

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have concurred with my vote in the instant Judgment of the Inter-American Court of Human Rights in the case of the *Gómez Paquiyauri Brothers versus Peru*. The issues raised by the *cas d'espèce* and addressed by the Court in the Judgment it reached have led me to reflect on certain matters that I feel I must state in this Separate Opinion, as the grounds for my position on them. I will refer, specifically, to the following points: a) the tragic vulnerability of the human condition, as shown by the facts in the instant case; b) establishment of the emergence of the international responsibility of the State; c) interaction between international law and domestic law in the current sphere of protection, transcending the "principle of subsidiarity," as it has been called; d) emancipation of the individual *vis-à-vis* his or her own State; e) implementation of the international responsibility of the State through the initiative of the individual as the subject of international law; and f) compulsory Law (*jus cogens*) and the establishment of the aggravated international responsibility of the State.

I. The Tragic Vulnerability of the Human Condition.

2. The facts in the instant case bring before this Court, once again, the recurring issue of the vulnerability and insecurity inherent to the human condition. The inevitable nature of human suffering seems proven over the centuries, and the fragility of the human condition has always been a matter of reflection, including our own days.¹ Since the times of Aeschylus, Sophocles, and Euripides to our own, the perennial and current nature of tragedy has expressed itself in the lives of millions and millions of human beings, generation after generation. It is difficult to find someone who has not suffered it somehow or become aware of it. Tragedy, today as in the 5th century B.C., is present every day in the daily life of millions of human beings. The facts of the instant case of the Gómez Paquiyauri brothers attest to this as they -like so many others whom we have not even heard about over the ages- were the victims of human brutality.

3. In the instant case of the *Gómez Paquiyauri Brothers*, the testimony of the next of kin of the two victims before this Court, and throughout the instant Judgment, concur in that when their bodies were found at the morgue, with a sign that read "unidentified", they were both wet, dirty, with their clothes full of dirt and blood, with an expression of "horrible pain," and their faces mangled; the eye sockets of both brothers were empty, and there was encephalic mass on their hair; one of them (Rafael) was missing a thumb, which had been shot off, and the palms had holes in them, as if they had been burned; the other deceased brother's mouth (Emilio's) was half-open, his teeth full of dirt. One of the surviving brothers (Miguel Ángel Gómez Paquiyauri) stated before the Inter-American Court that "he ha[d] no words to describe" what he saw. The father of the two youths (Ricardo Samuel Gómez Paquiyauri) added that "his children, 14 and 17 years old, were cruelly tortured and murdered."²

4. In her testimony before the Inter-American Court, at the public hearing on May 5, 2004, the Gómez Paquiyauri brothers' mother (Marcelina Paquiyauri Illanes de Gómez) stated that, when she arrived at the morgue to identify the bodies of her two sons,

"when we entered the room, on a table, that seemed to be made out of metal, (...) there were my children, Rafael and Emilio, crosswise, not as I left them, healthy,

¹. For example, in the works of A. Malraux and H. Arendt, with similar titles, among others.

². See para. 49 (b),(c),(d), and (e) of the instant Judgment.

smiling, happy, but their face disfigured, they had shot one of them in the eye and the other was all bruised; Emilio, his mouth half-open, his teeth full of dirt, his clothes full of dirt, wet (...). Likewise, Rafael was the same, eyeless, they had shot his thumb off (...). I didn't know what to do, but when I looked at Rafael's chest there was a white piece of paper or cloth that said 'approximately 27 years old, arrived as a corpse [unidentified]'; about Emilio it said 'approximately 24 years old, unidentified, arrived as a corpse.' I felt desperate, (...) I began to scream because they gave them those ages, that could not be, eyesight is for seeing, we see who is older, who is younger, you could see they were children and they gave them that age. (...) Then (...) I yelled, how is it possible that you gave them that age, knowing they are children? (...) Then (...) I began to cry and to say why did they give them that age, they did not even respect the fact that they [are] children (...)."³

5. The victim's sister (Lucy Rosa Gómez Paquiyauri), in turn, when she testified before the Court on that same day, May 5th, stated that when she found the decomposing corpses of her brothers at the morgue,

"I could not believe what my eyes were seeing. (...) For me it was shocking, (...) I cannot describe in words what I felt at that moment, I felt that my life was falling apart. (...) Any ignorant person could realize that my brothers were just children; what they did to my brothers is unspeakable, they were children, they had nothing to do with what had happened (...).

