is the individual legal personality. That is, individuals
have rights and interests at the international level that need to be taken under consideration by states, international adjudicative bodies and the international community as a whole.

The source of the law of nations does not lie with the so-called founding fathers, but, differently, with the Romans. The modern international human rights instruments, by prioritizing persons based on a pro homine view, codifies the Roman notions of the law of nations. Moreover, both Inter-American and European courts of human rights unconsciously accept and reaffirm this view. This Roman framework contextualizes the approaches of both human rights courts establishing the view that adjudicative bodies are not isolated but rather decide “hard cases” based on a theoretical framework that underpins international human rights law.

In order to understand this system of international law of human rights, I analyze the concept the law of nations throughout history, the Roman law of nations, the view of the so-called founding fathers of international law and the individual legal personality to explain the role of individuals at the international plane and how that shaped an individual-centric framework. Consequently, I will seek to give my own perspective on topics such as the normative character of declarations, the difference between declarations and treaties, the source of individuals’ rights at the international level, individual interest as one of the elements the individual personality, the source of the teleological interpretation of international human rights, the characteristics of the Roman law of nations and the theoretical background of modern international human rights law.

This work represents a contribution to the study of the science of law. The role of the human person in international law, including in human rights, is far from uncontroversial. The object theory is still relevant and part of the reasoning of international scholars.22 International

22 See Orkhelashvili, supra note 3.
lawyers who support the international legal personality of individuals either root it in the so-called “founding fathers” of the law of nations,\textsuperscript{23} or on developments of legal instruments without a historical context,\textsuperscript{24} or follow a positivistic analysis.\textsuperscript{25} Furthermore, historical and theoretical analysis focus on general aspects of Roman law and natural law without deep links to international law\textsuperscript{26} or argue a new legal system without rescuing the theoretical elements of the Roman law of nations.\textsuperscript{27}

Moreover, even the status of Roman \textit{jus gentium} as international law is controversial. Scholars question and deny that the Romans indeed envisaged a system of international law but rather provided a rudimentary source of private international law\textsuperscript{28} or developed a legal system, mostly commercial law, to apply to foreigners and citizens alike without any connection to modern international law.\textsuperscript{29} One scholar summarized this view affirming that “so great was the influence of Grotius that even today \textit{Jus Gentium} is generally understood as meaning international law, a complete misconception, which if continued will serve only to retard the discovery of fundamentals”.\textsuperscript{30} Indeed, the existence of an ancient international law in general is controversial and questioned.\textsuperscript{31} Connections between ancient international law and modern international human rights law are, consequently, not part of legal literature.


\textsuperscript{24} See generally Kate Parlett, \textit{The Individual in the International Legal System: Continuity and Challenge in International Law} (New York: Cambridge University Press, 2011).


\textsuperscript{27} Rafael Domingo, \textit{The New Global Law} (New York: Cambridge University Press, 2010).


\textsuperscript{29} Walton, \textit{supra} note 19 at 367.

\textsuperscript{30} Henry C. Clark, “Jus Gentium – Its Origin and History III” (1920) 14 IIILR 341 at 347.

\textsuperscript{31} See Bederman, \textit{supra} note 6.
Although the European Court of Human Rights crystallized principles and interpretative notions as implicit rights, effectiveness, public order and living organism,\(^{32}\) it has never explicitly acknowledged the existence of an individual-centric legal framework flowing from the individual legal personality and based on Roman law. On the contrary, it could be argued that the Strasbourg Court focuses on the margin of appreciation as one of its main interpretative tools.\(^{33}\) There is no scholar advocating the Roman elements enshrined in decisions of the European Court of Human Rights.

Similarly, although I borrow the term *pro homine* from the Inter-American Court of Human Rights,\(^{34}\) this regional court envisages it as a principle that, in the words of Judge Ramirez, is invoked to “understand the meaning of a norm and also to include it in the principle that justifies it”.\(^{35}\) Furthermore, the Inter-American Court normally uses the *pro homine* to fill gaps of the American Convention without explicitly granting it any especial meaning.\(^{36}\) The Inter-American Court’s application of the *pro homine* principle is based in Article 29 of the American Convention and Article 31(1) of the Vienna Convention on the Law of Treaties,\(^{37}\)


\(^{34}\) See *The American Convention on Human Rights*, 1969, 1144 UNTS 123, OASTS no 36.


\(^{36}\) Lucas Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law" (2010) 21 EJIL 585.

which, in conjunction, inform that treaty obligations must be extensively interpreted taking into account that the objective of human rights treaties is the protection of the human person.\textsuperscript{38}

There is, however, a lack of theoretical arguments for the existence of the \textit{pro homine} principle,\textsuperscript{39} for the decision-making reasoning of the European and Inter-American regional courts – which leads to a treaty application so extensive to the point of creating new rights -, and the current historical approach of international human rights law, which seems to differ from traditional international law. The study of ancient international law and its impact on modern international law is an “under-studied field”\textsuperscript{40} and “many interesting themes are left for future research to tackle”\textsuperscript{41}.

Accordingly, I seek to tackle one theme: the current international human rights framework and its theoretical connections with the Roman law of nations. The current framework of international human rights law is a rescue of the Roman law notion of the law of

\footnotesize

\textsuperscript{38} See Crema, \textit{supra} note 33.


\textsuperscript{41} \textit{Ibid.}
nations centered on four basic premises. First, human rights seek and presuppose a universal application. Second, these two systems are focused on the human person as the source and end of law. Third, the development of both systems is highly based on the work of jurists and adjudication bodies. Finally, the Roman law of nations as international human rights law influences and establishes guidelines for domestic law. Consequently, international human rights law is an inherent law of natural reason established among all mankind and binding on all peoples and states alike.

1.2. Background Concepts

In order to argue the existence of a legal argument based and flowing from the individual legal personality, I will analyze universal and regional human rights instruments, the legal doctrine, the concept of international law, certain aspects of Roman law and case laws. My perspective is largely grounded in a universalist approach to human rights, that is, certain theoretical elements of international human rights law can be accepted and applied everywhere. However, certain scholars disagree with a universalist position and advocate the application of a relativist perspective of human rights.

The universalist argument claims that all international human rights are to be applied everywhere and are the same everywhere.42 Conversely, proponents of cultural relativism in human rights argue that notions of right and wrong differ because culture itself differs from place to place.43 Consequently, cultural relativism can go as far as asserting that due to these different

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views, no state is entitled or is justified in imposing certain notions and ideas on other states. The relativism approach might see the Universal Declaration and similar human rights instruments as a cultural imperialism of the West rooted in liberalism and Christianity.\textsuperscript{44}

In my view, this cultural perspective of human rights can lead to two major arguments. First, human rights might not be as universal as envisaged by some scholars, activists and organizations. Second, human rights can be shaped based on cultural and religious considerations of a specific group of people or state. The first position’s main argument is that the universal, human-centric, natural law oriented human rights system, especially embodied in the Universal Declaration of Human Rights, is a western concept and, moreover, no concept is as such universal.\textsuperscript{45} Consequently, a complete universality of human rights is a questionable assumption because not all states went through the same historical and cultural paths as the industrialized western nations.\textsuperscript{46}

The second position seeks to analyze and understand human rights or international law in general rooted in specific cultural and religious backgrounds. Accordingly, traditional concepts and norms can be reinterpreted based on religious or cultural elements to be more effective and in harmony with local particularities.\textsuperscript{47} An-Na'im, concerned about the relation between Islam and human rights, adopts a “constructive” approach, that is, seeks to reinterpret fundamental sources of Islamic tradition in a “sensitive” and “legitimate” manner based on human rights

\textsuperscript{44} \textit{Ibid.} See also \textit{Universal Declaration of Human Rights}, GA Res 217 (III), UN GAAOR, 3d Sess, Supp N° 13, UN Doc. A/810 (1948).
\textsuperscript{45} R. Panikkar, "Is the Notion of Human Rights a Western Concept?" (1982) 30 Diogenes 75 at 79-84.
\textsuperscript{46} \textit{Ibid.} at 88.
His argument is based on the idea that from “a Muslim cultural perspective, there are problems with human rights as defined and developed by the western liberal tradition”. Thus, to this author, the notion of human rights is a western concept, which needs to be reinterpreted and shaped to be applied based on Islamic traditions. Perhaps in a more activist and religious approach, he asserts that:

International peace, justice, and human rights have already been partially achieved through the Grace of God, and are to be enhanced and promoted through His Grace too. It is the paramount religious duty of all Muslims to participate in this ultimate act of worship.

In my view, these relativist arguments stem from the position that human rights developed in a historical evolution, which can be traced back to Christianity and Jewish traditions, and from social and political circumstances in Europe dating back to 1215, the French Revolution and the Enlightenment thought. However, the origins of human rights and of international human rights law are imprecise and a source of much debate. Before the Second World War, international human rights law was constrained to certain rights granted to certain individuals in certain situations. One scholar argues that the current notion of human rights, as

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48 Abdullahi Ahmed An-Na’im, "Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives: A Preliminary Inquiry" (1990) 3 Harv Hum Rts J 13 at 17. Although acknowledging that only a minority of Muslims share his position, Na’im asserts that “a modern version of Islamic law can and should be developed. Such a modern ‘Shari’ā’ could be… entirely consistent with current standards of human rights” (ibid. at 21). Consequently, he advocates Islamic reforms, which “must be sufficient to resolve human rights problems with Shari’ā while maintaining legitimacy from the Islamic point of view” based on contemporary economic, political and social circumstances because, according to him, human rights can be more effective in Muslim states if they have “Islamic legitimacy” (ibid. at 46-47 and 51).
50 Ibid.
51 See Chapter III.
52 Ibid. See also Heiner Bielefeldt, "‘Western' versus 'Islamic' Human Rights Conceptions? A Critique of Cultural Essentialism in the Discussion on Human Rights" 28 Political Theory 90 at 94-97.
universal and inherent, only fully developed in 1970s,\textsuperscript{53} thus, after the process of decolonization of most African and Asian European colonies. Furthermore, a number of African states adopted the “spirit”, that is, the legal reasoning of the Universal Declaration of Human Rights in their constitutional systems.\textsuperscript{54} Moreover, the Vienna Declaration and Program of Action, which reaffirm the basic values set by the Universal Declaration of Human Rights, were adopted by the United Nations in 1993.\textsuperscript{55}

Arguably, concepts such as equality between states, the elements and definition of states and statehood, and the notion of sovereignty are basic elements deeper rooted in liberal European thought than the notion of human rights, which is not only a difficult term to define, but perhaps is even more arduous and no less controversial to have its origins traced. Furthermore, the modern concept of international organizations is arguably grounded in the philosophical work of the Kant.\textsuperscript{56} Consequently, certain traditional underpinnings of international law are European, whereas human rights are only partially grounded in historical European events such as the French Revolution. Bielefeldt, looking for an “overlapping consensus” on human rights, argues that:

Hence there is no such thing as the Western or the Islamic conception of human rights. Historic analysis indeed shows that human rights always have been a political issue, not the natural result of any "organic" development based on the genes of a particular culture. Therefore any cultural essentialist occupation, such as an

\textsuperscript{54} See Chapter II.
\textsuperscript{55} Ibid. See also World Conference on Human Rights, Vienna Declaration and Programme of Action, 14 to 25 June 1993, UN Doc A/CONF.157/23 (1993) at I (1).
"Occidentalization" or an "Islamization" of human rights, should be rejected.\(^{57}\)

Furthermore, the system of law and courts is not a Western invention. Arguably, the origins of Roman law lie in the written law and codes of Babylon, especially with the Code of Hammurabi.\(^{58}\) Mesopotamian law, by its turn, influenced Egyptian law, which influenced Phoenician law.\(^{59}\) The law of these ancient societies had a great impact in Greece,\(^{60}\) which by its turn directly influenced Rome.\(^{61}\) Roman law, to a greater or lesser extent, influenced the legal systems of all nations, that is, these systems, in the words of Sherman, can be “largely traceable to Roman law”\(^{62}\).

The notion that the law of nations is a Christian and European creation is a superficial statement that bears the same historical and methodological flaws as arguing that law was created in Europe. To some extent, international law was part of the legal life of many ancient civilizations.\(^{63}\) Furthermore, it is not possible to fully understand Grotius’s law of nations without his predecessors Gentili and Vitoria who were influenced by Thomas Aquinas who was influenced by Isidore of Seville.\(^{64}\) It is not possible to understand the latter without first knowing Ulpian and before Ulpian there was Gaius who was influenced by Cicero.\(^{65}\)

\(^{57}\) Bielefeldt, supra note 52 at 114.
\(^{59}\) Ibid. at 18-20.
\(^{60}\) Ibid.
\(^{61}\) Ibid. at 20-21.
\(^{62}\) Ibid. at 13.
\(^{63}\) See Bederman, supra note 6; Coleman Phillipson, The International Law and Custom of Ancient Greece and Rome (London: Macmillan and Co, 1911).
\(^{64}\) Rafael Domingo, supra note 27 at xv.
\(^{65}\) Ibid.
The theoretical source of the modern law of nations lies, in my view, in Roman law. The Roman law of nations was universal and rooted in the pre-Christian concept of natural law.\textsuperscript{66} Furthermore, it is my main argument that this Roman based law of nations is specially part of modern international human rights law.\textsuperscript{67} To label international law or human rights as “European” or “Christian” can arguably be an oversimplification, which might not correspond to reality.

It is not within the scope of this work to analyze cultural or religious justifications for a universal or relative human rights system. However, an individual-centric human rights system, in my view, necessarily acknowledges a pluralistic world, that is, an international community which includes individuals and, furthermore, individuals with different backgrounds. Moreover, I am concerned with the instruments regarding the protection of human rights and their acceptance by international legal institutions and the international community. Consequently, that fact that the United Nations has accepted the Universal Declaration of Human Rights is sufficient to acknowledge that its reasoning was accepted by the member-states of the United Nations under the rules of the law of nations. Thus, if the international rules regarding treaty acceptance and entrance into force are met, these instruments are valid under the recognized rules of the law of nations and are thus officially part of the “legal world”, that is, they exist as legal instruments in the domain of international law. Furthermore, I can refer to the word “universal” as instruments that are not constrained to a specific geographic location. Conversely, regional instruments are those necessarily connected to a certain part of the globe.\textsuperscript{68}

\textsuperscript{66} See Chapter V.
\textsuperscript{67} Ibid.
I do not deny that certain specific human rights characteristics might differ from place to place or within groups of people due to cultural differences. Moreover, regional human rights instruments might even acknowledge and better apply certain cultural differences in specific geographic locations. Although I work mainly under the premise that certain instruments are applied universally – globally or regionally considered – they might be applied in different ways in order to acknowledge particularities of a specific group of individuals. The individual-centric framework, which flows from international treaties and legal decisions, can acknowledge cultural particularities and comprise extensive applications of rights that accommodate a pluralistic society and apply human rights instruments in a way that the interests of individuals are taken into consideration.

Accordingly, even though I start with the premise that human rights are universal, I acknowledge that these universal or regional instruments can and should be applied in a way that can accommodate different cultural backgrounds and individuals. Consequently, a general system of human rights can be incorporated within a framework that acknowledges the importance of the human person with specific necessities and cultural backgrounds.

1.3. Methodology

Modern international law of human rights incorporates the “spirit”, that is, the reasoning and concept, of the Roman law of nations. This was arguably an unconscious decision of states and

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69 See Chapter VI. Moreover, I adopt a natural law view of the law of nations (human rights flow from the human personality) and the positivistic notion that legal instruments are indeed necessary to establish mechanisms for the protection of human rights. Seeking to avoid theoretical contradictions, I use words as “inform” meaning that treaties, courts, states and declarations affirm certain rights that already exist flowing from the human personality. However, these rights are now part of a specific system of international human rights law. Consequently, words such as “inform” seek to avoid theoretical misconceptions, which could stem from words such as “establish”.

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the international community when they elaborated the post-Second War instruments and organizations. That is, states drafted treaties and declarations crystalizing the individual as a source and end of law. This system is in itself Roman-based. Furthermore, the European and Inter-American courts reaffirmed these Roman values. Thus, I intend to examine the concept of international law and human rights throughout history, the subjects and sources of international law, certain elements of the Roman law of nations, the discourse of human rights instruments and some case laws of the European and the Inter-American human rights courts.

I will pursue analytical and comparative approaches. I intend to compare ancient and modern concepts of the law of nations and different doctrinal views on this topic. Furthermore, I will analyze in detail the role of treaties and declarations in crystalizing the individual legal personality. To that end, I will analyze and compare treaties, declarations and legal doctrines searching for a link between Roman law and modern international law. Moreover, I will compare the theoretical framework of the Roman-based international law with case law from the European and Inter-American human rights courts.

This thesis is not focused on historical or political forces and events that might have driven certain legal doctrines and definitions. Rather, I am concerned with the evolution and application of a specific concept, that is, the understanding and definition of international law and how that connects to the current discourse of human rights instruments and court decisions. As the Roman definition of the law of nations was either accepted or rejected in subsequent writings, comparative and analytical approaches are necessary to describe and analyze the way in which Roman law influenced subsequent developments in the law of nations.
Chapter 2

The Human Person and the History of Modern International Human Rights

Law until Before the Second War

This thesis discusses the international legal personality of individuals which places them in a central position in international human rights law, and informs that states and international organizations – including tribunals – need to take the individual personality and interests into consideration when developing and applying human rights norms. This framework, which I call pro homine, is a revitalization of the Roman concept of the law of nations or jus gentium adapted to our contemporary society.

Furthermore, this hermeneutic system was arguably adopted, to some extent, by the European Court of Human Rights and especially by the Inter-American Court of Human Rights. In this Chapter, I focus on the concept, evolution and discourse of human rights at the international level, especially on how international law and states placed individuals in the protection of human rights before the Second World War.

This chapter focuses on the internationalization of human rights before the Second World War. Theoretically, it could be argued that modern human rights started to be part of international law with the Enlightenment thinkers. However, before the Second World War, the international protection of human rights was limited and state-centered. This system changed with the human rights declarations and treaties that were concluded after the Second World War. States recognized the human person and universality as fundamental parts of international law. Arguably, states acknowledged that the international protection of human rights is centered on individuals.
Thus, in my view, international human rights law can be defined as a group of rights which assure human dignity. Consequently, domestic and international human rights converged into a similar definition. In both systems, human rights are universal, rooted on the human person and grant rights to individuals. Accordingly, the questions that guide this Chapter are: How did modern human rights become part of international law? Are individuals an important part of international human rights law? Is there a difference between a human rights treaty and a human rights declaration?

2.1. Brief Comments on the Emergence of Modern Human Rights System

From the establishment of modern states to before 1945, modern human rights were largely articulated at national levels and reflected in instruments such as the Magna Carta, the American Declaration of Independence and Bill of Rights, and the French Declaration of the Rights of Man and of Citizens.\(^1\) However, the preoccupation with the protection of certain rights can be traced back to theories of natural law and religious doctrines.\(^2\) Some scholars argue that theology represents the foundation of human rights.\(^3\) Kaplan, for example, comments that the Old Testament acknowledges the high value of individuals. He asserts that:

> Human rights belong to man, not only because of his place in nature, but by virtue of his own nature. He was created in the image of God, and thus embodies, in his own fashion and within his own limits, ultimate and supreme worth. The preposition that man was created in the divine image (Gen.

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1:27) was selected by Azzai, one of the sages of the early Talmudic period, as the most important single verse in scripture.⁴

From a Christian perspective, for instance, the duty to love is based on divine righteousness and a test for the love of God.⁵ Extrapolating the domain of Christianity, in a wide religious context, every human being is sacred.⁶ This concept is not only rooted in the Judeo-Christian tradition, but also in Islam and other religions with a theistic base.⁷ Religions have moral commandments such as the “golden rule” – found in all religions – which imposes the duty not to harm others or to not do to others what you would not want to be done to yourself.⁸ Consequently, cultural, philosophical and moral justifications for the protection and universality of human rights can be found in all major religions of the world.⁹

Notwithstanding Aristotle’s position that individuals should flourish, that is, develop both morally and intellectually¹⁰ and the stoicism advocating a universal dignity of individuals based on a common rational heritage, which influenced the development of human rights,¹¹ the Magna Carta, from 1215, stands as an important mark in the initial modern codification of human rights.¹² King John, under duress, signed the Magna Carta limiting the monarch’s

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⁶ Shestack, supra note 3 at 205.
⁷ Ibid.
¹² Ed Bates affirms that from the “perspective of legal measures championing the rights of the common person against the state, the starting point of the history of human rights is typically taken to be the Magna Carta of 1215.”
absolute power.\textsuperscript{13} The Magna Carta enshrined a number of principles that are now under the sphere of human rights, including the principle of equality before the law, a right to property and an element of religious freedom, although such rights applied only to nobles.\textsuperscript{14} Subsequently, the English Bill of Rights of 1689, again advocating the interests of Protestant nobles, provided, among other issues, for the right to bear arms, freedom from cruel and unusual punishment, freedom from excessive bail, freedom to petition to the king, and freedom from fines and forfeitures without trial.\textsuperscript{15}

The Virginia Declaration of Rights from 1776, the first human rights declaration of modern times, established that all individuals have certain inherent rights and are by nature equally free and independent.\textsuperscript{16} The United States’ Declaration of Independence of 1776 also acknowledged the equality of men and the existence of certain unalienable rights, among them, the right to life, liberty, and the pursuit of happiness.\textsuperscript{17} Although the United States Constitution of 1787 provided some human rights as the right to trial by jury and the right to \textit{habeas corpus}, it could at first be regarded as a disappointment.\textsuperscript{18}

However, the first ten amendments to the American Constitution or the Bill of Rights came into force in 1791.\textsuperscript{19} This Bill of Rights established the “freedom of religion (Amendment I), various requirements relating to the due process and the right to a fair trial (Amendments V, VI, VII, VIII) and freedom of person and property (Amendment IV)”.\textsuperscript{20} Notwithstanding these

\textsuperscript{14} Haas, \textit{supra} note 10 at 39.
\textsuperscript{15} Smith, \textit{supra} note 2 at 5.
\textsuperscript{16} Haas, \textit{supra} note 10 at 41.
\textsuperscript{18} Ed Bates, \textit{supra} note 12 at 21.
\textsuperscript{19} \textit{Ibid.} at 23.
\textsuperscript{20} Haas, \textit{supra} note 10 at 44.
\textsuperscript{21} Smith, \textit{supra} note 2 at 6.
changes, the inalienable rights enshrined in the American Independence did not initially apply to black slaves, Native Americans, and women in general.\textsuperscript{21}

The theory of natural rights, that is, rights that should be enjoyed by all humans also influenced the French Revolution of 1789.\textsuperscript{22} The French Declaration of Rights of Man and of the Citizen from 1789, following the steps of the American Declaration of Independence, established the “idea of the inherent freedom and intrinsic rights of the human person”\textsuperscript{23} and acknowledged the existence of natural, inalienable and sacred rights of man.\textsuperscript{24} The French Declaration states that all men are free and equal.\textsuperscript{25} Moreover, it crystalizes some rights such as the right to liberty – here understood as the power to do what is not injurious to others; the separation of powers; and the necessity of the rule of law.\textsuperscript{26} The establishment of civil rights in France arguably advanced with the Civil Code, which entered into force in 1804.\textsuperscript{27} It crystalized principles addressed by the French Declaration of the Rights of the Man such as individual freedom, freedom of conscience, secular state, equality before the law, and the protection of the private property.\textsuperscript{28}

The French Declaration and the American Bill of Rights were landmarks in the development of human rights highly influenced by the Enlightenment philosophers.\textsuperscript{29} Thomas Hobbes did not develop a broad concept of human rights but asserted that under a social contract individuals surrender their state of nature in order to benefit from a stable rule and have

\textsuperscript{21} Kälin & Künzli, \textit{supra} note 16 at 4-5.
\textsuperscript{22} Smith, \textit{supra} note 2 at 6.
\textsuperscript{23} Kälin & Künzli, \textit{supra} note 16 at 5.
\textsuperscript{24} Ed Bates, \textit{supra} note 12 at 22.
\textsuperscript{25} Kälin & Künzli, \textit{supra} note 16 at 5.
\textsuperscript{26} Smith, \textit{supra} note 2 at 6.
\textsuperscript{27} Rubim Santos Leão Aquino \textit{et al.}, \textit{História das Sociedades} [History of Societies] (Rio de Janeiro: Editora Livro Técnico, 1993) at 150-151.
\textsuperscript{28} \textit{Ibid}.
\textsuperscript{29} Ed Bates, \textit{supra} note 12 at 23.
security.\textsuperscript{30} John Locke argued that governments should protect natural rights of individuals against arbitrary government and to stop private individuals from jeopardizing the rights of others.\textsuperscript{31} Locke, moreover, postulated that human beings are free and equal.\textsuperscript{32} Another thinker of the Enlightenment period, Kant, argued that humans have dignity and not price and are, therefore, ends in themselves who cannot be used as means to an end.\textsuperscript{33} From a juridical perspective, Kant argues that the existence of an internal national law (\textit{jus civitatis}) and the laws regulating the relations between states (\textit{jus gentium}), which are complemented by a cosmopolitan law (\textit{jus cosmopoliticum}).\textsuperscript{34}

Cosmopolitan law, according to Kant, is the law of world citizenship so far as individuals and states are considered citizens of a universal state in their external mutual relationships.\textsuperscript{35} In mutually dependent relation, cosmopolitan law is a necessary extension of \textit{jus civitatis} and of \textit{jus gentium}.\textsuperscript{36} Amanda Perreau-Saussine asserts that these systems are complementary and adds that “juridical freedom cannot be protected by domestic law alone, given the perpetual threat posed by international war to individual’s external freedom (including their property) and the need for cosmopolitan law if individuals are to be free to relate to and trade with foreigners.”\textsuperscript{37} These conclusions can flow from Kant’s understanding that cosmopolitan law is “a complement of the unwritten code of law – constitutional as well as international law – necessary for the public rights of mankind in general and thus for the

\textsuperscript{30} Haas, \textit{supra} note 10 at 21
\textsuperscript{31} \textit{Ibid.} at 21-22.
\textsuperscript{32} Ed Bates, \textit{supra} note 12 at 20.
\textsuperscript{35} \textit{Ibid.}
\textsuperscript{36} Patrick Capps & Julian Rivers, "Kant's Concept of International Law" (2010) 6 Legal Theory 229 at 252.
realization of perpetual peace”.\textsuperscript{38} It is possible to argue that the Stoics, at least to a certain degree, influenced Kant.\textsuperscript{39} Nussbaum affirms that:

As do Marcus and Cicero, Kant stresses that the community of all human beings in reason entails a common participation in law (\textit{ius}), and, by our very rational existence, a common participation in a virtual polity, a cosmopolis that has implicit structure of claims and obligations regardless of whether or not there is an actual organization in place to promote and vindicate them.\textsuperscript{40}

Notwithstanding the interconnections of these three different systems, within this view, cosmopolitan law differs from domestic or constitutional law and from the law of nations. This third area of law is not limited to one specific nation – as domestic law – and it is not only comprised of sovereign states. Differently, cosmopolitan law endows all citizens of the planet “with rights and duties going far beyond their formal status as subjects and citizens of one particular state”.\textsuperscript{41} Thus, Kant argues that individuals, irrespective of their nationalities, can have certain rights as citizens of the world.\textsuperscript{42} The Kantian cosmopolitan law has two different perspectives due to its duality of subjects. From a state perspective, this law regulates trade and economic interdependence between states of a global society. Within an individual perspective, it concerns transnational ties between humans.\textsuperscript{43}

\textsuperscript{38} Kant, \textit{supra} note 34 at 142.
\textsuperscript{39} It is, however, outside the scope of this work to analyze the points of convergence and divergence between Kant’s theory and the Stoic philosophy or Roman law.
\textsuperscript{40} Martha C. Nussbaum, “Kant and Cosmopolitanism” in James Bohman and Matthias Lutz-Bachmann, eds, \textit{Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal} (New Baskerville: MIT Press, 1997) at 37
\textsuperscript{43} Andrew Hurrell, "Kant and the Kantian Paradigm in International Relations" (1990) 16 Review of International Studies 183 at 203. Hurrell, thus, points out that Kant was a statist and a cosmopolitan.
The idea of cosmopolitan law is still quite controversial.⁴⁴ Patrick Capps and Julian Rivers, following a different view, argue that cosmopolitan law is not a “thick concept of human rights or the like” and add that “it is directed toward the creation of mutual relations between distant continents, resulting in a type of world community, which in turn can lead to regulation by public law of nations”.⁴⁵ Jürgen Habermas, believes that Kant’s cosmopolitan law focuses on individuals and not on state sovereignty. He argues that some scholars advocate that

Because Kant believed that the barriers of national sovereignty were insurmountable, he conceived of the cosmopolitan community as a federation of states, not of world citizens. This assumption proved inconsistent, insofar as Kant derived every legal order, including that within the state, from a more original law, which gives rights to every person “qua human being”. Every individual has the right to equal freedom under universal laws… This founding of law in human rights designates individuals as the bearers of rights and gives to all modern legal orders an inviolable individual character. If Kant holds that this guarantee of freedom… is precisely the essential purpose of perpetual peace… then he ought to not allow the autonomy of citizens to be mediated through the sovereignty of their states.⁴⁶

Thus, Habermas asserts a less statist view of cosmopolitan law, which gives legal status to individuals and justifies their “unmediated membership” in an association of free and equal citizens.⁴⁷ Arguably, this framework which comprises individuals and states in an interdependent relation goes beyond the “Westphalian logic” and represents a conceptual innovation.⁴⁸ Kant’s

⁴⁴Archibugi, supra note 41 at 312.
⁴⁵Capps & Rivers, supra note 36 at 253. However, they do not mention what would be the role of individuals as a part of the cosmopolitan law in this “mutual relation between distant continents”. Moreover, following this line of thought, it would seem unclear the reason to name it “cosmopolitan law” if it would only be comprised as a form of the traditional jus gentium.
⁴⁶Jürgen Habermas, “Kant’s Idea of Perpetual Peace, with the Benefit of Two Hundred Years’ Hindsight” in James Bohman and Matthias Lutz-Bachmann, supra note 40 at 128
⁴⁷Ibid.
⁴⁸Lafer, “Declaração”, supra note 33 at 300.
position, based on a universal hospitality, is that a “violation of right in one part of the world is felt all over it”\textsuperscript{49} and thus the idea of a cosmopolitan law “is no fantastical, high-flown notion”.\textsuperscript{50} Accordingly, this sensibility regarding the violation of rights and an interdependence of individuals and states influenced the development of not only domestic human rights, but of international human rights law, especially after the Second World War.\textsuperscript{51}

Kleingeld argued that “international law now includes the category of rights that Kant subsumed under the title of cosmopolitan law”.\textsuperscript{52} International law of human rights seeks to express a cosmopolitan law which acknowledges the importance of states and individuals as part of an international legal system.\textsuperscript{53} In my view, international law of human rights necessarily requires two distinct yet important actors, namely, individuals and states, to establish a human rights system and to, consequently, crystalize the international relevance of human dignity. Kant’s theory of cosmopolitan law, although important in stressing the importance of the human person, is historically inaccurate precisely for creating a new and unnecessary stream of law. As will be discussed in further chapters, the law of nations is intrinsically connected with Stoic notions and with the human person as its source and end within a universal system.\textsuperscript{54}

Modern conceptions and codifications of human rights gradually became an important feature of international law.\textsuperscript{55} Thus, I now turn to explain the internationalization of human rights, as part of general international law, based on the preoccupation with the protection of inherent individuals’ rights and the gradual recognition of the individual legal personality before the First World War.

\textsuperscript{49} Kant, \textit{supra} note 38 at 142.
\textsuperscript{50} \textit{Ibid.}
\textsuperscript{51} Lafer, “Declaração”, \textit{supra} note 33 at 300-301.
\textsuperscript{52} Kleingeld, \textit{supra} note 42 at 84.
\textsuperscript{54} See Chapters V, VI and VII.
\textsuperscript{55} For a view on ancient aspects of international law see Chapter V below.
2.2. Modern International Human Rights before the Second World War

From the 19th century to prior to the Second World War, there was not an international effort to protect all individuals and recognize their inalienable rights as a fundamental part of the law of nations. Ed Bates goes as far as asserting that international law “was virtually a blank canvas as far as the protection of human rights was concerned”.\(^{56}\) However, the diplomatic protection, the abolition of slave trade, the mandate system, and the creation of the International Labor Organization represented embryonic steps towards an internationalization movement.\(^{57}\) Thus, although limited and unorganized, there was some concern to protect human rights at the international level from the 19th to before the Second World War.\(^{58}\)

The international protection of human rights of the 19th and beginning of the 20th centuries were, to a great extent, focused on the preoccupation of states about the treatment of their nationals abroad. The doctrine of diplomatic protection is a legal fiction, which follows a traditional approach whereby when a host state infringes the rights of a national of the foreign state, instead of breaching individual rights, it violates the rights of this foreign state and prompts the possibility of political or legal action.\(^{59}\) The International Law Commission’s Draft Articles on Diplomatic Protection defined diplomatic protection as a “diplomatic action or other means of

\(^{56}\) Ed Bates, *supra* note 12 at 27.
peaceful settlement by a state adopting in its own right the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another state”.

Oppenheim, following this traditional perspective of international law, asserts that nationality represents the link between individuals and the law of nations. Thus, if individuals are wronged abroad, “only and exclusively” their home state has the right to ask for redress, not even these individuals themselves. Consequently, the doctrine of diplomatic protection aims to protect individuals only when they are considered foreigners, and if is in the interest of their national states to protect them.

This doctrine is premised on the existence of norms for the adequate treatment of nationals of a certain state when in a foreign territory. It is, thus, rooted in the idea of nationality, which can be defined as “a link between the individual and his or her state as regards particular benefits and obligations”. Nationality, in this state-centric system, works as a key, which allows states to mediate individuals’ interests at the international level. Under this state-centric and voluntarist perspective of international law, there is no obligation for states to provide diplomatic protection for their nationals abroad. Indeed, according to Oppenheim, stateless persons, that is, individuals who do not possess any nationality, “enjoy no protection

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62 Ibid.

63 André de Carvalho Ramos, Direitos Humanos na Integração Econômica [Human Rights in Economic Integration] (Rio de Janeiro: Renovar, 2008) at 21 [Ramos, Integração].

64 The doctrine of diplomatic protection might be applicable to legal persons as corporations. See Draft Articles on Diplomatic Protection, supra note 60 at articles 9-13.


66 Ibid.

67 Ibid. Shaw, however, does not explicitly mentions the term “voluntarist positivism” when he explains the doctrine of diplomatic protection.
whatever, and if they are aggrieved by a State they have no way of redress”.

In a traditional position regarding the protection of individuals at the international level, “as far as the law of nations is concerned, there is, apart from restraints of morality or obligations expressly laid down by treaty, no restriction whatever to cause a State to abstain from maltreating to any extent such stateless individuals”.

Notwithstanding this traditional approach, in the Draft Articles on Diplomatic Protection of the International Law Commission establishes that states might exercise diplomatic protection in respect of stateless persons and refugees who, at the date of injury and at the date of the official presentation of the claim, are lawfully and habitually residents in that state. However, the diplomatic protection of stateless individuals is still controversial. Some current scholars assert that a host state cannot face an international complaint by a foreign state for infringing the rights of a stateless individual.

Besides nationality, the exhaustion of local remedies is the second requirement for the exercise of diplomatic protection. Thus, individuals wronged by a host state first need to exhaust available local remedies before their claim can be espoused by their national state. This procedural rule – attached to the notion of sovereignty – provides that it is in the best interest of the host state to settle international disputes domestically (political or juridical) before reaching the international level. This requirement presupposes the availability of local remedies.

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68 Oppenheim, supra note 61 at 367.
69 Ibid.
70 Draft Articles on Diplomatic Protection, supra note 60 at article 8 (1) and (2).
72 Draft Articles on Diplomatic Protection, supra note 60 at article 14.
74 Ibid. at 142.
75 Ibid. at 149-161. The Draft Articles on Diplomatic Protection provide that local remedies do not need to be exhausted in the following cases: when there are no reasonably available local remedies; when there is undue delay in the remedial process; when there was no relevant connection between the injured individual and the state.
Furthermore, local remedies must not only exist, but they should be accessible to aliens, efficient in settling the dispute, and able to render an impartial decision.\textsuperscript{76}

The doctrine of diplomatic protection, notwithstanding possible problems in application\textsuperscript{77} and its traditional approach deeply rooted in voluntarism, represents an advance on the protection of human rights. It attempted to set minimum standards for the protection of foreigners when in a host state. However, before the Second World War, there was no general procedure available under international law with which individuals could contest their treatment by their own states.\textsuperscript{78} The diplomatic protection focused only on the treatment of nationals abroad. Moreover, the doctrine of diplomatic protection claims to be universal, but “in practice it was mainly the powerful western states that exercised this privilege”.\textsuperscript{79} Thus, although important to the protection of human rights, the doctrine of the diplomatic protection lacks effective universality in application. Notwithstanding the existence of exceptions, it is grounded in a link of nationality between an individual and a state. Furthermore, it is based on state discretion to espouse an individual’s claim at the international level on case-by-case basis.

The abolition of slave trade represents another important step in the pre-Second War international law of human rights. Slavery, which has existed since ancient times, was largely acceptable.\textsuperscript{80} This position was accepted by the Roman \textit{jus gentium} and by some European

\begin{flushleft}
\textsuperscript{76} Rezek, \textit{supra} note 71 at 174.
\textsuperscript{77} The Calvo Clause, for example, represents a dissatisfaction of some Latin American states with the application of diplomatic protection. This theory is based on the idea that diplomatic protection can grant privileges to some states to the detriment of others. \textit{Ibid.} at 276-277. See also Amerasinghe, \textit{supra} note 73 at 191-211
\textsuperscript{78} \textit{Ibid.} at 21.
\textsuperscript{79} \textit{Ibid.}
\end{flushleft}
writers from the seventeenth century as, for example, Hugo Grotius who argued that slaves are individuals who might have been put to death, but were spared.\footnote{Ibid. at 18.}

Though some philosophers from the Enlightenment such as Montesquieu and Rousseau were voices against slavery,\footnote{Ibid. at 18-19.} Vattel’s law of nations still admitted the possibility of turning prisoners of war into slaves.\footnote{Emerich de Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns, vol 3 in James Brown Scott, ed, The Classics of International Law (Washington: Carnegie Institution of Washington, 1916) at 286.} However, Great Britain led the way in abolishing slave trade domestically and internationally. Lauterpacht in his Oppenheim’s International Law asserts that Great Britain:

\[W\]ho had abolished the slave traffic throughout her colonies in 1807, induced France to agree in the Treaty of Paris of 1814 to co-operate with her in the furtherance of this policy, and at the Congress of Vienna in 1815 succeeded in obtaining from the Powers a solemn condemnation of the slave trade principle. But this was not enough to make the traffic in slaves a crime \textit{jure gentium}, as piracy is, and therefore repressible by any state regardless of the nationality of the offender or of the flag flown by his ship.\footnote{Hersch Lauterpacht, ed, Oppenheim’s International Law: A Treatise, vol 1(New York: Longmans, Green and Co., 1948) at 664 [Lauterpacht’s Oppenheim].}

Following the Napoleonic Wars, the slave trade under international law was no longer an accepted and presumptively lawful practice. Led by Britain, the major powerful states agreed in principle to suppress this practice.\footnote{Martinez, supra note 80 at 36.} Thus, states concluded a number of treaties seeking to decrease and stop slave trafficking, which includes the Treaty of London of 1841\footnote{A covenant between Great Britain, Austria, France, Prussia, and Russia. See Lauterpacht, Lauterpacht’s Oppenheim, supra note 84 at 665-666.} and the

\begin{footnotesize}
\begin{thebibliography}{8}
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\bibitem{81} Ibid. at 18.
\bibitem{82} Ibid. at 18-19.
\bibitem{84} Hersch Lauterpacht, ed, Oppenheim’s International Law: A Treatise, vol 1(New York: Longmans, Green and Co., 1948) at 664 [Lauterpacht’s Oppenheim].
\bibitem{85} Martinez, supra note 80 at 36.
\end{thebibliography}
\end{footnotesize}
Slavery Convention of 1926,\(^87\) which sought to prevent and suppress the slave trade and “to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms”.\(^88\)

Negotiations between England, Netherlands, Portugal, and Spain prompted the establishment of mixed courts, which would have powers to try and condemn captured slave ships\(^89\) based on the agreement that these courts would have indefinite jurisdiction to adjudicate future cases.\(^90\) The Anglo-Portuguese,\(^91\) Anglo-Spanish,\(^92\) and Anglo-Dutch treaties\(^93\) were all signed in 1817 and contained robust mechanisms to enforce their provisions, which included the mutual right of search and seizure of suspected slave vessels.\(^94\) Thus, mix commission courts were established in Freetown, Sierra Leone, Havana, Rio de Janeiro, and Suriname.\(^95\) Moreover, between 1819 and 1867, courts were set up in Luanda, Kingston (Jamaica), and New York.\(^96\) These treaties provided that member-states would appoint a Commissary Judge, and a Commission of Arbitration, who would be authorized to hear and to decide, without the

\(^{87}\) Ibid. at 665-666.
\(^{88}\) Slavery Convention, 25 September 1927, 60 LNTS 4 at article 2.
\(^{89}\) David Eltis, "The Nineteenth-Century Transatlantic Slave Trade: An Annual Time Series of Imports into the Americas Broken down by Region" 67 The Hispanic American Historical Review 109 at 111.
\(^{90}\) Martinez, supra note 80 at 35.
\(^{92}\) Treaty between Great Britain and Spain for the Abolition of the Slave Trade, Gr. Brit. - Spain, 23 September 1817, 68 Consol TS 45. See also William Loney RN, Background, Treaty between Great Britain and Spain for the Abolition of the Slave Trade, West Africa, online: http://www.pdavis.nl/Treaty_1817.htm Accessed on 1 May 2012 [hereinafter “Anglo-Spanish treaty of 1817”].
\(^{93}\) Treaty between His Britannic Majesty and His Majesty the King of the Netherlands, for Preventing their Subjects from Engaging in Any Traffic in Slaves, Gr. Brit. - Neth., 4 May 1818, in British and Foreign State Papers, vol. 5 (London: James Ridgway and Sons, 1837) at 125. See also William Loney RN, Background, Treaty between His Britannic Majesty and His Majesty the King of the Netherlands, for Preventing their Subjects from Engaging in Any Traffic in Slaves, West Africa, online: http://www.pdavis.nl/Treaty_NL.htm Accessed on 1 May 2012 [hereinafter “Anglo-Dutch Treaty of 1817”].
\(^{94}\) Martinez, supra note 80 at 35-36.
\(^{96}\) Eltis, supra note 89 at 111.
possibility of appeals, all cases concerning captured slave vessels in accordance with the stipulations of each treaty.\textsuperscript{97}

Great Britain, in 1826, signed a similar treaty with now independent Brazil, which also authorized a mutual right of search and established mixed commission courts on both sides of the Atlantic.\textsuperscript{98} It entered into force in 1830 and provided that “slave ships flying the Brazilian flag captured off the Brazilian coast were to be taken before the Anglo-Brazilian mixed commission court sitting in Rio de Janeiro for adjudication.”\textsuperscript{99} After, in the late 1830s and early 1840s, Chile, Uruguay, the Argentine Confederation, Bolivia, and Ecuador agreed to be part in the mix courts in Sierra Leone.\textsuperscript{100} In 1862, the United States joined the mix courts system in New York, Sierra Leone, and Cape Town.\textsuperscript{101} According to Umozurike, by “1842, the trade had become officially illegal in most of Europe and the New World although practice varied.”\textsuperscript{102} He added that “the defeat of the South in the American Civil War and the abolition of slavery in Cuba and Brazil in the 1880's went a long way to abolishing the slave trade”.\textsuperscript{103} Efforts to ban the slave trade were not only focused on the American Continent. The Sultan of Zanzibar, in 1873, agreed to abolish

\begin{itemize}
\item \textsuperscript{97} Anglo-Portuguese Treaty of 1817, supra note 91 at article 2 of the Regulations for the Mixed Commissions; Anglo-Spanish treaty of 1817, supra note 92 at article 2 of the Regulations for the Mixed Commissions; and Anglo-Dutch Treaty of 1817, supra note 93 at article 2 of the Regulations for the Mixed Commissions.
\item \textsuperscript{98} Beatriz G. Mamigonian, "In the Name of Freedom: Slave Trade Abolition, the Law and the Brazilian Branch of the African Emigration Scheme (Brazil–British West Indies, 1830s–1850s)" (2009) 30 Slavery & Abolition: A Journal of Slave and Post-Slave Studies 41 at 42.
\item \textsuperscript{99} Ibid.
\item \textsuperscript{100} Martinez, supra note 80 at 78.
\item \textsuperscript{101} Ibid. at 79.
\item \textsuperscript{103} Ibid. The United States abolished slavery in 1862 (entered into effect in 1863). Brazil ended the slave trade in 1850 and completely abolished slavery in 1888 with the “Lei Áurea” or “Golden Law” enacted by Princess Isabel. See Haas, supra note 10 at 48.
\end{itemize}
the slave trade.\textsuperscript{104} Moreover, treaties of search and seizure were concluded with Egypt (in 1877), Turkey (in 1880) and Persia (in 1882).\textsuperscript{105}

Martinez asserts that the mixed commissions had a “dramatic human impact” on the anti-slavery movement.\textsuperscript{106} She explains that more than 80,000 men, women, and children were freed by the mixed courts in some 600 cases.\textsuperscript{107} Notwithstanding the important role of the mixed commissions and the efforts of some states in internationally combating the slave trade, the law of nations was still based on its traditional inter-state system where individuals were deprived of an effective participation. Thus, the mixed commissions were no exception to this rule. Accordingly, the voices of individuals are indeed absent from the mix courts’ proceedings.\textsuperscript{108}

Individuals, the primary beneficiaries of an anti-slave trade movement on a human rights perspective, were deprived of participation. They were only occasionally called to give testimonies as witnesses; were not directly represented in trials; and they rarely appeared as claimants of rights in legal proceedings.\textsuperscript{109} In my view, an effective human rights system requires a set of rules that promote individual participation. The mixed courts did not acknowledge the existence of the international individual personality. Nonetheless, they helped establish the illegality of slavery and the slave trade under the law of nations. Moreover, they represent examples of how international courts can support the development of a more humane approach of a law of nations preoccupied with protecting individuals.\textsuperscript{110} Thus, by 1885, states generally

\textsuperscript{104} Umozurike, supra note 102 at 343.
\textsuperscript{105} Ibid.
\textsuperscript{106} Martinez, supra note 80 at 99.
\textsuperscript{107} Ibid.
\textsuperscript{108} Ibid.
\textsuperscript{109} Ibid.
\textsuperscript{110} See Chapter V.
recognized the slave trade as an activity contrary to international law.\footnote{Umozurike, supra note 102 at 344. As it will be explained below, only in the end of the 19\textsuperscript{th} century and beginning of the 20\textsuperscript{th} century that the law of nations finally met one of the main natural law postulates of Roman law: all humans are free and equal, consequently, slavery is contrary to the law of nature. Ironically, this movement happened during the “reign” of voluntarist positivism. See Chapters IV and V.} Prior to the Second World War, these efforts culminated in the Slavery Convention of 1926, which sought to provide a framework of protection against slavery, slave trade and forced labor under international law.\footnote{Slavery Convention, supra note 88 at articles 2-6.} Humanitarian law, which originated in the 19\textsuperscript{th} century, imposes legal limits on states’ acts in order to protect individuals in specific situations, namely, in cases of armed conflicts.\footnote{Mazzuoli, Human Rights, supra note 57 at 34. See also Shaw, supra note 65 at 1054-1055.} International humanitarian law aims to protect, in wartime, members of the armed forces, non-combatants – injured, sick and prisoners – and civilian populations located at or near conflict zones.\footnote{See Rezek, supra note 71 at 365. See also Celso Lafer, “Prefácio” in José Augusto Lindgren, Direitos Humanos como Tema Global (São Paulo: Editora Perspectiva & Fundação Alexandre de Gusmão, 1994) at xxiv-xxv.} Thus, humanitarian law imposes limitations on the autonomy of states to regulate the implementation of violence in specific situations.\footnote{Humanitarian law is based on the principles of neutrality, non-discrimination and responsibility. The first principle informs that humanitarian assistance cannot interfere in armed conflicts. The second principle provides that humanitarian protection cannot discriminate based on gender, nationality, race, language, religion, and philosophical or political opinions. The third principle points out that it is the responsibility of the state to carry out the Geneva Conventions and to assure the safety of those protected by the treaties (Rezek, supra note 71 at 361).}

Although humanitarian law flourished in the 20\textsuperscript{th} century, the preoccupation with individuals during armed conflicts is not new. Rousseau, in his Social Contract, argued that war is a “relation, not between man and man, but between state and state, and individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of their country, but as its defenders.”\footnote{Jean Jacques Rousseau, The Social Contract or Principles of Political Right, Book I, Chapter V, website Constitution Society, online: http://www.constitution.org/jjr/socon.htm Accessed on 3 May 2012.} He adds that in “real war, a just prince, while laying hands, in the enemy's country, on all that belongs to the public, respects the lives and goods of individuals: he
respects rights on which his own are founded.”  

Although he acknowledges that the purpose of war is to destroy a hostile state, he asserts that the right to kill a state’s defenders exists while they are bearing arms and “as soon as they lay them down and surrender, they cease to be enemies or instruments of the enemy, and become once more merely men, whose life no one has any right to take.”

Thus, the Law of The Hague and the Law of Geneva stem from the postulates which inform that means of warfare should be restricted, and individuals who are not involved – or no longer involved – in hostilities should be protected. The Hague Conventions of 1899 and of 1907 seek to control state action in armed conflict basically by establishing three different limits. First, limits *ratione personae* provide that in armed conflicts non-combatants should be spared. Second, limits *ratione loci* establish that states must only attack places with clear military purposes. Finally, limits *ratione conditionis* forbid arms and war methods that might

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117 Ibid.
118 Ibid.
119 Kälin & Künzli, supra note 16 at 10.
122 Rezek, supra note 71 at 361.
123 Ibid.
cause excessive suffering.\textsuperscript{124} Furthermore, the Geneva Conventions of 1949\textsuperscript{125} seek to protect soldiers who are not in combat (sick, wounded or shipwrecked); war prisoners; medical and health personnel; and non-combatants in general.\textsuperscript{126}

Following the significant devastation and loss of life occasioned by the First World War, some states gathered for the creation of the League of Nations to promote international cooperation, peace and international security by the establishment of friendly relations between nations and an understanding not to resort to war.\textsuperscript{127} The League of Nations is an association of states under specified conditions seeking to accomplish purposes of common interest.\textsuperscript{128} These purposes of common interest are provided in preamble of the 1919 Covenant of the League of Nations:

\begin{quote}
The high contracting parties, in order to promote international co-operation and achieve peace and security by the acceptance of obligations not to resort to war, by the prescription of open, just and honorable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and by the maintenance of justice and a scrupulous respect for all treaty obligations in the dealings of organized peoples with one another, agree to this covenant of the League of Nations.\textsuperscript{129}
\end{quote}

\begin{footnotes}
\textsuperscript{124} Ibid.

\textsuperscript{125} Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287; and the Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135.

\textsuperscript{126} Rezek, supra note 71 at 365. See also Leslie C. Green, The Contemporary Law of Armed Conflict (New York: Juris Publishing, 2008) at 53-54.


\textsuperscript{128} Ibid. at 6.

\end{footnotes}
Arguably, the primary function of the League of Nations was to prevent war. The traditional position places the law of nations as a law regulating the relations of sovereign states and, thus, the League of Nations was established to help states achieve two interconnected purposes, namely, to maintain international peace and promote international cooperation. Furthermore, Article 10 of the Covenant of the League of Nations adds the idea of security as one of the responsibilities of its member-states.

Thus, in the beginning of the 20th century, international law focused on promoting peaceful relations among sovereign states and maintaining international cooperation. Significantly, the League of Nations had only generic provisions relating to human rights notably the mandate system of the League, the minority system and a preoccupation regarding labor conditions of men, women, and children.

The Covenant of the League of Nations has one generic provision concerning some specific human rights, which establishes that the member-states, in accordance with international treaties, will endeavor to secure and maintain fair and humane conditions of labor for men, women, and children creating “the necessary international organizations”; will “secure the just treatment of the native inhabitants of territories under their control”; will “entrust the League with the general supervision over the execution of agreements with regard to the traffic in

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131 Lauterpacht, Lauterpacht’s Oppenheim, supra note 84 at 354.
132 This provision provides that members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled (Covenant of the League of Nations, supra note 129 at article 10).
133 Nowak, supra note 8 at 20-21. See also Covenant of the League of Nations, supra note 129 at article 23 (a).
134 Covenant of the League of Nations, supra note 129 at Article 23.
135 Ibid.
women and children, and the traffic in opium and other dangerous drugs”;136 have to “entrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest”;137 will “make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members”;138 and “will endeavor to take steps in matters of international concern for the prevention and control of disease”.139

Moreover, the League of Nations established the Mandate System,140 which transformed the former colonies that belonged to the Axis powers into League Mandates supervised by the Mandates Commission.141 The former colonies were divided into A, B, or C Mandates based on their stage of development and were normally administered by mandatory powers, England or France.142 The Mandates Commission, consisted of ten members, was entrusted to examine reports sent by the Mandate Powers and petitions sent by individuals from the administered territories.143 Moreover, the Mandate System also sought to establish treaties protecting minorities of the newly created or expanded territories.144

This system arguably represents the commencement of a global structure of individual petitions and human rights reports sent to quasi-judicial bodies.145 Moreover, it worked as a temporary solution aimed at allowing territories to be independent in the future. Theoretically,

136 Ibid.
137 Ibid.
138 Ibid.
139 Ibid.
140 Ibid. at Article 22.
142 Nowak, supra note 8 at 20.
143 Myers, supra note 127 at 198-199.
145 Nowak, supra note 8 at 20.
the role of the Mandate powers was to provide means for a future independence and to permit a 
*de facto* state equality by acknowledging the necessity of according different treatment to 
different nations.\(^{146}\)

The minority protection is based on agreements carried out after the First World War to 
grant some minimum rights to minorities,\(^{147}\) normally concerning racial, linguistic or religious 
rights concluded with new states and those which had their territories extended.\(^{148}\) Consequently, 
although the protection of minorities fell under the responsibility of constitutional law, they 
constituted obligations of international concern and were, thus, placed under the guarantee of the 
League of Nations.\(^{149}\) Accordingly, any member of the Council of the League of Nations could 
bring to its attention the existence of any infraction, or danger of infraction to the minority 
protection provisions, and the Council could give directions and take actions as it deemed 
necessary and effective.\(^{150}\) Furthermore, the League of Nations appointed a Minority Committee 
to deal with issues arising from the minority provisions.\(^{151}\) By 1938, the Committee had dealt 
with approximately 650 petitions submitted by minorities or the members of the Council.\(^{152}\)

The League of Nations faced the question whether the protection of minorities was a 
general guarantee which imposed a continuous responsibility of the Council and the permanent 
organs charged with duties of supervision, or the protection merely implied a duty to take 
cognizance of cases of infraction submitted to the Council. The Council denied the theory of

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\(^{146}\) Differently, Myers argued that the Mandate system attacked the “libertarian dogma of equality of man” (at 205). He affirms that the Covenant of the League of Nations, in the Mandate System, denies the doctrine of equality of man “almost in some many words” (at 207). He points out that the Covenant presupposes a position of inferiority of some nations, which have to be under the tutelage of advanced nations possessed with rights to guide, govern or advise (Myers, *supra* note 127 at 205-208).

\(^{147}\) Nowak, *supra* note 8 at 21.

\(^{148}\) Myers, *supra* note 127 at 209.

\(^{149}\) Lauterpacht, *Lauterpacht’s Oppenheim, supra* note 84 at 652-653.

\(^{150}\) *Ibid.*

\(^{151}\) Nowak, *supra* note 8 at 21.

\(^{152}\) *Ibid.*
continuous responsibility applying a restrictive interpretation to human rights provisions.\textsuperscript{153} This decision attenuated the protection minorities as petitions fell under the view of a merely informative source without granting individuals the right to be informed of the grounds of the rejection of their petitions.\textsuperscript{154} This approach weakened the protection of human rights further marginalizing the importance of individuals within the international legal system.

The Versailles Treaty also contributed to the formation and establishment of international human rights law through the creation of the International Labor Organization, mandated to ascertain rights that apply to all workers regardless of nationality.\textsuperscript{155} The International Labor Organization, which today is under the auspices of the United Nations, contributed to the development of international human rights law in three significant ways. First, it weakened the position that individuals were only under the protection of their states of nationality.\textsuperscript{156} Second, it sought to protect a specific category of individuals (workers).\textsuperscript{157} Third, it established a unique tripartite composition comprised of representatives of governments, employers and employees.\textsuperscript{158} Moreover, in 1926, a Committee of Experts composed of representatives of governments, workers and employers was set up to examine state reports on their efforts to implement the International Labor Organization’s recommendations and conventions.\textsuperscript{159}

The League of Nations, thus, attempted to strengthen the human rights system at the international level, especially regarding the protection of individuals in specific situations such as slaves and workers. Moreover, the League set up a Commission for Refugees in 1921. Initially

\begin{itemize}
\item \textsuperscript{153} Lautherpacht, \textit{Lautherpacht’s Oppenheim, supra} note 84 at 654 and 654 n2.
\item \textsuperscript{154} \textit{Ibid.} at 654-655.
\item \textsuperscript{155} Mazzuoli, \textit{Human Rights}, supra note 57 at 37. See also Haas, \textit{supra} note 113 at 66.
\item \textsuperscript{157} \textit{Ibid.}
\item \textsuperscript{158} \textit{Ibid.}
\item \textsuperscript{159} Kälin & Künzli, \textit{supra} note 16 at 13.
\end{itemize}
entrusted to provide financial, legal and material assistance to refugees from Russia, this
Commission expanded its scope of protection to Armenians refugees from Turkey, and after to
refugees from Nazi Germany, Saar, Austria and from Sudetenland.\textsuperscript{160}

The protection of human rights was not something alien to international law of the
Enlightenment period and through the 19\textsuperscript{th} and early 20\textsuperscript{th} centuries. However, during this time,
human rights focused on the human person were not a central concern of international law.
Individuals were commonly regarded as objects of the law of nations and states had complete
power over their citizens.\textsuperscript{161} Thus, international law did not grant direct rights to the human
person. Although individuals, in some circumstances, could submit complaints to international
bodies, they did not have universally recognized rights.\textsuperscript{162} Human rights were state obligations
\textit{vis-à-vis} international organizations as the League of Nations. Moreover, there was not a
movement towards a general universal human rights system which would protect all individuals.
Human rights guarantees were envisaged to protect certain individuals in certain specific
situations (\textit{e.g.} workers, slaves, minorities, and refugees).

Thus, from the 18\textsuperscript{th} century until before the Second War, human rights at the international
level were largely focused on protecting certain individuals based on inter-state agreements or on
state obligations \textit{vis-à-vis} international organizations, which placed individuals under discretion
of their states of nationality.\textsuperscript{163} Based on this view, for example, the League of Nations accepted
Nazi Germany’s argument that its anti-Jewish racial laws in Upper Silesia were internal affairs
and beyond the scope of international law.\textsuperscript{164} It is my main argument that the law of nations was
not initially envisaged as a human-excluding system. Conversely, it was emerged centered and

\textsuperscript{160} Haas, \textit{supra} note 10 at 69.
\textsuperscript{161} See Chapter IV.
\textsuperscript{162} \textit{Ibid}.
\textsuperscript{163} Kälin & Künzli, \textit{supra} note 16 at 9.
\textsuperscript{164} \textit{Ibid}.
based on the human person. However, this human-based system was not the international law framework of the 19th and early 20th centuries.

The Second World War (1939-1945) and, in particular, the holocaust, showed why human rights protection should not be at the complete discretion of individual states. Thus, a great number of human rights treaties were concluded seeking to better protect individuals by establishing state obligations toward them. John P. Humphrey asserts that the “traumatic experiences through which the world had just passed, including the studied violation of basic rights by the government of one of the most civilized countries, provided the catalyst to revolutionize traditional concepts of the relation of international law to individuals”. The traumatic experience of the Second World War led the international community to reshape international law and, by developing a core human rights system, approximate it to the old law of nations of ancient Rome.

Consequently, after the Second World War, a core part of international law was designed to implement a more effective international protection of human rights and to prevent further atrocities based on an individual-centric system. A diverse number of international organizations and international instruments seek to establish a new paradigm that approximate the law of nations once again to moral and ethical values developed by the Roman jus gentium. The somewhat utopic purpose of international human rights law is to crystalize the notion that in the protection of individuals, pleas such as “domestic law matter” or an “offense to sovereignty” can

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165 See Chapters IV and V.
168 See Chapter V.
169 Ibid.
no longer be admissible. This new international framework starts with the creation of the United Nations in 1945. Accordingly, in this following chapter, I focus on the United Nations and on certain human rights instruments to analyze the human rights discourse and demonstrate that the post-Second World War international law of human rights is centered on individuals. In other words, this new paradigm, different from the international law of the 19th and early 20th centuries, grants direct rights to the human person and crystalizes the individual legal personality.

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170 Mazzuoli, Human Rights, supra note 57 at 41-42.
171 Charter of United Nations, 26 June 1945, Can. T.S. No. 7 (entered into force 24 October 1945) [hereinafter “U.N. Charter” or “the Charter” or “the Charter of the United Nations”].
Chapter 3

The Post-Second World War Discourse: The Individual-Based Framework of International Human Rights

In Chapter I, I analyze the international human rights regime part of the law of nations of the 19th and early 20th centuries. Human rights were indeed part of the pre-Second World War international law. The doctrine of diplomatic protection, the Mandate System of the League of Nations, humanitarian law, the International Labor Organization, the anti-slave trade movement and the protection of minorities in certain locations stand out as examples that the law of nations had provisions and mechanisms that protected individuals’ rights.

However, this human rights protection had substantive and theoretical limitations. Theoretically, international law was structured under the voluntarist positivism, that is, individuals were excluded from a state-centric system completely dependent on state will. On the substantive side, there was a lack of international law instruments establishing universal rights protecting individuals irrespective of their nationality. The pre-Second War human rights system focused on certain individuals in specific situations or places (as, for example, workers).

Accordingly, after the Second World War, the international community decided to reshape the existing international law placing the protection of human rights at its core. Human rights instruments – treaties and declarations – focused on the human person as a subject of rights and duties as part of a universal system. In this Chapter, I analyze the human rights discourse crystalized in treaties and declarations to demonstrate that they establish a direct link

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1 See Chapter IV below.
between international law and individuals. In other words, human rights are universal and concern states and individuals as addressees of norms.

