Is there anyone beyond capitalist social relations and abstract rights?

Analysing the IACtHR innovative jurisprudence regarding collective (cultural) rights and its transformative potential.

Sociology of Law Master's Thesis

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Abstract: This research explores the transformative role of the Global South in innovative jurisprudence concerning (cultural) collective rights, transcending its conventional perception as a mere recipient of legal norms. Focusing on the Inter-American Court of Human Rights (IACtHR), the study investigates the impact of landmark cases worldwide and their potential challenges to the (neo)liberal capitalist system. Through an analysis and categorization of judgments, the research reveals that although the IACtHR has recognized collective rights through innovative interpretations, it falls short of posing a significant challenge to private property and capitalism. Additionally, it emphasizes the need for a collective and concrete vision of rights to achieve meaningful transformation. The study also finds a potential alliance among peripheral regions to foster innovative jurisprudence through court dialogue, which may lead to a more substantial transformational role in safeguarding collective rights.

Keywords: Global South, private property, collective rights, imperialism, epistemologies.

List of acronyms

ACHPR: African Commission on Human and Peoples' Rights

ESCER: Economic, Social, Cultural and Environmental Rights

IACHR: Inter-American Commission on Human Rights

IACtHR: Inter-American Court on Human Rights

ILO: International Labour Organisation

OAS: Organisation of American States

R2P: Responsibility to Protect

TWAIL: Third World Approaches to International Law

UDHR: Universal Declaration of Human Rights

UNGA: UN General Assembly

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1. Introduction

In every field in general, and in the realm of International Human Rights Law in particular, the creation of innovative jurisprudence has often been attributed to the Global North or the imperialist centre, with the Global South being perceived as passive recipient of legal norms and interpretations. However, this research seeks to challenge this prevailing notion and shed light on the pivotal role played by the Global South, particularly focusing on the Inter-American Court of Human Rights (IACtHR), in shaping innovative jurisprudence regarding (cultural) collective rights and the possible transformational role. Departing from liberal approaches, long-established academic assumptions are denaturalized, such as the sanctity of private property – which is conceptualised as the source of many of today's problems–.

This dissertation aims at investigating the role of the IACtHR in creating innovative jurisprudence concerning (cultural) collective rights. The research delves into whether the Court's interpretations extend beyond the traditional notions of protecting private property and how these innovations have been applied and utilized. Specifically, the study explores whether these groundbreaking interpretations have transcended borders and be employed.

The research adopts a rigorous and comprehensive approach to analyse judgments and derive insights. A manual text analysis is employed, eschewing the use of software due to the manageable number of judgments under examination and the necessity for in-depth categorization of content. This approach allows for a nuanced understanding of the jurisprudential innovations by the IACtHR.

The study is framed within a theoretical framework rooted in the perspectives of Third World Approaches to International Law (TWAIL) and Marxism. By distinguishing between concrete and abstract human rights, the research addresses the complex interactions between capitalism and the environment, as well as the persistent North-South and centre-periphery divides. Furthermore, the role of Human Rights Law in perpetuating the capitalist system is scrutinized, along with exploring the potential of Human Rights as a strategic tool to attain socialist rights. The dissertation is structured into four main parts: a) a theoretical framework, b) the definition of the methodology to justify the selection of the IACtHR and its concrete judgements, c) an analytical part divided in two main sections regarding the categorization of the innovative jurisprudence on the one hand and the uses of them throughout the world on the other and d) finally, some conclusions with final remarks, implications and possible limitations are highlighted.

2. Theoretical framework

2.1. Are liberalism and human rights compatible?

Many scholars have written on the question *Can a marxist believe in human rights?* (Lukes, 1981). However, when looked at from Marxist lenses, the doubt would be whether a liberal can believe in human rights, with lowercase letters. Law is never neutral, so international law in general and the Human Rights law in particular respond to some interests. As TWAIL[1] scholars argue, international law is domination, as long as the "established relations of power are 'systematically asymmetrical" (Thompson, 1994: 134). In fact, the basis consists in the regulation of property rights worldwide, by defining democracy in liberal terms, to enable fertile soil specially in the Global South so that "transnational capital can flourish" (Chimni, 2006: 8). This approach creates the bias in the whole legal system to benefit what they call the *First World* and harm the *Third World*, causing all the States in the world, but especially those belonging to the latter, to restrict the principles of sovereignty and self-determination and bend them to the interests of the *lex mercatoria* (Chimni, 2006: 13). Northern academic institutions are exposed as having a key role in establishing a research agenda that follows the interests related to the hegemonic matrix of epistemology and ontology (Chimni, 2006: 15), and this work aims at circumventing this trend and looking at the object of study through different lenses.

International Law is not the only part of the superstructure responding to the interests of the capital; Human Rights in capital letters need to be problematised as well. One of the clearest examples showing the level of hegemony of liberalism nowadays is that when talking about human rights it is difficult to think about them, outside the Human Rights Declaration and the institutionalised elements. In fact, doing a brief genealogy of how that declaration came to be, it is necessary to understand the context and the correlation of forces at that moment. As Achcar affirms, the Declaration was very progressive due to the pressure of large, organised groups; mostly communists, of subaltern classes and nations who were operative after being strengthened during the Second World War to combat fascist forces (Achcar, 2015; Cruz Rojo & Gil de San Vicente, 2015: 187). The Declaration included some rights which were in their original meaning against the interests of the ruling class, and a clear example would be the right of rebellion stated in the Preamble (UDHR, 1948). This right was rapidly transformed into a

[1] TWAIL stands for Third World approaches to international law. It is a critical legal perspective challenging global inequality, imperialism, and colonial legacies in the context of international law. Antony Anghie, B.S. Chimni, Upendra Baxi and Balakrishnan Rajagopal some of the most remarkable authors.

tool for imperialism that meant the right of the so-called Free World to assist other peoples' resistance to falling to communism (Bricmont, 2008: 123-6), so all possible revolutionary content was erased. What's more, the use of it against the interests of the capital is criminalised with the concept of "terrorism" (Cruz Rojo & Gil de San Vicente, 2015: 243). The new meaning was even legalised and legitimised by the debate and approval of the Responsibility to Protect, known as R2P (ICISS, 2001). As far as the Human Rights are an instrument to the internationalisation and protection of property rights (Bebbington, 2012) and therefore aim at minimising the tendency of the rate of profit to fall (Chimni, 2006: 11), the most progressive rights in the Declaration – social, economic, political and civil- are an obstacle to that objective (Arrizabalo, 2005: 474-7; Rojo Cruz & Gil de San Vicente: 252).

Therefore, the UDHR was adopted with hesitation by the most powerful countries because its content supported some "concrete rights", but it did not mean subaltern groups and nations were satisfied with the result. Jensen (2016) analyses the construction of Human Rights during history, the participation of some Global Southern countries' elites pushing for some changes; and how the bipolarity of the international system – between the United States representing liberalism and the Soviet Union backing communism – affected heavily the results. Moreover, some struggles between both parties to attract and align Global Southern countries with their views took place; for instance, the decolonisation and race issues (Jensen, 2016: 106-9). So, the context where the declaration was adopted makes false the statement that Human Rights are Western values (Ibidem: 110).

Once clarified the reasons why the content of the Declaration might seem progressive, in order to answer the previous question, it is essential to make a distinction between two irreconcilable concepts: abstract and concrete rights, bourgeois law and socialist law. The former refers to liberal rights, which are depicted as ahistorical, universal, static (Cruz Rojo & Gil de San Vicente: 136) and are based on methodological individualism and hold capitalist social relations as the basis for their accomplishment. Liberal rights require applying same parameters to different subjects, and therefore equal rights is an offence to equality and justice (Lenin, 1986: 94-6). This bias due to avoiding seeing beyond the simple circulation of commodities, where the equality between the exploiter and the exploited is defined because they are both conceived as exchangers of something (Marx, 1976: 179).

Socialist rights, the concrete ones, however, are situated in the concrete material situation, and aim at giving dignified standards of life to every human being, the inequality is acknowledged

–between the owners of the means of production exploiting those that only have their own labour-power-. The document representing the liberal rights have already been analysed, but the most known declaration containing the paradigmatic example of socialist rights is the *Declaration Of Rights Of The Working And Exploited People*, created in 1918; and one of the most remarkable elements in it is the elimination of private property of the land, being the aim "to abolish exploitation of man by man"; leaving aside abstract work (Lenin, 1918). An example of clashes between both worldviews is what democracy means to each of them; for liberals it is related to the participation of citizens to elect certain people that enact laws and policies and distribute the money maintaining private property intact; while for communists democracy means the democratisation of the means of production, deleting classes and oppressions capitalism use for the accumulation of capital; hence the dictatorship of the capital vs. the dictatorship of the proletariat (Cruz Rojo & Gil de San Vicente, 2015: 131, 167). This dichotomy was also raised at the time the Declaration was still young, by some public figures, one of them Friedrich Hayek, who argued that the Declaration was an attempt to combine liberal Western rights with opposite doctrines of the Marxist revolution (Losurdo, 2001: 7-8)

Since in the criticism of TWAIL, the internationalisation of private property rights is the motive for the existence of international law, it seems clear that the rights held in the UDHR are instrumental, and therefore can be suspended if needed; in case they need to demonstrate the military strength or "to quell the possibility of any challenge being mounted to their vision of world order" (Chimni, 2006: 19). Examples of these cases are shown in the case of CIA support to paramilitary forces in Italy using local groups (Blum, 2005: 260-2), the support to Pinochet in Chile to establish a neoliberal system (Barder, 2013), Contras in Nicaragua, McCarthyism in the US suspending individual rights and freedoms (Schrecker, 2004), etc. Moreover, there is a naturalisation of the discourse claiming that the violence exercised by the State and its affiliated actors is the only legitimate one; and the right to resistance and rebellion is only possible in an abstract sense in case they aim at harming the interests of the bourgeoisie (Cruz Rojo & Gil de San Vicente, 2015: 252) and overcoming the capitalist system.