(...) We have the right to know the truth, for the truth to be known (...). Do we not have the right to claim for the life of my brothers? I loved my brothers; there is no day in my life that I do not remember them, there is no day in my life that they are not present, they were everything for me; (...) never before this happened did I feel alone, never; they were always there next to me. (...) No matter how many years pass, I will always miss them, I will always feel their absence. We want the truth to be known, we want to ensure that what happened to my family, what happened to my brothers, the abuse committed against them never happens again."⁴

6. Nothing will be as it was before. The survivors of the Gómez Paquiyauri family today have the memory of paradise lost. Together with Rafael and Emilio, brutally torn from this world by their fellow men, they also lost the unrecoverable happiness of simple and harmonious family life. The vacuum was filled by a feeling of deep sorrow and rebellion, with its corrosive effect. The damage suffered and narrated by the next of kin of the two young brothers who were murdered is truly irreparable, and the reparations ordered by the Court in the instant Judgment can only attenuate their grief,⁵ which has not eroded over time.

7. What occurred in the instant case does in fact generate a reflection on the precarious nature of the human condition. This has been so, since the fall of the human being in Eden, which gave rise to the "tragic and ominous future" of humankind;⁶ the seed of good and evil became established in everyone, throughout human succession, which "was destined to the calamitous events of life."⁷ As J. Milton said in his universal work, *Paradise Lost* (1667),

"(...) like one of us Man is become
To know both Good and Evil, since his taste
Of that defended Fruit; but let him boast
His knowledge of Good lost, and Evil got,

³. I-A Ct of HR, *Transcripción de la Audiencia Pública Celebrada los Días 5, 6 y 7 de Mayo de 2004 - Caso de los Hermanos Gómez Paquiyauri versus Perú*, San Jose, Costa Rica, I-A Ct of HR, 2004, pp. 52-53 (internal distribution).

⁴. *Ibid.*, pp. 43-44 and 48.

⁵. See, in this regard, my Separate Opinions in the cases of the "Street Children" (*Villagrán Morales et al. versus Guatemala*, Reparations, Judgment of 26.05.2001), of *Bámaca Velásquez versus Guatemala* (Reparations, Judgment of 22.02.2002), and of *Bulacio versus Argentina* (Merits and Reparations, Judgment of 18.09.2003).

⁶. As described by J. Milton, *Paradise Lost* (1667), book IX, verses 6-15.

⁷. *Ibid.*, book X, verses 967-991.

Happier, had it suffic'd him to have known
Good by it self, and Evil not at all."⁸.

8. Everyone has experienced or become aware of some expression of the violence that human beings carry within themselves. No one can deny the finite nature of human beings, highlighted by a feeling of powerlessness in face of brutality and injustice, and the suffering they entail, reflected in tragedy over the centuries.⁹ In the age of the modern nation-State, abominable crimes have been committed in the name of alleged "State security", and citizens have been placed in the most pitiless human insecurity. State security (originally conceived for the realization of the common weal) and that of the human person have not gone hand in hand; quite the contrary, the former has often been invoked as a pretext to unduly restrict the latter. The facts in the instant case eloquently show this historical distortion.

9. In the instant Judgment in the case of the *Gómez Paquiyauri Brothers*, the Court has, in short, found that one of the proven facts is that

"At the morgue the bodies of Rafael Samuel and Emilio Moisés Gómez Paquiyauri were full of blood and dirt, wet, dirty; there was encephalic mass on their hair, and one of Emilio's fingers was missing. In both of them, the eyes were missing" (para. 67(j)).

10. Working for human rights, then, entails sharing the deepest human suffering, being in contact with the evil within each person since the fall of the first two human beings in Eden. Working effectively for human rights, with concrete results, is to once again find the good that is also within each person, and to help attain redemption through the realization of justice. The first step, on the difficult path in search of justice, is to identify the origin of the responsibility of the State, that is, to establish how said responsibility arises.

II. Establishment of the Emergence of the International Responsibility of the State

11. At the outset, I must point out that inclusion in the instant Judgment of the Inter-American Court, of a chapter (VIII) on the International Responsibility of the State, as it has been addressed in the respective adjudicatory proceeding, evinces the need to take general international law and the general principles of international law into account, together with the provisions of the American Convention on Human Rights, when applying a treaty such as the latter. In point of fact, the general theory of exhaustion of domestic remedies, in international law, has for a long time had to address precisely the aforementioned issue of the establishment of the moment of emergence of the international responsibility of the State.

12. As I pointed out in a study on the subject, published in Geneva in 1978, over the last decades attempts to codify the matter, international jurisprudence, international doctrine and international practice have demonstrated a clear division between two theses, the *substantive* and the *procedural* ones (according to which State responsibility is, or is not, respectively, contingent upon reparations in domestic law). Combinations of these two theses, and of other explanatory theories (such as that of *complex international wrongdoing*, of *dédoublement fonctionnel*, of

⁸. *Ibid.*, book X, verses 84-89.