The United Nations, different from its predecessor, acknowledges the importance of human rights as an essential part of international law. Based on the foundation set by this international organization, a number of treaties and declarations solidify the international legal personality of individuals. Accordingly, treaties and declarations inform that individuals are subjects of international law, that is, they are direct addressees of human rights norms. In my view, the international legal personality of individuals is the normative character of human rights declarations (what I call “general normative character”). Differently, treaties go one step further and crystalize specific rights and duties directly applied to individuals.

The post-Second World War international legal system placed individuals as the source and end of human rights. The general normative force, that is to say, the individual legal personality enshrined in human rights instruments, including their preambles, is the binding character of treaties and declarations. The international human rights system built after the Second War is universal and individual-centric because it is focused on the human person as a necessary subject of rights and duties regardless of any nationality or other prerequisite. Thus, in this Chapter I analyze the evolution of human rights after the Second War and the discourse of human rights instruments to conclude that this framework is universal and based on the human person.

The main argument flowing from this Chapter is that the language of treaties and declarations recognize that the human person is at the core of international human rights as an entity diverse from states and with interests at the international level (they seek to have their rights protected). I call this new paradigm the general normative force. Human rights
declarations and treaties equally crystalized this individual legal personality. Furthermore, more descriptive considerations in Chapter II lead the way to a more detailed account of the individual legal personality in Chapter III.

3.1. The Universal Declaration of Human Rights

The Second World War and events preceding it set in motion a wave that radically changed the very nature of international law. One could even claim that international human rights law, as we know it today, is a post-II World War phenomenon. The starting point to understand this new international law is the Charter of the United Nations.

Following the steps of the former League of Nations, the United Nations kept as one of its main purposes to maintain peace and security by, negatively, preventing and suppressing breaches of peace, and by, positively, promoting the preservation and maintenance of peace. However, the United Nations differs from its predecessor in one important key aspect: the protection of human rights and fundamental freedoms. Moving away from the purposes of the League of Nations, the protection of human rights is one of the main aspects of the United Nations.

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There was an effort by some states at the San Francisco Conference on International Organization to include a bill of rights as part of the Charter of the United Nations. However, each of the principal victorious powers had serious human rights problems domestically and was not initially willing to adopt an extensive bill of rights. Nonetheless, the Charter of the United Nations contains seven references to human rights largely due to the efforts of small states and of non-governmental organizations, which were able to obtain support for some of their suggestions. Thus, one can highlight two points from the meetings leading to the creation of the United Nations. First, the San Francisco Conference on International Organization was opened to the participation of non-state actors. Second, human rights were a concern of states and non-state actors.

Some of the differences between the League of Nations and the United Nations are clear by the preamble of both treaties. The first organization sought to affirm the importance of international law in keeping peace and security, and on establishing cooperation between states. The United Nations’ preamble, in turn, determines that this organization is engaged in the following principles: the prevention of war; the necessity to respect the rules of international law; the promotion of social progress and of “better standards of life in larger freedom”; and the reaffirmation of “faith in fundamental human rights, in the dignity and worth of the human

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7 Buergenthal, "International Human Rights", supra note 3 at 3.
8 *Charter of United Nations*, 26 June 1945, Can TS No 7 (entered into force 24 October 1945) at preamble, and Articles 1, 13, 55, 62, 68, and 76 [hereinafter “U.N. Charter” or “the Charter” or “the Charter of the United Nations”].
9 Humphrey, “The UN Charter”, supra note 6 at 40.
10 *Covenant of the League of Nations [Versailles Treaty]* 28 June 1919, 225 Consol TS 188 at 199 (entered into force 10 January 1920) at preamble. The Covenant’s preamble also points out the importance of the acceptance of obligations not to resort to war.
person, in the equal rights of men and women and of nations large and small”.11 Article 1 of the
Charter of the United Nations crystalizes the notion that the purpose of this international
organization goes beyond the maintenance of peace and security by promoting and encouraging
the “respect for human rights and for fundamental freedoms for all without distinction as to race,
sex, language, or religion”.12

Article 13 of the Charter provides that the General Assembly might initiate studies and
make recommendations to promote and assist the realization of human rights and fundamental
freedoms.13 Article 5514 spells out that the United Nations shall promote: higher standards of
living; the solution of international, social, health and related problems; and the universal and
effective respect of human rights and fundamental freedoms for everybody without any kind of
distinction.15 Article 56 of the Charter extends the obligations enshrined in Article 55 to all
member-states of the United Nations, which must “take joint and separate action in cooperation
with the Organization for the achievement of the purposes set forth in Article 55”.16 Article 62 of
the Charter entrusts the Economic and Social Council to make recommendations seeking the
promotion and respect for human rights and fundamental freedoms.17 Article 68 establishes that
the Economic and Social Council shall create “commissions in economic and social fields and
for the promotion of human rights”.18 Finally, Article 76 provides that the trusteeship system

11 Charter of United Nations, supra note 8 at preamble.
12 Ibid. at Article 1.
13 Ibid. at Article 13.
14 Article 55 is perhaps the most important human rights provision in the Charter after Article 1 due to the
fact that it establishes clear obligations to promote and respect human rights. See Humphrey, “The UN
Charter”, supra note 6 at 42.
15 Charter of United Nations, supra note 8 at Article 55.
16 Ibid. at Article 56.
17 Ibid. at Article 62.
18 Ibid. at Article 68.
shall encourage respect for human rights for all without any kind of distinction, and shall encourage recognition of the “interdependence of the peoples of the world”.

Thus, the innovation of the United Nations was not to establish provisions protecting human rights. In my view, the new post-Second War paradigm is not the internationalization of human rights _per se_. International law as already concerned with some human rights issues as, for example, the diplomatic protection, the anti-slavery movement including its mixed courts, the International Labor Organization and the protection of minorities. Comparing it to the law of nations of the late 18th to early 20th century, the difference is the perception of human rights and its place in international law. After the Second World War, international law developed under a new paradigm based on the idea that the protection of human rights has no boundaries and that the international community should guarantee that governments protect human rights within their territories. Smith, explaining this new position, argues that:

> The United Nations system is based on a fundamental and irrevocable belief in the dignity and worth of each and every individual. Realization of this should ipso facto obviate the need for minority protection, every individual is entitled to the same fundamental rights and freedoms. The protection of the basic rights of all citizens of the world has evolved to surpass national law, it is an integral part of ‘being’ and thus neither nationality nor state opinion are determinant factors.  

In my view, differently from the Covenant of the League of Nations, the Charter of the United Nations brought human rights to the center of international law, although proposals to

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19 _Ibid._ at article 76 (c).
20 Buergenthal, "Normative", _supra_ note 4 at 703.
annex a bill of rights to the Charter failed to prevail at the San Francisco Conference in 1945.\textsuperscript{22}

Moreover, arguably, the Charter and the subsequent human rights instruments placed individuals as right bearers under the law of nations. One of the purposes of this organization is to promote the respect and observance of universal human rights and not to only promote state implementation of human rights.\textsuperscript{23}

In my view, Articles 55 and 56 can be interpreted as a way of strengthening the protection of human rights. Article 55 crystalizes the protection of human rights as one of the main purposes of the United Nations with or without explicit state support, although it mentions the importance of state relations in providing stability.\textsuperscript{24} Another provision, Article 56, extends the obligation to protect human rights to all member states by establishing that they “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55”.\textsuperscript{25} Thus, the protection of human rights is one of the main purposes of the United Nations with or without explicit state action. Nonetheless, member states have the vague obligation to assist the United Nation in this purpose.

The legal force of the Charter was upheld by some domestic courts in the early days of the United Nations. In 1945, in Canadian the case of \textit{Re Drummond Wren}, the former Ontario High Court of Justice decided that a restrictive covenant establishing that a land was not to be sold to “Jews or persons of objectionable nationality” was void for the reason that it

\begin{footnotesize}
\footnote{22} Katarina Månsson, "Reviving the 'Spirit of San Francisco': The Lost Proposals on Human Rights, Justice and International Law to the UN Charter" (2007) 76 Nordic Journal of International Law 217 at 228-229.

\footnote{23} \textit{Charter of United Nations}, supra note 8 at article 55. The United Nations had big challenges ahead. Less than two months after the adoption of the U.N. Charter, the United States dropped atomic bombs in Hiroshima and Nagasaki and after the end of the Second War the cold war started, which divided the world in two blocks of political, economic and ideological influences (the capitalist and socialist worlds). See Antonio Cassese, \textit{International Law} (New York: Oxford University Press, 2005) at 41 and Eric Hobsbawn, \textit{Era dos Extremos: O Breve Século XX 1914-1918 [Age of Extremes]} (São Paulo: Schwarcz, 2008) at 223-438

\footnote{24} \textit{Charter of United Nations}, supra note 8 at Article 55.

\footnote{25} \textit{Ibid.} at Article 56.
\end{footnotesize}
discriminates individuals based on religion and ethnic group which is against public policy.\textsuperscript{26}

The Court invoked, among other arguments, the Charter of the United Nations, which was considered to be of “profound significance” and part of the public policy of Canada.\textsuperscript{27}

Similarly, the Supreme Court of the United States, in 1948, without directly referring to the U.N. Charter, decided that judicial enforcement of restrictive covenants “precluding transfer of the property to Negros” is precluded\textsuperscript{28} based, according to Mr. Chief Justice Vinson, on “restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents.”\textsuperscript{29} Moreover, in 1949, the Supreme Court of the State of Oregon decided that the Alien Land Law prohibiting aliens from leasing or owing property in Oregon was void.\textsuperscript{30} The Court argued that the United States became bound to respect Articles 55 and 56 of the U.N. Charter.\textsuperscript{31} Thus, in the early days of the United Nations, some domestic courts already recognized the U.N. Charter’s authoritative force in human rights matters.

Although vague in terms and in definitions, the Charter of the United Nations transformed universal human rights into an international concern at the core of the post-World War II law of nations.\textsuperscript{32} Moreover, this change had an important impact on the 19\textsuperscript{th} century theory of international law, which had been until this point focused on inter-state relations or on relations between states and international organizations such as the League of Nations. The Charter allowed the wide participation of international organizations in the protection and promotion of universal human rights without the strict mediation of states. Thus, individuals and

\textsuperscript{26} Re Drummond Wren (1945), OR 778 at 1, 5, and 8.
\textsuperscript{27} Ibid. at 4 and 8.
\textsuperscript{28} Hurd et Ux. v Hodge et al 334 US 24 (1948) (68 S Ct 847) at 5.
\textsuperscript{29} Ibid. at 13
\textsuperscript{30} Namba et al v McCourt & Neuner, 185 Ore 579 (1949) at 1, 4, and 20.
\textsuperscript{31} Ibid. at 15.
\textsuperscript{32} Buergenthal, “International Human Rights”, supra note 3 at 4.
international organizations could, theoretically, work together to strengthen the protection of human rights, not excluding the importance of states in maintaining this system. The Charter represents, as Buergenthal points out, the basic framework, which “spawned a vast body of international human rights law, encompassing numerous international instruments adopted by the United Nations, its specialized agencies, and such regional intergovernmental organizations”. Arguably, the human rights instrument with the most symbolic importance spawned by the Charter is the Universal Declaration of Human Rights from 1948.

3.1.1. The Universal Declaration of Human Rights

Although the Charter of the United Nations mentions individual rights and freedoms in several provisions and established a framework for the development of the modern international law of human rights, the San Francisco Conference failed to prepare a more detailed document enumerating basic human rights. However, soon after the Charter entered into force, the former Commission on Human Rights was established and entrusted to write an international bill of rights starting with a human rights declaration, which was adopted by the General Assembly in 1948.

Some scholars believe that the Universal Declaration is not truly universal because at the time of its adoption most Asian and African states were still colonies and were not members of

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33 Ibid.
34 Universal Declaration of Human Rights, GA Res 217 (III), UN GAAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) [hereinafter the “Universal Declaration” or “Universal Declaration of Human Rights”].
the United Nations. However, different states from different geographic locations participated in the elaboration of the Universal Declaration. Thus, the following states were part of the Human Rights Commission: Australia, Belgium, Byelorussian Soviet Socialist Republic, Chile, China, Egypt, France, India, Iran, Lebanon, Panama, Philippine Republic, United Kingdom, United States of America, Union of Soviet Socialist Republics, Uruguay, and Yugoslavia. The Commission decided that the drafting of the Universal Declaration would be under the supervision of an executive group comprised of the Chairman of the Commission; the Vice-Chairman; a rapporteur; and members from Australia, Chile, China, France, Lebanon, the USSR, the United Kingdom and the United States.

John P. Humphrey accepted the task of drafting the declaration. In order to give significant legitimacy to the declaration, Humphrey based his work on existing constitutions; on the acceptability of the declaration by the member states of the United Nations; on an easy to comprehend vernacular; and on the understanding that the declaration should cover a basic list of rights. After, a Temporary Working Group was set up with representatives from France, Lebanon and the United Kingdom, and it asked René Cassin to, based on Humphrey’s draft, work on a declaration. The Second Session of the full Commission, in 1947, was joined by all Commission members, by consultants of organizations such as the International Committee for the Red Cross, by groups without consultants, and even by individual citizens who were able to make recommendations. Moreover, members of the United Nations were able to send their own

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38 Morsink, supra note 36 at 4.
39 Ibid. at 5.
40 Ibid.
41 Ibid. at 7-8.
42 Ibid. at 8.
43 Ibid. at 9.
drafts or comments to the official Commission draft. The following states suggested bills or commented the official draft: China, the United Kingdom, France, Chile, Ecuador, Cuba, Panama, India, the United States, Egypt, Norway, South Africa, Pakistan, Canada, the Netherlands, Australia, New Zealand, Sweden, Brazil and Mexico.\footnote{Ibid. at 10.} The first sentence of Article 12, for example, is based on a version proposed by China.\footnote{Ibid.}

The meetings from the Third Committee of the General Assembly, held in 1948, provided an opportunity to hear opinions from UN member-states which were not part of the Human Rights Commission about the proposed Universal Declaration.\footnote{Morsink, supra note 36 at 11.} After, the Declaration was sent to the Plenary Session of the Third General Assembly and was overwhelmingly approved on 10 December 1948.\footnote{Edward D. Re, "The Universal Declaration of Human Rights: Effective Remedies and the Domestic Courts" (2003) 33 Cal W Int'l LJ 137 at 140.} Thus, notwithstanding the fact that many future members of the United Nations were not able to participate in the elaboration and adoption of the Universal Declaration, this international instrument, in my view, was based on universal concerns and had the participation of different entities – states, organizations, and individuals – from different geographic locations.

During the drafting of the Universal Declaration, the United Nations had fifty-eight members comprising twenty-one states from the Americas, sixteen from Europe, fourteen from Asia, four from Africa, and three states from Oceania.\footnote{Mary Ann Glendon, "Knowing the Universal Declaration of Human Rights" (1998) 73 Notre Dame L Rev 1153 at 1164.} Moreover, among those members, six belonged to the emerging socialist bloc; in eleven of them, Islamic culture was strong; four states

\footnote{Ibid. Article 12 of the Universal Declaration spells out that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks” \cite{Universal Declaration of Human Rights, supra note 34 at 12}.}
had a large Buddhist population; and thirty-seven were largely based on the Judeo-Christian traditions and Enlightenment thought.\[49\]

The United Nations purpose, therefore, was to develop a truly universal human rights system, although it was still limited by political and philosophical differences between its member-states and the existence of colonies in Africa and Asia. Nonetheless, before the final adoption of the Universal Declaration, the United Nations Educational, Scientific, and Cultural Organization appointed a committee to enquire and gather different opinions from scholars and thinkers with diverse cultural and philosophical backgrounds regarding human rights and a universal declaration of human rights.\[50\] Important respondents included notables such as Mahatma Gandhi, Benedetto Croce, Pierre Teilhard de Chardin and Aldous Huxley.\[51\]

Moreover, Glendon asserts that to “the Committee's surprise, the lists of basic rights and values they received from their far-flung sources were essentially similar”.\[52\] Thus, the United Nations sought to create a truly universal instrument to set moral standards for the whole international community. As the Universal Declaration’s preamble arguably shows, the United Nations envisaged a universal instrument focused on the human person.\[53\]

\[49\] Ibid.


\[51\] Ibid. at 2-3.

\[52\] Glendon, supra note 48 at 12

\[53\] The preamble establishes that “[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, [w]hereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind…, [w]hereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, [w]hereas it is essential to promote the development of friendly relations between nations, [w]hereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom, [w]hereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms…” (Universal Declaration of Human Rights, supra note 34 at preamble).
The Universal Declaration of Human Rights does not provide an enforcement mechanism and was adopted as a General Assembly resolution under the status of a recommendation, that is, without imposing any legal obligation on states.\footnote{Francisco Rezek, \textit{Direito Internacional Público: Curso Elementar} \textit{[Public International Law: Basic Textbook]} (São Paulo: Saraiva, 2002) at 211.} Thus, its status of U.N. resolution makes it non-binding.\footnote{Ibid.} Accordingly, there is no difference, from a legal perspective, between the Declaration’s preamble and its provisions because the entire instrument is non-binding. Arguably, the preamble is as important as the Declaration as a whole in establishing the moral conscience of the international community. In effect informing the existence of universal individual interests and rights at the international level.

Thus, in my view, the preamble sets some basic premises of a post-World War international law of human rights: inherent dignity, and equal and inalienable rights as international concerns; the importance of essential freedoms – freedom of speech and belief and freedom from fear –; the existence of a conscience of mankind; the rule of law; friendly relations between nations; reaffirmation of the basic fundamental human rights enshrined in the Charter of the United Nations; the existence of a common standard of achievement for all peoples and all nations; and the existence of national and international fundamental rights concerning peoples of member-states and those of territories under their jurisdiction.

Consequently, the Universal Declaration of Human Rights crystalizes three different points concerning the international protection of human rights. First, the importance of individuals as subjects of rights under the law of nations irrespective of their nationality. Second, a constant duality between legal positivism and natural law for the Declaration refers to the importance of relations between states to protect human rights, the existence of a “conscience of
mankind” and of inherent and inalienable rights. Finally, every individual and every organ of society should constantly keep this declaration in mind, in other words, the principles and purposes of the Universal Declaration of Human Rights should guide the legal and moral reasoning of every entity whose actions can resonate internationally. Thus, this international instrument acknowledges the importance of individuals as bearers of internationally recognized rights, and moreover informs that their interests should be taken into consideration by other individuals and by domestic or international entities. Consequently, the Universal Declaration is an expression of *jus cosmopoliticum*, that is, of the importance to recognize the human person as an actor at the international level.56

Thus, the Universal Declaration, regardless of its legal status, complements the Charter of the United Nations by reaffirming its basic principles concerning the protection of human rights. It spells out a basic list of rights establishing both positive obligations requiring the action of the subjects of international law,57 and negative obligations, which require their abstention from acting.58 Furthermore, this instrument recognizes individuals as possible bearers of rights at the international level without, however, undermining the importance of states in maintaining peace and securing the protection of universal human rights. In my view, the Universal Declaration of Human Rights together with the Charter of the United Nations inform the international


57 Most of the positive obligations are economic, social and cultural rights and most of the negative obligations are civil and political rights.

community that the interests of individuals must be taken into consideration in order to establish or maintain peace, justice and freedom at the international and domestic levels.

This human rights declaration was adopted with practically a unanimous position of the member-states of the United Nations repudiating the idea that this Declaration could impose any legal obligation to respect human rights and fundamental freedoms.\(^{59}\) Lauterpacht affirms that there was no difference between states that voted in favor of the Declaration and those that abstained from voting regarding the denial of the legal authority of the Declaration.\(^{60}\) However, some representatives claimed the Declaration possessed some authoritative force. The French delegation argued that the Universal Declaration could be considered an “authoritative interpretation of the United Nations Charter”.\(^{61}\) This opinion was similarly expressed by representatives of China and Australia who also considered that the Universal Declaration could express or advance towards the definition of the “fundamental rights and freedoms” referred to in the Charter.\(^{62}\) Moreover, Belgium argued that the Declaration had an undeniably legal force and some of its principles were already part of the customary law of nations.\(^{63}\) Notwithstanding the position of some representatives, the majority adopted the position that the Universal Declaration was a General Assembly recommendation and thus could not impose legal obligations.\(^{64}\) However, it is largely accepted that the Universal Declaration has significant moral, historical, political and legal importance.\(^{65}\) The impact of this declaration is unquestionable. Virtually all


\(^{60}\) *Ibid.* at 402-403. The following states abstained from voting: Byelorussia, Czechoslovakia, Honduras, Poland, Saudi Arabia, Ukraine, Soviet Russia, South Africa and Yugoslavia. See *Ibid*.


\(^{62}\) *Ibid*.


\(^{64}\) Rezek, *supra* note 54 at 211.

\(^{65}\) Roberto Luiz Silva, *Direito Internacional Público* [Public International Law] (Belo Horizonte: Del Rey, 2008) at 424. See also Morsink, *supra* note 36 at xii.
subsequent international instruments and treaties dealing with human rights invoke or are influenced by provisions of the Declaration. Indeed, a number of new constitutions and many revised old ones borrowed, copied, made direct reference or simply plagiarized the Universal Declaration. This overwhelming acceptance demonstrates that states committed to the ideology that the Universal Declaration represents. Due to the Universal Declaration’s special characteristics, some international law scholars attempt to demonstrate its binding force. Humphrey explains that:

[T]he Declaration has been invoked so many times both within and without the United Nations that lawyers now are saying that, whatever the intention of its authors may have been, the Declaration is now part of the customary law of nations and therefore is binding on all states. The Declaration has become what some nations wished it to be in 1948: the universally accepted interpretation and definition of the human rights left undefined by the Charter.

The arguments in favor of the Universal Declaration’s binding character are based on four different aspects. First, some scholars argue that the Universal Declaration is part of the general principles of law due to the number of domestic legislations and constitutions developed based on its principles and articles. Second, the Declaration is binding due to its status as a

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66 D. Re, *supra* note 47 at 6-7.
69 Humphrey, “Bill of Rights”, *supra* note 2 at 529.
customary norm and model for the elaboration of subsequent human rights treaties and declarations.\(^72\) Third, the Universal Declaration could be envisaged as an imperative norm of international law or \textit{jus cogens}.\(^73\) Fourth, the Universal Declaration is legally binding because it represents the official definition of the expression human rights and for fundamental freedoms crystallized in the Charter of the United Nations.\(^74\)

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\(^{74}\) The Declaration constitutes the best interpretation of the expression “human rights and fundamental freedoms” in the U.N. Charter and moreover, because of this importance, is arguably an integral part of this Charter. See Lafer, “Declaração”, \textit{supra} note 56 at 312 and Thomas Buergenthal \textit{et al}, \textit{International Human Rights in a Nutshell} (St.Paul: West Group, 2009) at 41-46.
Although different in words and perspectives, all arguments are basically the same: the Universal Declaration of Human Rights has acquired normative status due to its overwhelming acceptance by states and the whole international community. Moreover, the Universal Declaration arguably stands as the best definition of the expression “fundamental rights and freedoms” enshrined in the U.N. Charter. Regardless of the intention of its authors, the Universal Declaration became a framework used for the development of international human rights treaties and domestic bills of rights. This authoritative character of the Universal Declaration moves customary norms of international law closer to becoming part of “the common language of humankind” as a part of a widely accepted human rights ideology.

Consequently, some scholars reached the conclusion that in legal, political, and moral perspectives, the Universal Declaration remains even more significant today then when it was adopted. This declaration embodies three essential features. First, it expresses universal values. Second, it identifies and strengthens the understanding that individuals are subjects of international law. Third, it emphasizes the existence of state responsibilities towards individuals.

In my view, the Universal Declaration embodies two features that are at the core of the international protection of human rights. First, the Universal Declaration informs states of the

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75 Hannum comments that perhaps the Universal Declaration has more frequently been referred to by courts of the United States than by courts of any other jurisdiction (Hannum, supra note 72 at 304). In a more up-to-day survey, there are seven references to the Universal Declaration by the Supreme Court of the United States (Thomas Knight, Aka Askari Abdullah Muhammad v. Florida; Carey Dean Moore v. Nebraska 528 US 990 (1999) (120 S Ct 459); and Jose Francisco Sosa v Humberto Alvarez-Machain et al 542 US 692 (2004) (124 S Ct 2739)).

76 Cançado Trindade, “Interdependence”, supra 72 at 513.

77 Hannum, supra note 72 at 354.


79 Louis Henkin argues that the Universal Declaration is a universal document for all individuals in all societies (Henkin, supra note 67 at 19-21).

80 Henkin affirms the Universal Declaration helped to put an end to the idea that states can treat their inhabitants as they choose (ibid.).

81 Bayefsky, supra note 78.
importance to recognize universal human rights, which are not limited to state boundaries and consequently acknowledge that individuals can be direct bearers of rights and duties under the law of nations. Second, the Universal Declaration informs states and society as a whole that the interest of individuals must always be taken under consideration in the development and application of human rights, or according to the Universal Declaration: “every individual and every organ of society, keeping this Declaration constantly in mind, shall strive… to promote respect for these rights and freedoms and… to secure their universal and effective recognition and observance”.

The arguments acknowledging the normative status of the Universal Declaration are not far-fetched. During the drafting of this instrument, some representatives of states argued that it could have some binding force based on customary rules of international law or the fact that it would represent the United Nations’ official definition of human rights. The fact that the Universal Declaration did not and still does not provide any enforcement mechanism does not undermine its normative character. In my view, to acknowledge its binding force is to recognize the Declaration’s universal values, which are centered on individuals.

Accordingly, the human person, as an entity with a legal personality, has universal interests diverse of those of states and can have direct rights, duties and capacity at the international level. In my view, this is the normative character of the Universal Declaration. Its provisions and preamble guide states and the international community as a whole in developing more effective domestic and international methods and norms to protect and acknowledge the human person as a bearer of essential rights and duties. Similarly, the international community

82 Universal Declaration of Human Rights, supra note 34 at preamble.
83 See Chapter IV below.
faced the question of the binding status of the American Declaration on the Rights and Duties of Man.\textsuperscript{84}

\subsection*{3.1.2. The American Declaration of the Rights and Duties of Man}

The Organization of American States (OAS),\textsuperscript{85} created in 1948 at the Ninth Inter-American Conference in Bogotá (Colombia),\textsuperscript{86} is a regional organization that, among other goals, promotes the respect of human rights principles.\textsuperscript{87} The purpose of this international organization, set out by the American states, is “to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.”\textsuperscript{88} To that end, the American Declaration on the Rights and Duties of Man\textsuperscript{89} was adopted at the same Ninth Inter-American Conference seeking to establish the basic human rights principles that should govern the American states. Initially, the American Declaration had no enforcement mechanism and was envisaged to work as a charter of guidance rather than a treaty placing real obligations upon states.\textsuperscript{90}

The American Declaration, which predates the Universal Declaration,\textsuperscript{91} adopted an approach balancing the importance of natural law and legal positivism in the protection of human rights. This regional instrument declares, in its preamble, the importance of domestic legislation

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\textsuperscript{84} OAS, General Assembly, 3rd Sess, \textit{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 of the Rights and Duties of Man” or “American Declaration”].
\textsuperscript{85} \textit{Charter of the Organization of American States}, 30 April of 1948, 1609 UNTS 119, OASTS NOS. 1-C and 61 [hereinafter “Charter of the Organization of American States or OAS Charter”].
\textsuperscript{86} Ibid. at article 3.
\textsuperscript{87} \textit{American Declaration of the Rights and Duties of Man}, supra note 84.
\textsuperscript{88} Ibid. at article 1.
\textsuperscript{89} \textit{American Declaration of the Rights and Duties of Man}, supra note 84.
\textsuperscript{90} Smith, supra note 21 at 109. See also Christina M. Cerna, “Reflections on the Normative Status of the American Declaration of the Rights and Duties of Man” (2009) 30 U Pa J Int'l L 1211 at 1211.
\textsuperscript{91} Smith, supra note 21 at 109.
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and of an increasing international cooperation between the American states to protect human rights.\textsuperscript{92} Moreover, taking an approach closer to natural law, this declaration acknowledges that the American states recognize that “essential rights of man are not derived from the fact that he is a national of a certain state, but are based upon attributes of his human personality”\textsuperscript{93}. Thus, the members-states of the Organization of American States agree that the American Declaration spells out rights recognized by states, but that flow from the human person. Moreover, these rights flow from the individual personality. In my view, this is not an affirmation to be taken for granted.

Thus, when the American Declaration affirms the existence of rights derived from the “human personality”, acknowledged that individuals have personality at the international level and, furthermore, this personality grants rights to them. The American Declaration, like the Universal Declaration, was not initially envisaged as a legally binding document. Thus, this regional instrument was arguably created to state a list of fundamental individuals’ interests which flow from their legal personality and should be taken into consideration by the American states at the international and domestic levels. These “interests” could later become legally binding norms if enacted by domestic legislation or international treaties. However, this Declaration became even more important. These “interests”, that is, these “soft” rights and duties changed status and today are considered to belong to a normative instrument.\textsuperscript{94}

\textsuperscript{92} American Declaration of the Rights and Duties of Man, supra note 84 at preamble. It states that the “affirmation of essential human rights by the American States together with the guarantees given by the internal regimes of the states establish the initial system of protection considered by the American States as being suited to the present social and juridical conditions, not without a recognition on their part that they should increasingly strengthen that system in the international field as conditions become more favorable” (ibid.).

\textsuperscript{93} Ibid.

\textsuperscript{94} Buergenthal, supra note 74 at 262. Buergenthal claims the American Declaration is now considered normative. Moreover, he does not use the notion of rights and interests.
Due to the fact that some states still have not ratified the American Convention on Human Rights, the American Declaration is the only regional instrument to shape the general human rights obligations of those states. Furthermore, the American Declaration, as the Universal Declaration, arguably stands as the best interpretation of the human rights obligations enshrined in the OAS Charter. In light of these considerations, Colombia submitted a request for an Advisory Opinion to the Inter-American Court of Human Rights asking whether this Court could render advisory opinions on the interpretation of the American Declaration and whether this human rights instrument had acquired normative status under the legal framework of the OAS system of protection.

In this advisory opinion, some states submitted their opinions recognizing the importance of the Declaration, but were nevertheless against its binding status. The United States affirmed that the American Declaration was not drafted as a legal instrument, but as a set of basic moral principles, which lacks the necessary precision to “resolve complex legal questions” and that recognizing it as legally binding would “would seriously undermine the process of international

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95 *American Convention on Human Rights*, 1969, 1144 UNTS 123, OASTS nº 36. The following states have not signed and ratified the American Convention: Antigua y Barbuda, Bahamas, Belize, Canada, Guyana, St. Kitts & Nevis, St. Lucia, and St. Vincent & Grenadines. The United States signed the treaty in 1977, but still has not ratified it. Moreover, Trinidad and Tobago denounced the treaty in 1998. However, the following states are parties to the Convention: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Honduras, Jamaica, México, Nicaragua, Panamá, Paraguay, Peru, and Dominican Republic. See [http://www.oas.org/juridico/english/sigs/b-32.html](http://www.oas.org/juridico/english/sigs/b-32.html) Accessed on 11 Jun 2012.

96 Smith, *supra* note 21 at 110.

97 Burgenthal at al, *supra* note 74 at 262.

98 *American Convention on Human Rights*, *supra* note 95 at Chapter VIII [hereinafter “Inter-American Court of Human Rights” or “Inter-American Court” or “IACHR”].

99 *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights* (1989), Advisory Opinion OC-10/89, Inter-Am Ct HR (Ser A) Nº 10, at para 2. On this topic, I examine only the arguments and decisions regarding the legal status of the American Declaration.

100 Although acknowledging the American Declaration’s importance, the United States, Venezuela, and Costa Rica were not in favor of its normative status (*ibid.* at 3-6).
lawmaking”. Following a different view, the government of Costa Rica pointed out that although the American Declaration was not initially conceived as a legally binding instrument, many of its rights now belong to the domain of customary international law. Following a different approach, Peru asserted that Article 29 of the American Convention gives normative status to the American Declaration. In other words, the normative status of the American Declaration flows from the phraseology of the American Convention. Similarly, Uruguay advocating the evolution of international human rights law, affirmed that the American Declaration is “a binding, multilateral instrument that enunciates, defines and specifies fundamental principles recognized by the American States and which crystallizes norms of customary law generally accepted by those States”.

The Inter-American Court held that to determine today’s legal status of the American Declaration, it is necessary to look to the American system in the light of the evolution undergone since the adoption of the Declaration. Based on theological and evolutive approaches, the Inter-American Court of Human Rights laid its fundamental argument that:

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

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101 Ibid. at para 12. Similarly, the government of Venezuela pointed out that a declaration is not a treaty and it is “limited to a statement of desires or exhortations” (Ibid. at para 15). However, Venezuela stated that declarations could create political or moral obligations for the subjects of the law of nations (ibid.).
102 Ibid. at para 18.
103 Ibid. at para 13.
104 Ibid. at para 14.
105 Ibid. at para 37.
106 See Chapter VI.
In this advisory opinion, is not exactly clear what the distinction between “classical international law” and international law of human rights mentioned by the Inter-American Court is. In my view, the key distinction between classical or traditional international law and international law of human rights is that the latter is necessarily based on the human person as its end and source in a system that revitalizes and readjusts the theoretical concept of the Roman *jus gentium* and, consequently, establishes a framework recognized by states and the international community as a whole, including international tribunals. However, the Inter-American Court does not reach this conclusion. It merely states the existence of differences between the classic law of nations and human rights law to a “significant extent”, and after it mentions the reasons why the American Declaration has acquired normative status.

The Inter-American Court asserted that the OAS Charter refers to fundamental rights in its preamble and in a number of provisions without however listing or defining them. Furthermore, the Court points out that the Inter-American Commission on Human Rights protects rights “enunciated and defined in the American Declaration” based on Article 1 of the Inter-American Commission’s Statute. The Inter-American Court also pointed out that the

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107 Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, supra note 99 at paras 37-38.
108 See Chapter V.
109 Chart of the Organization of American States, supra note 85 at articles 112 and 150.
110 Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, supra note 99 at para 41.
OAS General Assembly has “repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS”.  

Based on the arguments explained above, the Inter-American Court held that member states of the Organization of American States indicated their agreement that the American Declaration “contains and defines the fundamental human rights referred to in the Charter”. The Court, thus, unanimously decided that although the Declaration is not a treaty the American Convention remains the first source of obligations to its Parties.

In this advisory opinion, the Inter-American Court based its decision not on a state-centric position, but rather on the evolutive nature of international law that is, in the light of current developments and advancing the mechanisms of human rights protection. This decision, however, was not an offense to state sovereignty or its role as subject of international law. As previously pointed out, arguments that human rights declarations can be regarded as binding are not new and they were put forward by states themselves.

The Inter-American Court, however, reached a decision without explaining the difference between a normative declaration and a treaty. What would then be the difference between the American Declaration and the American Convention since both are legally binding? As the representative of the United States mentioned, the American Declaration was not envisaged to be a treaty and thus “lacks the precision necessary to resolve complex legal questions”. Accordingly, treaties such as the American Convention place more defined and elaborated obligations upon states. Furthermore, the American Convention requires domestic

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114 Ibid. at para 42.
115 Ibid. at para 43.
116 Ibid. at paras 46-47.
implementation to give effect to the purposes of this treaty,\textsuperscript{118} and it set rules on treaty interpretation and application, which further limits state sovereignty based on a previous acceptance by the state parties.\textsuperscript{119} This legal fiction, that is, the normative status of the American Declaration, was adopted by the Inter-American Commission.\textsuperscript{120} However, treaties remain an important source of international law to impose human rights obligations upon states and the international community as a whole. At the global level, the most comprehensive treaties are the 1966 Covenants.

\textbf{3.1.3 The U.N. Global Covenants}

The United Nations, following a different path from its predecessor the League of Nations, took the task to elaborate an International Bill of Rights consisting of one declaration and binding treaties.\textsuperscript{121} The treaties comprise the International Covenant on Civil and Political Rights,\textsuperscript{122} the International Covenant on Economic, Social and Cultural Rights,\textsuperscript{123} and two important protocols, the Optional Protocol to the International Covenant on Civil and Political Rights,\textsuperscript{124} and the Optional Protocol to the International Covenant on Economic, Social and

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\item[118] \textit{American Convention on Human Rights, supra} note 95 at Article 2.
\item[119] \textit{Ibid.} at Articles 28-30.
\item[120] Cerna, \textit{supra} note 90 at 1212. Cerna asserts that the “Inter-American Commission on Human Rights has maintained that the American Declaration acquired legally binding force” (\textit{ibid.}).
\item[121] Smith, \textit{supra} note 21 at 35. As Smith points out, the initial idea was for a Bill of Rights comprising a declaration, a covenant and measures of implementation. However, the General Assembly agreed to elaborate two distinct binding instruments rather than a single treaty. In 1966, draft proposals were submitted to the General Assembly, but the treaties only entered into force in 1976 (\textit{ibid.} at 41-42).
\item[122] \textit{International Covenant on Civil and Political Rights}, 19 December 1966, 999 UNTS 171, 1976 Can TS Nº 47 [hereinafter “ICCPR” or “Covenant on Civil and Political Rights”].
\item[124] \textit{Optional Protocol to the International Covenant on Civil and Political Rights}, 16 December 1966, 999 UNTS 171.
\end{enumerate}
\end{footnotesize}
Cultural Rights.\textsuperscript{125} In contrast to the Universal Declaration, they are multilateral treaties and, therefore, envisaged to be legally binding instruments since their elaboration.\textsuperscript{126}

Both Covenants have the same preamble,\textsuperscript{127} which was likely influenced by the preamble of the Universal Declaration.\textsuperscript{128} The first sentence of the Covenants’ preambles inform that “in accordance with the principles proclaimed in the Charter of the United Nations”, the state parties recognize that the inherent dignity and “the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.\textsuperscript{129} Although this sentence was taken from the preamble of the Universal Declaration, the phrase “in accordance with the principles proclaimed in the Charter of the United Nations” was not part of the 1948 instrument.\textsuperscript{130} The authors of the Universal Declaration believed that this clause constituted a general principle which exists independently of the United Nations.\textsuperscript{131} However, arguably, the phrase “in accordance with the principles proclaimed in the Charter” endows the sentence “the inherent dignity and of the equal and inalienable rights” with legal force flowing from the Charter itself.


\textsuperscript{126} William R. Slomanson, \textit{Fundamental Perspectives on International Law} (Belmont: Thomson Wadsworth, 2007) at 543.

\textsuperscript{127} See \textit{International Covenant on Civil and Political Rights}, supra note 122 at preamble. See also \textit{International Covenant on Economic, Social and Cultural Rights}, supra note 123 at preamble.

\textsuperscript{128} \textit{Universal Declaration of Human Rights}, supra note 34 at preamble. Indeed, the preambles of both treaties refer to the Universal Declaration.


\textsuperscript{130} United Nations’ Secretary General, \textit{Draft}, supra note 129 at 34. See also \textit{Universal Declaration of Human Rights}, supra note 34 at preamble.

\textsuperscript{131} United Nations’ Secretary General, \textit{Draft}, supra note 129 at 34.
Treaty preambles are not legally binding, but – as preambles of municipal legislation – can provide interpretative support.\textsuperscript{132} Notwithstanding this presumption of a lack of normative status, the preambles of both Covenants are directly linked to the U.N. Charter when they acknowledge the existence of an “inherent dignity” and “equal and inalienable rights” advancing the argument that individuals can have international legal personality and rights under the general principles set by the Charter of the United Nations.

Thus, the preambles of both Covenants reinforce the understanding that individuals have dignity and inalienable rights under the law of nations. Arguably, the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights – the 1966 Covenants – fall within a system which recognizes rights and dignity to individuals under international law. However, this does not undermine the importance of states in ratifying and implementing international treaties. States can accept and acknowledge a duty to implement rights and soft norms, which do not belong to them, but rather flow from the individual legal personality.\textsuperscript{133} Furthermore, this argument was advanced by the preambles of both Covenants when they establish that “these rights derive from the inherent dignity of the human person”.\textsuperscript{134}

During the drafting of both Covenants, it was argued that “the rights of man appertained to him as a human being and could not be alienated and that they constituted a law anterior and superior to the positive law of civil society”.\textsuperscript{135} Thus, it was proposed that the preamble should recognize that the rights established by the Covenants are “inalienable and derive from the inherent dignity of the human person”. Although there was no agreement as to whether the rights

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\item \textsuperscript{132} Rezek, \textit{supra} note 54 at 44-45.
\item \textsuperscript{133} See Chapter IV.
\item \textsuperscript{134} \textit{International Covenant on Civil and Political Rights, supra} note 122 at preamble. See also \textit{International Covenant on Economic, Social and Cultural Rights, supra} note 123 at preamble.
\item \textsuperscript{135} United Nations’ Secretary General, \textit{Draft, supra} note 129 at 34.
\end{itemize}
proclaimed in both treaties were inalienable, there was a general acceptance that the rights set forth in the Covenants derive from the “inherent dignity of the human person”.\textsuperscript{136}

In my view, both parts of the preamble and the discussions during the drafting of the Covenants should be interpreted together. The first parts of the preambles acknowledge that the state parties recognize that “the inherent dignity” and “the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”\textsuperscript{137} After, the preambles state that “these rights derive from the inherent dignity of the human person”. Both Covenants recognize the existence of inherent and inalienable rights. Moreover, they state that civil, political, economic, social and cultural rights derive from the human person. Arguably, not every human right could be regarded as inalienable, but every human right derives from the human person. However, in my view, the international community might, regardless of the intention of the drafters, recognize every single human right as inalienable.

Accordingly, both Covenants seek to crystalize an international system for the protection of human rights by granting rights to individuals at the international level and establishing duties for states. Moreover, influenced by Article 29 of the Universal Declaration,\textsuperscript{138} they also recognize that individuals indeed have duties under the law of nations.\textsuperscript{139} As pointed out by the United Nations, 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”.\textsuperscript{140} Thus, while “the

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\item \textsuperscript{136} Ibid. at 34-35.
\item \textsuperscript{137} See International Covenant on Civil and Political Rights, supra note 122 at preamble. See also International Covenant on Economic, Social and Cultural Rights, supra note 123 at preamble.
\item \textsuperscript{138} Universal Declaration of Human Rights, supra note 34 at Article 29 (1). It states that “[e]veryone has duties to the community in which alone the free and full development of his personality is possible” (ibid.)
\item \textsuperscript{139} The preamble of both Covenants spell out that individuals “having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant” (International Covenant on Civil and Political Rights, supra note 122 at preamble. See also International Covenant on Economic, Social and Cultural Rights, supra note 123 at preamble).
\item \textsuperscript{140} United Nations’ Secretary General, Draft, supra note 129 at 36.
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covenants were intended to protect human rights and freedoms it was thought appropriate that the duties and responsibilities of the individual should be mentioned in the preambles.”

Both Covenants seek to establish a system to better implement their treaty provisions. The ICCPR is to be implemented based on international and domestic cooperation. In my view, Article 2 of the ICCPR provides “state duties” to crystalize a domestic and international system of protection. Moreover, the ICCPR establishes a Committee consisting of eighteen members of high moral character and recognized competence in the field of human rights, selected based on geographical distribution, for a term of four years with the possibility of re-election.

The Covenant and the Optional Protocol establish the Human Rights Committee’s functions. The Covenant requires member-states to submit reports to the Human Rights Committee regarding measures they have adopted to give effect to the Covenant rights and informing the “progress made in the enjoyment of those rights”. Moreover, the ICCPR provides for an optional inter-state communication system. Under this system, a member-state


141 Ibid. at 36.
142 Sohn, supra note 35 at 21.
143 First, it determines that member-states have the duty to respect all rights proclaimed by the Covenant. Second, member-states have the duty to ensure to all individuals, without any distinction, the rights recognized in the Covenant, which includes adopting new domestic legislation if needed. Third, member-states need to ensure the existence of domestic remedies when civil or political rights are violated. Finally, member-states must ensure the effectiveness of their domestic remedies. See International Covenant on Civil and Political Rights, supra note 122 at Article 2(1), (2), (3) (a), (3) (b) and (c).
144 Ibid. at Articles 28-32.
146 International Covenant on Civil and Political Rights, supra note 122 at Article 40 (1). In the light of the information provided by the state report, the answers submitted to the Committee from questions posed by its members, and on information from other sources, the Human Rights Committee adopts a written text, the “Concluding Observation”, which is submitted to the concerned state and reproduced in the Committee's annual report to the General Assembly (Buergenthal, “U.N. Committee”, supra note 145 at 350).
147 Ibid. at 364.
“claims that another State Party is not fulfilling its obligations under the present Covenant”.\textsuperscript{148}

The implementation system provided by the ICCPR is weak, that is, is focused on mediation and conciliation without a binding adjudication system.\textsuperscript{149} For that reason, this system is complemented by the Optional Protocol to the International Covenant on Civil and Political Rights, which allows alleged victims of a violation of the Covenant to submit to the Human Rights Committee communications against State Parties.\textsuperscript{150}

The ICCPR Optional Protocol is not unique within the United Nations system. Many global human rights treaty bodies have the capacity to have individual complaints.\textsuperscript{151} All of these non-judicial treaty-monitoring bodies established by convention mechanisms have basically the same individual complaint system. Committees first consider admissibility and after the merits of the petition. To be admissible, domestic remedies must have been exhausted, the communication must not be anonymous, must be in writing, must not have been previously examined by the treaty-body to which it has been sent or by any other international settlement or investigation organization, and must not be manifestly ill-founded.\textsuperscript{152} If the Committee admits a petition, it

\textsuperscript{148} International Covenant on Civil and Political Rights, supra note 122 at Article 41 (1). However, to date no state has ever invoked this human rights mechanism and the Human Rights Committee can only analyze inter-state communications if both states have previously made the declaration under Article 41, paragraph 1 (Buergenthal, “U.N. Committee”, supra note 145 at 364).

\textsuperscript{149} Buergenthal, “International Human Rights”, supra note 3 at 13.

\textsuperscript{150} Optional Protocol to the International Covenant on Civil and Political Rights, supra note 124 at Article 1.


\textsuperscript{152} Mark Freeman & Gibran van Ert, International Human Rights Law (Toronto: Irwin Law, 2004) at 394-395.

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will analyze its merits and decide whether the member-state has violated the treaty’s provisions.\(^{153}\) The conclusions are sent to the concerned state and the complainant (and eventually also to the General Assembly).\(^{154}\) Although the Human Rights Committee is a quasi-judicial system,\(^{155}\) it was able to crystallize a rather substantial system of individual petition.\(^{156}\)

The ICESCR, on the other hand, normally requires states to take positive steps for the implementation of its provisions. This implies financial expenditure and different criteria may be applied to different states.\(^{157}\) Member-states agree to domestically implement the rights established by the ICESCR by “steps” based on the maximum of their available resources.\(^{158}\) The ICESCR requires states to submit reports to the Economic and Social Council informing “measures which they have adopted and the progress made in achieving” the goals and rights set forth in the Covenant.\(^{159}\) To strengthen the protection of economic, social and cultural rights, the Economic and Social Council established a Committee of eighteen members to supervise the implementation of the ICESCR\(^{160}\) and to clarify the meaning of its ambiguous provisions.\(^{161}\)


\(^{154}\) *Ibid.*

\(^{155}\) Notably, the United Nations chose carefully the wording of the Optional Protocol to the ICCPR and of the Committee’s Rules of Procedure. The words individual petition or complaint are avoided and replaced by “communication”. Indeed, the ICCPR does not provide for the right of petition. Moreover, the Committee does not issue a “judgment” or “decision”, but instead it “formulates its Views”. Furthermore, the state concerned does not “comply with the Committee’s decision”, but instead the Rules of Procedure mentions “give effect to the Committee’s Views”. See International Covenant on Civil and Political Rights, *Rules of Procedure of the Human Rights Committee*, UNCCPR, UN Doc CCPR/C/3/Rev 8, (2005) at Rules 93-100.


\(^{157}\) Buergenthal *at al*, *supra* note 74 at 71-72. The ICESCR provisions are programmatic, although some norms, e.g. family rights, may need immediate application. See Fabiana de Oliveira Godinho, *A Proteção Internacional dos Direitos Humanos* (Belo Horizonte: Del Rey, 2006) at 19.

\(^{158}\) *International Covenant on Economic, Social and Cultural Rights*, *supra* note 123 at Article 2 (1).

\(^{159}\) *Ibid.* at Article 16 (1) and (2) (a). Although this approach may favor state ratification and ultimately strengthens the protection of economic, social and cultural rights, Louis Sohn comments that the ICESRC received critics for “not going far enough and for being full of loopholes” (Sohn, *supra* note 35 at 40).

Since the adoption of the ICESCR, proponents of economic, social and cultural rights have complained about the lack of a justiciable system compared to that of the ICCPR.\textsuperscript{162} The Committee on Economic, Social and Cultural Rights began discussing the creation of an additional protocol establishing an individual complaint system as early as in 1990.\textsuperscript{163} However, only in 2001 did the former Commission on Human Rights embraced the idea.\textsuperscript{164} Consequently, in 2008, under the auspicious of the Committee on Economic, Social and Cultural Rights, the former Commission on Human Rights and an open Working Group, an individual complaint system was finally adopted.\textsuperscript{165}

In my view, the Optional Protocol, developed in 2008, reaffirms basic values set by the Universal Declaration of Human Rights and by other UN instruments. The Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, arguably proclaims the human person as the source of international human rights law when it affirms that human rights “and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments.”\textsuperscript{166} Moreover, this instrument reaffirms the universality of human rights as the basis of the United Nations’ human rights system when it establishes that all “human rights are universal, indivisible and interdependent and interrelated”.\textsuperscript{167}

\textsuperscript{161} Buergenthal \textit{at al.}, \textit{supra} note 74 at 74. Buergenthal points out that, despite numerous problems, “has gradually devised a sound and creative approach for pressing states to live up to their treaty obligations” (\textit{ibid}).

\textsuperscript{162} Michael J. Dennis & David P. Stewart, "Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaint Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?" (2004) 98 AJIL 462 at 462-463.

\textsuperscript{163} \textit{Ibid.} at 463.

\textsuperscript{164} \textit{Ibid.}

\textsuperscript{165} Buergenthal \textit{at al.}, \textit{supra} note 74 at 75. See also \textit{Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, supra} note 125.


\textsuperscript{167} \textit{Ibid.} at I (5).
Following this line of thought, the Optional Protocol to the ICESCR, in its preamble, confirmed that human dignity is a general principle of the UN Charter when it informs that “in accordance the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.\textsuperscript{168} Furthermore, the preamble upholds the university principle when it reaffirms “the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms”.\textsuperscript{169}

Although it reassures some basic human rights principles set by the Universal Declaration, the primary role of the Optional Protocol to the ICESCR is to strengthen the right of petition by granting individual access to the Committee on Economic, Social and Cultural Rights. Following the steps of the Optional Protocol to the ICCPR, the Optional Protocol to the ICESCR establishes that individuals, groups of individuals, and peoples or organizations on the behalf of individual victims can submit communications to the Committee.\textsuperscript{170} Moreover, acknowledging the importance of state cooperation in the protection of human rights, this Additional Protocol establishes the possibility of inter-state communications.\textsuperscript{171}

Thus, treaties and declarations are wholly different instruments. In my view, a human rights declaration exists to provide information to individuals regarding the existence of basic human rights and to inform states that individuals have interests that need to be taken into

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\textsuperscript{168} Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, supra note 125 at Preamble.
\textsuperscript{169} Ibid.
\textsuperscript{170} Ibid. at Article 2. The Optional Protocol to the ICESCR provides for a broader access because the Optional Protocol to the ICCPR only mentions “victims”. Its Article 1 states that a “State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol” (Optional Protocol to the International Covenant on Civil and Political Rights, supra note 124 at Article 1).
\textsuperscript{171} Ibid. at Article 10.
\end{flushleft}
consideration in the development and application of international and domestic law. Arguably, the overwhelming acceptance of human rights declarations reinforced their normative nature, regardless whether the Universal Declaration of Human Rights, for example, is now binding due to its status as a customary norm, or due to the fact that it became a general principle of law, or because its obligations flow from the Charter of the United Nations. In my view, the general normative point of the Universal Declaration is the individual legal personality, which places individuals at the center of international law of human rights.

Moreover, this same position was applied to the American Declaration, which informs that states need to consider the protection of individuals and its legal personality. This inter-American instrument acquired significant importance at the regional level due to a legal fiction, which grants it a strong normative force flowing from the Charter of the Organization of American States[^172] and especially from the Statute of the Inter-American Commission on Human Rights.[^173] This extra force provided by treaties and supported by the Inter-American Court[^174] is a necessary reasoning due to the fact that some member states of the Organization of American States have not acceded to the American Convention on Human Rights. However, in my view, the main normative character of both human rights declarations is the acknowledgment that human rights are rooted in the human person placing them in a center position in the development and application of international human rights law.[^175]

Treaties, on the other hand, are not declarations. Human rights treaties also recognize the individual legal personality, namely, individuals as bearers of inherent rights and duties and with

[^172]: Charter of the Organization of American States, supra note 85 at Articles 2 and 3.
[^174]: Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, supra note 99.
[^175]: This universal and human-centered system was, to a large extent, envisaged by states themselves. They mentioned the importance of individuals in treaty provisions, declarations and preambles, and created international tribunals and bodies to interpret and further develop international human rights law.
some procedural capacity (based on the right of petition). Similarly to human rights declarations, human rights treaties also inform that individuals have interests at the international level, that is to say, they seek the full application of the rights enshrined in human rights instruments. Moreover, both international instruments acknowledge that human rights stem from individuals themselves without undermining the importance of state cooperation and law-making.

However, the purpose of international human rights treaties is not limited to recognizing the importance of individuals in international law. They specify rights and duties in detail, crystalizing state obligations and fully recognize individuals’ rights. Moreover, they normally establish implementation mechanisms seeking to provide domestic and international effectiveness to the protection of human rights. Furthermore, treaties can create organizations, which may interpret and further develop the protection of human rights. Furthering the acknowledgment of the individual legal personality, human rights treaties may also crystalize the pro homine principle.176 This principle arguably flows from provisions enshrined in human rights treaties establishing a hermeneutical criterion, which informs that the interpretation of protected rights must always be extensive, limitations of rights must be restrictively interpreted and in case of doubt the most protective interpretation to the human person must be adopted.177 Thus, even acknowledging that declarations can acquire normative status, they differ from treaties.

176 For study on the relation between the pro homine principle and domestic law crystalizing a dialogue of sources see Valerio de Oliveira Mazzuoli, Tratados Internacionais de Direitos Humanos e Direito Interno [International Human Rights Treaties and Domestic Law] (São Paulo: Saraiva, 2010).
Accordingly, after the Second World War, the international community established a new paradigm different from that of the late 18th and 19th centuries. It places a universal and individual-centered protection of human rights as one of the main concerns of international law. As previously mentioned, the protection of human rights was part of international law before the Second War. However, this 19th century system of human protection was scarce, limited, solely focused on states and not universal. With the American and the Universal declarations and the treaties that followed, states arguably recognized the human person as the source and end of human rights. Moreover, states and international organizations envisaged a universal system of protection which encompasses a wide range of rights (e.g.: civil, political, economic, social, and cultural rights) that are not restricted to certain individuals. These rights are universal, interconnected and interrelated. Thus, in my view, after the Second War, states recognized individuals are bearers of rights and duties and with a will of their own at the international level. This is a paradigm shift in international law from the 19th and early 20th centuries and represents a return to the theoretical system of the law of nations of the Romans.178

Notwithstanding the importance of states as the main subjects of international law, the protection of human rights is centered on individuals who are addressees and right holders of these rights. Moreover, the corpus juris of international law of human rights is based on three different aspects. First, it crystalizes the individual protection through norms and principles enshrined in treaties and declarations.179 Second, it provides mechanisms of implementation of

178 See Chapter IV and, especially Chapter V.
179 Antônio Augusto Cançado Trindade, "Desafios para a Efetiva Proteção Internacional dos Direitos Humanos" [Challenges for an Effective International Protection of Human Rights] in Antônio Paulo Cachapuz de Medeiros, Desafios do Direito Internacional Contemporâneo [Challenges of Contemporary International Law] (Brasília: Fundação Alexandre de Gusmão, 2007) at 210-211. Cançado Trindade asserts that international human rights law is a corpus juris created to protect the human person. He adds that international human rights law protects individuals through substantive and procedural aspects. In a substantive perspective, the focus is on the protection of human beings based on norms and principles crystalized by treaties, conventions and resolutions from international
these norms and principles, which grant procedural importance to individuals.\textsuperscript{180} Third, within its own hermeneutic and methodological systems,\textsuperscript{181} it informs that individuals are subjects of international human rights law and, consequently, have interests which need to be taken into consideration by states and international bodies when developing and applying international law. These three aspects place international human rights law under an individual-centered framework, which might differ from other areas of international law.

Accordingly, post Second War human rights instruments are sensitive to the human person, that is, they recognize the “other entity”, the human entity, as a subject of law with rights, duties, capacity and interests at the international level. I believe that this recognition of the human personality is the general normative force of all human rights declarations. Furthermore, human rights declarations can have a specific normative force if their provisions become customary norms of international law or general principles of law. Treaties, differently, further recognizes the individual legal personality by crystalizing specific binding rights and duties and implementation mechanisms. International human rights law is an individual-centric law. Thus, in the following chapter, I analyze the individual legal personality under the law of nations in detail.

\textsuperscript{180} Ibid.
\textsuperscript{181} Ibid. at 211.
Chapter 4

The Individual Legal Personality

In the previous chapter, I point out that the human rights discourse is focused on the human person as the center of this subarea of international law. Treaties and declarations address equally states and individuals. Furthermore, human rights declarations have a “general normative force”, that is, inform that individuals are subjects of international and states need to take this personality under consideration when they interpret and develop human rights norms. Differently, treaties go one step ahead than providing a general normative force and grant specific rights, duties and capacity to individuals.

In this chapter, I analyze in detail the individual legal personality and its connection with the concept of the law of nations. My main point is that individuals are indeed subjects of international law, especially of international human rights law. They possess rights, duties, capacity and interests. Accordingly, I add one extra element to the international personality: interests. Individuals have interests different from those of states and the international community need to take this element into account when applying, interpretation and developing international human rights norms.

I analyze the evolution of the concept of international law and the theory of its subjects based on doctrinal and jurisprudential considerations. The law of nations was initially envisaged focusing on the human person. However, with the rise of voluntarist positivism, the human person became an object of international law. The object theory was refuted by the doctrine and by jurisprudential decisions of international courts. Jurists and judges stressed the possibility of
the individual legal personality, that is, they affirmed that the human person can be a direct addressee of rights and duties.

Accordingly, the traditional history of international law can be divided in three stages. First, there is the international law of the so-called “founding fathers”, which focused on the emergence of modern states and in the human person based on a natural law view of the law of nations. Second, international law was altered to exclude individuals and focus on state will as the source and end of law. Third, after the two World Wars, states and the international community as a whole placed human rights at the core of international law. This human-centered view of international law marks a new paradigm, acknowledged by international courts and scholars, which prioritizes individuals. However, this post-war paradigm is not a rescue of the law of nations of the so-called “founding fathers”, but rather a return of the method and concept of the Roman law of nations.

4.1. A Voluntarist International Law and its Object Theory: From Doctrinal Development to Jurisprudential Denial

The scope of the international legal personality, the definition of international law, and the understanding of the role of international law’s subjects in the legal system are arguably interconnected topics. Law recognizes certain entities as legal persons endowed with the capacity to possess and maintain rights, and be subject to perform specific duties. Legal personality,

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under the law of nations, requires the interrelationship between rights, duties and capacity to enforce them within the international system.\(^2\)

It is not an easy task to determine whether an entity possesses international legal personality. There are divergences in establishing the role and extent that international capacity and enforcement play in characterizing the legal personality. Furthermore, there is a wide range of participants at the international level, including states, international organizations, non-governmental organizations, public companies, private companies, and individuals.\(^3\) The International Court of Justice, in the advisory opinion concerning the *Reparation for Injuries Suffered in the Service of the United Nations*, endorsed this position by affirming that an entity, in this case an international organization, possesses international personality, that is, is a subject of international law, when it has international rights and duties, and has capacity to “maintain its rights by bringing international claims”.\(^4\) Furthermore, the Court did not restrict the scope of subjects of international law to only States. It acknowledged the open nature of the international legal personality when it affirmed that:

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The **subjects of law** in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States.\(^5\)

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\(^2\) *Ibid.* at 196. Ian Brownlie adopts this same position that a legal person, a subject of law, is “an entity capable of possessing international rights and duties and having the capacity to maintain its rights by bringing international claims” (Ian Brownlie, *Principles of Public International Law* (New York: Oxford University Press, 2008) 57).

\(^3\) Shaw, *supra* note 1 at 195.


\(^5\) *Ibid.* at 178 [emphasis added].
Based on the traditional criteria regarding the determination of international legal personality, Mazzuoli argues that states are the traditional subjects of the law of nations and continue to occupy a dominant position among the subjects of international law. Indeed, a “classical” position of international law is focused on states as its only subjects. Brierly, for example, asserts that international law is “a body of rules and principles of action which are binding upon civilized states in their relations with one another”. Arguably, it was with Vattel’s Droit des Gens, ou Principes de la Loi Naturelle, Appliqués à la Conduite et aux Affairs des Nations et des Souverains that international law began to be shaped as a law between states.

