

# PRACTICE AND ONTOLOGY OF IMPLIED HUMAN RIGHTS IN INTERNATIONAL LAW

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## *Abstract*

Since the XIXth Century, implied (unenumerated) rights have been widely recognized by the courts of several countries with the purpose of addressing the shortcomings existing in national constitutions with respect to the protection of the fundamental rights and freedoms of the human person. In the last decades, such a trend has been emulated by international human rights treaty bodies and regional courts, which use implied human rights to fill the gaps existing in human rights instruments. This practice increases the level of protection afforded to individuals and communities, achieving the goal of guaranteeing effectiveness of human rights.

## *Introduction*

One characteristic recurring in several international human rights instruments consists in including, at their inception, a solemn proclamation according to which either all human beings or the specific categories of people addressed by the instrument concerned are entitled to the enjoyment of *all human rights and fundamental freedoms*,<sup>1</sup> or, to use an equivalent expression, of the *full measure of human rights*.<sup>2</sup> These expressions are very evocative and

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<sup>1</sup> See, e.g., World Conference on Human Rights, *Vienna Declaration and Programme of Action*, para. 1, U.N. Doc. A/CONF.157/23 (June 25, 1993); Convention on the Rights of Persons with Disabilities art. 1, Dec. 12, 2006, 2515 U.N.T.S. 3; G.A. Res. A/RES/61/295 (Sept. 13, 2007).

<sup>2</sup> See ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries art. 3, June 27, 1989, 1650 U.N.T.S. 383 (affirming that

praiseworthy, with a huge symbolic value, but also an extraordinary practical significance, as they proclaim the very foundation and *universal* mission of human rights, *all* of which should be effectively enjoyed by *all* human beings. At the same time, we are dealing with expressions which are very easy to proclaim, but, at the same time, quite hard to define in their precise meaning and contents. In fact, is a list of rights available somewhere which may be considered as being so comprehensive to totally cover *all existing* human rights? For sure, such a list is not contemplated by any of the existing international human rights treaties or soft law instruments, as demonstrated by the fact that the catalogues of rights enumerated by such instruments are all different—at least partially—from each other. For instance, the collective rights protected by Articles 19-24 of the African Charter on Human and Peoples' Rights (African Charter)<sup>3</sup> are not contemplated by either the European Convention on Human Rights (ECHR)<sup>4</sup> or the American Convention on Human Rights (ACHR).<sup>5</sup> Similarly, the right of every person “to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes,” provided for by Article 22 ACHR, is not included in the other main universal or regional conventions generally dealing with human rights, while a right “to seek political asylum in another country in order to escape persecution” is established by Article 28 of the Arab Charter of Human Rights.<sup>6</sup> Therefore, all existing international human rights instruments—with no exception—provide for a measure of human rights which is not *full*, but rather partial. Or, in other words, they do not include *all* existing human rights, but only part of them. This is understandable in light of the fact

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“Indigenous and tribal peoples shall enjoy *the full measure of human rights and fundamental freedoms* without hindrance or discrimination”) (emphasis added).

<sup>3</sup> African Charter on Human and Peoples' Rights, June 28, 1981, 1520 U.N.T.S. 217.

<sup>4</sup> Convention for the Protecting of Human Rights and Fundamental Freedoms, Nov. 4, 1950, C.E.T.S. No. 5.

<sup>5</sup> American Convention on Human Rights: "Pact of San José, Costa Rica," Nov. 22, 1969, 1144 U.N.T.S. 123.

<sup>6</sup> League of Arab States, Arab Charter on Human Rights, May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REP. 893 (2005), *entered into force* March 15, 2008.

that, in spite of the assumed universality of human rights solemnly proclaimed by several pertinent instruments,<sup>7</sup> each region of the world has its own understanding of such rights, which is influenced by the cultural traits prevailing in a given area,<sup>8</sup> and the elements characterizing such multiple understandings coincide only in part. Furthermore, the presence and function of human rights treaty bodies is to be taken into account, as they usually play a propulsive role in interpreting the relevant human rights standards. This role is not limited to providing an interpretation of such standards that is appropriate for each concrete case submitted to their attention, but sometimes extends to a *creative* function having the purpose of filling the protection gaps present in the treaties subject to their supervision. Indeed, human rights treaty bodies significantly contribute to attributing to each human rights treaty its own specificity and distinctiveness.

Even hypothesizing to draw a list composed by *all* human rights enumerated by *all* human rights treaties and other pertinent instruments presently in force worldwide, taken together, such a list would anyway not contain *all* existing human rights. A hypothetical full list of human rights, in fact, would include not only those human rights that are expressly contemplated by relevant instruments (*expressed—or enumerated—rights*), but also those human rights which, although not explicitly mentioned by such instruments, implicitly derive from either the combination of expressed rights or from the extensive (*evolutive*) interpretation of the latter in concrete cases. These rights are commonly defined *unenumerated, unnamed, or implied* rights. They are usually identified at the interpretative level and, consistently with what has been noted right above, human rights treaty bodies play a fundamental role in determining their affirmation and development.

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<sup>7</sup> See World Conference on Human Rights, *Vienna Declaration and Programme of Action*, *supra* note 1 at Part I, ¶ 1 (stating “[t]he universal nature [of human rights and fundamental freedoms] is beyond question”).

<sup>8</sup> See FEDERICO LENZERINI, *THE CULTURALIZATION OF HUMAN RIGHTS LAW* (Oxford Univ. Press 2014).

*The Affirmation of Implied Rights in Domestic  
and International Practice*

It is reasonable to argue that, when an international human rights treaty is adopted, the drafters of its text try to make it comprehensive and capable of properly addressing all possible situations of human rights breaches, within its own scope of application, which may occur in the real world. Generally, however, factual evidence shows that such an assumption is approximate, either for the reason that the drafting of a treaty is mainly a theoretical exercise—which in most cases may only partially be grounded on empirical evidence—or due to the generally conservative approach followed by many State delegations during negotiations, usually tending to restrict as much as possible the scope and extent of the international obligations arising from a forthcoming treaty. “Even an open-ended corpus of human rights must acknowledge that not all imagined rights can be guaranteed.”<sup>9</sup>

As a consequence, when the correct implementation of a treaty is watched by a monitoring body, it is very frequent that such a body, consistent with its own practice, will try to fill the gaps of protection existing in the treaty of reference. The same approach may well be pursued at the domestic level as well, especially by national courts (normally on the basis of their own domestic law, especially of constitutional character).

*Recognition of “Unenumerated” Rights in Domestic Law*

It was actually thanks to the jurisprudence of national courts that the idea and the practice of implied (or unenumerated) rights first emerged and was developed. This happened in particular in the United States in the XIXth Century, due to the fact that, as written by John Rogge in 1959, “[t]he [US] Constitution originally did not have a bill

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<sup>9</sup> Samuel J. Levine, *Unenumerated Constitutional Rights and Unenumerated Biblical Obligations: A Preliminary Study in Comparative Hermeneutics*, 15 *CONST. COMMENT.* 511, 524-25 (1998).

of rights because the delegates to the Federal Convention which proposed it did not feel that one was necessary ... they thought that the States would protect individual rights.”<sup>10</sup>

At that time, unenumerated rights were basically conceived as arising from the law of nature. Courts of different states of the Federation consistently declared the existence of several unenumerated rights as corresponding to principles of natural law, including the right of an illegitimate child to inherit from her mother,<sup>11</sup> the right of a person not to be condemned without being adequately summoned,<sup>12</sup> the right to leave a country in time of war,<sup>13</sup> and the right not to be tried twice for the same crime,<sup>14</sup> among others. Successively, and up to the present times, American courts have regularly continued to recognize the existence of unenumerated rights. In fact,

[m]ost American constitutional lawyers, including the majority of the Justices on the US Supreme Court, regard the Constitution as a living document that has to be interpreted in light of present-day conditions. The supporters of this theory believe that the Constitution was meant to grow and develop over time, while its meaning should be interpreted and adjusted in accordance with changing conditions.<sup>15</sup>

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<sup>10</sup> O. John Rogge, *Unenumerated Rights*, 47 CALIF. L. REV. 787, 787 (1959).

<sup>11</sup> See Richard. H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 UNIV. PA. J. CONST. L. 401, 409 n.73 (2007) (describing *Heath v. White*, 5 Conn. 228, 234-35 (1824)).

<sup>12</sup> See *id.* n.71 (describing *Astor v. Winter*, 8 Mart. (o.s.) 171, 178 (La. 1820)).

<sup>13</sup> See *id.* at 410 n.74 (describing *Kilham v. Ward*, 2 Mass. (1 Tyng) 236, 239 (1806)).

<sup>14</sup> See *id.* n.75 (describing *Simmons v. Commonwealth*, 5 Binn. 617, 623 (Pa. 1813)). See also Eric Slauter, *Written Constitutions and Unenumerated Rights*, AM. ANTIQUARIAN SOC’Y 277, 277 (2007) (providing a historical perspective of the recognition of unenumerated rights by US courts).

<sup>15</sup> TOM ZWART, *Why Originalism Ought to be in the Game Outside the U.S. as Well: The Case of Unenumerated Rights*, HOLY WRIT INTERPRETATION IN LAW AND RELIGION 113, 114 (A.J. Kwak ed., 2009).

In particular, unenumerated rights have been drawn from the IXth and XIVth Amendments to the U.S. Constitution. As far as the former is concerned, it is exactly entitled “Unenumerated Rights,” and establishes that “[t]he enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>16</sup> With regard to the XIVth Amendment, it contemplates the prohibition for the states of the Federation to “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>17</sup> The latter provision has extensively been used as source of unenumerated rights thanks to the indefinite character of the term *liberty*, which consequently attains an extent allowing to subsume within its meaning a virtually unlimited number of concrete prerogatives of the person. Per effect of this jurisprudential approach, many specific rights have been sanctioned by U.S. courts, “through an extension of the principles embodied in those rights actually enumerated in the constitutional text.”<sup>18</sup> Such rights include, inter alia,

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<sup>16</sup> See M.W. McConnell, *Ways to Think about Unenumerated Rights*, U. ILL. L. REV. 1985, 1991 (2013) (discussing the significance of the IXth Amendment in the context of unenumerated rights).

<sup>17</sup> <sup>17</sup> See *Slaughter-House Cases*, 83 U.S. 36, 125 (1872) (illustrating that the first U.S. Supreme Court case referring to enumerated rights was actually based on the XIVth Amendment).

<sup>18</sup> Levine, *supra* note 9, at 520.

the right to privacy,<sup>19</sup> the right to engage in political activity,<sup>20</sup> freedom of movement,<sup>21</sup> the right to knowledge,<sup>22</sup> the right to confrontation,<sup>23</sup> and the right to the use of the mails.<sup>24</sup> Even the First Amendment to the Constitution, which guarantees freedom of speech, has been used by the US Supreme Court as basis for the recognition

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<sup>19</sup> See Rogge, *supra* note 10, at 799. The unenumerated right to privacy has been used by the US Supreme Court to recognize a number of specific prerogatives in favour of individuals. For instance, in a famous judgment of 1965, the Court declared a statute of Connecticut which prohibited the use of contraceptives as void and as a violation of the right to marital privacy, on the basis of the assumption that “[t]o hold that a right so basic and fundamental and so deep rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.” See *Griswold v. Connecticut*, 381 U.S. 479, 491 (1965) (Goldberg, J., concurring); “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . Various guarantees create zones of privacy.” *Id.* at 484. Also, in 1973, the Supreme Court held that the U.S. Constitution guarantees personal privacy to an extent which “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy” in its early stages. See *Roe v. Wade*, 410 U.S. 113, 153 (1973). See also *Planned Parenthood v. Casey*, 505 US 833 (1992); Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381 (1992) (regarding a doctrinal comment on the topic). Another interesting example is offered by *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), in which the Supreme Court recognized the right to privacy as guarantee of the liberty to engage in “certain intimate conduct;” the case concerned the validity of a statute of Texas qualifying as a crime the behavior of two persons of the same sex consisting in carrying out certain intimate sexual conduct. The Court held that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions . . . It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons . . . The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.” *Id.* at 567, 578.