Therefore, the answer to the first question ("Are liberalism and human rights compatible?") would be: depending on which perspective does the observer take. When approaching human rights from a liberal standpoint, where inherent inequality is not considered, and private property is at the basis, the elements sustained in the UDHR might be accomplished when the status quo is not challenged and with subjects that are "citizens" and *intramuros*. The option to suspend those rights is always there because from a dialectic point of view the history goes by

through the fight of the bourgeoisie and the proletariat; and when the latter gains force, the former might react by suspending abstract human rights and repressing the antithesis (Cruz Rojo & Gil de San Vicente, 2015: 153). From a Marxist point of view, a liberal could never believe in (socialist) human rights because they attack the basis of liberalism (private property) and therefore attack the essence and not the appearance. That is why cultural, social and economic rights do not receive much attention from International Courts or their justiciability is of lower intensity: most of them are concrete rights, linked to specific material conditions and are not constructed in an ahistorical and absolute sense, they are not compatible with the capitalist system because, even when re-defined, they leave floor for demands by those peoples owning nothing but their labour-power.

2.2. Alternatives to the hegemonic epistemic matrix from the periphery

According to some authors (Fisher, 2009; Plehwe, Walpen & Neunhöffer, 2007; Morvaridi & Hughes, 2018)), neoliberalism is the hegemony today, but it is disguised under the idea that the context nowadays is post-political, beyond ideologies; naturalising capitalism up to the point where it is impossible to imagine any alternative to it (Fisher & Gilbert, 2013: 90). In fact, as Fisher (2013) states: "that effacement is what defines capitalist realism". This work pretends to give voice to those alternative, counterhegemonic ideas that are not widely extended in academia, and it seeks to problematise some *a priori* propositions of the capitalist worldview and to see reality through other lenses. It is important to break the naturalisation of the capitalist system, to see it as a contextual, historically situated and the result of certain correlation of forces; to unravel the domination system, even if that could suppose the use of the physical force to maintain the hegemony (Chimni, 2006: 15).

The imposition of the epistemological matrix (Mignolo, 2011) has not erased the other ideas; alternatives to the capitalist system were theorised, put into practice and are still there nowadays in different grassroot movements all over the world. Nevertheless, since this research aims at looking at the role of the Global South, some elements will be singled out to understand the role of that part of the world and which is the dialectical relationship it has with the Global North – which does not mean to ignore the class struggles within the two big blocks, although it is not the focus of this essay. Franz Fanon is one of the theorists who offers a systemic and structural view of the dynamics between the richest countries and the poorest, with the theorization of the *nonbeing zone.* As Gordon affirms: "Rationalizations of Western thought often led to a theodicy of Western civilization" (Gordon, 2005: 1) turning itself into an

“absolute being”. Fanon argues the otherization process that peoples from the Global South go through, that their identity is constituted as an alterity, and describes the zone where all those subjects which are not considered men live or survive, *the nonbeing zone* (Fanon, 1986: 10). Moreover, he clarified the existence of this zone as a necessary condition for the *being zone* to exist, which was the metropolis, the imperialist heartland, a place where advancement, democracy, liberties and abstract rights are assured. On the other hand, the *nonbeing zone,* or the imperialist periphery, was a region of underdevelopment, of being deprived of democracy, rights, and liberties, and a region where the logic of purely violent behaviour operated. This constituted not only a territorial-geographical division; but also a biopolitical one: while zones of being and non-being were created, "humans" (citizens with rights and freedoms) and "sub-humans" (those lacking any rights or freedoms) were also defined; and he clearly stated: “The black is not a man” (Fanon, 1986: 12). This mutual constituency of both zones and “types of humans” does not prevent the author to neglect the agency of all those no-men, and he argues that there is a huge potential for change.

In addition, the scholars related to the dependence theory do also provide a useful insight, in order to explain the current situation in what they call periphery vis á vis the situation in the imperialist centre, and their limitations due to this relation. There are different trends in there, but this will focus on the common elements between them: a) capitalism as a global process since the beginning, and therefore globalisation as an inherent element to that system, b) capitalist system as structurally functioning to prevent peripheric countries to reach centre States, and c) there is a polarisation between the centres and peripheries (Kvangraven, 2017: 15). This trend explains immanent and growing inequalities between different parts of the world, without forgetting that the same phenomena take place inside each country. Furthermore, the accelerated centralization of the control of the capital is a growing element due to the financialization, and polarization is faster and harder, mainly in peripheral countries (Kvangraven, 2017: 16).

This sharpening of contradictions inside the capitalist system leads to violations of rights and increasing repression by State and non-State actors against those who challenge the hegemonic worldview, carrying out practices against the commodification of environment and therefore the interests of transnational companies: massacres of social leaders in Colombia, the “false positives” scandal (BBC, 2021; EFE, 2023, Daniels, 2021), or the killings of MST members in Brasil (TeleSur, 2020; TeleSur, 2018), to mention just a few examples. The repressive face of the States is also visible in the imperialist centre: the illegalisation of *Soulèvements de la Terre*

in France (Libération, 2023), listing the Basque *Mugimendu Sozialista* as a terrorist organisation by the Prosecutor in the Spanish State (Gedar, 2022); the arrest of citizens trying to stop evictions all over Europe and the US (DailyMail, 2020; Agirre, 2015; Público, 2023), among others.

All the abovementioned structural inequalities between the centre and the periphery are not limited to the economic sphere, a complete view of the whole system is necessary: social, cultural, political and legal structures do also contribute to this process of accumulation of capital. In this sense and related to the aim of this work, it is essential to look at the notion of legal transplants. Those transplants can be seen as a neutral tool, as a natural part of legal systems' development. Or, on the contrary, they can be understood as a device of hegemonic powers to implement a given matrix of knowledge and hermeneutics (Mignolo, 2011) in the weaker parties of the global scene. Mattei (2003) supports this notion, highlighting three historical models: a) imposition through military force, as during the colonial period in Latin America; b) imposition through negotiation; and c) diffusion through prestige, wherein the willingness of Global South countries to adopt legal transplants is conditioned and shaped by propaganda mechanisms. However, there is limited literature on the opposite direction of transplants.

One notable study by Sital Kalantry (2020) explores what she terms "reverse legal transplants," focusing on the transfer of sex-selection abortion laws from India to the United States. Kalantry finds that there are very few instances of legal transplants from lower GDP per capita countries to those with higher GDP per capita, and such transplants tend to occur between peripheric countries. This suggests a prioritization of economic growth over social justice and well-being, which aligns with southern epistemologies. However, there are instances where international organizations recognise these epistemologies through the inclusion of community representatives, even if not through jurisprudence from Global South courts, as demonstrated in Stefan Disko's paper (2017). There is also an example of the European Court of Human Rights being influenced by jurisprudence from the Inter-American Court of Human Rights regarding forced disappearances (Sethi, 2018). In fact, the transplant of laws, as TWAIL scholars affirm, is one of the main tools to assure free flow of transnational capital and internationalise private property in every aspect of life, even the most basic source of life: the land; and this is even more prominent in the current era of neoliberal deregulation visible in all sectors (Poirier et al., 2022).

Regarding inter-court dialogue, asymmetry remains to be a key element to define the direction that interpretations travel. Some argue that "judicial dialogue between regional tribunals is to some extent a monologue" (Killander, 2011 in Papaioannou, 2014: 1046). However, there are plenty of cases where the African Court uses European Court's judgements' interpretations as guidelines (Ibidem: 1046). This shows the persistent trend of Southern or peripheral Courts "learning from" the Northern institutions. There is a minority number of cases where the European Court of Human Rights has used the African or Inter American Court of Human Rights (Ibidem: 1046-7). But dialogue between the Southern or peripheral Courts needs also to be considered, as it could constitute in some cases legal innovation leaving aside some of the individual liberal rights' limitations (Ibidem: 1049-1055). In fact, according to some scholars, the South-South cooperation promotes more horizontal relations between the parties with strategic interdependence (Erisman, 1991: 142-6); which could be a tool to get rid of the pressure of the imperialist centre, in case local elites are not co-opted and their interests aligned.