Vattel, arguably influenced by Zouche, defines the law of nations as “the science of the rights which exist between nations or states, and of the obligations corresponding to these rights”. To him, nations or states are societies of men who combined their forces to form political bodies in order to “procure their mutual welfare and security”. States, thus, have legal personality, that is, they have an understanding and a will of their own with obligations and rights. A nation that governs itself and does not depend on any other nation is a sovereign

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6 Valerio de Oliveira Mazzuoli, Curso de Direito Internacional Público [Textbook on Public International Law] (São Paulo: Editora Revista dos Tribunais, 2009) at 363. Shaw also argues that states “remain by far the most important legal persons” (Shaw, supra note 1 at 197).
11 Ibid.
12 Ibid.
Furthermore, although based on a natural law perspective, Vattel sustains that the law of nations regulates sovereign and equal nations.\textsuperscript{14}

According to this Swiss author, the first general law of international law provides that every state should contribute to the happiness and the advancement of other states.\textsuperscript{15} Furthermore, since every state is free and independent, it must be free to enjoy its liberty, that is, must be free to consider and determine which duties it can fulfill “towards others without failing in its duties towards itself”.\textsuperscript{16} Thus, states are free and this is a general rule of international law grounded on natural law. Furthermore, states are equal. Based on the laws of nature, individuals are equal with equal rights and obligations. States, which are formed by individuals, are by nature equal with the same obligations and rights.\textsuperscript{17} Accordingly, based on the laws of nature regulating the basic premises of the law of nations, states are free, independent and equal.\textsuperscript{18} Vattel concludes that the law of nations or droit des gens, as he calls it, “is the law of sovereigns; free and independent states are moral persons, whose rights and obligations we are to set forth in this treatise.”\textsuperscript{19}

Vattel’s law of nations, thus, setting the premises of classical international law, focuses on rights and duties of states. Furthermore, he also analyzes the relation between states and individuals. He argues that whoever ill-treats a citizen of a state indirectly injures the state itself. Thus, the sovereign of the injured citizen must “avenge the deed” and, if possible, should seek to force the aggressor to give full satisfaction or punish him.\textsuperscript{20} States, on the other hand, must not

\textsuperscript{13} Ibid. at 11.
\textsuperscript{14} Ibid. at 6 [emphasis added].
\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.
\textsuperscript{17} Ibid. at 7.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid. at 12.
\textsuperscript{20} Ibid. at 136.
allow its citizens to injure individuals from other states and must not offend that state itself. This rule, in Vattelian doctrine, follows from the understanding that states must mutually respect one another and avoid acts which might be hurtful to others. However, it cannot be asserted in general that an injury to a citizen is an injury to her state.

Moreover, Vattel explains an early development of the doctrine of extradition when he asserts that “[a]ssassins, incendiaries, and robbers are seized whenever they are found, and delivered up, on request, to the sovereign in whose territory the crime has been committed”. He also admits the possibility of this practice regarding less serious crimes or even civil offences. Moreover, a state as a whole is also responsible for the crimes of its citizens when “by its practices and by the principles of its government it accustoms and permits its citizens to rob and ill-treat foreigners at will, to make inroads into neighboring territory, etc”. Furthermore, commenting about foreigners, Vattel asserts that sovereignty is the right to command throughout the territory of the state, and thus the laws regulate all persons, citizens and foreigners, in every part of the land. Accordingly, if a sovereign accepts foreigners, he agrees to protect them and provide security.

The Vattelian doctrine is connected to the rights and duties of states and the relation between individuals and states concerning citizens and foreigners. Consequently, although grounded on natural law elements, Vattel’s international law sets the basis of a positivistic law of nations, that is, the international aspect of law connected to the relations between sovereign states based on their consent. Thus, international law is applicable to the separate personality of

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21 Ibid. at 136.
22 Ibid.
23 Ibid. at 137.
24 Ibid.
25 Ibid.
26 Ibid. at 144.
27 Ibid. at 145.
the state and not the ruler of the state, or its body of citizens or to private individuals. With the exception of the natural law principles connected to international law, the Vattelian doctrine was largely accepted by subsequent doctrine and practice.

However, arguably, Vattel was not completely oblivious to what could be considered remote notions of human rights. His natural law perspective can be linked to human rights if we agree that they are a set of rights and duties that empower humans to have a life of dignity and recognize that international law places states under the obligation to respect them. He argues that the second object of good governance is to provide the “true happiness of the nation”, which is the “great end of natural law”. According to the Vattelian doctrine, states have the duty, as the objects of good governance, to provide for the needs of the people. However, he acknowledges that this is not enough to achieve the happiness of a state and argues that education is important to achieve happiness.

Moreover, Vattel advocates in favor of “the liberty of philosophical discussion” which can be understood as an early notion of freedom of speech. Vattel questions that a person cannot enlighten his fellow citizens if “he finds himself a continual object of attack by ignorant bigoted quibblers, and if he is obliged to be continually on his guard to avoid being accused by cavillers of indirectly offending received opinions”. However, he asserts that liberty has limits and the state needs to “watch over the press and not allow publication of scandalous works which attack morality, the government, or religion established by law”. Furthermore, he argues that a state

28 Portmann, supra note 8 at 38.
29 Ibid.
30 Vattel, supra note 10 at 47.
31 Ibid.
32 Ibid.
33 Ibid. at 47.
34 Ibid. at 48.
35 Ibid.
must “inspire a love of virtue and an abhorrence of vice”36 and, thus, endeavor to “make the nobility and the common people virtuous”.37 Moreover, state obedience must not be absolute or blind and that agreements cannot violate natural law.38 Accordingly, there is an implicit right of resistance, which allows any foreign power to rightfully assist the oppressed population, which would constitute a right of international intervention in order to safeguard the individuals’ fundamental rights.39

After Vattel, states became the only public authorities and consequently the only actors on the international stage.40 During the eighteenth and mid-nineteenth centuries, scholars accepted a coexistence of legal positivism – the law of nations as state-made law – and natural law as the sources of international law.41 The arguably classical view of international law focuses on states42 and its main elements: sovereignty and equality.43 Follows the argument that sovereignty is divided in internal, that is, an independent domestic government,44 and external, which consists in the independence of one state in respect to other states.45 One scholar argues, for example, “sovereign states are equal in the eye of international law, whatever may be their

36 Ibid. at 49.
37 Ibid. at 50. Vattel adds that a state must inspire its citizens “with an ardent love for their country”37 as every person has a duty to love his or her state (Ibid. at 51).
39 Ibid. at 119.
40 Portmann, supra note 8 at 37.
41 Ibid. at 41.
42 Henry Wheaton, in his Elements of International Law, from 1866, asserted that nations and “those political societies of men called states” are the subjects of international law. Within this view, relations between private individuals or corporations and other states or their citizens are part of private international law, especially regarding conflicts of municipal laws of different states. He concludes that “the peculiar objects of international law are those direct relations which exist between nations and states” (Henry Wheaton, Elements of International Law in James Brown Scott, ed The Classics of International Law (Washington, The Carnegie Institution, 1916) at 13a. and 25-27).
43 Travers Twiss affirms that international law is the “rules which govern the international life of states” and independence is the possibility to enter into relations with other states, and sovereignty is the power to create and enforce the law (Travers Twiss, The Law of Nations Considered as Independent Political Communities (Oxford: Clarendon Press, 1884) at 2 and 25-25).
44 Wheaton, supra note 42 at 27 and 44.
45 Ibid. at 27.
relative power”.\textsuperscript{46} Wheaton, for example, based his law of nations on natural law by arguing that international law consists of rules of conduct deduced by reason, as consonant to justice, from the “nature of the society” existing among independent states.\textsuperscript{47}

This increasing state-centric view did not completely exclude natural law at the onset. In Twiss’ theory, for example, humans tend to organize in society for the purpose of aiding and assisting each other.\textsuperscript{48} From this tendency, grows a “Natural Law of Society”, which provides that “each individual should do for the others everything which their welfare requires, and which he can perform without neglecting the duty which he owes to himself”.\textsuperscript{49} Thus, for him, individuals can associate and form states, and might enter positive engagements individually or as states, but they continue to be under the obligation of the “Natural Law of Society”.\textsuperscript{50} Consequently, the purpose of the relations of the “National Society amongst States” is the “exchange of good offices” between states for their mutual preservation and for the advancement of their happiness.\textsuperscript{51}

Thus, although Vattel and some of his successors started to emphasize states as the subjects of international law, they were envisaged as a community of individuals bound by natural law. However, natural law, which flows from relations between individuals, was the ultimate but not the only source of law. States could also create new norms by consent. Consequently recourse to natural law, with only a difference of emphasis, was present in the

\textsuperscript{46} Ibid. at 44.
\textsuperscript{47} Ibid. at 20.
\textsuperscript{48} Ibid. at 7.
\textsuperscript{49} Ibid.
\textsuperscript{50} Ibid. at 7-8.
\textsuperscript{51} Ibid. at 8. Travers Twiss, following the classical view of the law of nations of the mid-19\textsuperscript{th} century, asserts that states must follow the “qualifications for Natural Society”, which requires them to perform to other states everything which their welfare requires without neglecting the duty that each state owes to its members. Consequently, states must be able to discharge the obligations of the “Natural Society” towards other political bodies, and be able to regulate, in conjunction with them, the mode of discharging those obligations (Twiss, supra note 43 at 8-9).
writings of naturalists, Grotians, and positivists.\textsuperscript{52} The rigid distinction between these three schools of thought, in the words of Lauterpacht, “was an afterthought of the positivistic period in the twentieth century – a period which was of short duration”.\textsuperscript{53} Accordingly, international law remained a law established by states and by natural law until the mid-nineteenth century.\textsuperscript{54} With the development of voluntarist positivism, international law was relegated to a law solely dependent on the will of states and with only few connections to human rights or individuals \textit{per se}.

\textbf{4.2. The Voluntarist International Law}

The German philosopher Hegel envisaged an international law system, which he called \textit{Staatsrecht}, only applied to “relations between states” and depended of “distinct and sovereign wills”.\textsuperscript{55} In Hegel’s view, states had absolute power and, contrary to the position of some previous scholars, their will was superior to international law: “[t]he relationship between states is a relationship of independent units which make mutual stipulations but at the same time stand above these stipulations”.\textsuperscript{56}

With the ascendancy of Vattel’s state-oriented view and with Hegel’s philosophy regarding state power in the international system, the law of nations was deprived of its moral and natural law elements, its conception of the individual as a subject of the law of nations and the idea of common good or \textit{recta ratio} as a universal goal. The state-centered theory of the law of nations viewed international law as subordinate to states, as a mere group of rules and

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\item \textsuperscript{52} Lauterpacht, \textit{Human Rights}, supra note 38 at 115.
\item \textsuperscript{53} Ibid.
\item \textsuperscript{54} Portmann, \textit{supra} note 8 at 41.
\item \textsuperscript{55} G.W.F. Hegel, \textit{Elements of the Philosophy of Right} (New York: Cambridge University Press, 1991) at 366.
\item \textsuperscript{56} Ibid.
\end{itemize}
\end{footnotesize}
principles that states had chosen, out of self-interest, to guide their relations with each other. This voluntarist concept of international law became the prevailing theory. It denied the international legal personality of individuals envisaging an international law which was not above, but below states.

In this voluntarist positivism, the law of nations is a system of legal rules that determines the rights and duties of states. This view could further minimize the influence of global community of states by arguing that international law is the system of international practices recognized by the states of Europe only. This exclusivist system was detached from notions of morality or ethics because law, unlike morality, is primarily concerned with the outward act and only secondarily to the motive or intention, seeking to elucidate the voluntariness and true character of the act. By the second half of the nineteenth century, international law could be envisaged as a law comprised by the consent of a limited number of sovereign states.

The twentieth century starts following the path of the nineteenth century, limiting international law to a body of rules and principles, which states, as members of the community of nations, recognize as binding in their mutual relations. Fenwick, for example, affirmed that “international law, like other forms of law, is based ultimately upon the realization by states of the need of a rule governing their mutual contacts of relationships”. Consequently, the ultimate basis of international law is the collectivity of states, the international community, which gives to

57 Shelton Amos, Lectures on International Law (London: Stevens and Sons, 1874) at 1.
58 Ibid. at 13.
59 Ibid. at 6.
60 See Ibid. at 8 and 13.
62 Ibid. at 36. Amos Hershey, in a similar approach, defines international law as a body of principles, costumes, and rules which are normally recognized as binding upon states in their mutual relations or with relations with nationals of other states (Amos Hershey, The Essentials of International Public Law and Organization (New York: The Macmillan Company, 1927) at 1).
the principles and rules the quality of an “objective legal system”.\textsuperscript{63} Accordingly, Fenwick seems to advocate that international law is a law “between states”, which collectively grant it the status of law. A consequence of this view is that “international law does not deal directly with individuals”, that is, the human person have neither rights nor duties at the international plane.\textsuperscript{64} Individuals, as property, are the “things” of international law in “respect to which rights are held and duties imposed”.\textsuperscript{65} He explains that:

\[\text{[I]ndividuals under such circumstances are not “subjects”, but merely “objects”, of international law. Their apparent international rights and duties are merely the rights and duties of their respective governments to assert claims in their behalf or to redress wrongs arising indirectly from their conduct. Strictly speaking, international law, as it exists today, knows only the state of which such individuals are nationals and will protect their rights or punish their acts only through the interposition of their state.}\textsuperscript{66}

Hershey, following this theory, adds that international law differs from international ethics. The former is connected to the principles of justice, conscience, or humanity, which should govern international relations. Conversely, international law, although influenced by international ethics, is “by no means identical with international law; for the latter fails to condemn certain practices and principles (as, e.g., the right of conquest) which are clearly at variance with ideals of justice and humanity”\textsuperscript{67} and is, consequently, based on interest and convenience.\textsuperscript{68}

\textsuperscript{63} Ibid.
\textsuperscript{64} Ibid. at 86.
\textsuperscript{65} Ibid. at 87, note 1.
\textsuperscript{66} Ibid. at 87.
\textsuperscript{67} Hershey, supra note 62 at 2-3.
\textsuperscript{68} Ibid. at 3.
Thus, for the voluntarist approach, international law is a result of the interest and convenience of states. Some positivist scholars can recognize the importance of natural law elements in developing the law of nations – which can be called international ethics or morality – but they do not form the basis of international law. This area of law is centered exclusively on states as sovereign and independent entities with equal rights and duties.\textsuperscript{69} The primary source of international law is consent, which can be tacit in the case of custom\textsuperscript{70} or express by means of treaties.\textsuperscript{71} In this voluntarist and state-centric system, there is no space for individuals. Individuals as material goods or things are objects of international law.\textsuperscript{72} “Things” are: “land territory, territorial waters, the open sea, aerial space, public vessels (mainly warships), private vessels (mainly merchantmen), and other public and private property of various sorts”.\textsuperscript{73} Hershey, after discussing the topic of “things”, especially territory, sea, and territorial waters, affirms that individuals are not subjects of international law, but rather are in this same category as goods or things, and adds that “[i]nasmuch as their international rights and obligations are mainly secured and determined by the states or political communities to which they belong, their nationality or political allegiances is a matter of the first importance”.\textsuperscript{74} However, Hershey admits that piracy and slave trade are international crimes.\textsuperscript{75}

The main proposition of voluntarist positivism is that international law concerns the relations of sovereign states based on their consent.\textsuperscript{76} Thus, one of the principal differences between municipal law and the law of nations is that the latter is not applicable to individuals,

\begin{itemize}
\item \textsuperscript{69} Ibid. at 22.
\item \textsuperscript{70} Hershey argues that imitation can also form a customary norm. See Ibid. at 24.
\item \textsuperscript{71} Ibid.
\item \textsuperscript{72} Ibid. at 267.
\item \textsuperscript{73} Ibid.
\item \textsuperscript{74} Ibid. at 347.
\item \textsuperscript{75} Ibid. at 336.
\item \textsuperscript{76} Portmann, supra note 8 at 46.
\end{itemize}

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but rather, is only pertinent to states based on consent either by treaty or practice. Consequently, individuals are not part of the international legal system. International norms and principles do not apply to them but, rather, they concern the consenting states, which undertake the responsibility to apply international norms domestically. Hence, international law applies to states based on their consent and individuals as objects can only be affected by the law of nations indirectly. The key aspect of this vision of international law is the states’ will. States, as only subjects of international law, choose which norms they should uphold and individuals are simply not part of this equation. Perhaps, the major contributor to this voluntarist positivist perspective of international law was Lassa Oppenheim.

Oppenheim defined international law as a group of conventional and customary rules considered legally binding by “civilized states” in their intercourse with each other. He thus adds that international law is a state law and “not a law of individuals”. Furthermore, following the steps of Hegel, Oppenheim asserts that the law of nations is a law between states and not above. Accordingly, international law is solely based on the will of states. Individuals have no active participation and the law of nations works as a way of inter-state communication completely deprived of any moral grounds or supra state power. Oppenheim argued that morality applies only to conscience, whereas law is enforced by external power, which, in the case of international law, is the common consent of the family of nations.
The challenge of the voluntarist positivism is to take a stand regarding the rights and duties of individuals at the international plane, that is, to provide a logical explanation for the role of individuals as part of the international legal system. The classical voluntarist position is that individuals are objects of the law of nations and, thus, as objects they are only indirectly connected to international law. For voluntarists, states are the conduits, which connect individuals to the law of nations.\(^8\) Accordingly, the law of nations imposes duties upon states to grant certain privileges to certain individuals as, for example, diplomatic envoys or citizens in a foreign territory.\(^9\) States, on the other hand, grant these rights by their domestic laws.\(^7\) Consequently, international law imposes certain duties, which can be transformed into individuals’ rights by domestic laws of a specific state.

This voluntarist reasoning maintains the exclusivity of states as the only subjects of international law and, furthermore, grants states full control of individuals because international norms are never directly applied to them. Rather, these norms are only applied based on the will of the individuals’ states of nationality. Consequently, in my view, this theory requires two different types of consent. First, there is an international consent, which is the acceptance of a duty to provide rights or privileges to individuals. Second, there is a domestic consent represented by the adoption of this international duty and its application domestically. Thus, there is no international norm that could bypass the “two consents” of states.\(^8\)

Accordingly, the link between an effective system of international individuals’ rights lies in the notion of nationality. In a strange logic, which places individuals in the same group as inanimate elements, Oppenheim affirms that international law acknowledges the “personal

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\(^8\) Ibid. at 362-363.
\(^9\) Ibid. at 363.
\(^7\) Ibid.
\(^8\) This voluntarist doctrine extends to the protection of individuals when in a foreign state who are protected by municipal law rather than the law of nations (Ibid. at 363-364).
supremacy of every state over its subjects at home and abroad”

and he adds that “these individuals appear just as much objects of the law of nations as the territory of the states does in consequence of the recognized territorial supremacy of the states”. Consequently, Oppenheim’s extremist position goes as far as placing the human person under complete control of their states of nationality and, furthermore, deprives stateless individuals from any international protection. He thus argues that:

Such individuals as do not possess any nationality enjoy no protection whatsoever, and if they are aggrieved by a state they have no way of redress, there being no state which would be competent to take their case in hand. As far as the law of nations is concerned, apart from morality, there is no restriction whatever to such stateless individuals.

Furthermore, Oppenheim fully excludes the possibility of a human rights system part of international law. He maintains that “rights of mankind” such as the “right of existence, right to protection of honor, life, health, liberty, and property, the right of emigration, and the like” do not enjoy “any guarantee whatsoever” from the law of nations, since this area of law concerns the relations between states and individuals are not its subjects. Thus, he argues that even in the case where a state acts with cruelty which would “stagger humanity” and the “world” calls upon the “Powers” to intervene, this would not represent the existence of rights of mankind nor would the conditions of life to which certain individuals are forcibly submitted within certain states.

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89 Ibid. at 366.
90 Ibid.
91 Oppenheim, supra note 80 at 366-367
92 Ibid. at 368.
93 Ibid. at 368-369.
Thus, the voluntarist positivism places individuals, like planes, territory, beasts or ships, as its objects.\textsuperscript{94} Under this object theory\textsuperscript{95} the fact that an entity is mentioned in the provision of an international treaty does not mean it is a subject of international law. Individuals would just be in the range of interests of international law, which may grant them indirect rights as it could also do with objects or the environment. The role of individuals on the international plane is akin to that of property in domestic law; legal norms regulate property but do not turn it into a subject of law. Accordingly, individuals are things deprived of international rights or claims against states. Moreover, individuals only have the object status against states other than their own.\textsuperscript{96}

This state-centric position rooted on voluntarist positivism was, at least to some extent, adopted by some international courts when adjudicating certain cases normally concerning diplomatic protection. In Mavrommatis case, the Ottoman Empire, prior to the First World War, granted concessions to a Greek national to build public works in Palestine.\textsuperscript{97} However, according to the applicant, the British government, which was the Mandate Power over Palestine after the War, refused to recognize Mavrommatis’s rights guaranteed by the agreements and contracts concluded with the Ottoman Empire.\textsuperscript{98} Accordingly, the Greek government took up Mavrommatis’s claim and filed a complaint before the Permanent Court of International Justice.\textsuperscript{99} The Permanent Court of International Justice, setting the judicial parameters of the doctrine of diplomatic protection, decided that:

\begin{quote}
\textsuperscript{94} Roberto Luiz Silva, \textit{Direito International Público} [Public International Law] (Belo Horizonte: Del Rey, 2008) at 422. The author, however, refers to the objectification of individuals as the “human-object” theory. See also Georg Manner, “The Object Theory of the Individual in International Law” (1952) 46 AJIL 428 at 429.
\textsuperscript{95} This theory is currently followed by international law scholars like the former judge of the International Court of Justice Rezek (Francisco Rezek, \textit{Direito Internacional Público: Curso Elementar} [Public International Law: Basic Textbook] (São Paulo: Saraiva, 2002) at 146.
\textsuperscript{96} Manner, \textit{supra} note 94 at 428-429.
\textsuperscript{97} \textit{The Mavrommatis Palestine Concessions (Greece v. UK)}, Jurisdiction, 1924 PCIJ Series A No. 2 at 7.
\textsuperscript{98} Ibid.
\textsuperscript{99} \textit{Ibid.}, at 8. See also \textit{Statute of the Permanent Court of International Justice}, 16 December 1920, LoN Treaty Series 170) [hereinafter “Permanent Court of International Justice” or “PCIJ”].
\end{quote}
In the case of the Mavrommatis concessions it is true that the dispute was at first between a private person and a State.... Subsequently, the Greek Government took up the case. The dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two States... This is undoubtedly the case in the present suit... It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects... on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law... Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.

The Permanent Court of International Justice, in this case, arguably acknowledged the voluntarist state-centric conception of international law. However,, in the light of the Permanent Court of International Justice’s restrictive access, this view of the doctrine of diplomatic protection was arguably the legal fiction necessary to crystalize an effective protection of individuals’ interests.\(^{100}\) In the classical positivistic approach, individuals were objects outside the scope of the law of nations. Nationality remained the only possible channel that connected individuals to the international sphere. The doctrine of diplomatic protection, thus, was the way

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\(^{100}\) See Statute of the Permanent Court of International Justice, supra note 99 at Article 34. This article establishes that “[o]nly States or Members of the League of Nations can be parties in cases before the Court” (ibid.). The Permanent Court of International Justice dealt with a similar question when Estonia filed a complaint arguing that Lithuania, owners and concessionaires of the Panevezys-Saldutiskis railway line, refused to recognize the rights of Esimene Juurdeveo Raudteede Selts Vefiemaal Company or to compensate it for illegal seizure and operation of this line. Furthermore, Estonia affirmed that Lithuania is under an obligation to make good the prejudice faced by the Esimene Juurdeveo Raudteede Selts Venemaal Company. The Lithuanian government, taking into account that Esimene Company was initially Russian founded at St. Petersburg, argued the impossibility of a diplomatic protection maintaining that a claim must be national at the time of the injury and at the time of its presentation. However, before reaching a decision regarding this issue, the Permanent Court of International Justice accepted Lithuania’s second claim, that is, that Estonia did not fulfill the requirement of exhaustion of local remedies and, consequently, its claim could not be entertained by the Permanent Court. See The Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania), Judgement 1939 PCIJ Series A/B No. 76 at 5, 9-14, 16 and 21-22.
by which states could seek to ensure the protection of individuals’ rights and interests. Thus, it is not a surprise that international courts as the former Permanent Court of International Justice and the current International Court of Justice, based on the doctrine of diplomatic protection, had to sooner or later face the question whether the human person could possess direct rights and duties.

4.3. The Limitation of the Object Theory by International Courts

The Permanent Court of International Justice’s advisory opinion concerning the jurisdiction of the courts of Danzig led to debates of whether individuals could possess international rights. According to international agreements, Poland had control and administrative powers over the Free City of Danzig’s railways.\footnote{Jurisdiction of the Courts of Danzig (Advisory Opinion) 1928 PCIJ Series B No. 15 at 8.} Furthermore, the two parties established the \textit{Endgültiges Beamtenabkommen} to regulate the Danzig railway officials who passed to work as part of the service of the Polish Administration.\footnote{Ibid. at 10.} Subsequently, several of these workers brought actions before Danzig courts against Poland for pecuniary claims.\footnote{Ibid.} The High Commissioner of the League of Nations at Danzig decided that such claims could not be based on the \textit{Beamtenabkommen}, which led Danzig to appeal to the Council of the League. The latter requested an advisory opinion of the Permanent Court asking whether the High Commissioner’s decision is well founded.\footnote{Ibid.} Poland argued that the \textit{Beamtenabkommen}, as a treaty, can only create rights and duties between the parties and, consequently, cannot regulate the legal relationship between the Polish Railways Administration and the Danzig officials.\footnote{Ibid. at 13.} In an arguably dubious comment, the Permanent Court of International Justice maintained that the
“answer to this question depends upon the intention of the contracting Parties”. In reaching its decision that the agreement is indeed directly relevant to the employment matters between the Polish Railways Administration and Danzig officials, the PCIJ sustained that:

It may be readily admitted that, according to a well-established principle of international law, the Beamtenabkommen, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts.

Accordingly, the PCIJ, in theory, adopts, at least to some extent, the traditional voluntarist positivism whereby international treaties cannot grant direct rights to individuals. However, even though the Court’s President, Anziliotti, was one of the main proponents of voluntarist positivism, the Permanent Court of International Justice’s decision is unclear on this aspect. It is possible to achieve an opposite conclusion: individuals could indeed have international rights if states so wish. In this case, the Permanent Court of International Justice did not analyze whether Poland had implemented the treaty domestically. Indeed, Poland’s arguments were in part based on the fact that it had never transposed the agreement into its municipal law.

Moreover, the PCIJ reinforced this understanding by affirming that the “wording and general tenor of the Beamtenabkommen show that its provisions are directly applicable as

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106 Ibid. at 17.
107 Ibid. at
108 See note 79 above.
109 Lauterpacht, Human Rights, supra note 38 at 28.
between the officials and the Administration”. Furthermore, when analyzing Article 9 of the agreement, the PCIJ decided that this treaty “should not be construed in a manner which would make the applicability of the provisions of the Beamtenabkommen depend on their incorporation into a Polish Regulation”. Consequently, the Permanent Court of International Justice, during the presidency of Anziliotti, had the opportunity to entirely dismiss the possibility of direct application of treaty norms and deny, on a restrictive interpretation, the possibility of individuals’ rights and duties under the law of nations by applying Poland’s municipal law, but it did not.

Consequently, the Jurisdiction of the Courts of Danzig case is an example that even before the Charter of the United Nations and the Universal Declaration of Human Rights, states could agree to place direct rights and obligations upon individuals. Furthermore, I believe this intention to expand rights and consequently incorporate new subjects can be explicit – if a treaty refers to this expansion – or implicit if the phraseology of the instrument lead to this understanding. Accordingly, the Permanent Court of International Justice, an arguably traditionally positivistic tribunal and presided by a prominent voluntarist scholar, arguably reached a groundbreaking, but obvious conclusion that states could surpass international law’s state-valued position and agree that individuals could possess international rights. Although this position is solely rooted on a state-centric view of international law, it demonstrates that

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110 Jurisdiction of the Courts of Danzig, supra note 101 at 18.
111 Ibid. at 20.
114 See Chapter III.
traditional international law instruments and judicial practice were gradually accepting the possibility of individual participation in the international sphere.\textsuperscript{115}

After the end of the League of Nations, the international community decided to replace the Permanent Court of International Justice with the International Court of Justice, which is a similar court with the same state-centric and voluntarist grounds.\textsuperscript{116} The ICJ initially followed its previous Court’s traditional position on certain aspects regarding diplomatic protection. In the \textit{Nottebohm} case, Lichtenstein argued that Guatemala breached its obligations under international law when it arrested, detained, expelled, and refused to readmit Mr. Nottebohm, and seized and retained his property without compensation.\textsuperscript{117} Nottebohm was a German citizen who lived in Guatemala, the place of his business activities, and applied and obtained naturalization from Liechtenstein in 1939.\textsuperscript{118} Thus, Liechtenstein requested the Court to declare that Nottebohm’s naturalization was not contrary to international law and that there is, consequently, the possibility of diplomatic protection.\textsuperscript{119}

The World Court, in a perhaps more voluntarist approach, maintained that “[d]iplomatic protection and protection by means of international judicial proceedings constitute measures for the defense of the rights of the state”.\textsuperscript{120} The ICJ espoused the theory that the nationality requirement of diplomatic protection must entail a genuine and effective connection between the state and the individual concerned.\textsuperscript{121} Thus, the International Court of Justice decided that

\textsuperscript{115} Georg Schwarzenberger, \textit{International Law}, vol 1 (London: Stevens & Sons Limited, 1958) at 142. Although Schwarzenberger admitted that individuals could be subjects of international law if states so agreed, he believed that the Permanent Court of International Justice, in the \textit{Jurisdiction of the Courts of Danzig}, did not grant direct rights to individuals (\textit{ibid.} at 145-146).
\textsuperscript{116} \textit{Statute of the International Court of Justice}, annex to the Charter of United Nations, 26 June 1945, Can. T.S. No 7 (entered into force 24 October 1945) [hereinafter “International Court of Justice”, or “World Court”, or “ICJ”].
\textsuperscript{118} \textit{ibid.} at 13 and 16.
\textsuperscript{119} \textit{ibid.} at 16.
\textsuperscript{120} \textit{ibid.} at 24.
\textsuperscript{121} \textit{ibid.} at 22-23. See also Brownlie, \textit{supra} note 113 at 440-441.
Nottebohm’s links to Liechtenstein were insufficient for an international recognition of nationality, and this state was thus ineligible to bring, on behalf of Nottebohm, a claim against Guatemala.\textsuperscript{122} The World Court was arguably influenced by Nottebohm’s reason to apply for naturalization, which was to be linked to a neutral state instead of Germany.\textsuperscript{123}

In another case concerning diplomatic protection, the \textit{Barcelona Traction} case, Belgium filed a complaint to the International Court of Justice arguing that Spain should pay reparations for damages allegedly caused to the Barcelona Traction, Light and Power Company, Limited, on account of acts contrary to the law of nations.\textsuperscript{124} The company was incorporated in Toronto (Canada), where it has its head office, but it formed a number of subsidiary companies to provide an electric power production and distribution system in Catalonia (Spain).\textsuperscript{125} Three of these companies were incorporated under Canadian law and the others were incorporated under Spanish law and had their registered offices in Spain.\textsuperscript{126} Furthermore, although contested by Spain, Belgium argued that Barcelona Traction's shared capital was largely held by Belgian nationals.\textsuperscript{127} The World Court sustained that Belgium could indeed exercise diplomatic protection in this case. Moreover, the Court acknowledged Canada’s capacity to act on behalf of Barcelona Traction on grounds of diplomatic protection.\textsuperscript{128} The Court reached its decision by arguing that:

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\item Nottebohm Case, supra note 117 at 26.
\item Brownlie, “The Place”, supra note 113 at 441. See also Nottebohm Case, supra note 117 at 26.
\item The Barcelona Traction, Light and Power Company Limited Case (Belgium v. Spain) [1970] ICJ Rep 3. In sum, Belgium argued that the Spanish authorities behaved in a way contrary to international law in order to facilitate the transfer of control over the property of the Barcelona Traction group into the hands of a private Spanish group. Furthermore, Spanish courts usurped a power of jurisdiction which they did not have under the rules of international law. Moreover, Belgium asserted that a large number of decisions of the Spanish courts did not properly followed Spanish law and constituted, in international law, a denial of justice. The Belgic government added that Spain did not apply the rights of the defence in the bankruptcy proceedings (ibid. at 17-22).
\item Ibid. at 8 para 8.
\item Ibid.
\item Ibid. at para 9.
\item Ibid. at 43-44.
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The Court would here observe that, within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting. Should the natural or legal persons on whose behalf it is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress…. However, all these questions remain within the province of municipal law and do not affect the position internationally.\textsuperscript{129}

However, the International Court of Justice decided that Belgium and Canada bear different types of diplomatic protection with regard to the Barcelona Traction Company.\textsuperscript{130} Canada, as the place where the company was incorporated, bears the primary right to exercise diplomatic protection to take up the claim of Barcelona Traction’s shareholders as its own claim. Belgium, on the other hand, possesses a secondary right, which only “comes into existence at the time when the original right ceases to exist”.\textsuperscript{131} Thus, the ICJ held that Belgium did not possess \textit{jus standi} in this case.\textsuperscript{132}

The International Court of Justice applied a traditional concept of diplomatic protection in \textit{Barcelona Traction} and decided to not mention the existence of individual rights, but rather, acknowledged that the primary right to take up claims from shareholders belongs to states where

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\textsuperscript{129} \textit{Ibid.} at 44 para 78 [emphasis added].
\textsuperscript{130} \textit{Ibid.} at 45 para 86 and 50 para 100.
\textsuperscript{131} \textit{Ibid.} at 50 para 100.
\textsuperscript{132} \textit{Ibid.} at 50 para 101. The Court stated that “the essence of a secondary right is that it only comes into existence at the time when the original right ceases to exist. As the right of protection vested in the national State of the company cannot be regarded as extinguished because it is not exercised, it is not possible to accept the proposition that in case of its non-exercise the national States of the shareholders have a right of protection secondary to that of the national State of the company.” It added that “[i]n the present case, it is clear from what has been said above that Barcelona Traction was never reduced to a position of impotence such that it could not have approached its national State, Canada, to ask for its diplomatic protection, and that, as far as appeared to the Court, there was nothing to prevent Canada from continuing to grant its diplomatic protection to Barcelona Traction if it had considered that it should do so” (\textit{ibid.} at paras 96 and 100).
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a company was incorporated. However, this case represents some steps outside the framework of a traditional voluntarist perspective with regards to human rights. The World Court arguably admitted that international law surpasses the single will of states when it maintained that states have obligations towards the international community as a whole, which they are bound to comply. These obligations *erga omnes* derive from, among other sources, “the principles and rules concerning the basic rights of the human person”. Accordingly, the International Court of Justice acknowledged that human rights can set obligations that are not based on state by state relations, but concern relations between states and the international community as a whole. Moreover, states are bound to comply with such obligations which place them, at least to some extent, above the mere will of a single state.

Notably, the conclusion of international instruments and the work of international courts led to the development of an international legal argument which ignores or at least weakens the traditional voluntarist positivism. However, it is not possible to reach the conclusion that states are no longer the primary subjects of international law or even that the traditional voluntarist position sponsored by scholars such as Oppenheim was set aside in *Barcelona Traction*. In this same case, the World Court, when commenting on the universal system of human rights, asserted that “the instruments which embody human rights do not confer on states the capacity to protect the victims of infringements of such rights irrespective of their nationality.” The Court, thus, acknowledges that, at the universal level, nationality is still the primary link that secures any kind of protection. Consequently, Oppenheim’s voluntarist positivism was still strongly resonating in the Court’s judgment.

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133 *Ibid.* at para 34.
135 See Chapter III above.
136 *The Barcelona Traction, Light and Power Company Limited Case*, *supra* note 124 at para 91.
Notwithstanding the recognition human rights can protect individuals irrespective of their nationality, the World Court upheld its status as a Court that handles disputes between states. Human rights issues irrespective of nationality claims should be under the scope of the regional systems of human rights. Accordingly, Barcelona Traction represents one step forward in recognizing that international law, at least in some specific cases as in human rights, is above the single will of states and can crystalize obligations that bind the whole international community. However, the Court missed the opportunity to state that certain treaties might establish rights directly applicable to individuals, that is, that the human person can be bearers of international rights and duties. Arguably, the International Court of Justice reached that decision in the LaGrand Case.

The LaGrand Case, regarding the prosecution and execution of two German nationals in the state of Arizona, attracted media attention due to its special circumstances. This case, which concerns human rights and general international law, was filed only hours before the execution of Walter LaGrand, prompting the International Court of Justice to decide proprio motu on a request for provisional measures; the first in ICJ’s history.

In 1982, Karl and Walter LaGrand were arrested in Arizona for an attempt of armed bank robbery in the course of which one individual was murdered and another one was seriously injured. On 14 December 1984, they were sentenced to death for first degree murder.

\[\text{137} \text{Ibid.} \text{The ICJ affirmed that "[i]t is therefore still on the regional level that a solution to this problem has had to be sought; thus, within the Council of Europe, of which Spain is not a member, the problem of admissibility encountered by the claim in the present case has been resolved by the European Convention on Human Rights, which entitles each state which is a party to the Convention to lodge a complaint against any other contracting state for violation of the Convention, irrespective of the nationality of the victim" (ibid.).}\]

\[\text{138} \text{LaGrand Case (Germany v. United States of America) [2001] ICJ Rep 466.}\]


\[\text{140} \text{LaGrand Case (Germany v. United States of America), supra note 138 at para 14.}\]

\[\text{141} \text{Ibid.}\]
Germany was informed of the situation only in 1992 by the LaGrands themselves who had learned about their right to consular assistance from other sources.\textsuperscript{142} After Germany was notified, the LaGrand filed a set of *habeas corpus* writs arguing, among other claims, that United States authorities violated the international law when it did not notify the German consulate of the arrest.\textsuperscript{143} However, American federal courts rejected this argument on the grounds of "procedural default", that is, this claim was not first argued in state courts.\textsuperscript{144}

On 2 March 1999, one day before the execution of Walter LaGrand,\textsuperscript{145} Germany filed an application and requested provisional measures to the International Court of Justice arguing that that the United States breached Article 36(b) of the Vienna Convention on Consular Relations.\textsuperscript{146} Germany sustained that the United States, in arresting, detaining, trying, convicting and sentencing Karl and Walter LaGrand, breached Germany’s own right and "its right of diplomatic protection of its nationals as provided by Articles 5 and 36 of the Vienna Convention".\textsuperscript{147} The International Court of Justice, under provisional measures, urged the United States not to execute Walter LaGrand.\textsuperscript{148} However, the United States protested the order and LaGrand was nonetheless...

\textsuperscript{142} *Ibid.* at para 22.
\textsuperscript{143} *Ibid.* at para 23.
\textsuperscript{144} *Ibid.* The LaGrand did not know of their right to consular assistance when they argued their case before state courts. See also Portmann, *supra* note 8 at 198-199. The ICJ points out that only on December 1998, the United States formally notified the LaGrands of their right to consular assistance. See *LaGrand Case (Germany v. United States of America)*, *supra* note 138 at para 24.
\textsuperscript{145} Karl LaGrand was executed before, on 24 February 1999. See *LaGrand Case (Germany v. United States of America)*, *supra* note 138 at para 29.
\textsuperscript{146} *Ibid.* at paras 1 and 3. Article 36 (b) of the Vienna Convention on Consular Relations establishes that: "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph". See *Vienna Convention on Consular Relations*, 24 April 1963, 569 UNTS 262 at Article 36 (b).
\textsuperscript{147} *LaGrand Case (Germany v. United States of America)*, *supra* note 138 at para 10.
\textsuperscript{148} *Ibid.* at para 32 (a).
executed later that day. Despite LaGrand’s execution, Germany decided to continue with the case before the ICJ.

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. Thus, Germany maintained that the Vienna Convention on Consular Relations, in its Article 36, paragraph 1 (b) establishes individual rights. In other words, Germany asserted that individuals have direct rights under general international law and the breach of these rights can prompt the subsequent right of redress. Furthermore, Germany argued that the “right of access to the consulate of the home state, as well as the information on this right, constitute individual rights of foreign nationals and are to be regarded as human rights of aliens”.

The International Court of Justice, a established state-centered and voluntarist court, faced two unusual questions. First, the World Court was called to decide whether individuals could have rights at the international level, in other words, if they are subjects of international law. Second, whether treaties are evolutive, that is, if a treaty, due to current developments, could be interpreted as a human rights instrument although it was arguably not initially envisaged as one. The United States asserted that rights of consular notification are rights of

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150 Ibid. at 37 and LaGrand Case (Germany v. United States of America), supra note 138 at para 38.
151 Vienna Convention on Consular Relations, supra note 146.
152 LaGrand Case (Germany v. United States of America), supra note 138 at para 75.
153 Ibid.
154 Ibid. at para 75. The government of the United States, among other points, argued that the International Court of Justice couldn’t play the role of an ultimate court of appeals in criminal proceedings. However, the ICJ rejected this argument by asserting that it was called to decide on the interpretation and application of an international treaty (ibid. at 50 and 52).
155 Statute of the International Court of Justice, supra note 116 at Articles 34 and 36.
states and not of individuals, even though they could be beneficiaries of those rights.\textsuperscript{156} Thus, the United States maintained that “the treatment due to individuals under the Convention is inextricably linked to and derived from the right of the state”.\textsuperscript{157}

Following a textual interpretation, the International Court of Justice asserted that the “clarity of these provisions, viewed in their context, admits of no doubt”.\textsuperscript{158} Thus, the World Court concluded that this provision of the Vienna Convention on Consular Relation establishes certain individual rights, which were breached by the United States.\textsuperscript{159} Accordingly, there are two important points of this decision. First, the ICJ explicitly acknowledged that individuals, more than just beneficiaries, can be direct bearers of international rights; not only human rights. Second, the World Court reached this conclusion by examining the wording of the provision and, consequently, decided to avoid an evolutive or teleological interpretation, which could lead to view the Vienna Convention on Consular Relations as a human rights treaty or containing human rights provisions.

Arguably, this approach was not accidental because the Court had to examine Germany’s argument that Article 36, paragraph 1, of the Vienna Convention on Consular Relations not only established an individual right, but “has today assumed the character of a human right”.\textsuperscript{160} The ICJ avoided this issue altogether. It grounded its decision on a textual interpretation of the Convention’s provision to reach the conclusion that the United States indeed breached Article

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\item \textsuperscript{156} \textit{LaGrand Case (Germany v. United States of America), supra} note 138 at para 76.
\item \textsuperscript{157} \textit{Ibid.} Article 36, paragraph 1 (b) of the Vienna Convention on Consular Relation spells out that: With a view to facilitating the exercise of consular functions relating to nationals of the sending state:
\item \textsuperscript{158} ... (b) if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph” (\textit{Vienna Convention on Consular Relations, supra} note 146 at Article 36, para 1 (b)).
\item \textsuperscript{159} \textit{Ibid.}
\item \textsuperscript{160} \textit{Ibid.} at para 77.
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Thus, the World Court dodged the question holding that it was unnecessary to consider this additional argument from Germany.\footnote{Ibid.}

Consequently, the International Court of Justice explicitly admitted that individuals can have direct rights under international law.\footnote{Ibid.} The ICJ acknowledged that the “beneficiary theory”, that is, the traditional concept of international law influenced by Vattel and later developed by Hegel and Oppenheim was no longer applicable as a general theory of international law.\footnote{Ibid. at para 89. The Court reaffirmed this understanding by arguing that “[t]he Court cannot accept the argument of the United States which proceeds, in part, on the assumption that paragraph 2 of Article 36 applies only to the rights of the sending State and not also to those of the detained individual. The Court has already determined that Article 36, paragraph 1, creates individual rights for the detained person in addition to the rights accorded the sending State, and that consequently the reference to "rights" in paragraph 2 must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual” (ibid [emphasis added]).}

The International Court of Justice arguably rejected this voluntarist system as a general rule of international law when it recognized that individuals have international rights, that is, they are bearers of rights on the international plane as a general conception of international law.

Although the International Court of Justice is not a constitutional tribunal or supreme court, it is the principal juridical organ of the United Nations and its advisory opinions and judgments are clearly significant to the interpretation and development of international law.\footnote{Traditionally, as previously mentioned, international law was envisaged to be a law between sovereign states and individuals were not part of this equation. Consequently, states could decide to accept an international instrument, which could, under the framework of domestic law, be beneficial to individuals.}

Consequently, the ICJ recognized that, as a general rule of international law, individuals are bearers of international rights. This understanding has important consequences for both international law and domestic law. At the international level, this decision states that individuals as bearers of rights can be subjects of international law even if this status is not explicitly established by a treaty or other international instrument. At the municipal level, this decision

\footnote{See Shabtai Rosenne, The World Court: What it is and How it Works (Dordrecht: Martinus Nijhoff Publishers, 2003) at 3-25 and 31-32.}
informs domestic judges and legislators that individuals, to international law, are direct addressees of rights and duties.

The Supreme Court of the United States dealt with similar questions. More explicitly, in the case of *Jogi v. Voges*, an Indian national argued that county law enforcement officials did not inform him of his right to notify his consulate of his arrest under Vienna Convention on Consular Relations. The United States Court of Appeals was the first American Court to directly face the question whether “a personal right can be inferred from Article 36 of the Vienna Convention”. It affirmed that this Convention crystalizes individual rights in at least two places: Article 5 and Article 36. The Court affirmed that "Article 36 confers individual rights on detained nationals. Although international treaties as a rule do not create individual rights..., Sosa recognizes that international law in general, and thus treaties in particular, occasionally do so". Thus, they concluded that “Article 36 of the Vienna Convention by its terms grants private rights to an identifiable class of persons... and that its text is phrased in terms of the persons benefitted”.

166 In the case of *Sanchez-Llama v. Oregon*, the Supreme Court of the United States held that the “the ICJ’s interpretation deserves ‘respectful consideration’” and without explicitly affirming that individuals are bearers of international rights, the American Supreme Court arguably acknowledged it indirectly when it affirmed that “[a] defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police” (*Sanchez-Llama v Oregon* (United States Supreme Court) [2006] 548 U.S. 331, 126 S.Ct. 2669, 165 L.Ed.2d 557, 74 USLW 4493, 06 Cal. Daily Op. Serv. 5718, 2006 Daily Journal D.A.R. 8363, 19 Fla. L. Weekly Fed. S 386 at 18 and 15).


171 *Ibid.*. The United States Court of Appeal decided that “Jogi is entitled to pursue his claim under § 1983”. See *ibid.* at III. This was a different position that that of Alberta Court of Appeal. In the case of *R. v. Van Bergen*, the Alberta Court of Appeals faced the question whether individuals could have direct rights under the Vienna Convention on Consular Relations. Van Bergen, a Canadian citizen, appealed from an order of committal by the extradition judge, and he applied for judicial review of the decision of the Minister of Justice surrendering him to the United States for crimes committed in that state. The application for judicial review was also based on the argument that the appellant was not informed of his right to consular assistance upon his arrest in the United States. Alberta Court of Appeal also dismissed the application for judicial review asserting that “[t]he Vienna Convention creates an obligation
The World Court faced again the same question whether individuals can be international bearers of rights and whether Article 36 of the Vienna Convention on Consular Relations has status of a human right. In the case of *Avena*, Mexico filed a complaint before the International Court of Justice against the United States requesting the Court to impede the execution of several Mexican nationals based on the Vienna Convention on Consular Relations.\(^{172}\) The ICJ, following the same reasoning applied in *LaGrand*, affirmed that:

The Court would first observe that the individual rights of Mexican nationals under paragraph I (b) of Article 36 or the Vienna Convention are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the United States. Only when that process is completed and local remedies are exhausted would Mexico be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection.\(^{173}\)

Accordingly, the World Court reaffirmed that Article 36 (b) establishes individual rights.\(^{174}\) Furthermore, the ICJ recognized that violations of this individual right can lead to a violation of the rights of the sending state, and, conversely, a breach of a sending state’s right can entail a violation of individual rights.\(^{175}\) Consequently, to use the expression of the ICJ, in cases of an “interdependence of the rights”, a state can submit a claim in its own name requesting the Court to rule on a violation of its direct rights and of the rights of individuals, which were granted by a treaty provision.\(^{176}\) Article 36, paragraph 1 (b), for example, contains three separate but interrelated elements. First, the right of the individual to be informed without delay of his

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\(^{172}\) *Avena (Mexico v United States)* [2004] ICJ Rep 12 at 1-3.

\(^{173}\) Ibid. at para 40 [emphasis added].

\(^{174}\) Ibid.

\(^{175}\) Ibid.

\(^{176}\) Ibid.
rights enshrined in Article 36. Second, the provision contains the right of the consular post to be notified, without delay, that one of its nationals was detained. Finally, the duty of the receiving state to notify, without delay, the consular post of any communication sent the detained individual.\textsuperscript{177}

Thus, according to the jurisprudence of the International Court of Justice, a treaty provision can establish more than one right and one duty. They can be multifaceted by creating multiple rights and duties to different international entities such as states and individuals. This is particularly true for human rights, which are based on individuals. Accordingly, the International Court of Justice acknowledged that a treaty can indeed establish direct rights for states and individuals, that is, treaties can create non-excluding rights. In other words, treaties can establish rights both states and individuals at the same time.

The International Court of Justice arguably held that the object theory is unnecessary because international norms could directly apply to individuals. Thus, individuals can have international legal personality if a legal instrument grants them this status directly, by explicit reference to them as bearers of rights, or indirectly, if the instrument’s nature concerns the protection of individuals and its provisions are addressed to them. Accordingly, different from the “traditional” approach of diplomatic protection where a state must espouse an individual’s claim before the matter enters the domain of international law and the right transforms into a state right, the modern version of diplomatic protection recognizes that states can espouse their own claims and individual claims both as part of international law.

The ICJ’s general theory of the individual legal personality at the international level arguably applies to \textit{lex specialis}, that is, to specific norms of international law, especially in the

\textsuperscript{177} Ibid. at 61.
area of international human rights law. In 2010, in the Case Concerning Ahmadou Sadio Diallo, the International Court of Justice faced the question whether individuals are direct addressees of human rights at the international level. Guinean filed a complaint to the World Court against the Democratic Republic of the Congo (DRC) concerning ‘serious violations of international law’. According to Guinea, Ahmadou Sadio Diallo, a Guinean citizen, was unjustly imprisoned, despoiled his sizable investments, businesses, movable and immovable property and bank accounts, and after expelled by the Democratic Republic of the Congo. Diallo lived in the DRC where he founded an import-export company, Africom-Zaire, incorporated under Zairian law, and after took part, as a manager of Africom-Zaire, in the founding of Africontainers-Zaire, which is a company specialized in the containerized transport of goods. Diallo was arrested in 1988 and released in 1989. In 1995, he was rearrested and subsequently expelled from DRC in 1996.

Guinea argued that the DRC by arresting, detaining and expelling Mr. Diallo breached Article 13 and Article 9, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights and Article 6 and Article 12, paragraph 4, of the African Charter of Human and Peoples’ Rights for the expulsion of Diallo. Furthermore, the conditions in detention were “comparable to forms of inhuman or degrading treatment that are prohibited by international

179 Ibid. at 645.
180 Ibid.
181 Ibid. at para 16.
182 Ibid. at para 19. The ICJ, however, decided that the claim concerning the arrest and detention from 1988 to 1989 was inadmissible (ibid. at para 47).
183 Ibid.
184 See International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47 at Article 9, paragraphs 1 and 2 and Article 13 [hereinafter ‘International Covenant on Civil and Political Rights or ICCPR’].
186 Case Concerning Ahmadou Sadio Diallo, supra note 178 at para 63.
law”, and he was not informed of his right to request consular assistance under Article 36 of the Vienna Convention on Consular Relations. In its preliminary judgment, the ICJ pointed out that Guinea espoused Mr. Diallo’s claims arguing that the Democratic Republic of Congo violated his “individual personal rights” and his direct rights as a shareholder. Guinea claimed that DRC breached Diallo’s individual rights to not to be subjected to inhuman and degrading treatment, and his rights enshrined in the Vienna Convention on Consular Relations. Arguably, in the light of Guinea’s submissions, the ICJ recognized:

Owing to the **substantive development of international law over recent decades in respect of the rights it accords to individuals**, the scope _ratione materiae_ of diplomatic protection, originally limited to alleged violations of the minimum standard of treatment of aliens, has subsequently widened to include, inter alia, internationally guaranteed human rights.

Consequently, to the International Court of Justice, “internationally guaranteed human rights” are rights accorded to individuals. Thus, it concluded that Guinea had standing in this case regarding Diallo’s direct rights. Significantly, even before the analysis of Guinea’s arguments, the World Court subdivided these claims under the name “Protection of Mr. Diallo’s Rights as an Individual” and, furthermore, placed human rights provisions together with

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187 Ibid.
188 Ibid. See also _Vienna Convention on Consular Relations_, supra note 146 at Article 36, para 1 (b).
189 _Case Concerning Ahmadou Sadio Diallo (Guinea v Republic Democratic of Congo)_ [2007] ICJ Reports 582 at 29.
190 Ibid. at para 29.
191 Ibid. at para 39 [emphasis added].
192 Ibid. at para 65. The ICJ, however, does not agree with the possibility of a “protection by substitution”. The Court asserts that “having carefully examined State practice and decisions of international courts and tribunals in respect of diplomatic protection of _associés_ and shareholders, is of the opinion that these do not reveal — at least at the present time — an exception in customary international law allowing for protection by substitution, such as is relied on by Guinea” (ibid. at para 89).
193 _Case Concerning Ahmadou Sadio Diallo_, supra note 178 at 639 (Table of Contents).
Article 36 of the Vienna Convention on Consular Relations, which the ICJ had previously determined creates rights for states and individuals. Furthermore, the International Court of Justice, taking into account the interpretation of regional and global human rights bodies, arguably reaffirmed that human rights provisions confer direct rights to individuals and, consequently, states could, in certain circumstances, espouse this violation as their own.

Furthermore, the Court indirectly acknowledged that Article 36 of the Vienna Convention on Consular Relations also grants individual rights and concluded that DRC indeed violated this provision. Moreover, in wording that arguably takes into account the individual status as bearers of rights, the ICJ affirmed that the breach of a regional treaty is related to the “damage Mr. Diallo suffered as a result of the internationally wrongful acts of which he was a victim”.

Individuals are the primary addressees of human rights norms and this qualifies them as subjects of international law in human rights. In this case, the International Court of Justice recognized this special status of international human rights norms, which grants rights to individual and states. Accordingly, perhaps for the first time in its history, in an approach similar to that of human rights courts, the International Court of Justice analyzed universal and

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194 Ibid. at para 63. See also Avena (Mexico v United States), supra note 172; and LaGrand Case (Germany v. United States of America), supra note 138.
195 Case Concerning Ahmadou Sadio Diallo, supra note 178 at para 74 [emphasis added]. The ICJ, thus, concluded that “Article 13 of the Covenant was violated in respect of the circumstances in which Mr. Diallo was expelled” (ibid.). Moreover, the World Court asserted that the detention and arrest of Diallo was arbitrary and, thus, not in accordance with Article 9, paragraph 1, of the ICCPR and Article 6 of the African Charter. Furthermore, DRC breached paragraph 2 of Article 9 when it did not inform, at the time of the arrest, of the reasons of Diallo’s arrest (ibid. at para 80). Although the International Court of Justice recognizes that the prohibition of inhuman and degrading treatment is a rule of general international law binding on states “in all circumstances”, Guinea could not demonstrate that this general rule was breached (Ibid. at para 87-89).
196 Ibid. at para 95. The ICJ stated Mr. Diallo have the right to be informed of “his rights in that respect”.
197 Ibid. at para 97.
198 Ibid. at para 98. Thus, in my view, it was not by accident that the International Court of Justice grouped human rights claims together with the violation of Article 36 of the Vienna Convention on Consular Relations. Individuals are direct bearers of human rights norms as in the case of the right of consular notification. Even not acknowledging its status as a human right, the ICJ could not discard the notion that the right of consular notification exists to protect individuals and, thus, they are its primary addressees.
199 Case Concerning Ahmadou Sadio Diallo [2010], Separate Opinion of Judge Cançado Trindade, ICJ Rep 639 at 95.
regional 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.\textsuperscript{200} Although the
International Court of Justice avoided a more activist role and did not explicitly affirm that
individuals are subjects of international law or that the main purpose of human rights is the
protection of individuals, the ICJ’s reasoning arguably leads to the conclusion that individuals
indeed are direct bearers of human rights and that the object and purpose of this area is the
protection of the human person.\textsuperscript{201}

Judge Cançado Trindade, in his separate opinion, went one step further and explicitly
mentioned the individual-centric purpose of international law of human rights. He affirmed that
this case “concerns, in reality, the \textit{individual rights} of Mr. A. S. Diallo, as set forth in the 1966
UN Covenant on Civil and Political Rights and in the 1981 African Charter”\textsuperscript{202} and it “further
concerns his individual right to information on consular assistance”.\textsuperscript{203} He emphasized the
uniqueness of this case by affirming that it “is, thus, significantly, \textit{an inter-State contentious case
before the International Court of Justice, pertaining entirely to the rights of the individual
concerned}”.\textsuperscript{204} Commenting the decision of the International Court of Justice and the parties
concerned to shift the focus of this case from diplomatic protection – a remainder state-centric
doctrine of international law – to the protection of human rights, Trindade affirmed that:

\begin{quote}
Ours are the times of a new \textit{jus gentium}, focused on the
rights of the human person, individually or collectively,
which the “\textit{droit d’étatistes}” of the legal profession insist on
refusing to reckon, or rather on refusing or failing to
\end{quote}

\begin{thebibliography}{99}
\bibitem{200} Ibid. at para 160.
\bibitem{201} Case Concerning Ahmadou Sadio Diallo, supra note 178 at para 39 and para 74.
\bibitem{202} Case Concerning Ahmadou Sadio Diallo, Separate Opinion of Judge Cançado Trindade, supra note 199 at para 4
[emphasis in original].
\bibitem{203} Ibid.
\bibitem{204} Ibid. at para 5 [emphasis in original].
\end{thebibliography}
understand, willingly or not. Much to the credit of both Guinea and the DRC, the ICJ is now called upon to settle a dispute… on the basis of two human rights treaties… which have a prominent place in the contemporary *corpus juris* of the international law of human rights, in addition to the 1963 Vienna Convention on Consular Relations.\(^{205}\)

In this decision, Cançado Trindade stressed two fundamental aspects of international human rights law. First, it mainly concerns the protection of individuals.\(^{206}\) Second, the application and interpretation of international law, based on its object and purpose, must focus on an effective protection of individual rights and, consequently, limitations of rights must be restrictively interpreted.\(^{207}\)

Arguably, the International Court of Justice’s decision recognizes the individual-centric aspect of international human rights law. However, Judge Cançado Trindade in his separate opinion in *Ahmadou Diallo* case\(^{208}\) and in his separate opinion in *the Unilateral Declaration of Independence in Respect of Kosovo*\(^{209}\) is clearly unsatisfied with what he calls the “conservative approach” asserting that the ICJ avoids centering its reasoning on individuals or on humanitarian considerations and consequently shows that it “cannot bear very much reality”.\(^{210}\) The


\(^{207}\) *Ibid.*

\(^{208}\) *Ibid.* at para 21. He affirmed that “The fact that the mechanism remains a strictly inter-State one, rather anachronistically, as if attempting to defy the ineluctable passing of time, does not mean that the reasoning of the ICJ should nowadays remain also one developed on a strictly inter-State perspective, a reasoning which can only behold States (cf. paras. 203-205, infra). We have before us a human rights case, a case concerning the rights of Mr. A. S. Diallo under the UN Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights (in addition to the 1963 Vienna Convention), in respect of the arrests and detentions he was subjected to in 1988-1989 and 1995-1996, prior to his expulsion from the country of his long-time residence in 1996. Despite its inter-State procedure, the Court is called upon to pronounce on the rights of a human person, beyond the inter-State straightjacket” (*ibid.*).

\(^{209}\) *According with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Cançado Trindade’s Separate Advisory Opinion [2010] ICJ Reports 403 at para 35*.

\(^{210}\) *Ibid.* Cançado Trindade argues that: “[a]s a Member of the Court, I feel obliged to examine that factual background in the present separate opinion, given the fact that the Court appears not to have found it necessary to do so, namely, to consider carefully Kosovo’s grave humanitarian crisis. This issue, to which I attach great relevance, was, after all, brought repeatedly to the attention of the Court, in the course of the present advisory proceedings, by
International Court of Justice and the Permanent Court of International Justice, however, played an important role in acknowledging that individuals can indeed be international bearers of rights and duties, which shows the abandonment of the “object” theory of international law.

4.4. The Theoretical Abandonment of the Object Theory

As previously mentioned, international law is classically defined as a system of rules and principles that bind and guide the relations between of sovereign states. From this perspective, which was prominent throughout the 19th and 20th centuries, the core of the concept of international law is the notion that its subjects were only states, as expressed by the term “Staatenrecht” – law of states – used to designate international. This state-centric system arguably started to emerge after the Peace of Westphalia in 1648 when the concept of modern states not subjected to religious power and guided by principles of equality and sovereignty created an international system based on independent states without superior authority over them.

More recently, international organizations joined the group of subjects of international law together with states. The International Court of Justice acknowledged that it is indispensable for the United Nations to have an international personality to achieve its ends, thus

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211 Brierly, supra note 7 at 1. See also P.K. Menon, “The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine” (1992) 1 J Transnat'l L & Pol'y 151 at 4.
212 Silva, supra note 94 at 47.
213 Ibid. at 50.
214 The political and historical aspects concerning the Peace of Westphalia are outside the scope of this thesis. For a more detailed account see Antonio Cassese, International Law (New York: Oxford University Press, 2005) at 25.
215 Ian Brownlie affirms that for international organizations to have legal personality there must be a permanent association of states, a legal distinction between the organization and its member states, and the existence of legal powers that can be exercised on the international plane and not only within the municipal system of one or more states (Brownlie, supra note 2 at 649).
recognizing the necessity for some international organizations\(^{216}\) to be subjects of international law.\(^{217}\)

However, the legal personality of international organizations is of a different nature than that of states. They are not primary subjects of international law because they depend on the will of their members to exist and to pursue the execution of their objectives.\(^{218}\) Furthermore, their existence is contingent on a constitutive treaty.\(^{219}\) Notwithstanding their secondary role as subjects of international law, international organizations can enter into relations with states and other organizations, they are bearers of rights and duties at the international level and they can conclude treaties with other organizations and/or with states.\(^{220}\) Thus, although peculiar and fundamentally different from that of states, the international personality of these organizations is virtually uncontested.

The status of individuals as subjects of international law does not have the same international acceptance as that of international organizations. Although there has been much debate of their standing in international law,\(^{221}\) opinions are strongly divided of whether

\(^{216}\) Seyersted defines international organizations as “international organs… which are not all subject to the authority of any other organized community (except that of participating communities acting jointly through their representatives on such organs), and which are not authorized by all their acts to assume obligations (merely) on behalf of the several participating communities” (Finn Seyersted, *Common Law of International Organizations* (Leiden: Martinus Nijhoff Publishers, 2008) at 39).

\(^{217}\) *Reparation for the Injuries Suffered in the Services of the United Nations*, supra note 4 at 178. The Court stated that: “[t]hroughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable” [ibid. [emphasis added]].


\(^{219}\) Rezek, *supra* note 95 at 145-146.