⁹. See W. Kaufmann, *Tragedy and Philosophy*, 2d. ed., Princeton/N.J., Princeton University Press, 1992, pp. 131, 133, 309 and 315.

the rule of conflict and of the rule of *policy*) ultimately tend to converge toward the basic dichotomy between the substantive and procedural theses.¹⁰

13. Both in that study and in others I have always insisted on the need to establish a distinction between the emergence and the implementation (*enforcement, mise-en-oeuvre*) of the international responsibility of the State. In the sphere of responsibility of the State for damages caused to foreigners, the rule of domestic remedies has often been given a substantive nature (especially in the practice of several States), perhaps due to its *preventive* nature *vis-à-vis* discretionary exercise of diplomatic protection; instead, in the sphere of international protection of human rights, the formulation of said rule *takes on the form of a procedural condition of admissibility of international claims or petitions*¹¹ (integrating domestic remedies in the international process of reparation of human rights violations).

14. This being so, in my opinion there can be no doubt that, in International Human Rights Law, *the international responsibility of the State arises at the very moment of violation of the rights of the human person*, that is, as soon as the international wrongful act attributable to the State occurs. In the framework of the Inter-American Convention on Human Rights, the international responsibility of the State may be generated by acts or omissions of any branch or body or agent of the State, whatever its or his hierarchy, that violates the rights protected by the Convention.¹² This has been the clear understanding of the Inter-American Court, which today constitutes its *jurisprudence constante* on the matter.¹³

15. Yet despite the clarity of the matter, unfortunately there has continued to be controversy, as I mentioned in my Separate Opinion (para. 4) in the *Myrna Mack versus Guatemala* case (2003), about the very moment of emergence of the responsibility of the State (perhaps due to the different contexts in which the rule of domestic remedies has been invoked¹⁴), - and this can be seen in the various positions adopted on the matter by the Inter-American Commission on Human Rights and by the representatives of the victims in the instant case of the *Gómez Paquiyauri Brothers versus Peru* (2003).

16. It is, therefore, appropriate to insist in the instant case on the specific point made before. As I underlined in my Concurring Opinion in the case of "*The Last Temptation of Christ*" (2001), with respect to Chile,

"(...) in the present context of the international protection of human rights, - fundamentally distinct from that of discretionary diplomatic protection at inter-State level,¹⁵ - the rule of domestic remedies is endowed with a *procedural* rather than

¹⁰. See A.A. Cançado Trindade, "The Birth of State Responsibility and the Nature of the Local Remedies Rule", 56 *Revue de droit international de sciences diplomatiques et politiques* - Sottile (1978) pp. 157-188.

¹¹. *Ibid.*, p. 176.

¹². See Inter-American Court of Human Rights (I-A Ct of HR), case of "*The Last Temptation of Christ*" versus Chile, Judgment of 05.02.2001, Series C, n. 73, p. 47, para. 72; and see Concurring Opinion of Judge A.A. Cançado Trindade, p. 76, para. 16, and see pp. 85-87, paras. 31-33.

¹³. See I-A Ct of HR, case of the "Street Children" (*Villagrán et al. versus Guatemala*, Merits), Judgment of 19.11.1999, Series C, n. 63, p. 89, para. 220; I-A Ct of HR, case of the "Five Pensioners" versus Peru, Judgment of 28.02.2003, Series C, n. 98, para. 163; I-A Ct of HR, *Case of Juan Humberto Sánchez versus Honduras*, Judgment of 07.06.2003, Series C, n. 99, para. 142.

¹⁴ Such as the fundamentally different contexts of international protection of human rights and diplomatic protection.

¹⁵ The basic differences in the context require that application of the rule of domestic remedies, in the sphere of international protection of human rights, pay special attention to the human person's need for protection. Said rule is far from being an unchangeable or sacred principle of international law, and nothing hinders its application with greater or lesser rigor in different contexts. After all, domestic

substantive nature. It thus conditions the *implementation (mise-en-oeuvre)* of the responsibility of the State (as a requisite of admissibility of an international petition or complaint), but not the *birth* of such responsibility.

This is the thesis which I have been constantly sustaining for more than twenty years (...).¹⁶ (...) I have always maintained that the *birth* and the *implementation* of the international responsibility of the State correspond to two distinct moments; in the present context of the international protection of human rights, the requisite of prior exhaustion of remedies of domestic law conditions the implementation, but not the birth, of that responsibility, which is conformed as from the occurrence of an internationally wrongful act (or omission)(...)" (paras. 33-34).

17. And, in two of my conclusions¹⁷ in that Concurring Opinion, which I wish to reiterate here, I argued precisely, in brief, that

- "(...) the international responsibility of a State Party to a human rights treaty arises at the moment of the occurrence of an international wrongful act - or omission - (*tempus commisi delicti*), imputable to that State, in violation of the treaty at issue;

- (...) in the context of the international protection of human rights, the rule of exhaustion of remedies of domestic law is endowed with a procedural rather than substantive nature (as a condition of admissibility of a petition or complaint to be resolved *in limine litis*), thus conditioning the implementation but not the birth of the international responsibility of a State Party to a human rights treaty" (para 40).