<sup>20</sup> See Rogge, *supra* note 10, at 804.

<sup>21</sup> *Id.* at 806.

<sup>22</sup> See *id.* at 811-13.

<sup>23</sup> See *id.* at 816-18.

<sup>24</sup> See *id.* at 823-24.

of unenumerated rights, particularly the right to broach offensive symbolic expressions, such as the burning of the American flag, which is considered an essential part of the freedom guaranteed by the amendment.<sup>25</sup>

Australia is a country with a constitution not including a bill of rights. This, starting from the 1990s, persuaded the High Court to recognize that “[f]undamental constitutional doctrines are not always the subject of exhaustive constitutional provision, either because they are assumed in the Constitution . . . or because what they entail is taken to be so obvious that detailed specification is unnecessary.”<sup>26</sup>

Such an approach led the High Court to affirm the existence of an implied constitutional right<sup>27</sup> to freedom of political communication,<sup>28</sup> based on “the text, structure and history of the Constitution, combined with an ethical (and partly prudential) judgment about the desirability of a system of representative democracy in which civil and political rights such as free speech are protected by constitutional judicial review.”<sup>29</sup>

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<sup>25</sup> See *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>26</sup> *Australian Capital Television Pty Ltd. v Commonwealth* (1992) 177 CLR 106 ¶ 16 (Gaudron, J.) (Austl.).

<sup>27</sup> See Dan Meagher, *The Brennan Conception of the Implied Freedom: Theory, Proportionality and Deference*, 30 U. QLD. L. J. 119, 119 (2011).

<sup>28</sup> See *Australian Capital Television Pty Ltd.*, 177 CLR at ¶ 26 (McHugh, J.) (Austl.); *Nationwide News Pty Ltd v. Wills*, (1992) 177 CLR 1 (Austl.); *Lange v Austl Broadcasting Corp.*, (1997) 189 CLR 520 (Austl.); A.R. Blackshield, *The Implied Freedom of Communication*, in *FUTURE DIRECTIONS IN AUSTRALIAN CONSTITUTIONAL LAW* 232 (Geoffrey Lindell ed., The Federation Press, 1994); Nicholas Aroney, *A Seductive Plausibility: Freedom of Speech in the Constitution*, 12 U. QLD. L. J. 249, 259-61 (1998); NICHOLAS ARONEY, *FREEDOM OF SPEECH IN THE CONSTITUTION*, 119-21 (Centre for Independent Studies, 1998); H.P. Lee, *The Implied Freedom of Political Communication*, in *AUSTRALIAN CONSTITUTIONAL LANDMARKS* 383 (H.P. Lee & George Winterton eds., Cambridge University Press 2004) (2003); Nicholas Aroney, *Towards the “Best Explanation” of the Constitution: Text, Structure, History and Principle in Roach v. Electoral Commissioner* 30 U. QLD. L. J. 145, 151 (2011).

<sup>29</sup> Aroney, *supra* note 28, at 146 n.28.



In the words of Justice Brennan,

[t]o sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential; it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments.<sup>30</sup>

The High Court's cases concerning the freedom of political communication have attained a notable importance and raised a huge—and quite controversial—debate within the Australian legal environment. While the existence of the freedom of political communication has been reiterated in principle in more recent cases, it has been done through providing heterogeneous explanations concerning the foundation, weight and extent of, and concrete implications arising from, such a freedom,<sup>31</sup> giving rise to a progressively growing disagreement among the High Court's judges and to a “lack of coherence and clarity in High Court decisions on the topic.”<sup>32</sup> It has been consequently argued that “only the idea of an implied freedom [has] remain[ed].”<sup>33</sup> Less radically, it has been held that “implied rights idea appears to have been contained, and radical changes in the law are less likely today than once seemed possible.”<sup>34</sup> Indeed, “the fact remains that . . . the implied freedom is now a

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<sup>30</sup> *Nationwide News Pty Ltd v Wills*, [1992] 177 CLR 47 at ¶ 18 (Brennan, J.) (Austl.).

<sup>31</sup> See Aroney, *supra* note 28, at 151-52 (discussing the way freedom of political expression is expressed in recent cases); see also Tom Campbell & Stephen Crilly, *The Implied Freedom of Political Communication, Twenty Years On*, 30 U. QLD. L.J. 59, 61-69 (2011) (detailing the relevant case law on political expression).

<sup>32</sup> Campbell, *supra* note 31, at 59.

<sup>33</sup> *Id.* at 66.

<sup>34</sup> Grant Huscroft, *Romance, Realism, and the Legitimacy of Implied Rights*, 30 U. QLD. L.J. 35, 37 (2011).

permanent fixture in Australia's constitutional law."<sup>35</sup> Consistently, its constitutional force has been reiterated in 2017 by the High Court in *Brown v. Tasmania*,<sup>36</sup> when the Court found that certain provisions of a Tasmanian act were to be considered invalid because they "impermissibly burden[ed] the implied freedom of political communication, contrary to the Constitution."<sup>37</sup> The Court reiterated the principle expressed in its early jurisprudence, according to which "[f]reedom of communication on matters of government and politics is an indispensable incident of the system of representative and responsible government which the Constitution creates and requires."<sup>38</sup> However, the freedom in point is only to be considered "as a limitation on legislative and executive power," and not as attributing an individual right.<sup>39</sup> However, apart from the meaning it may assume under Australian constitutional law, the distinction appears more theoretical than capable of determining practical implications, at least according to the purposes of this writing. In fact, the freedom in point corresponds to a prerogative that individuals are entitled to exercise and claim before the judiciary to obtain its enforcement. For this reason, it does not substantially differ from a "right" under the perspective of "human rights and fundamental freedoms," as they are normally meant under international law. Consistently, some scholars do not refrain from referring to the freedom in point as "*right to freedom of political communication*."<sup>40</sup> In addition, as noted by Meagher, "[t]he method (and legitimacy) of deriving implied rights from the constitutional text and structure . . . has been subsequently applied to imply" other prerogatives which should clearly be qualified as "rights," including a right to

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<sup>35</sup> Meagher, *supra* note 27, at 119. *See also* Campbell, *supra* note 31, at 68 (admitting that, "[t]hrough the source and form of the freedom has changed substantially, the idea of a higher standard of review in some circumstances remains . . . [while] [w]hat standards would be applicable . . . is not clear.").

<sup>36</sup> *See Brown v Tasmania* [2017] HCA 43 (Austl.).

<sup>37</sup> *Id.* ¶ 310. *See also id.* ¶ 396, ¶ 440-41.

<sup>38</sup> *Id.* ¶ 312.

<sup>39</sup> *Id.* ¶ 313, 465.

<sup>40</sup> Meagher, *supra* note 27, at 119, 133 (emphasis added).

(procedural) due process.<sup>41</sup>

In Ireland the jurisprudence recognizing unenumerated rights is grounded on Article 40 of the Constitution, Sections 3.1—according to which “[t]he State guarantees in its laws to protect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen”—and 3.2, affirming that the State shall, “in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.” On the basis of these provisions, Irish courts inaugurated the jurisprudence on unenumerated rights in 1964, when the Supreme Court recognized the implied right of bodily integrity, basing itself on the fact that the guarantee of rights under Article 40, Section 3(1), is not exhausted by the rights specifically contemplated by Article 40, and other rights are included flowing from the Christian and democratic nature of the State.<sup>42</sup> In the following years, unenumerated rights became “the heartbeat of the Irish Constitution.”<sup>43</sup> For instance, in a judgment released in 1966, the High Court recognized the implied right of access to courts.<sup>44</sup> In 1972, the right to earn one’s living was established,<sup>45</sup> while the unenumerated right to marital privacy (as inherent in the human personality) was affirmed in principle by the Supreme Court in two leading cases, of 1974<sup>46</sup> and 1983 respectively.<sup>47</sup> This favour for unenumerated rights was grounded on the perception of the need to guarantee

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<sup>41</sup> *Id.* at 119 n.4 (referring to *Nicholas v The Queen* (1998) 193 CLR 173 (Austl.) as jurisprudential authority for the basis of the implied right to (procedural) due process).

<sup>42</sup> See *Ryan v. Att’y Gen.* [1965] IR 294 (Ir.).

<sup>43</sup> See Connor O’Mahony, *Unenumerated Rights: Possible Future Directions After NHV?*, DUBLIN UNIV. L.J. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3084619](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084619).

<sup>44</sup> See *Macauley v. Minister of Posts and Telegraph* [1966] IR 345 (H. Ct.) (Ir.), *aff’d* *Byrne v. Ireland* [1972] 1 IR 241 (Ir.).

<sup>45</sup> See *Murtagh Properties v. Cleary* [1972] IR 330 (H. Ct.) (Ir.); see also *Murphy v. Stewart* [1973] IR 97 (Ir.).

<sup>46</sup> See *McGee v. Att’y Gen.* [1974] 1 IR 284 (Ir.).

<sup>47</sup> See *Norris v. Att’y Gen.* [1984] 1 IR 36 (Ir.), *aff’d* *Norris v. Ireland*, 142 Eur. Ct. H.R. 186 (1988).

to the citizen, within the required social, political and moral framework, such a range of personal freedoms or immunities as are necessary to ensure his dignity and freedom as an individual in the type of society envisaged. The essence of those rights is that they inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the Constitution.<sup>48</sup>

In more recent times, although “some well-established unenumerated rights have been applied almost as if they were expressly contained in the constitutional text, no new rights have been recognised by the Supreme Court for over two decades (or, since its establishment, by the Court of Appeal).”<sup>49</sup>

This restrictive trend, however, was interrupted in 2017, when the Supreme Court held that the statutory prohibition for asylum applicants to seek or take up employment, while the determination of their asylum application was pending, was to be considered contrary to the Constitution as a violation of the unenumerated right to work.<sup>50</sup>

Another country with a strong jurisprudential tradition on unenumerated rights is India. Such a jurisprudence is based on the *theory of emanation*—meaning that, even if a given human right is not explicitly mentioned in Part III of the Constitution (providing for a long list of “expressed” human rights), “it may still be a fundamental right . . . if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right.”<sup>51</sup> Through applying this theory, the Supreme Court has recognized a notable number of implied rights, particularly the right to privacy, the right to human dignity, the right to travel abroad, the right to be free from torture, cruel or unusual punishment or degrading treatment, the right to speedy trial, the right to free legal aid in criminal trial, the right not to be victim of delayed execution, the right to

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<sup>48</sup> *Id.* at 71.

<sup>49</sup> O’Mahony, *supra* note 43, at 1.

<sup>50</sup> *See* NHV v. Minister for Justice and Equal. [2017] IESC 35 (Ir.).

<sup>51</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 (India).

shelter, the right to timely medical assistance, the right to health, the right to a pollution-free environment, the right to education for children under the age of 14, the right to listen, the right to know, the right to freedom of the press,<sup>52</sup> the right to means of livelihood,<sup>53</sup> and the right to water.<sup>54</sup>

Although the preceding analysis obviously did not pursue the aim of covering all countries where a jurisprudence on implied (unenumerated) rights has developed,<sup>55</sup> it shows that the use of such rights, at the domestic level, is well entrenched in many parts of the world. In practical terms, the evident *purpose* of their recognition is to ensure *effectiveness* of (expressed) human rights—or, to use the words of Justice Douglas of the US Supreme Court, to “give them life and substance”<sup>56</sup>—irrespective of whether and to what extent they are recognized by national constitutions or legislations. This is exactly the same purpose of the recognition and affirmation of implied human rights in the context of international law, as will be shown in the next sub-section.