\(^{221}\) Brownlie, “The Place”, *supra* note 113 at 435-436.
individuals possess any standing or personality at the international level.\textsuperscript{222} The problem exists largely because there is no treaty or customary norm of international law clearly defining the elements and the subjects of the law of nations.\textsuperscript{223} Consequently, debates regarding the elements of international personality have been part of doctrinal discussions.\textsuperscript{224}

However, Panama requested an advisory opinion from the Inter-American Court of Human Rights asking whether legal entities (\textit{e.g.}: corporations) could be victims of human rights violations and whether there is a specific protection of shareholders within the Inter-American system.\textsuperscript{225} These questions could arguably result in an opinion, which would help clarify the current state of the law within the jurisprudence of regional human rights courts regarding the scope of entities with international legal personality in human rights.\textsuperscript{226}

\textsuperscript{223} See Portmann, \textit{supra} note 8 at 9.
\textsuperscript{224} One doctrinal issue on the individual legal personality is whether fully accepting individuals as subjects of international law undermines the international human rights system by pushing states away. Some could argue that sovereignty is the main element underlying international law. Consequently, the existence of a human rights system centered on the human person would remove state power, which would weaken this system’s legitimacy. Post-Second War human rights have arguably eroded state sovereignty. However, as previously mentioned, international human rights instruments, including treaties, explicitly recognize the individual legal personality. States themselves accepted this human-centered and self-limitation system. Moreover, sovereignty is still a key element of international law. States decide whether they will accept a human rights treaty or even whether they will join a human rights system altogether. States can also denounce human rights treaties whenever they want. International human rights law indeed eroded the “classical” international sovereignty concept studied since the 19th century with a more individual-centered and Roman-based system. However, sovereignty and state acquiescence are still relevant aspects of international law. See Louis Henkin, “That ‘S’ Word: Sovereignty, and Globalization, and Human Rights, et Cetera” (2000) 68 Fordham L Rev 1 at 4 and 7. See also Louis Henkin, “Human Rights and State ‘Sovereignty’” (1996) 25 Ga J Int'l & Comp L 31. See also Oona A Hathaway, “Do Human Rights Treaties Make a Difference?” (2002) 111 Yale Law Journal 1935.
\textsuperscript{226} Another controversial issue is the existence of collective rights. Some scholars argue in favour and others argue against the existence, justification or necessity of collective rights. Arguably, there are three different views on collective rights (which might be argued concomitantly or separately). Collective rights could be group rights or corporate rights. Group rights could be separate rights addressed to a group of individuals (\textit{e.g.}: self-determination) or they could be individual rights held by a community (\textit{e.g.}: communal property). Some add corporations as another aspect of collective rights. See generally Jack Donnelly, \textit{Universal Human Rights in Theory and Practice} (Ithaca: Cornell University Press, 1989) at 16-17; Yoram Dinstein, "Collective Human Rights of Peoples and Minorities" (1976) 25 ICLQ 102 at 105-106; Miodrag A. Javanovic, "Are there Universal Collective Rights?" (2010) 11 Hum Rights Rev 17 at 24; Will Kymlicka, \textit{Multicultural Citizenship} (New York: Oxford University Press,
Following a different perspective, my argument is that to deny the international legal personality of individuals is not in accordance with the Roman-based status that human rights treaties and declarations granted to the human person and international courts later indirectly acknowledged. In the first topic, I focused on the “classical” view of the subjects of international law and the approach of the two main general international law courts, the former Permanent Court of International Justice and the International Court of Justice. Now I turn to the doctrine of international personality of individuals.

As previously mentioned, the object theory of international law regarding individuals has three different and interrelated elements. First, individuals do not possess international rights and duties under the law of nations. Second, individuals are but a “thing”, an international object, as a ship or the environment which, however, could be benefited by international law as an extension of states’ rights and duties or by domestic implementation of international instruments. Third, individuals have no access to international mechanisms of complaints and cannot argue that states did not treat them in accordance with international law. Consequently, nationality is the source and limit of the protection of human rights. In other words, the human person is protected by international law only if states espouse their claims at the international level or if there is a domestic norm in accordance with international law protecting their rights.

Thus, to the object theory, human rights treaties do not establish or acknowledge the individual legal personality, but rather confirms the theory that, under these treaties, individuals are mere bearers of benefits granted by states under international law of human rights and,

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227 Manner, supra note 94 at 428-429.

228 Ibid.
consequently, are not *de facto* or *de jure* subjects of international law.\textsuperscript{229} Accordingly, there is a distinction between purpose and subjects. The purpose and objective of human rights treaties is the protection of individuals, but, differently, they place obligations and rights on states. Thus, to the proponents of the object theory, there is no mention of direct applicability of rights to individuals in the main human rights instruments.\textsuperscript{230} Furthermore, the possibility of direct applicability of human rights norms to individuals is within the ambit of domestic law and no state is obliged by international treaty law to accept it.\textsuperscript{231}

The argument is that there are two distinct situations: obligations, including their content, and applicability. Obligations and their contents are determined by international law. However, the status of these obligations, that is, whether they can be directly applied to individuals falls within the ambit of domestic law.\textsuperscript{232} Consequently, individuals are not subjects of international law, but can nonetheless be addressees of international law norms domestically if a state constitution determines a direct applicability. Arguably, this “non-subject” position in a modern approach sustains that human rights obligations flow from agreements between states in which the beneficiaries are third parties who are not normally subjects of international law.\textsuperscript{233} Orakhelashvili, mentioning Lauterpacht and Oppenheim, argues that “treaties do not normally create these rights, but they impose the duty upon the contracting states of calling these rights

\textsuperscript{229} *Ibid.* at 437.
\textsuperscript{230} Orakhelashvili, *supra* note 222 at 265.
\textsuperscript{231} *Ibid.* at 266.
\textsuperscript{232} *Ibid.*
\textsuperscript{233} Mégret asserts that human rights obligations have a “special character” due the fact that they pre-exist their legal recognition, set *erga omnes* obligations and they “have a life of their own”. However, he takes the position that “human rights treaties create rights specifically for individuals who are not normally subjects of international law generally or treaties specifically” (Frédéric Mégret, “Nature of Obligations”, in Daniel Moeckli *et al.*, *International Human Rights Law* (New York: Oxford University Press, 2010) at 127).
into existence by their municipal laws” and concludes that “these individuals do not, as a rule, acquire any international rights under these treaties”.

Although compelling, these arguments are not in accordance with the notion of international law in general and specifically with the definition of international human rights law. Furthermore, it is important to distinguish the position of Lauterpacht and Oppenheim. The latter was a positivist international law scholar. He believed that the importance of individuals to the law of nations is “just as great as that of a territory.” Consequently, they are objects with “nationality as the link between this law and individuals.”

Ironically, Hersch Lauterpacht, an international human rights lawyer, in 1945, took the task to edit Oppenheim’s main international law book and to bring it up to date. Thus, Lauterpacht was editing the main book of a prominent international scholar and arguably could not change the theoretical basis intrinsic to Oppenheim’s views. Accordingly, Orakhelashvili’s quote of Lauterpacht is in fact the position of Oppenheim.

Although facing limitations that required the preservation of the author’s main positions, Lauterpacht sought to update Oppenheim’s work in order to harmonize it with the possibility of the individual legal personality. In Oppenheim’s Chapter I (Foundations of the Law of Nations), Lauterpacht added the subsection “13a” in which he asserts that:

[Although states are the normal subjects of international law they may treat individuals and other persons as endowed

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234 Ibid. at 580-581. Furthermore, Orakhelashvili argues that Lauterpacht, an advocate of the individual legal personality, asserted in his revision of Oppenheim’s International Law that states may occasionally confer direct rights upon individuals (Lassa Oppenheim, Lauterpacht Oppenheim’s International Law: A Treatise (New York: Longmans, Green and Co., 1948) at 581 [Oppenheim, Lauterpacht Oppenheim’s International Law]). See also Orakhelashvili, supra note 222 at 266-267.

235 Oppenheim, supra note 89 at 362

236 Ibid. at 366 [Oppenheim, International Law].

237 Oppenheim, Lauterpacht Oppenheim’s International Law, supra note 234 at v.

238 Ibid. at xxxi.
directly with international rights and duties and constitute them to that extent subjects of international law…. Although individuals cannot appear as parties before the International Court of Justice, states may confer upon them the right of direct access to international tribunals.\textsuperscript{239}

This section was not part of the original Oppenheim’s publication\textsuperscript{240} and is, thus, an addition from Lauterpacht himself. In this quote, it is possible to notice that Lauterpacht’s position was indeed divergent from that of Oppenheim. Oppenheim was the scholar who argued that: “in those rare cases in which states stipulate by international treaties certain favors to individuals other than their own subjects, these individuals do not acquire any international rights under these treaties”.\textsuperscript{241} He further added that treaties “impose the duty only upon the state whose subjects these individuals are of calling those favors into existence by municipal law”.\textsuperscript{242}

Thus, the argument that international law can only apply to individuals if a state’s municipal legal system provides such mechanism is from Oppenheim. Lauterpacht’s position is different. For him, states can endow individuals with direct international rights and duties and grant them access to international courts. In other words, individuals can be subjects of international law. This position, which was years later accepted by the International Court of Justice,\textsuperscript{243} is further elaborated in Lauterpacht’s own publications. He argued that there is nothing in international law that could forbid individuals to become subjects of the law of nations and to be parties in proceedings before international courts.\textsuperscript{244}

\textsuperscript{239} Ibid. at 21 [emphasis added].
\textsuperscript{240} Oppenheim, \textit{supra} note 80 at xv. Different from Lauterpacht, Oppenheim asserts that “states solely and exclusively are the subjects of international law” (\textit{ibid.} at 19).
\textsuperscript{241} Ibid. at 364.
\textsuperscript{242} Ibid.
\textsuperscript{243} See \textit{Avena (Mexico v United States), supra} note 172; and \textit{LaGrand Case (Germany v. United States of America), supra} note 138.
\textsuperscript{244} Hersch Lauterpacht, \textit{International Law, in International Law Being the Collected Papers of Hersch Lauterpacht} vol.1 (New York: Cambridge University Press, 1970) at 141-142 [Lauterpacht, “Collected Papers”].
Furthermore, Lauterpacht asserted that it is “inadmissible that the state should claim... that it is the best instrument for protecting all these interests and that it is entitled to exclude from this legal sphere individuals and non-governmental bodies which may be created for that purpose”. Consequently, the claim that states are the exclusive representative and manager of internationally relevant interests lacks justification and is a “legitimate cause of resentment”. Furthermore, the object theory is “devoid of any substance”. Lauterpacht’s argument is largely based on natural law conceptions. He argues that in “the theories of the law of nature the starting point is the individual human being. The law of nations, and, we may say, the law of nature, by denying, as they needs must do, the absolute sovereignty of states, give their imprimatur to the indestructible sovereignty of man”. Consequently, international law lies outside and above the state.

The other main arguments carried out by Orakhelashvili concerns the impossibility of a direct applicability of international norms to individuals. This could only happen if a state’s constitution permits a direct application of human rights instruments within its domestic legal system. Consequently, the existence of international human rights obligations is an international concern, but the direct applicability of human rights instruments falls within the ambit of domestic law.

However, this theory is not related to the notion of international legal personality, but rather with the relationship between domestic law and international law. Domestic constitutions normally, although not necessarily, establish the status and the existence of divisions between

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245 Lauterpacht, Human Rights, supra note 38 at 68.
246 Ibid. at 69.
247 Ibid.
248 Ibid. at 123.
249 Ibid.
domestic law and international law.\textsuperscript{250} In other words, some states are monist, that is, they do not require the transformation of an international norm into a domestic legislation to have any effectiveness internally. Accordingly, with the regular acceptance and approval of a treaty by the required constitutional and international mechanisms, the treaty is valid domestically.\textsuperscript{251} In other states, the dualist states, treaty approval is not sufficient. To have any domestic effectiveness, beyond treaty ratification, the international instrument needs to be transformed into domestic legislation to be applicable inside this state’s jurisdiction by domestic judges.\textsuperscript{252}

This monist-dualist system, however, concerns the domestic application of international norms, normally by national courts. The international legal personality of individuals examines the role of international norms and the status of individuals at the international plane. It is not connected with the domestic status of a specific legal instrument or whether a national court could or could not directly apply an international norm. It is, thus, concerned with the role of individuals internationally. Individuals who could be bearers of international rights and duties and could go to international mechanisms of protection and advocate their rights against their violators.

The choice of monist or dualist systems falls within a particular domestic decision of each state. However, the international legal personality of individuals is a necessary requirement of international human rights law flowing from human rights instruments. Undoubtedly, in a monist system, the argument of the international legal personality of individuals is more compelling because these norms would already be directly applicable to them domestically.

\textsuperscript{251} \textit{Ibid.} at 92-103.
\textsuperscript{252} See Rezek, \textit{supra} note 95 at 4-5. See also Thomas Buergenthal, “Modern Constitutions and Human Rights Treaties” (1998) 36 Colum J Transnat’l L 211.
However, there is not an intrinsic link between monist/dualist systems and the status of individuals in international law.

As discussed above, the International Court of Justice established that to be a subject of international law, an entity must have international rights and duties, and capacity to “maintain its rights by bringing international claims”\textsuperscript{253} The ICJ held that one of the requirements for the international personality is the power to bring “international claims” and not domestic claims. International law cannot and it is not seeking to determine the elements and requirements of domestic legal personalities. Thus, domestic courts and cases are not part of international jurisprudence. Consequently, individuals must have some access to international mechanisms of human rights protection.

Certain treaties such as, for example, the Optional Protocol to the International Covenant on Civil and Political Rights establish an individual complaint system to \textit{quasi}-judicial mechanisms of human rights protection\textsuperscript{254} Moreover, the Central American Court of Justice, the first permanent international court created in 1908 (functioned until 1918)\textsuperscript{255} granted direct access to individuals\textsuperscript{256} In 1992, the Central American Court of Justice was reestablished in Managua\textsuperscript{257} and still grants direct access or \textit{jus standi} to individuals in contentious cases against

\begin{itemize}
\item \textsuperscript{253} \textit{Reparation for Injuries Suffered in the Service of the United Nations}, supra note 4 at 179.
\item \textsuperscript{254} See above. See also \textit{Optional Protocol to the International Covenant on Civil and Political Rights}, 16 December 1966, 999 UNTS 171.
\item \textsuperscript{256} Manley O. Hudson, “The Central American Court of International Justice” (1932) Am. J. Int’l L. 759 at 768.
\end{itemize}
a member state of the Organization of Central American States or a body part of the “Central American Integration System”.258

Although the Central American Court of Justice already granted direct access to individuals in the early years of the twentieth century, the question whether individuals could have access to a universal court of international law was still debatable. In 1920, the League of Nations entrusted an Advisory Committee of Jurists with the preparation of draft of a Permanent Court of International Justice (PCIJ)259 and its members faced the question whether individuals should have direct access in contentious cases before the Permanent Court. Some members of the Committee fiercely advocated for individual access260 and others were not contrary to the idea.261 Furthermore, some members of the League of Nations also supported the access of individuals.262 However, the Committee of Jurists decided that only states would have access.263

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260 Albert Geouffre de Lapradelle, argued that the Court should essentially deal with disputes between states, but individuals could have access to the Court in specific cases of denial of justice. See International Court of Justice, Other Documents concerning the Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, 16 June to 24 July 1920 at 205-206, online: http://www.icj-cij.org/pcij/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf [Advisory Committee of Jurists, Procès-Verbaux]. Accessed on 23 January 2013.

261 B.C.J. Loder, the representative of the Netherlands, argued that he saw no reason “for limiting the competence of the Court by stipulating that private individuals must be represented by their Governments in other to have access to the Court” (Ibid. at 206). Albert Geouffre de Lapradelle, argued that the Court should essentially deal with disputes between states, but individuals could have access to the Court in specific cases of denial of justice (Ibid. at 205-206).

262 The draft from the government of Netherlands established that the court should be opened to claims in which one of the parties is a private individual and detailed the procedure that would be adopted in such cases (Ibid. at 29). Germany, by its turn, proposed that besides its jurisdiction over disputes between states, the PCIJ should be entitled to decide on individual complaints against foreign states and heads of states which national courts have dismissed, and could render decisions about the interpretation of treaties (Ibid.). Moreover, The government of France (the Paris Committee) proposed that the international court could decide on all sorts of state disputes, including disputes between states and between a private individual and a state, with the exception of private law claims between a state and its citizens (Ibid).
The final version, therefore, stipulated that “[o]nly States or Members of the League of Nations can be parties in cases before the Court”.264 At the time, Korowicz criticized this final decision and argued that individuals are subjects of international law and could have access to this Court.265 However, the International Court of Justice, with its Statute annexed to the Charter of the United Nations, retained the state-centric provision.266

In international human rights, however, individuals have direct or indirect access to regional courts. In the European system of human rights, with the entry into force of Protocol Eleven, the European Court of Human Rights admitted claims directly submitted from individuals.267 Consequently, individuals who meet the requirements set by Article 34 of the European Convention can send petitions directly to the European Court of Human Rights. This change is arguably connected to a previous decision from the European Court, in Norris v Ireland, holding that is the right of individuals to have access to international mechanisms of human rights protection.268

Recent reforms to the Inter-American Court’s Rules of Procedure enhanced the participation of individuals in this regional system of human rights. Though individuals still are not able to directly submit cases to the Inter-American Court, they have access to it (locus standi).269 The right of individual petition, as crystalized by Article 44 of the American

263 Ibid. at 331.
264 Statute of the Permanent Court of International Justice, supra note 99 at article 34.
266 Statute of the International Court of Justice, supra note 116 at Article 38.
269 OAS, Inter-American Court of Human Rights, Rules of Procedure of the Inter-American Court of Human Rights, Approved by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28 (2009), online: http://www.corteidh.or.cr/reglamento.cfm at article 78. Accessed on 24 January 2013 [Rules of Procedure of the Inter-American Court of Human Rights]. These changes entered into force in January 2010.
Convention, is obligatory and unlimited: “any person or group of persons, or any non-
governmental entity legally recognized in one or more member states of the Organization, may
lodge petitions with the Commission containing denunciations or complaints of violation of this
Convention by a State Party”.

In the African system of human rights, the young African Court on Human and Peoples' Rights can “entitle relevant Non-Governmental Organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol”. Article 34, by its turn, establishes that member states, at any
time, can make a declaration accepting the individual petition mechanism of the African Court. Consequently, individuals have direct access to the European and African courts of human rights and indirect access, participatory rights with the aid of the Inter-American Commission, before the Inter-American Court of Human Rights.

The right of individual petition, that is, the right of access to international human rights courts is an elementary feature of the international protection of human rights and arguably

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270 The American Convention on Human Rights, 1969, 1144 UNTS 123, OASTS nº 36 at Article 44. In the Castillo Petruzzi, the Inter-American Court asserted that: “[t]his broad authority to make a complaint is a characteristic feature of the system for the international protection of human rights. In the present case, the petitioners are a ‘group of persons’, and therefore, for the purpose of legitimacy, they satisfy one of the possibilities set forth in the aforementioned Article 44…. This consideration is strengthened if it is remembered that, as the Court has stated on other occasions, the formalities that characterize certain branches of domestic law do not apply to international human rights law, whose principal and determining concern is the just and complete protection of those rights” (Castillo Páez case (Peru) (1996), Inter-Am Ct HR (Ser C) Nº 24 at paras 22-23). Furthermore, Cançado Trindade, when he was a judge of the Inter-American Court affirmed, in his separate opinion in the case of Castillo Páez, that “the spectre of the persistent denial of the procedural capacity of the individual petitioner before the Inter-American Court… arose from dogmatic considerations, belonging to another historical era…. Such considerations, in my view, in our time lack support or meaning, even more so when referring to an international tribunal of human rights…. In the present domain of protection, every international jurist, faithful to the historical origins of his discipline, will know to contribute to the rescue of the position of the human being as a subject of international law (droit des gens), endowed with international legal personality and full capacity” (Castillo Páez case (Peru) (1996), Separate Opinion of Judge A A Cançado Trindade, Inter-Am Ct HR (Ser C) Nº 24 at paras 16 and 17 [emphasis in original]).


272 Ibid. at Article 34 (6).
constitutes a matter of international public order (ordon public), which cannot be limited by single states or for reasons of domestic law. In other words, only treaties can limit the right of individual access to human rights courts or quasi-judicial mechanisms. Cançado Trindade argues that:

With the consolidation of the right of individual petition before international tribunals of human rights, international protection has attained its maturity. The human being nowadays occupies the central position which he merits, as subjects of both domestic and international law. The international legal titularity of the human being is now an undeniable reality, calling now for the consolidation, in distinct human rights systems, and within the framework of the universality of human rights, of his full juridico-procedural capacity at the international level.

Individuals are, thus, subjects of international law with rights, duties and capacity at the international level. This is the paradigm of international law after the Second World War: the recognition the individual legal personality. This legal personality exists because individuals have rights, duties, capacity and interests at the international level. From this personality flows the requirement that international human rights norms must be applied, developed, and interpreted based on the human person as the start and end of international law of human rights. Accordingly, this system prioritizes the human person, that is, is pro homine.

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273 Antonio Augusto Cançado Trindade, The Access of Individuals to International Justice (New York: Oxford University Press, 2011) at 48-49 [Cançado Trindade, Access of Individuals]. In the case of Five Pensioners case, Judge Cançado Trindade in his separate opinion held that “the assertion of those juridical personality and capacity constitutes the truly revolutionary legacy of the evolution of the international legal doctrine in the second half of the XXth century. The time has come to overcome the classic limitations of the legitimatio ad causam in International Law, which have so much hindered its progressive development towards the construction of a new jus gentium….The individual is subject jure suo of International Law, and to the recognition of the rights which are inherent to him corresponds ineluctably the procedural capacity to vindicate them, at national as well as international levels” (Five Pensioners case (Peru) (2003), Separate Opinion of Judge A A Cançado Trindade, Inter-Am Ct HR (Ser C) Nº 98 at para 24 [emphasis in original]).

274 Ibid. at 49 [emphasis in original].
Consequently, to accept the object theory – or beneficiary theory – of the legal personality of individuals is to disregard the significant developments in the international human rights law regime since the end of the Second World War. To deny the legal personality of individuals is to forget about the increasing access of individuals to human rights mechanisms of protection and to disregard the jurisprudence of human rights courts and the International Court of Justice. Borrowing words from Lauterpacht, the object theory is “devoid of any substance”.\textsuperscript{275} This is especially true in the light of the current international legal system.

The intention of international law of human rights is the protection of the human person. Orakhelashvili’s argument that human rights instruments only create obligations and corresponding rights for states,\textsuperscript{276} although compelling, is misconceived. The words and structures of human rights instruments clearly demonstrate that its normativity concerns states and individuals.\textsuperscript{277} Most provisions of the American Convention on Human Rights, for example, start with the expression “every person has the right to”,\textsuperscript{278} which indicates that these rights are addressed to states, which must uphold rights, and individuals, who possess rights.

As explained in the previous chapter, the structure of human rights instruments was clearly developed to establish rights and duties to individuals. The 1966 U.N. Covenants, following the reasoning established by the Universal Declaration of Human Rights, recognize a general principle that informs that individuals have inherent and inalienable rights under the law.

\textsuperscript{275} Lauterpacht, \textit{Human Rights, supra} note 38 at 68-69. To accept that individuals are nothing but a thing, a beneficiary of international law, and possess rights and duties only under municipal law, is to sustain that individuals have rights and duties under domestic law in accordance with, consistent with and in consequence of international law. One of the elements of legal right is the protection of interests through a legally prescribed duty. Consequently, to argue that individuals have rights and duties in accordance or in conformity with international law is to admit that the human person is the possessor of legally protected interests by international conducts. Accordingly, the possession of legally protected interests and the performance of legally prescribed conducts are qualities of legal persons and not objects (Manner, \textit{supra} note 94 at 441).

\textsuperscript{276} Orakhelashvili, \textit{supra} note 222 at 268.

\textsuperscript{277} See \textit{Avena (Mexico v United States), supra} note 172.

\textsuperscript{278} \textit{American Convention on Human Rights, supra} note 270 at Articles 3-5, 7-8, 10-13, 16, 18-23, and 25.
of nations.\textsuperscript{279} Moreover, the Covenants go even further and link this general principle proclaimed in the preambles with the U.N. Charter granting it, at least to some extent, normative status.\textsuperscript{280} In my view, human rights declarations and treaties recognize individuals as subjects of international law and place the international community – including tribunals – under the obligation to take their personality and interests into account when developing and applying human rights norms. Treaties, however, go one step further and specify rights and duties in detail, crystalizing state obligations and fully recognizing individuals’ rights.

Another argument against the individual legal personality and in favor of the object theory is that individuals do not possess lawmaking powers, that is, they cannot conclude treaties with states.\textsuperscript{281} This argument is also devoid of substance. Treaty making power is not one of the requirements set by the International Court of Justice or even followed by the traditional doctrine to establish the international legal personality. Moreover, international entities have different characteristics and attributes. International organizations, for example, can have international legal personality even though they do not possess the same attributes as states. Their capacity to conclude treaties depends on their constitutive treaty, that is, is not unlimited. Furthermore, they have limited access to international courts.\textsuperscript{282}

Individuals, like international organizations, do not have the same characteristics as states. They might not have diplomatic relations with states, but they have rights related to consular relations.\textsuperscript{283} Although individuals cannot be parties to international treaties, this should not suffice to deprive them of an international legal personality. If the opposite is accepted, by

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\textsuperscript{279} See above.  
\textsuperscript{280} Ibid.  
\textsuperscript{281} Orakhelashvili, supra note 2 at 256-264.  
\textsuperscript{282} Some organizations, for example, may ask for advisory opinions before the International Court of Justice (Statute of the International Court of Justice, supra note 116 at Article 65). Furthermore, this World Court might ask some organizations to provide information relevant to cases before it (Ibid. at Article 35 (2)).  
\textsuperscript{283} Vienna Convention on Consular Relations, supra note 146.
analogy, individuals should not be subjects of domestic law because they do not formally take part in the elaboration of municipal norms. Domestic norms are created through a prerogative of states, normally by the action of a Legislative Power. Consequently, in domestic law, the Legislature, as representative of a state’s population, may legislate. The same logic applies to international law, where states conclude treaties representing their population on the international order. Thus, individuals are necessarily the indirect parties of treaties.\footnote{See Antonio Augusto Cançado Trindade, “General Course on Public International Law” (2005) 316 Rec des Cours 21 at 260 [Cançado Trindade, “General Course”].} Moreover, although individuals do not have direct law making powers, the international community, when creating a human rights instrument, must bear in mind that individuals have rights and duties at the international level.

In sum, individuals meet all the requirements set to have international legal personality, especially under international human rights law. They have direct rights and duties. They have direct or indirect access to quasi-judicial human rights bodies and to all human rights courts. Moreover, individuals are the primary addressees of human rights as established by the main human rights instruments.

One of my arguments is that the individual personality is the general normative character of human rights declarations. The international individual personality and the obligations flowing thereof form the \textit{pro homine} framework. Furthermore, the individual legal personality comprises not three but four elements: rights, duties, capacity and interests at the international level. Individuals have direct rights and duties at the international level, have direct or indirect access to human rights adjudications bodies and have interests diverse of states at the international sphere. Under international human rights law, a state or group of states allegedly breach certain internationally protected individuals’ rights. Within this system, individuals’ rights have their
corresponding states’ duties. Consequently, individuals have interests diverse of those of states. The individual right to life, for example, requires a state duty to not kill or to investigate and bring to justice individuals who have killed another person.

The law of nations was initially based on the human person. However, the exclusion of individuals from the international level as gradual, but consistent. Vattel acknowledged the natural law element of international law, but limited its application to the relations of sovereign states. Oppenheim completely removed any natural law or ethical aspect of the law of nations leaving it at mercy of the will of states. However, after the Second World War and the conclusion of human rights treaties, the human person was placed at the center of the international protection of human rights. However, this current human-centered system of international human rights law is not a new endeavor. In my view, post-war international law of human rights is largely based and represents an unconscious rescue of the old law of nations, which dates back to the Romans.

Accordingly, the underlying question is whether individuals were always excluded from international law and the extent the ancient law of nations can resonate in modern days. Consequently, in the next chapter I analyze the evolution of international law from the standpoint of the individual seeking to prove that the current individual-centric system of international human rights law is, contrary to current belief, rooted in the Roman law of nations. Accordingly, both systems prioritize the human person as the beginning and end of law.
Chapter 5

The Roman *Jus Gentium* and International Human Rights Law: The Rescue of the Human Person as the End and Source of the Law of Nations

In the previous chapter, I analyze the individual legal personality. The prevailing positivistic doctrine excluded the human person from the scope of the law of nations. Consequently, international law became a law flowing from and based on the will of states. In other words, it was a law between states or *Staatenrecht*. The theoretical framework underpinning the entire law of nations was, thus, state-centric. However, international doctrine and courts contested this state centrality of international law, that is, its exclusivist character, which excluded the international human personality. International courts began to acknowledge that the human person could possess direct rights and duties.

Consequently, international norms can establish rights and duties for multiple actors, including the human person. This position is in accordance with the view that there is nothing in international law that could forbid the individual legal personality. The human person is indeed a direct bearer of rights and duties, and with access to a number of adjudication bodies. Moreover, I added one extra element to the requirements of the international legal personality: interests. The human person has interests at the international level diverse of those of states.

In this chapter, I analyze the evolution and the concept of international law from the standpoint of the human person. First, I point out that international law, especially regarding treaties, diplomatic envoys and wars, for example, was part of the ancient law and life. However, the Romans envisaged a theoretical framework for the law of nations based on Greek philosophy and their own legal practice and political reality. After, I focused on the so-called “founding
fathers” of the law of nations. In my view, the “founding fathers” are revivalists of the Roman law of nations adapted to their own reality. Part of the Roman law of nations was incorporated into civil law/domestic law, but certain topics remained at the core of the law of nations. Furthermore, the revivalists, highly influenced by the teachings of Roman jurists, kept or adapted the Roman concept and view of the law of nations. Accordingly, the human-centered law of nations of the Romans was adapted and kept alive by the revivalists.

In my view, the revivalists were more concerned with proving the existence of a rule of law at the international level and explaining the emergence of modern states than with a human centered law of nations. The source of the revivalists’ view of international law and the underpinnings of current international human rights law is rooted in the Roman law of nations or *jus gentium*. Accordingly, I seek to differentiate my argument from international law scholars such as Lauterpacht and Cançado Trindade. My argument is that the Roman concept of the law of nations, rooted on universality, doctrinal and jurisprudential considerations not rigidly constrained by formalities, and the human person as the source and end of law was codified in modern international human rights law.

This natural law conception from the Romans is intrinsically part of international human rights law. Roman *jus gentium*, codified in modern international law of human rights, provides the concept and guidelines for the application, development and interpretation of human rights norms, which must be based on the human person as a subject of international law with different interests of those of states. Consequently, modern post war international human rights law is based on a universal system that prioritizes the human person, that is, a *pro homine* framework that guides the creation, development, interpretation and application of human rights norms. In
other words, the current human rights system belongs, in theory and method, to a body of the Roman law of nations.

**5.1. Jus Gentium and the Establishment of International Law**

Arguably, the Peace of Westphalia (1648) constituted a turning point in the evolution of modern international law. First, it recognized the independence of states from the church. Second, it established the modern international system based on the plurality of independent states with no superior authority over them.¹ Consequently, these treaties that form the Peace of Westphalia had undoubtedly an important impact on the development and understanding of international law, which could then be envisaged as a law governing the relation of sovereign and equal states. There is, however, the question of whether the treaties of the Peace of Westphalia were indeed the most important elements to the establishment of international law. It seems that two other elements were even more important. First, the notion of “the other”, that is, the recognition of different groups of people entitled to rights and duties. Second, there is the notion of territoriality as one of the main links between individuals and the law and, conversely, of the law that connects individuals without clear territorial boundaries.

In my view, international law concerns the recognition of “the other” as an entity with rights and duties apart from specific territorial boundaries. This notion was and still is one of the most important elements of international law and the main characteristic of international human rights law. The word “other” means that international law’s concept developed based on a gradual recognition that law can apply to individuals outside a certain civilization, boundary or

religion. Even in the pre-Second World War period, scholars still debated the scope of the law of nations. Thus, although the classic or traditional Oppenheim-view of international law can be traced back to Renaissance Europe, to Westphalia or to 19th century notions, as Shaw teaches, the “seeds of this particular hybrid plant are of far older lineage. They reach far back into history”.  

In Ancient times law was intrinsically connected to religion. Law was religion applied to the social, civic and political life. It retained a sacred status for a long time. At least in the early history of the Greeks and Romans, religion permeated their public and private lives. Furthermore, modern writers have disparate views of whether international law existed in ancient civilizations. However, there was arguably more than a mere rudimentary version of the law of nations in ancient Greece and Rome. Moreover, Roman law was highly influenced by Greek law, which by its turn was influenced by Egyptian law, which was largely influenced by Babylonian law.

Some writers affirm that the first major treaty in history is from around 1280 to 1272 B.C and concluded between Ramses II, the Egyptian Pharaoh of the 19th dynasty, and Hattusili III, the king of the Hittites, to end the Battle of Kadesh. The treaty included norms concerning territorial integrity, trade, immigration, extradition, alliances against common rivals and established eternal peace and brotherhood. This treaty sought to regulate the political

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6 *Ibid.* at 50.
relationship of both powers and was a paradigm with “enduring influence” on the traditions of treaty-making in the ancient world, especially in Israelite law which later influenced the Greek and western Mediterranean practices. The long period of peace and cooperation that followed the adoption of this treaty suggests that it was duly complied by both ancient powers.

A divergent position points out that the first treaty is from approximately 2500 B.C. concluded between Eannatum of Lagash and the city-state of Umma in Mesopotamia. This treaty was inscribed on a stone block called Stele of Vultures under the oath of a number of Sumerian gods and regulated boundaries of these two places. However, writers suggest that this treaty was not established under equality because Umma, defeated in a conflict with Lagash, probably had a dependent status.

Treaties were also a common practice in ancient China. They were divided in two different categories: those concluded to terminate wars – which were not always common – and those concluded in order to promote friendship and welfare. The Treaty of Kweichiu, concluded in 651 B.C. between different states, for example, in its five articles, establish different obligations as the duty of granting distinction to the virtuous, the duty to respect the old and be kind to the young, the duty to not be forgetful to foreigners, the prohibition on restrictions on the sale of grains, the prohibition on promotions without “first announcing them to the

11 Mazzuoli, *Treaties, supra* note 8 at 32.
12 Bederman, *supra* note 10 at 139. See also Mazzuoli, *Treaties, supra* note 8 at 32.
14 Bederman, *supra* note 10 at 139.
Emperor”, and the duty to maintain amicable relations.\footnote{Ibid. at 252.} Treaty violations usually resulted in war, which arguably demonstrates the existence of a notion of \textit{pacta sunt servanda} in ancient China.\footnote{Ibid. at 254.}

Moreover, there was arguably some preoccupation of the law of nations of ancient China with the human person. Economic sanction, for example, was not a common practice of treaty enforcement.\footnote{Ibid. at 255.} Treaty of Kweichiu and the Treaty of Hou expressly provided that states have the supreme obligation to aid each other.\footnote{Ibid.} Arguably, the law of nations of ancient China took into consideration the interest and welfare of individuals. In 648 B.C., for example, Ts'in rejected the possibility of taking advantage of Tsin's famine to open hostility, although there were unfriendly relations between the two states.\footnote{Ibid.} Moreover, philosophers and statesmen of that time usually believed that war was never justifiable, irrespective of whether there was provocation.\footnote{Ibid. at 260.} War was relegated to a last resort action when there was no hope of reconciliation.\footnote{Ibid.} Moreover, the preoccupation with the human person existed during war. Te-hstu Ch'eng explains that “[p]eople of the different states were always on friendly terms despite the war activity carried on by their respective governments. Indeed, there was not a single case in history which showed the
This was probably due to the absence of national feelings, which turned conflicts into governmental business and did not reach the citizens of an enemy state.25

The law of nations of ancient civilizations (including here Babylonia, Egypt, the Hittites, Greece and China) required the respect and protection of the official representatives of other sovereigns.26 It was not uncommon for some ancient cultures to have strong notions of hospitality and proper courtesies to foreigners.27 This notion of hospitality and friendship was religiously sanctioned and formalized by social institutions and legal power.28 Commenting the existence of an ancient system of diplomacy among coequal sovereigns with immunities, Bederman asserts that:

It was also possible to see the entire system of diplomatic privileges and immunities as an outgrowth of the recognition that certain classes of entitled individuals were subject only to their own sovereign’s authority, even when they traveled into the territorial realm of another ruler.29

The primary and earliest function of the law of nations, in my view, is to recognize the existence of “others”, that is, of other individuals and of organized groups, which include, for example, states and more recently international organizations. By the way ancient civilizations treated foreigners and individuals of diverse religious backgrounds and by their understanding of

24 Ibid. at 263. However, although condemned, the practice of hostages was not uncommon in ancient China. Ibid. at 257. There was also the practice of Asylum. Britton explains that “[n]obles in flight from their own states customarily were received and harbored by the nobility of other states. Such asylum was open to rebels and legitimate princes alike, but to aristocrats only, not to serfs”. See Roswell S. Britton, "Chinese Interstate Intercourse before 700 B.C." (1935) 29 AJIL 616 at 630.
25 Te-hstu Ch'eng, supra note 11 at 264. Ch'eng, however, points out that “[n]o exception was ever raised to the taking of property belonging to the hostile state as the conqueror's prize” (ibid.). Britton, however, affirms that the “text of the twenty years has abundant cases of reprisal and intervention, and a few illustrating the gallant code of battle” (Britton, supra note 24 at 634).
26 Bederman, supra note 10 at 88. This notion was probably part of the law of nations of ancient China. Customary forms of interstate communication and treaty-making in a system based on a high degree of equality and independence between states were common elements of ancient Chinese international law (Britton, supra note 24 at 634).
27 Bederman, supra note 10 at 88.
28 Ibid. at 89.
29 Ibid. at 95.
the scope of the law of nations one can find the place of the human person in early systems of international law.

Ancient China, as previously mentioned, arguably had some preoccupation with the protection and status individuals in their law of nations. Ancient Middle Eastern civilizations, however, although had a system of international law which influenced Greece and after Rome, had a “sketchy” system of customs related to the treatment of foreigners.\(^\text{30}\) In ancient Egypt, and in Assyria and Chaldea, foreigners were arguably not effectively part of their legal system.\(^\text{31}\) In India, individuals born out of their land were considered impure.\(^\text{32}\) The preoccupation with individuals and a tolerance towards foreigners in ancient China and Persia\(^\text{33}\) was arguably also part of ancient Mediterranean civilizations.\(^\text{34}\)

In most Greek states, especially in Athens, there were rights not connected to citizenship. There was the notion of general hospitality.\(^\text{35}\) Free foreigners and their property were safeguarded and, moreover, even ransomed prisoners of war had “faithful protection”.\(^\text{36}\) This notion of hospitality was seen as a sacred bound transmitted from father to son.\(^\text{37}\) Athens accepted refugees fleeing from conflicts in Greek states.\(^\text{38}\) Furthermore, there was the right of asylum, freedom of speech, some freedom of movement, and laws in favor of suppliants.\(^\text{39}\)

\(^{30}\) Ibid. at 121.
\(^{31}\) Jacob Dolinger, Direito Internacional Privado: Parte Geral [Private International Law: General Part] (Rio de Janeiro: Renovar, 2008) at 128. The Egyptians, as the Hebrews, Greeks and other civilizations, regarded themselves as the “human race par excellence. Moreover, for the Egyptians, foreigners were “criminals and savages” (Phillipson, supra note 3 at 124-125).
\(^{32}\) Dolinger, supra note 31 at 121.
\(^{33}\) Ibid. The Persians, according to Phillipson, “often showed a remarkable tolerance towards strangers” (Phillipson, supra note 3 at 125).
\(^{34}\) Bederman, supra note 10 at 121.
\(^{35}\) Phillipson, supra note 3 at 131.
\(^{36}\) Ibid.
\(^{37}\) Ibid.
\(^{38}\) Ibid. at 134.
\(^{39}\) Ibid. at 134 and 136.
The *metoikoi* or metics were permanent residents of Athens who possessed certain rights including judicial protection, and some duties as, for example, the duty to pay taxes, to be subject to military conscription and to join some liturgies.\(^{40}\) Moreover, Greek states could grant civic rights by treaties in a practice called *isopolity*.\(^{41}\) That was a mutual exchange of private rights of citizenship, which included the right to intermarriage and the right to hold land and houses.\(^{42}\) However, it was not uncommon to establish an *isopolity* on unilateral basis.\(^{43}\)

The notion of *isopolity* could arguably be seen as a rudimentary system which granted certain rights to certain individuals and influenced the concept of a *civitas gentium* and the unity of Rome.\(^{44}\) Furthermore, in ancient Greece, there was the institute of *sympolity* through which states formed a union with an interchange of full civil and political rights. Although rarer in practical application compared to *isopolity*, the *sympolity* did not necessarily imply an impairment of civil and political independence of the member states.\(^{45}\)

In ancient Greece as well as in other ancient civilization as, for example, Egypt there was the institution of *proxenia*, which was, in many aspects, a rudimentary version of the modern consular system.\(^{46}\) This institution existed to meet the demands of individuals trading with foreign states.\(^{47}\) The *proxeni* assisted and advised individuals residing temporally or more

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40 Bederman, *supra* note 10 at 122.
41 Phillipson, *supra* note 3 at 141.
42 Ibid. Phillipson adds that the exercise of the privileges set by isopolity usually required the renunciation of former citizenship (*ibid*).
43 Ibid.
44 Ibid. at 142.
45 Ibid. at 144.
46 Ibid. at 147.
47 Ibid. at 149.
permanently in another state.\textsuperscript{48} Furthermore, they provided information to the government that appointed them.\textsuperscript{49}

Ancient Greece had a legal system, including international system, largely based on religious grounds.\textsuperscript{50} However, Greece’s international system, in doctrines such as \emph{isopoly} and \emph{proxenia} had some preoccupation with the status and rights of individuals. There was not, however, a notion of an international system of human rights, even as a loose concept of wide individual rights prioritizing the human person. The Greeks, as the Egyptians and Babylonians, had exchanges with each other, which included treaties and the regulation of their mutual relations.\textsuperscript{51} There was nonetheless, a possible root for a future notion of a universal law. Aristotle in his Rhetoric established a difference between special and general law. For this famous Greek philosopher, special law is the “written law which regulates the life of a particular community”\textsuperscript{52} and general law comprises “unwritten principles which are supposed to be acknowledged everywhere”.\textsuperscript{53} Thus, Aristotle acknowledged the existence of universally recognized principles.\textsuperscript{54}

Resting on a notion of universality, the Stoic philosophy was a large influence on Roman law and consequently on the law of nations. Roman law began to be influenced by Greek culture and philosophy after the conquest of Greece in 146 B.C.\textsuperscript{55} The Stoic philosophy appealed to

\begin{itemize}
\item \textsuperscript{48} \textit{Ibid.}
\item \textsuperscript{49} \textit{Ibid.} Differently from the modern consular system, the proxenus was a citizen of the state that received foreign individuals (\textit{ibid.}).
\item \textsuperscript{50} Dolinger, \textit{supra} note 31 at 127.
\item \textsuperscript{51} See Bederman, \textit{supra} note 10.
\item \textsuperscript{53} \textit{Ibid.}
\item \textsuperscript{54} Phillipson, \textit{supra} note 3 at 54. Phillipson links these principles to morality (\textit{ibid.}).
\item \textsuperscript{55} Sherman, \textit{supra} note 7 at 58.
\end{itemize}
Romans of the Later Republic, especially Cicero, Alexander Severus and Marcus Aurelius.\textsuperscript{56} Presumably, for the Stoics, individuals ought to pursue a goal set by nature.\textsuperscript{57}

Thus, the good life is a life in agreement with nature.\textsuperscript{58} Living in agreement with nature entails following a pattern of life allegedly provided by nature for humans and all animals, namely seeking to perfect and preserve oneself by selecting things in accord with one's nature and avoiding things that go against it.\textsuperscript{59} Natural things are those needed for self-preservation like health, strength, intelligence, wealth, reputation, and the company and well-being of others which includes human beings in general.\textsuperscript{60} This theory, thus, constitutes of rules of universal relevance.\textsuperscript{61} Shaw asserts that:

\begin{quote}
Such rules were rational and logical, and because the ideas and precepts of the ‘law of nature’ were rooted in human intelligence, it followed that such rules could not be restricted to any nation or any group but were of worldwide relevance. This element of universality is basic to modern doctrines of international law… In addition to being a fundamental concept in legal theory, Natural Law is vital to an understanding of international law, as well as being an indispensable precursor to contemporary concern with human rights.\textsuperscript{62}
\end{quote}

I believe that the element of universality is basic not only to modern conceptions, but to the Roman view of international law, which, by its turn, influenced the so-called “founders” of international law and crystalized the notion that the law of nations is a system for and from the human person. The Roman law of nations, by eliminating the notion of religious exclusiveness

\begin{flushright}
\textsuperscript{56} \textit{Ibid.}\\
\textsuperscript{57} Gisela Striker, “Following Nature: a Study in Stoic Ethics” (1991) 9 Oxford Studies in Ancient Philosophy 1 at 2.\\
\textsuperscript{58} \textit{Ibid.} at 3.\\
\textsuperscript{59} \textit{Ibid.} at 3.\\
\textsuperscript{60} \textit{Ibid.} at 25.\\
\textsuperscript{61} \textit{Ibid.}\\
\textsuperscript{62} Shaw, \textit{supra} note 2 at 17.\\
\textsuperscript{62} \textit{Ibid.} at 17.
\end{flushright}
that influenced the view and treatment of foreigners, is an improvement compared to that of Greece.\footnote{Phillipson, supra note 3 at 106.}

Moreover, Phillipson asserts that Rome, at least in the first period of her history, “recognized the existence of sovereign and independent states other than her own, that she had clear notions of a \textit{civitas gentium}, and possessed an international juridical conscience, and admitted the principle of reciprocity”.\footnote{Ibid. at 110.} The juridical basis of international law rested upon the idea of an international juridical conscience.\footnote{Ibid. at 116.} Phillipson adds that Cicero’s notion of \textit{civitas} (or \textit{societas}) \textit{gentium} is not only a metaphysical concept, but rather, “[t]he existence and the influence of a juridical consciousness is clearly evidenced in the whole fabric of the law of nations as accepted by the Romans”.\footnote{Ibid. at 117.} Cicero, following the Stoic reasoning, believed that law is the highest reason, established by the human mind and rooted in nature, “which commands things that must be done and prohibits the opposite”.\footnote{Marcus Tullius Cicero, \textit{Cicero: On the Commonwealth and on the Laws} (New York: Cambridge University Press, 1999) at 111.} Furthermore, Cicero, commenting on the universality of law and the consciousness of \textit{jus gentium}, adds that:

Because of the similarity between honor and glory, people who have been honored seem blessed, and those who have no glory seem wretched. Trouble, happiness, desires, and fears pass equally through the minds of all, and if different peoples have different beliefs, that does not mean that the superstition that affects people who worship dogs and cats is not the same as that which besets other races. What nation is there that does not cherish affability, generosity, a grateful mind and one that remembers good deeds? What nation does not scorn and hate people who are proud, or evildoers, or cruel, or ungrateful? From all these things it may be understood that the whole human
race is bound together; and the final result is that the understanding of the right way of life makes all people better.68

Cicero’s notions of universality and natural law influenced Roman law, especially the branch known as *jus gentium*.69 Roman law is based on a dichotomy between *jus gentium* and *jus civile*. The latter was a Roman law *par excellence*, that is, a legal system for the Romans.70 The term *jus civile* can designate two different notions. First, it can refer to a whole branch of law applicable to all individuals enjoying rights in Rome similar to the French term *droit civil* or the Portuguese *direito civil*.71 Furthermore, it can be used to describe the law applicable to Roman citizens.72 Administrate by the city praetor (*praetor urbanus*), *jus civile* existed for the exclusive benefit of the Romans, and foreigners and Roman provincial subjects were outside its jurisdiction.73

The growth of Rome and the influence of Stoic philosophy through the works of notables such as Cicero required a novel outlook on law. *Jus civile* was not suited to accommodate legal notions rooted on Stoic philosophy. Furthermore, after the First Punic War, there was a large influx of foreigners to Rome and an expansion of commerce between Romans and foreigners74. This pluralistic system strengthened by notions of natural law required a new legal view. Accordingly, the notion of *jus gentium* was gradually developed. *Jus gentium* is a universal law first applied to foreigners and to relationships between foreigners and Roman citizens, but

68 Ibid. at 116.
71 Ibid. at 369.
72 Ibid. I normally use the expression *jus civile* referring to the domestic law applicable to Romans.
73 Sherman, supra note 7 at 36.
eventually, as Stephenson argues, “proved so far-reaching and useful that it was accepted in the dealings of citizens with citizens, and became part and parcel of *jus Romanorum*”. Gaius, a prominent Roman jurist, asserted that:

> Law which a people establishes for itself is peculiar to it, and is called *ius civile* (civil law) as being the special law of that *civitas* (state), while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* (law of nations, or law of the world) as being the law observed by all mankind. Thus the Roman people observes partially its own peculiar law and partially the common law of mankind.

Gaius, therefore, sets the basic definition of *jus gentium* which established the fundamental view of international law centered on two interconnected elements: the law of nations as a law of all mankind or nations (*iure omnes gentes*); and rooted on the natural law notion of natural reason of all humankind (*naturalis ratio inter omnes homines*). International law is not a Roman creation. As demonstrated, the law of nations was part of the practice or the concern of a number of ancient civilizations. However, the notion of universality and human-centrality were not part of ancient international systems. This only changed with the influence of Greek philosophy, namely Stoicism, and the understanding by the Romans that law should not be fully constrained by citizenship. Notwithstanding its universality element, *jus gentium* mainly concerned free or freed individuals – as slavery was an important part of Roman law - and

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75 Ibid.
76 Gaius wrote the highly acclaimed Institutes, which “have served as a model for all subsequent textbooks on law, especially elementary treatises” (Sherman, *supra* note 7 at 76).
77 G 1.1 (translated by Zulueta); Inst 1.2.1.
78 Ibid. at 1, *commentarius primus*.
could cover topics from international law, private international law, foreign law and Roman law.  

Complex civilizations need a system of international law to regulate the interaction and acceptance of other individuals (foreigners). Pre-Roman international systems were arguably problematic as they were not a wide system *per se*. There was not a universally accepted mechanism regulating the relations of various individuals and nations. Rather, each civilization, each group or city-state had their own views and rules concerning international law, which were particular and usually centered on religious and civilizational aspects. International law was not universal and human centered.

Conversely, the Roman perspective of international law is based on a natural law view centered on humankind and with universal application. This is, in my view, the origin of the contemporary law of nations. This is not to say that Roman international law was widely accepted by different civilizations, but that this subdivision of Roman law established notions of universality and human-centrality. Furthermore, these characteristics reemerged as intrinsically part of contemporary international human rights law.

Hersch Lauterpacht, mentioning Cicero and Ulpian, argues that the contribution of Roman legal thinking lies on the ideas of freedom and equality of individuals. In my view, the natural law concept of *jus gentium* developed by Roman legal thought is indeed a notion that provides for equality and freedom. However, these ideas were philosophical concerns that could not be implemented in practice.

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80 See Sherman, *supra* note 7 at 38; Phillipson, *supra* note 3 at 70-77. Stephenson, however, argues that *jus gentium* was built by Roman jurist and a part of Roman law and not by the adoption of doctrines and institutions, one after another, found to be “generally current among other peoples” (Stephenson, *supra* note 74 at 197).

81 Although Confucian international law was not religious, it was usually restricted to states forming the Middle Kingdom (China). Consequently, it was deprived of the universality element of the Roman law of Nations. On the extension of Confucian international law see Iriye, *supra* note 11.

not amount to change the legal practice and institutes of ancient Rome. Slavery, as previously mentioned, was an important part of Roman law, including of *jus gentium*. Accordingly, the Romans started notions of equality and freedom, which are arguably part of the natural law thinking and part of international law of human rights. However, these were consequences of more fundamental and paradigmatic elements. The Roman paradigm was the concept of a universal *jus gentium* centered on the human person: individuals are the source and the end of the law of nations. In my view, even though the idea started with Rome, freedom only fully entered the institutional level of international law much later with the creation of the United Nations.\(^8\)

In the 5\(^{th}\) century, the Western Roman Empire was overthrown by the German tribes.\(^8\) During the Middle Age period from the second conquest of Italy by the Lombards to the twelfth century, Walton asserts that the “*Corpus Juris* is almost lost to sight”.\(^8\) The German tribes crystallized the system of personal or personality law throughout the invaded Roman Empire.\(^8\) Accordingly, personality law bound the members of a nation or tribe regardless of their domicile and regulated the relations between members of different tribes.\(^8\) Walton teaches that:

> The German tribes themselves have been migrating from place to place, being governed all the time each by its own tribal customs. It seemed to them natural that a Goth should be under Gothic law, or a Burgund under Burgundian law, wherever he might happen to find himself. And they were willing to apply the same principle to the Roman provincials whom they had conquered. Let the Roman keep his law, and the Goth keep his law, although they might live side by side in the same city.\(^8\)

\(^8\) See Chapter III above.
\(^8\) Walton, *supra* note 70 at 319.
\(^8\) Ibid. at 70.
\(^8\) Ibid. at 320. I use “personal law” or “personality law” as synonyms.
\(^8\) Walton, *supra* note 70 at 320.
There are different theories concerning the influence and continuance of Roman law in the West and East of the Empire. While some scholars argue that break in continuity between the ancient world and the Middle Ages occurred with the invasion of Germanic tribes, others hold the view that it only happened after the Arab invasions in the seventh century, and, differently, certain academics argue that this break actually had not occurred at all. 89 However, in my view, personal law was a strong feature of the early Middle Ages, which consequently weakened the notion of *jus gentium*. There was arguably an international legal system during the Middle Ages after the collapse of the Roman Empire in Europe. 90 However, the Roman concept of the law of nations as a universal and human centered system was shadowed by the widely accepted rule of personal or personality law.

In my view, the law of nations or *jus gentium* requires the acknowledgment of individuals as bearers of universally recognized – international – rights and duties. Roman international law, thus, comprised practices of previous ancient civilizations, of Greek philosophical notions of nature, and of particularities pertaining to Roman legal tradition. This system had limitations – only free or freed individuals could have rights – due to the existence of slavery. However, the amalgamation of these factors allied with the extension of Rome and its contacts with other civilizations formed the core aspects of its *jus gentium*, that is, an individual centered law of nations. This notion was broken with the end of West and East Roman Empires and the strengthening of personal law, which recognized individuals “only insofar as they are members of the established groups in society”. 91

89 Guterman, *supra* note 87 at 265. See also Walton, *supra* note 70 at 319-324; Sherman, *supra* note 7 at 187-384.
91 Guterman, *supra* note 87 at 271.
In Europe, personal law lasted until roughly about the tenth century. Migrations, marriages and contacts between different individuals, and the strengthening of ties between individuals and their land influenced in the mitigation and abandonment of personality laws in favour of territorial laws. Furthermore, a period of tranquility in conjunction with the augmentation of commerce between different groups and the rise of Italian cities in the twelfth century influenced the awakening of Roman law, which was called the “Twelfth Century Renaissance” with the great impact of the Justinian Corpus Juris Civilis.

5.2. The Revival of the Roman Law of Nations

The revival of Roman law gained strength with the Italian glossators who studied and wrote notes – glossae – on Roman texts. Around 1260, Franciscus Accursius compiled all the glossae together and published the whole Corpus Juris Civilis, which was for centuries a major source of legal learning. From Italy, the study of the Justinian Corpus Juris and the glossae reached France through Montpellier and became the model for all French law schools until the 16th century. The work of the Italian glossators influenced Germany and in 1495 the Justinian Corpus Juris Civilis became the official law of Germany and other parts of the medieval Roman Empire. Roman law influence spread throughout Europe, including Austria-Hungary, Holland,
Spain and Portugal (especially after the Arab expulsion), Scotland where, like in Germany, Roman law was adopted, and, England (to a more limited extent). Furthermore, in the East, the Corpus Juris Civilis was rearranged, updated and compiled, in Greek, in a group of books called the Basilika. Moreover, Sherman asserts that the Justinian Corpus Juris Civilis highly influenced Islamic law in parts that it did not contradict the religion.

Accordingly, the revival of Roman law and the increase of commerce and interaction between different individuals led to the mitigation or abandonment of personality laws and set in motion a discussion on jus gentium as a legal system apart from the Corpus Juris Civilis or from the new European systems influenced by Justinian law. Furthermore, the Protestant Reformation, the Thirty Years’ War and the expansion of Europe to the American continent arguably assisted in shaping the Roman jus gentium based on the needs and views of this new historical period. Thus, the organization of Europe, which includes international law from the 11th or 12th century, was based on new elements and others borrowed from Greek and Roman antiquity, from Byzantine institutions, from Arabo-Berber sultanates from the north coasts of Africa, and Moorish kingdoms.

Thomas Aquinas, influenced by Greek philosophy and by the Roman understanding of natural law, defined human law based on natural law, which by its turn stem from human reason. For Aquinas, the purpose of law is the common good. Human law, as part of all law,
“has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law”. For Thomas Aquinas, *jus gentium* was apprehended by natural reason and was endowed with universal validity. His notions of the purpose of law and natural law arguably influenced Francisco de Vitoria, one of the first of the so-called founders of international law. Francisco de Vitoria, professor from the University of Salamanca from 1526 to 1546, dealt with the question whether the indigenous population of the Americas had legal rights. He argues that the right of the indigenous peoples not to be harmed derives from the law of nations (*jus gentium*).

Clearly quoting the definition of *jus gentium* from the Institutes of Gaius, Vitoria asserts that the natural reason (*naturalis ratio*) established among all peoples or nations (*inter omnes gentes*) constitutes the law of nations (*ius gentium*). The original sentence from Gaius, as previously explained, establishes that the law of nations is a law of all mankind or nations (*iure omnes gentes*) and rooted on the notion of natural reason of all humankind (*naturalis ratio inter omnes homines*). Although Victoria’s quote of the Institutes in the version of Ernest Nys

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111 Francisco de Vitoria, *supra* note 105 at 151.
112 See Inst 1.2.1. and G 1.1 (translated by Zulueta). Vitoria, commenting on the definition of *jus gentium*, refers to Gaius when he quotes the Justinian Institutes (Inst 1.2.1). See Francisco de Vitoria, *supra* note 105 at 151.
113 Francisco de Vitoria, *supra* note 105 at 151.
114 G 1.1 (translated by Zulueta)
is *inter omnes gentes*, in Krueger’s version is *inter omnes homines*,\(^\text{115}\) which brings Vitoria’s definition of *jus gentium* even closer to that of Gaius.

Thus, influenced by the Roman concept and understanding of *jus gentium*, Vitoria argues that foreigners and visitors have the right – Vitoria affirms that it is “humane” – under the law of nations to be treated well.\(^\text{116}\) Moreover, as a rule of *jus gentium* influenced by Roman law, Vitoria affirms that foreigners may trade provided that they do not harm citizens.\(^\text{117}\) Again influenced by Gaius,\(^\text{118}\) Vitoria asserts that because it is a derivation of natural law, the law of nations is capable of conferring rights and creating obligations.\(^\text{119}\) Furthermore, Vitoria acknowledges that the law of nations, besides rules deriving from natural law, can include rights and obligations created “through consensus of the greater part of the whole world, especially in behalf of the common good of all”.\(^\text{120}\) Based on the law of nations, Vitoria argues that the Spaniards have certain rights in foreign lands and if the indigenous peoples prevent the enjoyment of such rights, the Spaniards have to first explain to them by reason and persuasion without the use of force, unless in self-preservation or to avenge a wrong.\(^\text{121}\)

Vitoria’s *jus gentium*, based on human reason – *recta ratio* – is applied to all, governed and governors – covering the relations of all peoples transcending the limitations of the *jus voluntarium*.\(^\text{122}\) Accordingly, Francisco de Vitoria asserted that indigenous peoples, as all humans, have certain rights and duties rooted in the law of nations and in natural law. I believe

\(^{115}\) Francisco de Vitoria, *supra* note 105 at 257 note 4.
\(^{116}\) *Ibid.* at 151.
\(^{117}\) *Ibid.* at 152.
\(^{118}\) G 1.1 (translated by Zulueta).
\(^{119}\) Francisco de Vitoria, *supra* note 105 at 153.
\(^{120}\) *Ibid.* at 153.
\(^{121}\) *Ibid.* at 154.
that Vitoria’s views are largely based on religious scriptures and the Roman *jus gentium* (especially the Justinian *Corpus Juris Civilis*). As law is not a product of a specific mind and age, the law of nations cannot stem out of nowhere with the Spaniard theologians of the 16th century or with the work of Thomas Aquinas. The concept of the law of nations is rooted in Roman law. Moreover, its practical considerations can be traced back to even more remote civilizations.

