CONCURRING OPINION OF
JUDGE A.A. CANÇADO TRINDADE

1. I have concurred with the adoption of the present Judgment of the Inter-American Court of Human Rights on preliminary objections in the *Castillo Petruzzi versus Peru* case. The decision taken by the Court, in dismissing the fifth and sixth preliminary objections interposed by the respondent State (pertaining to the legal personality and the *legitimatio ad causam* of the petitioning Chilean non-governmental organization, the *Fundación de Ayuda Social de las Iglesias Cristianas* (FASIC)), brings to the fore the right of individual petition under the American Convention on Human Rights (Article 44), reaching the bases of the mechanism of protection itself under the American Convention.

2. The importance of the right of individual petition does not appear to me to have been sufficiently stressed by international case-law and doctrine to date; the attention which they have devoted to the matter has been, surprisingly, unsatisfactory in my view, not keeping proportion with the great relevance that the right of individual petition has under the American Convention. This is a point which is particularly dear to me. If should be kept in mind that, ultimately, it is by the free and full exercise of the right of individual petition that the direct access of the individual to justice at international level is guaranteed.

3. The question of the *legitimatio ad causam* of the petitioners has occupied a central position in this phase of preliminary objections of the case *Castillo Petruzzi versus Peru*, and the Inter-American Court has decided, in my view correctly, to dismiss the fifth and sixth preliminary objections, which pertained to the matter. In my understanding, Article 44 cannot be analysed as if it were a provision like any other of the Convention, as if it were not related to the obligation of the States Parties of not creating obstacles or difficulties to the free and full exercise of the right of individual petition, or as if it were of equal hierarchy as other procedural provisions. The right of individual petition constitutes, in sum, the cornerstone of the access of the individuals to the whole mechanism of protection of the American Convention.

4. As the judgment of an international tribunal of human rights serves the wide purpose not only of resolving the legal questions raised in a given case, but also of clarifying and developing the meaning of the norms of the human rights treaty at issue, and of thereby contributing to its observance by the States Parties[1], I feel obliged to add my thoughts on the matter in this Concurring Opinion. I do so bearing in mind the concerns raised in this respect during the public hearing before the Court held on 08 June 1998[2], and in support to the decision taken by the Court in the present case *Castillo Petruzzi*, given the necessity which I find of contributing to clarify - also for future cases - the juridical nature and extent of the right of individual petition under Article 44 of the American Convention.

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1. In this sense, European Court of Human Rights, *Ireland versus United Kingdom* case (Merits), Judgment of 18 January 1978, Series A, n. 25, p. 62, par. 154.

2 Cf. Inter-American Court of Human Rights, *Transcripción de la Audiencia Pública Celebrada en la Sede de la Corte el 08 de Junio de 1998 sobre Excepciones Preliminares en el Caso Castillo Petruzzi,* pp. 9-12 (internal circulation).

I. Consolidation, Juridical Nature and Scope of the Right of Individual Petition.

5. The right of individual petition is a definitive conquest of the International Law of Human Rights. It is of the essence itself of the international protection of human rights the contraposition between the individual complainants and the respondent States in cases of alleged violations of the protected rights. It was precisely in this context of protection that the *historical rescue* took place of the position of the human being as subject of the International Law of Human Rights, endowed with full international procedural capacity.

6. Three centuries of an international legal order crystallized, as from the treaties of peace of Westphalia (1648), on the basis of the co-ordination of independent nation-States, of the juxtaposition of absolute sovereignties, led to the exclusion from that legal order of the individuals as subjects of rights (*titulaires de droits*). At international level, the States assumed the monopoly of the condition of subjects of rights; the individuals, for their protection, were left entirely at the mercy of the discretionary intermediation of their nation-States. The international legal order thus erected, - which the excesses of legal positivism attempted in vain to justify, - excluded therefrom precisely the ultimate addressee of the juridical norms: the human being.