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<sup>52</sup> Anant Kalse, *A Brief Lecture on “Human Rights in Constitution of India,”* 13-14 (2016), <http://mls.org.in/books/H-2537%20Human%20Rights%20in.pdf> (last visited Mar. 23, 2020). *See also* Gandhi, *supra* note 51; *Paschim Banga Khet Mazdoor Samity & Ors v. State of West Bengal & Anor*, AIR 1996 SC 2426 (India).

<sup>53</sup> *See Olga Tellis and Ors v. Bombay Municipal Corp. and Ors*, AIR 1986 SC 180 (India).

<sup>54</sup> *See Subhash Kumar v. State of Bihar and Ors*, AIR 1991 SC 420 (India) (considering the Right to Water as direct emanation of the “expressed” right to life). *See also* Nikolina Zenovic, *Implied Human Rights: The Implementation of the Implied Right to Water*, 2 INT’L REL. REV. BERKELEY 5, (2017) (pertaining to this specific topic).

<sup>55</sup> *See, e.g.*, SHARON WEINTAL, *ISRAELI CONSTITUTIONAL LAW IN THE MAKING* 285 (Gideon Sapir, Daphne Barak-Erez, Aharon Barak eds., 2013); ZWART, *supra* note 15, at 120-21 (referencing France, Switzerland, and The Netherlands); Huscroft, *supra* note 34, at 37-41 (examining the judicial development of implied rights in Canada). The discourse of unenumerated rights has indeed been developed (with heterogeneous outcomes) in other countries. *Id.*

<sup>56</sup> *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

*Practice on Implied Human Rights in International Law*

In recent times, “it has become a practice of human rights bodies to adopt readings of human rights conventions that look for their *effet utile* to an extent perhaps wider than regular treaties.”<sup>57</sup> Indeed, UN human rights monitoring bodies and regional human rights courts make a quite extensive use of implied rights. In international law such rights are evidently an emanation of expressed rights, arising either from the extensive (evolutive) interpretation of the latter or from the combination of two or more of them. Without—again—any pretence of covering *all* situations in which the existence of implied rights has been declared by human rights bodies, a number of examples may be described showing that the practice of relying on such rights is today well entrenched in international human rights law.

In the context of the implementation of the International Covenant on Civil and Political Rights (ICCPR),<sup>58</sup> the Human Rights Committee (HRC) has affirmed that the obligation of States parties to respect, and to ensure to all individuals subject to their jurisdiction, the rights recognized in the Covenant—established by Article 2 ICCPR—implies

an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 [right to life] and 7 [prohibition of torture, cruel, inhuman or degrading treatment or punishment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative

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<sup>57</sup> U.N. GAOR, 58th Sess., Int’l Law Comm’n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶ 428 U.N. Doc. A/CN.4/L.682 (April 13, 2006).

<sup>58</sup> See International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171.

authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.<sup>59</sup>

With this statement, the HRC certified the existence of an individual right “not to be deported to dangerous areas,” which is not textually contemplated by the ICCPR, but is nevertheless binding for the States parties to it as a precondition for ensuring effectiveness of certain rights expressed by the Covenant. An equivalent approach has been followed by the HRC in interpreting Article 27 ICCPR, which establishes that, in “those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”<sup>60</sup>

In its General Comment concerning this provision, the HRC noted that, “[a]lthough the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority. . . .”<sup>61</sup>

In this case, a *collective* implied right—i.e. the right of minority groups (including indigenous communities) to have their own cultural identity protected—was recognized as ensuing from a right of an individual nature, in the context of a legal instrument (the ICCPR) in which human rights are only conceived as individual prerogatives (with the only exception of the right of self-determination of peoples provided for by Article 1). The hermeneutic process leading the Committee to reach such a conclusion evidently consisted in an extensive interpretation of the provision at issue, determined by the

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<sup>59</sup> Human Rights Committee, Eightieth Session, Gen. Cmt. No. 31 [80], *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 29 March 2004, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

<sup>60</sup> ICCPR, *supra* note 60, art 27.

<sup>61</sup> See Human Rights Committee, Fiftieth Session, Gen. Cmt. No. 23, *The rights of minorities (Art. 27)*, 1994, ¶ 6.2, CCPR/C/21/Rev.1/Add.5 (Aug. 4, 1994).

need to ensure its effectiveness. In fact, the protection of the rights expressly contemplated by Article 27 “is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned.”<sup>62</sup>

The Committee on Economic, Social and Cultural Rights (ESCR Committee) has developed an attitude analogous to that of the HRC in interpreting and applying the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>63</sup> For example, in 2003 the ESCR Committee published a General Comment on the right to water, affirming that it emanates from Article 11(1) ICESCR, providing for the right to an adequate standard of living. Indeed, the “right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”<sup>64</sup> Furthermore, as emphasized by the ESCR Committee also in previous general comments,<sup>65</sup> the human right to water is not only inherent to the right to an adequate standard of living, but is also “inextricably related to the right to the highest attainable standard of health . . . and the rights to adequate housing and adequate food,”<sup>66</sup> as well as to the right to life and human dignity.<sup>67</sup> It follows that States parties to the ICESCR are under an obligation to guarantee the implied<sup>68</sup> human right to water—i.e. “to sufficient, safe, acceptable,

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<sup>62</sup> *Id.* at ¶ 9.

<sup>63</sup> International Covenant on Economic, Social, and Cultural Rights [ICESCR], *adopted and opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 23, 1976).

<sup>64</sup> ICESCR, Gen. Cmt. No. 15, *The Right to Water* (Arts. 11-12 of the Covenant), ¶ 3, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

<sup>65</sup> See ICESCR Gen. Cmt. No. 6, *The Economic, Social and Cultural Rights of Older Persons*, ¶¶ 5, 32, U.N. Doc. E/1996/22 (Dec. 8, 1995); ICESCR Gen. Cmt. No. 14, *The Right to the Highest Attainable Standard of Health*, art. 12, ¶¶ 11, 12(a), (b), (d), 15, 34, 36, 40, 43, 51, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000).

<sup>66</sup> ICESCR Gen. Cmt. No. 15, *supra* note 64, ¶ 3.

<sup>67</sup> *Id.*

<sup>68</sup> The position assumed in the text is that the right to water is to be considered an implied right in the context of the scope of application of the ICESCR. At the same time, the right to water is expressly contemplated by other human rights treaties. See, The Convention on the Elimination of All Forms of Discrimination Against Women, art. 14, ¶ 2, Dec. 18, 1979, 1249 U.N.T.S. (entered into force Sept.



physically accessible and affordable water for personal and domestic uses”<sup>69</sup>—for everybody.

A real forge of implied human rights is represented by the ESCR Committee’s General Comment No 21, concerning the right to take part in cultural life, released in 2009.<sup>70</sup> According to the Committee, a number of prerogatives are implicit in the said right, including, inter alia: the right of children members of minorities or indigenous peoples to be imparted education in their own language and taking into consideration the wishes expressed by the community to which they belong;<sup>71</sup> the rights of older persons to “participate actively in the formulation and implementation of policies that directly affect their well-being” and to “have access to the educational, cultural, spiritual and recreational resources of society,”<sup>72</sup> the right of minorities “to conserve, promote and develop their own culture,”<sup>73</sup> the rights of indigenous peoples “to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired,”<sup>74</sup> as well as to have their cultural productions (“including their traditional knowledge, natural medicines, folklore, rituals and

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3, 1981) (affirming the obligation of state parties to “take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, [to] ensure to such women the right: . . . (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.”); The Convention on the Rights of the Child, art. 24, ¶ 2, Nov. 20 1989, 1577 U.N.T.S. 3 (noting “States Parties shall pursue full implementation of [the] right [of the child to the enjoyment of the highest attainable standard of health] and, in particular, shall take appropriate measures: . . . (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution”)[hereinafter CRC].

<sup>69</sup> ICESCR Gen. Cmt. No. 15, *supra* note 64, ¶ 2.

<sup>70</sup> See ICESCR, Gen. Cmt. No. 21, *Right of Everyone to Take Part in Cultural Life* (Art. 15 ¶ 1(a) of the Covenant), ¶ 15(a), U.N. Doc. E/C.12/GC/2, (Dec. 21, 2009).

<sup>71</sup> *Id.* ¶ 27.

<sup>72</sup> *Id.* ¶ 29.

<sup>73</sup> *Id.* ¶ 32.

<sup>74</sup> *Id.* ¶ 36.

other forms of expression”) respected and protected;<sup>75</sup> the right of everyone to “take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life,”<sup>76</sup> the (*collective*) right of all groups and communities to have their cultural heritage respected and protected,<sup>77</sup> the right of everyone to be protected against “practices harmful to the well-being of a person or group of persons . . . including those attributed to customs and traditions, such as female genital mutilation and allegations of the practice of witchcraft.”<sup>78</sup>

Another UN monitoring body showing a marked attitude to recognize implied human rights is the Committee on the Elimination of Racial Discrimination (CERD Committee), in its activity of interpretation and enforcement of the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>79</sup> For instance, in its 1997 General Recommendation on indigenous peoples, the CERD Committee emphasized that protection of those peoples against racial discrimination implies the guarantee in their favour of the following rights, among others: right to recognition, respect, and preservation of their own “distinct culture, history, language and way of life as an enrichment of the State’s cultural identity and to promote its preservation,”<sup>80</sup> right to be guaranteed “conditions allowing for a sustainable economic and social development compatible with their cultural characteristics,”<sup>81</sup> right to “effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent,”<sup>82</sup> right to “practise and revitalize their cultural traditions and customs and to preserve and to

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<sup>75</sup> *Id.* ¶ 50(c) (quoting ICCPR: Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, art. 27, ¶ 1(1)).

<sup>76</sup> *Id.* ¶ 49(e).

<sup>77</sup> *Id.* ¶ 50 (b).

<sup>78</sup> *Id.* ¶ 64.

<sup>79</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, Dec. 21, 1965, 660 U.N.T.S. 195.

<sup>80</sup> CERD, Gen. Com. No. 23, *Indigenous Peoples*, ¶ 4(a), U.N. Doc. 18/08/97 (1997).

<sup>81</sup> *Id.* ¶ 4(c).

<sup>82</sup> *Id.* ¶ 4(d).

practise their languages,”<sup>83</sup> right “to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to [have] those lands and territories [returned].”<sup>84</sup>

In a more recent recommendation, the CERD Committee recognized the existence of analogous rights in favour of people of African descent.<sup>85</sup>

The Committee on the Rights of the Child (CRC Committee) is worth mentioning as well. Among the many documents of interest pertaining to such a Committee, one may refer to the 2005 General Comment on unaccompanied and separated children outside their country of origin,<sup>86</sup> in which the CRC Committee, together with a number of rights explicitly contemplated by the CRC, recognized certain rights not expressed in the Convention’s text which are anyway to be guaranteed in favour of such children. These rights include: the right to respect for the principle of *non-refoulement*,<sup>87</sup> the right to protection of the “confidentiality of information received in relation to an unaccompanied or separated child, consistent with the obligation to protect the child’s rights, including the right to privacy” (provided for

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<sup>83</sup> *Id.* ¶ 4(e).

<sup>84</sup> *Id.* ¶ 5.