Influenced by Roman law, Greek Philosophy, Catholic views and Thomas Aquinas, Francisco Suarez, in 1612, following the steps of Vitoria, sought to determine the concept and scope of the law of nations. Suarez, as Vitoria, holds that the purpose of law is the common good of the community.\(^{123}\) He argues that *jus gentium* is a part of natural law constituting an intermediate form between natural law and human law.\(^{124}\) Heavily based on the precepts of the Justinian Digest (part of the *Corpus Juris Civilis*) and on the Institutes from Gaius, Suarez points out that different from natural law, which is shared with all living creations, *jus gentium* is peculiar to all humankind.\(^{125}\) Furthermore, directly citing the Justinian Digest and indirectly mentioning the Institutes, Suarez asserts that *jus gentium* is “held to be natural as well, but in a special sense peculiar to mankind”.\(^{126}\)

*Jus gentium*, to Suarez, is formed by precepts introduced by free will and consent of humankind.\(^{127}\) He, thus, excludes some institutions or behaviors that to the Romans could fall under the scope of the law of nations as, for example, worshiping God, honoring one’s parents or

\(^{124}\) *Ibid.* at 325.
\(^{126}\) *Ibid.*
\(^{127}\) Suarez, *supra* note 123 at 332.
neighbors, the restitution of property or deposit, and speaking the truth.\textsuperscript{128} Moreover, he argues that the law of nations is connected to the study of man in society and the human person is its central element.\textsuperscript{129}

Furthermore, Suarez analyzes the examples that Isidore of Seville\textsuperscript{130} believed pertained to the domain of \textit{jus gentium}: the occupation of places of settlement, the right of building, the right of fortification, defence to just war, captivity and slavery, postliminium (right to recover one's liberty or to return to a former civil status after released from captivity), treaties of peace, truces, the inviolability of ambassadors, and the prohibition of marriages with a foreign born.\textsuperscript{131} Based on the notion that \textit{jus gentium} requires the exercise of rights that belong to all peoples,\textsuperscript{132} Suarez asserts that the four first examples clearly fall under the category of \textit{jus gentium}.\textsuperscript{133} Furthermore, he points out that peace, truce and the inviolability of ambassadors are part of the law of nations “[f]or all these points have their foundation in some human agreement”.\textsuperscript{134} However, he affirms that captivity and slavery are not part of \textit{jus gentium} and does not depend on the exercise of human reason.\textsuperscript{135} Moreover, postliminium and the prohibition to marry foreigners fall outside of the scope of \textit{jus gentium} because these rules are not common to all peoples.\textsuperscript{136}

\textsuperscript{128} \textit{Ibid.} at 330
\textsuperscript{129} \textit{Ibid.} at 336.
\textsuperscript{130} Arguing that the law of nations is the law of all peoples (\textit{omnes gentes}), Isidore affirms that: “[\textit{jus gentium est sedium occupatio,aedificatio,munitio,bella,captivitates,servitutes,postliminia,foedera pacis,indutiae,legatorum non violandorum religio,conubia inter alienigenas prohibita}” (University of Chicago, LacusCurtius: Into the Roman World, Isidore of Seville: \textit{The Etymologies (or Origins)}, online: http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Isidore/home.html Accessed on 25 February 2012).
\textsuperscript{131} Suarez, \textit{supra} note 123 at 337-338.
\textsuperscript{132} \textit{Ibid.} at 339.
\textsuperscript{133} \textit{Ibid.}
\textsuperscript{134} \textit{Ibid.} at 339.
\textsuperscript{135} \textit{Ibid.} at 340.
\textsuperscript{136} \textit{Ibid.} at 340-341.
Suarez, thus, following the concepts set by the Institutes of Gaius and the Justinian Digest argues that *jus gentium* is a law common to all humankind.\textsuperscript{137} Moreover, Suarez, influenced by Roman law, rooted his law of nations in the universal standpoint of human reason,\textsuperscript{138} which arguably transcends the scope of *jus civile*.\textsuperscript{139} Accordingly, the law of nations is not solely concerned with states of kingdoms. Its source is the human reason and it is applicable to states and individuals (*jus inter homines*) throughout the world (*jus totius orbis*).\textsuperscript{140} *Jus gentium*, thus, is rooted on human reason and is concerned with human beings (*versetur in materia propria hominum*).\textsuperscript{141} Accordingly, Suarez follows the definition of *jus gentium* set by Gaius and by the Justinian Digest. Victoria and Suarez did not set a new paradigm concerning the law of nations, but rather sought to reaffirm the concept and examples of *jus gentium* established by Roman law and to delineate and adapt it to their society.\textsuperscript{142}

Following the teachings of his predecessors, Alberico Gentili, an Italian protestant who sought safeguard in England, published, in 1589, his acclaimed *De Jure Belli Libri Tres*.\textsuperscript{143} Based on the works of Cicero, the *Corpus Juris Civilis* and the Institutes, Gentili defines the law of nations as the law used by all peoples or nations of men (*quo gentes humanae*) established by natural reason (*naturalis ratio*) constituted by all mankind (*inter omnes homines constituit*).\textsuperscript{144} Furthermore, Gentili sought to delineate and explain this Roman law concept of *jus gentium*. He asserts that the law of nations is not a combination of peoples or nations at a given time, but,
differently, represents the intention and purpose of the entire world *(totius orbis decretum)* based on what has seemed successively acceptable to all individuals.\textsuperscript{145}

Gentili, however, differently from the Spaniard theologians, accepts a second definition of the law of nations rooted in religion and thus not strictly connected to Gaius. The law of nations, in this second view, would constitute from certain universal written laws not enacted by men, but given to them by God.\textsuperscript{146} Accordingly, Gentili’s law of nations is a combination of the “Sacred Books of God”, which were given “special weight”\textsuperscript{147} and references to the Justinian *Corpus Juris Civilis*, which, according to Gentili, was “possible to adapt to our uses”.\textsuperscript{148} However, the *Jure Belli* is largely structured based on the *Corpus Juris Civilis*. Influenced by the teachings of Roman law, especially Cicero, Gentili excludes, for example, pirates from the purview of the law of nations because they are “the common enemies of all mankind”.\textsuperscript{149}

Accordingly, based on the Justinian law, he argues that:

\begin{quote}
It is a right to make war upon pirates, and the Romans justly took up arms against the Illyrians, Balearians, and Cilicians, even though those people had touched nothing belonging to the Romans, to their allies, or to anyone connected with them; for they had violated the common law of nations. And if a war against pirates justly calls all men to arms because of love for our neighbor and the desire to live in peace, so also do the general violation of the common law of humanity and the league of human society. Therefore war should be made against pirates by all men, because in the violation of that law we are all injured, and individuals in turn can find their personal rights violated; is it not so?\textsuperscript{150}
\end{quote}

\textsuperscript{145} *Ibid.* at 8.
\textsuperscript{146} *Ibid.* at 10.
\textsuperscript{147} *Ibid.* at 11.
\textsuperscript{148} *Ibid.*
\textsuperscript{149} *Ibid.* at 22.
\textsuperscript{150} *Ibid.* at 124 [emphasis added].
Gentili, thus, although also influenced by a religious natural law, acknowledged and based many of his examples on the Roman *jus gentium* rooting the source of this law on the human person. Furthermore, he recognized the existence of common rights of mankind as a law common to humanity and the league of human society part of the law of nations and intrinsically connected to individual rights.\(^{151}\) Accordingly, for Gentili, the law of nations, as a law centered on humans, admitted the individual personality and thus certain violations of *jus gentium* crystalizes breaches of personal rights. Moreover, Gentili’s *jus gentium* is rooted in the human person and above the will of states otherwise “we put sovereigns on a different plane from all other men, if we decide that they have the right to act according to their whim and caprice”.\(^{152}\) International law or *jus gentium* binds states and individuals as part of the “society formed by the whole world”.\(^{153}\)

In 1625, Hugo Grotius published his acclaimed *De Juri Belli ac Pacis* (*The Law of War and Peace*) and became the most famous of the so-called “fathers of modern international law”.\(^{154}\) However, following the steps of his predecessors, Grotius’s notion of *jus gentium* and natural law are rooted in Roman law. This position is clear from the *prolegomena* where he justifies the necessity of his treatise referring to Cicero and arguing that he “justly characterized as of surpassing worth a knowledge of treaties of alliance, conventions, and understandings of peoples, kings and foreign nations; a knowledge, in short, of the whole law of war and peace”.\(^{155}\) Indeed, Cicero is the most cited author in the *Jure Belli ac Pacis*.\(^{156}\) Grotius kept his

\(^{151}\) See Meron, *supra* note 143 at 114-115.
\(^{152}\) *Ibid.* at 75.
predecessors Roman based tradition envisaging an international law that, in his view, would better fit the questions and problems of his time. Following a different position, Balogh affirmed that “Grotius absolutely rejected the idea of accepting Roman law as the only authoritative source”.  

However, he nonetheless accepted that:

We generally agree to accept the fact that Grotius based his conception of Natural Law on the teachings of theologians, i.e., the *Summa Theologiae* of Thomas of Aquinas.... Yet, Grotius had found this idea likewise in the writings of the Roman jurisconsults, such as Ulpian and Gaius, and also in those of Paulus, intermingled, however, with that of the Law of Nations. For the first two, the Law of Nature established a juridical community among all living beings of Creation, and the others following the path traced by stoics of antiquity, made out of this Law of Nature a special law of man allied to his reasoning power.  

Furthermore, he argues that Grotius was influenced by Roman civilists in developing a law of nations embedded in private law institutions. Indeed, the *Jure Belli ac Pacis* follows the division of subjects crystalized in the Institutes of Justinian (persons, property, contracts and actions). Although Grotius acknowledged a “degree of validity” of the law of nature even if we concede that there is no God, Balogh argues that it is “a great mistake to interpret Grotius, who just as often refers to the Christian religion and morals as to historical events, as if he were responsible for the secularization of the Law of Nations”. Indeed, Balogh sought to demonstrate that Grotius managed to synthetize Christian and secular views in his treatise.

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157 Elemér Balogh, "The Traditional Element in Grotius Conception of International Law" (1929) 7 NYU L Q Rev. 261 at 272.
159 *Ibid.* at 274.
162 Balogh, *supra* note 157 at 283.
However, although acknowledging that Grotius dwelled upon religious concepts and was influenced by Roman law, Balogh did not analyze Grotius’s concept of the law of nations and did not compare it with the Roman view of natural and international laws.

Hersch Lauterpacht, differently, asserts that Hugo Grotius “secularized the law of nature”. However, Lauterpacht recognizes that the famous Dutch scholar pointed out that in addition of the law of nature there is the will of God. Furthermore, Lauterpacht argues that Grotius’s “reliance on Roman law is less frequent and less emphatic than is generally assumed”. Accordingly, although he acknowledges that Grotius often sought to treat Roman law as evidence of the law of nature, he was occasionally “at pains to show that specific rules of Roman law found no confirmation in the law of nations”. Conversely, I believe that the whole Grotian concept of the law of nations and his definition of natural law are based on Gaius and the Justinian Corpus Juris.

Grotius argues that humans are a superior kind of animal and thus, contrary to the Ulpian conception, he sought to determine that the law of nature is not common to all animals but “peculiar to the nature of man”. Adapting the Justinian notion of jus gentium to mean jus naturale (law of nature) and granting it some religious weight, he asserts that:

[T]he law of nature is the “dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral

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165 Ibid. at 8. See also Grotius, supra note 155 at 14.
167 Ibid. at 11.
168 Grotius, supra note 155 at 11.
169 Inst 1.2.1.
170 Grotius, supra note 155 at 12.
necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God.\textsuperscript{171}

Accordingly, Gaius’ secular notion of \textit{jus gentium} or law of nations later codified in the Justinian \textit{Corpus Juris Civilis} was arguably reinterpreted by Grotius with specific reference to morality and God. The \textit{Corpus Juris Civilis} establishes that \textit{jus gentium} is based on the natural reason of all mankind equally observed by all peoples and used as law by all peoples or nations.\textsuperscript{172} The traditional Roman concepts of the law of nations and law of nature were secular. However, Hugo Grotius placed them under the tutelage of divine law.

Moreover, Grotius divides human law in municipal law or the law of nations (\textit{jus gentium}).\textsuperscript{173} With confusing definitions, Grotius asserts that municipal law “emanates from the civil power”\textsuperscript{174} and \textit{jus gentium}, broader in scope, is the law “which has received its obligatory force from the will of all nations, or of many nations”.\textsuperscript{175} Initially, with these definitions in mind, it would not be far-fetched to argue that the law of nations and the law of nature were two completely different systems. However, Hugo Grotius promptly excludes this reasoning affirming that “outside of the sphere of the law of nature, which is also frequently called the law of nations, there is hardly any law common to all nations”.\textsuperscript{176} The law of nations and the law of nature are, thus, similar but different.

Furthermore, there seems to be no clear answer in Grotius’s treatise of the hierarchy between the law of nature and of nations. Although the law of nature could in some situations yield to the law of nations, it is not possible to affirm that this is the official position of

\begin{footnotesize}
\begin{enumerate}
\item[171] Ibid. at 38-39.
\item[172] Inst 1.2.1. This is a position from Gaius who envisaged a universal legal system rooted in the human person based on natural reason (G 1.1 (translated by Zulueta)).
\item[173] Grotius, \textit{supra} note 155 at 44.
\item[174] Ibid. at 44.
\item[175] Ibid.
\item[176] Ibid.
\end{enumerate}
\end{footnotesize}
Grotius. Even the definition of the law of nature is unclear. Most of the harshness of the law of war, for example, is deduced from the law of nature rather than from the law of nations.

Grotius oscillated between two different conceptions of the law of nature. In certain points he followed Hobbes’s view of the right of nature and of the law of nature as expressing “physical laws rather than ethical or juridical norms” based on the notion that individuals have to preserve their own nature and of the natural reason forbidding individuals to do what is destructive to their lives. In other occasions, the law of nature is conceived as a humanizing element in the amelioration of human condition based on an assertion of liberty and alleviation of suffering.

Lauterpacht argues that the principal characteristics of the Jure Belli ac Pacis remain identical with the current problems and features of international law and, furthermore, the teaching of Grotius “has become identified with the progression of international law to a true system of law both in its legal and its ethical content”. Lauterpacht, thus, points out some features of the Grotian law of nations that remain or were recognized by contemporary international law of human rights. First, Grotius subjected the totality of international relations

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178 Ibid. at 9.
179 Ibid.
180 Ibid. at note 9. See also Thomas Hobbes, Leviathan, Project Gutenberg, online: http://www.gutenberg.org/files/3207/3207-h/3207-h.htm Accessed on 6 March 2013. Hobbes asserts that the right of nature “which Writers commonly call Jus Naturale, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto” (at chapter xiv). Law of nature (Lex Naturalis) “is a Precept, or generall Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved” (ibid).
182 Ibid. at 19.
183 Lauterpacht mentions the following points: the subjection of the totality of international relations to the rule of law; the acceptance of the law of nature as an independent source of international law; the affirmation of social nature of man as the basis of the law of nature; the recognition of the essential identity of states and individuals; the rejection of reason of state; the distinction between just and unjust wars; the doctrine of qualified neutrality; the binding force of promises; the fundamental rights and freedoms of the individual; the idea of peace; and the tradition
to the rule of law. The acceptance of the law of nature as an independent source of international law, that is, the law that binds states is not solely a product of their sovereign will. The law of nations proper or *jus gentium voluntarium*, which depends on consent manifested in the practice of states, is just a component of international law.

As a third point, Lauterpacht mentions the affirmation the law of nature is largely envisaged as deduced from the nature of man intrinsically moved by a wish for social life, endowed with measures of goodness, altruism and morality, and able of acting on general principles and of experience. Four, states are composed of subjects with rights and duties, namely, individuals. As the ultimate unit of all law, international and municipal, individuals are the ultimate addressees of international obligations. Fifth, Grotius rejected the “reason of state” as the basic and decisive element of international relations, which is connected to the legal and moral unity of mankind. Sixth, although Grotius arguably sought to provide some humanitarian elements *jus gentium* and was the first who accepted the principle of humanitarian intervention when he acknowledged as a cause of just war to prevent the maltreatment of nationals by states. Finally, the Grotian position of idealism and progress advanced the view of of idealism and progress (*ibid.* at 19-53). However, due to the delineation of this work, only some features of Lauterpacht’s view are considered.

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186 *Ibid.* Lauterpacht asserts that “though a great deal of international law proper rests on consent, much, but not all, of it follows from the precepts of the law of nature” (*ibid.*) and, thus, in a winder sense, the binding force of all of international law, including the part that originates on consent rests on the law of nature (*ibid.*).
188 *Ibid.* at 27.
189 *Ibid.* Lauterpacht affirms that “the development, the well-being, and the dignity of the individual human being are a matter of direct concern to international law” (*ibid.*).
191 Grotius argued that the law of nations allowed certain practises as slavery and he rejected the idea of the sovereignty of the people. His view of the institute of slavery, as strange as it might sound, is, however, permeated with notions of charity and mercy. See Lauterpacht, “The Grotian Tradition”, *supra* note 164 at 45-46. See also Grotius, *supra* note 155 at Chapter IV paras i-vii and 551.
international law and explained institutes that became in whole or in part fundamental areas of international law.  

I agree with Lauterpacht that the *Jure Belli act Pacis* contributed to the crystallization of contemporary international law. However, I do not agree that Grotius “secularized the law of nature” and that his “reliance on Roman law is less frequent and less emphatic than is generally assumed”. Conversely, all the major elements pointed out by Lauterpacht are indeed intrinsically connected or flows from the Roman concept of *jus gentium* adapted to the historical challenges of the time. Moreover, the Roman notion of *jus gentium* is secular in its essence, that is, without explicit reference to the will of God.

Grotius perhaps sought to establish clear differences between *jus gentium* and natural law that would separate him from theorists such as Thomas Aquinas and could, in his view, secularize these definitions. However, he confused more than enlightened. It is unclear whether his law of nature humanizes law or serves as excuses to the maltreatment of individuals and to establish causes of war. Grotius, for example, argues that the right to kill or injure “extends not only to those who actually bear arms, or are subjects of him that stirs up the war, but in addition to all persons who are in the enemy’s territory”. Moreover, this right extends to infants, women, captives and hostages.

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192 Lauterpacht, “The Grotian Tradition”, supra note 164 at 48. Furthermore, Lauterpacht comments other elements from the *Jure Belli ac Pacis* that are not necessarily connected to human rights and the concept of international law and might perhaps pertain to the domains of criminal law or humanitarian law: the distinction between just and unjust wars; the doctrine of qualified neutrality; the binding force of promises; and the idea of peace (*ibid.*).


196 *Ibid.* at 648-650. However, Grotius states that the law of nations forbids killing by poison (at 651). Furthermore, Grotius, not differently from his predecessors, asserts that the institute of slavery is permitted by the law of nations. Furthermore, slave is a more humane option. Instead of killing, captors spare the lives of captives by choosing slavery as a more advantageous approach for them. Grotius indeed sustained that it is not possible to impose upon slaves excessively severe tasks and that the “health of slaves is to receive humane consideration” that among all nations alike masters have power of life and death over their slaves” (*ibid.* at 690, 692 and 764)
Moreover, the characteristics pointed out by Lauterpacht from the *Jure Belli ac Pacis* can be linked and better explained with reference to Gaius’ concept of *jus gentium* than of that of Grotius. Gaius’ concept of the law of nations is secular without reference to God or religion. Moreover, his definition of *jus gentium*, which was later accepted by the Justinian *Corpus Juris Civilis*, better fits and explains most of the principal characteristics of the *Jure Belli ac Pacis*. Gaius definition of the law of nations as the law of natural reason flowing from all mankind and followed by all peoples alike\(^\text{197}\) better expresses a system of international law that is centered on individuals and is above the will of sovereigns. Moreover, the Roman law of nations arguably seems to crystallize the rule of law covering not only Romans, but the relations among different people and sovereignties in an international system that stems from the “international juridical conscience”\(^\text{198}\). Phillipson comments that:

The existence and the influence of a juridical consciousness is clearly evidenced in the whole fabric of the law of nations as accepted by the Romans. It is manifested in the practice of *deditio* (as corresponding to the civil procedure of *noxae datio*, noxal surrender of the delinquent), which was applicable to certain prescribed cases, it is indicated in a multiplicity of institutions and doctrines, such as the *hospitium publicum* and *privatum*, the *ius honorarium* (in reference to peregrins), the *ius legationis*, the *foedera*, *spansiones*, and *postliminii*, the doctrine of balance of power, the reference to arbitration and acceptance of the arbitral judgement, and in various other principles and institutions.\(^\text{199}\)

Accordingly, the Roman concept of the law of nations as a universal law flowing and for the human person based on a juridical consciousness better presents the contemporary definition of international law of human rights. Furthermore, the characteristics of the *Jure Belli ac Pacis*

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\(^\text{197}\) *Ibid.* at 1.

\(^\text{198}\) Phillipson, *supra* note 3 at 69.

\(^\text{199}\) *Ibid.* at 117.
showed by Lauterpacht fits this Roman definition better than that of Grotius. Based on the Roman definition, there is arguably some subjection of the international relations to the rule of law; individuals are the main subjects of the law of nations; natural law is an independent source of law intrinsically connected to international law; there is the affirmation of the nature of man as the basis of the law of nations; and there is arguably an improvement on the recognition of individual equality and freedom.²⁰⁰

The definition of the law of nations (jus gentium) from Gaius is better able to convey the ideas purported by Lauterpacht as all the elements he mentions concerning the human person is embedded in Gaius’ concept. However, Lauterpacht’s explanation of the main points of the Jure Belli ac Pacis demonstrates that Grotius, although using confusing terms and definitions, followed to a great extent the Roman concept of the law of nations. There are two important ideas in Grotius’ treatise central to the issue of individuals’ international legal personality. First, the human person occupies the central position in the international legal system. Second, as the international community cannot exist without law, states are not above it. Grotius, influenced by Roman law, asserted that the law of nations was the law of the universal human society primarily derived from natural law which, in turn, derived from human nature and placed the individual as the source and ultimate addressee of jus gentium.²⁰¹

Accordingly, the revival of Roman law, which started at the end of the Middle Ages included the study and adaptation of the Roman law of nations. The formation of modern states and the Thirty Years’ War, which led to the treaties of Westphalia, demanded a fresh look on the Roman institutes of jus gentium. However, although with alterations, the concept and certain

²⁰⁰ Phillipson argues that Roman international law shows a great advance on that of Greece (ibid at 106).
aspects of this area of law remained and influenced the works of the so-called “fathers of
international law”. Thus, they are not actually “fathers”, but rather “revivalists” of the actual
father of this concept of the law of nations: the Romans. Moreover, this concept from Gaius was
revitalized after the Second World War and codified in human rights treaties.

Richard Zouche explicitly referred to Roman concept of *jus gentium*. After citing
Gaius, he divides this concept of *jus gentium* in two subtopics. First, “it is the common
element in the law which the peoples of single nations use among themselves”. The second
approach to this concept is as a law that “is observed in common between princes or peoples of
different nations”. He calls this second approach the *jus inter gentes* and adds that “[a]mong
Romans it was called by a special name”: *jus feciale*.

However, I believe that Zouche’s definition and division of *jus gentium* might lack some
accuracy. Although he rightly recognizes the importance of Gaius and his concept of the law of
nations, he refers to two different names – *jus gentium* and *jus feciale* – without clearly
explaining the similarity or difference between them. Zouche just adds that *jus feciale* has to do
with the condition of kings, peoples and foreign nations. *Jus feciale*, in Roman law, commonly
refers to sacred rules that could in certain circumstances be connected to *jus gentium* (law of
nations). It is a body of sacramental decisions from the *fetiales*, that is, a special group of
priests.

\[\text{Zouche, Juris e Judicii Fecialis, sive Juris Inter Gentes, et Quaestionum de Eodem Explicatio from 1650}\]
\[\text{Richard Zouche, Juris e Judicii Fecialis, sive Juris Inter Gentes, et Quaestionum de Eodem Explicatio, vol 2 in James Brown Scott, ed, The Classics of International Law (Baltimore, Carnegie Institute of Washington, 1911) at 1.}\]
\[\text{Ibid.}\]
\[\text{Ibid.}\]
\[\text{Ibid.}\]
\[\text{Ibid.}\]
\[\text{Arthur Nussbaum, “The Significance of Roman Law in the History of International Law” (1952) 100 U Pa L Rev 678 at 679. Phillipson affirms that “In many points it coincided with the *ius gentium*, in the sense that the special is contained in the general, though certain matters of *ius fatiale* – rather minor matters concerned with formal proceedings than fundamental questions relating to the fundamental foundation of international law – were not}\]
Accordingly, it seems inaccurate to limit Gaius’s concept of *jus gentium* to a mere *jus inter gentes* or a law between nations and to link it to a *jus fetiale*. Zouche’s position can be interpreted not as an acknowledgement that *jus gentium* means a law between states, but rather that the concept of *jus gentium* is wide and can, together with the notion of individuals, include state relations. Moreover, the idea that *jus inter gentes* is a synonym of inter-state law (*Staatenrecht*) was only to prevail, much later, in the 19th century.\(^{208}\) The term *gens* or *gentes* is wide in scope than only states and encompasses peoples or individuals.\(^{209}\) This broad term explains, for example, the translation of *jus gentium* (law of nations) to *droit de gens* (French),\(^{210}\) *direito das gentes* (Portuguese),\(^{211}\) *derecho de gentes* (Spanish),\(^{212}\) *Völkerrecht* (German)\(^{213}\) and *diritto delle genti* (Italian),\(^{214}\) in all cases meaning the “law of peoples”.\(^{215}\)

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\(^{208}\) Cançado Trindade, *supra* note 109 at 14.


\(^{210}\) Vattel was probably the first to publish a book translating the expression *jus gentium* to *droit de gens*. However, in English, instead of translating to “law of peoples”, the chosen terminology was “the law of nations” (Emmerich de Vattel, *The Law of Nations, or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and Sovereigns*, in James Brown Scott, *The Classics of International Law*, vol III (Washington, The Carnegie Institution, 1916)).

\(^{211}\) Francisco Rezek refers to *direito das gentes* and *direito internacional* (international law) as synonyms. See Rezek, *supra* note 42. See also Emmerich de Vattel, *O Direito das Gentes* (Ijui: Editora UNIJUI, 2008).


\(^{213}\) In German “international law” can be referred as *Völkerrecht* or *Internationales Recht*. See generally Beolingus: Your Online Dictionary, German-English Translation, online: [http://dict.tu-chemnitz.de/dings.cgi?lang=en&service=deen&opterrors=0&optpro=0&query=Völkerrecht&iservice=&comment=&email=](http://dict.tu-chemnitz.de/dings.cgi?lang=en&service=deen&opterrors=0&optpro=0&query=Völkerrecht&iservice=&comment=&email=) Accessed on 14 March 2013. See also Emer de Vattel, *Völkerrecht oder Gründliche Anweisung wie die Grundsätze des Natürlichen Rechts auf das Betragen und auf die Angelegenheiten der Nationen und Souveräne Angewendet Werden Müssen* (Franckfurt und Leipzig, 1769).


Pufendorf, in 1672, examines again the relationship between natural law, civil law and the law of nations. The laws of nature, dictates of the right reason, can be divided into principles, that is, fundamental laws of nature arising from the “very character of the human nature”, and conclusions, which “are deduced from these principles by necessary consequence or subsumption”. Pufendorf’s definition of the law of nations is analogous to that of the law of nature applied to individuals. Thus, the law of nature and the duties of individuals “can be readily applied to whole states and nations which have also coalesced into one moral person”. There is, in my view, a tend to focus the law of nations on states instead on individuals and thus limiting the Roman definition.

Writing not long after the publication of Vattel’s treatise, Christian Wolff defined the law of nations as “the science of law which nations or peoples use in their relations with each other and of the obligations corresponding thereto”. Accordingly, different from the Roman concept of the law of nations, Wolff’s definition fails to mention that the law of nations flows from individual human beings. However, he argues that natural law is the source of the law of nations. Furthermore, rights and obligations of nations or the group of nations are analogously based on individuals and on the common good.

217 Ibid. at 159.
218 Ibid. at 165.
219 Ibid.
220 In 1764.
222 Ibid.
223 Ibid. at 14-19 and 20-30. Wolff argues that “characteristics which are to be predicated of the greater part of a nation, or the majority in some definite kind of life, pass from the individuals to the nation as a whole and consequently are to be predicated of it” (ibid. at 29). Wolff recognizes the common good, that is, the existence of an adequate life, peace and security as the purpose of nations and states in a system under the law of nations (ibid. at 14).
However, with the emergence of Vattel’s state-centric law of nations (which arguably began with Zouche) and the limitation on the Roman concept to a *jus inter gentes*, the prevailing theory seems to be that the whole international law framework does not flow from individuals anymore. This path could be explained in the light of the emergence of modern states and the lack of a debate concerning the existence of a minimum set of human rights at the international level. The law of nations was indeed rapidly moving towards a system of inter-state law. Vattel’s definition as a “science of the rights which exist between” equal and sovereign nations or states[^224] paved the way to strict limitations to the Roman concept of *jus gentium* crystalizing it as a *jus inter gentes* or a law between states.

The revival of the Roman law of nations started with Vitoria and resonated, in different extents, with most of the so-called “founding fathers” of international law. However, the revivalists sought to adapt the Roman law of nations to their own reality and society. Zouche pointed out that one of the elements of *jus gentium* is indeed a *jus inter gentes* and, following his steps, Vattel went even further and focused on the state-centric element of international law.

The theory of *jus inter gentes* spawned the voluntarist positivism of the late 19th and beginning of the 20th centuries supported by scholars such as Oppenheim. This positivistic theory deprived the law of nations of any element of morality. International law was a law from and to states. Individuals had no rights at the international level.[^225] The object theory excluded the possibility of an effective international system of human rights because it presupposes the inexistence of individual rights at the international level. Oppenheim, thus, maintained that

[^224]: Vattel, *supra* note 210 at 3 and 11.
“rights of mankind” such as the “right of existence, right to protection of honor, life, health, liberty, and property, the right of emigration, and the like” are not part of the law of nations.\textsuperscript{226}

However, as previously explained, the traditional voluntarist positivism based on an extreme state-centric view has been rejected by the International Court of Justice and regional human rights courts. Furthermore, scholars sought to demonstrate and explain the concept of international law based on or non-excluding the human person. In this following topic, I analyze mainly two individual-centric theories pointing out their strengths and problems. After, I will compare these theories with my main argument, which provides that the Roman law of nations was codified in modern international law of human rights.

5.3. The International Law Theories and the Human Person: From General Acceptance to a Return to a Roman Law of Nations

The object theory, widely accepted in the international context at the beginning of the 20\textsuperscript{th} century, is untenable in the light of current developments of international law.\textsuperscript{227} Even before the Second World War, international law scholars put the state-centric doctrine into question. In 1928, Jean Spiropoulos argued against the voluntarist theory asserting that states exist to accomplish the aspirations of individuals and are, consequently, not only subjected to their own

\textsuperscript{226} Ibid. at 368.
\textsuperscript{227} Cançado Trindade, commenting the practical inapplicability of the object and voluntarist theories affirmed that “[s]uch strictly inter-state outlook of international law, in turn, paved the way to the excesses of state voluntarism (reducing international law to a sort of “external” state law) and to successive abuses committed by states to the detriment of persons under their respective jurisdictions, amidst flagrant impunity. International law could not remain indifferent to that; in recent decades the need became manifest of rescuing the original universal outlook of the discipline, by means of reconstruction of \textit{jus gentium}” (Cançado Trindade, \textit{supra} note 109 at 15).
will. Accordingly, the law of nations must grant individuals certain immediate rights and, furthermore, place human rights under the protection of the international juridical order. In that same year, Nicolas Politis, from the standpoint of the individual at the international level, criticized the object theory of international law arguing that international law regulates the relations of individuals belonging to various groups. He advocated that international law could not be envisaged as an inter-state law or a *jus inter gentes*, but a law concerned with individuals. He concluded that “[i]t is becoming impossible to maintain that, separately from his country, the individual has, from the legal point of view, no place in international relations”.

However, it was after the Second World War with the creation of the United Nations and the establishment of human rights instruments that scholars began to increasingly support the idea of the individual legal personality, especially in international human rights law. This support can normally be divided in two distinct categories: on the analysis of the way human rights instruments treat individuals based on post-Second War developments or on a natural law approach can be traced back to the so-called founding fathers of international law.

The first approach focuses primarily on the language and the development of international human rights law, especially of its written instruments. For these scholars, human rights treaties, especially after 1945, established a discourse that confers international rights to individuals.

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228 Jean Spiropoulos, “L'Individu et le Droit International” [The Individual and International Law] (1929) 30 Recueil des Cours 191 at 222 and 246-247. He acknowledges that the science of the law of nations is beginning to address the issue of the emancipation of the individual from the tutelage and omnipotence of states (*ibid.* at 247).
233 See above.
individuals.\textsuperscript{234} This position stresses the wording of treaty provisions can lead to the conclusion that they can confer direct rights to individuals.\textsuperscript{235} Consequently, there is no relevant reason prohibiting individuals from having direct access to international bodies and from having rights, duties and responsibilities under the law of nations.\textsuperscript{236}

This approach to international law is, to a certain extent, correct. States may agree to conclude treaties and declarations according rights and duties and international capacity to individuals. The wording of international law instruments can have elements establishing whether individuals have international rights, duties and capacity in specific situations. Moreover, international law instruments can only grant direct rights and duties to individuals if there is a general agreement among states to accord such personality.

However, this theory is incomplete. It fails to acknowledge that international law encompasses range of diverse areas of law and that in the specific case of human rights, the individual legal personality is essential to crystalize a proper existence of a system of human protection at the international level. Human rights necessarily require a framework focused on the human person. In other words, the existence of international human rights law is conditional on the acceptance of the international legal personality of the human person. If individuals are deprived of international rights and duties, the whole system of international human rights law ceases to exist and the only element left is a state duty to establish a domestic system of human rights. Accordingly, the exclusiveness of the will of states as the only source of law seems to conflict with the indispensable importance of individuals in human rights.

\textsuperscript{234} Kate Parlett, \textit{The Individual in the International Legal System: Continuity and Change in International Law} (New York: Cambridge University Press, 2011) at 339. Parlett acknowledges that human rights treaties, especially the ones concluded after the Second World War, grant direct rights to individuals (see \textit{ibid.} at 337-339).


The second category, thus, seeks to acknowledge the importance of individuals to international human rights law by reference to natural law. Perhaps, the most prominent scholar of post-Second War natural law reasoning in international law is Hersch Lauterpacht. He takes account of the practical importance of individuals as bearers of rights and duties and with international capacity granted by human rights instruments.\textsuperscript{237} However, different from the supporters of the first category, he, following the teaching of the “founders of modern international law”, argues that the law of nature, an ethical and moral postulate, is the ultimate source of law and, consequently, individuals are placed as the ultimate subjects of international law.\textsuperscript{238}

Lauterpacht’s premise is that international law is indirectly under the obligation to the idea of inherent human rights, which, in turn, is connected to the notion of the law of nature.\textsuperscript{239} Thus, he ascertains the mutual influence and inward relation of international law, the law of nature and the rights of man.\textsuperscript{240} In his view, the starting point and the “irreducible element” of the law of nature is the human person.\textsuperscript{241} It is the role of the law of nations and the law of nature to limit the absolute sovereignty of states giving approval to the “indestructible sovereignty of man”.\textsuperscript{242} Accordingly, ascertaining the existence of a common point between natural law and the law of nations and placing it above the will of states, Lauterpacht affirms that:

\begin{quote}
It is probably the natural law of humanity to develop its capacities to all attainable perfection. This is also an essential part of man’s moral duty. That duty man has a natural right to fulfill – through freedom. Inasmuch as freedom means the
\end{quote}

\textsuperscript{237} Lauterpacht, Human Rights, supra note 82 at 27-29.
\textsuperscript{238} Elisabeth Nijman, supra note 201 at 298-299.
\textsuperscript{239} Lauterpacht, Human Rights, supra note 82 at 115.
\textsuperscript{240} Ibid. at 122.
\textsuperscript{241} Ibid. at 123.
\textsuperscript{242} Ibid.
fullest development of the possibilities of human personality it is not a means of the highest order, but an end in itself. That state is to ensure that freedom. The law of nations, conceived in the fullness of its proper function, exists for the double purpose of accomplishing that object by making man’s freedom secure from the state and by rendering the state secure from external danger. It is not enough to say that the law of the state is circumscribed by its purpose and by external nature of its power. Democracy, although an essential condition of freedom, is not an absolute safeguard of it. That safeguard must lie outside and above the state.\textsuperscript{243}

It seems that Lauterpacht’s picture might consist of a pyramid. At its top lies the law of nature with its main purpose to secure the development of the individuals’ capabilities. Below the law of nature – a word possibly chosen in reference to Hugo Grotius’ treatise\textsuperscript{244} – stands the law of nations. The main or one of the main objectives of the law of nations is to accomplish the postulate set by the law of nature. Consequently, the law of nations seems to work as an instrument to help establish and guarantee freedom.

This position seems incomplete or perhaps incoherent in certain aspects. I believe that international law exists to safeguard and provide legal security to the aspirations of states and individuals alike. Furthermore, human rights are not rights of states, but, rather, are rooted in moral and supra-state considerations. However, Lauterpacht chose freedom as the purpose for the law of nations and natural law alike. It is through freedom, man’s moral duty and natural right, that man can develop the possibilities of human personality.\textsuperscript{245} It is, however, unclear why Lauterpacht chose freedom.

The work of the so-called founding fathers of modern international law is not grounded on the notion of freedom or that individuals should be protected from their own states. Indeed, as

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\begin{itemize}
  \item \textsuperscript{243} \textit{Ibid.}
  \item \textsuperscript{244} Grotius, \textit{supra} note 155 at 38-39.
  \item \textsuperscript{245} Lauterpacht, \textit{Human Rights}, \textit{supra} note 82 at 123.
\end{itemize}
previously mentioned, slavery was a legal institute validated by the law of nations although,
following the Roman tradition, was condemned by the law of nature.\textsuperscript{246} Hugo Grotius accepted
slavery\textsuperscript{247} and a right to kill and injure which could extend to all persons who are in the enemy’s
territory, including women, children, captives and hostages.\textsuperscript{248}

Accordingly, even during the time when natural law and international law were seen to be
interchangeable, freedom did not seem to be a fundamental part of this equation. Furthermore,
democracy as an essential condition of freedom leads one to believe that it also plays an
important role in the systems of the law of nature and the law of nations. However, it is even
unclear whether democracy is part of the core concept of international law or even of
international human rights law.

Kelsen, for example, argues that democracy, freedom and liberalism are possible
principles of social organization as are autocracy and socialism.\textsuperscript{249} To prefer one principle over
another is a political and moral choice which, according to him, has no scientific character.\textsuperscript{250}
Kelsen’s criticism of Lauterpacht’s view is valid. Even discarding the positivistic view that
moral considerations have no room in legal science, the questions remains of the preponderance
of one specific principle, in this case freedom, over others as, for example, equality. The
principle of equality could arguably be as important as the principle of freedom and liberal
democracy. Consequently, there seems to be no compelling reason to choose one principle as a
“super principle”, that is, the principle-aim for the law of nations over other arguably equally
important principles.

\textsuperscript{246} Grotius, \textit{Book III, supra} note 195 at 690.
\textsuperscript{247} \textit{Ibid.} at 692.
\textsuperscript{248} \textit{Ibid.} at 648-650 and 690.
\textsuperscript{250} \textit{Ibid.} at 4-5.
Furthermore, in international law’s history, the principle of freedom seems to be not as important as the principle of what I call “recognition”. In my view, the Roman-based law of nations was established to recognize the legal importance of individuals and their institutions without *a priori* limitations of religion or citizenship. The Roman concept of the law nations of conveys the notions of universality, human-centrality and the rule of law. Accordingly, if there are underlying “super-principles” guiding the objective and purpose of international law are precisely the human-centrality and the existence of a universal rule of law at the international level. In international human rights law, the human-centrality aspect stands out because of the specific particularities of this system, which seeks to protect the human person.

Cançado Trindade follows the footsteps of Hersch Lauterpacht arguing that the rule law is above the will of states and that individuals are subjects of international law with rights, duties and capacity. For him, the Roman *jus gentium* had its origins in private law and only in the late Middle Ages did it transcend this scope and began to be associated with the emerging law of nations. Accordingly, although denying the Roman origins of the law of nations, Cançado Trindade as Hersch Lauterpacht believes that individuals should break the complete tutelage of states and have full personality at the international plane.

In tune with the international practice, Cançado Trindade acknowledges that in current times, states, international organizations and the civil society contribute to the development of

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251 Cançado Trindade, “*A Recta Ratio*”, *supra* note 122 at13.
international law. The law of nations evolves based on a common effort from the international community as a whole formed by a multitude of actors. The human person is “subject *jure suo* of international law, and to the recognition of the rights which are inherent to him corresponds ineluctably to the procedural capacity to vindicate them, at the national as well as international levels”.

Thus, Cançado Trindade, following Lauterpacht, seeks to demonstrate that individuals are subjects of international law and, moreover, the international legal system could be more humanely structured. Indeed, for him, the whole evolution of international law points to a return to a universal and individual-based *jus gentium* initially envisaged by the founding fathers of international law and now formed by a body of international law (*corpus juris gentium*) established to restrict the unlimited sovereignty of states and crystalize an effective rule of law at the international plane.

Similar to Lauterpacht, Cançado Trindade bases his view of international law on a natural law postulate based on the writings of the so-called founding fathers of international law following, however, a slightly different reasoning. He acknowledges that international law manifests through its traditional positivistic sources (*e.g.*: custom, treaties, general principles of law, case-law, doctrine, and equity), which he calls “formal sources”, and through a

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257 Five Pensioners case (Peru) (2003), Separate Opinion of Judge A. A. Cançado Trindade, Inter-Am Ct HR (Ser C) Nº 98 at para 24 [emphasis in original].  
metajuridical *substratum* or “material source” from where the formal source originates.\(^{260}\) Thus, the natural law element is already part of the law of nations.

The formal sources follow the well-known and commonly referred “classical sources” of the law of nations established by Article 38 of the Statute of the International Court of Justice (treaties, custom, general principles of law and, secondarily, judicial decisions and doctrine.).\(^{261}\) The formal sources of international law do not flow from the consent of states or the international community as a whole, but rather from consensus as an expression of the legal conscience of the international community.\(^{262}\) Trindade’s theory is constructed as a criticism and a response to legal positivism in international law.\(^{263}\) In his view, a higher standard of justice should assess positive law, that is, the “formal sources” of international law. The key-elements in this reorganization lie in his concept of “material source” and on the notion of a “universal juridical conscience”.\(^{264}\) Moreover, even in the formal sources of international law, the individual consent of states is replaced by the notion of consensus and *opinio juris*, which,

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\(^{260}\) Antônio Augusto Cançado Trindade, “International law for Humankind: Towards a New *Jus Gentium* (I): General Course on Public International Law” (2005) 316 Recueil des Cours 9 at 147 [Cançado Trindade, “General Course (I)”].

\(^{261}\) *Statute of the International Court of Justice*, annex to the *Charter of United Nations*, 26 June 1945, Can. T.S. Nº 7 (entered into force 24 October 1945) at Article 38 (1). Apart from the sources provided by Article 38, he adds to the list: unilateral juridical acts of states, as manifestations of subjects of international law with legal consequences, and resolutions of international organizations when established as legal manifestations of subjects of the law of nations which could have certain normative force. See Cançado Trindade, “General Course (I)”, *supra* note 260 at 164-168.

\(^{262}\) *Ibid.* at 169.

\(^{263}\) He asserts that “[a] continuous “rebirth” of natural law has been constantly identified, though this latter has never disappeared. This has taken place in face of the hermetic posture of legal positivism, upholding the status quo, with its typical subservience to power. It is no longer a *return to classic natural law*, but *rather the affirmation or restoration of a higher standard of justice, whereby positive law is assessed*. That ‘rebirth’ has much contributed to the assertion and the consolidation of the primacy, in the order of values, of the obligations pertaining to the rights of the human person, owed to the international community as a whole” (*ibid.* at 173 [emphasis added]).

instead of forming the subjective element of custom is here envisaged as “a key factor in the formation itself” of the law of nations.\textsuperscript{265}

Trindade’s reasoning follows the notion that human conscience opposes injustice and rebel against oppression.\textsuperscript{266} This conscience or \textit{recta ratio}, which is of difficult definition,\textsuperscript{267} is based on an “irreducible minimum”, which impedes total submission of power-holders and oppression of the human person.\textsuperscript{268} It is, thus, the ultimate material source of international law presupposing an order of universal values with the realization of justice as its heart.\textsuperscript{269} Commenting on this human conscience (also called \textit{recta ratio} or international juridical conscience), Trindade affirms that:

\begin{quote}
It is my view that there is, in the multicultural world of our times, an \textbf{irreducible minimum}, which, insofar as international law-making is concerned, rests on its ultimate material source: human conscience. This may admittedly \textbf{have distinct forms of expression}, in distinct cultures, but I believe they all mean, ultimately, \textbf{that which is common to all human beings} (and distinguishes them from other species), which guides their actions, which identifies their values, which assists them in searching the meaning of their lives, individually and in socially organized collectivities: human conscience.\textsuperscript{270}
\end{quote}

In international law practice, this juridical conscience arguably found support in certain instruments and decisions. The \textit{Institut de Droit International} considered that the juridical conscience of the civilized world requires the recognition of human rights.\textsuperscript{271} Following this

\begin{footnotesize}
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\item \textsuperscript{265} Cançado Trindade, “General Course (I)”, \textit{supra} note 260 at 175.
\item \textsuperscript{266} Cançado Trindade, \textit{Humankind, supra} note 109 at 141.
\item \textsuperscript{267} Cançado Trindade, “General Course (I)”, \textit{supra} note 260 at 180.
\item \textsuperscript{268} Cançado Trindade, \textit{Humankind, supra} note 109 at 142-143.
\item \textsuperscript{269} \textit{Ibid.} at 144.
\item \textsuperscript{270} \textit{Ibid.} [emphasis added].
\end{itemize}
\end{footnotesize}
same line, the preamble of the Rome Statute of the International Criminal Court also refers to the “conscience of humanity”.\textsuperscript{272} Similarly, the preamble of the Universal Declaration of Human Rights contains the expression “conscience of mankind”.\textsuperscript{273} Furthermore, Trindade points out that the juridical conscience was invoked by different delegations during the travaux préparatoires of the Vienna Convention on the Law of Treaties\textsuperscript{274} and in the Martens Clause in humanitarian law\textsuperscript{275} that works as a hermeneutical tool “warning against the assumption that whatever is not expressly prohibited by the Conventions on international humanitarian law could be allowed”.\textsuperscript{276}

The change of paradigm in international law, which is no longer centered on states but rather on the human person, is due to the “awakening of a universal juridical conscience”, which is the ultimate “material source” of the law of nations.\textsuperscript{277} Furthermore, the “material source” is not only the ground source of international law – although it is its source par excellence.\textsuperscript{278} It is

\textsuperscript{273} Universal Declaration of Human Rights, GA Res 217 (III), UN GAAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) at preamble [hereinafter the “Universal Declaration” or “Universal Declaration of Human Rights”].
\textsuperscript{274} Cançado Trindade, Humankind, supra note 109 at 151-152.
\textsuperscript{275} Ibid. at 150. Friedrich von Martens presented a clause that sought to confer legal protection to civilians and combatants in all situations, on the grounds that the principles of the law of nations are derived from established customs, principles of humanity and public conscience (Cançado Trindade, “Revaluation”, supra note 264 at 94-95). See Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 29 July 1899, 32 Stat. 1803, 187 Consol TS 429 at preamble; and Hague Convention IV - Laws and Customs of War on Land, 18 October 1907, 36 Stat 2277, 205 Consol TS 277 at preamble. See also Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 at Article 63; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85 at Article 62; Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 at Article 142; and Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 at Article 158. All provisions establish that “[t]he denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience”.
\textsuperscript{276} Cançado Trindade, “General Course (I)”, supra note 260 at 191.
\textsuperscript{277} Ibid. at 158.
\textsuperscript{278} Ibid.
the source of all law moving forward from civilization to civilization in pursuit of the realization of an objective justice. Furthermore, Trindade argues that humankind is a separate subject of international law. Furthermore, Trindade argues that humankind is a separate subject of international law.

Thus, in this view, states, international organizations, individuals, groups of individuals and humankind as such are all subjects of international law. The notion of humankind is connected to a “principle of humanity”. This principle could be envisaged in three distinct ways. First, it could be understood as “underlying the prohibition of inhuman treatment established by Article 3 common to the four Geneva Conventions of 1949”. Second, this principle can refer to humankind as a whole, that is, “in matters of common, general and direct interest to it” and, furthermore, it can be invoked to “qualify a given quality of human behavior”. Humankind, in Trindade’s view, concerns a common law of mankind encompassing various treaties in different domains of the law of nation and with international personality. He comments that:

[H]umankind encompasses all the members of the human species as a whole (including, in a temporal dimension, present as well as future generations). In fact, there is nowadays a growing body of international instruments… containing express references to “mankind” or “humankind”, and attributing rights to it. There are nowadays some conceptual constructions in course to give concrete expression, with juridical consequences, to rights attributed to humankind.

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279 Ibid.
280 Ibid. at 318.
281 Cançado Trindade, Humankind, supra note 109 at 273.
282 Ibid. at 279.
283 Ibid. at 279-280.
284 Ibid. at 280.
287 Cançado Trindade, Humankind, supra note 109 at 281.
I agree with Cançado Trindade in four of his major conclusions. First, individuals are a central part of the law of nations, especially of international human rights law. Second, international law of human rights developed – doctrinally and jurisprudentially – towards the protection of the human person and needs to keep advancing in this direction. Third, natural law and legal positivism coexist as part of the international system. Finally, “considerations of humanity”, that is, notions of common good of all human beings must inform the decision-making and evolution of the law of nations, at least of international law of human rights. However, although I concur with the outcomes of his considerations, some of his basic premises could be far-fetched and of difficult demonstration.

Trindade’s theory rests on the assumption that the ultimate source of international law is the “material source”. However, in practical terms, there seems to be no evidence that the international community or international law in general crystalized the notion that the material source is higher in hierarchy than treaties or the usual “formal sources”. Moreover, Trindade did not elaborate on the relation between the material and formal sources, that is, on the reason for the existence of formal sources if material sources are higher in hierarchy and are connected to the notion of *opinio juris*. Furthermore, the dichotomous division between the sources weakens the formal sources and finds no support in legal practice.

Following the tradition of the so-called founding fathers, Trindade sought to place natural law as part of the law of nations. However, it provides a divided account of international law, which does not explain the differences between, for example, international trade law, which majorly concerns inter-state relations, and international human rights law, which arguably requires the individual legal personality to exist as a branch of human rights. International law of
human rights, as previously explained, evolved based on moral considerations. Human rights instruments were concluded based on moral grounds.

There is no clear line separating natural law perspectives from the positivistic approach centered on written instruments. Human rights treaties and declarations are envisaged based on and triggered by natural law considerations and they can, as indeed happens, codify natural law positions. Consequently, the separation between natural law approaches and legal positivism could weaken both “sources” because there is no evidence that the international community as a whole established the notion of justice as the ultimate source of international law. Different from Lauterpacht, who highlights the notion of freedom, Cançado Trindade focuses on justice, which arguably works as an assessment mechanism for positive law.\(^\text{288}\) However, international justice is arguably an imprecise term. It is unclear, following this theory, to see how or even if the justice of states meets that of individuals. In other words, individuals and states, as different entities, might have different interests. In a case of a human rights violation, for example, a state might believe that justice exists when its domestic system provides access to justice and pays compensation in case of a violation. Individuals, on the other hand, might believe that the state’s view is not enough. The right thing to do would also include an official statement from the state apologizing for the violation and the establishment of mechanisms to assure that future violations of the same kind will not happen again.

Arguably, treaties and declarations are of fundamental importance in defining and establishing the parameters of action and decision-making at the international level. Thus, justice and morality usually need to be rooted in treaties and declarations to provide levels of legal certainty. I believe that Cançado Trindade’s point, that is, that international law – especially

\(^{288}\) Cançado Trindade, “General Course (I)”, supra note 260 at 173.
human rights – need to evolve and be applied taking into account the well-being of individuals, can be reached based on a mutual collaboration of “material” and “formal” sources not as different systems, but as one single framework wherein natural law, that is, the view that human reason is a source and the purpose of international law is codified in legal instruments. Arguably, there are not two legal sources with different hierarchy, but rather one single framework, a positive law system, which embodies natural law. The main natural law principle is not necessarily the single notion of freedom or justice. Choosing a “meta-principle” leads to question the nature and reason of selecting one principle over another arguably equally important.

I do not share the opinion that the “founding fathers” established the current international law system. As previously mentioned, the main elements of international human rights law can be traced back to Roman law. However, they must be interpreted and applied in the light of current developments. This current system codified the natural law notion of individual-centrality in treaties and declarations. Cançado Trindade’s account on the sources, universal juridical conscience and on the humanization of international law rests on some vague and unclear definitions. In other words, how could one identify the minimum *substratum* forming the juridical conscience before its manifestation in international law instruments or customary practice?

In my view, a unification of both systems whereby the fundamental notion of international human rights law, the human-centrality (human person as the source and the end of law based on reason), codified in written instruments can vest this natural law approach in a positivistic system. In other words, the “formal sources” of international law set the parameters of legal

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289 Although the elements comprising the definition of international law, especially international human right law, can be traced back to Roman law, rudimentary notions international law were part of the practice of a number of ancient civilizations.
obligations at the international level. However, reason dictates that individuals must be acknowledged as subjects of international law with rights, duties, capacity and interests in order to have an effective international human rights system. Consequently, this individual legal personality is part of human rights instruments with normative force, what I call the general normative force. This conclusion can be reached by a thorough analysis of the main human rights instruments and the evolution of international law. Consequently, my theory is different from that of Cançado Trindade and Hersch Lauterpacht.

Furthermore, the notion of “humankind” is confusing. Cançado Trindade claims that humankind and humanity are different terms. However, it is difficult to demonstrate that humankind is a subject of international law with rights, duties and capacity. This difficulty arguably arises because Trindade’s theory is based on the existence of two different sources of international law, which are not intrinsically connected. Formal and material sources must have their own legal basis. Accordingly, humankind, as a separate notion, to exist at the international level needs to be based on formal and material considerations. On the side of the formal sources of law, Trindade is not able to provide a compelling number of arguments that could amount to prove the existence of such subject of international law.

In my view, all actions of the international community, in international human rights law, must have in mind the individual personality (rights, duties, capacity and interest). I add an extra element to the individual legal personality: interest. Individuals have interests, that is, aspirations at the international level that are different from other subjects of international law. Furthermore,

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290 See above.
individuals have increasing access to international adjudication bodies. Accordingly, there is no need to envisage a new entity, humankind, as a distinct subject of international law.

Similarly, the same reason applies to Trindade’s principle of humanity. This principle seems to be a modern interpretation of the notion of “common good”. Indeed, I argue that there are universal rights, which are common to all and there are thus aspirations common to the international community as a whole. Furthermore, the ultimate goal of international human rights law is the protection of the human person. However, there are also particularities that might undermine or complicate the notion of a universal common good in praxis. One could mention, for example, the right to property. Arguably, there are two perspectives of the right to property: the individual right to property and the right to communal property.

In a situation of conflict between both visions of property rights, what would be the common good, to uphold the individual or the communal conception? If the answer is that it depends on the practical case, the notion of “common good” is not so “common” that is, is not universal and varies depending on the circumstances. Moreover, one could argue the inexistence of a common good underlying the whole international community. That is, the common good of states might not be necessarily the common good of individuals. In a case of massive human rights violation, for example, for states, the common good might be outside the scope of the law. It could be to create truth and reconciliation commissions and establish a new system, which would arguably impede future massive human rights violations. Consequently, the common good could be the non-application of pre-determined legal norms. However, for the individuals who had their rights breached, the common good could be precisely the application of pre-determined human rights norms. Even if one argues that the notion of common good must be interpreted

\[291\] See Cançado Trindade, Access of Individuals, supra note 252 at 1-49.

\[292\] Cançado Trindade, Humankind, supra note 109 at 399.
only within the legal system, conflicts in legal disputes still may rise due to possible differences of interests between individuals and states.

At the international level, individuals file complaints against states, that is, they argue that a certain state failed to comply with international human rights norms and principles. Consequently, there is an individual-state dichotomy. In this individual-centered system, a judge or even the international community as a whole interprets and applies the law taking into account the interests of individuals in specific (the ones who filed the complaint) and in general (the interests of individuals as subjects of international law).

The *pro homine* framework is, thus, a more specific notion than that of common good as the sole parameter. There is a balance which bends towards individuals. Conversely, the notion of common good comprises no balance. In the case of the two examples, judges would not have an *a priori* answer in a *pro homine* system. However, the balance would be towards the claims from individuals rather than that of the state because the whole system is based on and flowing from individuals. Furthermore, when explaining his notion of the juridical conscience, Cançado Trindade affirms that:

It is my view that there is, in the multicultural world of our times, an irreducible minimum, which, in so far as international law-making is concerned, rests on its ultimate material source: human conscience. This may admittedly have distinct forms of expression, in distinct cultures, but I believe they all mean, ultimately, that which is common to all human beings (and distinguishes them from other species), which guides their actions, which identifies their values, which assists them in searching the meaning of their lives, individually and in socially organized collectivities: human conscience.²⁹³

²⁹³ Cançado Trindade, “General Course (I)”, supra note 260 at 182-183.
Arguably, the principle of humanity concerns the evolution and interpretation of international law with the idea of justice. The juridical conscience is the material source, a minimum standard of protection and goals, which is common to all individuals and the international community as a whole. If this is the right interpretation, the material source is the natural law and superior element of international law connected with the notions of justice and common good. Humanity is a principle acknowledging this material source, but part of the formal system. As previously explained the division of material and formal sources is problematic, uncertain and requires herculean strength to prove its existence. Furthermore, Trindade envisaged two different elements – a meta-source and a principle – which could arguably in practice mean the same thing: the protection and safeguard of the human person. There is no reason for such differences.

Accordingly, I believe that there is one source of law, which is what Trindade calls the “formal source”. However, the formal source is not a group of letters on a page of a treaty or declaration. Furthermore, these instruments are not restricted to the original intent of the contracting states. The Vienna Convention on the Law of Treaties, which is a codification of customary norms related to treaty practice,\textsuperscript{294} crystalized the understanding that treaties should be interpreted based on “their context and in the light of its object and purpose”.\textsuperscript{295} Furthermore, treaties, as legal instruments, must be analyzed based on the system from which they are part. The Vienna Convention, in tune with this reasoning, spells out that treaties are interpreted based on their context, which includes preambles, annexes, agreements relating to the treaty and

\textsuperscript{294} Mazzuoli, supra note 8 at 36.
instruments connected to the treaties accepted by the parties. Moreover, the Convention adds that besides the context, subsequent agreements between the parties, or practice regarding interpretation and “relevant rules of international law applicable in the relations between the parties” are taken into account when interpreting and applying treaties.  

In my judgement, the Vienna Convention on the Law of Treaties establishes the notion that ordinary meaning, context and object and purpose are all equally important set of parameters to interpret and apply treaties. Conversely, Linderfalk argues that the object and purpose of a treaty, that is, its ratio legis or raison d’etre, is a “second step in the interpretation process”. In other words, if using the conventional language is still insufficient, that is, is vague or ambiguous or leads to conflicting results, the applier can supplement the “ordinary meaning” by recourse to the object and purpose of a treaty. I do not share this position. However, one could argue that his view could be the position of the International Law Commission at the time of the creation of the Vienna Convention on the Law of Treaties when it affirmed that the majority of its members emphasized “the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty as means of interpretation.”

However, even applying Linderfalk’s view, that is, if one analyzes the Vienna Convention focusing on its ordinary meaning based on the “everyday language” and on the relevant “technical language”, it could be possible to reach a wholly different conclusion. Article 31(1) of the Vienna Convention spells out that “[a] treaty shall be interpreted in good faith in
accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” \(^{301}\) Accordingly, in my view, the literal interpretation fails to provide a subsidiary or supplementary role for the object and purpose.

Furthermore, the International Law Commission pointed out that “the starting point of interpretation is the meaning of the text”, that is “‘the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose should be the first element to be mentioned’”. \(^{302}\) Preference, for the International Law Commission, must be given to the ordinary meaning, which “is not to be determined in the abstract but in the context of the treaty and in the light of its object and purpose”. \(^{303}\) Consequently, “the starting point of interpretation is the elucidation of the meaning of the text, not an investigation \textit{ab initio} into the intentions of the parties”. \(^{304}\)

Taking into account the position of the International Law Commission, the textual interpretation is based on the treaty’s ordinary meaning in the light of its object and purpose. In international human rights law, the general object and purpose of treaties – as declarations – is to crystallize an effective protection of individuals by acknowledging their status as bears of rights and duties and with capacity and interests at the international level, which flow from individuals themselves and exist for all humankind.

Furthermore, human rights instruments have in common a general normative force: the recognition of the individual legal personality. This personality is not the same of that of states. Individuals have different interests which can, in concrete situations before international adjudication bodies, conflict with those of states. Consequently, the traditional view of the

\(^{301}\) \textit{Vienna Convention on the Law of Treaties, supra} note 295 at Article 31 (1).
\(^{302}\) “Draft Articles on the Law of Treaties with Commentaries on the work of its eighteenth Session”, \textit{supra} note 299 at 220.
\(^{303}\) \textit{Ibid.} at 221.
\(^{304}\) \textit{Ibid.}
international legal personality based on three elements – rights, duties and capacity – is incomplete. To acknowledge the individual legal personality is to maintain that individuals indeed possess aspirations at the international level unconnected from states’ interests. There are, therefore, four elements to determine the legal personality at the international level: rights, duties, capacity and interests.

In international human rights law, this conclusion is possible due to the codification of the Roman view of “human-centrality” in human rights instruments, which establishes the pro homine framework. Treaties and declarations stress the importance of state cooperation and agreements in the protection of human rights, which commonly occur through the elaboration of treaties and human rights mechanisms of adjudication. Furthermore, states’ willingness to comply with courts decisions is a key aspect in the crystallization of an effective human rights system. This positivistic approach, that is, the view that state cooperation and instruments are essential to the protection of human rights is complemented by the Roman law notion that establishes the human person as the source and aim of human rights.

As previously explained, this natural law and Roman-based view is crystallized in the preamble of universal and regional human rights instruments. The Universal Declaration of Human Rights points out that “inherent dignity and of the equal and inalienable rights of all

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305 The Universal Declaration, for example, establishes that "[m]ember States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms" (Universal Declaration, supra note 273 at preamble). The European Convention on Human Rights, by its turn, spells out that “as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration” (Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221, Eur TS 5 at preamble [hereinafter “European Convention” or “European Convention on Human Rights”]).

members of the human family is the foundation of freedom, justice and peace in the world”.\textsuperscript{307} Furthermore, the Universal Declaration acknowledges that morality prompted the development of human rights in the post-Second War system when it spells out that the “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind”.\textsuperscript{308} The European Convention, by its turn, states that it aims at “securing the universal and effective recognition and observance of the Rights therein declared”.\textsuperscript{309} The International Covenant on Civil and Political Rights arguably grants normative force to the preamble of the Universal Declaration by linking it to the Charter of the United Nations when it establishes that “in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace”.\textsuperscript{310}

Furthermore, in tune with the natural law argument, the ICCPR recognizes that human rights “derive from the inherent dignity of the human person”.\textsuperscript{311} Moreover, the ICCPR informs that individuals have not only rights but duties at the international level.\textsuperscript{312} Notwithstanding this natural law position, the ICCPR stresses the “obligation of states under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms”.\textsuperscript{313} By the same token, the American Convention on Human Rights informs that:

\begin{quote}
[T]he \textbf{essential rights} of man are not derived from one's being a national of a certain state, but are \textbf{based upon attributes of the human personality}, and that they therefore justify international
\end{quote}

\textsuperscript{307} \textit{Universal Declaration}, supra note 273 at preamble.
\textsuperscript{308} Ibid.
\textsuperscript{309} \textit{Convention for the Protection of Human Rights and Fundamental Freedoms}, supra note 305 at preamble.
\textsuperscript{310} \textit{International Covenant on Civil and Political Rights}, 19 December 1966, 999 UNTS 171, 1976 Can TS No 47 at preamble [emphasis added] [hereinafter “ICCPR” or “Covenant on Civil and Political Rights”].
\textsuperscript{311} Ibid.
\textsuperscript{312} Ibid.
\textsuperscript{313} Ibid.
protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states.\(^\text{314}\)

The American Convention exemplifies the interchangeable relation between natural law and legal positivism as essential attributes of international law of human rights. However, these two notions are not separate and one does not necessarily flow from the other. Indeed, classic natural law does not necessarily derive from any element but rather is grounded in reason.\(^\text{315}\) In my view, there is a necessary codification of a specific Roman-based attribute of the law of nations – the “human centrality” – as the main element of international law of human rights.