2.3. Defining the periphery: between unity and division

Rich countries condition the praxis of the Southern countries, their interdependent relationship has already been drawn; but homogenising all the countries, peoples and nations that are part of that block is not accurate. This was done, for example, with the process of "orientalism" that Eduard Said (1979) described decades ago, which was enforced after 2001 and the beginning of the "war on terror" by the leader of the unipolar world. In the same way, to "misrepresent and undermine the unity of the Other is a crucial element in any strategy of dominance" (Chimni, 2006: 6), as far as the lack of an imagined unity prevents "a global coalition of subaltern States and peoples" (Ibidem). Within each country and each region, there are local elites and subaltern subjects with opposite interests; and international institutions are an instrument to legitimise the status quo, "co-opt the elite from peripheral countries, and absorb counter-hegemonic ideas" (Cox, 1993: 52). Then, even if in general "the Third World has become a recipient rather than a maker of these norms" (Herencia Carrasco, 2018: 161), there might be an alignment between the interests of the peripheral elites and the bourgeoisie of the imperialist centre.

However, those international actors are more than objects, they also exercise their agency. The role that Global South countries' ruling classes had during the first years of UDHR construction was significant and shaped the modern understanding of Human Rights. One of the most prominent countries was Jamaica, which was a major force shaping British view on Human

Rights (Jensen, 2016: 91) and, concerning this research, was essential that the "Jamaican vision easily embraced the interrelatedness and indivisibility of human rights" (Ibidem: 99). The Global South was instrumental in pushing for the recognition of economic, social, and cultural rights, in addition to civil and political rights, as part of the broader human rights framework, vindicating a holistic view of all those dimensions as the Soviet Union did. So, southern views together with anticapitalistic ideas were the ones that introduced the topic of race for example (Ibidem: 107), or the idea of self-determination for peoples living under colonial and foreign domination in the Helsinki Final Act. While the Soviet Union and some countries in the Global South shared common interests in promoting anti-colonialism and opposing Western imperialism, they were not necessarily aligned on all issues, as the issue of religion showed (Ibidem: 167-8).

However, this guiding role of the Global South didn't last forever. It was in the beginning of the 70s when "the human rights engagement of the Global South [was] on the decline while Western interest in international human rights was in the ascendant" (Ibidem: 176-7). The climate deteriorated in the UN after the Six-Day War (1967), and the clashes between the communist and capitalist block became louder and louder (Ibidem: 184). The Tehran conference was a milestone in this sense, showing the trend of dissonance (Burke, 2020). Even if there was an agreement on a final statement, the Soviet Union tried to arrive to an agreement with the US to determine the outcome of the Conference, the Afro-Asian countries had more and more doubts about the relevance (p. 195-6), and in many decolonized countries the ruling elites turned authoritarian, f. e. Jamaica (Ibidem: 202).

Despite that authoritarian shift of some regimes, the decades after the IIWW were characterised by strong movements for decolonisation and self-determination, starting in Africa during the sixties and spreading to every corner of the globe in the next decades. Nonetheless, all those resistance movements did also face opposition from the imperialist centre, which was seen in Latin America, for instance, with the increasing control and repression of the region after trade unions' strength increased and socialist ideas extended. In this attempt to control the situation, many Latin American countries and the US signed a military agreement known as Rio Treaty in 1947 (CRS, 2019); and this element combined with the reinforced national bourgeoisies was used to maintain leaders aligned with the North American interests (Hernandez Perez: 2019: 41). In spite of attacks against liberation movements, the organisation of peoples from the three continents became an important landmark during the Cold War.

In this sense, four events should be highlighted:

Taking them in a chronological order, the first one would be the Bandung Conference in 1955, held in Indonesia, it was essential because newly independent nations from Asia and Africa started to construct their own agenda away from the two main hegemonies at the time of the Cold War; even if with huge disagreements on the aim of their organisation between revolutionaries and reformists. The outcome was a Declaration that did not challenge the world order neither the abstract rights held at the UDHR (Saney, 2018: 153-54); in fact, the participants were not even able to agree on the definition of imperialism (Parrott & Lawrence, 2022: 31).

This Declaration led to the establishment of the Non-Aligned Movement (NAM) in Yugoslavia one year later, in 1956; but the struggle between the reformists and revolutionaries were hampering its operationality. This radicalization process, which culminated with the Cuban and Algerian Revolution, was already visible in the meeting of 1957 in Cairo, where the Solidarity Council of the Afro-Asian Countries was founded (Saney, 2018: 155-7).

After revolutionary anti-imperialist messages were delivered in the Conferences of the NAM, finally in 1965 Latin American countries were accepted in the Organization of Solidarity of Peoples Asia, Africa and Latin America, and this was the seed for the celebration of the Tricontinental Conference in Havana. As some authors describe, "their goal was to define a vision of Third world solidarity that could combat the threat of imperialism, colonialism and neocolonialism" (Parrott & Lawrence, 2022: 1-2), and it represented a more developed version of the Bandung conference, it was an example of "proletarian internationalism" (Young, 2005: 19).[2]

Apart from those attempts to unify the worldwide anti-imperialist revolutionary movement there were other important landmarks such as the *Afro-Asian Women Conference* in El Cairo in 1961 (Prashad, 2021: 101-115 in Rojo Cruz & Gil de San Vicente: 203) and the *Argel Declaration* in 1976. However, the ruling class puts all possible means to counter challenges to their power, as it has been previously explained with a few examples. In this case, neoliberal policies, that started to apply in all the newly independent countries to ease the foreign capital flow, to adapt their economies and societies to what is called "development" and their

[2] The revolutionary character of the Tricontinental was a threat to the hegemony of the capitalist block. Consequently, after attempts to delegitimise it by using propaganda they killed Mehdi Ben Barka, one of the main organisers; but it didn't prevent from the Conference being celebrated in Havana despite all tricks in the OAS. (Bouamana, 2018)

introduction in the global "free market", brought changes everywhere. Some of the changes were implemented by establishing US backed military dictatorships as it was the case in Chile, using direct violence attempting against the lives of every opposition; but in other States it was limited to the use of the market, to a more hidden violence. Then, the material, concrete sovereignty of all those peripheral States was at stake, foreign capital from different States, transnational companies and international institutions as the International Monetary Fund didn't know frontiers, the labour market was deregulated and social public services underfunded, which caused general worsening of the living conditions. In some cases, all this brought about situations of competition between previously united parts of the Third World, in order to attract foreign investment (Chimni, 2006: 11); in what was called as "race to the bottom" (Oloka-Onyango & Udigama, 2000: 34)

2.4. Capitalism and environment: a destructive relationship

One of the most basic concrete rights is the right to the land; as it is the basic source of reproduction of life on Earth, and therefore of labour-power to make possible the accumulation of capital (Marx, 1872: 306-8). Engels (1876). This enables seen the land not only as a source of wealth, neither as something exogenous, but as humans as part ot it. Then, that "oneness" cannot be denied as it would disrupt the vital cycle; but capitalism does. Capitalists look at the short-term, immediate profits without caring about the future consequences of current actions related to the concrete mode of production. Nature, however, needs to be considered not as a resource, but as a wider category to which humans belong; dichotomising and separating both shows the incompatibility of nature and capitalism (Rojo Cruz & Gil de San Vicente: 150-151; Engels, 1878: 96-7). So, in order to respond to the on-going climate change and all the ecological problems that affect mostly people who life in strong connection with environment and land, proposed solutions that do not consider the elimination of private property are not able to provide a real way out. The oneness of humanity and nature needs to be reconstructed (Bukharin, N., 2013: 108-112 in Rojo Cruz & Gil de San Vicente: 340), "metabolic interchange with nature" needs to be restored (Foster, 2014 in Rojo Cruz & Gil de San Vicente, 2015: 173). Moreover, the consumerist mindset must be eliminated, massive and unnecessary use of natural resources is not a sustainable practice; leaving aside this bourgeois idea, the objective should be from a socialist perspective to understand what a "need" is. In the former view, needs are created by the capital, whereas using the approach of the latter those needs are always collective, as they are part of the social process of labour to face an objective and concrete need (Cruz Rojo & Gil de San Vicente, 2015: 177).

Capitalist social relations that lead to see human subjects as mere exchangers within the market are deeply entrenched with non-sustainable practices from an environmental perspective. The neoliberal tendency to the commodification (Kavoulakos, 2020) of every existing element, including the land, the soil that permits human life, disturbs the process of avoiding collapse; and humanity should banish the dualism between anthropocentrism and ecocentrism. The following statement sums up the reason: "[t]he fight to protect the environment is an inevitable fight against big capital, which is attacking nature and healthy living conditions for people at all levels, local, regional and global." (Rojo Cruz & Gil de San Vicente: 2015: 339). As it was previously shown with other issues was shown, offensives against concrete rights face always resistances, and peoples in different places around the world are struggling against big transnational companies' exploitation and plundering of natural resources (Uribe, 2005; Martín, Páez & Fernández, 2010; Acosta, 2015).