<sup>85</sup> CERD, Gen. Com. No. 43, *Racial Discrimination against People of African Descent*, ¶ 4, U.N. Doc. CERD/C/GC/34, (Oct. 3, 2001). In particular, the CERD Committee asserts that “[p]eople of African descent . . . are entitled to exercise, without discrimination, individually or in community with other members of their group, as appropriate, the following specific rights: (a) The right to property and to the use, conservation and protection of lands traditionally occupied by them and to natural resources in cases where their ways of life and culture are linked to their utilization of lands and resources; (b) The right to their cultural identity, to keep, maintain and foster their mode of life and forms of organization, culture, languages and religious expressions; (c) The right to the protection of their traditional knowledge and their cultural and artistic heritage; (d) The right to prior consultation with respect to decisions which may affect their rights, in accordance with international standards.” *Id.*

<sup>86</sup> See CRC, Gen. Com. No. 6, *Treatment of Unaccompanied and Separated Children Outside of Their Country of Origin*, U.N. Doc. CRC/GC/2005/6 (June 3, 2005).

<sup>87</sup> *Id.* ¶ 26.

by Article 16 CRC),<sup>88</sup> the right of not being criminalized “solely for reasons of illegal entry or presence in the country.”<sup>89</sup> In a later general comment, concerning the best interests of the child, the CRC Committee followed the same path, through recognizing, for instance, the right of the child to have his or her best interests taken as a primary consideration not only as an individual rights—as it is expressly contemplated by Article 3 CRC—but also as a *collective* right of indigenous children “as a group,” a right which “requires consideration of how [it] relates to collective cultural rights.”<sup>90</sup> In the same document, the Committee also recognized the right of children that all measures taken by States which may affect them are subjected to a “child-rights impact assessment (CRIA)” capable to “predict the impact of any proposed policy, legislation, regulation, budget or other administrative decision which affect children and the enjoyment of their rights.”<sup>91</sup> Furthermore, “[d]ue consideration of the child’s best interests implies that children have [the right to] access to the culture (and language, if possible) of their country and family of origin, and the opportunity to access information about their biological family.”<sup>92</sup>

Another pertinent example is represented by the recognition by the CRC Committee—in a recent joint general recommendation/comment with the Committee on the Elimination of Discrimination against Women—of the implied right “of adolescent girls to continue their studies, during and after pregnancy.”<sup>93</sup>

At the level of regional human rights treaty bodies, a landmark decision on implied rights was released by the African Commission on Human and Peoples’ Rights (ACommHPR) in 2001, in a case

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<sup>88</sup> *Id.* ¶ 29.

<sup>89</sup> *Id.* ¶ 62.

<sup>90</sup> CRC Committee, *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration*, ¶23, U.N. Doc CRC/C/GC/14 (May 29, 2013).

<sup>91</sup> *Id.* ¶ 99.

<sup>92</sup> *Id.* ¶ 56.

<sup>93</sup> Committee on the Elimination of Discrimination against Women and Committee on the Rights of the Child, *Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child on harmful practices*, ¶ 63, U.N. Doc CEDAW/C/G/31-CRC/C/GC/18 (November 14, 2014).

concerning the exploitation by the State oil company of the traditional territories of the Ogoni people in Nigeria.<sup>94</sup> On that occasion, the ACommHPR held that the States parties to the African Charter have the obligation to guarantee in favour of all human beings the implied human rights to shelter and to food. As regards the former, the Commission declared that,

[a]lthough the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 ... the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the [African] Charter a right to shelter or housing which the Nigerian Government has apparently violated.<sup>95</sup>

In addition, the ACommHPR found that “[t]he particular violation by the Nigerian Government of the right to adequate housing as implicitly protected in the Charter also encompasses the right to protection against forced evictions”<sup>96</sup> (also not expressly contemplated by the African Charter). With regard to the right to food, the Commission considered it “implicit in the African Charter, in such provisions as the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article

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<sup>94</sup> See Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria [2002] 15/96 (Nigeria); Fons Coomans, *The Ogoni Case Before The African Commission on Human and Peoples' Rights*, 52 INT'L AND COMP. L. Q., 749–760 (2003).

<sup>95</sup> Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, *supra* note 94, ¶ 60.

<sup>96</sup> *Id.* ¶ 63.

22).”<sup>97</sup> It follows that, “[b]y its violation of these rights, the Nigerian Government trampled upon not only the explicitly protected rights but also upon the right to food implicitly guaranteed.”<sup>98</sup> In fact, the right to food

is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens. Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples’ efforts to feed themselves.<sup>99</sup>

Also, the Inter-American Court of Human Rights (IACtHR)—which is well known for its propensity to interpret the provisions of the ACHR with a markedly evolutionary approach—has not missed to rely on implied rights when this has been considered opportune to guarantee the effectiveness of human rights standards. In this regard, the task of the Court is facilitated by Article 29, section c, of the ACHR, which affirms that no provision of the latter shall be interpreted as “precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.”<sup>100</sup> Consistently, the IACtHR—drawing

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<sup>97</sup> *Id.* ¶ 64.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* ¶ 65.

<sup>100</sup> Héctor Gros Espiell, *Los derechos humanos no enunciados o no enumerados en el Constitucionalismo Americano y en el artículo 29.C de la Convención Americana sobre Derechos Humanos*, 4 ANUARIO IBEROAMERICANO DE JUSTICIA CONSTITUCIONAL 146 (2000).

inspiration from the European Court of Human Rights (ECtHR)<sup>101</sup>—has developed a jurisprudential approach based on the consideration that “human rights treaties are living instruments whose interpretation must consider the changes over time and present-day conditions.”<sup>102</sup> Several rights not implicitly recognized by the ACHR have therefore been established by the IACtHR, based on both the extensive interpretation of the rules of the Convention and on provisions included in human rights treaties other than the ACHR. One very well-known example is represented by the recognition and enforcement by the IACtHR of the *collective* right of indigenous communities to *communal* property of their ancestral lands—on the basis of an evolutive interpretation of Article 21 ACHR<sup>103</sup>—sanctioned for the first time in the renowned case of the Awas Tingni community in Nicaragua.<sup>104</sup> The decision of the Court in this respect was based on the assumption that

[a]mong 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

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<sup>101</sup> See *Tyrer v. United Kingdom*, App. No. 5856/72, Eur. Ct. H.R. ¶ 31 (1978); *Marckx v. Belgium*, App. No. 6833/74, Eur. Ct. H.R. ¶ 41 (1979); *Loizidou v. Turkey (Preliminary Objections)*, App. No. 15318/89, Eur. Ct. H.R. ¶ 71 (1995) (hereinafter *Eur. Ct. H.R. Cases*).

<sup>102</sup> See *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (ser. A) No 16, ¶ 114 (October 1, 1999).

<sup>103</sup> American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32) art. 21, Nov. 1969, OEA/Ser.K/XVI/1.2 (stating “1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.”).

<sup>104</sup> *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) (hereinafter *Mayagna (Sumo)*). See also S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT’L & COMP. L. 1 (2002).

group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; 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. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.<sup>105</sup>

This finding has been confirmed by the IACtHR in all subsequent cases relating to claims by indigenous communities concerning their traditional lands.<sup>106</sup> The position advanced by the Court is the result of an extensive and evolutive interpretation which “is consistent with the general rules of interpretation embodied in Article 29 of the American Convention, as well as those set forth in the Vienna Convention [on the Law of Treaties].”<sup>107</sup> In particular, such an interpretation aims at reaching a very concrete goal, i.e. guaranteeing effective enjoyment of human rights by human beings and communities:

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<sup>105</sup> *Mayagna (Sumo)*, *supra* note 104, ¶ 149.

<sup>106</sup> *See* *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (Jun. 17, 2005); *Sahoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214, (Aug. 24, 2010); *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (Jun. 27, 2012); *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 284 (Oct. 14, 2014); *Xucuru Indigenous People and its members v. Brazil*, Preliminary Objections, Merits, Reparations and Costs, Judgment (ser. C) No. 346 (Feb. 5, 2017).

<sup>107</sup> *Yakya Axa Indigenous Cmty.*, *supra* note 106, ¶ 125.



This notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention. Disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons.<sup>108</sup>

A notable feature of the jurisprudence of the IACtHR is that of declaring the existence of implied rights *as arising from other implied rights*.<sup>109</sup> For instance, basing on the just described collective right to property of ancestral lands recognized in favour of indigenous peoples, the Court has held that

[a]n issue that necessarily flows from the assertion that the members of [an indigenous] people have a right to use and enjoy their territory in accordance with their traditions and customs is the issue of the right to the use and enjoyment of the natural resources that lie on and within the land, including subsoil natural resources ... The [members of the indigenous community concerned] claim that their right to use and enjoy all such natural resources is a necessary condition for the enjoyment of their right to property under Article 21 of the Convention. The State argued that all rights to land, particularly its subsoil natural resources, are vested in the State, which can freely dispose of these resources

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<sup>108</sup> Sawhoyamaya Indigenous Cmty., *supra* note 106, ¶ 120.

<sup>109</sup> See Gonzalo Candia Falcón, *Unenumerated Rights and the Inter-American Court of Human Rights: A Reflection in the Light of the Rule of Law*, 42 REVISTA CHILENA DE DERECHO 873 (2015).

through concessions to third parties.<sup>110</sup>

In addressing this controversy, the IACtHR ruled in favour of the members of indigenous peoples, recognizing the existence of an implied right of theirs to own, use and enjoy all natural resources existing in their traditional territories, since the term “property” used in Article 21 ACHR includes “those material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value.”<sup>111</sup>

When transposed in the context of indigenous peoples’ land rights, this assertion determines the consequence 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. Hence the need to protect the lands and resources they have traditionally used to prevent their extinction as a people. That is, the aim and purpose of the special measures required on behalf of the members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States.<sup>112</sup>

Consistent with the foregoing, another right which may be considered as emanating from the right of indigenous communities to

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<sup>110</sup> See Saramaka People, *supra* note 106, ¶ 118.

<sup>111</sup> Mayagna (Sumo) Awas Tingni Cmty., *supra* note 104, ¶ 144.

<sup>112</sup> *Id.* ¶ 121.

their traditional territories is the right to cultural identity. In *Yakye Axa*, the IACtHR held that “[d]isregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members.”<sup>113</sup>

In other words, the special significance of the land for indigenous peoples . . . entails that any denial of the enjoyment or exercise of their territorial rights is detrimental to values that are very representative for the members of said peoples, who are at risk of losing or suffering irreparable damage to their *cultural identity* and life and to the cultural heritage to be passed on to future generations.<sup>114</sup>

However, the right to cultural identity is also implicit in rights other than the one provided for by Article 21 ACHR (as extensively interpreted by the IACtHR), particularly the right to food and access to clean water, the infringement of which has “a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to *cultural identity*.”<sup>115</sup> In any event, “recognition of the right to cultural identity is an ingredient and a crosscutting means of interpretation to understand, respect and guarantee the enjoyment and exercise of the human rights of indigenous peoples and communities protected by the Convention and, pursuant to Article 29(b) thereof, also by domestic law.”<sup>116</sup>

It follows that “the right to cultural identity is a fundamental right—and one of a collective nature—of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society.”<sup>117</sup>

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<sup>113</sup> *Yakya Axa Indigenous Cmty.*, *supra* note 106, ¶ 147.

<sup>114</sup> *Id.* ¶ 203 (emphasis added).

<sup>115</sup> *Id.* ¶ 147. (emphasis added).

<sup>116</sup> *Kichwa Indigenous People of Saravaku*, *supra* note 106, ¶ 213.

<sup>117</sup> *Id.* ¶ 217.