18. The representative of the alleged victims and their next of kin (Mónica Feria Tinta) has argued quite rightly in a similar vein before the Court in the instant case of the *Gómez Paquiyauri Brothers*, both in her written pleadings on April 17, 2002 (pp. 13-14, para. 25), and in her oral pleadings at the seat of the Court on May 7, 2004.¹⁸ The Inter-American Commission on Human Rights, in turn, missed this important specific conceptual point, and that even led the Commission to inappropriately mix the issue of the emergence of the international responsibility of the State with the "principle of subsidiarity," as it is called (see *infra*).

III. Beyond Subsidiarity: the Interaction between International Law and Domestic Law in the current Sphere of Protection

19. In face of this misunderstanding, I must specify another point, to clarify this conceptual matter and perhaps to provide a better understanding of the issue. In its *Report* of 11.10.2001 (under Article 50 of the American Convention) on the instant case, the Inter-American Commission argued, somewhat surprisingly, that "not every violation" of human rights committed by the agents of the State entails the international responsibility of the State; according to the Commission's *Report*,

remedies are a part of the international system for protection of human rights, itself, with an emphasis on the component of reparation (redress) rather than on the mechanical process of exhaustion (of said remedies). The rule of domestic remedies attests to the interaction between international law and domestic law in the current context of protection. We are here before a *law of protection*, endowed with its own specificity, geared primarily toward the victims, toward the rights of the human beings and not of the States. The generally accepted principles of international law (which the formulation of the rule of domestic remedies refers to in human rights treaties such as the American Convention), in addition to evolving differently in the various contexts where they are applied, necessarily undergo a certain degree of adjustment or adaptation when they are included in human rights treaties, due to the special nature of the object and purpose of said treaties and to the widely acknowledged specificity of the international protection of human rights. A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, University Press, 1983, pp. 1-443, esp. 6-56. 279-287, 290-322, and 410-412.

¹⁶ A.A. Cançado Trindade, "The Birth of State Responsibility...", *op. cit. supra* n. (10), pp. 157-188.

¹⁷ The first and the seventh.

¹⁸ I-A Ct of HR, *Transcripción de la Audiencia Pública Celebrada los Días 5, 6 and 7 de Mayo de 2004 – Caso de los hermanos Gómez Paquiyauri versus Perú*, San Jose, Costa Rica, I-A Ct of HR, 2004, p. 146 (internal distribution).

the State does not incur responsibility if it investigates the facts, punishes those responsible, and provides due reparation. According to the Commission, "the above is explained by the subsidiary nature of the inter-American human rights system."¹⁹ Still according to the Commission, in the instant case, the international responsibility of the State remained because it did not conduct a complete and adequate investigation, and it neither tried nor punished those responsible.²⁰

20. In its oral pleadings at the aforementioned public hearing before this Court on 07.05.2004 the Commission,²¹ as reported in the instant Judgment of the Court (para. 68), once again inappropriately mixed the origin of the international responsibility of the State with the "subsidiary nature" of international jurisdiction with respect to domestic or national jurisdiction. In my understanding, any violation of a right protected by the American Convention *immediately* entails the responsibility of the State; the *tempus commissi delicti* is that when the internationally wrongful act occurred. This gives rise –as consequences of the original violation– to the obligations of the State *under the Convention* to investigate the facts, punish those responsible, and provide reparations to the victims; if it does not fulfill those obligations, the State commits additional violations to the applicable international law.

21. An ongoing international human rights proceeding is not affected by domestic legal measures taken independently of it and in light of a different applicable law (the domestic or national one); said measures, therefore, do not magically "discharge" the international responsibility already incurred by the State or make it "disappear." Implementation of said responsibility (at a moment other than its birth) necessarily occurs in light of the provisions of the human rights treaty involved, which is directly applicable in the domestic law of the State responsible for wrongdoing.

22. A tribunal such as the Inter-American Court is empowered to establish the international responsibility of the State in cases brought before it, without considering a *renvoi* of the issue under its competence to domestic courts; this is its own prerogative, and also its duty. And since the responsibility of the State under domestic law is not necessarily identical with its responsibility under international law, and the parties and the issue debated under international jurisdiction are not necessarily the same as those under domestic venue,²²

"The [Inter-American] Court cannot abdicate from such determination, not even in the hypothesis that the decision of a national tribunal is entirely coincident with its own as to the merits. Otherwise, this would lead to a total juridical relativism, illustrated by the "endorsement" of a decision of a national tribunal when it is considered in accordance with the Convention, or else the determination that it does not generate, or ought not to generate, legal effects (...) when it is considered incompatible with the American Convention."²³

23. In addition to this, the conditions for admissibility of claims or petitions under the American Convention refer to *implementation* of the responsibility, not to

¹⁹. Inter-American Commission on Human Rights, *Informe n. 99/01 - Caso n. 11.016 (Perú)*, doc. OAS/Ser/L/V/II.113/doc.36, of 11.10.2001, pp. 9 and 12-13, paras. 48-49, 59 and 63.