Latin American is a fertile region of resistance movements, alternative epistemologies and philosophies. In this sense, one of the first elements to understand collectivist epistemologies that arise from that region is the indivisibility and interrelatedness of different types of human rights. The UN and other international organisations tend to see civil, political, economic, social, cultural, religious etc. rights in separate boxes and are regulated with different norms (A/RES/2200A; A/RES/217A). However, from other perspectives all those rights are interconnected and must be interpreted in a holistic manner, as Jamaica argued during the drafting of the UDHR (Jensen, 2016: 99). This vision was also defended by the Soviet Union, advocating for concrete rights in all spheres acknowledging their mutual effects, and an example of that vision would be the *Declaration Of Rights Of The Working And Exploited People* (Lenin, 1918).

Another essential idea is the one regarding the communal view of property rights, specially linked to the concrete labour, far from the abstract production relations promoted by capitalism. Cultivating and working the land, before communal lands were expropriated by the bourgeois class for the purpose of massive land concentration in a few hands and the interests of capital, was a collective process as it is a means of production from a capitalist view (Engels, 1845). Those social relations that don't respond to the hegemonic understanding promote the perception of other peoples in the community as collaborators for the construction of the collective project to answer common needs. This is the opposite of the capitalist view, where other humans are a limitation for one's own liberty and for the achievement of individual interests (Cruz Rojo & Gil de San Vicente, 2015: 115). Moreover, this also affects the

understanding of labour: according to the collective view labour is a collective process, and the result cannot be individualised, whereas liberals base their economy precisely on the individualised division of the outcome created by the labour-power. From the former viewpoint, the privatisation of land is not rational, as it does not respond to the needs that different communities have.

A strong clash occurs when these collective views are applied to law and collective subjects of rights are required to address the conflicts as concretely as possible. In this sense, indigenous communities in Latin America have been a key actor in leading significant jurisprudence and even legal innovation. "Indigenous peoples in Latin America, […] have a communal experience that tends to prioritize the collectivity over the individual" (Herencia Carrasco, 2018: 164), which is reflected also in how they approach their rights, collectively. The lack of understanding with liberal law is defined in the following statement: "When indigenous peoples frame their claims in the language of human rights these are often claims of a distinctly collective nature, and, in that way, they appear to be at odds with traditional individual rights" (Contreras-Garduño & Rombouts, 2010: 7).

In the concrete case of cultural rights, which is the topic of this work, they are understood as a part of the whole, due to the indivisibility of the rights and their integral cosmovision, leaving aside the individual abstract subject of rights, and the view of the land as part of the community and maintaining the oneness of environment and humanity. Their rights "to their land and resources [are essential], since the protection of these rights does not only imply the protection of an economic unit, but also aims at shielding a community from outside interference with their cultural and social development, which is inextricably linked to their relationship with their land" (Contreras-Garduño & Rombouts, 2010: 13). Pentassuglia (2011), in the same direction, argues that there is a double dimension in the case of indigenous peoples and their relationship with the land: possession and spiritual connection (Ibidem: 170-2). Therefore, curbing their land rights would also hamper cultural, economic and social development (Papaioannou, 2014: 1050), as well as the preservation and transmission of their cultural legacy to future generations (Contreras-Garduño & Rombouts, 2010: 14). In the same line, harming their *Lebensraum* would harm their physical survival, as far as this space represents for them "an integrated system of beliefs, values, norms, mores, traditions and artifacts" (Ibidem: 1058) and the loss of that culture and spiritual life would imply the deprivation of their heritage and therefore the groups' identity. Acknowledging "their culture and social aspects as fundamental to their own existence and wellbeing" (Herencia Carrasco, 2014: 164), one point is clear: the

incompatibility of processes for (land) privatisation and the survival of indigenous communities. In a sense, this could be extended to all the working class worldwide, as the concrete rights of each of the members are vulnerated because private property is irreconcilable with egalitarian, solidary and popular rights. (Cruz Rojo & Gil de San Vicente, 2015: 225).

Thus, the preservation of heterogeneous cultures by those indigenous peoples and other nations is a form of resistance against the attempted homogenisation process that neoliberalism aims: to harmonise legislations everywhere, to move the focus from the collective to the individual in abstract terms, and to consider all subjects as *homo economicus,* a utilitarian being who aims at maximising happiness through the means offered by the market. Capitalism uses diverse tools to achieve that homogeneous world: integration policies promoted by the States (Rojo Cruz & Gil de San Vicente, 2015) through propaganda mechanisms such as Netflix, Disney... The ecosystem of languages and cultures is being attacked; so, both ecosystems, the natural and the cultural, are in danger under the capitalist system.

2.5. Instrumentalising Human Rights

All the previous paragraphs have shown the role of International Law and Human Rights, which impose "limitations […] on collective groups such as indigenous peoples" and "perpetuate forms of colonialism and dominance" (Contreras-Garduño & Rombouts, 2010: 160, 164); as far as "the right to private property […] is central to the discourse of human rights" (Chimni, 2006: 11). Nonetheless, the bourgeois rights can be instrumentalised by the subaltern peoples to achieve the wider goal of a society without any oppression, so they could be defined as "both, fighting tools and battlefields" (Plessman, 2014 in Rojo Cruz & Gil de San Vicente, 2015: 218-9). Similarly, according to Restrepo (2015 in Rojo Cruz & Gil de San Vicente, 2015: 219), these measures are seen as beneficial for upholding the dignity of nations that face the neoliberal ideology, aiming to shift the global focus away from profit-centric motives. "Nowadays, to resist law in the name of law is not a contradiction anymore. What's more, they are a tool for reversing the present state of systematic rights violations by those in power is of utmost importance." (Mugertza, 2012).

Nevertheless, the use of those Human Rights as an instrument to achieve a socialist society needs to be seen as a tactical tool, without forgetting the strategy in the long term, where the oppressed people will have to build their own law, their own concrete rights (Rojo Cruz & Gil de San Vicente, 2015: 127, 226). During that period to construct a counter-hegemonic law (Rajagopal, 2008 in Herencia Carrasco, 2010: 164), local resistances are essential, to then

construct a bottom-up movement to have enough force to create a favourable context so that socialist and concrete rights are included in the enforced norms; to make that possible it is important not to look at each other as competitors, but as equals, without taking into account race, origin, ethnicity or culture (Rojo Cruz & Gil de San Vicente, 2015: 120). So, in the case of Latin America, the Inter American Court of Human Rights and the Inter American Commission of Human Rights are instrumentalised by indigenous population; and they are an example of resistance in a context where transnational capital flows freely and labour-power is more and more devaluated for capital accumulation to increase.

This way to struggle for improving the living conditions, is limited, since the justiciability of different types of rights is diverse. As far as social, economic and cultural rights are harmful for the capitalist interests, they are undermined when it is necessary. Moreover, the equation is not limited to the normativity constructed by States in international organisation, the role of transnational companies and the parallel system of legality that they create and apply is getting ever stronger (Rojo Cruz & Gil de San Vicente, 2015: 279; Vittor, 2015). Their interests are defended by the capital they invest in the countries and therefore shape policies, especially in weak democracies, and most of them are in peripheral nations. This weakness makes political elites accept conditions of multinational companies, even if they harm the weakest part of their own society, which is very often composed by indigenous populations (Munarriz, 2008). Resistances to the increasing attacks on the detriment of native populations are carried in different ways, and one of the initiatives is the Permanent Tribunal of the Peoples (Hincapie, 2018); even if the efficacy in the implementation of the decisions is not strong enough; but there is not a huge difference with the justiciability and strength of the implementation that regional and international organisations have.

3. Methodology

The choice to study collective rights, focusing on cultural rights in Latin America is driven by several significant factors. This region, comprising a diverse range of countries with distinct historical, cultural, and socio-political backgrounds, presents a rich and compelling context for exploring the concept of collective rights. It has a complex history marked by indigenous populations' struggles, social movements, and political transitions. These historical dynamics have led to the emergence of collective rights as a pivotal issue in the region. Moreover, indigenous populations, are a source of own epistemologies and ontologies, and part of the

periphery or the Global South, suggesting they are an interesting agent of change and approaches beyond capitalist social relations (Contreras-Garduño & Rombouts, 2018: 7).

Secondly, Latin America is a region with a wide range of its own legislation regarding Human Rights, with the American Charter of Human Rights but also the innovative American Declaration on the Rights of Indigenous Peoples (2016). In fact, Latin America itself was the one who boosted the creation of regional systems of Human Rights (Jensen, 2016: 94) and they have had an important role in the development of those rights when the absence of action by the United Nations resulted in decentralized initiatives and the enforcement of human rights through regional instruments (Papaioannou, 2014: 1038). In this sense, the "larger number of rights in the American Convention on Human Rights […] reflects the regional particularities" (Buergenthal, 1980: 155-6 in Papaioannou, p. 1040).