The right to cultural identity is also considered by the IACtHR as the primary “source” of a further implied right, i.e. the right of indigenous peoples to be consulted by State authorities before taking decisions which may affect them: “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.”<sup>118</sup>

Close to the right to *cultural* identity is the right to *personal* identity. Although such a right is not found expressly established in the Convention, it is possible to determine it on the basis of that provided in Article 8 of the Convention on the Rights of the Child, which established that said right encompasses the right to nationality, to a name, and to family relationships. Likewise, [such a right] can be conceptualized as the collection of attributes and characteristics that allow for the individualization of the person in a society, and, in that sense, encompasses a number of other rights according to the subject it treats and the circumstances of the case[.]<sup>119</sup>

Other examples of implied rights recognized by the IACtHR include (but are not limited to) the right to know the truth, which is “included in the right of victims or their next of kin to have the harmful acts and the corresponding responsibilities elucidated by competent State bodies, through the investigation and prosecution provided for in Articles 8 [right to a fair trial] and 25 [right to judicial protection] of the Convention[.]”<sup>120</sup> as well as the right to have access to the

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<sup>118</sup> *Id.*

<sup>119</sup> Gelman v. Uruguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 122 (Feb. 24, 2011) (citations omitted).

<sup>120</sup> Almonacid-Arellano v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 154, ¶ 148 (Sept. 26, 2006) (citations omitted). *See also* Bámaca Velásquez v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 201 (Nov. 25, 2000); Barrios Altos v. Peru, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75, ¶ 48

medical technology necessary to exercise the right to private life and reproductive freedom.<sup>121</sup>

A certain favour for implied rights also emerges from the jurisprudence of the ECtHR, although “the Court is precautionary not to be too ‘evolutive’ in recognising [completely new] implied positive obligations [for States], if and as long as there is no common ground for such obligations in the law and practice of the States [of the Council of Europe].”<sup>122</sup>

In any event, as previously noted,<sup>123</sup> the ECtHR is well engaged in the approach according to which the ECHR is a living instrument which must be interpreted in the light of present-day conditions.<sup>124</sup> Such an approach has paved the way for the actual recognition of implied rights, as emanating from the provisions of the ECHR.<sup>125</sup> In this respect, the pioneering judgment was *Golder*, in which the ECtHR, contrary to the position of the respondent State,

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(Mar. 14, 2001)(citation omitted).

<sup>121</sup> See *Artavia Murillo* (“In vitro fertilization”) v. Costa Rica, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 150 (Nov. 28, 2012).

<sup>122</sup> PIETER VAN DIJK, “Positive Obligations” Implied in the European Convention on Human Rights: Are the States Still the “Masters” of the Convention?, in *THE ROLE OF THE NATION-STATE IN THE 21ST CENTURY: HUMAN RIGHTS, INTERNATIONAL ORGANISATIONS, AND FOREIGN POLICY ESSAYS IN HONOUR OF PETER BAEHR*, 17, 20, 22 (Monique Castermans-Holleman et al. eds., 1998). See also DINAH SHELTON, *Inherent and Implied Powers of Regional Human Rights Tribunals*, in *TOWARDS CONVERGENCE IN INTERNATIONAL HUMAN RIGHTS LAW. APPROACHES OF REGIONAL AND INTERNATIONAL SYSTEMS*, 454, 487 (Buckley, Carla et al. eds., 2016).

<sup>123</sup> Eur. Ct. H.R. Cases, *supra* note 101, (including corresponding text).

<sup>124</sup> This approach started with the *Tyrer* Case, *supra* note 101, ¶ 31. “It is true that the Convention and its Protocols must be interpreted in the light of present-day conditions [. . .]. However, the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset. This is particularly so here, where the omission was deliberate.” *Johnston and Others v. Ireland*, App. No. 9697/82, Eur. Ct. H.R. ¶ 53 (1986) (confirming that the ECtHR is actually reluctant to recognize implied rights which are substantially ungrounded in any of the provisions of the ECHR or of its protocols).

<sup>125</sup> See J. G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 85 (Manchester U. Press, 1995) (regarding the recognition and application of implied rights by the ECtHR).

holding that the Convention does not recognize a right of access to courts due to the absence of an explicit provision, concluded that such a right

constitutes an element which is inherent in the right, stated by Article 6 para. 1 [ECHR (right to a fair trial)]. This is not an extensive interpretation forcing new obligations on the Contracting States: it is based on the very terms of the first sentence of Article 6 para. 1 [...] read in its context and having regard to the object and purpose of the Convention, a lawmaking treaty [...], and to general principles of law.<sup>126</sup>

Also implicit in Article 6, para 1, ECHR is the right to legal aid; indeed, according to the ECtHR, although it is not possible to hold that “that the State must provide free legal aid for every dispute relating to a ‘civil right’,” and

despite the absence of a similar clause for civil litigation, Article 6 para. 1 [. . .] may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case.<sup>127</sup>

Another implied right recognized by the ECtHR is the right to the payment of a compensation in the event of expropriation, implicit in the right to property expressed by Article 1 of Protocol 1 to the ECHR. In a judgment released in 1986, the Court agreed with the European Commission on Human Rights on the fact that, since “under

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<sup>126</sup> *Golder v. United Kingdom*, App. No. 4451/70, Eur. Ct. H.R. ¶ 36 (1975).

<sup>127</sup> *Airey v. Ireland*, App. No. 6289/73, Eur. Ct. H.R. ¶ 26 (1979).

the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances,”<sup>128</sup> in the context of Article 1 of Protocol 1 “the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle.”<sup>129</sup> It follows that, although the provision in point does not “guarantee a right to full compensation in all circumstances”, “the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 [of Protocol 1].”<sup>130</sup>

One of the best-known instances of evolutive interpretation developed by the ECtHR concerns the extraterritorial application of Article 3 ECHR, which states that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Since the renowned *Soering* judgment of 1989,<sup>131</sup> the Court has developed a constant jurisprudence according to which deportation of an individual to a country, where a realistic risk exists that he or she is subjected to a treatment contrary to Article 3, is considered a violation of the latter. The ECtHR has thus sanctioned the existence within the system of the ECtHR of a right not to be subjected to *refoulement* (or, said in different terms, an implied right to de facto asylum),<sup>132</sup> which, in the words of the Court, offers a level of protection “wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees.”<sup>133</sup>

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<sup>128</sup> *Lithgow and Others v. United Kingdom*, App. No. 9006/80, Eur. Ct. H.R. ¶ 120 (1986).

<sup>129</sup> *James and Others v. United Kingdom*, App. No. 8793/79, Eur. Ct. H.R. ¶ 54 (1986).

<sup>130</sup> *Id.* See also MERRILLS, *supra* note 125, at 86.

<sup>131</sup> *Soering v. United Kingdom*, App. No. 14038/88, Eur. Ct. H.R. (1989).

<sup>132</sup> See Terje Einarsen, *The European Convention on Human Rights and the Notion of an Implied Right to de Facto Asylum*, 2 INT’L J. REFUGEE L. 361 (1990).

<sup>133</sup> *Chahal v. the United Kingdom*, App. No. 22414/93, Eur. Ct. H.R. ¶ 80 (1996). See also *Ahmed v. Austria*, App. No. 25964/94, Eur. Ct. H.R. ¶ 41 (1996). Art. 32 of the Convention on the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, provides for the prohibition of expelling “a refugee lawfully in [the] territory [of a state party] save on grounds of national security or public order[...]”, while

Even Article 2 ECHR, on the right to life, has been used by the Court as source of implied rights. In particular, the ECtHR has held that an obligation for States parties (corresponding to an individual right) to properly investigate killings is implicit in the scope of such a provision. In fact,

a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision ... requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.<sup>134</sup>

A provision of the ECHR which has been used by the ECtHR as basis of a number of implied rights is Article 8, concerning the right to respect for private and family life. This provision has been considered by the Court—for instance—as presupposing a right to receive information. For instance, in 1998, in a case concerning severe environmental pollution affecting individual well-being and

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Art. 33, ¶ 2, contemplates the prohibition of *refoulement*, which, however, may be the object of derogation with regard to those refugees “whom there are reasonable grounds for regarding as a danger to the security of the country in which [they are], or who, having been convicted by a final judgement of a particularly serious crime, [constitute] a danger to the community of that country.” The ECtHR has instead held, in *Chahal* and in *Saadi v. Italy*, that the prohibition of deportation of a person to a country where he or she faces the risk of being subjected to a treatment contrary to Article 3 ECHR cannot be the object of derogation in whatever circumstances. *Saadi v. Italy*, App. No. 37201/06, Eur. Ct. H.R. (2008). See Federico Lenzerini, *Il principio del non-refoulement dopo la sentenza Hirsi della Corte europea dei diritti dell'uomo* (2012) 95 *Rivista di Diritto Internazionale* 721, translated in Federico Lenzerini, *The Principle of Non-Refoulement After the Hirsi Judgment of the European Court of Human Rights*, 95 *INT’L L.J.* 721 (2012) (regarding the application of the principle of *non-refoulement* by the ECtHR).

<sup>134</sup> *McCann v. United Kingdom*, App. No. 18984/91, Eur. Ct. H.R. ¶ 161 (1995). See van Dijk, *supra* note 122, at 26-27 (pertaining to this issue more comprehensively).



preventing the applicants from enjoying their homes, the ECtHR held that they were entitled to receive “essential information that would have enabled them to assess the risks they and their families might run if they continued to live [in the area at risk].”<sup>135</sup> A few months later, the Court reached an equivalent conclusion in a judgment relating to a confidential record containing private and confidential information on the applicant and his care. More specifically, the applicant contended that he had been ill-treated during his childhood, when he had been in care of public institutions for most of the time, and that he wanted to learn about his past in order to be able to overcome his current problems. The ECtHR found that “persons in the situation of the applicant have a vital interest, protected by the Convention, in receiving the information necessary to know and to understand their childhood and early development,”<sup>136</sup> and that in the case at hand the lack of such information had produced a violation of Article 8.

Another implied right arising from Article 8 ECHR is the right to protection of one’s ethnic identity, the existence of which has been affirmed by the ECtHR in a number of cases. In the words of the Court,

[t]he notion of ‘private life’ within the meaning of Article 8 of the Convention is a broad term not susceptible to exhaustive definition. The notion of personal autonomy is an important principle underlying the interpretation of the guarantees provided for by Article 8. It can therefore embrace multiple aspects of a person’s physical and social identity. The Court has accepted ... that an individual’s ethnic identity must be regarded as another such element ... In particular, any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group’s sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as

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<sup>135</sup> *Guerra v. Italy*, App. No. 116/1996/735/932, Eur. Ct. H.R. ¶ 60 (1998).

<sup>136</sup> *Gaskin v. United Kingdom*, App. No. 10454/83 Eur. Ct. H.R. ¶ 49 (1989).

affecting the private life of members of the group.<sup>137</sup>

Consequently, racist verbal abuse and assault (including attempted assault), as offences against the ethnic identity of the person, were considered as determining a violation of Article 8 ECHR.<sup>138</sup>

Other implied rights considered by the ECtHR as deriving from Article 8 are the right of post-operative transsexuals to legal recognition of their new sexual identity,<sup>139</sup> or the right to a safe environment. As regards the latter, in particular, in *Lopez Ostra*, decided in 1994, the ECtHR held that “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.”<sup>140</sup> Equivalent conclusions were reached by the Court in subsequent cases, including, inter alia, *Guerra v. Italy*<sup>141</sup> and *Öneryıldız v.*

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<sup>137</sup> *R.B. v. Hungary*, App. No. 64602/12 Eur. Ct. H.R., ¶ 78 (2016). *See also*, *S. and Marper v. United Kingdom*, App. No. 30562/04, 3056604 Eur. Ct. H.R. ¶ 66 (2008) (stating that “the concept of ‘private life’ is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person ... It can therefore embrace multiple aspects of the person’s physical and social identity ... Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8”); *Ciubotaru v. Moldova*, App. No. 27138/04 Eur. Ct. H.R. ¶ 49 (2010). In equivalent terms the HRC considered that the sections of the Criminal Code of Tasmania which prohibited “unnatural sexual intercourse,” “intercourse against nature,” or “indecent practice between male persons” (referring to homosexual activities), although not applied since several years, determined a violation of the right not to be subjected to arbitrary or unlawful interference with one’s privacy established by Article 17 ICCPR, because “the policy of the Department of Public Prosecutions not to initiate criminal proceedings in respect of private homosexual conduct does not amount to a guarantee that no actions will be brought against homosexuals in the future.” *Toonen v. Australia*, Comm. No 488/1992, ¶ 8.2 (Apr. 10, 1992).