Consequently, human rights instruments recognize individuals’ essential rights that flow from the human personality. Moreover, this individual-centric system is based on the Roman law of nations. In other words, Roman law considerations guide the crystallization of an international human rights system. Moreover, this notion was accepted by states themselves. Human rights cannot be an effective system without focusing on the human person as the bearers of rights and rights to claim.

In international law of human rights, the traditional notion of state cooperation alone is not sufficient to establish an effective human rights system, which requires humans as right bearers. International law must be under a framework that is sensitive to the aspirations and needs of all humankind. States recognized that human rights flow and exist to protect the human person. They are, thus, based on human reason. This was crystalized in human rights treaties and declarations. Consequently, there are not two different sources of law, but one, the formal


\(^{315}\) On the history of natural law, including its classical conception, see generally Lloyd L. Weinreb, *Natural Law and Justice* (London: Harvard University Press, 1987). On the question of natural law and practical reasoning see John Finnis, “Natural Law and Legal Reasoning” (1990) 38 Clev St L Rev 1; and on the separation between “is” and “ought” see John Finnis, “Natural Law and the “Is” - "Ought" Question: an Invitation to Professor Veatch" (1981) 26 Cath Law 266.
source, which acknowledges the human centrality. This is a codification of this Roman notion of *jus gentium* based on a certain view of natural law in a modern framework, a *pro homine* framework.

Furthermore, Trindade argues the existence of consensus instead of consent as the basis of international law. This view arguably envisages the international plane as a forum wherein states, individuals, international organizations and other actors reach agreements on the development of international law based on consensus. Accordingly, if I interpret it correctly, this theory presupposes that in a treaty-making negotiation, for example, the final text of the treaty is reached based on a consensual decision in an open debate which includes a number of international actors with equal powers.

The consensus view arguably presupposes equality in standing in the elaboration of legal norms, which might not be an accurate account of the practice of the international community. Although this would be the wishful procedure, states still occupy a dominant position among the subjects of international law. Conversely, I believe that international human rights law is grounded on consent. However, this consent is not solely a state agreement to be part of a treaty or another instrument based on selfish considerations. International law is not a law between states (*jus inter gentes*), but, differently, binds the whole international community. As a law above the single will of states, it cannot develop based on selfish considerations. Rather, it depends on a shared notion of consent.

By “shared consent”, I mean that states when creating new human rights treaties or when establishing new customary norms must have in mind the interests of individuals as an autonomous entity with international legal personality. This is a logical requirement. To exist as a distinct area of international law concerned with the protection of the human person, human
rights necessarily requires the notion of individuals as bearers of rights and duties. Consequently, if states genuinely seek to create a human rights treaty, they need to take the individuals’ interests as subjects of international law under consideration.

The general interest of individuals is to have their legal personality recognized at the international level. Moreover, they have specific interests, which can change according to the purpose of the treaty or the nature of the group of individuals. The specific individual interest in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for example, is to protect the physical integrity of individuals regardless of their nationality (purpose of the treaty). Furthermore, indigenous communities might require a communal interpretation of the general right to property enshrined in Article 21 of the American Convention on Human Rights (specific interest).

Accordingly, states necessarily need to take into account the interests of individuals when creating or accepting human rights instruments. Individuals are thus part of the “conscience” of states and international organizations in the treaty-making process. Consequently, the traditional notion of consent as an individual and state-centric act of agreement is not suited to explain international law of human rights. State consent is pluralistic, that is, is based on the interests and aspirations of individuals and the international community as a whole. The creation and acceptance of treaties falls primarily under the responsibility of states. However, this consent is shared, that is, is pluralistic. It takes into consideration the aspirations and interests of individuals as bearers of rights and duties and the primary focus of international human rights law.

317 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.
International human rights law is rooted in the human person as its source and purpose. This view is grounded on the Roman concept of the law of nations. My main argument is to demonstrate the revival of the Roman concept of the law of nations, which emerged from the ashes of the Second World War when moral considerations prompted a human-centered and reason based view of international human rights law. In the next topic, I seek to explain in further detail the Roman concept of the law of nations and its connection with the classic view of the law of nature.

5.4. The Roman Concept of Jus Gentium and Jus Naturale

International law, at least to some extent, was part of the practice of a number of ancient civilizations. The law of nations is not a Western invention and not a Christian creation. The Romans, facing contacts with different civilizations, expanded and shaped the application of the law of nations by officially recognizing that there is a law applicable to different individuals or groups of individuals regardless of their religion, social status, origin and ethnicity. Nussbaum explains that:

Roman law held out a convenient name for the new discipline: *jus gentium* (law of nations, *droit des gens*). In ancient Roman law, to be sure, that term had a different significance. It meant first a *quasi*-cosmopolitan segment of municipal Roman law designed primarily for litigation among or with foreigners; in a broader – as it were philosophical – sense it meant the law common to all or to many nations (for instance, protection of property). It was in the latter sense that *jus gentium* included rules of international law such as the sanctity of envoys or the captor’s right to war booty;

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319 Neff, *supra* note 11 at 11-49.
320 Ibid.
in fact, international law is to a great extent necessarily “universal”.

As previously explained, Gaius’s concept of the law of nations was codified *ipsis litteris* by Justinian. However, different from Gaius’s Institute, the *Corpus Juris Civilis* adopts a tripartite division of law accepting and codifying the concepts of the law of nations (*jus gentium*), civil law/domestic law (*jus civilis*) and natural law (*jus naturali*). The Institutes of the *Corpus Juris Civilis*, in section two named “of natural law, of the law of nations and of civil law” (*de iure naturali et gentium et civili*) adopts Gaius’s division of law when it establishes that:

All peoples are governed by the laws and costumes which are partially their own and partially the law of the common use of all men. The law which the group of individuals establish as the law for themselves as part of a particular group is called civil law, that is, the peculiar law of the society. However, the law established by natural reason between all individuals observed by all individuals is called the law of nations, which is the law that all nations or peoples observe.

However, in this same section, the compilers of the *Corpus Juris Civilis* also adopted Ulpian’s division of law, which includes natural law. The Justinian Institute, citing Ulpian, defined natural law as “what nature teaches to all animals; for it is not specific to the human race,

322 Nussbaum, *supra* note 207 at 682.
323 G 1.1 (translated by Zulueta) and Inst 1.2.1. Gaius only divides law in the law of nations and civil law.
324 Inst 1.2.1 pr [translated by author]. The original in Latin: “*omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur. nam quod quisque populus ipse sibi ius constituit, id ipsius proprium civitatis est vocaturque ius civile, quasi ius proprium ipsius civitatis: quod vero naturalis ratio inter omnes homines constituit, id apud omnes populus peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur*” (*ibid.*).
326 Inst 1.2.11; and Dig 1.15.4 (Ulpian).
but rather to all living creatures, that is, animals from the air, earth and sea". Furthermore, this same reasoning is part of the Digest of the *Corpus Juris Civilis*. The Digest establishes that:

Natural law is what nature teaches all animals: for it is not specific to the human race alone but to all animals - land animals, sea animals and birds as well. From this law comes the union of male and female, which we call marriage, the procreation of children and their education. We see that other animals, even wild beasts, are acquainted with this law. The law of nations is observed by all peoples or nations of the world. It is a lawful to depart from the natural law, because the first is common to all animals, whereas the latter is common to all individuals. 

Consequently, the *Corpus Juris Civilis* accepted with equal standing two divisions of law. The first, from Gaius, does not seem to recognize the existence of a wide notion of natural law, which binds humans and animals alike. The second classification, from Ulpian, points out a tripartite view of law which includes a broad view of natural law as a separate law. Much has been written about this apparent contradiction found in the outset of the Institutes and the Digest, and about the Roman concept of natural law.

Furthermore, it is not the focus of this thesis to discuss in detail the origins of *jus naturale* in Roman law. However, the concept of the law of nations is intrinsically connected with that of the law of nature and this link dates back to Roman law.

327 *Ibid* at Inst 1.2.1 [translated by author]. The original in Latin: “*ius naturale est, quod natura omnia animalia docuit. nam ius istud non humani generis proprium est, sed omnium animalum, quae in caelo, quae in terra, quae in mari nascuntur*” (*ibid*).

328 *Ibid* at Disg 1.2.1 [translated by author]. The original in Latin: “[*ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalum, quae in terra, quae in mari nascuntur, avium quoque commune est, hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellantam, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam iuris peritia censeri. Ius gentium est, quo gentes humanae utuntur. quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit*” (*ibid*).

The Roman notion of the law of nations or *jus gentium* is, thus, quite complex and, as previously explained, encompasses public international law (e.g.: in areas relating to diplomatic envoys, ambassadors, and agreements), private international law and matters pertaining to civil law but are not constrained to Roman citizens. However, there is one common thread to all notions of *jus gentium* and definitions from Gaius and Ulpian, which is the recognition of international rights and duties which belong to all individuals. Furthermore, Jeremy Waldron, for example, points out that the Roman law of nations includes the traditional idea of natural law but with a substantial difference. He explains that:

Now, natural law also involved the idea of commonality: just as fire burns in Persia as well as in Greece, so murder is wrong in Carthage and in Rome. The difference was that the law of nature posed itself explicitly an ideal: what did human reason as such say about the basics of human action and relationship, justice and injustice, right and wrong? *Ius gentium*, on the other hand, afforded a more grounded focus of aspiration, looking not just to philosophic reason but to what law had actually achieved in the world.

A common example mentioned by authors to point out the difference between natural law and the law of nations is slavery, which is prohibited under natural law but nevertheless accepted under the rules of the law of nations. However, there is not a clear separation between both concepts, especially taking into account the divergence on the divisions of law between Gaius and Ulpian. One could affirm that Gaius’s bipartite classification represents the view that the law

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330 See Bederman, supra note 10.
331 Walton, supra note 70 at 163. Private international law commonly concerns conflicts of norms belonging to different legal systems. Consequently, only if we adopt a wide definition which would include rules regulating the relations between foreigners and foreigners and citizens that this area of law would arguably be part of the Roman law of nations (Dolinger, supra note 31 at 128-129).
332 Muirhead, supra note 321 at 239-265.
334 Ibid. at 134.
335 Ibid.
of nations already completely includes natural law and Gaius did not accept the theory that
central law focused on animals and humans alike. Shifting perspectives, one could argue that the
difference between the views of Gaius and Ulpian is philosophical.\footnote{Kroger, supra note 329 at 906.} Gaius’s account could be
Aristotelian grounded on the human person, human reasoning and universality.\footnote{Ibid. at 917-918.} Conversely, Ulpian’s view would be Stoic rejecting the Aristotelian argument that natural law is understood
or revealed by humans alone and acknowledges an ethical idea of natural law rooted in
equality.\footnote{Ibid. at 937-938. See also Muirhead, supra note 321 at 271.}

Pollock points out the similarities between the law of nature (or natural law) and the law of
nations. Stressing the influence of the Greek philosophy, he argued that “the classical jurists,
perhaps with more aid from the Greek philosophical works than we can now trace, proceeded to
identify \textit{ius gentium} with \textit{ius naturale} for the purpose of legal science”.\footnote{Ibid.} Accordingly, “\textit{ius naturale} should signify the rules of conduct deducible by reason from the general conditions of
human society; \textit{ius gentium}, so much of those rules as is actually received and acted upon among
civilized people”.\footnote{Pollock, supra note 329 at 14.} However, he adds that this distinction is “seldom made by the Roman
lawyers”\footnote{Ibid.} and thus these terms were “treated as synonyms in ordinary cases”.\footnote{Ibid.}

Consequently, Pollock had difficulty to explain Ulpian’s concept of natural law as a
separate law different from the law of nations and grounded on animals and individuals alike. He
asserts that Ulpian’s view is a “piece of over ambitious generalization taken from some forgotten
Greek writer, perhaps a rhetorician and not a philosopher”,\footnote{Ibid. at 15.} and, affirms that Ulpian’s concept
of natural law is “quite contrary to the Stoic conception of the law of nature”\(^{344}\) which is based on human nature and human reason.\(^{345}\) Accordingly, for him, Ulpian’s “unlucky phrase is alone in the \textit{Corpus Iuris}”\(^{346}\) because “there is no sign of the notion having had any influence in Roman law”.\(^{347}\)

Zuckert seeks to conciliate the Roman concepts of the law of nature and the law of nations. First, he asserts that Ulpian’s concept of natural law “emphatically” disagrees with the Stoic natural law position, which teaches that it pertains “especially to human beings, to the reason and to social life”.\(^{348}\) He places the origins of the law of nations on “philosophical speculation” affirming that Cicero, who was influenced by Aristotle, is “credited with coining the term”.\(^{349}\) Furthermore, he asserts that:

\begin{quote}
The most natural is the most common, so that what men share with all living, animate beings is emphatically \textit{jus naturale}; but what all men share with each other is also natural, at least natural for men. Thus, in this sense \textit{jus gentium} is \textit{jus naturale humanum}, and all such universal principles, along with the yet more universal \textit{jus naturale} itself, are distinguishable from the \textit{jus civile} as the particular and variable. Thus the \textit{jus gentium} is both non-natural and natural, both a separate or third type of \textit{jus} and assimilated to it, as Gaius did.\(^{350}\)
\end{quote}

This claims that \textit{jus gentium} can on certain occasions change the \textit{jus naturale} as in the case of slavery, which is initially wrong based on a natural law perspective but is nevertheless valid as

\begin{footnotes}
\footnote{Ibid.}
\footnote{Ibid. It is out of the scope of this work to analyze the Stoic concept of the law of nature and its relation with animals and humans.}
\footnote{Ibid.}
\footnote{Ibid.}
\footnote{Ibid.}
\footnote{Zuckert, \textit{supra} note 325 at 76.}
\footnote{Ibid. at 77-78.}
\footnote{Ibid. at 77.}
\end{footnotes}
accepted by *jus gentium*.³⁵¹ Human agreements, which include both the law of nations and domestic law (*jus civile*), can add or subtract from natural law and still remain valid.³⁵² To him, natural law is narrow, that is, is “so unauthoritative that it may be and even needs to be changed by human convention”.³⁵³ However, in a broader sense, these human conventions are “potentially rooted in nature”.³⁵⁴ Consequently, the “task of the jurist is to bring the *jus civile*, that is, the effective law, as close as possible to the natural standards”.³⁵⁵ He concludes that the ultimate character of natural law, in a broad sense, is connected to a “standard of rights” toward natural standard.³⁵⁶

This theory is thus based on the existence of two notions of natural law.³⁵⁷ Furthermore, the “real pay-off” of *jus gentium* is in validating the “conventional” and, consequently, “vulnerable” *jus civile*.³⁵⁸ The problem with this argument is that there is no evidence that these two views of natural law are indeed based on the *Corpus Juris Civilis* or on that the majority of Romans actually followed a tripartite division of *jus* based on “narrow and extensive” understandings of natural law. Arguably, there is no evidence in Roman law supporting this position.

There are, thus, two problematic points connected with the classification of Roman *jura* (*jus*). First, there is the question of the definition of natural law (*jus naturale*) and its place in the Roman legal system. Secondly, there is question of the division or relation between natural law and the law of nations.

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³⁵³ *Ibid.* at 82.
The difficulty in determining the precise definition of the terms *jus gentium* and *jus naturale* leads to confusion in understanding the separation between these two classifications of law and, furthermore, in understanding the precise scope of the law of nations.\(^{359}\) Due to terminology imprecisions and perhaps even lack of access to more primary sources of Roman law, the law of nations and natural law could be envisaged as synonyms.\(^{360}\) However, it would not be a far-fetched assumption to affirm that the law of nature is a more abstract understanding of law in contrast with the law of nations, which can focus on practical considerations.\(^{361}\) Phillipson, furthermore, adds that:

The theoretical *ius naturale* and the practical *ius gentium* interact, refining and enlarging each other, - the former representing the ideal, what ought to be established, the latter representing the real, what is universally established. And as the two have a very large portion of their respective contents in common and converse towards the same goal, there is a tendency, especially in the minds of what may be called a practical nature, to call one by the name of the other.\(^{362}\)

Based on the information available, it is difficult or perhaps even impossible to determine that natural law and the law of nations were synonyms in the eyes of Roman law.\(^{363}\) However, as Muirhead points out, there “can be no doubt” that the law of nations was “much largely imbued with precepts of natural law than was the *jus civile*”.\(^{364}\) This closer proximity between the law of nations and natural law is because both divisions of law focus on the human person. *Jus civile*, as

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\(^{359}\) As I previously mentioned, the Roman law of nations also included public international law. See Bederman, *supra* note 10.

\(^{360}\) Stephenson, for example, mentions *jus gentium* and *jus naturale* as synonyms. See Stephenson, *supra* note 74 note at 313.

\(^{361}\) Pollock, *supra* note 329 at 13-14.

\(^{362}\) Phillipson, *supra* 3 note at 92.

\(^{363}\) Muirhead, *supra* note 321 at 271.

a domestic law, is only concerned with citizens.\textsuperscript{365} Jus gentium, on the other hand includes individuals irrespective of their nationalities, that is, it has “a wider range and took all mankind within its purview”.\textsuperscript{366} Jus naturale would include all individuals, free or slaves.\textsuperscript{367} Even if one considers that natural law includes individuals and animals alike, it would still encompass all individuals, free or slaves.

The division between scholars is regarding the extent natural law and the law of nations can signal a similar or a diverse concept. The law of nations admitted slavery as a valid legal institution. This reality only changed in contemporary times. Although succeeding to obtain a solemn condemnation of the slave trade, the Congress of Vienna, in 1815, failed to make it a crime \textit{jure gentium}, which only started to come into fruition in 1926.\textsuperscript{368} Natural law, on the other hand, on principle, has always condemned the slave trade as being unnatural.\textsuperscript{369} Natural law could, in this sense, represent a higher standard of achievement for both domestic law and the law of nations. Ulpian, in a famous passage of the \textit{Corpus Juris Civilis} commenting slavery, teaches that:

\begin{quote}
Manumissions are also comprised in the \textit{jus gentium}. Manumission is the same as dismissal from \textit{manus} (hand), in short the giving of liberty; as long as man is by manumission in a state of slavery he is subject to \textit{manus} and \textit{potestas} (control), by manumission he is freed from control. All this had its origins in the \textit{jus gentium}, seeing that by natural law all were born free, and manumission was not known, because slavery itself was unknown; but when slavery came in through the \textit{jus gentium}, there followed the relief given by manumission; and whereas people were once simply called by the one natural name of "man",
\end{quote}

\begin{flushright}
\textsuperscript{365} Ibid. \\
\textsuperscript{366} Ibid. \\
\textsuperscript{367} Ibid. at 271. \\
\textsuperscript{368} Hersch Lauterpacht, ed, \textit{Oppenheim's International Law: A Treatise}, vol 1(New York: Longmans, Green and Co., 1948) at 664-666 [Lauterpacht’s Oppenheim]. See also Chapter II above. \\
\textsuperscript{369} Kroger, \textit{supra} note 329 at 938.
\end{flushright}

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by the *jus gentium* there came to be three divisions, first freemen, then as contradistinguished from them, slaves, and then, in the third place, freedmen, that is persons who had ceased to be slaves.\(^{370}\)

Justinian thus crystalized with the force of law, the difference between natural law and the law of nations. It is clear that the law of nations and the law of nature were not synonyms to the compilers of the *Corpus Juris Civilis*. Furthermore, part of the law of nature seems to set an abstract high standard for law in general, including to the law of nations. It could be thus possible to conclude that in Roman law, *jus naturale*, or *jus naturae* or *naturalis ratio* is concerned with the *raison d’être* of a rule, whilst *jus gentium*, or the law of nations, further implicates some practical considerations.\(^{371}\)

Confusion about the scope of natural law could arguably be due to the lack of sources that survived through the Middle Ages and perhaps even one of translation and stress. Phillipson, for example, explains the Ulpian notion of natural law is based on a far-fetched use of a term. He argues that this definition, which stresses natural instinct, “uses the expression *ius naturale* to denote what Cicero had intended to convey by *vis naturae*, and Seneca by *lex naturae*”.\(^{372}\) Citing Seneca and Cicero, Phillipson concludes that Ulpian, probably aware of other notions of natural law, attached prominence to natural instinct in his definition.\(^{373}\) Furthermore, commenting on the confusion between the terms law of nations and law of nature, he reminds us that Justinian,

\(^{370}\) Dig 1.1.4 (translated by Charles Henry Monro), online: http://archive.org/details/digestjustinian00monrgoog Accessed on 19 June 2013. In original: “*Manumissiones quoque iuris gentium sunt. est autem manumissio de manu missio, id est datio libertatis: nam quamdium quis in servitute est, manui et potestate suppositus est, manumissus liberatur potestate. quae res a iure gentium originem sumpsit, upote cum iure naturali omnes liberi nascerentur nec esset nota manumissio, cum servitus esset incognita: sed posteaquam iure gentium servitus invasit, secutum est beneficium manumissionis. et cum uno naturali nomine homines appellaremur, iure gentium tria genera esse coeperunt: liberi et his contrarium servi et tertium genus liberti, id est hi qui desierant esse servi*” (see Dig 1.1.4 (translated by Krueger)).

\(^{371}\) Phillipson, *supra* note 3 at 92. Specially because the latter, different from domestic law or *jus civile*, is already closer to a “high standard” of achievement, that is, it is not constrained by the boundaries of nationality and religion.\(^{372}\) *Ibid.* at 84.\(^{373}\) *Ibid.*
writing later than Cicero or Ulpian, “uses naturae ius to express the right of the eldest son to the succession, though elsewhere he adopts ius gentium in reference to the same right”.

One legal historian mentions the following propositions connected to the Roman tradition of natural law: the “recognition of the claims of blood”; the “duty of faithfulness to engagements”; a standard of equity in distribution of advantage and disadvantage, gain or loss; and the supremacy of the notion of voluntatis ratio “over the words or forms in which the will is manifested”. As illustrations of the applicability of these characteristics in Roman law includes the equal footing between emancipated and unemancipated children in matter of succession granted by praetors, the impossibility of unjustifiable enrichment at other’s cost and the validity of a “natural obligation”.

Roman natural law is intrinsically connected with reason or recta ratio shared by all persons derived by nature (or in Ulpian’s view, all persons and animals). Natural, in Roman and Greek thought, designates the most complete idea of a thing. Consequently, natural law expresses the perfect application of law to a subject in question. However, although this notion found its way into the Roman understanding of natural law, it is not the only accepted view. In my view, the Roman natural law, as codified by the Corpus Juris Civilis, can be divided in wide or narrow.

Ibid.
Muirhead, who compiled this list, was influenced by the teachings of Voigt. See Moritz Voigt, Das Ius Naturale, Aequum Et Bonum Und Ius Gentium Der Römer: Das Jus Civile Und Jus Gentium Der Römer ([N.A.]: Nabu Press, 2011).
Muirhead, supra note 321 at 272.
Ibid.
Ibid.
Ibid.
Ibid.
Ibid.
In its wide notion, natural law is a fully abstract concept setting high standards of achievement. It represents the course that law should take, how law should evolve and how law should decide cases. It does not mean that *jus gentium* or Roman law in general is necessarily what natural law dictates, but law or certain aspects of law should strive in that direction. The Roman jurist Paulus, commenting on the understanding of the term “*jus*” in a passage codified by the Justinian *Corpus Juris Civilis*, affirmed that:

> The word *jus* is used in a number of different senses: in the first place, in that in which the name is applied to that which is under all circumstances fair and right, as in the case of natural law; second, where the word signifies that which is available for the benefit of all or most persons in any particular state, as in the case of the expression civil law. With equal correctness the term *jus* is applied in our state to honorary law. We may add that the praetor is said to administer the law even when he gives an unjust judgment, the word referring not to what the praetor did in the particular case, but to what it is his business to do. The term *jus* is applied in another sense to the place in which law is administered, the name being transferred from the thing done to the place where it is done.\(^3\)\(^8\)\(^3\)

Paulus acknowledges that natural law (*jus naturale*) is always (he uses the Latin word *semper*) fair and right (*aequum ac bonum*).\(^3\)\(^8\)\(^4\) Accordingly, he stresses the natural law aspect connected to a higher standard of law, that is, to what law is and what law should be, all things considered. This “wide scope” is in the rule against slavery. When Ulpian asserts that slavery is contrary to natural law,\(^3\)\(^8\)\(^5\) he is arguably referring to the wishful aspect of law, that is, that law should strive to acknowledge all individuals as free. Consequently, he was aware that at that time

\(^{3}\)\(^8\)\(^3\) Inst 1.5.11 (translated by Charles Henry Monro)
\(^{3}\)\(^8\)\(^4\) Dig 1.1.11 (translated by Krueger).
\(^{3}\)\(^8\)\(^5\) Dig 1.1.4.
slavery was an accepted international doctrine. However, based on natural law considerations, the law of nations should cease to recognize slavery’s legality.

Moreover, natural law points out the existence of certain legal doctrines that are elementary and basic, which could be called a “narrow natural law”. It is narrow because it does not necessarily establish a high standard of achievement. It informs that some legal institutes are basic and found in organized societies in general, perhaps even among animals. Accordingly, Ulpian’s examples of marriage, education and procreation, that is, the right to marry, the right to have and take care of children and the right to an education falls under the scope of narrow natural law.\textsuperscript{386} Moreover, this narrow understanding of natural law presupposes a universal system. Consequently, this natural law view is an essential part of the law of nations. Ulpian himself acknowledges a connection between the \textit{jus naturale} and \textit{jus gentium} when he asserts that domestic law is not altogether independent or completely subordinate from natural law or the law of nations.\textsuperscript{387}

The narrow concept of natural law represents the most fundamental aspects of law, which are, in turn, intrinsically connected to the law of nations because the latter concerns the law common to all individuals and nations. Natural law in a “wide sense” is, to some extent, connected to law, including the law of nations, because it sets the parameters they should develop and follow. In both cases natural law is a “superior” law in the sense it represents a high standard of achievement and is a basic system arguably necessary for a functioning society.

Accordingly, different from Zucker’s view,\textsuperscript{388} natural law is not the lowest division of law or a non-law. Rather, it is a superior understanding of law. Natural law grants the \textit{raison d’être} of

\textsuperscript{386} Dig 1.2.1.\textsuperscript{387} Dig 1.1.6.\textsuperscript{388} Zuckert, \textit{supra} note 325 at 77-82,
basic rules which, in turn, could be rules of domestic law or *jus gentium*. The narrow conception of natural law provides an explanation for certain elementary and universal legal doctrines focused on the human person or on all animals. The Roman law of nations concerns existing norms and principles focusing on individuals or nations regardless of nationality based on the human person and human reason, which is intrinsically connected with natural law.\(^{389}\) Accordingly, now I turn to the connection between the Roman law of nations and the modern international law of human rights.

### 5.5. The Roman Law of Nations and the Modern International Law of Human Rights

The Roman *jus gentium*, as pointed out, is different from the *jus gentium* of the revivalists – or the so-called “founding fathers” –, and the traditional international law of the legal positivists. Jeremy Waldron explains that the Roman expression encompasses “customary international law”, “general common law” or “federal common law” and adds that it “is still both an inspiration for domestic law and a guiding ideal for a uniform body of transnational law”.\(^{390}\) His view is that *jus gentium*, in Roman law, besides its international and “nationality free” characteristics, took on a role to correct or even supplement the *jus civile* “on its home ground”.\(^{391}\) Waldron, furthermore, asserts that:

> If *ius gentium* concerns relations and transactions in what we would regard as domestic law – in torts, crimes, contracts, and property – how did it become so tightly associated with international law? In its early usage, *ius gentium* often dealt with issues like the status of ambassadors, that we would regard as

\(^{389}\) Dig 1.5.10 (Hermogenianus) (translated by Krueger).
\(^{390}\) Waldron, *supra* note 333 at 133 and 135.
\(^{391}\) *Ibid.* at 134.
international law issues, along with issues concerning merchants, sojourners, and immigrants. But as international law began to develop into an independent body of law, legal positivists began to wonder if *ius gentium* was really a separate body of law or if it had been subsumed under international law. Jeremy Betham’s scrutiny was the most devastating: he said “the law of nations” meant nothing more than international law, defined as “the mutual transactions between sovereigns as such.”

I do not agree with Waldron. The shape of the current law of nations, which includes certain topics as for example the law of treaties and the question of war, was not deliberately elaborated by legal positivists as Jeremy Betham or Oppenheim. Due to the influence of *jus gentium* in ancient Rome, certain topics that previously belonged to this area of Roman law moved towards the particular sphere of *jus civile*.

This mainly happened because *jus civile* was an excessively rigid system. Following the strict rules of *jus civile*, for example, a *mancipatio* was ineffective if one of the parties or even one of the witnesses was an alien; foreigners could not be a *paterfamilias*; Latin was the only accepted language in legal relations; and intention of the parties was not as relevant as the form prescribed by law.

*Jus gentium*, which is grounded on the notions of human reason and the human person regardless of nationality, influenced some changes in these strict *jus civile* rules. The rule granting strong observation to the form prescribed by law was eventually replaced by the *jus gentium* rule of intention or consent. The influence of *jus gentium* in the domestic legal system led to the abandonment of the Latin language requirement in favor of any language as long as

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393 Walton, supra note 70 at 361-364.
394 *Mancipatio* was a typical form of conveyance of real property (*ibid.* at 363).
395 *Patria potestas* is the rules and powers of the head of the family (*ibid.*).
understood by all the parties. Furthermore, certain rules concerning trade and mercantile law in general were not strictly attached to the form and fell under the scope of *jus gentium* as well.

Moreover, marriage is another example of a legal institute influenced by *jus gentium*. The agreement of marriage or *justae nuptiae* based on mutual promises required the existence of *connubium*, that is, no impediment to marriage, which was limited to Roman citizens. This was the only type of marriage accepted in Roman law. However, marriages without *connubium* or *matrimonium juris gentium* came to be legally recognized side by side with *justae nuptiae*. Accordingly, following the *matrimonium juris gentium*, the children were lawful and the father was bound to feed them although without *potestate*. Consequently, the influence of *jus gentium* in the development of *jus civile* led Walton to affirm that:

> The history of the Roman law is to a large extent the history of the gradual invasion of the *jus civile* by the *jus gentium*. The rapid development of the *jus gentium*, if not its origins, was due to the growth of foreign trade at Rome. The praetorian edicts, and especially the edict of the *praetor peregrinus*, formed the vehicle by which it was introduced. Its evolution was aided by the spread of philosophical culture, and the consequent decline of the exclusive sentiment which at first prevented the Romans from admitting that a foreigner could claim to be heard before a Roman tribunal, or that the Romans could have any laws in common with foreign nations.

Walton did not explain the meaning of “the spread of philosophical culture”. Furthermore, without deep explanations, he argued that *jus gentium* was not international law and categorically affirmed that it “has nothing to do with the law, positive or ideal, which is to be

399 Stephenson, *supra* note 74 at 349.
402 Walton, *supra* note 70 at 367.
403 *Ibid.* at 363-364 [emphasis in original].
applied in regulating the differences between independent states”.\textsuperscript{404} He added that Grotius and the “founders” of international law “were seeking for a philosophical basis upon which to rest their theories found the \textit{jus gentium} a convenient term”.\textsuperscript{405} However, he does not explain in detail the difference between the “philosophical basis” of \textit{jus gentium} and the theories put forward by the so-called founding fathers. He just mentions that the rules of humanity and justice, which the “founders” sought to apply in the international relations fell well under the definition of \textit{jus gentium} based on human reason, that is, the “natural sense of right” and the human person.\textsuperscript{406} However, that is precisely what makes the Roman \textit{jus gentium} the same as the one envisaged by the so-called founding fathers and was revived after the Second World War.

The Roman law of nations comprised topics that are part of the current understanding of international law. The status and rules concerning ambassadors, for example, fell under the scope of the Roman \textit{jus gentium} and, consequently, a violation of the “personal sanctity of an ambassador” was a clear breach of the \textit{jus gentium}, which could be a \textit{casus belli}, that is, a just cause to war.\textsuperscript{407} The right to send diplomatic envoys and the obligation to receive rested on the law of nations.\textsuperscript{408} Furthermore, treaty violations were an offence not only to divine law but especially to the law of nations taking into account that the sacred element of the oath, part of the conclusion of treaties, belonged to \textit{jus gentium}.\textsuperscript{409}

Livy (Titus Livius) in his History of Rome connects \textit{jus gentium} with the conduct of embassies, the declarations of wars, conclusion of peace and the elaboration of treaties.\textsuperscript{410} He

\begin{thebibliography}{9}
\bibitem{Note} Ibid. at 367.
\bibitem{Note} Ibid.
\bibitem{Note} Ibid. at 367-368.
\bibitem{Note} Bederman, \textit{supra} note 10 at 224.
\bibitem{Note} Phillipson, \textit{supra} note 3 at 311.
\bibitem{Note} Ibid. at 389.
\bibitem{Note} Gordon E. Sherman, “Jus Gentium and International Law” 12 Am J Int’l L 56 at 61.
\end{thebibliography}
mentions, for example, that the ill treatment of ambassadors is an offence to the law of nations and that the observation of treaties was part of this subdivision of Roman law. Furthermore, he associates the law of war and the law of war and peace with the law of nations. The lawful defense against armed attacks without a declaration of war or in violation of treaties fell under the scope of the law of nations. In one passage Livy asserts that:

There was in the cavalry, on that day, a military tribune named A. Cornelius Cossus... When he saw the Roman squadrons shaken by the repeated charges of Tolumnius in whatever direction he rode, and recognised him as he galloped along the entire line, conspicuous in his royal habiliments, he exclaimed, "Is this the breaker of treaties between man and man, the violator of the law of nations? If it is the will of heaven that anything holy should exist on earth, I will slay this man and offer him as a sacrifice to the manes of the murdered envoys."

The Roman law of nations already included topics typically discussed by the so-called founding fathers of international law. It is arguable that the Corpus Juris Civilis and Livy’s practical examples influenced Isidore of Seville’s account of jus gentium. Isidore (560-636 A.D.), following Gaius, asserts that the law of nations is followed by almost all peoples or nations (omnes fere gentes utuntur). However, differently from Gaius, he adds the word “almost” (fere) perhaps as an attempt to exclude the necessity of consensus or complete universality to qualify a legal practice as part of the law of nations.

412 Ibid. at 272.
413 Sherman, supra note 410 at 61.
Furthermore, Isidore points out the following examples of the law of nations: the occupation of land, the right of building, fortification, defence to just war, captivity and slavery, right to recover one’s liberty or to return to a former civil status after release from captivity, peace treaties, truces, the inviolability of ambassadors, and the prohibition of marriages with foreign persons.\footnote{Ibid.} Isidore’s list bears some similarities with Hermogenianus’s examples of \textit{jus gentium} codified in the \textit{Corpus Juris Civilis} combined with the views of Gaius and Ulpian.\footnote{Domingo mentions this similarity in this book. However, he does not believe that modern international law is the same as the Roman \textit{jus gentium} (Domingo, \textit{supra} note 414 at 11 and xiv).}

The law of nations, for Hermogenianus, included wars, the end of nations, the foundation of kingdoms, distinct dominions, field boundaries, fortification, commerce, conduct of renting and obligations which do not pertain to \textit{jus civile}.\footnote{Dig 1.5.10 (Hermogenianus) (translated by Krueger).} Accordingly, the definition and examples set by Isidore of Seville are drawn from the \textit{Corpus Juris Civilis} itself.\footnote{Isidoro’s concept and definition rooted in the Justinian \textit{Corpus Juris} was also followed by St. Thomas Aquinas in his \textit{Summa Theologica} and by Gratian in his \textit{Decretum}. See Aquinas, \textit{supra} note 106 at Question 94, Article 4; and Columbia University Libraries, Gratian, \textit{Decretum Corpus Iuris Canonici}, vol 1 (New York, N.Y.: Columbia University Libraries) at 3 or 1, 1, IX, online: http://www.columbia.edu/cu/web/digital/collections/cul/texts/ldpd_6029936_001/pages/ldpd_6029936_001_00000060.html?toggle=image&menu=maximize&top=&left= Accessed on 9 July 2013.} However, he removed commerce as part of the law of nations and added the prohibition of marriage with foreigners. This addition is not in accordance with the Roman law of nations because it was precisely due to the reasoning following the \textit{jus gentium} that marriage was extended to foreigners, including unions between Roman citizens and foreign born individuals.\footnote{Walton, \textit{supra} note 70 at 363.}

Although Isidore’s example of prohibition of marriage with foreigners was an odd addition not in tune with the Roman \textit{jus gentium}, the others were likely drawn from the \textit{Corpus Juris Civilis} and perhaps from Livy’s historical account of Rome. Furthermore, it is not far-fetched to suppose that Isidore was aware that part of \textit{jus gentium}, especially in matters such as
obligations and commerce, had been subsumed by *jus civile*. My view is that *jus gentium* from the onset, including in the time of Gaius and the compilers of the *Corpus Juris Civilis*, included topics typically part of the law of nations of the so-called founding fathers, such as treaties, the establishment of war, the creation and cessation of nations and kingdoms, the definition of boundaries and diplomatic envoys. These topics became part of the law of nations *par excellence* when some equally important institutes such as marriage, obligations and commerce turned into an exclusive part of *jus civile*.

The *Corpus Juris Civilis* became the law in or in parts of Italy from 554 A.D. and continued until practically the 12th century Bologna revival of Roman studies, which marked the spread of the Eastern Roman *Corpus Juris* through Western Europe.422 Even before the revival, the Justinian law reached other parts of Europe in the 9th century through the hands of the clergy.423 The church, however, focused and cherished the Institutes, the Code and the Novels, but practically ignored the Digest.424 This only changed with the revival, when the latter came into the hands of Irnerius, which “must have been for him as a new revelation”.425 The Justinian Digest, however, as Muirhead points out, “seems to have reached him by installments; at least this is the reasonable explanation of its division by the Glossarists”.426 He added that of “the whole *Corpus Juris Civilis*, as the collected body of the Justinian law was first styled by Denis Godefroi (Gothofredus) in 1583”.427 Only the Holy Bible had more printed editions than Justinian’s *Corpus Juris Civilis*.428 Arguably, the so-called “founding fathers” – who I call the

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422 Sherman, *supra* note 7 at 125. Arguably, the barrier formed by the Lombards, who invaded Italy, mitigated the spread of Justinian law past northwards (See Muirhead, *supra* note 321 at 391).

423 Muirhead, *supra* note 321 at 391.


“revivalists” of international law – had contact with the *Corpus Juris Civilis* including its definition and examples of the law of nations.

It is probable that the international law revivalists knew that part of the Roman law of nations had been subsumed by the *jus civile* with the exception of certain topics not directly related to domestic law as the laws of war, peace, treaties and diplomacy, for example. Furthermore, the central aspect of the law of nations, that is, its reason and human centrality was maintained by them as envisaged by the Romans.\(^\text{429}\)

Consequently, I do not agree with the argument that the foundation of modern international law is the hands of the revivalists (“founding fathers”) or the positivists. The practice of international law is ancient and part of great civilizations dating back to Greece, Egypt or ancient China. However, its characterization as a separate, definite and universal body of law rooted on the human person and reason, which encompasses a range of areas including war, peace, ambassadors and treaties comes from Roman law.\(^\text{430}\)

The Roman law of nations, which is indeed international law,\(^\text{431}\) was set as a universal law of all mankind or nations (*iure omnes gentes*) rooted on the notion of natural reason of all

\(^{429}\) See generally Lauterpacht, “Grotius Tradition”, *supra* note 164. Lauterpacht, however, does not argue that the Roman law of nations was revived by Grotius. He merely points out the human centered aspects found in Grotius’s main treatise.

\(^{430}\) Accordingly, it is not possible to deny that the Roman *jus gentium* is, to a large extent, the same modern international law but envisaged to deal with matters part of the Roman life, which are not necessarily equal to the issues of modernity. However, some elements remained the same or equally important. The law of nations, since its Roman origins, dealt with certain typical topics such as treaties, diplomacy and war and, furthermore, was grounded on universality and the human person.

\(^{431}\) Contrary to the view of Walton (Walton, *supra* note 70 at 367), I believe that the Roman law of nations is, to a great extent, modern international law. Furthermore, *jus gentium*’s method, that is, its source and end is intrinsically part of modern international law of human rights. Henry Clark, following Walton, believes that international law and *jus gentium* are not the same subdivision of law. See Henry C. Clark, “Jus Gentium – Its Origin and History III” (1920) 14 HIILR 341. He argues that limiting the use *jus gentium* to international law “takes away its very soul” (*ibid.* at 347). He adds that “even today *Jus Gentium* is generally understood as meaning international law, a complete misconception, which if continued will serve only to retard the discovery of fundamentals” (*ibid.* at 347-348). Furthermore, he defines *jus gentium* as “the law, both public and private, common to all nations, a law with a glorious history and a wonderful future” (*ibid.* at 347). However, he does not provide arguments to justify this position. He rarely mentions the Justinian *Corpus Juris Civilis*. His considerations on the “method” of the *jus
mankind (*naturalis ratio inter omnes homines*).\(^{432}\) This reasoning, intrinsically part of *jus gentium*, influenced Roman law in general and especially the *Corpus Juris Civilis*. The Institutes of Justinian, on opening words, asserts that law is for the sake of persons and knowledge of law is not enough if it overlooks them.\(^{433}\) The Digest, following the same line of thought, establishes that law is established for the sake of human beings (*hominum causa omne ius constitutum sit*).\(^{434}\) John Finnis argues that:

> Roman law... gave its students and practitioners a better account of law’s point. The opening sentence of the Institutes directs us towards it: justice, understood precisely as a disposition to act for a certain kind of purpose: ‘Justice is the stable and lasting willingness to give to each his right. Each who? The Birks translation quite properly renders this object as ‘to acknowledge all men’s rights’. For the closing words of the introductory sections...tell us that law exists ‘for the sake of persons’, and the following sentence, opening the whole treatise on the law of persons, stakes out the essential position: all men are persons. Slavery is bluntly defined as the subjection of ‘someone’ to another’s ownership and mastery ‘contrary to nature’, indeed, more precisely, ‘contrary to natural law/right’.\(^{435}\)

Although not focusing on the Roman law of nations, which is individual-centered *par excellence*, Finnis argues that Roman law is generally focused on individuals and exists for their sake. He calls this individual based law the “priority of persons”, that is, a legal system that...
recognizes that (i) human beings are all persons; (ii) mature and healthy persons can communicate what they mean and choose ways of behaving; and (iii) persons matters “in ways that nothing else in our environment does”. 436 Furthermore, he argues that Roman law in general is based on individuals and this “phraseology” was followed by the Universal Declaration of Human Rights. In his words:

Law’s point – what, or better, whom it is for the sake of – is identified in the opening words of Article 1 of the Universal Declaration of Human Rights (1948), adopting the phraseology of the Roman jurists: ‘[a]ll human beings are born free and equal in dignity and rights’. Article 1’s subject, ‘all humans beings’, is equated with the preamble’s ‘all members of the human family’ and ‘the human person’, so that the reference of the remaining articles, ‘everyone’, ‘all’, and ‘no one’, is clear. So it is all human beings who are ‘equal before the law’ and entitled to its ‘equal protection’ (Article 7); and ‘everyone’ has the ‘right to recognition everywhere as a person before the law’ (Article 6). 437

Finnis does not further elaborate on this thought. For him, it is sufficient to know that Roman law was envisaged for the sake of all individuals and the Universal Declaration followed that premise. However, there is a deeper argument to it. Roman law was indeed for the sake of persons, but this was especially true for the law of nations. The latter was rooted on the notion of human person and human reason. Accordingly, it was not only the Universal Declaration that adopted the Roman law “phraseology”, but rather the whole international human rights system was built based on the Roman notion of the law of nations. The international community rescued the intrinsic individual-based values, which formed the core of the Roman law of nations and adapted it to shape the post-Second War international law of human rights.

436 Ibid. at 305.
437 Ibid. at 308.
The revivalists – by some called “founding fathers” – knew the characteristics of the Roman law of nations. As previously explained, the definitions and examples related to the law of nations were majorly drawn from the *Corpus Juris Civilis* and especially from Gaius’s concept. Suarez, for example, in an explicit reference to Ulpian and Gaius asserts that *jus gentium* is “held to be natural as well, but in a special sense peculiar to mankind”.438 Vitoria, following Gaius’s concept *ipsis litteris*,439 argued that *jus gentium* is the natural reason (*naturalis ratio*) established among all peoples or nations (*inter omnes gentes*).440 Similarly, copying the *Corpus Juris Civilis*, Gentili asserted that *jus gentium* is the law used by all peoples or nations of men (*quo gentes humanae*) established by natural reason (*naturalis ratio*) constituted by all mankind (*inter omnes homines constituit*).441 The same view is followed by Pufendorf442 and, in more confusing terms, by Grotius.443

The revivalists’ humanistic system of international law, which sought to establish the rule of law at the international level binding states and individuals and concerned with the future and well-being of the human person, is drawn from the Roman law of nations. However, the revivalists dealt with a changing European society, which faced the horrors of wars (especially the 30 Years Old War), the still increased power of religious institutions,444 and the spawn of modern nation-states.445 This reality derailed the attention from a universal legal system based on

438 Suarez, *supra* note 123 at 327.
439 G 1.1 (translated by Zulueta); Inst., 1.2.1.
440 Vitoria, *supra* note 105 at 151.
441 Gentili, *De Juri vol 1*, *supra* note 144 at 10
442 Pufendorf, *supra* note 216 at 165.
443 Grotius, *supra* note 155 at 39-40 and 44.
444 Although it is important to mention that the medieval church played a crucial role in preserving several aspects and books of Roman law. Furthermore, the first major international law revivalists, Vitoria and Suarez were priests. See García y García, *supra* note 109; Vitoria, *supra* note 105; Suarez, *supra* note 123.
the individual as the source and end of the law of nations. The increasing power of modern states shifted the scope and focused of international law to inter-state relations and state characteristics.

Legal positivism complemented this vision with its voluntarist theory, which stripped international law’s connection with the Roman natural law and, consequently, removed any substantial reference to the human person as a relevant character of the law of nations. The *jus inter gentes* was a truly state-will based system and was further away as possible, in the opposite spectrum, from the Roman *jus gentium* or even the Roman-based *jus gentium* of the revivalists. This theoretical disparity between the positivist and the Roman law of nations can easily lead to the conclusion that the Roman *jus gentium* is not the same of modern international law. This argument is not completely inaccurate. The old and modern international law were grounded on completely different theories until the Second World War with the establishment of an international law system focused on human rights.

As previously mentioned, certain human rights aspects were part of the law of nations before the Second World War. However, attempts to elevate human rights to the international level in this period faced restrictions, that is, were limited in scope and in effect.\(^{446}\) The international community, especially shocked by the horrors of the holocaust, sought to rebuild an international legal system that would not be so intrinsically connected with the positivistic approach centered on a state-will perspective. This is not the same as the exclusion of states as a prominent subject of international law. Rather, states themselves, through the international human rights instruments that followed the end of the Second War,\(^{447}\) envisaged a system based on the return to the Roman theory adapted to modern specificities.

\(^{446}\) See Chapter II.

\(^{447}\) See above.
The discourse adopted in human rights instruments points towards the view that individuals are again the central aspect of the law of nations. In my view, the main and binding aspect of human rights declarations, the general normative force, is precisely the human centrality of international human rights law. These instruments codify the notion that human rights are fundamental rights established by natural reason among all humankind and followed by all peoples alike. These rights are grounded on human reason among all peoples because they do not pertain to any individual state or society but rather they “derive from the inherent dignity of the human person”, that is, are rooted on an “inherent dignity”, which is “based upon attributes of the human personality”. International human rights law, following the Roman law of nations, is “followed by all peoples alike”, in other words, there must be a “universal respect for and observance of human rights and fundamental freedoms”, that is, the “ideal of free men…can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights”.

International human rights law is not only based on the Roman definition of jus gentium set by Gaius, Ulpian and the Corpus Juris Civilis, but, furthermore, on how this system operates. The Roman law of nations was intrinsically connected to natural law and jus civile. It changed the reasoning and certain aspects of jus civile providing a more humane system, as in the institute of marriage, for example. Accordingly, certain aspects of the jus gentium were subsumed by jus civile. As Cicero explained, civil law (jus civile) is not necessarily the same as the law of

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448 International Covenant on Civil and Political Rights, supra note 310 at preamble.
449 Universal Declaration, supra note 273 at preamble.
450 American Convention on Human Rights, supra note 314 at preamble.
451 G 1.1 (translated by Zulueta); Inst 1.2.1.
452 Universal Declaration, supra note 273 at preamble.
453 American Convention on Human Rights, supra note 314 at preamble.
454 Walton, supra note 70 at 163.
nations (*jus gentium*), but the law of nations ought to also be *jus civile*.\(^{455}\) Consequently, the Roman *jus gentium* regulated topics intrinsically connected to international law and, furthermore, provided guidelines or parameters to change or be incorporated into domestic law.\(^{456}\)

This same understanding applies to international law of human rights. This subdivision of the law of nations is intrinsically connected to domestic law. The Universal Declaration, as previously mentioned, was created based on existing domestic bill of rights but, after it was approved, this human rights instrument influenced the elaboration of a diverse number of constitutions. Furthermore, this declaration was even incorporated in a number of domestic bills of rights.\(^{457}\) Moreover, the American Convention on Human Rights expressly provides that:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the *States Parties undertake to adopt*, in accordance with their constitutional processes and the provisions of this Convention, *such legislative or other measures as may be necessary to give effect to those rights or freedoms.*\(^ {458}\)

The European Convention on Human Rights, on a similar tone, spells out that the “High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”.\(^ {459}\) Furthermore, the work of international human rights courts is based on the premise that state-parties have the duty to comply and incorporate human

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\(^{456}\) Sherman, *supra* note 410 at 58.


\(^{458}\) *American Convention on Human Rights,* supra note 314 at Article 2 [emphasis added].

rights norms as part of their domestic legal system. The Inter-American Court of Human Rights, for example, in the case of Sawhoyamaxa Community, asserted that the concerned state must adopt “all legislative, administrative and other measures necessary to formally and physically convey to the members of the Sawhoyamaxa Community their traditional lands, within three years”. In the case of Yakye Indigenous Community, the Inter-American Court affirmed that:

Pursuant to Article 2 of the Convention it is necessary to establish appropriate procedures in the framework of the domestic legal system to process the land claims of the indigenous peoples involved… For this, the general obligation to respect rights set forth in Article 1(1) of said treaty places the States under the obligation to ensure that said procedures are accessible and simple and that the bodies in charge of them have the necessary technical and material conditions to provide a timely response to the requests made in the framework of said procedures.

The Roman jus gentium and the modern international human rights law are based on similar premises. More than intrinsically connected, jus gentium’s method and definition was codified in modern international human rights law. That is, modern international law, especially human rights, is an adaptation from the Roman law of nations. Although international law and the Roman jus gentium could be based on different grounds – the latter on the human person and the former on state will and sovereignty –, international human rights law and the Roman law of nations are both necessarily rooted on the notion of the individual as the source and the end of their systems. Furthermore, the unclear separation between domestic law and the law of

\[460\] Case of Sawhoyamaxa Indigenous Community v Paraguay (2006) Inter-Am Ct HR (Ser C) No 146 at 106.
\[461\] Case of Yakye Indigenous Community v Paraguay (2005) Inter-Am Ct HR (Ser C) No 125 at para 102 [emphasis added].
\[462\] It is outside the scope of this work to analyze whether international human rights law is indeed part of general international law or is a self-contained regime. However, I agree with the report of the International Law Commission pointing out that international human rights law is lex specialis or special law, but not a self-contained regime altogether. Indeed, in my view, general international law encompasses areas intrinsically based on the human person and others which focus on state will and sovereignty. International human rights law, as a particular aspect of
nations and between positivism and natural law are common elements in both the Roman *jus gentium* and in international human rights law.\textsuperscript{463}

Borrowing Finnis’s expression,\textsuperscript{464} the modern international law of human rights was crystallized under a new framework rooted on the Roman *jus gentium* in a system that prioritizes persons. Taking into account historical, sociological and political differences, there is a rescue of the old Roman *jus gentium* codified in treaties and declarations as the essential framework of international human rights law. After the horrors of the Second World War, humanity faced four options.

First, the international community could keep the positivistic voluntarist system as it was adopted in the late 19\textsuperscript{th} and beginning of the 20\textsuperscript{th} centuries prioritizing states and relegating human rights and individuals to a marginal role in international law. Second, the international community could arguably start from scratch and envisage a completely new legal system from a *tabula rasa*, that is to say, without preconceived ideas or predetermined goals. Third, all members of the international community or the victorious states could together agree that international law and human rights are not the suited systems to regulate the international sphere and attempt to remove law from international relations.

Finally, the international community could agree to change and adapt the legal system in effect based on previous humanistic concepts and predetermined values. Perhaps with a small


\footnotesize{463 Kroger, supra note 329; James Luther Adams, “The Nature in Greco-Roman Thought” (1945) 25 The Journal of Religion 97 at 114; Zuckert, supra note 325 at 76; and Pollock, supra note 329 at 13.}

\footnotesize{464 Finnis, supra note 435.}
degree of skepticism over the connection between the then existing international law and the Roman *jus gentium*.

Sherman, analyzing the world after the chaos of the First World War, had foreseen that:

International law can indeed point to an origin and history whose features logically demand that the future shall follow the leading of the past; and this is well, for were it the world’s task to now initiate a wholly new order of thought and action adequate to control the intercourse of nations, the burden would be heavy, indeed.

Happily, however, such is not the case. For it is not a new creation that is required, but rather the *partial reshaping of an existing science in the light of its own imprescriptible standards*.

Sherman already envisaged the necessity to look into international law’s framework and concept in order to reshape it to meet the standards and necessities of society. The law of nations was created to prioritize persons, but this vision was completely abandoned by the beginning of the 20th century. That is to say, the classical state-based international law, although developed from the Roman law of nations, was grounded on a different concept, which stripped it from its original source, values and philosophical notions.

The voluntarist positivism as the main source of international law led to a theoretical rupture with Roman law. However, after the horrors of the Second World War, the international community followed Sherman’s prediction and decided to reshape international law turning to the Roman concept of the law of nations by prioritizing the human person and the notion of universality in a system that it could effectively impact the domestic legal order.

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465 Sherman, *supra* note 410 at note 9,
466 *Ibid.* at 349-350 [emphasis added].
467 For the theory on how international law and municipal law can interchangeably influence each other, see Valério de Oliveira Mazzuoli, "A Influência dos Tratados Internacionais de Proteção aos Direitos Humanos no Direito Interno Brasileiro e a Primazia da Norma mais Favorável como Regra de Hermenêutica Internacional" [The
The Roman law of nations was envisaged to change and set parameters to *jus civile*.

With a less rigid system focused on the human person and on universality, *jus gentium* changed certain aspects of *jus civile*, which were not in conformity with social developments. The same conclusion can be reached in modern times based on similar considerations. The Inter-American Court of Human Rights, for example, intuitively following the precepts of Roman *jus gentium*, affirmed that justice cannot be sacrificed for the sake of formalities. The “spirit”, that is, the reasoning and concept of Roman law were codified in modern international human rights law. Consequently, human rights instruments, in accordance with Roman law seek universal application, prioritize persons and are not rigidly constrained by formalities.

The application and interpretation of human rights norms are based on the concept of international human rights law, which in turn is rooted on Roman law. Consequently, the Roman *jus gentium*, codified in modern instruments, provides the concept and guidelines of application and interpretation of human rights norms, which must be based on the human person. Accordingly, the *pro homine* framework of international human rights law is indeed a *corpus juris gentium*. In other words, the modern international human rights law framework, that is, its concept and guidelines of interpretation, application and development are truly *jus gentium* in the original Roman meaning.


Clark, “Jus Gentium I-II”, *supra* note 431.

As previously pointed out, the *matrimonium juris gentium* is an example of *jus gentium* interference in the institutes of *jus civile* in order to adapt it to social aspirations – in this case, to broaden the scope of the persons who could legally marry – and center it on the human person instead of rigid legal formalities. Walton, *supra* note 70 at 163.

*Cayara Case (Peru)* (1993), Preliminary Objections, Inter-Am. Ct. H.R. (Ser.C) nº14, at para. 42. The court sustained that “[i]t is generally accepted that the procedural system is a means of attaining justice and that the latter cannot be sacrificed for the sake of mere formalities. Keeping within certain timely and reasonable limits, some omissions or delays in complying with procedure may be excused, provided that a suitable balance between justice and legal certainty is preserved” (*ibid.*)
In my view, the “spirit” of international human rights law, its framework, is a modern codification of the Roman law of nations. The pro homine framework – the structure prioritizing the human person – conveys the notion that the international human rights system is part of the juris gentium romani or the Roman law of nations. Conversely, one could arguably envisage that international law might currently move towards the establishment of a different legal system altogether. Domingo argues that:

Just as the law of peoples became international law, international law must give away to a particular sort of global law. All three sought to order legal relations beyond their realm. But the law of peoples, which overlooked the principle of equality among peoples, was too hierarchical. International law, for its part, enshrined the principle of equality among states (Staatenrecht) but overlooked the citizens that made up those states. It was thus an artificial law – more institutional than personal.471

Domingo, thus, believes that international law and “global law” are incompatible because “we either make a law of persons or we make a law of sovereign states”.472 In my view, however, there is no clear sign of a new legal system in the course of formation designed to replace current international law. Rather, international actors and jurists adapt and modify international law searching for a system that meets the requirements of their societies. In the past, jurists as Cicero and Roman magistrates envisaged an international system that they deemed necessary for their society. Jurists as Hugo Grotius adapted the Roman system attempting to provide a jus gentium they thought could respond to the world in the time and recently after the 40 Years’ War.

471 Domingo, supra note 414 at 98.
472 Ibid. at 99. See also ibid. at 100-1001, 119, 121, 123-126, 128, 145 and 158-185.
After, states and jurists as Oppenheim envisaged a modified international law they believed better represented modernity and their view of law. Recently, especially after the world wars, jurists, states and international courts arguably believe that part of international law – the one concerned with the protection of the human person\(^\text{473}\) – requires a different method, a diverse framework from that of positivistic international law in order to meet the requirements of modern society. This framework, adopted and initially envisaged by states themselves is, to a large extent, a return to a Roman method of thinking and conceptualizing the law of nations. However, this Roman method is in tune with contemporary society (e.g.: the proliferation of treaties, creation of international human rights courts and globalization).

There is, however, no explicit reference to Roman law in human rights texts. This movement is an unconscious or a natural return to some basic concepts and methods peculiar and intrinsically connected with the Roman notion of *jus gentium*. The phraseology adopted by human rights instruments, as Finnis briefly suggests,\(^\text{474}\) is deeply embedded in Roman law. Indeed, the framework of international human rights law is a rescue of the Roman *jus gentium* centered on four basic premises. First, human rights, as the Roman *jus gentium*, seek and presuppose a universal application. Second, these two systems are focused on the human person as the source and end of law. Third, the development of both systems is highly based on the work of jurists and adjudication bodies.\(^\text{475}\) Finally, the Roman law of nations as international human rights law influence and establish guidelines to domestic law.

International human rights law is part of a universal system that prioritizes the human person, that is, a *pro homine* framework that guides the creation, development, interpretation and

\(^{473}\) I do not analyze the evolution and reasoning of other human-oriented subareas of international law such as international humanitarian law, international criminal law and international refugee law.

\(^{474}\) Finnis, *supra* note 435.

\(^{475}\) See Chapters II and III above. For an account on the development of *jus gentium* by Roman magistrates see Clark, “Jus Gentium I-II”, *supra* note 431.
application of human rights norms. In other words, human rights norms are part, in theory and method, of a truly \textit{corpus juris gentium romani} (body of the Roman law of nations). Consequently, international human rights law is an inherent law of natural reason established among all humankind and binding on all peoples and states alike. The Roman \textit{jus gentium} was largely developed based on the works of the magistrates through the adoption of edicts (\textit{edicta}). This international human rights framework, unconsciously following this Roman law tradition, was largely accepted and further developed by international human rights courts. Accordingly, this next and final Chapter focuses on the Roman oriented \textit{pro homine} approach of the European and the Inter-American human rights courts.

\footnotesize{\textsuperscript{476} Scholars have argued that international human rights law must be interpreted based on the teleological approach of the \textit{pro homine} principle, which provides that, in case of doubt, human rights norms must be applied and interpreted based on the best approach for the individual. I believe that the \textit{pro homine} is a framework establishes that international human rights law must be interpreted, developed, and applied based on the human person as a subject of international law with rights, duties, capacity and interests. See Mazzuoli, \textit{supra} note 467; Lucas Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law" (2010) 21 EJIL 585; Andres E. Montalvo, "Reservations to the American Convention on Human Rights: A New Approach" (2001) 16 Am U Int'l L Rev 269; Fabián Salvioli, "Un análisis Desde el Principio Pro Persona sobre el Valor Jurídico de las Decisiones de la Comisión Interamericana de Derechos Humanos" [An Analysis of the Legal Value of the Decisions of the Inter-American Commission on Human Rights from the Pro Persona Principle] in \textit{En Defensa de la Constitución: Libro Homenaje a Germán Bidart Campos} [Defending the Constitution: Book in Honor to German Bidart Campos] (Buenos Aires: Ediar, 2003); Humberto Henderson, "Los Tratados Internacionales de Derechos Humanos en el Orden Interna: La Importancia del Principio Pro Homine" [International Human Rights Treaties in Domestic Law: the Importance of the \textit{Pro Homine} Principle] 39 Revista IIDH 71; and André de Carvalho Ramos, \textit{Teoria Geral dos Direitos Humanos na Ordem Internacional} [General Theory of Human Rights at the International Level] (Rio de Janeiro: Renovar, 2005) at 96-97. \textsuperscript{477} Muirhead, \textit{supra} note 321 at 228.}
Chapter 6

The Roman Jus Gentium and International Human Rights Law: The European Court and the Inter-American Court Reinforcing International Law’s Roman Elements

In the previous chapter, I analyze the history and the concept of international law through the standpoint of the human person. First, I point out that international law, especially concerning treaties, diplomatic envoys and wars, for example, was part of the legal and social systems of ancient societies. However, the Romans envisaged a theoretical framework for the law of nations based on the human person and their own legal practice. Furthermore, with the acceptance and ramifications of *jus gentium*, part of this Roman law was incorporated into civil law/domestic law, although certain topics remained at the core of the law of nations.