Because of the limitation of time and resources, this work has focused only on the jurisprudence by the Inter American Court of Human Rights, specifically in eight landmark cases related to cultural, social, economic and property collective rights:

- Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua Judgment of August 31, 2001. (*Mayagna* from now on)
- Case of the Moiwana Community v. Suriname Judgment of June 15, 2005 (*Moiwana* from now on)
- Case of the Yakye Axa Indigenous Community v. Paraguay Judgment of June 17, 2005 (*Yakye Axa* from now on)
- Case of Sawhoyamaxa Indigenous Community v. Paraguay Judgment of March 29, 2006 (*Sawhoyamaxa* from now on)
- Case of the Saramaka People v. Suriname Judgment of November 28, 2007 (*Saramaka* from now on)
- Case of the Kichwa indigenous People of Sarayaku v. Ecuador judgment of June 27, 2012 (*Sarayaku* from now on)
- Case of the Kaliña and Lokono Peoples v. Suriname Judgment of November 25, 2015 (*Kaliña Lokono* from now on)
- Case of the Indigenous Communities of the Lhaka Honhat (our land) Association v. Argentina Judgment of February 6, 2020. (*Lhaka Honhat* from now on)

In each of these cases, several elements were analysed. Firstly, an innovative interpretation element was identified in each of them. After, it was assessed which were the collective rights

at stake, and how were enforced (or not), together with observations of whether an obligation was placed upon the State to make sure the effectivity of the given right. Moreover, given the attention the cases gave to elements beyond material positivistic approaches, the understanding of how cultural rights were entrenched with other types of rights was assessed. And finally, their potential transformative power was analysed by seeing how it challenged, or not, the conception of private property and the centrality of capitalist interests, by looking at the land as a mere means of production for private property or as understanding humanity as part of it and considering it a source of wellbeing and something where concrete rights can materialise and collective concrete work can be carried out to fulfil collective needs.

4. Analysis

The IACtHR recognises some collective rights in its jurisprudence on social, economic, cultural and property related issues, and they are pioneers in doing so, even prior to the UN Declaration on the Rights of Indigenous Peoples of 2007. Moreover, it is essential to acknowledge that the latter document, as many others related to this topic are not legally binding instruments, so the protection of indigenous communities with the recognition and enforcement of their rights relies on human rights jurisprudence (Pentassuglia, 2011). All the analysed cases deal with the dispossession of different indigenous communities' ancestral lands in diverse States, and they raise important issues on cultural rights together with economic, social and even environmental rights, so that their interpretation goes beyond the mere concept of property. In fact, this last element is also essential to understand up to which point are those recognised rights challenging what TWAIL scholars consider the core of international law, i.e. internationalisation of private property; and therefore, their potential for being transplanted into the imperialist centre (the more they put the "absolute right" of private property at stake the less likely they will be eligible for transfer). The analysis will be divided into two parts: firstly, jurisprudence innovation, and secondly, the travelling of those innovations. In both cases, the focus will not be on the normative procedure only, but also the limits of monitoring and enforcement will be studied to see how abstract rights become concrete and what the results in the material reality of those groups are.

4.1. Jurisprudence innovation

4.1.1. Contextualisation

One of the important points in all the analysed cases is how the material, cultural, economic, social, political context is considered, and a deep understanding of it is promoted by listening to the victims, members of indigenous communities but also to expert anthropologists, sociologists and expert witnesses (*Yakye Axa:* 9-22, *Saramaka:* 17-20*; Sawhoyamaxa:* 13-21*; Moiwana:* 19-25, *Kaliña* 9-12*; Sarayaku:* 12-15, *Mayagna:* 10-45*)*. The ways of living of those groups are considered to assess the impact of the expropriations by States of third private parties: "The territory of the Mayagna is vital for […] their very subsistence, as they carry out hunting activities (they hunt wild boar) and they fish (moving along the Wawa River), and they also cultivate the land." *(Mayagna:* 20, 83b), "The Sarayaku subsist on collective family-based farming, hunting, fishing and gathering within their territory following their ancestral customs and traditions. Around 90% of their nutritional needs are met by products from their own land" (*Sarayaku*, par. 54: 17). Apart from demographic and geographic data, other essential topics to have a full understanding of the case are raised, such as the cosmovision of those communities, specially linked to their connection with the land for their identity: "The tie to the land is essential for their self-identification" (Mayagna: 24), "the cultural identity of each cultural group is dependent on the special relationship it has with nature" (*Sarayaku,* par. 154: 38). The next quotation clearly states how the different layers from material to spiritual are considered to take the decision: "Since a N'djuka community's relationship to its traditional land is of vital spiritual, cultural and material importance, their forced displacement has devastated them emotionally, spiritually, culturally, and economically" (*Moiwana*, par. 95c: 76). In *Moiwana*, the transcendental dimension is especially important, as all the members of the community that were killed during the attack in 1986 will not rest until justice arrives, and therefore their spirits may harm other members, what makes it undesirable for the group members to go back and establish themselves in their lands (Ibidem, par. 96-97: 44-45).

This concretisation to take the decision moves beyond hegemonic paradigm of positivism, as issues beyond material conditions are considered. Moreover, there are some examples where the Court acknowledges the abstract and non-substantive character of some rights. One example is the consideration of "citizenship is as if it were imaginary, because they continue to suffer structural forms of discrimination, social exclusion, and marginalization*."(Mayagna:* 23). The reflexion regarding the right to prior consultation is another example of the necessity

to understand each case in depth and the inability of effectiveness of that right without having a full understanding of each situation and the internal processes of each indigenous group (*Sarayaku,* par. 202-3: 57-58). Another case is the right to legal identity– for individuals in this case- which exists in all the States involved in the analysed cases, however its abstract nature does not assure the conditions for that right to be enforced, so in different cases the duty of the State for the establishment of suitable conditions for that right to be held substantively is required (*Saramaka,* par. 167: 49; *Sawhoyamaxa* par. 189-90: 89). The abstract nature of the recognition of an indigenous land is also reflected: "merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established" (*Yakye Axa* par 143: 77).

Thus, regarding contextualisation two important features come up: a) the material and transcendental ways of living and conditions need to be considered in order to assess properly the impact of some actions by the State or by third private parties and b) having abstract rights in constitutions and other binding laws does not mean their enforcement is effective, a passive subject of rights needs to be defined; and the equal treatment of all members in society implies the perpetuation of inequalities.

4.1.2. Collective subject of rights

In the previous part it was shown that the individual right to legal identity was not assured in some cases; but the Courts have not only pushed States to comply with this basic right; they have also reached the conclusion that the indigenous group itself should hold legal personality, in a collective way. The evolution of that recognition was gradual. In the *Mayagna* case there was a call to consider indigenous communities as collective subjects of rights: "American Convention must be interpreted including the principles pertaining to collective rights of indigenous peoples, pursuant to article 29 of the Convention" (*Mayagna*, 140 ñ: 71), a claim that came in connection to property rights.

The *Moiwana case* goes through this issue, and the Court establishes that Suriname's legislation does not recognise indigenous groups as legal entities, even if the individual members themselves are considered natural persons (*Moiwana, par. 86(5)*). When deciding who are the beneficiaries of reparation measures, regarding material damages only individuals are considered (*Moiwana,* par. 176-181); but when deciding on beneficiaries of moral damages the IACtHR stated: "Given that the victims of the present case are members of the N'djuka

culture, this Tribunal considers that the individual reparations to be awarded must be supplemented by communal measures to safeguard the right to the truth ; said reparations will be granted to the community" (*Ibidem oar. 194).* Those measures include the investigation of the case to prosecute the perpetrators, recover and identify the remains of the massacre, issue a public apology to the whole Moiwana community and build a monument to guarantee non-repetition and embrace memory (par. 201-218). So, the whole group was considered as a subject of the right to the truth.

In *Yakye Axa*, the right to collective property is already taken for granted by the Court, as the Paraguayan legislation addresses that issue (*Yakye Axa,* par. 155: 79). The following paragraph of the judgments encompasses the idea perfectly: **"**the indigenous Community has ceased to be a factual reality to become an entity with full rights, not restricted to the rights of the members as individuals, but rather encompassing those of the Community itself, with its own singularity." (Yakye Axa, par. 83: 62). This constituted a landmark in the IACtHR jurisprudence, and it was afterwards used by many cases where the recognition of a collective subject of rights was at stake. In *Sawhoyamaxa* case, in fact, when dealing with this issue paragraphs 82-83 of Y*akye Axa* are quoted, as the State considered that the proceedings to claim their lands started once they acquired legal personality as a group, and the representatives and the Court itself argued that it was seven years before that "by means of a notice served by the leaders of the Sawhoyamaxa Community on the IBR2" *(Yakye Axa*, paras. 93-94: 64).

The Saramaka case is crystal clear, and the IACtHR in the decision affirms: "The State shall grant the members of the Saramaka people legal recognition of the collective juridical capacity" (*Saramaka*, par. 6: 61). It also states that due to the recognition of their juridical personality they have "the right […] to enjoy certain rights in a communal manner" (Ibidem, par. 172). The *Sarayaku* decision, does also recognise indigenous communities as collective holders of rights, in the concrete case of cultural rights *(Sarayaku* par. 217)[3] and the right to prior consultation by moreover citing many judgements of national Courts of countries that have ratified ILO Convention No. 169 (Ibidem, par. 164). The IACtHR ruled in the same direction in *Kaliña Lokono* case, where it affirms that Suriname violated Art. 3 of the American Convention on Human Rights as the national legislation "do[es] not recognize the collective exercise of the juridical personality of the indigenous and tribal peoples" (*Kaliña Lokono*, par. 114). Finally, in *Lhaka Honhat* the IACtHR draws on the previously mentioned jurisprudence

[3] Communication No. 276/2003 of the African Commission on Human and Peoples' Rights sub .285 footnote.

and legal innovations and states: “international law on indigenous and tribal peoples and communities recognizes rights to them as collective subjects of international law” (*Lhaka Honhat,* par. 154).