<sup>138</sup> *See R.B. v. Hungary*, App. No. 64602/12, Eur. Ct. H.R. ¶ 80 (2016).

<sup>139</sup> *See Goodwin v. United Kingdom*, App. No. 28957/95, Eur. Ct. H.R. ¶ 85 (2002).

<sup>140</sup> *Ostra v. Spain*, App.No. 16798/90, Eur. Ct. H.R. ¶ 51 (1994).

<sup>141</sup> *Guerra*, *supra* note 135, ¶ 60.

*Turkey*,<sup>142</sup> confirming the existence of a right of individuals to be protected against dangerous environmentally-harmful activities carried out by private actors. These judgments have de facto introduced in the system of the ECHR obligations in the field of environmental human rights not explicitly contemplated by the Convention's text. While, on the basis of a cautious theoretical approach, these obligations "may be regarded . . . as a simple enlargement of the scope *ratione materiae* of Article 8 [ECHR],"<sup>143</sup> in practice they assume the form of "new obligations imposed on the contracting parties that were not intended by the drafters of the Convention,"<sup>144</sup> corresponding to implied rights of human beings.

It is noteworthy that, as noted by George Letsas, not only the ECtHR has "recognized rights that the drafters [of the ECHR] had not clearly intended to grant, but it [has] also recognized rights that the drafters had really intended *not* to grant."<sup>145</sup> According to the Court, the provisions of the ECHR "cannot be interpreted solely in accordance with the intentions of their authors as expressed more than forty years ago [or any other long period of time] . . . at a time when a minority of the present Contracting Parties adopted the Convention."<sup>146</sup>

An excellent example of this approach is represented by the right not to be compelled to join an association, considered by the Court as deriving from Article 11 ECHR, concerning freedom of assembly and association. The *travaux préparatoires* took a clear position on the right in point, elucidating that,

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<sup>142</sup> See *Öneryıldız v. Turkey*, App. No. 48939/99 Eur. Ct. H.R. (2004).

<sup>143</sup> Daniel Rietiker, *The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and Its Consistency with Public Int'l Law - No Need for the Concept of Treaty Sui Generis*, 79 NORDIC J. INT'L L. 245, 266 (2010).

<sup>144</sup> *Id.*

<sup>145</sup> GEORGE LETSAS, *A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, 65 (Oxford U. Press, 2007) (italics in the original text).

<sup>146</sup> *Loizidou v. Turkey* (Preliminary Objections), App. No. 15318/89, Eur. Ct. H.R. ¶ 71 (1995).

[o]n account of the difficulties raised by the ‘closed-shop system’ in certain countries, the Conference in this connection considered that it was undesirable to introduce into the Convention a rule under which ‘no one may be compelled to belong to an association’ which features in [Article 20 par. 2 of] the United Nations Universal Declaration [of Human Rights].<sup>147</sup>

This notwithstanding, in the case of *Young, James and Webster* the ECtHR held that:

[a]ssuming for the sake of argument that, for the reasons given in the above-cited passage from the *travaux préparatoires*, a general rule such as that in Article 20 par. 2 of the Universal Declaration of Human Rights was deliberately omitted from, and so cannot be regarded as itself enshrined in, the Convention, it does not follow that the negative aspect of a person’s freedom of association falls completely outside the ambit of Article 11 (art. 11) and that each and every compulsion to join a particular trade union is compatible with the intention of that provision. To construe Article 11 (art. 11) as permitting every kind of compulsion in the field of trade union membership would strike at the very substance of the freedom it is designed to guarantee.<sup>148</sup>

The decisive factor persuading the Court to controvert the intention manifested by the ECHR’s drafters rested in the fact that an obligation to join an association “strikes at the *very substance* of the freedom guaranteed by Article 11.”<sup>149</sup> The same approach was

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<sup>147</sup> *Travaux Préparatoires*, Report of the Conference of Senior Officials 262 (Vol. IV 1950).

<sup>148</sup> *Young, James and Webster v. United Kingdom*, App. No. 7601/76; 7806/77, Eur. Comm’n H.R. Dec. & Rep. 17 (1981).

<sup>149</sup> *Id.* at 18 (emphasis added).

followed by the Court more recently with regard to the situation of an *applicant compelled to belong to an employers' association*.<sup>150</sup>

*Ontology of Implied Human Rights and their Distinction from  
Expressed Rights and Natural Rights*

Implied human rights are unwritten and implicit. Consequently, they are obviously distinct from expressed rights, which are catalogued in writing by relevant treaties (or, at the domestic level, by national constitutions or other legislation). At the same time, in ontological terms implied human rights are dependent on the existence of expressed human rights. It is true that, as previously noted especially with regard to the jurisprudence of the IACtHR, in some cases it is even possible that certain implied rights emanate from *other implied rights*; however, the latter derive on their turn from one or more expressed rights; it follows that the primary source of an implied right remain(s) in any case one (or more) expressed right(s). The existence and enforceability of one or more expressed rights are therefore the necessary prerequisites for the recognition and enforcement of implied rights. The rational justification of the existence of implied rights is determined by the entitlement of human beings to certain expressed rights and the consequent need of ensuring effectiveness of the latter. In other words, implied human rights are a rationalist produce of an hermeneutic operation aimed at ensuring effectiveness of expressed human rights. This hermeneutic approach is necessitated by the fact that implied rights, and their enforcement, are morally and legally *necessary* in order to guarantee the effective realization of expressed rights and, a fortiori, the appropriate protection of the paramount value of human dignity. Expressed rights cannot be properly realized without implied rights and, to the extent that the foregoing holds true, the former are *interdependent* with the latter.

In practice, the concrete identification of implied rights is usually empirically achieved, in light of the experience of the

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<sup>150</sup> See Sigurður A. Sigurjónsson v. Iceland, App. No. 16130/90, Eur. Comm'n H.R. Dec. & Rep. 12 (1993).

individuals and/or communities specifically concerned, basing on different hermeneutic methods. First, implied rights may take the form of concrete implications of a specific expressed right; one example of this instance is provided by the affirmation of the prohibition of *refoulement* arising from the expressed right prohibiting torture and inhuman or degrading treatment or punishment. Secondly, an implied right may represent a necessary precondition for the effective realization of an expressed right, as happens, for instance, as regards the right of the members of indigenous communities to “use and enjoy . . . [the] natural resources [located on their ancestral lands, which] is a necessary condition for the enjoyment of their right to property under Article 21 of the [ACHR].”<sup>151</sup> Thirdly, an implied right may ensue from the combination of more expressed rights, as either a condition for their effective realization or an implication arising from their combined application; it is the case, for example, of the right to food, considered by the ACommHPR as “implicit in the African Charter, in such provisions as the right to life . . . , the right to health . . . and the right to economic, social and cultural development.”<sup>152</sup> Fourthly, implied rights may be specifications of expressed rights recognized in favour of subgroups of a group of general character (e.g., recognition of the right to privacy for a specific category of people (subgroup) deducted from the general right to privacy expressly guaranteed in favour of the general group of human beings).

Still under an ontological perspective, implied human rights are in principle distinct from human rights rules established by customary international law, although both categories take the form of unwritten rules. In fact, the two categories are well differentiated in terms of constitutive elements, of the methodological process leading to their formation, as well as in terms of their purpose and effects. With respect to the constitutive elements, it is well known that those determining the existence of customary international law are State practice and *opinio juris*, while implied human rights represent

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<sup>151</sup> *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 118 (Nov. 28, 2007).

<sup>152</sup> *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Afr. Comm’n H.P.R., ¶ 64 (Oct. 27, 2001).

*preconditions, implications* or *specifications* of expressed rights. These different constitutive elements obviously imply that the formation of the two categories in discussion rests on different methodological processes. In fact, while customary international law is the result of the development of relevant practice and, contextually, of the materialization of awareness by States of the legally binding character of the rule concerned (*opinio juris*), implied rights are formed through a logical process of hermeneutics based on one or more expressed rights. Finally, as far as the purpose and effects of the norms belonging to the two categories are concerned, customary law rules on human rights have the purpose and determine the effect of creating obligations extending their scope of application to all countries in the world, irrespective of whether or not they have ratified the treaties existing in the field. The purpose and effect of implied rights is instead to fill gaps (usually) existing in relevant treaties through recognizing rules which are not expressly contemplated by the latter.<sup>153</sup>

This said, as a matter of legal methodology nothing prevents that an implied human right may evolve to the point of being recognized as a rule of customary international law. To a similar extent, it is well possible that implied rights may come into existence not only as result of the combination or evolutive interpretation of treaty rules, but also through carrying out the same interpretative operations basing on norms of customary international law. When such a process takes place, the implied right concerned—for the very reason of being *implied* and deriving from other rights—should be considered as grounded on the same State practice and *opinio juris* legitimizing the existence of its “constituent” right(s).

Implied rights are also to be distinguished, in principle, from *natural rights*, despite the fact that both categories of rights are unwritten and implicit. Natural rights are those rights—including the rights to equality and to freedom (conceived as “*presumption of liberty* that puts the burden on governments to show that any interference with the exercise of the rights retained by the people is justified”)<sup>154</sup>—with

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<sup>153</sup> Van Dijk, *supra* note 122, at 25.

<sup>154</sup> Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the*

which “all human beings are born.”<sup>155</sup> They are the rights originating in natural law,<sup>156</sup> as theorized since the times of classical Greek philosophers (Socrates, Plato, Aristotle),<sup>157</sup> and later detailed by St. Thomas Aquinas—who elaborated on the existence of naturally right goods and behaviours which are instinctively recognizable by the human being through right reasoning.<sup>158</sup> The doctrine of natural rights was then further expounded by Grotius<sup>159</sup> and—although with slightly divergent theoretical and hermeneutic constructions—by the philosophers of the Age of Enlightenment, particularly Hobbes, Locke, Hutcheson, and Rousseau.<sup>160</sup> These rights, therefore, are innate in nature and belong to the human being by reason of his own existence,<sup>161</sup> and were later transposed into the legal context, for the reason that in nature “the enjoyment of these rights [was] insecure [while] [s]ociety and the state are devices to guarantee a more secure enjoyment of human rights.”<sup>162</sup> In other words,

[i]f inherent [i.e. *natural*] rights are moral demands inherent in essential necessities for each and every person’s leading a minimally dignified life, extrinsic [i.e. *expressed*] rights derive their moral legitimacy from the consequentialist reason that they are instrumental for safeguarding inherent rights against standard modern threats under given human conditions in the contemporary world. Without extrinsic rights, an

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*Rule of Law*, 14 HARV. J. L. & PUB. POL’Y 615, 630 (1991).

<sup>155</sup> Jack Donnelly, *Human Rights and Western Liberalism*, in HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES 31, 34 (A.A. An-Na’im & F. Deng eds. 1990).

<sup>156</sup> See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2011).