²⁰. *Ibid.*, pp. 15 and 19, paras. 69 and 87.

²¹. See *Transcripción de la Audiencia Pública...*, *op. cit. supra* n. (18), pp. 156-157 (internal distribution).

²². See, in this regard, I-A Ct of HR, *Case of Las Palmeras versus Colombia*, Judgment of 06.12.2001 (Merits), Series C, n. 90, Joint Separate Opinion of Judges A.A. Cançado Trindade and M. Pacheco Gómez, pp. 43-45, paras. 2-3 and 5.

²³. *Ibid.*, Joint Separate Opinion of Judges A.A. Cançado Trindade and M. Pacheco Gómez, pp. 44-45, para. 4.

its *origin or emergence*. The former conditions are procedural in nature, while the establishment of the responsibility of the State is in the sphere of substantive or material law. I do not see how one can relate said establishment with the "principle of subsidiarity," as it is called, which refers directly and specifically to the protection *mechanisms*, at the national and international levels –the international ones being considered "subsidiary" to the national ones.

24. The subsidiarity mentioned above does not encompass material law, that is, it cannot be invoked with respect to the substantive provisions pertaining to the protected rights, nor regarding the content and scope of the respective obligations. In my opinion, one cannot give said subsidiarity a dimension that it does not effectively have, and never did. Furthermore, viewing relations between the international and national legal systems from the standpoint of the "principle of subsidiarity" is essentially static. Therefore, it does not faithfully reflect the dynamics and current state of evolution of the *interaction* between international law and the domestic law of the States in the current sphere of protection, for the benefit of the human beings protected.

25. As I mentioned, in this regard, in my Concurring Opinion in the case of "*The Last Temptation of Christ*" (2001), international law will be perfected and strengthened when human conscience attains a degree of evolution such that it no longer accepts the enactment of domestic laws (or administrative acts or court decisions) that obstruct application of international provisions for protection integrated with the provisions of domestic law (para. 10). And, long before my aforementioned Opinion, in an essay published in Germany in 1977-1978, I argued that, since human rights treaties entrust the national courts themselves with protective functions in the application of the rule of domestic remedies, said remedies are part of the international protection procedures; the purpose and effect of the resulting interaction between the international and national legal systems in the current context of protection is to perfect the national legal protection systems, as required by international instruments to safeguard human rights.²⁴

III. Emancipation of the Individual *vis-à-vis* his or her own State.

26. This is not the first time that this happens. Previously, in the case of the "*Five Pensioners*" *versus Peru* (2003), the petitioners and the Commission also followed different lines of reasoning with respect to a certain aspect of their respective pleadings. This is natural, and heartening, as it helps to highlight the different roles of the petitioners (the true substantive applicant party before the Court) and the Commission (as the auxiliary body of the Court in adjudicatory proceedings under the American Convention, and the defender of public interest and guardian of the Convention).

27. In my Concurring Opinion in that case of the "*Five Pensioners*" (para. 16), I pointed out that this development reflects the necessary prevalence of the *entitlement* of individuals to all the rights protected by the Convention above all other considerations, as subjects of International Human Rights Law. Said development is also a direct consequence of the step forward taken by the Court since it adopted its current rules of Procedure, the fourth in its history, granting *locus standi in judicio* to the individual petitioners in all stages of the procedure

²⁴. A.A. Cançado Trindade, "Exhaustion of Remedies in International Law and the Role of National Courts", 17 *Archiv des Völkerrechts* - Tübingen (1977-1978) pp. 333-370; and see, in this same regard, twenty years later, A.A. Cançado Trindade, *O Esgotamento dos Recursos Internos no Direito Internacional*, 2d. updated ed., Brasília, Edit. Universidad de Brasília, 1997, pp. 176-177 and 244-245.

before the Court. As I argued in my aforementioned Opinion in the case of the "*Five Pensioners*" (para. 19), and as was corroborated in the adjudicatory proceeding before this Court in the instant case of the *Gómez Paquiyauri brothers*,

"The petitioners themselves are those who, better than anyone else, can assess which rights have presumably been violated. To attempt to restrict this faculty would go against the right of access to justice under the American Convention."