All these cases show therefore that the recognition of the collective subject of rights was an innovative element introduced first in the *Mayagna* case, but it was consolidated in *Yakye Axa,* due to the broad interpretation including the ILO Convention No. 169 and the explicit recognition of such a right in the Paraguayan domestic law. The following cases together with the judgements of different national Courts of Latin America show there is no room for doubt regarding the collective juridical personality of indigenous peoples. However, the case of *Saramaka* and *Kaliña Lokono* show the limits of the IACtHR to enforce its decisions, as in the former case the Court asked the State to comply with the same right that it is at stake in the latter case eight years later.

4.1.3. Communal property and cultural rights

The previous parts have shown the capacity of the analysed regional court to innovate jurisprudence and introduce collective rights in different spheres regarding right to the truth, property and cultural rights among others. This section aims at seeing the connection between the last two: right to communal property and collective cultural rights, as they are both inextricably linked in all the judgements and in the indigenous cosmovision. In order to do that, first the connection that indigenous communities have with the land needs to be assessed, as the experts and the Court affirm that “the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.” (Mayagna, par. 149) and “[their] essence derives from their relationship to the land” (Ibidem: 24). In *Yakye Axa* the Court acknowledges what land means to them, and accepts the different character compared with other more mainstream views: “The ancestral land of the Yakye Axa Community and the habitat that its members have humanized in this land[…] defines the identity of the Community […] it represents the place where it is possible for them to imagine the realization of life aspirations that respect their cosmogony and their cultural practices” (*Yakye Axa, par.* 158 J). *Moiwana* established that access to the homeland is essential for the culture to maintain its integrity and identity (*Moiwana,* par. 86 (6)). The other expert witnesses and the members of the Court identify and consider this spiritual connection with the land, and the view fits with the “oneness” of environment and humanity that was stated in the theoretical framework, clashing with the

State's and the third private parties' view of the land as a source of resources to make profit, a mere means of production, a property.

4.1.3.1. Collective property and the connection with other rights

Cultural rights are important as they establish the basis to acknowledge communal property rights of indigenous peoples. In fact, in *Mayagna* the cosmovision of indigenous groups that they see land and its resources as a communal concept is taken into account (*Mayagna*: 24), and the Court even accepts that the concession given to the firm to exploit the land and its resources does in fact harm cultural integrity of the members of the community (*Mayagna*, para. 140 k). The *Saramaka* case established that : "Land is more than merely a source of subsistence for them; it is also a necessary source for the continuation of the life and cultural identity of the Saramaka people" *(Saramaka*, par. 82). The communal property of the land is also required for the maintenance of their minoritised languages (*Yakye Axa*, par. 39 f: 20). The IACtHR affirmed also that the expulsion of indigenous populations from their lands leads to "the free development and transmission of their culture and traditional rites [being] threatened." (*Sawhoyamaxa*: par. 143). The *Kaliña Lokono* case determined that the ability to occupy ancestral lands is a vital requirement for the preservation of indigenous culture, their overall well-being, and the realization of their life aspirations (*Kaliña Lokono*, par. 138); and *Lhaka Honhat* judgement affirms in the same direction that "ownership of the land ensures that the members of the indigenous communities preserve their cultural heritage" (*Lhaka Honhat*, par. 95).

Communal property is mainly linked with two rights: the right to life and the right to education. Even if in *Mayagna* the claim related to the right to life was dismissed because it was not included from the beginning (*Mayagna*, par. 156*), Yakye Axa, Sawhoyamaxa* and *Sarayaku* deal with this issue; in the other analysed cases it does not constitute a central element, but it is invoked by some party in all of them. In those cases where it is considered, the Court understands that right in *lato sensu* and therefore considers that communal property of the land is a condition for the lives of the members of the community as their identity is endangered without their culture, which cannot be preserved without the territory because of the holistic view that considers themselves and the environment surrounding them all part of a whole (Yakye Axa, par. 158). In *Sarayaku*, the Court does not interpret the right with the same wide scope, but in relation to the fact that some explosives had been buried buried in ancestral lands (*Sarayaky*, par. 244-249). The *Sawhoyamaxa* case is especially interesting, because of the

separate opinion by Judge A. A. Cançado Trindade, whereby one of the sections is about the right to life and cultural identity; and defines the latter as a component of the former; because life should not be interpreted in a restricted sense, and therefore the mere survival is not enough according to him (*Sawhoyamaxa*, s. o. Trindade, par. 28-32). In *Sawhoyamaxa*, it is also interesting to see the link of collective property rights with the right to education, where language plays an essential role, it is strongly linked to cultural rights. An expert witness who works as a teacher in the KM 16 settlement, warned that the number of speakers of the native language has been steadily decreasing; at the beginning because of their proximity to local Paraguayan population, and by the time the trial took place, because of the proximity of the highway that made the loss even more pronounced. To reverse that trend and facilitate the revival of the language the community relied on the resources of nature of their ancestral lands (*Sawhoyamaxa*, par. 34 D).

The most recent innovation appears in the *Kaliña Lokono* case, which was pioneer in establishing the focus on the environmental rights. As it was seen with the cases presented before, usually communal property was related to the idea that not recognising it would harm the indigenous community because of their a) loss of cultural identity and practices, b) destruction of the connection and spiritual dimension with the land, c) detriment of economic, social and health conditions etc. But this case presents the right to communal property in relation to the benefits this would carry to the environment itself, not to the indigenous community. The following paragraph sums up clearly the stance the Court took:

"Thus, in general, the indigenous peoples may play an important role in nature conservation, since certain traditional uses entail sustainable practices and are considered essential for the effectiveness of conservation strategies. Consequently, respect for the rights of the indigenous peoples may have a positive impact on environmental conservation. Hence, the rights of the indigenous peoples and international environmental laws should be understood as complementary, rather than exclusionary, rights." (*Kaliña Lokono,* par. 173).

So, this judgement did recognise the positive relationship between the environmental conservation and indigenous communities' way of life, showing the "oneness" of the latter's epistemologies. Moreover, an implicit connection is established between indigenous peoples' and environmental laws, acknowledging the positive outcome of understanding both together and related to the previously mentioned indivisibility of human rights that are usually classified in different boxes by liberalism.

4.1.3.2. Building collective (private) property rights

The link between cultural rights and collective property have already been analysed, but the very re-interpretation of Art. 21 regarding private property must be scrutinised to see whether this collective right challenges the core of liberalism. As previously mentioned, *Mayagna* is the landmark case accepting collective right to property, and in order to do that, first the Court acknowledged the characteristic of indigenous groups regarding the collective dimension: "Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community" (*Mayagna*, par. 149). The IACtHR after states: "the members of the Awas Tingni Community have a communal property right to the lands they currently inhabit, without detriment to the rights of other indigenous communities" (*Mayagna*, par. 153). It also clarified that there is no need for an official property title, and that possession is enough to have an official recognition of property and register it (*Mayagna*, par. 151). This jurisprudence was after cited in all the other cases, but a little change was added in *Moiwana*, which consolidated this communal property right, because in the previous case the very Constitution of Nicaragua recognised such a right, whereas other Latin American States did not. So, in *Moiwana*, the IACtHR specified that "Suriname violated the right of the Moiwana community members to the communal use and enjoyment of their traditional property" *(Moiwana*, para. 135), even if Suriname did not recognise that right in the national legislation. Moreover, the Court held that in this case possession did not apply because they left the land after the attack as their lives were in danger, but even in this situation they were "legitimate owners of traditional lands" (*Moiwana*, par. 134), because the land was not transferred to third parties in good faith during their absence.

In *Yakye Axa*, references to *Mayagna* decision are made and the interpretation of Article 21 as respecting private property rights for individuals as well as for groups. It goes beyond stating that, as in the case of Nicaragua, even if the Paraguayan law recognizes such a right, its positive obligations to make it effective were not met and in consequence "this has threatened the free development and transmission of their traditional practices and culture (*Yakye Axa*, par. 155). In this case, possession did not apply either, because they had moved due to bad living conditions in their ancestral lands after the privatization and exploitation by cattle industry, where they were employed, notwithstanding their "oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and value." (*Yakye Axa*, par. 154).

However, the possibility of land restitution applied in this case after assessing the legality, necessity, proportionality and fulfilment even if there was a clash of interests; "a compensation granted must be guided primarily by the meaning of the land for them" (Ibidem, par. 149); thus cultural rights play a huge role in determining which interests should prevail, the ones claimed by the indigenous community or the ones by the third private party.