<sup>157</sup> See Lenzerini, *supra* note 8, at 3.

<sup>158</sup> ST. THOMAS AQUINAS, SUMMA THEOLOGIAE I-II, 94, 2 (Fathers of the English Dominican Province transl. BiblioBazaar 2007) (1265–74).

<sup>159</sup> HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (Jean Barbeyrac, Richard Tuck et al., eds. 2005) (1625).

<sup>160</sup> See Lenzerini, *supra* note 8, at 12.

<sup>161</sup> THOMAS PAINE, THE RIGHTS OF MAN 68 (Henry Collins et al., eds. Penguin Classics 1984) (1791).

<sup>162</sup> Donnelly, *supra* note 155, at 34.



inherent right would remain *abstract* in conception and vulnerable in practice. The inherent right to basic subsistence, for example, is abstract for a right-bearer in the contemporary world if it is not defined more specifically as, for instance, the right to work (and to labour protection), the right to participate in economic development, the right to education, the right to own property, and rights to express opinions and participate in decision-making ... *If the actual enjoyment of certain good X is essential to the equal and sustainable safeguard of an inherent right, then, the demand that the enjoyment of X be guaranteed is justified as an extrinsic right ...* Extrinsic rights form a security zone around inherent rights, keeping at bay standard modern threats. They prevent severe deprivation of goods essential for the equal and sustainable enjoyment of the goods demanded by inherent rights ... this consequentialist approach is so dependent on empirical evidence. It involves assessing means-end effectiveness.<sup>163</sup>

Therefore, *in principle*, natural rights would precede expressed rights (as “natural law ‘underlay’ the positive law”<sup>164</sup>), while implied rights are the consequence of the latter. Natural rights represent the origin and moral justification of expressed rights, while implied rights are a consequence of the latter. This appears to be the best explanation of the relationship between natural rights and implied rights—especially as regards the nature of the latter in the context of international law—despite the fact that, as previously elaborated, especially in the context of relevant domestic practice the relationship between the two concepts in discussion was originally (and in some cases is still *today*) conceived in different terms, specifically in the sense that natural law was (or is) understood as the “source” for establishing the sort and

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<sup>163</sup> XIAORONG LI, *ETHICS, HUMAN RIGHTS AND CULTURE: BEYOND RELATIVISM AND UNIVERSALISM* 168 (Palgrave Macmillan, 2006).

<sup>164</sup> Helmholz, *supra* note 11, at 402.

content of implied rights. Conceived in this sense, natural rights and implied rights come to overlap to a notable extent. Indeed, it is undeniable that, just like natural rights, also implied rights are instinctively recognizable by the human being through right reasoning. However, as far as international human rights law is concerned, the contemporary understanding of implied rights suggests to keep them distinguished from natural rights, according to the rationale explained right above.

*Implied Rights, Rule of Law, and Effectiveness of Human Rights*

As shown in the second section of this article, the fact that in the context of international human rights law wide recourse is made to implied rights is beyond question. What is in principle disputable is whether such an approach may be considered adequate and correct. Some scholars openly criticize the very idea of implied rights, claiming that their characteristic of not being expressly contemplated by written legal provisions would undermine the accomplishment of the principle of legality and of the rule of law.<sup>165</sup> This position is held in particular by *Originalists*, who, referring to domestic law,

believe that judges are only human and therefore will be tempted to read their own subjective views into the Constitution. To prevent this from happening, the discretion of the judges should be limited as much as possible . . . Rather than adjusting the meaning of the [Law] to fit the case, the Originalists will leave it to the political process to amend the [Law].<sup>166</sup>

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<sup>165</sup> E.g., Falcón, *supra* note 109.

<sup>166</sup> Zwart, *supra* note 15, at 115. See also T.C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); David Lyons, *Constitutional Interpretation and Original Meaning*, 4 SOC. PHIL. & POL'Y 85 (1986); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Princeton U. Press, 1997); DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION*

It has even been argued that,

[t]o conclude not only that rights may be implied by the constitution but also that the judiciary has the power to enforce those rights—overriding legislation if necessary—is to repudiate the separation of powers the constitution establishes. It is to do violence to the judge’s duty to uphold the constitution, regardless of how noble the motivation to protect particular rights may seem to be.<sup>167</sup>

Admittedly, at a first sight the proclamation and use of implied rights may appear as threatening the requirement of certainty of law, especially (now referring to international law) for States, which would be unable to precisely know in advance which obligations are binding for them in the field of human rights. This was exactly the argument raised by the British judge Fitzmaurice in his separate opinion attached to the ECtHR’s *Golder* judgment, saying that States cannot be expected to implement international obligations when they are “not defined sufficiently to enable them to know exactly what it involves.”<sup>168</sup>

This argument actually deserves consideration, persuading to assume that, in order for implied human rights to be legitimate, it is necessary that they are clearly recognizable in advance by any reasonable observer, so as not to create obligations which are actually *new* and *unforeseeable*, and consequently impose an excessive and unreasonable burden on States. However, in the context of the practice of human rights monitoring bodies described above such a condition appears as being actually respected, as demonstrated by the circumstance that States have never, or very rarely, seriously

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AND THE DEBATE OVER ORIGINALISM (Cambridge U. Press, 2005) (referring to Originalist theories).

<sup>167</sup> Huscroft, *supra* note 34, at 47.

<sup>168</sup> Golder, *supra* note 126, ¶ 30 (addressing the Separate Opinion of Judge Sir Gerald Fitzmaurice).

complained or objected to the construction of implied human rights by such bodies, demonstrating that the said practice is acceptable for them. In fact, implied rights are no more than an emanation of expressed rights, i.e. concrete preconditions, implications or specifications of them, justified by the awareness that their denial would actually prevent the effective enjoyment of expressed rights in practice. For instance, taking as example the ECtHR jurisprudence recognizing the implied right to a safe environment,<sup>169</sup> the lack of protection from severe environmental pollution would actually deprive the (expressed) right to private and family life of effectiveness.

Applying implied rights is not tantamount to applying new law retroactively, but is simply an operation of extensive or analogic (*evolutive*) interpretation, which not only is perfectly permissible in law in general, and in international law in particular, but is even due in the field of human rights, in order to ensure their effectiveness in the real world. This is fully consistent with Ronald Dworkin's assumption that legal judgments must "follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."<sup>170</sup>

Even under the perspective of the scope and significance of the concept of the "rule of law," no real inconsistencies exist between the latter and implied rights. As noted by Randy Barnett,

constitutional theorists who resist recognizing and protecting unenumerated rights on the ground that the judicial protection of these rights violates the rule of law fail to grasp the new, refined conception of the rule of law based on both rules and principles. In particular, they fail to recognize the importance of presumptions . . . in reconciling the rule of law with the pursuit of justice.<sup>171</sup>

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<sup>169</sup> See *Lopez Ostra v. Spain* App. No. 16798/90, Eur. Ct. H. R. (2002). See also *Guerra*, *supra* note 135; *Öneryıldız*, *supra* note 142; *Rietiker*, *supra* note 143.

<sup>170</sup> RONALD DWORKIN, *LAW'S EMPIRE* 225 (HARV. U. PRESS, 1986).

<sup>171</sup> Barnett, *supra* note 154, at 620; See also Frederick Schauer, *Rules and the*

This understanding of the rule of law is all the more valid in the context of international law—a legal system in which no “central legislator”<sup>172</sup> exists capable of providing exhaustive legal regulation of all situations which may arise in international relations. This does not mean that one has to refute the assertion of Robert Jennings and Arthur Watts, according to which “every international situation is capable of being determined as a matter of law.”<sup>173</sup> On the contrary. But the legal determination of international situations is not only realized through “the application of specific legal rules where they already exist,” but also through “the application of legal rules derived, by the use of known legal techniques, from other legal rules or principles.”<sup>174</sup> Implied human rights are undoubtedly included in such “derived” legal rules. It follows that the “analysis of the role of the Rule of Law as applied at the international level requires a reconceptualization of the principle in such a way as to take account of systemic differences between the domestic and international legal order.”<sup>175</sup>

Consistently, as noted by Jeremy Waldron, “[w]e have to be careful . . . that invocation of the Rule of Law in the international realm does not undermine the values that are supposed to be secured by [international human rights law] within national polities.”<sup>176</sup> In fact,

the liberty of an individual state is not such an  
important value as the liberty of an individual person.  
It is not clear that national states need protection from

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*Rule of Law*, 14 HARV. J. L. & PUB. POL’Y 645, 674-76 (1991).

<sup>172</sup> Arthur Watts, *The Int’l Rule of Law*, 36 GERMAN Y.B. INT’L L. 15, 28 (1993).

<sup>173</sup> ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INT’L LAW* 12-13 (Oxford U. Press, Vol. 1 1992).

<sup>174</sup> *Id.*

<sup>175</sup> FRANCIS NEATE, *THE RULE OF LAW: PERSPECTIVES FROM AROUND THE GLOBE* 155 (LexisNexis, 2009) (citing Hisashi Owada, *The Rule of Law in a Globalising World—An Asian Perspective*, 8 WASH. U. GLOBAL STUD. L. REV. 187, 193 (2009)).

<sup>176</sup> Jeremy Waldron, *The Rule of Law*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* 8.5 (2016).

international law and the power that it represents in the way that ordinary men and women need protection from the exercise of political power in society. Moreover, in areas like international human rights law, any presumption based on the Rule of Law in favour of the liberty of national states will tend to have detrimental effects on the liberty or wellbeing of individual men and women.<sup>177</sup>

Therefore, it is necessary to interpret “the requirements of the rule of law at the international level so as to ensure at least substantial compliance with [its] underlying values.”<sup>178</sup> As human rights are actually “underlying values” of international law, the elaboration and application of implied rights is totally legitimized, as they pursue the purpose of ensuring “substantial compliance” with such values. It follows that the realization of actual effectiveness of human rights prevails over a strict application of the rule of law as traditionally conceived in domestic law, provided that—as previously noted—the construction of implied rights does not transcend a reasonably foreseeable interpretation of expressed rights, so as to result in the imposition of a totally unpredictable and unreasonable burden on States.

Furthermore, as noted by Dina Shelton, “human rights treaties are viewed as different in nature from other agreements, having a ‘public order’ dimension to their interpretation and application.”<sup>179</sup> Indeed, respect and effectiveness of human rights represent essential conditions for giving proper realization to the rule of law: “the rule of law and human rights are two sides of the same principle, the freedom to live in dignity. The rule of law and human rights therefore have an indivisible and intrinsic relationship.”<sup>180</sup> Borrowing from Siegfried

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<sup>177</sup> *Id.*

<sup>178</sup> Dinah Shelton, *Inherent and Implied Powers of Regional Human Rights Tribunals*, in *TOWARDS CONVERGENCE IN INTERNATIONAL HUMAN RIGHTS LAW: APPROACHES OF REGIONAL AND INTERNATIONAL SYSTEMS* 454, 487 (C. M. Buckley, A. Donald & P. Leach eds., 2016).

<sup>179</sup> U.N. GAOR, 68th Sess., at 4, U.N. Doc. A/68/213/Add.1 (July 11, 2014).