28. Furthermore, as I have been arguing in recent years, we are in the midst of a historical process of *strengthening of the emancipation of the individual vis-à-vis his or her own State*. Six years ago, in my Concurring Opinion in the *Castillo Petruzzi et al. versus Peru* case (Preliminary Objections, 1998) before this Court, I summarized as follows the "qualitative leap" that would take place under the American Convention:

"This means to seek to secure, not only the direct representation of the victims or their relatives (*locus standi*) in the procedure before the Inter-American Court in cases already forwarded to it by the Commission (in all stages of the proceedings and not only in that of reparations²⁵), but rather the right of direct access of individuals before the Court itself (*jus standi*), so as to bring a case directly before it, as the sole future jurisdictional organ for the settlement of concrete cases under the American Convention. To that end, individuals would do without the Inter-American Commission, which would, nevertheless, retain functions other than the contentious one,²⁶ prerogative of the future permanent Inter-American Court.²⁷

(...) Above all, this qualitative advance would fulfill, in my understanding, an imperative of justice. The *jus standi* - no longer only *locus standi in judicio*, - without restrictions, of individuals, before the Inter-American Court itself, represents - as I have indicated in my Opinions in other cases before the Court²⁸ - the logical consequence of the conception and formulation of rights to be protected under the American Convention at the international level, to which the full juridical capacity of the individual petitioners to vindicate them ought to correspond necessarily." (paras. 42-43)

29. More recently, in my Concurring Opinion in the aforementioned case of the "*Five Pensioners*" (2003), I argued that "Not always the complaint originally presented by the petitioners before the Commission (Article 44 of the Convention) is necessarily the same as the complaint subsequently interposed by the Commission before the Court (Article 61(1) of the Convention). If the States are required, in conformity with the Convention (Article 25), to respect the right of access to justice, preserving the faculty of the individual complainants to substantiate their legal actions before national tribunals, how can they be denied this same faculty in their arguments before an international tribunal like the Inter-American Court? (...) one cannot curtail the right of the petitioners of access to justice at the international level, expressed in their faculty to indicate the rights which they deem violated." (paras. 20-21) The same applies to the arguments of the applicants on birth or emergence of international responsibility of the respondent State.

IV. Implementation of the International Responsibility of the State through the Initiative of the Individual as a Subject of International Law.

²⁵. As occurred under the previous (third) Rules of Procedure of the Court, Article 23.

²⁶. Like those of the undertaking of missions of *in loco* observation and the preparation of reports.

²⁷. Enlarged, functioning in chambers, and with considerably greater human and material resources.

²⁸. See, in this regard, my Separate Opinions in the *Castillo Páez versus Peru* case (Preliminary Objections, Judgment of 30.01.1996), paras. 14-17, and *Loayza Tamayo versus Peru* case (Preliminary Objections, Judgment of 31.01.1996), paras. 14-17, respectively.

30. This is precisely what happened in the instant case, in which the representative of the victims and their next of kin has submitted her own understanding of the origin of the responsibility of the State, different from that of the Inter-American Commission. Regarding this matter, we must take into account general international law, alongside and together with the American Convention. We must not forget that, of all the methods used in the international human rights protection systems, the only one that is activated by the individuals themselves (rather than activated *ex officio* by the bodies entrusted with their oversight) is the *right to individual petition*. It is by exercising this right that individuals, emancipated from their own State, are able to set in motion the process of implementing the international responsibility of the State.

31. To try to impede the *jus standi* of individuals before the international venue in the current sphere of protection is an unconvincing artifice, hostage to past dogma, incapable of understanding that assertion of the international juridical capacity and right to legal recognition of the human person reflects a real *necessity* of the international juridical order itself.²⁹ As I noted in my Concurring Opinion in the aforementioned case of the "*Five Pensioners*", if "before national tribunals the faculty of the individual complainants to substantiate their own allegations of violations of their rights is secured, how to justify the denial or restriction of that faculty to the individual petitioners before the international tribunals of human rights?" (para 23). And I concluded:

"In fact, the assertion of those juridical personality and capacity constitutes the truly revolutionary legacy of the evolution of the international legal doctrine in the second half of the 20th century. (...) An important role is here being exercised by the impact of the proclamation of human rights in the international legal order, in the sense of humanizing the latter: those rights were proclaimed as *inherent* to every human being, irrespectively of any circumstances.³⁰ The individual is subject *jure suo* of International Law, and to the recognition of the rights that are inherent to him corresponds ineluctably the procedural capacity to vindicate them, at national as well as international levels." (para. 24).

32. By exercising this procedural capacity, the individual today activates the mechanism for implementation of the international responsibility of the State for human rights violations. The individual petitioner today is able, as shown in the instant case of the *Gómez Paquiyauri brothers*, of –correctly– stating his or her understanding of the origin of State responsibility, for its subsequent international implementation. The instant adjudicatory proceeding has clearly demonstrated that full participation of the individuals –the victim or the victim's next of kin and their legal representatives– in said proceeding before the Court contributes effectively to better conduct the proceeding,³¹ both regarding factual and legal aspects.³²

²⁹. A.A. Cançado Trindade, "A Personalidade e Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", in *Jornadas de Derecho Internacional* (Mexico City, December 2001), Washington D.C., OAS Subsecretariat of Legal Affairs, 2002, pp. 311-347.