Sawhoyamaxa refers also to the collective property rights of the indigenous community, considering not only material elements (the land) but also spiritual, non-corporeal elements (*Sawhoyamaxa*, par. 124) referring to the conceptualisation that was done in *Mayagna* and *Yakye Axa* cases. This was a similar situation to the one faced by the Yakye Axa community, the privatisation of the lands where they lived in the nineteenth century caused their move to other places, most of them located in a place next to the highway where material conditions constitute a threat to the right to life (Ibidem, par. 73(61)- 73(74)). As they were forced to leave, the right to restitution of traditional lands recognised by the Paraguayan State applied to them (para. 131), and the Court concluded just as in the previous case: "[t]he free development and transmission of their culture and traditional rites have thus been threatened" (Ibidem, par. 143) by the expropriation. The Court condemned the State because it did not meet its positive obligations to assure "not only of the material possession of their lands but also from the fundamental basis to develop their culture, their spiritual live, their integrity and their economic survival" (Ibidem, par. 113 A).

The *Saramaka* case provided a new point regarding the collective property rights that were established in the other cases: the right to natural resources located in those ancestral lands. The element mentioned in *Moiwana* case continued without any change, the national legislation did not provide any collective juridical capacity to indigenous groups, and therefore the collective right to property was not contemplated; but the use of international and regional laws provided enough grounds to enforce the right in Suriname too (*Saramaka*, par. 98). In fact, Court argues that the State only recognizes the privilege, not the right to land enjoyment, so no guarantee is provided to avoid third parties' interference (*Saramaka*, par. 115). The context was that both, Saramaka people and the State claimed the right to use the natural resources that were in possession of the former group, to legitimise the concessions the State had made to private companies for the extraction of subsoil resources. The Court ruled that "members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical

and cultural survival of such peoples is at stake" (Ibidem, par. 121). In this sense, the Court had to find out how to define which were those resources that Saramaka people needed to survive, and concluded that the extraction of non-vital resources for the indigenous community might also harm the vital ones in the process (Ibidem, par. 126). Another essential element the case raised was the very definition of a group as "indigenous", because Saramaka people escaped traditional pre-colombine conception, and the judgment establishes the conditions of having a strong relationship with the territory (in this case since the 17th century) and differentiating social, economic and cultural features (Ibidem, par. 73-84).

After assessing the interpretation that the IACtHR has developed on collective property rights, it may be excessive to conceive those rights as challenging private property rights. It is true that indigenous communities' cosmovision is respected and their spiritual connection is used as a basis to claim and recognise that right, but the State has the final say in respecting or not those rights, acknowledged or not in domestic legislation. In each of the parties two different dimensions are in danger: indigenous communities' survival is what is at stake on one side, while the profits of an extractive company would be on the other; repeating again the "oneness" and the instrumental view of nature and humanity. Consequently, after seeing the developed jurisprudence two points might be raised: a) the recognition of indigenous groups' collective property rights is a step forward to recover the elements expropriated by the bourgeois class during the last centuries, but the result does not depend on the will of the Court, neither on the State in some cases, as private companies have enough power and resources – military and economic- to reverse the decision, and b) indigenous groups recovering their lands is good news but this right is restricted only to those groups with specific characteristics and does not encompass other peoples without any special mystic connection that could quit abstract work and start to construct different social relationships by working together some lands to respond to collective needs; even though it may be a good start to then extend this right.

4.1.4. Right to Free, Prior and Informed Consent

The right to free, prior and informed consent is one of the most important protection rights that indigenous peoples have to defend themselves from private companies and their interests – which might be aligned with the interests of the State as in *Saramaka-*, in case they affect to their lands or communities. It is enshrined in two international legal instruments: ILO Convention NO. 169 (Art. 6.1(a); Art. 7; Art. 15.2; Art. 16, Art. 17 and Art. 22) and UN Declaration on Rights of Indigenous Peoples (Art. 32). However, there is an important

difference: the first one is binding and only 22 countries have ratified it, among which many Latin American countries; the second one is a soft-law instrument, it is not binding and it was approved by 144 members of the UNGA. These numbers already give a hint of which is the level of commitment that States are willing to have with the indigenous issue, which suggests it would suppose a challenge to the capitalist interests. There are even four countries that voted against the UN Declaration despite its non-binding character, one of them being the US.

The issue of the adequacy with which this right was applied was discussed in two cases that are analysed in this work: *Saramaka* and *Sarayaku*. In the former case, the Court affirmed that beyond consultation a prior, free and informed consent was needed, in consonance with their own practices and customs (*Saramaka*, par. 134), giving enough information and encouraging effective participation and not just the formalisation of previously decided projects and carrying out prior environmental and social impact assessment (Ibidem, para. 133-157); and the State failed to comply with those safeguards (Ibidem, par. 158). Moreover, in this case the lack of recognition of the collective legal personality by Suriname, as was already mentioned, implied the impossibility of considering them as a subject with whom the projects should be discussed (Ibidem, par. 174-5).

In *Sarayaku* case, the context was quite different, as the national law, the Ecuadorian Constitution of 2008, was considered the most exemplary one in the world with regard to the indigenous peoples and their rights (*Sarayaku*, par. 168). Nevertheless, as it was already seen in the case of other rights, merely being in the normative body does not mean that those rights are properly enforced by the State. In fact, Ecuador argued it failed to carry out its obligations because they were adapting the regulation to make the right to prior consultation effective (Ibidem: par. 224). The oil company caused severe harm to the natural resources of the Sarayaku's ancestral land, land destroyed spiritually important places (Ibidem, par. 212-227). Therefore, given the consequences on the material basis that do affect their cosmovision and therefore quality of living, the Court ruled that Ecuador violated right to communal property and cultural identity (Ibidem, par. 232).

4.1.5. Justiciability of economic, social, cultural and environmental rights (ESCER)

Sarayaku case is not only relevant because of its concretization of the prior consultation right, but it does also innovate on the justiciability of cultural rights. ESCR are usually considered just as programmatic guidelines, and are framed in an abstract way without even establishing any passive subject of the rights with any obligation to make sure the right is enforced and

effective. The IACtHR decided in that case that “the right to cultural identity is a fundamental right - and one of a collective nature” (Sarayaku, Par. 217). Furthermore, the Court defines who is responsible for making those abstract rights real and enforceable: "States have an obligation to ensure that indigenous peoples are properly consulted on matters that affect or could affect their cultural and social life, in accordance with their values, traditions, customs and forms of organization” (Ibidem).

The key case in the justiciability is *Lhaka Honhat*, which arrived in the Court because of non-compliance by Argentina with the previous IACHR’s decision regarding the recognition of collective property rights of many indigenous groups. This is the first case that analyses the breach of Article 26 of the American Convention on Human Rights related to the rights to a healthy environment, to water, to food and to cultural identity (*Lhaka Honhat*, par. 60).

The Charter of the OAS already included the right to a healthy environment, as stated in the Advisory Opinion OC-23/17 titled "The environment and Human Rights." The opinion suggests that this right is seen as a universal value because of the broad interpretation of articles 4 and 5 (Ibidem, par. 203). Furthermore, the Protocol of San Salvador[4] as well as many of the constitutions of the Latin American region recognise the abovementioned right to a healthy environment including the country at trial, Argentina (Ibidem, paras. 205-207). The Court concludes that the State has the obligation to prevent environmental damage, to act *ex ante* with all possible mechanisms, even in the private sphere to prevent the most vulnerable groups from suffering (Ibidem: paras. 207-209).

The issue of the right to water was introduced by the Court itself by using *iura novit curia*[5] principle and therefore widening the enforceable ESCER catalogue in the Charter (Ibidem, par. 200). The Court used as reference the General Comment No. 15 “The Right to Water” of the UN High Commissioner for Human Rights, where availability, accessibility and quality are the indicators to establish whether the right is effective or not (Ibidem, par. 227). Moreover, the understanding, far from a restrictive vision, encompasses many different uses and variations according to climate or work conditions; specifically mentioning indigenous’ communities link to their lands and the problems of pollution they suffer (Advisory Opinion OC-23/17, par. 111). In this case the Court also establishes an obligation for the State to make sure all these

[4] It is an Inter-American treaty aiming to safeguard economic, social, and cultural rights in the OAS members. It complements the American Convention on Human Rights.

[5] The principle of "iura novit curia" refers to the court's ability and responsibility to know and apply the applicable law in a case without relying solely on the parties to provide the legal rules or arguments.

conditions are fulfilled, including measures to protect indigenous groups from third private parties' unlawful activities (Ibidem, para. 229).

Another enforced right is the right to adequate food, and it applies here to the ESCR Committee opinion, concluding it is necessary to have enough food available, with enough quality and accessibility (Ibidem, par. 218). The last right is directly a cultural right: the right to take part in cultural life which contains the right to cultural identity, is reinforced by this judgement as it gives meaning to that right already considered in the American Declaration of Human Rights and the Protocol of San Salvador (Ibidem, par. 234-237). The Court also establishes the positive State obligations to make sure this right is effective.

This judgement is crucial because as it was explained, concrete rights were defined in a specific material context and their justiciability was enabled by doing that; but also because of the approach to all the human rights the ruling present. There is a whole part regarding the entrenched connection of all the abovementioned rights among them of the indivisibility of ESCER, which could be extended to social and political rights too (Ibidem, par. 243-254). Nevertheless, this strong relation should not prevent the Court from establishing autonomous measures for reparation of each right, defining concrete and feasible solutions with concrete timing and resources (Ibidem, par. 331-342). This may imply a step forward from abstract liberal rights to concrete ones, allowing better living conditions to the indigenous communities; but also for all the dispossessed working class.