After, I focused on the so-called “founding fathers” of the law of nations. In my view, the “founding fathers” are Roman *jus gentium* revivalists that adapted it to their own reality. The source of the revivalists’ view of international law and the underpinnings of current international human rights are rooted in the Roman law of nations or *jus gentium*. However, the revivalists were more concerned with proving the existence of a rule of law at the international level and the emergence of modern states than with a human-centered and Roman-oriented law of nations. Modern international human rights law is thus more Roman-based than the law of nations from the revivalists. My argument is that the Roman concept of the law of nations, rooted on universality, doctrinal and jurisprudential considerations not rigidly constrained by formalities, and the human person as the source and end of law was codified in modern international human rights law. Consequently, modern post war international human rights law is based on a
universal system that prioritizes the human person, that is, a pro homine framework. This Roman system guides the creation, development, interpretation and application of human rights norms. In other words, the current international human rights law truly belongs, in theory and method, to a body of the Roman law of nations.

In this Chapter I argue that both main human rights courts, the European Court of Human Rights and the Inter-American Court of Human Rights, apply a teleological, effectiveness-oriented and individual-centered approach. These features match the Roman law framework. The Roman jus gentium sought to provide guidelines for domestic law and crystalized an international law system based on the human person (as a source and end of law), on universality and on doctrinal and jurisprudential perspectives. Both regional human rights courts unconsciously follow this Roman framework as a way to crystalize an effective protection of human rights and expand their judicial powers.

When analyzing both human rights courts, I focus on some key “hard cases”. They are cases without a clear answer that required a more imaginative legal interpretation. Arguably, they demonstrate the Roman approach of human rights courts. Furthermore, they indicate that restrictive interpretative tools as the margin of appreciation should be within a Roman system. That is, interpretative tools must be constrained within a more general legal framework. Consequently, human rights courts follow Roman precepts and reinforce their applicability in international human rights law.
6.1. The Spirit of the Roman *Jus Gentium*

The expansion of Rome, the influx of foreigners, the increasing integration between Romans and non-Romans, the work of magistrates and the legal and philosophical perspectives of jurists all contributed to the development of the Roman law of nations or *jus gentium*, which coexisted and influenced *jus civile*.¹ *Jus gentium*, different from *jus civile*, was not envisaged to be applied only to a specific group of people or to be constrained to rigid traditions and forms.² Furthermore, perhaps due to its Stoic influence, the Roman law of nations arguably developed under more humane considerations, that is, was preoccupied with notions of universality and fairness and, consequently, changed and adapted *jus civile* itself.³

As previously mentioned, the Roman *jus gentium* centered on four basic premises, which were later adopted by modern international law of human rights. The first is universality. Roman *jus gentium* seeks and presupposes universal application. Second, the Roman law of nations and modern international human rights law are centered on the human person as the source and end of law. Third, the development of both systems is highly based on the work of jurists and adjudication bodies. Finally, both systems influence and establish guidelines for domestic law. Based on these characteristics, I define international human rights law as an inherent law of natural reason established among all humankind and binding on all peoples, states and institutions alike.

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² Walton, supra note 1 at 362-363.
³ *Ibid.* at 366-367. Walton, however, does not refer to *jus gentium* as a fairer or more humane legal system. It is, thus, my own conclusion.
The influence of the Roman law of nations on post-Second World War international human rights law is not constrained to its definition. The interpretation, application and development of human rights closely follow the reasoning of the Roman _jus gentium_. This Roman legal system was intrinsically connected to natural law and _jus civile_. Furthermore, it changed the reasoning and certain aspects of _jus civile_ providing a fairer and more human-centered system, as in the institute of marriage, for example.\(^4\) Accordingly, certain aspects of the _jus gentium_ were subsumed by _jus civile_. Moreover, magistrates, in the words of Muirhead, “must have had a powerful influence in giving shape and consistency to the rising jurisprudence”.\(^5\)

International human rights law, as previously pointed out, follows this Roman reasoning. Arguably influenced by Roman law,\(^6\) its development, interpretation and application are centered on the human person. Furthermore, international law of human rights helps shape domestic systems.\(^7\) The American Convention on Human Rights, for example, affirms that its member states must give domestic effect to the provisions enshrined in this treaty.\(^8\) Modern international human rights law, following the steps of the Roman law of nations, also influences the development of domestic law and is, to a great extent, shaped by decisions of international courts.

In my view, international human rights courts unconsciously follow the precepts of the Roman _jus gentium_. In other words, international judges contribute to the reaffirmation that international human rights is indeed centered on the human person as the end and source of law. Furthermore, international judges reaffirm the notion that international human rights law could

\(^4\) _Ibid_. at 163
\(^5\) Muirhead, _supra_ note 1 at 219.
\(^6\) See Chapters II, III and V.
\(^7\) See Chapter III for comments on the Universal Declaration of Human Rights.
\(^8\) _American Convention on Human Rights_, 1969, 1144 UNTS 123, OASTS nº 36 at Article 2.
modify domestic law and establish a legal system more preoccupied with justice and the human person than with formalities and state interests.

I believe the example of marriage is paradigmatic. As mentioned in the previous chapter, marriage under *jus civile* was limited to Roman citizens.\(^9\) Non-Roman citizens did not usually possess *conubium*, one of the imperative requirements to enter into a Roman marriage or *justae nuptiae*. However, *jus gentium* changed the Roman institute of marriage to include the *matrinonium juris gentium*, which represents an accommodation of diversity, the recognition of certain degree of equality and fairness between Romans and non-Roman citizens and, furthermore, demonstrates that the main aspects of *jus gentium*, namely, the individual-centrality, universality, and the less formal and consent-based system influenced and helped shape the Roman civil law.\(^10\) Walton, although pointing out the lack of *patria potestas* of the husband over the children, argues that “a marriage *juris gentium* came to be recognized side by side with a strictly Roman marriage”.\(^11\)

In my view, the case of Roman marriage is an example of the influence of the Roman law of nations on civil law based on an extensive and human-centered interpretation and application of the former. This development was aided by the work of judges, that is, the praetor.\(^12\) The jurists and philosophical works improved and shaped the theoretical framework of *jus gentium* but as Walton points out “broadly speaking, the *jus gentium* was home-grown law worked out at Rome by Roman magistrates”.\(^13\)

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\(^10\) On the *matrinonium juris gentium* see Walton, *supra* note 1 at 367. See also Chapter V.

\(^11\) *Ibid.* at 367 [emphasis in original].

\(^12\) *Ibid.*

\(^13\) *Ibid.* at 366.
As it was the case during the development of the Roman *jus gentium*, in modern times, international human rights highly depends on the work of judges to reiterate its main *jus gentium* elements and apply an expansive interpretation helping shape a new domestic law. Accordingly, in this Chapter, I briefly focus on certain cases of the European and the Inter-American courts of human rights in which they uphold the individual-centered system contributing to the crystallization of the *pro homine* framework grounded on the human person, universality and expansive interpretation and application.

These regional human rights courts did not acknowledge that international human rights law is a true *juris gentium romani* or that it crystalizes a Roman *jus gentium* system. However, in my view, the Roman law of nations is part of the core value of international human rights law. Consequently, judges could not completely disregard this individual-centered system as a *lex specialis* of international law. Thus, human rights courts unconsciously accepted and extended the Roman *jus gentium* values codified in modern international human rights law. The European human rights system, which predates the Inter-American, was the first to recognize the *jus gentium* character of international human rights law.

### 6.2. The *Pro Homine* Framework and the European Court of Human Rights

The European human rights system, created by the Council of Europe\(^\text{14}\) after the Second World War, initially comprised of a commission, the European Commission on Human Rights,\(^\text{15}\)

\(^{14}\) *Statute of the Council of Europe*, 5 May 1949, Eur TS 1/6/7/8/11.

and a court, the European Court of Human Rights.\textsuperscript{16} Among other objectives, the Council of Europe\textsuperscript{17} seeks to ensure respect for the rule of law and the protection of human rights and fundamental freedoms.\textsuperscript{18} To achieve this goal, the Convention for the Protection of Human Rights and Fundamental Freedoms\textsuperscript{19} was adopted in 1950.\textsuperscript{20} The original Convention, which protects civil and political rights,\textsuperscript{21} was later complemented by additional protocols.\textsuperscript{22}

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 freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party”\textsuperscript{23}. This provision reaffirms the extensive approach of human rights norms and reasoning, that is, the European Convention cannot limit rights and freedoms. It can only be applied and interpreted to extend the protection of basic rights. As previously mentioned, the Roman \textit{jus gentium} was based on an individual-centered system – the human person as the source and end of law – and on an extensive approach, which permeated different areas of \textit{jus civile} changing the approach of certain Roman institutes.\textsuperscript{24}

The European Convention, following the same reasoning, focuses on the human person and, as Article 55 points out, on an extensive and universal application of human rights. This

\begin{footnotesize}
\begin{enumerate}
\item Ibid. [hereinafter “European Court of Human Rights” or “European Court”].
\item Statute of the Council of Europe, supra note 14.
\item Ibid. at Article 3.
\item Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5 [Hereinafter “the European Convention” or “ECHR”].
\item Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 19 at Articles 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14.
\item The European Convention on Human Rights was altered by 15 additional protocols from 1952, the day of opening to ratification of the first protocol, to 2009 when Protocol 14bis entered into force. Two additional protocols, the Protocol 15 and 16, are currently opened to ratification but not yet into force. See The Council of Europe, Treaty Office, \textit{List of the Treaties Coming from the Subject-Matter: Human Rights (Convention and Protocols Only)}, online: http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=3&CM=7&CL=ENG Accessed on 31 October 2013.
\item Convention for the Protection of Human Rights and Fundamental Freedoms, supra note 19 at Article 55.
\item See Chapter V.
\end{enumerate}
\end{footnotesize}
provision sets the interpretative rule of the European human rights system, which is universal and extensive. Accordingly, international human rights law, due to these characteristics grounded on Roman *jus gentium*, can be differentiated from general international law, which could, at least to some extent, be rooted in state-interests and in the Vatelian view.\(^{25}\) Acknowledging the special nature of international human rights law and, consequently, of the European Convention, Ovey and White affirms that:

> Although the European Convention on Human Rights is an international treaty, it has a special character which goes beyond merely setting out the rights and obligations of the Contracting States. The European Convention penetrates the national legal orders by requiring Contracting States to behave in a particular way towards their own citizens and those citizens of other countries who are within their jurisdiction. What was previously treated by international law as a matter within domestic jurisdiction of States is brought within an international system of protection and supervision.\(^{26}\)

Following the Roman *jus gentium* reasoning, the obligations enshrined in the European Convention must not be interpreted restrictively based on the argument that they derogate from state sovereignty.\(^{27}\) 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, according to the European Court of Human Rights,\(^{28}\) to “protect fundamental rights of individual human beings” and not establish interstate obligations.\(^{29}\) Furthermore, this view flows from the general rule of the Vienna Convention on the Law of Treaties, which establishes that treaties are

\(^{25}\) See Chapters III and IV.  
\(^{26}\) Clare Ovey & Robin White, *supra* note 20 at 29.  
\(^{27}\) *Ibid.* at 34-35.  
\(^{28}\) *Convention for the Protection of Human Rights and Fundamental Freedoms, supra* note 19 at Section II.  
\(^{29}\) *Austria v Italy* (1962), 4 YB Eur Conv HR 116 at 138.
interpreted in the light of their ordinary meaning based on their contexts and light and purpose.\textsuperscript{30}

The European Court, thus, seeks an interpretation following the objective and purpose of the European Convention, which is not centered on states but rather on the human person.\textsuperscript{31}

Accordingly, the European Court of Human Rights seeks to interpret and apply its human rights instrument based on the principle of effectiveness. In other words, the application and interpretation of the European Convention should contribute to an increasing protection of the human person.\textsuperscript{32} Thus, the provisions of the European Convention should be effective, that is, they should have an impact on practical considerations and situations and not just be a written piece of paper.\textsuperscript{33}

The principle of effectiveness is a teleological view of law, which seeks to construe treaties in the light of its object and purpose.\textsuperscript{34} This does not exclude, at least in its moderate forms as adopted by the Vienna Convention on the Laws of Treaties,\textsuperscript{35} the intention of the parties. Lauterpacht supported the principle of effectiveness as a fundamental rule not only for human rights but international law in general as it “constitutes a general principle of law and a


\textsuperscript{31} See Wemhoff Case (1968), 1 EHRR 55 at para 8. The European Court, however, does not explicitly state that the European Convention is individual-centered.


\textsuperscript{33} Ibid.

\textsuperscript{34} See G. G. Fitzmaurice, "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points" (1951) 28 Brit YB Int'l L 1 at 4-5.

\textsuperscript{35} See Vienna Convention on the Law of Treaties, supra note 30 at Article 31(1). Commenting the final draft of the Vienna Convention, Jacob asserts that “[t]he Draft Convention thus avoids both a strictly textual approach which would naturally give the terms of a treaty their original significance, and a purely teleological approach which would allow for the effect of an evolution of the law on the interpretation of legal term. But the omission of the original restriction to the law contemporary with the treaty supports the view that the sources of interpretation enumerated in the paragraph include subsequent developments not initially envisaged by the parties” (ibid. at 331). He adds that “[t]he inclusion of the phrase "in the light of its object and purpose "in the final draft of the principal interpretative provision of the Convention may be regarded as introducing an element of the teleological approach” (ibid. at 337). See Francis G. Jacobs, "Varieties of Approach to Treaty Interpretation: with Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference“ (1969) 18 ICLQ 318 at 331 and 337.
cogent requirement of good faith”. 36 He developed his view of this principle rooted in the intention of the parties. 37 However, Lauterpacht, in his theory, which concerns international law as a whole and is not restricted to human rights, acknowledged that a “treaty, once signed and ratified, is more than the expression of the intention of the parties. It is part of international law and must be interpreted against the general background of its rules and principles”. 38 He, thus, conceives that in cases that the intention is unclear or inexisten one should seek “the common intention in relation to the particular derived from the common intention of the treaty as a whole- from its policy, its object, and its spirit”. 39

In international human rights, there is a common intention regardless of possible problems concerning treaty interpretation such as clarity, gaps and scope. The common intention of the whole international community is the protection of the human being. The object and “spirit”, to use a word from Lauterpacht, of all human rights treaties and the system as a whole, is the human person. Consequently, the European Court of Human Rights mainly recognizes, especially in certain unclear or hard cases, that the purpose and objective of human rights is the protection of the human person, that is, human rights law is individual-centric.

As an example of the application of the principle of effectiveness, in the Söering case, the European Court of Human Rights dealt whether to extradite a German national, who was detained in England, to the United States to face murder charges. 40 Söering admitted to the United Kingdom police the killing of his Canadian girlfriend’s parents. 41 He affirmed that he was in love with Miss Haysom and, because her parents were opposed to the relationship, he and

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37 Ibid. at 73.
38 Ibid. at 76.
39 Ibid. at 79-80.
40 Söering vs the United Kingdom (1989), 11 EHRR 439 at para 11.
41 Ibid. at para 12.
Miss Haysom planned to kill them.42 A grand jury of the Circuit Court of Bedford County indicted the applicant on charges of murder and the Government of the United States requested his extradition.43 Moreover, Germany also requested Söering’s extradition.44 The United Kingdom expressed its desire to proceed with the request of the United States to the detriment of Germany but they sought an assurance on the question of the death penalty.45 The attorney for Bedford County responded that a representation, in the name of the United Kingdom, could be made to the judge at the time of sentencing informing the wish of the United Kingdom that the death penalty should not be imposed or carried out.46

Before the European Court of Human Rights, the applicant, Mr. Söering, 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 on Human Rights.47 The United Kingdom asserted that this provision “should not be interpreted so as to impose responsibility on a Contracting State for acts which occur outside its jurisdiction”.48 Moreover, they asserted that Article 3, in extradition cases, should only be applied in cases where the “treatment or punishment abroad is certain, imminent and serious”.49

The European Court of Human Rights, thus, faced the question whether Article 3, which prohibits torture and inhumane or degrading punishment, is applicable when, in the words of the Court, “the adverse consequences of extradition are, or may be, suffered outside the jurisdiction

42 Ibid. at para 13.
43 Ibid. at paras 13-14.
44 Ibid. at para 16. The United States, via diplomatic note, requested the Söering’s extradition to the United States in preference to Germany. Furthermore, Elizabeth Haysom was eventually extradited to the United States and was sentenced to 90 years’ imprisonment. See Ibid. at paras 17-18.
46 Ibid. at para 20.
47 Ibid. at 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 note 19 at Article 3.
48 Söering v the United Kingdom, supra note 40 at para 83.
49 Ibid.
of the extraditing State as a result of treatment or punishment administered in the receiving State”. 50 The European Court, following the underpinnings of international human rights, which prioritize persons, asserted that:

In interpreting the Convention regard must be had to its **special character** as a treaty for the collective enforcement of human rights and fundamental freedoms…. Thus, the object and purpose of the Convention as an instrument for the **protection of individual human beings** require that its provisions be interpreted and applied so as to make its **safeguards practical and effective**…. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society". 51

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, the international community must acknowledge that international human rights is a human-centered framework which sets effective guidelines and parameters to the states’ domestic legal systems. These are the ideals and values that form the “spirit” of the Convention.

Analyzing the prohibition of torture and of inhuman or degrading treatment or punishment enshrined in Article 3 of the European Convention, the Court, acknowledging the universal aspect of human rights, referred to “other international instruments such as the 1966 International Covenant on Civil and Political Rights and the 1969 American Convention on

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51 *Ibid.* at para 87 [emphasis added].
Human Rights”. The European Court, in a teleological interpretation recognized the pro homine framework prioritizing the human person, affirmed that:

It would hardly be compatible with the underlying values of the Convention… were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intention of the Article, and in the Court’s view this 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 proscribed by that Article (art. 3).

The European Court, thus, extended the interpretation and application of Article 3 of its Convention to include an intrinsic responsibility of the member states of this treaty to assess the conditions of the country to where an individual would eventually be extradited and evaluate whether this person would be subjected to torture or to inhuman or degrading treatment or punishment. Accordingly, the European Court, reaching its decision, recognized the universality element of international human rights, influenced changes in the state’s domestic legal system (concerning extradition) and prioritized the human person as the source and end of law. The European Court, thus, informed the mutable aspect of human rights stating that the Convention is a “living organism” implicitly acknowledging the important role of international

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52 Ibid. at para 88.
53 Ibid. [emphasis added].
54 Ibid. at para 91.
55 The Court stated that “the likelihood of the feared exposure of the applicant to the "death row phenomenon" has been shown to be such as to bring Article 3 (art. 3) into play” (ibid. at para 99).
56 Ibid. at para 102.
judges. The European Court of Human Rights, consequently, upholds the Roman law elements of international human rights law.

The European Court of Human Rights interprets its treaty, the European Convention, as a living organism and an instrument of public order. In 1978, the case of Tyrer v United Kingdom reached the European Court of Human Rights. Before a local juvenile court, Tyrer, a citizen of the United Kingdom, pleaded guilty when he was 15 years old to unlawful assault, which resulted in bodily harm to a senior pupil at his school.57 The crime occurred possibly because the victim had reported Tyrer and other boys for taking beer into the school.58 Due to his acts, Tyrer was sentenced to “three strokes of the birch in accordance with the relevant legislation”.59

During the application of the sentence, the “applicant was made to take down his trousers and underpants and bend over a table; he was held by two policemen whilst a third administered the punishment, pieces of the birch breaking at the first stroke”.60 While this sentence was being carried out, the applicant’s father had to be restrained because he lost his self-control and moved towards one of the policemen.61

Although abolished in England, Wales and Scotland in 1948 and in Northern Ireland in 1968, judicial corporal punishment of adults and juveniles was still applicable in the Isle of Man where the applicant resided.62 The European Court of Human Rights decided that the sentence imposed on the applicant did not amount to torture or an inhuman punishment within the scope

57 *Tyrer v United Kingdom* (1978), 21 ECHR (Ser A) 612, 2 EHRR 1 at para 9.
of Article 3 of the European Convention.\textsuperscript{63} However, the European Court faced the question whether the applicant was subjected to a degrading punishment in virtue of Article 3.\textsuperscript{64}

The European Court acknowledged the imperativeness of the prohibition of torture and any degrading or inhuman punishment affirming that acts contrary to Article 3 are never permissible “whatever their deterrent effect may be”.\textsuperscript{65} The Court, applying an individual-centered and Roman based view of the law of nations, asserted that “the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions”.\textsuperscript{66} Accordingly, the European Court “cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field”.\textsuperscript{67} The European Court, acknowledging that human rights move on an increasing level of protection based on the advances of their protection, decided that there is a minimum standard that must not be crossed when punishing a person. The European Court held that “the fact that one penalty may be preferable to, or have less adverse effects or be less serious than, another penalty does not of itself mean that the first penalty is not ‘degrading’ within the meaning of Article 3”.\textsuperscript{68}

In \textit{Loizidou vs Turkey}, the applicant alleged that after the Turkish occupation of northern Cyprus she had been prevented from accessing and enjoying her properties in the region.\textsuperscript{69} The European Court, in the preliminary objections, analyzed the territorial restrictions established by

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{63} \textit{Ibid.} at para 29.
\item \textsuperscript{64} \textit{Ibid.}
\item \textsuperscript{65} \textit{Ibid.} at para 30.
\item \textsuperscript{66} \textit{Ibid.} at para 30.
\item \textsuperscript{67} \textit{Ibid.}
\item \textsuperscript{68} \textit{Ibid.} at para 34. The European Court decided that the applicant was indeed subjected to degrading punishment. See \textit{ibid.} at para 35.
\item \textsuperscript{69} \textit{Loizidou v Turkey} Preliminary (1995), 20 EHRR 99 at para 12.
\end{itemize}
\end{footnotesize}
Turkey in relation to Article 25\textsuperscript{70} and Article 46\textsuperscript{71} of the European Convention.\textsuperscript{72} Turkey justified its restrictions by, among other arguments, comparing the European Convention, a human rights treaty, with the Statute of the International Court of Justice, which regulates the function of the main juridical organ of the United Nations.\textsuperscript{73} The respondent asserted that Article 36 of the Statute of the International Court of Justice allows substantive territorial and temporal restrictions to the recognition of this Court’s jurisdiction.\textsuperscript{74} Moreover, Turkey argued that drafting history of the European Convention demonstrates that Article 36 of the Statute of the International Court of Justice was used as a model for Article 46 of the Convention.\textsuperscript{75} Consequently, the wording of these two provisions is the same "in all material aspects".\textsuperscript{76} Turkey concluded that it is “a well established principle in international treaty law that an expression used in one treaty will bear the same meaning if used in another".\textsuperscript{77} Furthermore, it added that Articles 25 and 46 of the Convention must be interpreted based on their meaning when the

\textsuperscript{70} Paragraphs 1 and 2 of Article 25 establish that: “1 The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right. 2 Such declarations may be made for a specific period.” See \textit{Original Version of the Convention for the Protection of Human Rights and Fundamental Freedoms}, supra note 15 at Article 25, paras 1 and 2.

\textsuperscript{71} Article 46 states that “1 Any of the High Contracting Parties may at any time declare that it recognizes as compulsory 'ipso facto' and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention. 2 The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain other High Contracting Parties or for a specified period. 3 These declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties” (\textit{ibid.} at Article 46).

\textsuperscript{72} The Court, in \textit{Loizidou v Turkey}, mentions the body of the European Convention before the end of the Commission and the general changes of Protocol 11.

\textsuperscript{73} \textit{Charter of United Nations}, 26 June 1945, Can TS N° 7 (entered into force 24 October 1945) at Article 92. It states that “[t]he International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter” (\textit{ibid.}). See generally Shabtai Rosenne, \textit{The World Court} (Dordrecht: Martinus Nijhoff Publishers).

\textsuperscript{74} \textit{Loizidou v Turkey} Preliminary, supra note 69 at para 67.

\textsuperscript{75} \textit{Ibid.}

\textsuperscript{76} \textit{Ibid.}

\textsuperscript{77} \textit{Ibid.}
Convention was drafted, which would lead to the conclusion that “international judicial practice permitted the addition of conditions or restrictions to any optional recognition of the jurisdiction of an international tribunal”.  

Turkey’s argument denies any specific or fundamental difference between international human rights law and general aspects of international law. Following this line of thought, the European Convention could be interpreted and applied following the premise or based on the wording of the Statute of the International Court of Justice. Furthermore, in Turkey’s view human rights should be restrictively interpreted and applied. In other words, the teleological and human-centered interpretation based on the object and purpose of the treaty should be set aside due to a more important rule of the intention of the parties, which would take into account that international law is a law between sovereign states and must be restrictively interpreted based on the express intention of the parties.

International human rights law although part of international law is governed by specific rules, which focus on the human person. Furthermore, the Vienna Convention on the Law of Treaties, which sets basic rules of treaty interpretation in general, undermines the intention of the parties when it states that recourse to “preparatory work of the treaty and the circumstances of its conclusion” is a supplementary mean of interpretation and establishes the view that, as a general rule, “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and

78 Ibid.
80 For a view on the restrictive and teleological approach in international law and the influence on the case law of the International Court of Justice see Hersch Lauterpacht, “Restrictive”, supra note 36.
purpose”. The European Court, following this teleological approach, dismissed Turkey’s argument that the Convention should be interpreted based on its preparatory works by holding that “the Convention is a living instrument which must be interpreted in the light of present-day conditions”. The Court added that this teleological approach is not restricted to substantive provisions of the Convention, but it extends to provisions such as Articles 25 and 46, “which govern the operation of the Convention’s enforcement machinery”.

Furthermore, again based on a teleological view, the European Court acknowledged the human-centered aspect of the European Convention holding that “the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective”. Accordingly, the European Court affirmed that substantive or territorial restrictions would “seriously weaken” the role of the Court and “would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (ordre public)”.

Commenting on the analogy argued by Turkey between the International Court of Justice and the European Convention, the European Court pointed out that that the fact that Article 46 of the Convention was modeled on Article 36 of the Statute of the International Court of Justice does not lead to the view that restrictions to the acceptance of jurisdiction would be permissible under the Convention. It noted that the International Court of Justice, contrary to the European Court, is “called on inter alia to examine any legal dispute between States” and it “is not

82 Ibid. at Article 31 (1). See Chapter III above.
83 Loizidou v Turkey Preliminary, supra note 69 at para 71.
84 Ibid.
85 Ibid. at para 72.
86 Ibid. at para 75.
87 Ibid. at para 83.
88 Ibid. at para 84 [italics in original].

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exclusively limited to direct supervisory functions in respect of a law-making treaty such as the Convention”. 89

Analyzing its Convention in the light of its object and purpose, the European Court concluded that Turkey’s restrictions ratione loci of Article 25 and Article 46 are invalid. 90 Analyzing the merits of the case, this regional human rights court reached the decision that Turkey indeed breached the European Convention by negating the “applicant’s property rights in the form of a total and continuous denial of access and a purported expropriation without compensation”. 91 The European Court based its decision on the view that:

[T]he Convention must be interpreted in the light of the rules of interpretation set out in the Vienna Convention of 23 May 1969 on the Law of Treaties and that Article 31 para. 3 (c) of that treaty indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". In the Court’s view, the principles underlying the Convention cannot be interpreted and applied in a vacuum. Mindful of the Convention’s special character as a human rights treaty, it must also take into account any relevant rules of international law when deciding on disputes concerning its jurisdiction pursuant to Article 49 of the Convention (art. 49). 92

Accordingly, human rights treaties focus on the human person and not on state interests. The European Court, in Wemhoff v Germany, further acknowledged that the European Convention is a law-making treaty, that is, it impacts domestic law, 93 and asserted that it “necessary to seek the interpretation that is most appropriate in order to realise the aim and

89 Ibid.
90 Ibid. at para 89.
91 Loizidou v Turkey, Merits (1996) 21 EHRR 188 at para 64 [Loizidou v Turkey, Merits].
92 Ibid. at para 43.
93 See Clare Ovey & Robin White, supra note 20 at 29.
achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties”.

Arguably, the European Court established this general system of interpretation in *Golder v United Kingdom*. The European Court of Human Rights was asked to decide whether Article 6 paragraph 1 of the European Convention is limited to securing the right to a fair trial in pending legal proceedings or whether it also secures a right of access to the courts for every individual wishing to start a legal action.

The European Court faced an interpretative issue since Article 6 fails to “state a right of access to the courts or tribunals in express terms”. The Court invariably needed to stand either on the side of the individual, Mr. Golder, expanding the protection crystalized by Article 6 or, conversely, limit the scope of this provision in a restrictive application of international human rights law. Furthermore, the European Court considered whether a general international law treaty not yet into force at the time of the decision, the Vienna Convention on the Law of Treaties, is applicable as the interpretation guide to the European Convention.

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94 *Wemhoff v Germany*, supra note 31 at para 8.
95 See *Golder v United Kingdom* (1975), 18 ECHR (Ser A) 524. Golder, a citizen of the United Kingdom, was convicted of robbery with violence and sentenced to fifteen years’ imprisonment. In jail, he was pointed out as one of the participants in serious disturbance occurred in a recreation area of the prison where Mr. Golder was. Although he denied, he was identified as one of the assailants. Golder unsuccessfully tried to transfer institutions due to the supposedly harshening of his conditions in jail. Furthermore, Home Secretary denied him access to a solicitor. Mr. Golder, then, submitted a petition to the former European Commission and the case eventually reached the European Court of Human Rights (see *ibid.* at paras 10-11, 13, 16, 18-19 and 22). See also Clare Ovey & Robin White, *supra* note 20 at 27-35.
96 It spells out that “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice” (*Convention for the Protection of Human Rights and Fundamental Freedoms*, supra note 19 at Article 6 para 1).
97 *Golder v United Kingdom*, supra note 95 at para 25.
The European Court accepted the Vienna Convention on the Law of Treaties as its main interpretative guide acknowledging that it embodies “generally accepted principles of international law”.\(^{100}\) The Court, thus, interprets its Convention based on the general rule established by Article 31 of the Vienna Convention, which affirms that the treaty should be interpreted in the light of its object and purpose.\(^{101}\) Furthermore, based on Article 31 paragraph 3 (c) of the Vienna Convention,\(^{102}\) the European Court asserted that the “principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognized’ fundamental principles of law”,\(^{103}\) which is, by its turn, one of the relevant rules of international law applicable in the relations between the parties”.\(^{104}\) To the Court, it would be “inconceivable” to acknowledge that Article 6 paragraph 1 of the Convention enshrines “procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court”.\(^{105}\) In a teleological approach, the European Court held that:

[T]he right of access constitutes an **element which is inherent in the right stated by Article 6** para. 1... This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 (art. 6-1) read in its context and **having regard to the object and purpose of the Convention, a lawmaking treaty**..., and to general principles of law. Article 6 para. 1 (art. 6-1)... In this way the Article embodies the "right to

\(^{100}\) *Ibid.*


\(^{102}\) This provision spells out that “[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties” (*Vienna Convention on the Law of Treaties, supra* note 31 at Article 31(3)).

\(^{103}\) *Golder v United Kingdom, supra* note 31 at para 35.

\(^{104}\) *Ibid.* See also *Vienna Convention on the Law of Treaties, supra* note 30 at Article 31(3) (c).

\(^{105}\) *Golder v United Kingdom, supra* note 95 at para 35.
of which the right of access... constitutes one aspect only.\textsuperscript{106}

The European Court thus cautiously states that this decision does not entail the creation of a new right apart of those spelled out in the European Convention.\textsuperscript{107} However, the Court arguably did just that: acknowledged the existence of a human right not explicitly provided in the treaty, that is, the right to access a court. The Convention informs that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.\textsuperscript{108} It does not explicitly affirm that everyone has the right to bring a claim to court. However, the European Court, based on the objective and purpose of the European Convention and the general principles of law under the framework of the Vienna Convention on the Law of Treaties, acknowledged the existence of “inherent rights” as part of this regional human rights treaty. Accordingly, the right of access to justice, to initiate legal proceedings, is an inherent right provided by Article 6 of the European Convention even though it is not explicitly mentioned in the treaty.

Consequently, the teleological approach to the European Convention acknowledges that this regional treaty is a lawmaking treaty, it is, thus, designed to impact the domestic legal orders and effectively crystalize a human rights protection system. The Court, in my view, chose an individual-centered approach. In the end, it stood by the claims brought by Golder to the detriment of the restricted view put forward by the respondent state.

The European Court of Human Rights acknowledged that its Convention, as a human rights treaty, possesses a special character. The Court also answered the question of what would

\textsuperscript{106} \textit{Ibid.} at para 36 [emphasis added].
\textsuperscript{107} \textit{Ibid.}
\textsuperscript{108} \textit{Convention for the Protection of Human Rights and Fundamental Freedoms, supra} note 19 at Article 6 para 1.
constitute this “special character”. It entails that the European Convention is interpreted and applied following the principle of effectiveness, is a lawmaking treaty, possesses inherent rights, is a living organism and an instrument of public order designed for the protection of individual human beings. This view strongly follows the Roman *jus gentium* approach.

In the case of *Rantsev v Cyprus and Russia*, from 2010, the applicant filed a complaint to the European Court affirming that Cyprus breached the European Convention by failing to investigate the circumstances of the death of his daughter, for failing to adequately protect her when she was still alive and for the lack of access to court in Cyprus.\(^{109}\) Furthermore, he claimed that Russia breached the Convention for failing to "investigate his daughter’s alleged trafficking and subsequent death and to take steps to protect her from the risk of trafficking".\(^ {110}\)

The European Convention on Human Rights has no provision specifically concerning human trafficking.\(^ {111}\) Accordingly, the Court analyzed the facts of the case in the light of a number of international agreements concerning the issue, including, for example, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children ("the Palermo Protocol").\(^ {112}\) Based on an extensive interpretation of its convention, the European Court acknowledged that it “has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein”.\(^ {113}\)

Rather, based on the Vienna Convention on the Law of Treaties, it is “required” to analyze the


\(^{110}\) Ibid.

\(^{111}\) The Convention, however, has a general provision prohibiting forced labor and prostitution. See *Convention for the Protection of Human Rights and Fundamental Freedoms*, *supra* note 19 at Article 4. This provision spells out that “[n]o one shall be held in slavery or servitude; [n]o one shall be required to perform forced or compulsory labour” (*ibid.* at Article 4 (1) (2)). The European Court acknowledges this affirming that “Article 4 makes no mention of trafficking, proscribing ‘slavery’, ‘servitude’ and ‘forced and compulsory labour’” (*Rantsev v Cyprus and Russia*, *supra* note 112 at para 272).


\(^{113}\) *Rantsev v Cyprus and Russia*, *supra* note 109 at para 273.
European Convention in “the light of the object and purpose of the provision from which they are drawn”. The Court affirms that:

The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions…. Account must also be taken of any relevant rules and principles of international law… and the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms … Finally, the Court emphasizes that the object and purpose of the Convention, as an instrument for the protection of individual human beings, requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.

The Court, furthermore, reaffirmed that the European Convention is a “living instrument, which must be interpreted in the light of present-day conditions”. Moreover, in its extensive interpretation, the European Court mentioning the International Criminal Tribunal for the Former Yugoslavia, asserts that human trafficking is “based on the exercise of powers attaching to the right of ownership” and concludes that “trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention”. The Court, by referring to the Palermo Protocol, international reports and domestic law, concluded that Cyprus breached Article 4 of the European Convention by not practically and effectively protecting Ms. Rantseva against trafficking and exploitation.

\begin{itemize}
  \item[114] Ibid.
  \item[115] Ibid. at paras 274-275.
  \item[116] Ibid. at para 277.
  \item[117] Ibid. at para 280.
  \item[118] Ibid. at para 281.
  \item[119] Ibid. at para 282.
\end{itemize}
and by failing to take the necessary measures to protect her.\textsuperscript{120} Furthermore, the Court decided that Russia breached the same provision for failing to investigate the trafficking of human persons.\textsuperscript{121}

In 2012, in the \textit{case of Elmasri v The Former Yugoslav Republic of Macedonia}, the European Court dealt with a difficult situation concerning a German national who traveled to Macedonia and was unlawfully detained at the border.\textsuperscript{122} He was first kept at a hotel in Skopje (being incommunicado) and after sent by "rendition" to a prison in Afghanistan.\textsuperscript{123} According to the applicant, after several rough interrogations and ill treatments, he was finally released in European territory.\textsuperscript{124} The Court, after analyzing a number of legal instruments and hearing from different organizations,\textsuperscript{125} asserted that:

\begin{quote}
The Court reiterates that the \textbf{Convention is an instrument for the protection of human rights} and that it is of crucial importance \textit{that it is interpreted and applied in a manner that renders these rights practical and effective}, not theoretical and illusory. This concerns not only the interpretation of substantive provisions of the Convention, but also procedural provisions; it impacts on the obligations imposed on respondent Governments, but also has effects on the position of applicants.\textsuperscript{126}
\end{quote}

The European Court decided that the respondent state breached Article 3 of the European Convention for subjecting the applicant to torture or to inhuman or degrading treatment or punishment in the hotel, at Skopje’s airport and for having transferred him into the custody of the

\begin{footnotes}
\item\textsuperscript{120} \textit{Ibid.} at paras 272-309 and at page 83 (8).
\item\textsuperscript{121} \textit{Ibid.} at para 309.
\item\textsuperscript{122} \textit{El-Masri v The Former Yugoslav Republic of Macedonia}, No. 39630/09, [2012] 57 EHRR 25 at paras 16-36.
\item\textsuperscript{123} \textit{Ibid.}
\item\textsuperscript{124} \textit{Ibid.}
\item\textsuperscript{125} \textit{Ibid.} at 3-8.
\item\textsuperscript{126} \textit{Ibid.} at para 134 [emphasis added].
\end{footnotes}
authorities of the United States. The European Court of Human Rights stretched the application of its convention and, in a human-centered approach, asserted that third states not part of the European Continent but working with European states need to treat their prisoners in accordance with human rights, regardless of suspicions of links with terror organizations.

The spirit of the European Convention is human-centered. It is linked to the vision of the Roman jurists who helped shape the traditional *jus gentium*. The ancient Romans rooted their *jus gentium* on the fundamental principle of universality, on the centrality of the human person, on the work of jurists and adjudication bodies, and on the understanding that it provides guidelines for domestic law. This is also the fundamental approach of the European Court of Human Rights. This regional court, when asserting the existence of inherent rights enshrined in the European Convention, seeks to determine a standard of protection in the European Continent crystalizing guidelines to municipal law within a universal system of protection.

Furthermore, in these “hard cases” previously mentioned, the European Court faced the question of extending or limiting the application and interpretation of its convention. The Court acknowledged the human centrality of international human rights law as its Convention works as “an instrument for the protection of individual human beings”. The Court’s notion of effectiveness, thus, closely follows the Roman view that its law of nations should impact and change domestic law taking into account the protection of individual human beings.

The Roman law of nations is not exactly the same as international human rights law as envisaged by the European Court of Human Rights. Their positive laws differ, as they are

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127 *Ibid.* at paras 194, 204, 211, 221 and 222.
expressions of different societies. However, the spirit, to use a word from the European Court,\textsuperscript{130} of human rights is deeply embedded in the Roman law of nations. The European Convention’s interpretation, application and purpose and objective is, thus, traditionally Roman. The evolution of international human rights law is not diversification or separation from the old values envisaged by Roman law. International law of human rights moves closer to the ideals and theoretical framework of the Roman law of nations to the point that sharing the same spirit.

This understanding of international human rights law is not only a particularity of the European Court. Its counterpart in the American Continent, following a Roman tradition, also recognizes the human person as the purpose and aim of law. Accordingly, in the next topic, I will focus on the regional court of the American Continent and how it helps acknowledging the Roman spirit of international human rights law.

6.3. The Pro Homine Framework and the Inter-American Court of Human Rights

In 1948, the Organization of American States (OAS)\textsuperscript{131} was established to “achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence”\textsuperscript{132}. On the American Continent, the OAS is the main regional organization that promotes the implementation and respect of human rights.\textsuperscript{133} To that end, two major organizations were created within the

\textsuperscript{130} See generally Söering vs the United Kingdom, supra note 40 at para 87.
\textsuperscript{131} Charter of the Organization of American States, 30 April of 1948, 1609 UNTS 119, OASTS NOS. 1-C and 61 [hereinafter “Organization of American States” or “OAS”].
\textsuperscript{132} Ibid. at Article 1.
\textsuperscript{133} Ibid. at Article 3 (d), (f), (g), (i), (l) and (n).
structure of the OAS: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

The Inter-American Commission on Human Rights, created in 1959 by the Fifth Meeting of Consultation of Ministers of Foreign Affairs, is an autonomous body of the Organization of American States part of both the general OAS system and of the American Convention on Human Rights. The Inter-American Commission’s competence, as a general body of the Organization of American States, extends to all members of the OAS Charter. However, as specific body of the American Convention, its functions apply to the states-party of this regional human rights treaty.

The Inter-American Commission can receive petitions from individuals through two different mechanisms. First, it can receive petitions concerning alleged violations of the

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134 Ibid. at Article 106.
135 American Convention on Human Rights, supra note 8 at Chapter VIII [hereinafter “American Convention”].
138 Thomas Buergenthal et al., International Human Rights in a Nutshell (St.Paul: West Group, 2002) at 228.
139 Charter of the Organization of American States, supra note 131 at Article 106.
140 American Convention on Human Rights, supra note 8 at Chapter VII.
141 Ibid. at Article 41 (a), (e) and (g). As a OAS Charter body, the Inter-American Commission develops an awareness of human rights, makes recommendations to the governments of the member states, prepares reports or studies, requests to OAS member states to inform it on "measures adopted by them in matters of human rights", responds to inquiries made by the member states and provides "those states with the advisory services they request", carries out on-site observations in a state and submits the program-budget of the Commission to the Secretary General. As an OAS body, the Inter-American Commission analyzes state compliance with the American Declaration of the Rights and Duties of Man and examines communications submitted to it. See Statute of the Inter-American Commission on Human Rights, supra note 136 at Articles 18 and 20.
142 Ibid. at Articles 41 (f), 44-51. As an organization of the American Convention, the Inter-American Commission, in addition to the powers and functions established by Article 19 of its Statute, can accept petitions and other communications in accordance with Articles 44 to 51 of the American Convention, appear before the Inter-American Court of Human Rights, request the Inter-American Court of Human Rights to take provisional measures, consult the Inter-American Court on the interpretation of the American Convention; "submit additional draft protocols to the American Convention" and submit to the General Assembly proposed amendments to the American Convention (ibid. at Article 19).
American Declaration (when the state is not part of the American Convention). Second, it receives individual petitions on possible violations of the American Convention if the concerned state has previously ratified this regional treaty. The Commission acts virtually in the same way in both individual petition cases. However, when the concerned state is a party to the American Convention and has accepted the contentious jurisdiction of the Inter-American Court of Human Rights, the Inter-American Commission can, if the concerned state has not complied with the recommendations set forth in its report, submit the case to this regional court.

The Inter-American Court, in contrast to its European counterpart, cannot receive direct petitions from individuals. However, individuals have participatory rights, *locus standi*, before the Court. The new Rules of Procedure of the Inter-American Court, from 2009, grant extensive participatory rights to individuals consolidating a true *locus standi in judicio*. This new change is summarized by Article 24, which provides that “[w]hen the application has

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146 *American Convention on Human Rights*, supra note 8 at Article 62.
151 OAS, Inter-American Court of Human Rights, *Rules of Procedure of the Inter-American Court of Human Rights*, Approved by the Court during its XLIX Regular Period of Sessions, held from November 16 to 25, 2000, and partially amended by the Court during its LXXXII Ordinary Period of Sessions, held from January 19 to 31, 2009, online: http://www.corteidh.or.cr/sitios/reglamento/ene_2009_ing.pdf Accessed on 1 April 201 [hereinafter “Rules of Procedure of the Inter-American Court”].
152 Mazzuoli, * supra* note 149 at 937.
been admitted, the alleged victims or their duly accredited representatives may submit their pleadings, motions, and evidence autonomously throughout the proceedings.”⁵³ These participatory rights represent an increasing recognition of the individual legal capacity and access to justice. As Cançado Trindade affirms, with these changes the “human person has thus been erected, in an unequivocal way, as a subject of international human rights law, endowed with juridico-procedural capacity in the proceedings before” the Inter-American Court.⁵⁴

This individual-centric view is also reflected in the jurisprudence of the Inter-American Court, which has followed in the footsteps of its European counterpart. In the early days of the Court, it was called upon to render an advisory opinion on the Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism.⁵⁵ In this advisory opinion, the Inter-American Court set its individual-centric view based on Article 29 of the American Convention. This provision, connected to the Court’s rules of interpretation, spells out that:

No provision of this Convention shall be interpreted as: a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.⁵⁶

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⁵⁴ Cançado Trindade, The Access of Individuals, supra note 150 at 44.
⁵⁶ American Convention on Human Rights, supra note 8 at Article 29.
Article 29 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.\textsuperscript{157} This provision, thus, reinforces an individual-centered protection by establishing that the interpretation of rights must be extensive and restriction to rights must be restrictively interpreted. This individual-centered or \textit{pro homine} view is connected to the object and purpose of human rights treaties.\textsuperscript{158} That is, in a teleological approach, human rights instruments, including the American Convention, address the human person.\textsuperscript{159}

The Inter-American Court, in an interpretation prioritizing the human person, can refer to different treaties or instruments in general to render decisions that escape the traditional scope of the American Convention and originally belonged to indigenous rights, international humanitarian law, investors’ rights, environmental law, and economic, social and cultural rights.\textsuperscript{160} The Inter-American Court, analyzing Article 29 of the American Convention in the advisory opinion on \textit{Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism}, asserted that:

The foregoing conclusion clearly follows from the language of Article 29 which sets out the relevant rules for the interpretation of the Convention….Hence, if in the same situation both the American Convention and another international treaty are applicable, \textbf{the rule most favorable to the individual must prevail}. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the

\textsuperscript{160} Lucas Lixinski, "Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law" (2010) 21 EJIL 585 at 603.
enjoyment of the rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.  

In another advisory opinion, Colombia questioned the legal status of the American Declaration.  

Like the European Court of Human Rights, the Inter-American Court asserted that to determine the legal status of this declaration is necessary to examine the evolution undergone by the inter-American human rights system since its adoption in 1948. Furthermore, the Court added that the development law in the inter-American system mirrors that of international law in general and especially in human rights law, which is distinguished from “classical international law to a significant extent”. The Court, however, did not explicitly explain what this difference would entail. A contextual analysis of this decision in conjunction with other cases of the Inter-American Court and the European Court can lead to the conclusion that this difference is precisely the Roman “spirit” – borrowing the vocabulary of the European Court – which is part of international human rights and dictates a human-centered system. Based on an evolutive interpretation focused on the best approach to the human

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161 Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), supra note 155 at para 52 [emphasis added].
162 Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights (1989), Advisory Opinion OC-10/89, Inter-Am Ct HR (Ser A) Nº 10, at para 2. The government of Colombia also asked the Court whether it “has jurisdiction to interpret the Declaration, and if so, what the scope of its jurisdiction is within the framework of Article 64 of the Convention” (ibid. at para 2). See also Chapter III.
163 Ibid. at para 37.
164 Ibid. at para 38.
165 See above. The European Court used the word “spirit” but did not link it to Roman law. See also Case of Söering vs the United Kingdom, supra note 40 at 87.
166 For a detailed explanation on this advisory opinion see Chapter III above.
person, the Inter-American Court decided that the American Declaration is a source of obligations to the member states of the Organization of American States.\textsuperscript{167}

In the case of \textit{Aloeboetoe et al v Suriname}, a number of soldiers tortured more than 20 male maroons in the presence of some 50 persons.\textsuperscript{168} After allowing some maroons to continue their way, these soldiers blindfolded and dragged into a military vehicle seven of them, including a 15-year old boy.\textsuperscript{169} The vehicle stopped and the soldiers gave spades to the victims ordering them to dig holes.\textsuperscript{170} One of them was shot trying to escape (and later died due to the wounds)\textsuperscript{171} and the others were killed.\textsuperscript{172} Suriname accepted its responsibility under international law for the acts\textsuperscript{173} and the Inter-American Court then faced the question of reparations.\textsuperscript{174}

This case concerns the Saramakas, a tribe formed by former African slaves who fled from their Dutch owners\textsuperscript{175} and follow their own customary law.\textsuperscript{176} The Saramakas’s family structure is strongly matriarchal and polygamy frequently occurs.\textsuperscript{177} Furthermore, Suriname failed to provide “the facilities necessary for the registration of births, marriages, and deaths, an essential requirement for the enforcement of Surinamese law”.\textsuperscript{178} To further complicate the establishment of compensation, Suriname had not ratified the International Labour Organization Convention No

\begin{itemize}
  \item \textsuperscript{167} \textit{Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, supra} note 162 at paras 42-43 and 46-47.
  \item \textsuperscript{169} \textit{Ibid.} at para 22.
  \item \textsuperscript{170} \textit{Ibid.} at para 14.
  \item \textsuperscript{171} \textit{Ibid.} at para 15.
  \item \textsuperscript{172} \textit{Ibid.} at para 14.
  \item \textsuperscript{173} \textit{Ibid.} at para 14.
  \item \textsuperscript{174} \textit{Ibid.} at para 22.
  \item \textsuperscript{175} \textit{Case of Aloeboetoe et al. v. Suriname} (1993), Reparations and Costs, Inter-Am Ct HR (Ser C) No 15.
  \item \textsuperscript{176} \textit{Ibid.} at para 56.
  \item \textsuperscript{177} \textit{Ibid.} at para 56.
  \item \textsuperscript{178} \textit{Ibid.} at para 59.
\end{itemize}
169 concerning Indigenous and Tribal Peoples in Independent Countries\textsuperscript{179} and there is no conventional or customary rule under international law indicating a general international rule of succession and inheritance.\textsuperscript{180}

Taking into account the general principles of law, a person’s successors would be his or her children, spouse and/or ascendants.\textsuperscript{181} However, Surinamese family law is not applicable within the Saramakas community and, according to the Court, “[i]t has proved extremely difficult to identify the children, spouses, and, in some cases, the ascendants of the victims in this case”.\textsuperscript{182} The Saramakas live in the jungle, only speak their own native tongue, practice polygamy and have unregistered marriages and births.

The Inter-American Court faced the curious problem of determining the beneficiaries of compensation when customary and conventional international law and domestic law could not provide an effective system. To establish compensation, the Inter-American Court, following a Roman-based thinking prioritizing the human person applied general principles of law and followed the customary practices of the Saramakas to the extent it did not conflict with the accepted norms of international law and human rights.\textsuperscript{183} Accordingly, the Court decided that:

\begin{itemize}
  \item a. Of the reparations for material damages caused to each victim, one third is assigned to their wives. \textbf{If there is more than one wife}, this amount shall be divided among them in equal parts. Two thirds shall go to the children, who shall also divide their
\end{itemize}


\textsuperscript{181} Case of Aloeboetoe et al v Suriname, \textit{Reparations}, supra note 174 at para 62.

\textsuperscript{182} Ibid. at para 63.

\textsuperscript{183} Ibid. at para 62.
portion equally among themselves if there is more than one child. b. The reparations for moral damages caused to each victim shall be divided as follows: one half is allocated to the children, one quarter to the wives and the remaining quarter to the parents. If there is more than one beneficiary in any of these categories, the amount shall be divided among them in equal parts.184

The Inter-American Court followed the Roman reasoning to extend the scope of the American Convention and seek a universal and individual-centric application and interpretation of international human rights law. This is at the core of the approach of this regional court. In the *Case of the Five Pensioners v Peru*,185 the Inter-American Court faced a contentious dispute that was not intrinsically connected to the right of life or physical integrity, but, rather, concerned economic, social and cultural rights which are only marginally mentioned in Article 26 of the American Convention.186

The Inter-American Commission filed an application against Peru arguing that it should “pay forthwith to Messrs. Torres Benvenuto, Mujica Ruiz-Huidobro, Álvarez Hernández and Bartra Vásquez, and to the next of kin of Mr. Gamarra Ferreyra, the difference in the amount of the equalized pensions that it has failed to pay them from November 1992 to the present”187 and should comply with the judgments of the Supreme Court of Justice and its Constitutional Court, which demanded it to pay the pensioners a sum of money based on the legislation in force when they began to be under a determined pension regime.188

184 Ibid. at para 97 [emphasis added].
185 *Case of the Five Pensioners (Peru)* (2003), Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 98.
186 This provision spells out that the “States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires” (*American Convention on Human Rights, supra* note 8 at Article 26).
187 *Case of the Five Pensioners (Peru), supra* note 185 at para 8.
188 Ibid. note 201 at paras 2 and 3.
Due to the lack of provisions regulating the issue, the Inter-American Court decided, based on Article 29 of its Convention, to render a decision prioritizing the human person on an extensive application of rights. Accordingly, this regional court asserted that Article 21 of the American Convention, which protects the right to property, assures the incorporation of the pension, as it was initially established, to the patrimony of the persons. In other words, this provision protects the right of the pensioners to “receive an equalized retirement pension” in accordance the domestic law of Peru. The Court, thus, decided that:

In light of the provisions of the Constitution of Peru, the rulings of the Peruvian Constitutional Court, Article 29(b) of the Convention – which prohibits a restrictive interpretation of rights – and a progressively developing interpretation of international instruments that protect human rights, this Court considers… the pensioners acquired a right to property related to the patrimonial effects of the right to a pension, in accordance with Decree Law No. 20530 and as established in Article 21 of the American Convention.

The right to an equalized pension flows from Article 21 of the American Convention and should only be restricted, according to the Court, on limited circumstances (for reasons of public utility or social interest) following the appropriate legal procedures. This is similar to the

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189 *Ibid.* at para 101. The Court asserted that “[i]t should be recalled that Article 29(b) of the American Convention establishes that no provision of the Convention may be interpreted as restricting “the enjoyment or exercise of any right or freedom recognized by virtue of the law of any State Party….’’” (*Ibid.*.)
190 This provision stipulates that: “1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law” (*American Convention on Human Rights, supra* note 8 at Article 21).
191 *Case of the Five Pensioners (Peru), supra* note 185 at para 102.
“inherent rights” approach of the European Court.\textsuperscript{195} In an argument prioritizing the human person, the Inter-American Court decided that Peru arbitrarily changed the amount of the pensions that the five claimants have been receiving and, consequently, breached Article 21 of the American Convention.\textsuperscript{196}

Moreover, the representatives of the victims and their next of kin argued that the concerned state had breached Article 8 of the American Convention.\textsuperscript{197} However, the Inter-American Commission, in its petition to the Court, did not find a violation of Article 8 and later added that the “proceeding before the Court should be circumscribed to the limits of the report on merits and the application filed before the Court”,\textsuperscript{198} that is, the Court should be circumscribed by the scope initially set in the petition submitted by the Inter-American Commission. There was a difference of opinion between the Inter-American Commission and the individuals with \textit{locus standi} (participatory rights) in this case.\textsuperscript{199} After explaining that supervening facts may be forwarded to the Court at any stage of the proceedings (before a final judgment),\textsuperscript{200} the Inter-American Court asserted that:

\begin{quote}
Regarding the incorporation of rights other than those included in the application filed by the Commission, the Court considers that the petitioners may invoke such rights. They are the \textbf{holders of all the rights embodied in the American Convention} and, if this were not admissible, it would be an undue restriction of their condition of \textbf{subjects of international human rights law}. It is understood that the foregoing, with regard to other rights, refers to facts that are already contained in the application.\textsuperscript{201}
\end{quote}

\begin{flushleft}
\textsuperscript{195} See above.  \\
\textsuperscript{196} \textit{Ibid.} at para 121. The Inter-American Court also decided that Peru breached Articles 1 (1) and 2 of the American Convention (\textit{ibid.} at para 168).  \\
\textsuperscript{197} \textit{Ibid.} at para 149.  \\
\textsuperscript{198} \textit{Ibid.} at para 150 a.  \\
\textsuperscript{199} \textit{Ibid.} at para 152.  \\
\textsuperscript{200} \textit{Ibid.} at para 154.  \\
\textsuperscript{201} \textit{Ibid.} at para 155.
\end{flushleft}
Although the Court avoided a ruling on a possible violation of Article 8 of the American Convention based on “insufficient evidence”, it asserted that it could, based on the principle of *iura novit curia*, examine the breach of articles of the American Convention that were “not included in the briefs of application; requests, arguments and evidence, and answer to the application”.\(^{202}\) Furthermore, the Inter-American Court acknowledged the individual legal personality under international human rights law, that is, the human person as bearers of “all the rights” enshrined in the Convention and with international capacity.\(^{203}\)

In my view, the recognition of this legal personality\(^ {204}\) is a core aspect to the Inter-American Court’s individual-centric case law, which closely follows that of the European. The individual-centric system of international human rights law basically means that individuals as a source and end of law must be taken under consideration by judges and the international community.\(^ {205}\) International human rights law is, to a large extent, victim-oriented, that is, it must acknowledge the suffering of the victims who are usually in situations of great distress and adversity.\(^ {206}\)

In the case called *Street Children*, the Inter-American Court considered the issue of abandoned children and their access to justice.\(^ {207}\) There is one generic provision in the American Convention, Article 19, which establishes that every minor “has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the

\(^{202}\) *Ibid.* at para 156.


\(^{204}\) See *Case of the Five Pensioners (Peru)* (2003), Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 98, Concurring Opinion of Judge Cançado Trindade, at para 16.

\(^{205}\) See Chapters III and IV.


\(^{207}\) *Case of the “Street Children”* (Villagrán-Morales et al) *v Guatemala* (1999), Merits, Inter-Am Ct HR (Ser C) No 63.
The Inter-American Court, based on an interpretation prioritizing the human person, sought to establish the protection of children as one of the main aspects of the American Convention. In the Case of Chitay Nech et al v Guatemala the Court affirmed that both the American Convention and the Convention on the Rights of the Child are part of the “international corpus juris of protection of children”. Furthermore, it had established that the content and scope of the obligations deriving from Article 19 of the American Convention are determined in light of the rules of the Convention on the Rights of the Child.

In Street Children, the Inter-American Commission asserted that two minors, Henry Contreras and Federico Túnchez were abducted, tortured and murdered. Furthermore, another minor, Anstraum Morales, was killed. The Commission also affirmed that Guatemala failed to appropriately deal with the violations and to provide access to justice for the victims’ families. The Inter-American Court analyzed the alleged breach of the right to life enshrined in Article 4 of the American Convention. It took into consideration the Commission’s argument that the “street children” were victims of different types of persecution, which includes threats,

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208 American Convention on Human Rights, supra note 8 at Article 19. Apart from this specific provision, the Convention crystalizes on Article 12 that “[p]arents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own conviction”; on Article 17 that in the case of a dissolution of a marriage a “provision shall be made for the necessary protection of any children solely on the basis of their own best interests” and the “law shall recognize equal rights for children born out of wedlock and those born in wedlock”; and on Article 13 that “public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence” (ibid. at Articles 12 (4), 17 (4) (5), and 13 (4)).


210 Case of Chitay Nech et al (Guatemala) (2010), Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 212, at para 165.

211 Ibid.

212 Julio Roberto Caal Sandoval and Jovito Josué Juárez Cifuentes.

213 Case of the “Street Children”, supra note 207 at paras 2 and 3.

214 Ibid.

215 Ibid. at para 2.

216 American Convention on Human Rights, supra note 8 at Article 4. Before, The Inter-American Court decided that Guatemala breached Article 7 of the American Convention due to the abduction and illegal detention of Henry Giovanni Contreras, Federico Clemente Figueroa Túnchez, Julio Roberto Caal Sandoval and Jovito Josué Juárez Cifuentes by state agents (ibid. at paras 122 and 128).
harassment, torture and murder.\textsuperscript{217} The concerned country placed these individuals in a state of vulnerability by not investigating and punishing those state agents responsible for the breaches and, consequently, “allowed, and even encouraged, the continuation of these violations”.\textsuperscript{218} The Court, in an individual-centered view, held that the violations of this right by state agents are attributed to the state itself and, consequently, after mentioning the Human Rights Committee, acknowledged that Guatemala indeed breached Article 4 of the American Convention.\textsuperscript{219}

In this same case, the Inter-American Commission affirmed that Guatemala breached Article 5 of the American Convention, that is, that state agents subjected the alleged victims to “torture or to cruel, inhuman, or degrading punishment or treatment”\textsuperscript{220} in violation of their right to “physical, mental, and moral integrity”.\textsuperscript{221} The Court addressed the question whether the victims were subjected to torture and degrading treatment and whether their mothers also faced similar violations. It pointed out the stark evidence that state agents violated the physical integrity of the victims and that, before they were killed, they faced of both ill treatment and physical and psychological torture.\textsuperscript{222} The Inter-American Court, following the jurisprudence of its European counterpart, held that even if there is no clear violation of Article 5 of the American Convention, an effectively real and imminent threat can by itself amount to a breach of rights.\textsuperscript{223}

Furthermore, the Inter-American Court extended the notion of victims. Based on the case law of its European counterpart and the Human Rights Committee, the Inter-American Court asserted that the gravity of the ill-treatment of the mothers’ offspring and the lack of official

\textsuperscript{217} \textit{Case of the “Street Children”}, supra note 207 at para 139.
\textsuperscript{218} \textit{Ibid.}
\textsuperscript{219} \textit{Ibid.} at paras 143-147.
\textsuperscript{220} \textit{American Convention on Human Rights}, supra note 8 at Article 5(2).
\textsuperscript{221} \textit{Ibid.} at Article 5(1).
\textsuperscript{222} \textit{Case of the “Street Children”}, supra note 207 at para 157. The Court also reminded that the youths were clandestinely retained for between 10 and 21 hours (\textit{Ibid.} at para 162).
\textsuperscript{223} \textit{Ibid.} at para 165 and 170.
information regarding their whereabouts can amount to a violation of rights in itself.\textsuperscript{224} Furthermore, the Court extended the interpretation of the expression “street children” to include “the five victims in this case, who lived on the streets”.\textsuperscript{225} The Inter-American Court followed an “evolutive interpretation”\textsuperscript{226} largely based on the Convention on the Rights of the Child.\textsuperscript{227}

Furthermore, extensively interpreting its adjudicative role, the Inter-American Court held that Guatemala breached the Inter-American Convention to Prevent and Punish Torture.\textsuperscript{228} This regional court was envisaged to, in contentious cases, interpret and apply the American Convention on Human Rights.\textsuperscript{229} This rule flows from the Convention itself when it establishes that “[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it”.\textsuperscript{230} However, the Inter-American Court extended its powers of adjudication affirming that it:

[C]onsiders that it should refer to its own competence to interpret and apply the Convention against Torture… the drafters of the Convention against Torture decided not to include in it an article that made express and exclusive reference to the Inter-American Court… What was considered important was to attribute the competence for applying the Convention against Torture to an international organ, whether this was a commission, a committee, an existing tribunal or one that would be created in the future. In the instant case, referred to the Court by the Inter-American Commission, it corresponds to this Court to exercise the said jurisdiction.\textsuperscript{231}

\textsuperscript{224} Ibid. at para 176-177.
\textsuperscript{225} Ibid at para 188.
\textsuperscript{226} Ibid. at para 192.
\textsuperscript{227} Ibid. at paras 194-195. See also Convention on the Rights of the Child, supra note 209 at Articles 2, 3, 6, 20, 27 and 37. Based on this reasoning, the Inter-American Court interpreted Articles 1.1, 8 and 19 of the American Convention (Case of the “Street Children”, supra note 207 at paras 198, 222 and 233).
\textsuperscript{228} Case of the “Street Children”, supra note 207 at 252.
\textsuperscript{229} See Mazzuoli, supra note 149 at 935-937. See also Thomas Buergenthal, “The Inter-American Court of Human Rights: Towards Establishing an Effective Regional Contentious Jurisdiction” (1990) 13 B C Int’l & Comp L Rev 127 at 134-135.
\textsuperscript{230} American Convention on Human Rights, supra note 8 at Article 62 (3).
\textsuperscript{231} Case of the “Street Children”, supra note 207 at paras 247-248.
The Inter-American Convention to Prevent and Punish Torture did not explicitly grant jurisdiction to the Inter-American Court.\textsuperscript{232} There is only one provision establishing that when “all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State”.\textsuperscript{233} The Inter-American Court of Human Rights, in an evolutive and individual-centered interpretation, extended its jurisdictional powers to better protect the victims in the specific case. There was not an express written instrument submitted by Guatemala acknowledging the extension of the adjudicative powers of the Inter-American Court. However, this absence of express consent did not hinder the extension of adjudicative competence following a Roman-based interpretation of international law.