³⁰. I-A Ct of HR, Advisory Opinion OC-17/02, on the *Juridical Condition and Human Rights of the Child*, of 28.08.2002, operative paragraph n. 1, and Concurring Opinion of Judge A.A. Cançado Trindade, paras. 1-71.

³¹. In addition to ensuring their right to freedom of expression in the course of the international proceeding.

³². See, in this regard, A.A. Cançado Trindade, "Vers la consolidation de la capacité juridique internationale des pétitionnaires dans le système interaméricain des droits de la personne", 14 *Revue québécoise de droit international* (2001) pp. 207-239, esp. pp. 223-224; and see A.A. Cançado Trindade, "Le système inter-américain de protection des droits de l'homme: état actuel et perspectives d'évolution à l'aube du XXIème siècle", 46 *Annuaire français de Droit international* - Paris (2000) pp. 570-577.

33. The individuals not only take the initiative of triggering implementation of the international responsibility of the State that committed the violation, but also express their understanding of the very basis for said international responsibility. Individuals thus contribute to evolution and humanization of international law, both with respect to conventions and general law. They are not only subjects of international law,³³ but also participants in the process of its constitution and evolution. This is a feature of the new *jus gentium*, at the start of the 21st century.

34. Consideration of the case of the *Gómez Paquiyauri Brothers* should not disregard a final, equally significant aspect that I must record in this Separate Opinion. Even though they happened 13 years ago, in mid-1991, the facts in the instant case are still indelibly engraved, with the branding mark of human brutality, in the memory of the next of kin of the victims. In her testimony before this Court, the sister of the two murdered boys said that she "loved [her] brothers," that "not a day passes in [her] life that [she] does not remember them, not a day in [her] life that they are not present" in her memory (see *supra*).

35. The image of the cruelty that surrounded the murder of the brothers Rafael and Emilio Gómez Paquiyauri, of their mangled remains and their decomposing bodies, was indelibly recorded in the memory of their beloved next of kin, and will remain there for the rest of their lives. There is no forgetting. As Cicero argued, in the year 45, in his treatise *On Supreme Good and Evil* (better known as *De Finibus*),

"(...) is it in our power to choose our memories? Themistocles, in any case, when Simonides or any other promised to teach him the art of memory, answered: 'I prefer oblivion, as I remember even what I do not want to, and I cannot forget what I want to forget.' (...) It seems characteristic of an overly authoritarian philosopher to forbid that we remember."³⁴

In the midst of the tragic vulnerability of the human condition, the grief of remembering brutality and impunity is often mitigated by the lenitive of justice, though delayed, the strict observance of which –as Cicero added in his day– translates into the welfare of human society.³⁵

36. The next of kin of the murdered brothers, Rafael and Emilio Gómez Paquiyauri, today finally found human justice, by means of the Judgment that the Inter-American Court has just rendered. Enforcement of the international responsibility of the respondent State was asserted and established at the end of an adjudicatory proceeding activated by individuals as the subjects of International Human Rights Law, endowed with legal/procedural capacity. Facts such as those in the instant case have, therefore, generated a reaction in human conscience, which has led to concrete results. And the degree of evolution that we have attained today in the current sphere of protection reveals that, despite the tragic inevitability of human suffering, human conscience has driven the Law (as its ultimate material source) toward the identification and application of means to alleviate that suffering, inherent to the tragically vulnerable human condition.

V. Compulsory Law (*Jus Cogens*) and the Establishment of the Aggravated International Responsibility of the State

³³. Even for purposes of directly receiving reimbursement for the legal costs of the international proceeding, as in the instant case.

³⁴. Book II, lines 101-108.

³⁵. See *De Finibus*, book II, lines 93-95 and 118-120.

37. It is highly significant that, in establishing the international responsibility of the State in the instant case of the *Gómez Paquiyauri brothers*, the Inter-American Court, when it found that Articles 5 and 4 of the American Convention were breached, explicitly recognized that an international juridical system of absolute prohibition of all forms of torture and extra-legal executions has been constituted in our day, and it is now part of the sphere of international *jus cogens* (paras. 111-112 and 128, respectively). Therefore, there is an *aggravated* international responsibility³⁶ (for the wrongful acts committed and the persons murdered, two children), with direct consequences regarding reparations.

38. Said responsibility entails, for the respondent State, among others, the obligation to render justice in its domestic law, investigating the facts and punishing those responsible.³⁷ As stated in the instant Judgment of the Inter-American Court, the “extreme gravity” of the instant case was underlined, in the Peruvian domestic legal system, by the Third Criminal Chamber of El Callao itself (para. 142). In the international legal system, the special *gravity* of certain violations of the rights of the human person is set forth in some international instruments.