4.1.6. Resisting to change: alliance between State and capital

All the abovementioned improvements on the enforcement of collective rights in social, economic, cultural and property issues were not straightforward, States showed important resistances to the changes. One clear example would be the actuation of Suriname in *Saramaka*, where it submitted six preliminary objections (*Saramaka*, paras. 19-57) One of them proves that when the State benefits from it they recommend to acknowledge and comply with customary rules of the indigenous peoples: "the State argued that the petitioners did not consult the paramount leader of the Saramakas, the Gaa'man, about filing the petition" (Ibidem, par. 19). However, when respecting those communities' rights harms the interests of the State, in the economic sphere mainly, violations to rights are abundant as the other cases show. One repeated practice in different countries is the attempt to homogenise the culture and, therefore, the worldview of all the inhabitants, therefore imposing "integration processes" on the

indigenous communities. *Mayagna* unveiled the practices of the Nicaraguan State to incorporate indigenous communities which "endanger their survival as social groups identified with a collective personality and a specific ethnic identity" (*Mayagna,* par. 83d).

Beyond the State, the Church has also played an important role historically in the elimination of all non-aligned beliefs and traditions. In Paraguay, due to the debts that the State had with the UK, many lands where indigenous communities lived where sold to British capitalists, and the Anglican Church established itself there employing indigenous people in the cattle estates imposed in their ancestral lands for "evangelization and pacification" (*Sawhoyamaxa,* par. 73(1)). In the case of Ecuador, a third actor played an essential role in the attempt to eliminate alternative epistemological matrixes: the private Argentinian enterprise CGC, who got the concession to oil exploitation in the ancestral lands of Sarayaku community. Since according to the ILO 169 the State had to obtain the free, prior and informed consent from that community, the CGC began some actions in order to corrupt enough community members to reduce opposition to the project by offering enormous amounts of money, offering medical services and personal gifts, (*Sarayaku,* para. 73-74), and even in this situation the Sarayaku people rejected the offer. After knowing that they did not accept, the strategy used by the oil-extraction company changed: "CGC hired Daymi Service S.A., a team of sociologists and anthropologists dedicated to planning community relations. According to Sarayaku members, its strategy consisted of dividing the communities, manipulating the leaders, and carrying out defamation campaigns to discredit the leaders and organizations." (Ibidem, par. 75).

An entanglement between State, Church and capitalist interests can be seen, which may confirm the TWAIL scholars' idea of cultural homogenisation being a tool for transnational capital to flow freely. However, the strategies used by all these actors are not limited to those subtle tactics. In some cases, when dissuasion and division plans do not function, physical violence enters into play. A clear example would be the presence of the military forces of Ecuador during the CGC incursions; as the opposition to the project was huge among the community, the State militarised the area to avoid any possible problem with the indigenous peoples (*Sarayaku*, par. 190-192). So, in the case of Ecuador, which is supposed to have the best legislation on indigenous communities' rights and even has introduced some alternative epistemologies as *sumak kawsay*, the State did not only violate the right to prior consultation, consent, and carry out activities with economic interests depriving the environment, habitat and all the socio-cultural meaning attached, but it also delegated its obligations on a private company, whose interests clashed directly with the concrete rights.

4.2. Travelling innovative interpretations

Innovative jurisprudence on collective rights was used by other regional Courts, and one of the most prominent systems of Human Rights using interpretations that came up in the IACtHR is the African Court of Human and Peoples' Rights (ACtHPR). There was specially one case were ideas related to collective property protection, the definition of indigenous communities and the connection with the right to life were listed: the case Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya (*Endorois* from here on). It uses *Mayagna, Moiwana, Sawhoyamaxa, Saramaka* and Yakye Axa to affirm collective property rights recognition to indigenous groups (*Endorois*, par. 93, 190, 197-9), and it even dedicates five entire paragraphs to the analysis of *Saramaka* in depth, due to the similarities of both cases, dealing with indigenous communities that suffered from the concession to a private enterprise to exploit resources without prior consultation to them. Moreover, the innovative understanding that rights of indigenous peoples apply not only to pre-colombine groups, established by *Moiwana* and *Saramaka,* was also used to frame the Endorois community as holder of collective property rights. The violation of the right to life by pushing out the community for the sake of private interests was confirmed by the case *Yakye Axa* (Ibidem, par. 216).

The IACtHR, in fact, also employs interpretations used by the ACHPR to support its decision regarding the right of indigenous communities to their natural resources, and to establish which should be the limitations, by referring to The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Communication 155/96 (2001) in *Saramaka* (par. 120 footnote 122). In fact, apart from the regional court decision, the IACtHR applies also the interpretation that the South African Court made on the restitution of the land against a mining corporation in the case called Alexkor Ltd. and the Government of South Africa v. Richtersveld Community and Other (Ibidem). *Sarayaku* also refers to ACtPHR jurisprudence in relation to the minorities' right to cultural identity and its collective dimension (*Sarayaku*, par. 216). In addition, the separate opinion by Judge Eduardo Ferrer Mac-Gregor Poison mentions the African Charter on Human and Peoples' Rights as well as the ACHPR case titled African Commission on Human and People´s Rights (Ogiek) v. Kenya (*Lhaka Honhat*, paras. 35-39 s. o. Mac-Gregor Poison). Therefore, the use of African decisions in Latin America and vice versa could be a sign of harmonisation of the interpretations in both Courts and Commissions regarding collective rights and the limitations that this supposes to the interests of private investors and States in some cases. It might be an example of the cooperative construction of a legal framework to increase protection of the rights of the dispossessed peoples of the periphery, but without arriving to challenge the internationalisation of private property as such.

According to Papaioannou, "the ECtHR has referred to the Inter-America human rights system in more than 50 cases" (2014: 1046). Yet, this travelling of interpretations did not involve collective rights, but was centred on restorative justice, torture, rights to life etc., where a view from alternative

epistemologies might be noticed, for example, in the consideration of not only the material harm, but also the moral and spiritual dimensions linked to the beliefs and traditions of the group of victims.

The ECtHR refers less to the African system of Human Rights, though the latter refers to the European Court. So, it can be seen that the travelling direction of jurisprudence depends on the topic and the approach, but South-South cooperation can be seen in the legal field as well as in economics and international relations among other fields.

5. Final remarks

After the review of critical literature regarding international law in general and human rights in particular together with the analysis of the eight cases, some ideas must be highlighted:

- The Human Rights' framework is limited by the capitalist system, and even if some steps forward can be given through the regional courts with binding decisions, the solution depends on the willingness of the State to comply with the judgements; which is, at the same time, bounded by economic interests, that in the case of Global South countries are dependent on the interests of the imperialist centre and their structurally asymmetrical position in the global market.
- Abstract rights remain strong, but the claims by indigenous communities and the wide contextualization of each of the cases oblige Courts to make those rights effective by applying concrete measures.
- Collective cultural rights are at the core of other collective rights, especially the right to communal property because there is an understanding of the indivisibility of rights on the one hand, but also because of the specific characteristics of indigenous groups concerning their worldview and cosmovision on the other. In general, they are always connected to other rights to make them effective, which shows the trend to consider them as programmatic guidelines and not justiciable, even if this trend is facing changes in the normative dimension.
- It seems that even if the IACtHR has innovated jurisprudence, the private property itself is not contested. Not even when the view indigenous groups have of the land and the resources beyond the capitalist lenses is acknowledged. The enjoyment of the land and its resources by such communities does pose a limitation for the State and the transnational capital and extractive industry for their projects, normatively at least; but the power asymmetry is so big that special protection measures are needed. However,

in case the State interests are aligned with the third actors', measures to safeguard concrete rights are not going to be completely fulfilled. In this sense, the Right to Free, Prior and Informed Consent is one of the most effective tools to make sure that private property for capital's interest will be limited.

- Inter-court dialogue is more present in the periphery, between Latin America and Africa especially. This might constitute an opportunity for unity of subaltern subjects throughout both continents and create a suitable normative framework to be legally protected when their rights are violated. However, the neoliberal deregulatory trend seems to be on vogue, and the role of corporations as lawmakers, judges and implementors is growing. This context, together with the entry of a new capitalist crisis because of the decreasing tendency of profit-rate, makes the suspension of rights even more usual, in the centre and in the periphery, so it might not help for indigenous communities to improve their situation.
- The original aim of this work was to see whether jurisprudence and legal innovation travel from South to North; however, the research process showed that this question is not as relevant as the interests that the norms represent. That a norm is born in the periphery or in the centre does not mean anything; the influential positions are usually held by powerful actors, whose interests are aligned with the bourgeoisie, so local epistemological matrixes and social logics beyond capitalism are not usually applied. In fact, the cases of the ECtHR that mention IACtHR jurisprudence do not contain those approaches. In the analysed cases, few constraints can stop privatisation of every element in Earth, but the most effective tool might be the Right of Free, Prior and Informed Consent/Consultation. Interpretations of this right by the IACtHR have only been used by the ACHPR, which may suggest an alignment between African and Latin American courts.

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