<sup>180</sup> U.N. Secretary-General, *Strengthening and Coordinating United Nations*

Wiessner, the right understanding of the rule of law should be grounded on “a law that would maximize access by all to the processes of shaping and sharing all things humans desire in life. This law would indeed serve human beings, not the other way around, and thus anchor the rule of law properly in our very own needs and aspirations.”<sup>181</sup>

In turning this idea of law into a concrete dimension, a decisive role is played by human rights and their full effectiveness. Since the existence of implied rights is actually necessary in order to guarantee effectiveness of human rights, implied rights themselves are a fortiori indispensable for guaranteeing proper realization of, and respect for, the rule of law. A practical example of the correctness of this conclusion is provided by the previously described *Golder* judgment,<sup>182</sup> in which the ECtHR, in refuting the argument of the government of the United Kingdom that Article 6 ECHR does not confer a right of access to courts, held that “one can scarcely conceive of the rule of law without there being a possibility of having access to courts.”<sup>183</sup> It follows that one “cannot reasonably . . . deny judges the power to derive rights that are necessary for explicit rights.”<sup>184</sup>

There are additional arguments supporting the legitimacy and opportunity of implied human rights, along with the foremost one, i.e., that implied rights are essential for ensuring effectiveness of expressed rights and of human rights as a general system of law.

Firstly, it is inescapable that, whatever list of rights is included in a legal instrument, it is inherently incomplete, especially in consideration of the constantly changing needs of human societies; if the elaboration of implied rights would not be allowed, “the rights of the people would be rendered incomplete.”<sup>185</sup> The very purpose of

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*Rule of Law Activities, Addendum*, ¶ 17, U.N. Doc A/68/213/Add.1 (July 11, 2014).

<sup>181</sup> Siegfried Wiessner, *The Rule of Law: Prolegomena*, ZDAR ABSCHIEDSHEFT 82, 84 (2018) (footnotes omitted).

<sup>182</sup> See *Golder*, *supra* note 126, ¶ 36.

<sup>183</sup> *Id.* at ¶ 34.

<sup>184</sup> Walter Sinnott-Armstrong, *Two Ways to Derive Implied Constitutional Rights*, in *LEGAL INTERPRETATION IN DEMOCRATIC STATES* 243 (J. Goldsworthy & T. Campbell eds., 2002).

<sup>185</sup> Barnett, *supra* note 154, at 628 (regarding Statement of James Wilson to the Pennsylvania Ratifying Convention, Nov. 28, 1787). See also Ryan, *supra* note 42

human rights is to protect the needs and aspirations of people living at the time when they need to be applied. Therefore, they must be flexible enough to effectively meet those needs and aspirations. Deference for the will of the drafters in the interpretation of a legal instrument dealing with human rights—it being a domestic constitution or an international treaty—would “unjustifiably devitalize . . . its provisions by effectively treating its long dead framers rather than the living people as the source of its legitimacy.”<sup>186</sup> Any “written constitution . . . underprotects rights and values that have become essential to keeping the inner logic and continuity of the narrative intact.”<sup>187</sup> While this consideration refers to domestic law, it is straightforwardly extendable to the international legal order, where the place of a “written constitution” is taken by a treaty. It follows that, as emphasized by the IACtHR, if human rights instruments would not be interpreted so as to admit the existence of implied rights, construed around the needs of their addressees, the protection offered by such instruments “would [be made] illusory for millions of persons.”<sup>188</sup> This is the substance of the (previously referred to) principle of *evolutive interpretation*, a kind of dynamic interpretation inspired by the assumption that—as put by the ECtHR—human rights instruments are living instruments that must be interpreted in light of the present-day conditions. In other words, rather than paying tribute to the intentions of the drafters, this method of interpretation advocates an approach devoting primary consideration for the real needs of human beings at the moment when human rights rules need to be applied to their life. It is an interpretative method fully consistent with the general rules of treaty interpretation prevailing in international law. Indeed, as clarified by Article 31 of the Vienna Convention on the Law of Treaties,<sup>189</sup> it is true that a treaty is

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(including corresponding text).

<sup>186</sup> *Theophanous v. The Herald and Weekly Times Limited and Another* (1994) 182 CLR 104, ¶ 167 (Justice Deane). In this case, the legal instrument referred to by the judges was the Constitution of Australia. *Id.*

<sup>187</sup> Sharon Weintal, *The Inherent Authority of Judges in a Three-Track Democracy to Recognise Unenumerated Constitutional Rights: The Israeli Story of a Judicial Mission with No Ammunition*, in *ISRAELI CONSTITUTIONAL LAW IN THE MAKING* 285 (Gideon Sapir et al. eds., 2013).

<sup>188</sup> *Sawhoyamaya Indigenous Cmty.*, *supra* note 106.

<sup>189</sup> Vienna Convention on the Law of Treaties, No. 18232, Vol. 1155, May 23,



to be interpreted in accordance with the ordinary meaning to be given to its terms, but these terms must be considered in their context and in the light of the *object and purpose* of the treaty concerned. The “object and purpose of [a human rights treaty] as an instrument for the protection of individual human beings require that its provisions be interpreted and applied *so as to make its safeguards practical and effective*.”<sup>190</sup> A monitoring body, therefore,

must . . . have regard to the changing conditions in the respondent State and in the Contracting States in general and respond, for example, to any emerging consensus as to the standards to be achieved . . . It is of crucial importance that [a human rights treaty] is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure . . . to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.<sup>191</sup>

Consequently, “a certain degree of flexibility enabling [a human rights] Convention review bodies to have regard to evolutions in standards should not only be permissible but should even be seen as crucial to the effectiveness of the Convention protection system.”<sup>192</sup>

It follows that evolutive interpretation is the only hermeneutic method which allows to guarantee *full effectiveness* of human rights, i.e. that human rights actually achieve their basic goal to effectively protect the person and dignity of human beings. Against this interpretative method, the argument of certainty of law, conceived in the sense that States should precisely know in advance what are their obligations in the human rights field, cannot be validly advanced,

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1969, U.N.T.S. 331.

<sup>190</sup> Soering v. United Kingdom, App. No. 1/1989/161/217 161, Eur. Ct. H.R. (ser A.) ¶ 87 (1989) (emphasis added). See also Rietiker, *supra* note 143.

<sup>191</sup> Scoppola v. Italy (No. 2), App. No. 10249/03, Eur. Ct. H.R. ¶ 104 (2009).

<sup>192</sup> Soren C. Prebensen, *Evolutive Interpretation of the European Convention on Human Rights*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 1125 (P. Mahoney et al. eds., 2000).

since States parties to a human rights treaty must,

in view of the special role vested by [the competent monitoring bodies] in interpreting the [relevant] Convention and the long-term character of the [relevant] Convention system of collective enforcement, be regarded as having accepted that, in exercising this task, they might take into account subsequent developments in national and international standards.<sup>193</sup>

Even the International Court of Justice (ICJ) has authoritatively held that certain legal concepts are “not static, but [are] by definition evolutionary, . . . [and] . . . [t]he parties to [a treaty] must consequently be deemed to have accepted them as such . . . [Their] interpretation cannot remain unaffected by the subsequent development of law.”<sup>194</sup> Such legal concepts undoubtedly include human rights.<sup>195</sup>

The second additional argument in favour of implied rights is that the latter are necessary for ensuring proper protection of the rights of *minorities*—intended not only as ethnic minoritarian groups, but especially as minorities in the “political” sense, i.e. those whose voice is not strong enough to make their point of view prevail or be taken into consideration (including at the international level).<sup>196</sup> Indeed, as actually happened at the beginning of the development of modern international human rights law, which was shaped according to the

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<sup>193</sup> *Id.*

<sup>194</sup> Legal Consequences for the State of Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1970 I.C.J. 16, ¶ 53 (June 21).

<sup>195</sup> In the excerpt, the ICJ referred to the principle included in Article 22 of the Covenant of the League of Nations, according to which “the well-being and development of [former colonized peoples who are not yet able to stand by themselves under the strenuous conditions of the modern world] form a sacred trust of civilisation.” Such principle is clearly very close to the idea of human rights.

<sup>196</sup> See Randy E. Barnett, *Who’s Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. 1, 13 (2006).

view prevailing in the Western world,<sup>197</sup> it is well possible that a human rights instrument is drafted on the basis of the understanding of rights perceived by the strong side of negotiators, and that the rights felt as necessary only by a minority of them may consequently be neglected. In such a circumstance, those “minority rights” may only be retrieved through making recourse to implied rights, and “[p]rotecting [implied] basic rights is vital to facilitating an open and fair intergroup dialogue.”<sup>198</sup>

Thirdly, implied rights may be justified through a natural-law-based *presumption of liberty*, in the sense that

natural or inherent rights protect the people’s liberty to act as they see fit unless justly restrained by the government. Protecting these rights does not require specifying every instance of protected liberty in advance. Instead . . . the burden [is put] on government to show that any interference with the exercise of the rights retained by the people is justified.<sup>199</sup>

This argument obviously fits better with the domestic context, also for the reason that it seems to presuppose a coincidence between natural and implied rights. However, it is valid at the international level as well, and is consistent with the general tendency of human rights monitoring bodies to put on States the burden of demonstrating that an argument supporting an allegation of human rights violations is unfounded.

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<sup>197</sup> See Lenzerini, *supra* note 8, at 9.

<sup>198</sup> Weintal, *supra* note 55, at 297.

<sup>199</sup> Barnett, *supra* note 154, at 630.

*Conclusion*

According to John Searle, while human rights are not lost when they are denied or not recognized, they may only function to the extent that they are recognized.<sup>200</sup> The utility and legitimacy of implied human rights rests exactly in an hermeneutic operation aimed at ensuring effectiveness of human rights through—by means of their recognition—filling the gaps existing in human rights instruments which would make the level of protection afforded to individuals and communities (when applicable) potentially insufficient and ineffective. Obviously, once we recognize the legitimacy and opportunity of implied human rights, since they are the product of an activity of interpretation, we also have to accept that courts (and other human rights monitoring bodies) are going to play a prominent role in the context of the dynamics of international human rights law. However, this is not necessarily to be seen in negative terms. On the contrary, in many cases it has actually been thanks to the propulsive action of (either domestic or international) courts that positive developments have occurred not only in the field of human rights protection, but in international law in general. Courts will therefore have the burden of providing in concrete cases a reasonable interpretation, based on the perceptions prevailing in a society, to distinguish between legitimate and illegitimate rights; needless to say that recognition of implied rights must be limited to the former. In this respect, possible (little) inconsistencies in the practice of different courts and other monitoring bodies are inherently unavoidable. However, this is perfectly acceptable, in light of the fact that, paraphrasing the UN Secretary-General, “[w]hile universally agreed human rights, norms and standards provide its normative foundation, the rule of law [and human rights themselves] must be anchored in a [local] context, including its culture, history and politics.”<sup>201</sup> In fact, a moderately differentiated interpretation and application of human rights, based on the cultural specificities and needs of the people

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<sup>200</sup> See JOHN R. SEARLE, *MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION* 183 (Oxford U. Press, 2010).

<sup>201</sup> U.N. Secretary-General, *The Rule of Law at the National and International Levels*, ¶ 17, U.N. Doc. A/68/213/Add.1 (July 11, 2014).

involved in a concrete case, is actually useful to guarantee—again—effectiveness of human rights.<sup>202</sup> And, in any event, even if one disagrees with this argument, the possibility that some little inconsistencies would surface in the jurisprudential recognition and enforcement of implied rights is in any case to be accepted, because it is mainly thanks to the latter rights that human rights instruments may assume the character of living instruments aimed at “the collective enforcement of human rights and fundamental freedoms . . . requir[ing] that [their] provisions be interpreted and applied so as to make [their] safeguards practical and effective.”<sup>203</sup> Indeed, only living instruments which are flexible enough to adapt to the real needs of people—of course remaining within the scope allowed by the general principles and rules enshrined by their texts—may actually guarantee the full effectiveness of human rights, so as to ensure that *all* human beings and communities may effectively enjoy *all human rights and fundamental freedoms*.

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<sup>202</sup> See Lenzerini, *supra* note 8, at 9.

<sup>203</sup> Soering, *supra* note 189 (noting text accompanying footnote).