39. Let us recall, for example, that the four Geneva Conventions of 1949 specify the “grave breaches”,³⁸ and the two Additional Protocols of 1977 to those Conventions enshrine “fundamental guarantees”,³⁹ which contain the absolute prohibition, *inter alia*, of murder and any form of torture (both physical and mental).⁴⁰ The search for a hierarchy at both the compulsory level (*jus cogens*) and the operative level (*erga omnes* obligations of protection), as well as the definition of internationally wrongful acts (*grave* violations of human rights) has, precisely, led to the current establishment of the *aggravated* international responsibility of the State.

40. In the instant Judgment, in the chapter on the international responsibility of the State, the Inter-American Court brings to mind that said responsibility “is immediately generated by the internationally wrongful act” ascribed to the State, and any actions under domestic venue do not inhibit it from continuing to hear the case, in a proceeding that has begun before it, since its role is to ensure due protection of the rights enshrined in the American Convention and the reparations for the violations committed (paras. 75-76). And it added that, in the instant case,

“the responsibility of the State is aggravated by the existence in Peru, at the time of the facts, of a systematic practice of human rights violations, including extra-legal executions, of persons suspected of belonging to armed groups, carried out by State agents under orders by military and police commanders. Said grave violations breach international *jus cogens*. Likewise, in establishing aggravated responsibility, it is necessary to take into account that the victims in this case were children” (para. 76).

41. The Court also expressed its concern regarding the existence of a “situation of grave impunity” in the instant case (para. 148), and it added the statement – which today is part of its *jurisprudence constante* – that “in accordance with the obligations undertaken by the States under the convention, no domestic legal

³⁶. See, in this regard, my Separate Opinion in the *Case of Myrna Mack Chang versus Guatemala* (Judgment of 25.11.2003), paras. 41-55.

³⁷. See my Separate Opinion in the *Plan de Sánchez Massacre* case (Judgment of 29.04.2004), para. 25.

³⁸. Article 50/51/130/147.

³⁹. Protocol I, Article 75; Protocol II, Articles 4-6.

⁴⁰. Protocol I, Article 75(2)(a); Protocol II, Articles 4(2)(a).

provision or precept, including that of extinguishment, can obstruct compliance with decisions of the Court regarding investigation and punishment of those responsible for human rights violations" (para.151).

42. In other cases before this Court, in addition to highlighting the development of a "true international system to oppose *grave* human rights violations," to which the peremptory provisions of international law (the *jus cogens*) and the *erga omnes* obligations of protection have contributed decisively,⁴¹ I have argued that

"one cannot deny the close link between reparations and combating impunity, as well as ensuring non-recidivism of the injurious acts, always and necessarily from the perspective of the victims. True *reparatio*, linked to realization of justice, requires overcoming obstructions of the duty to investigate and to punish those responsible, and putting an end to impunity."⁴²

43. The search for the truth –I have added- "constitutes the starting-point for the liberation as well as the protection of the human person; without truth (however unbearable it might come to be) one cannot be freed from the torment of uncertainty, nor is possible to exercise the protected rights."⁴³ Achievement of the right to the truth –to whose legal construction this Court has been contributing systematically- is essential to preserve "the bonds and links of solidarity between the dead and the living, forming the unity of the human kind, with the respect due to ones and the others".⁴⁴

44. I cannot conclude this Separate Opinion in the instant case of the *Gómez Paquiyauri brothers* without referring to a point that I feel is equally significant and worthy of noticing. I do not see how we can deny that the *aggravated* international responsibility of the State affects the basic values of the contemporary international community. Enshrinement of *jus cogens*, constantly expanding,⁴⁵ in turn reveals precisely the heartening openness of contemporary international law to higher and fundamental values, while also envisioning, on a horizon that is becoming closer, the dawn of a truly *universal* international law.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary

⁴¹. I-A Ct of HR, *Case of Blake versus Guatemala*, Judgment on Reparations of 22.01.1999, Separate Opinion of Judge A.A. Cançado Trindade, para. 39.

⁴². I-A Ct of HR, *Case of Myrna Mack Chang versus Guatemala*, Judgment of 25.11.2003, Separate Opinion of Judge A.A. Cançado Trindade, para. 46.

⁴³. I-A Ct of HR, *Case of Bámaca Velásquez versus Guatemala*, Judgment of 25.11.2000, Separate Opinion of Judge A.A. Cançado Trindade, para. 29.

⁴⁴. *Ibid.*, Separate Opinion of Judge A.A. Cançado Trindade, para. 39.

⁴⁵. See my Concurring Opinion in Advisory Opinion n. 18 on *The Legal Status and Rights of Migrants without Documents* (of 17.09.2003), paras. 65-73.