Furthermore, the Inter-American Court 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.\textsuperscript{234} This approach was possible based on what the Court calls “pro homine principle”. Usually based on Article 29, this principle informs that the interpretation and application of the American Convention should follow an extensive and evolutive approach in order to render decisions that

\textsuperscript{232} See Inter-American Convention to Prevent and Punish Torture, 12 September 1987, OAS Treaty Series No 67.
\textsuperscript{233} Ibid. at Article 8.
\textsuperscript{234} See generally Case of Aloeboetoe (Suriname), supra 174; 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 Sawhoyamaxa 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; Case of Case of Chitay, supra note 210; Case of Norín Catrímán et al. (Leaders, members and activist of the Mapuche Indigenous People) (Chile) (2014) Inter-Am Ct HR (Ser C) No 279. See also American Convention on Human Rights, supra note 8.
could better protect the human person. This individual-centered and Roman-based 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.

In *Mayagna (Sumo) Awas Tingni Community*, the Inter-American Commission asserted that Nicaragua had failed to demarcate the communal lands of the Awas Tingni Community and to adopt any effective measure to secure the property rights of the Community to its ancestral lands and natural resources. The notion of communal lands, which is vital to the protection of indigenous rights, is not expressly spelled out in the American Convention, which mainly protects civil and political rights.

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235 In the words of the Court: “In its prior decisions, the Court has resorted to Article 29 of the Convention in three diverse instances. Firstly, the Court has referred to the “Restrictions Regarding Interpretation” of Article 29 to define the content of certain provisions of the Convention. In this regard, subparagraph (a) has been used to define the scope of the restrictions to the guarantees established in the Convention. Similarly, pursuant to subparagraph (b) of the Article, the Court has construed the guarantees contained in the Convention in accordance with the standards established in other international instruments and domestic laws. Furthermore, subparagraph (c) has been used to construe conventional rights in accordance with the rights that result from representative democracy as a form of government. Secondly, Article 29 has been used to define construction criteria, such as the principle of “evolving interpretation” of human right treaties, which is “consistent with general interpretation rules” contained in such Article. Furthermore, the principle of “application of the most favorable rule for protection of human rights” has been developed in connection with Article 29(b) and the prohibition of depleting the main content of rights as a result of Article 29(a). Thirdly, the Court resorted to Article 29 to determine the scope of its advisory jurisdiction. In this regard, it has been noted that, in accordance with Article 29(d), “in interpreting the Convention in the exercise of its advisory jurisdiction, the Court may have to interpret the [American] Declaration [of the Rights and Duties of Man].” Furthermore, the Court has held that “to exclude, a priori, from its advisory jurisdiction international human rights treaties that are binding on American States would weaken the full guarantee of the rights proclaimed in those treaties and, in turn, conflict with the rules enunciated in Article 29 (b) of the Convention” (Case of Apitz Barbera et al ("First Court of Administrative Disputes") v Venezuela (2008) Inter-Am Ct HR (Ser C) No 182, at paras 217-219).

236 See supra note 235.

237 *Case of Mayagna (Sumo) Awas Tingni Community*, supra note 234.

238 Ibid. at para 2.

Following a Roman reasoning, the Inter-American Court held that indigenous peoples’ customary law must be taken under especial consideration. The Inter-American Court reached the conclusion that, due to customary practices, possession of the land “should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration”. Grounding their reasoning on Article 29 of the American Convention, it extended the understanding of the right to property enshrined in this human rights treaty to cover the protection of communal property and the recognition of the close ties of indigenous peoples with their land.

Following the evolutive interpretation unconsciously rooted in the Roman jus gentium, the Inter-American Court decided that the right to property enshrined in Article 21 “includes, among others, the rights of members of the indigenous communities within the framework of communal property”. In this aforementioned case, the Inter-American Court took into account that indigenous peoples have a communitarian tradition, that is, the ownership of the land is not centered on an individual person, but rather on the group and its community. This is a material and spiritual connection to the land in a way that it becomes part of “the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival”. The Inter-American Court thus decided that Nicaragua must adopt the measures necessary to
establish an effective mechanism for delimitation, demarcation and titling of Awas Tingni’s property taking into consideration their customary laws, values and customs.\(^{247}\)

In the case of *Yakye Indigenous Community*, the Inter-American Commission affirmed that Paraguay had failed to ensure the ancestral property rights of the Yakye Axa Indigenous Community and this situation has rendered impossible for the Community to own and possess their territory, which placed them in a vulnerable situation in terms of food, medical and public health care.\(^{248}\) As a counter-argument to the Commission, Paraguay affirmed that “[d]omestic legislation does not encompass a means to acquire the right to property based on a historical right”.\(^{249}\)

The Inter-American Court, by reference to Article 29 of the American Convention, Article 14(3) of the ILO Convention No. 169\(^{250}\) and Article 31 of the Vienna Convention of the Law of Treaties,\(^{251}\) extended the meaning of property rights - Article 21 of the American Convention - to acknowledge the right to communal property of ancestral lands for the indigenous peoples, including the preservation of their cultural identity, its transmission to future generations, and the state duty to assure the full effectiveness of this right.\(^{252}\)

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\(^{247}\) *Ibid.* at 164.

\(^{248}\) *Case of Yakye Indigenous Community*, *supra* note 234 at 2 para 2. See also Cançado Trindade, “The Right to Cultural Identity”, *supra* note 239 at 488-490.

\(^{249}\) *Ibid.* at para 94. Furthermore, this South American country added that “while there is a generic recognition of the traditional ownership right of indigenous peoples to their land[,] it is necessary for them to actually possess it and live as a community on that land” (*ibid.*).

\(^{250}\) See *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, *supra* note 179.

\(^{251}\) This provision spells out that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. See *Vienna Convention on the Law of Treaties*, *supra* note 30 at Article 31 (1).

\(^{252}\) *Yakye Indigenous Community (Paraguay)*, *supra* note 234 at paras 124 and 126. The Inter-American Court also mentioned Article 13 of ILO Convention No. 169 which spells out that states must respect “the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship”. Based on this reasoning, the Court concluded that Article 21 of the American Convention safeguards the close ties of indigenous peoples with their traditional lands and the natural resources associated with the indigenous culture, which includes the components derived from them (*ibid.* at paras 136 and 137).
reasoning followed the footsteps of the European Court of Human Rights, asserting that treaties are living instruments and their interpretation must go hand in hand with the evolution of international law and with current living conditions.253 According to the Court, the ILO Convention No. 169 could “shed light on the content and scope of Article 21 of the American Convention”254 and, applying this criteria, “the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations”.255

The jurisprudence of the Inter-American Court acknowledges two rights embodied in Article 21. First, there is the traditional view of the individual right to private property. Furthermore, this article enshrines the right of indigenous communities to their territory and natural resources in accordance with the indigenous culture, customs and spiritual life. These two views, however, do not conflict. In the individual-centered interpretation of the American Convention, whenever a conflict emerges between the territorial interests of private individuals (or a state) and those of indigenous communities, the latter will not necessarily prevail over the former.256

However, when states fail to adopt measures to return the traditional land and communal resources to indigenous communities, the compensation granted must not be solely guided by a state’s discretionary criteria, but rather must be based on a consensus with the indigenous peoples involved, in accordance with their own mechanisms of consultation, values, customs and customary laws.257 The Inter-American Court adopted this human-centered and

256 *Ibid.* at 149.
Roman-based reasoning to decide that Paraguay violated Article 21 of the American Convention in the *Case of Yakye Indigenous Community.* Moreover, the Court referred to exogenous instruments to decide that indigenous peoples can be in a vulnerable situation if the access to their ancestral lands are threatened and, consequently, they are not able to obtain food and clean water.

In case of *Sawhoyamaxa Indigenous Community,* the Inter-American Court, following an extensive interpretation, decided that the close ties indigenous communities have to their traditional lands, including their natural resources and incorporeal elements, "must be secured" under Article 21 of the American Convention. Based on “the evolution of the Inter-American system”, the Court asserted that this close relation with their traditional lands and natural resources exist not only because they represent their main means of survival, but also because they “form part of their worldview, of their religiousness, and consequently, of their cultural identity”.

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258 Ibid. at 149-151.
260 *Case of Yakye Indigenous Community,* supra note 234 at para 167. Moreover, among other orders, the Court decided that Paraguay must identify the traditional territory of the members of the Yakye Axa Indigenous Community and grant it to them free of cost; must take the necessary steps to secure an effective exercise of the right to property of the members of the indigenous community; must pay pecuniary damages and costs and expenses; and must conduct a public act of acknowledgment of its responsibility (ibid. at 104-105).
261 The Inter-American Commission filed a complaint affirming that Paraguay failed to ensure the ancestral property rights of the Sawhoyamaxa Community and its members. See *Case of Sawhoyamaxa Indigenous Community (Paraguay),* supra note 234 at para 2.
262 The regional court analyzed Article 21 of the Convention in the light of Convention No. 169 of the ILO. See *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries,* supra note 179.
263 Ibid. at para 118.
264 Ibid. at para 117
265 Ibid.
Accordingly, the Inter-American Court’s reasoning was grounded on the view that international human rights law must be interpreted and applied taking into consideration the “evolution of the Inter-American system”. However, it did not define or give the general characteristics of this evolution nor did the Court seek to provide a historical link, that is to say, did not state whether this view is new or connected to previous legal reasoning within international law history. However, it is possible to conclude that the spirit of the American Convention is human-centered. Cançado Trindade affirmed in his Separate Opinion that:

The instant case of the Sawhoyamaxa Indigenous Community, preceded by the case of the Indigenous Community Yakye Axa, are inscribed along the lines of the emancipation of human beings vis-à-vis his own State so that they may lay claim to the rights inherent to them that, furthermore precede and supersede such State.... Something has actually changed in the world, and in this particular matter, for the better.266

The current inter-American human rights system, its spirit, is human-centered. Like its European counterpart, it is linked to the vision of the Roman jurists and magistrates when they crystalized their jus gentium. The inter-American human rights law is clearly focused on the human person.267 Its pro homine principle seeks to apply the most favourable norm to the human person in the light of a specific case and allow the extensive, teleological, application of treaties in order to achieve this goal, which includes the application of domestic law or different international law instruments.268 It crystallizes the human-centrality within a Roman law

266 Case of Sawhoyamaxa Indigenous Community (Paraguay), Separate Opinion of Judge Cançado Trindade (2006) Inter-Am Ct HR (Ser C) No 146, at paras 50-51.
framework adapted to the circumstances and current legal developments of the Inter-American human rights system.

The *pro homine* principle of the Inter-American Court is connected to the object and purpose of human rights treaties. 269 This teleological interpretation informs that human rights address the human person. 270 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 and, conversely, must be restrictively interpreted when they limit protected rights. 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. 271

The Inter-American Court adopts this *pro homine* principle in conjunction with the evolutive interpretation to reach an objective similar to that of the European Court, that is, to protect the human person as the source and end of law. 272 The Inter-American Court from the onset of its interpretation of Article 29 followed the view that “the rule most favourable to the

Mexico, after the 2011 constitutional amendment, the *pro homine* principle is expressly mentioned in body the Constitution and is now part of the legal hermeneutics in human rights (see Mexico, Cámara de Diputados, Leyes Federales de México: Constitución Política [Constitution], available at: <http://www.diputados.gob.mx/LeyesBiblio/htm/1.htm> Accessed on 02 September 2014).

269 Montalvo, supra note 158 at 290.

270 Salvioli, supra note 159 at 8-9.

271 See Urquiaga, supra note 268. See also Levent Gonenc & Selin Esen, “The Problem of the Application of Less Protective International Agreements in Domestic Legal Systems: Article 90 of the Turkish Constitution” (2006) 8 European Journal Law Reform 485 at 494. Furthermore, the *pro homine* principle finds support in a number of municipal law principles as, for example, the *favor debitoris* (in favor of the debtor), *in dubio pro reo* (in case of doubt, favor the accused), and the *in dubio pro operario* (in case of doubt, favor the employee). See H. Henderson, “Los Tratados Internacionales de Derechos Humanos en el Orden Interna: La Importancia del Principio Pro Homine” [International Human Rights Treaties in Domestic Law: the Importance of the Pro Homine Principle], 39 Revista IIDH 71 at 91-92.

272 See Magnus Killander, "Interpreting Regional Human Rights Treaties (2004) 1 SUR - International Journal On Human Rights 145 at 163. Killander affirms that “[i]n interpreting the provisions of international human rights treaties, regional tribunals look to the text in context and in light of the object and purpose: The effective protection of human rights. This has led the tribunals to stretch the text of the provisions of the treaties in particular in the development of positive obligations of states” (ibid).
individual must prevail”.\textsuperscript{273} This individual-centered approach advances the protection of the human person beyond the initial set of rights spelled out by the American Convention in order to meet social needs and aspirations and to better protect human dignity within a system that recognizes the Roman law aspects of international law.\textsuperscript{274}

As previously mentioned, the Roman law of nations is rooted in the notion of universality, on the centrality of the human person, on the work of jurist and adjudication bodies and on the view that this legal system should provide guidelines to domestic law. This is precisely the approach of the Inter-American Court. Its \textit{pro homine} principle is the acknowledgment of the centrality of the human person in face of states. Furthermore, the Court seeks to demonstrate the university of this view by linking the \textit{pro homine} principle with both the American Convention\textsuperscript{275} and the Vienna Convention on the Law of Treaties.\textsuperscript{276} Moreover, the Court’s decision seeks to impact and change domestic laws and policies concerning the protection of the human person.

The Roman law of nations is not exactly the same as international human rights law or international law in general. However, the spirit, that is to say, its framework and object and purpose, are deeply embedded in international human rights. They rescue of certain values that had been long forgotten and buried with the development of legal positivism. Even during the legal renaissance when academics and lawyers read and applied Roman law, international law was still only marginally focused on certain Roman values. Perhaps the priority of establishing a nation-state system or the lack of sources of Roman law impaired a more Roman-oriented

\begin{itemize}
\item \textsuperscript{273} \textit{Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), supra} note 155 at para 52.
\item \textsuperscript{274} Lixinski, \textit{supra} note 160 at 603.
\item \textsuperscript{275} \textit{American Convention on Human Rights, supra} note 8 at Article 29.
\item \textsuperscript{276} \textit{Vienna Convention on the Law of Treaties, supra} note 30 at Article 31.
\end{itemize}
international law (which was though still influential through the works of notables such as Vitoria, Suarez and Grotius).277

The current framework, interpretation, application, purpose and objective of international law are thus traditionally Roman. Both European and Inter-American courts unconsciously follow this view. The evolution of international human rights law is not diversification or separation from the old values envisaged by Roman law. On the contrary, international law of human rights moves closer to the ideals and theoretical framework of the Roman law of nations to the point sharing the same spirit.

6.4. The Roman Law of Nations of International Human Rights Law: Brief Considerations of a New\Old System of International Law in a Global World

International law is not a recent creation. It is not even a sole European enterprise.278 Ancient civilizations from different places and backgrounds engaged in relations with each other and thus needed a system of practices, customs and rules that could make these interactions possible.279 However, one could argue that international law is not a simple myriad of practices set without general principles and philosophical justifications. Even if one accepts that international law is much more, and indeed it is, than a group of practices concerning international relations without a substantial theoretical background, its birthplace is still not European.

277 See Chapters III and IV.
278 See Chapter IV.
If international law comprises general principles rooted on a philosophical framework instead of a mere myriad of state practices, then it is possible to point Ancient China as its birthplace.²⁸⁰ This Confucian-oriented view of the law of nations was based on four key elements.²⁸¹ The first element emphasizes deference and hierarchy (of children to parents, of younger to older siblings and of society as a whole to the ruler, for example).²⁸² The second element roots Confucian international law within the notion of reciprocal duties coupled with a sense of nobleness.²⁸³ The third element informs that this duty system contributes to a harmonious and well-ordered society within which individuals have specific roles to play.²⁸⁴ The fourth element teaches that benevolence (including that of the ruler) and virtue are fundamental aspects in inspiring and educating society, including the subjects of the sovereign.²⁸⁵ As a consequence of these principles, the Confucian international law is grounded in the notion of pacifism instead of advocating war and conquest (especially due to its noninterventionism, although tributary principles applied).²⁸⁶

Commenting the law of nations of Mesopotamia, Ancient India and Ancient China, Neff concludes that “considering the Chinese experience generally, there can be no doubt, of the three cultural areas under consideration, it made the greatest advances in the direction of international

²⁸¹ Neff, supra note 280 at 21-22.
²⁸² Ibid. at 21.
²⁸³ Ibid.
²⁸⁴ Ibid. at 21-22.
²⁸⁵ Ibid. at 22.
²⁸⁶ Ibid. at 22-23. On the tributary system see Yasuaki Onuma, "When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective" (2000) 2 Journal of the History of International Law 1. For an opinion on the contrary, who believes that the Chinese international system was a little more than “patterns of convenience in a power struggle” see Richard L. Walker, The Multi-State System of Ancient China (Hamden: Shoe String Press, 1953) at 91-95.
However, although China, Greece and other civilizations had aspects and rules of international law, they were largely limited in scope. One could mention, for example, the Greek view on war. Differences in treatments between Greeks and non-Greeks were striking. War between Greeks were regarded as “fundamentally different” from that between Greeks and non-Greeks which could lead to views that “only conflicts with non-Greeks should be regarded as true war” as Greeks were “natural friends.”

International law, therefore, was limited in scope. It was barred by religious, ethnic, cultural or geographical differences. Although certain aspects of the Chinese international law reached beyond the boundaries of what would constitute its Imperial geography, there was arguably not a true universal view of law and even less of equality. Before the Romans, one could affirm two general aspects. First, there was an international law before the European Peace of Westphalia and the birth of the modern state system. Second, this international system was centered in civilizations, that is, they concerned and were applied to different civilizations and their interactions.

However, calls for universality were missing. Civilizations needed to leap beyond cultural, religious and geographic constraints. Language was a practical barrier in advocating universal international law. Moreover, religion placed another barrier to a universal legal rule. Religious impairments on suggesting the existence of international law arguably flowed from the view that legal obligations were intrinsically connected to a civilization’s deities, which

\[\text{\textsuperscript{287}}\text{ Neff, supra note 280 at 24.}\]
\[\text{\textsuperscript{288}}\text{ See above. See also Coleman Phillipson, The International Law and Custom of Ancient Greece and Rome (London: Macmillan and Co. Limited, 1911).}\]
\[\text{\textsuperscript{289}}\text{ Neff, supra note 280 at 27.}\]
\[\text{\textsuperscript{290}}\text{ See Onuma, supra note 286.}\]
\[\text{\textsuperscript{291}}\text{ Neff, supra note 280 at 34.}\]
\[\text{\textsuperscript{292}}\text{ See Chapter V.}\]
removed the option of universalist arguments. Neff recounts that Aristotle “famously contending that barbarians, as inferior beings, were naturally fitted to be servants, or slaves, of the Greeks”. In China, with the unification of the Warring States in 221BC under Chin, the view of equal footing between states or civilizations was not a welcoming concept.

The Romans further centered the law of nations on the human person and, moving away from previous civilizations, placed it on a universal scale. International law as a body of universal legal rules flowing from and applying to all humankind is a Roman development. Thus, I agree and disagree with Neff’s view of ancient international law in two different but interconnected points. I agree with him that both the ancient Chinese and the Romans contributed to the establishment of a universal international law. The Chinese universal law of nations was rooted in the notion of a benevolent and universal ruler. Following a different view, the Romans grounded their law of nations in a universal rule of law. However, Neff forgets to mention one important point: both laws of nations, as other views of international law in the ancient world, were deeply connected to the idea of civilizations (collective) and the human person (singularly considered). Furthermore, he asserts, following the view of other academics that the Roman law of nations “certainly did not correspond to what would later be called international law”.

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293 Neff, supra note 280 at 34.
294 Ibid. at 35.
295 Ibid. at 39. There were, however, cases that were not centered on the tributary system. The Chinese government, for example, concluded treaties with Tibet in 783AD and then in 822-23 arguably based on full equality. One could also mention the “states of equal standing” or kuo, especially dating from the period of Sung Dynasty (ibid. at 40).
296 See Chapter V.
297 Ibid.
298 Neff, supra note 280 at 48-49.
299 Ibid.
300 Ibid.
301 See Chapter V.
302 Neff, supra note 280 at 45.
The argument that the Roman law of nations is “certainly” not international law is implausible and not in accordance with the history of the law of nations.\textsuperscript{303} As previously explained, the Roman definition, reasoning and examples of the law of nations influenced and guided further writings on this topic for centuries after the end of the Roman Empire. Movements towards a proximity or separation from its Roman roots mark the history of the law of nations varying on the knowledge of Roman law and the theoretical view of lawyers and philosophers.

During the positivistic era of the 19\textsuperscript{th} and beginning of the 20\textsuperscript{th} centuries, international law was stripped of its Roman characteristics and applied as a law between sovereign states. Taking this definition as the authoritative interpretation of international law, it is possible to say that Roman law had no or almost no connection to this area of law. However, a more individual-centered, universalist and pluralist system of law grounded on equality tends to approximate the Roman view of the law of nations. Furthermore, the geographical scope of the Roman Empire and its influence on both western and eastern civilizations place its legal system, including the law of nations, as a major influential force throughout the world. Gaius’s definition of \textit{jus gentium} as the law “that natural reason establishes among all mankind” and “followed by all peoples alike”\textsuperscript{304} codified in the \textit{Corpus Juris Civilis}\textsuperscript{305} is the yardstick for all subsequent writings in the law of nations until its complete demise with the advent of voluntarist positivism.\textsuperscript{306}

I believe there is a rescue of this Roman concept of \textit{jus gentium} in the modern structure of international law, especially in international human rights. As previously pointed out, the

\textsuperscript{303} See Chapter V.
\textsuperscript{304} G 1.2.1 (translated by Francis de Zulueta)
\textsuperscript{305} Inst 1.2.1
\textsuperscript{306} See Chapter V.
doctrinal and historical developments of international law of human rights are in harmony with the structure of the Roman law of nations. These developments later extrapolated the doctrinal and historical aspects of international law and influenced the decision-making of international human rights courts, notably the European Court of Human Rights and the Inter-American Court of Human Rights.

These human rights courts seek to establish changes within domestic state systems but grounded in more universal legal elements centered on the human person. These courts face questions and violations that go beyond the mere wording of their human rights treaties. In these hard-cases, that is, cases without a clear answer, the courts’ reasoning and adjudicative approaches are strongly based on these above-mentioned Roman elements. These courts do not explicitly refer to Roman law or Roman writers but they implicitly apply Roman concepts and understanding of the law of nations, which match the historical and doctrinal developments of international human rights.

The Inter-American and European courts do not directly apply Roman law in their cases. As provided in their constitutive treaties, these courts seek to safeguard the application of their human rights treaties and secure an effective respect of human rights within their geographical regions. However, courts deal with a number of challenging cases as, for example, indigenous

307 As previously mentioned, the Roman law of nations was thus grounded in four basic premises: the human person, universality, cooperative development through legal writings and decisions from adjudicative bodies and the crystallization of guidelines to change domestic law.
308 Article 19 of the European Convention provides that “To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as “the Court”. It shall function on a permanent basis”. Article 33 of the American Convention establishes that “[t]he following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention: a. the Inter-American Commission on Human Rights, referred to as European Convention on Human Rights European Convention on Human Rights European Convention on Human Rights ‘The Commission,’ and b. the Inter-American Court of Human Rights, referred to as ‘The Court’”. See European Convention on Human Rights, supra note 19 at Article 19; American Convention on Human Rights, supra note 8 at Article 33.
rights, massacres, human trafficking and prisoners’ rights, that require a dynamic view of international law that goes beyond the textual understanding of their treaties and inform the human-centered aspect of international law.

The European Court and the Inter-American Court constantly deal with different issues affecting different continents. However, they share some core points.\textsuperscript{309} The first core point is the notion of living instrument, that is, a teleological interpretation of human rights based on current developments of the law of nations.\textsuperscript{310} The second point is universalism, that is, human rights is a universal standard of protection, which leads to constant reference of regional bodies to universal human rights treaties as the Vienna Convention on the Law of Treaties.\textsuperscript{311} The third element is juridical dialogue as adjudication bodies constantly reference each other in a cross-fertilization process.\textsuperscript{312}

Cançado Trindade provides a longer and non-exhaustive list of coordination points between both regional human rights courts. Both Courts have acknowledged that human rights treaties are different than “multilateral treaties of the traditional type” being “endowed with a special nature”.\textsuperscript{313} Furthermore, human rights treaties possess normative character of public order (ordre public);\textsuperscript{314} are “autonomously interpreted”;\textsuperscript{315} need to ensure an “effective protection of the guaranteed rights” (effet utile);\textsuperscript{316} their obligations have an objective character; and that permissible restrictions of rights, that is, limitations and derogations, are restrictively

\begin{itemize}
\item \textsuperscript{309} On the common aspects of both courts see Antônio Augusto Cançado Trindade, “The Merits of Coordination of International Courts on Human Rights” (2004) 2 J Int’l Crim Just 309 [Cançado Trindade, “The Merits”]; and Magnus Killander, supra note 272 at 152.
\item \textsuperscript{310} Ibid. at 152-154.
\item \textsuperscript{311} Ibid. See also Vienna Convention on the Law of Treaties, supra note 30.
\item \textsuperscript{312} Killander, supra note 272 at 153-154.
\item \textsuperscript{313} Cançado Trindade, “The Merits”, supra note 309 at 309.
\item \textsuperscript{314} Ibid.
\item \textsuperscript{315} Ibid.
\item \textsuperscript{316} Ibid.
\end{itemize}
interpreted.\textsuperscript{317} Moreover, both human rights courts pursue an evolutionary interpretation of their Convention.\textsuperscript{318} In addition, he also points out that both Courts extended the procedural recognition of the individual legal personality granting the human person direct access to the Court or \textit{jus standi} (in the case of the European Court), or full participatory rights or \textit{locus standi} (in the case of the Inter-American Court).\textsuperscript{319}

This cross-fertilization reflects the history and changes of international law of human rights as a whole. The Roman-oriented view of international human rights doctrine and history centralized in the human-person codified in international instruments\textsuperscript{320} influenced the reasoning of human rights judges. The “traditional” 19\textsuperscript{th} century state-centered view of international law

\textsuperscript{317} \textit{Ibid.}
\textsuperscript{318} \textit{Ibid.} at 309-310.
\textsuperscript{319} \textit{Ibid.} at 310. It is possible to question whether the Inter-American Court, by not fully granting direct access to individual unduly limits the right of petition. Consequently, it could be argued the Inter-American Court is not fully aligned with the individual-centered system of international human rights. Cançado Trindade, for example, asserts that this regional court could follow the steps of its European counterpart and grant direct access to individuals. However, the European Court of Human Rights faces an increasing number of individual petitions, which could arguably obstruct the court’s work. In my view, the Inter-American Court is gradually expanding the participation of individuals and further recognizing the individual legal personality within a Roman-based approach. However, it arguably seeks to avoid the same problems now faced by the European Court. Procedural changes granting full petition access to individuals could lead to undesired effects with an overflow of petitions within a part-time working Court and possibly pushing states away from this human rights system. On the European Court and its overflow of individual petitions see Christina G. Hioureas, “Behind the Scenes of Protocol No. 14: Politics in Reforming the European Court of Human Rights” (2006) 24 Berkeley J. Int'l L. 718. On the work of the European Court see generally Philip Leach, Taking a Case to the European Court of Human Rights (New York: Oxford University Press, 2011). On state consent and the Inter-American Court see generally Gerald L. Neuman, “Import, Export, and Regional Consent in the Inter-American Court of Human Rights” (2008) 19 Eur J Int'l L 101. On changes to the Inter-American system see Dinah Shelton, “Improving Human Rights Protection: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and Inter-American Court of Human Rights” (1988) 3 Am U J Int'l L & Pol'y 323. On individual access to the Inter-American Court see Antônio Augusto Cançado Trindade, “Hacia la Consolidación de la Capacidad Jurídica Internacional de los Peticionarios en el Sistema Interamericano de Protección Derechos Humanos: Su Relevancia para la Protección Internacional de los Refugiados” [Towards the Consolidation of the Petitioner’s Legal Capacity in the Inter-American Human Rights System: Its Relevance to the Refugee Protection] (2003) 37 Revista IIDH 13; and Cançado Trindade, \textit{The Access of Individuals}, supra note 150.

\textsuperscript{320} See Chapters II and III.
could not apply to human rights cases. Human rights are not concerned with the self-interest of states but rather with the well being of the human person.\footnote{321}{See Chapter II.}

The European Court strongly relies on notions of inherent rights, \textit{effet utile} and normative characters of public order in an evolutionary interpretation focusing on universal elements of law connected to the human person. The Inter-American Court takes a similar evolutionary approach grounding it on the so-called \textit{pro homine} principle to support an interpretation and application of human rights focusing on a universal view of law centered on the human person to recognize inherent rights, the normative character of its Convention and demand an effective impact of its treaty on domestic law.

The expression used by the Inter-American Court, \textit{pro homine} principle, is a precise summary of the view held by both Courts and international human rights law in general. It is a Latin expression – which resonates the Roman influence on international law of human rights that could be roughly translated as “in favor of/for the human person”\footnote{322}{\textit{Pro} is a Latin preposition, which calls for an ablative declination. \textit{Homine} is thus the ablative declination of \textit{homo} or person. See Latin Dictionary, Search, \textit{Pro}, available at: http://www.latin-dictionary.net/search/latin/pro Accessed on 21 October 2014; Dizionario Latino, Dizionario Latino Flessione, \textit{Homine}, available at: http://www.dizionario-latino.com/dizionario-latino-flessione.php Accessed on 21 October 2014.} – and summarizes the human-centered, universalist (in regards to the human personality), extensive and effective-based approaches of international human rights law. Both regional human rights courts are, to a large extent, \textit{pro homine} courts. Buergenthal, comparing the European and Inter-American courts, asserts that the American Convention has some “quite unique” provisions, as Articles 29(c) and (d), which have no equal counterpart in the European Convention.\footnote{323}{Thomas Buergenthal, “The American and European Conventions on Human Rights: Similarities and Differences” (1981) 30 Am U L Rev 155 at 163.}
Buergenthal is only partially right. The European Convention indeed fails to provide explicit provisions establishing that it should not preclude “other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government”\textsuperscript{324} and that it should not exclude or limit “the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have”.\textsuperscript{325} However, this fact did not preclude the European Court’s \textit{effet utile} and implicit rights interpretation of the Convention because it flows from international human rights law’s framework itself. The doctrine and history of international law point to this Roman view of human rights, which is now adopted and further developed by human rights courts also in harmony with the Roman \textit{jus gentium}. The spirit (underlying elements, basis and reasoning) of the Roman law of nations is, borrowing the expression from the Inter-American Court and the other one from John Finnis,\textsuperscript{326} the \textit{pro homine} framework of international human rights law in a universal system of priority of persons.

The rescue of the Roman view in a \textit{pro homine} framework is not exclusively within the exercise of legal interpretation in treaty application. The above-mentioned cases from the European and Inter-American courts express the consequence and unconscious recognition of the Roman element of international law of human rights in general. This \textit{pro homine} (Roman based view) is more than an interpretative tool, which judges can choose or discard based on their needs and ideological or political views. The Romanization of international law of human rights undoubtedly requires the acceptance of judges in reassuring the universalism and human-centrality of international law of human rights. However, this process first required a historical

\textsuperscript{324} American Convention on Human Rights, \textit{supra} note 8 at Article 29 (c).
\textsuperscript{325} Ibid. at Article 29 (d).
\textsuperscript{326} See Chapter V for the explanation on John Finnis’s expression.
and doctrinal move towards the acceptance of the human person within the international legal system.\textsuperscript{327}

In international law’s history, even when voluntarist positivism was the prominent view, scholars and certain legal institutions sought to accommodate the international legal personality of the human person.\textsuperscript{328} After the World Wars, especially the Second War, international law of human rights began to occupy a prominent space within international law and international relations.\textsuperscript{329} International law doctrine and institutions slowly began to accommodate the human person as a central or at least important aspect of international law. This paradigm shift of international law of human rights brought it closer to the Roman understanding of the law of nations in much starker ways than in legal renaissance from the 15\textsuperscript{th} to 17\textsuperscript{th} centuries.\textsuperscript{330} The writings of the so-called “founding fathers” of international law (which they were not) strongly focused on the consolidation of a nation-state system and the organization of the European continent (and perhaps some of its colonies).\textsuperscript{331}

The Romanization of international law influenced and was complemented by the jurisprudence of human rights courts. The European and Inter-American courts are part of a legal framework (a \textit{pro homine} view) which goes beyond – although encompasses – tools of treaty interpretation. Teleological approaches of the Inter-American and European courts strongly grounded on Article 31 of the Vienna Convention of the Law of Treaties were important elements to further consolidate the Roman view of international law but were not the only ones. They are a consequence of historical and doctrinal rescues of the Roman view prioritizing the

\textsuperscript{327} See Chapter IV.
\textsuperscript{328} \textit{Ibid}.
\textsuperscript{329} See Chapters II and III.
\textsuperscript{330} See Chapters IV and V.
\textsuperscript{331} \textit{Ibid}. 
human person in substantive and procedural laws, which includes the elaboration of human rights declarations and treaties and the increasing procedural capacity of individuals before international adjudicative bodies.  

Moreover, there is no necessary conflict between the Roman priority of persons and the notion of the margin of appreciation or other divergent interpretive tools such as the plain textual interpretation of treaties. There might be an apparent conflict between the Roman law of nations and the notion of margin of appreciation. However, this conflict could only exist if one considers the pro homine Roman law of nations only as an interpretative tool.

The margin of appreciation is perhaps a problematic concept to translate. Although developed within the jurisprudential framework of the European Convention, it is now arguably extending and influencing other human rights institutions - including the Inter-American Court. Some authors ground the concept of the margin of appreciation in administrative law. Jacobs, for example, argued that the European Convention leaves a “certain area of discretion” or margin of appreciation. He based this concept on a civil law doctrine applicable to judicial review of administrative action that analyzes whether the authorities could in principle justify their actions. He further explains that the Court “must first ascertain on what grounds the national authorities acted, and then, decide whether those grounds gave them sufficient reason to believe that their action was necessary”.

332 See Chapters III and IV. See also Cançado Trindade, The Access of Individuals, supra note 150.
333 It is not the purpose of this work to discuss in the detail the margin of appreciation.
335 Ibid. at especially 3, 150-152 and 153-173.
336 Ibid. at 3.
338 Ibid.
339 Ibid. at 202.
The margin of appreciation refers to the latitude the European Convention and the Court allow to member-states when they observe this regional treaty’s provisions.\textsuperscript{340} If this margin is wide, there is an initial presumption in favour of the state practice or policy, but if it is narrow, the European Court undertakes close scrutiny.\textsuperscript{341} It is a theory of deference in an exercise similar to that of judicial review.\textsuperscript{342} On a different approach, the concept of the margin of appreciation can be divided in substantive and structural elements.\textsuperscript{343} The substantive element concerns freedoms and collective goals.\textsuperscript{344} The margin of appreciation, in a substantive perspective, justifies measures taken by the authorities because they pursue collective goals.\textsuperscript{345} Furthermore, the interference of individual rights does not amount to their violation. From a structural perspective, the margin of appreciation imposes limits on judicial review powers of international courts (which should be less comprehensive than constitutional or supreme courts).\textsuperscript{346}

A central issue concerning the margin of appreciation is to establish the basis on which human rights treaties may be effectively complied without infringing certain legitimate governmental activities.\textsuperscript{347} Much has been written on the legitimacy, scope and source of the margin of appreciation.\textsuperscript{348} It is not within the scope of this work to deeply analyze this

\textsuperscript{341} Ibid.
\textsuperscript{342} Ibid.
\textsuperscript{344} Ibid.
\textsuperscript{345} Ibid. at 84-85.
\textsuperscript{346} Ibid. at 90.
\textsuperscript{347} O'Donnell, supra note 340 at 475.
interpretative concept. Taking a different perspective, I seek to place it under the general framework of the Roman view of the law of nations based on two premises. First, the margin of appreciation is a limited concept, which usually refers to controversial matters that have no consensus within the regional system. Second, the concept of the margin of appreciation in itself does not exclude the existence of the Roman view of international law.

The European Court can, especially in politically controversial cases, compare the position of its member-states on a particular issue in order to determine the extension of an indeterminate right or to decide whether certain limitations could be considered reasonable or necessary. The European Court, thus, looks for consensus within its regional context, that is, it analyzes whether the majority of member-states takes a particular view. When there is lack of consensus, based in the Court’s assessment, it can decide to acknowledge a greater “margin of appreciation” when the state determines a course of action to take. The European Court often applies the margin of appreciation in situations concerning limitation clauses in the European Convention. Conversely, the Court tends to narrow the latitude granted by the margin of appreciation when it observes consensus in Europe. Furthermore, when the European Court


Killiander, supra note 272 at 151.

Ibid.


Killiander, supra note 272 at 151.
determines some rights as fundamental to democratic governments, it can follow a narrow margin of appreciation when interpreting and applying them.\textsuperscript{353}

Scholarly critique of the margin of appreciation is usually based on four main arguments. First, this interpretative tool opens the possibility of protecting majority rights over minority rights.\textsuperscript{354} Secondly, this tool is a restrictive interpretation method, which conflicts with the rationale of human rights conventions.\textsuperscript{355} Thirdly, it prevents the development of a coherent standard of judicial review and is thus detrimental to derogation cases.\textsuperscript{356} Finally, the margin of appreciation when extensively applied – especially in cases of public emergency – is detrimental to the protection of human rights.\textsuperscript{357}

The margin of appreciation, however, is an undeniable part of the jurisprudence of human rights courts, especially the European.\textsuperscript{358} This regional court, in \textit{Dahlab v Switzerland}, applying the margin of appreciation, decided that an Islamic primary school teacher was not permitted to wear a headscarf in class based on the impressionability of young children.\textsuperscript{359} In \textit{Vo v France}, the European Court applied the margin of appreciation to interpret the extension on Article 2 (right to life) of its Convention in a case concerning accidental abortion of a foetus by a

\textsuperscript{353} O’Donnell, \textit{supra} note 340 at 495. The wording of treaty provisions, however, can support the view that the margin of appreciation could be allowed in the case of accommodation clauses (\textit{ibid.})
\textsuperscript{355} Alexander Orakhelashvili, “Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights” (2003) 14 EJIL 529. This article, as its title suggests, focuses on the European Convention.
\textsuperscript{357} Higgins, \textit{supra} note 351.
\textsuperscript{358} Clare Ovey & Robin White, \textit{supra} note 20 at 41.
\textsuperscript{359} \textit{Dahlab v Switzerland}, No. 42393/98, [2001] V ECHR 899, at para 1 (“the law”). The Court affirms that “weighing the right of a teacher to manifest her religion against the need to protect pupils by preserving religious harmony, the Court considers that, in the circumstances of the case and having regard, above all, to the tender age of the children for whom the applicant was responsible as a representative of the State, the Geneva authorities did not exceed their margin of appreciation and that the measure they took was therefore not unreasonable” (\textit{ibid.}).
negligent doctor. In *Leyla Sahin v Turkey*, the European Court again applied the margin of appreciation to uphold the state’s restriction of headscarves.

The Inter-American Court, in an advisory opinion concerning *Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica*, asserted that conditions to grant nationality can “fall within the margin of appreciation reserved to the state as far as concerns the enactment and assessment of the requirements…upon which to base the acquisition of the new nationality… it cannot be said to be unreasonable and unjustified”. The Inter-American Commission also recognized this interpretative tool affirming that “the margin of appreciation goes hand in hand with Inter-American supervision”.

Protocol 15 seeks to include, for the first time, reference to the margin of appreciation in the preamble of the European Convention establishing that “High Contracting Parties… enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention”. The European Court, commenting this Protocol, affirmed that it preferred a more developed text to avoid “uncertainty as to its intended meaning”. Nonetheless, after the ratification of all member-states, the margin of appreciation will be part of the preamble of the European Convention.

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360 *Vo v France*, No. 53924/00, [2004] VIII ECHR 326, 40 EHRR 12, at para 82.
361 The Court affirmed that arguing that secularism “may be necessary to protect the democratic system in Turkey”. See *Leyla Sahin v Turkey*, No. 44774/98, [2004] XI ECHR 299, 41 EHRR 8, at para 14 and 122.
365 See also *Convention for the Protection of Human Rights and Fundamental Freedoms*, supra note 19 at preamble.
However, it is not possible to place the margin of appreciation on equal footing with the Roman-influenced priority of persons (or *pro homine* approach). Indeed, the margin of appreciation is a theory of deference leaving for states to decide some controversial issues surrounding the interpretation and application of human rights standards. However, it would be a troublesome conclusion to place the *pro homine* view of international human rights and the margin of appreciation on equal and opposite sides.\footnote{http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=213&CM=8&DF=&CL=ENG Accessed on 16 November 2014.} It is troublesome because human rights courts would have a schizophrenic nature if they equally apply extensive human-centered and restrictive sovereignty-based interpretations. This would be detrimental to the development and effectiveness of human rights. Nobody would know how courts would decide cases, including the court itself. Furthermore, it would impair the development of a coherent jurisprudence and the possibility of deciding hard cases without clear answers.

Although commonly applied, the margin of appreciation is a subsidiary element of human rights interpretation, which must be under the boundaries of the Roman view of the law of nations. The margin of appreciation usually concerns controversial issues with highly political ramifications that do not deeply violate individual rights. As Letsas explained, “although such measures may interfere with fundamental freedoms of the individual, such interference may not amount to a violation of his or her rights”.\footnote{367} Following a starker activist role, human rights courts could exercise a more effective judicial review and establish rigid criteria for derogation of rights or, for example, uphold claims that grant higher standard of protection allowing people to express their religious freedom in any way, including their dressing code. Furthermore,
international courts could envisage clear rules on the acquisition of nationality to complement vague provisions.

The margin of appreciation might not lead to a desirable outcome on the international protection of human rights. However, freedom of religion or the right to a nationality are protected and scrutinized under human rights courts regardless of the margin of appreciation. Furthermore, this deference theory did not impair the crystallization of the Roman view of the law of nations in the jurisprudence of international courts. The margin must be within the framework of a teleological interpretation of human rights treaties. Even in the context of the European Court, where the margin of appreciation was developed, the teleological approach, that is, reference to the object and purpose of human rights treaties “has been the most influential of the principles applied by the Court”.

The margin of appreciation is, thus, a secondary element applied when there is lack of consensus throughout the continent, when the matter discussed is highly political, or the state could regulate a certain issue without necessarily infringing individual rights. The European Court asserted that it could follow the margin of appreciation in certain cases:

“[N]otwithstanding an evolutive interpretation of the Convention, a “living instrument which must be interpreted in the light of present-day conditions” (see Tyrer v. the United Kingdom… and subsequent case-law). The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate… and, secondly, that there is no European consensus….

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369 Ovey & White, supra note 20 at 29.
Accordingly, the margin of appreciation, as a limitation to the individual-centered interpretation and application of human rights treaties, may be used when the issue concerning the protection of a certain claim is not “revolved within the majority” of states and there is no consensus. The teleological, individual-based, interpretation is the general framework followed by both the Inter-American and the European courts of human rights. This individual-centered approach is in accordance of the substantive, procedural and historical developments of international human rights law grounded in the Roman law of nations. However, in some controversial and “not resolved” situations, courts can leave the state a margin of discretion within the human-centered framework. There is thus the prevalence of the pro homine and the Roman based views.

Even if there were widespread use of the margin of appreciation, this fact would not invalidate the argument that international human rights law rescues Roman values of the law of nations. Roman jurists themselves acknowledged the limitation of its law of nations. Slavery, for example, was part of the law of nations even though, as Ulpian pointed out, individuals were free according to natural law. The Roman law of nations, rooted on equality and the human person, could not address certain inequality issues as slavery, which only started to be forbidden under the law of nations in the end of the 19th and beginning of the 20th centuries. The principles underlying the Roman law of nations were not unlimited. They worked as a theoretical framework to guide the development and implementation of the law of nations to the extent possible in light of the social, cultural and political systems.


371 See Chapters II and V.

372 On the difference between the law of nations and natural law see Chapter IV above.
The current Roman based view of international human rights law (the *pro homine* view) is, just as its Roman roots, not unlimited. Its “spirit”, that is, its framework and concept, is largely grounded on the human person, on universality, on doctrinal and jurisprudential developments and is intended to provide changes and guidelines to domestic law or *jus civile*. However, just as the Roman *jus gentium* was not a perfect natural law system, modern international human rights law is equally not perfect and face some limitations.

Modern international human rights law is limited by the voluntarist system of international law in general. States have to agree to which set of rights and duties may be enshrined in a treaty and they have to officially accept this treaty.\(^{373}\) Furthermore, individuals still do not enjoy full direct access to the Inter-American Court and they do not have any participatory rights before the International Court of Justice.\(^{374}\) Moreover, the margin of appreciation is a jurisprudential creation that can, in certain circumstances, limit the scope of the Roman view that prioritizes the human person.

These limitations, however, does not undermine the Roman rescue of the current structure of international human rights law. Its concept, historical development, jurisprudence and doctrine largely point to its Romanization within a human-centered or *pro homine* framework. During legal renaissance, lawyers and writers focused on local European issues and the emergence of modern states.\(^{375}\) Academics as Vitoria analyzed whether international law could be applied outside the scope of Christian and European nations.\(^{376}\) Universality in international law doctrine

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\(^{373}\) Although as previously explained, this state power is limited by the teleological and extensive approaches of human rights courts.

\(^{374}\) See Chapter IV and see above. See also *Statute of the International Court of Justice, supra* note 79.

\(^{375}\) See Chapter V above.

from the renaissance period to before the World Wars, mostly limited to religious groups, would probably seem odd to Roman lawyers as Cicero or Gaius.

Centuries after, in the pre-Second World War period of the 20th century, international lawyers still questioned whether international law could be applied to non-Christian nations. Oppenheim affirmed that there are states that “are not, or not full, members of that family, because their civilisation, if any, does not enable them and their subjects to act in conformity with the principles of International Law”. 377 Although asserting that there are no differences in the “Family of Nations” between Christian and non-Christian states, his list of non-Christian states part of international law was extremely short. It only included “the Mahometan State of Turkey and the Buddhistic state of Japan”. 378 He added that “[b]oubtful is the position of all non-Christian States except Turkey and Japan, such as China, Morocco, Siam, Persia, and further Abyssinia”. 379 He justified this view saying that “[t]heir civilisation is essentially so different from that of the Christian States that international intercourse with them of the same kind as between Christian States has been hitherto impossible”. 380

This view would not be in accordance with the Roman law of nations, as it was developed precisely to accommodate different nations and individuals from different backgrounds. 381 Furthermore, with the prominence of voluntarist positivism, the human person was completely excluded of the international legal system. 382 Although scholars argued in favour of the human person as a subject of international law, this status only started to

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378 Ibid. at 154.
379 Ibid. at 155.
380 Ibid.
381 See Chapter V.
382 Oppenheim, *supra* note 377 at 362. See also Chapters IV and V.
consolidate after the Second World War.\textsuperscript{383} International human rights law concerns with the protection and well being of the human person. To that end, legal instruments, writers and adjudication systems crystalize an array of doctrines, rights and duties forming a legal framework that resemble that of the Romans in a modern perspective.

International law of human rights today, as international law during the Roman period, seeks to prioritize the human person, as subjects with rights, duties, capacity and interests, within a universal system that binds everyone and flows from humankind as a whole. International human rights law prioritizes persons. In other words, although in a different historical, legal, economical, social and political contexts, international human rights law is in theory and method part of a truly \textit{corpus juris gentium romani} (body of the Roman law of nations). International human rights law is a universal law flowing from the human personality grounded on the natural reason of all humankind. It is, thus, a universal law flowing from and addressed to the human person as the source and end of law, as its objective and purpose, that is, as the spirit of international human rights.

\textsuperscript{383} See Chapters III and IV above.
Chapter VII

Conclusion

International law, as a set of rules that guides relations between different civilizations and states, might be as old as historical records go. Ancient civilizations, for example, dealt with other civilizations, sent ambassadors, concluded peace or trade treaties, set rules to guide warfare and developed rules on the justification of wars and kingdoms. Furthermore, Ancient China envisaged an international law largely grounded on Confucian doctrine and philosophical thought rooted on deference and pacifism. Arguably, the ancient law of nations enshrined certain elements that could, looking with current eyes, be prototypes of human rights or humanitarian considerations.

However, in China as in other civilizations before it, international law was constrained by religious, ethnic or geographical limitations. Ancient international law was not universal. Furthermore, there was no claim of equality between different individuals and civilizations, no attempt to change domestic legal rules and no general reasoning on the existence of such rules as fundamental to human development as part of a global and interconnected world. Even the Greeks did not seek to establish a universal and human-centered law of nations. There were clear divisions between Greek citizens and foreigners. Law, in ancient civilizations, did not applied to “the other”, that is, it did not encompass or protected non-citizens, slaves, non-religious or individuals belonging to different religions.

Roman law was first erected on similar pillars. Its domestic law or jus civile applied only to Roman citizens. It was limited in scope (only Romans), strict and formalistic. Law was

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comprised of a set of rules that were to be applied. Furthermore, there was an insurmountable
obstacle between Romans and non-Romans. However, the development of international law or
*jus gentium* changed this system. For reasons that scholars can only speculate but possibly
included the flux of foreigners, increasing trades with other civilizations and the work of
magistrates, Roman law extended to include the notion of universality centered on the human
person as a key part of *jus gentium* or the law of nations. Although Greek philosophy influenced
Roman lawyers and magistrates in developing this new paradigm to international law, this was
an unprecedented change in legal history. Distancing itself from *jus civile* or civil law (which
solely concerned Roman citizens), from *jus peregrinus* (which concerned foreigners) and from
*jus feciale* (which was still intertwined with religious traditions), *jus gentium* was not restricted
to notions of citizenship, ethnicity, tradition or religion. Although applied within Roman
boundaries, by Roman jurists and based on Roman thought and pragmatism, it was a truly
universal system of law.

*Jus gentium* was grounded on the on the human person irrespective of their religion,
ethnicity, social status, geographical location and arguably even language, as Latin was not
anymore seen as the only accepted vernacular in legal relations.\(^2\) The law of nations flows from
a juridical consciousness grounded on the view that all humans are “bound together”.\(^3\) Law of
nations was thus defined as the law that natural reason establishes among all humans and
followed by all peoples alike.\(^4\) *Jus gentium* regulated areas such as wars, end of nations,

\(^3\) Marcus Tullius Cicero, *Cicero: On the Commonwealth and on the Laws* (New York: Cambridge University Press,
1999) at 116.
\(^4\) G 1 (translated by Francis de Zulueta); Inst 1.2.1.
The Roman law of nations was grounded on four basic pillars. The first is universality. Roman *jus gentium* sought and presupposed universal application. Second, the Roman law of nations was centered on the human person as the source and end of law. Third, the development of this legal system was highly based on the work of jurists and magistrates. Finally, *jus gentium* influenced and established guidelines for domestic law. Although there was an attempt to delineate *jus gentium*, which primarily concerned issues of universal application (as, for example, foreigners and citizens and certain topics as creation of kingdoms, wars and diplomatic missions), it eventually influenced and modified domestic law most likely through the works of magistrates. One of the key examples of the impact of the law of nations on domestic law was the institute of marriage and the increasing acceptance of intention of the parties as an important legal principle.

With the fall of the Western and Eastern Roman Empires, the Roman *jus gentium* started to be less applicable under the increasing role of personality law, in Europe, or religious law in the East (although both areas were arguably influenced by Roman law). Legal Renascence marked the substantial study and application of Roman law, especially the Justinian *Corpus Juris Civilis* in Europe. The focus was, however, on domestic law in order to regulate and deal with an increasing commerce and economical development. The influence of Roman law, nonetheless, led to a later revival of *jus gentium* as well. The “renascence” of international law focused on a different issue. Even though writers and diplomats largely drew on Roman teachings and examples, the main preoccupation was on the establishment and characteristics of modern states.

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5 Dig 1.5.10 (Hermogenianus) (translated by Krueger).
International law of the 17th to 19th centuries largely focused on the emergence and characterization of a modern state system. Although initially rooted in Roman concepts and examples, by the 19th century, international law was anything but Roman.

The positivist system of international law, preponderant in the 19th and early 20th centuries, had little connection with the Roman law of nations. It was primarily focused on states and completely excluded the human person from the international sphere as an actor with rights and duties. It was not universal, as it was a law mainly applicable between Christian states. Furthermore, it was not intended to impact domestic law as it was only effective to the extent states agreed within a restrictive system of legal interpretation and application.

After the First World War, there were some writings pressing for a more universal legal system acknowledging the importance of the human person at the international level. However, a human-centered and truly universal movement part of international law is a post-Second War phenomenon. The international community, facing the challenges of international law’s framework, could either create a new system out of a tabula rasa or adapt the existing one. The choice of adapting the current international system with human rights at its core posed certain theoretical problems as it could not be solely concerned with states but included the human person as a central piece.

The emergence of human rights as a central aspect of international law changed paradigms. The phraseology of human rights declarations and treaties acknowledged the human personality, that is, the human person as a subject of international law with rights, duties and interest at the international level. In other words, the international community recognized the human person is a separate actor with interests, rights and duties distinct than those of states. The recognition of the human personality enshrined in human rights instruments led to the
establishment of adjudicative bodies to which individuals could participate as an autonomous actor or have direct petition access. Following this view, human rights bodies, especially courts, further recognized the individual legal personality as a central aspect of international law. This culminated in decisions from the International Court of Justice solidifying the status of individuals as subjects of international law.

Human rights, a central aspect of international law, crystalized a system centered on the human person as the source and end of law. International human rights law includes natural law and positivist elements, as it depends on state action to create and ratify treaties but also acknowledge rights and duties flowing from the individual personality. Furthermore, it is truly universal, claiming that it flows and applies to all individuals regardless of nationality, ethnicity, religion and geographical location. Moreover, international adjudicative bodies as the Inter-American Court of Human Rights and the European Court of Human Rights stress international human rights’ role as a system which provides guideless and might change domestic law in order to crystalize a minimum standard of protection to all humankind.

International human rights law is thus similar to the Roman law of nations. The law of nations’ “change of paradigms” is thus a change of a pathway. International law, from the 17th to the beginning of the 20th century, followed a trend that seems to increasingly exclude the human person from its core. However, after the Second World War, human rights became a central aspect of a universal international legal system. Accordingly, this “new paradigm” is in many ways a return to an old paradigm. As the Roman law of nations, international human rights is rooted on the human person, claims universality, develops based on works of jurists and

6 International human rights law can be applied based on geographical location. This system, however, is not an exception from the universality rule. Rather, regional systems of human rights seek to apply universal standards of protection in specific regional locations.
adjudicative bodies and establish guidelines and seeks to change domestic law. This view was upheld and further stressed by both the European Court of Human Rights and the Inter-American Court of Human Rights. In a cyclical movement, these regional courts fit the Roman view of the law of nations as they impact and impose guidelines on domestic law and they further reaffirm international human rights’ Roman elements.

The European Court followed this Roman framework in the way it interprets and applies its main treaty, the European Convention. Relying on the principle of effectiveness, the notions of inherent rights and living instrument, and the public order character of its human rights convention, the European Court provides guidelines and seeks to impact domestic laws, informs the universality of human rights within a regional context and emphasizes the human person as the purpose and end of human rights law.

The Inter-American Court followed the footsteps of its European counterpart and further emphasized the Roman law of nations aspects of international human rights. The Inter-American Court adopted the teleological approach of the European Court (effectiveness, living instrument, public order and inherent right) and further emphasized its purpose centered on the human person. The pro homine principle of the Inter-American Court, although grounded on a specific provision of the American Convention, is also based on the Vienna Convention on the Law of Treaties, on general developments of post-World War II international law and especially on the view of the European Court. Pro homine’s Latin name precisely reflects its Latin roots. Although applied within the context of the Inter-American system, this principle seeks to change and provide guidelines to domestic law recognizing the human person at the core of a universal human rights system.
The Inter-American Court thus acknowledges that human rights prioritize the human person. This universal system of priority of persons runs through the whole matrix of contemporary international human rights law. It is codified in declarations and treaties and is part of the reasoning of both the European and Inter-American courts. Similarly, this priority of persons was a fundamental part of the Roman law of nations. It influenced magistrates and was eventually codified. To both regional courts, this Romanization can arguably have three consequences. First, interpretative tools as the margin of appreciation must be applied within a Roman-oriented and individual-centered framework based on each court’s jurisprudence. As the Roman *jus gentium* is at the core of international human rights law, interpretative tools must be contained and applied within the boundaries set by this framework taking into account that the individual-centered approach cannot be unlimited. Second, rights spelled out in human rights treaties cannot be restrictively interpreted. Both regional courts extended the application of their human rights treaty. Furthermore, the Inter-American and European courts equally stressed the importance of an effective application of their human rights provisions. Finally, the human person has an increasing importance within international courts. Applicants seeking redress before an international body can know how far they can stress their arguments before human rights courts. As the Romans arguably placed importance on legislative enactment (e.g.: the *Corpus Juris Civilis*) coupled with the interpretation set by magistrates, claimants can know courts might acknowledge new rights but flowing from previously existing norms and based on their own treaty and the Vienna Convention on the Law of Treaties. This, consequently, sets rules on how international human rights law progresses. Furthermore, the Roman example demonstrates that international human rights law might be intertwined with domestic law to the
point of being difficult to separate where one starts and the other begins. Accordingly, with a historical approach it is possible to understand the limits of international human rights law and possibly seek to understand how it might keep changing. As a possible direction, international human rights law, as with the Roman *jus gentium*, might be increasingly connected with domestic law.

Furthermore, acknowledging the Roman influence on international human rights law might have important impact on the global acceptance of international law. In the current accepted view, international law’s root is European, Christian-based and state-centered. International law, however, seeks universal application and acceptance in an increasingly global age highlighted by the rise of civilization-based societies as the Chinese. This state of affairs might call for an understanding of an international law that is not constrained by European factors but finds its roots in civilizational and global perspectives. The Romans developed its legal system influenced by Eastern societies such as the Greeks, Egyptians, Sumerians and Babylonians. The *Corpus Juris Civilis*, as previously mentioned, was enacted in today’s Turkey. Roman law influenced both Cannon law and Islamic law. It was also later adopted, in different extents, by all European countries and exported to European colonies, which retained their Roman-influenced systems after independence. Furthermore, countries as Japan and China adopted Roman-influenced legal systems. Accordingly, Roman law is truly universal. It influenced virtually every modern legal system and is not connected to any specific state. This

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7 Professor Mazzuoli, for example, advocates that there should be no strict hierarchy between domestic law and international human rights law. Rather, adjudicators should choose the norm with is most protective to the human person in a system of “dialogue of sources” or “dialogical monism”. See Valerio de Oliveira Mazzuoli, *Tratados Internacionais de Direitos Humanos e Direito Interno* [International Human Rights Treaties and Domestic Law] (São Paulo: Saraiva, 2010).

universal influence and acceptance can be an important factor to interpret and understand international law more globally without historically constraining traits. The Roman *jus gentium* can strengthen the legitimacy of modern international law as it can provide a universal way to address and define it.

A Roman approach to the law of nations could arguably reduce arguments that international law is culturally European⁹ or that human rights is imperialistic.¹⁰ Furthermore, modern international law of human rights indeed rescues elements intrinsically part of the Roman law of nations. Post-World War II international human rights law, as the Roman law of nations, seeks to prioritize the human person, as subjects with rights, duties, capacity and interests and part of a universal system that binds everyone and flows from humankind as a whole. Adapting to different historical, legal, economical, social and political contexts, international human rights law is in theory and method part of a truly *corpus juris gentium romani* (body of the Roman law of nations). The *pro homine* framework of this modern *jus gentium* is the spirit of international human rights.

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⁹ See Chapters V and VI on Oppenheim’s view of international law.  
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