7. Three centuries of an international legal order marked by the prevalence of State sovereignties and by the exclusion of the individuals were incapable to avoid the massive violations of human rights, perpetrated in all regions of the world, and the successive atrocities of our century, including the ones that take place nowadays[3]. Such atrocities awoke the universal juridical conscience to the necessity to reconceptualize the foundations themselves of the international legal order, restoring to the human being the central position from where he had been displaced. This reconstruction, on human foundations, took as conceptual basis entirely distinct canons, such as those of the realization of superior common values, of the human being as subject of rights (*titulaire de droits*), of the collective guarantee of the realization of these latter, and of the objective character of the obligations of protection[4]. The international order of sovereignties yielded to that of solidarity.

8. This profound transformation of the international legal order, precipitated as from the Universal and American Declarations of Human Rights of 1948, completing this year half a century of evolution, has not taken place without difficulties, precisely for requiring a new mentality. It underwent, moreover, stages, some of which no longer sufficiently studied nowadays, also with regard to the consolidation of the right of individual petition. Already in the beginnings of the exercise of this right it was stressed that, although motivated by the search for individual redress, the right of petition contributed also to secure respect for the obligations of objective character which are incumbent upon the States Parties[5]. In several cases

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3. Such as the holocaust, the *gulag*, followed by new acts of genocide, e.g., in South-East Asia, in central Europe (ex-Iugoslavia), in Africa (Rwanda).

4. With a direct incidence of those canons in the methods of interpretation of the international norms of protection, without necessarily departing from the general rules of interpretation of treaties set forth in Articles 31-33 of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986).

5. For example, under Article 25 of the European Convention on Human Rights; cf. H. Rolin, "Le rôle du requérant dans la procédure prévue par la Commission européenne des droits de l'homme", 9 *Revue hellénique de droit international* (1956) pp. 3-14, esp. p. 9;

the exercise of the right of petition has gone even further, generating changes in the domestic legal order and in the practice of the public organs of the State[6]. The significance of the right of individual petition can only be appropiately assessed in historical perspective.

9. In fact, the *historia juris* of some countries discloses that the old *right to petition*, at domestic level, to the central authorities, as expression or manifestation of the freedom of expression, gradually developed into a legal remedy to be interposed before the tribunals for the reparation for damages[7]. Only in a more recent epoch the *right of petition* (no longer *right to petition*) was formed within the ambit of international organizations. The first classic distinctions appeared, such as that elaborated by Feinberg[8] and endorsed by Drost[9], between *pétition plainte*, based upon a violation of an individual private right (e.g., a civil right) and in search of reparation on the part of the authorities, and *pétition voeu*, pertaining to the general interests of a group (e.g., a political right) and in search of public measures on the part of the authorities.

10. The *pétition voeu* evolved into what it came to be called "communication"; examples, in turn, of *pétitions plaintes* - or "petitions" *stricto sensu* - are found, for

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C.Th. Eustathiades, "Les recours individuels à la Commission européenne des droits de l'homme", *in Grundprobleme des internationalen Rechts - Festschrift für Jean Spiropoulos*, Bonn, Schimmelbusch & Co., 1957, p. 121; F. Durante, *Ricorsi Individuali ad Organi Internazionali*, Milano, Giuffrè, 1958, pp. 125-152, esp. pp. 129-130; K. Vasak, *La Convention européenne des droits de l'homme*, Paris, LGDJ, 1964, pp. 96-98; M. Virally, "L'accès des particuliers à une instance internationale: la protection des droits de l'homme dans le cadre européen", 20 *Mémoires Publiés par la Faculté de Droit de Genève* (1964) pp. 67-89; H. Mosler, "The Protection of Human Rights by International Legal Procedure", 52 *Georgetown Law Journal* (1964) pp. 818-819.

6. It is to be always born in mind that, distinctly from the questions governed by Public International Law, in their majority raised horizontally above all at *inter-State* level, the questions pertaining to human rights are found vertically at *intra-State* level, in the contraposition between the States and the human beings under their respective jurisdictions. Accordingly, to pretend that the organs of internacional protection cannot verify the compatibility of the norms and practices of domestic law, and their ommissions, with the international norms of protection, would not make sense. Here as well the specificity of the International Law of Human Rights becomes evident. The fact that this latter goes beyond Public International Law in the matter of protection, so as to comprise the treatment dispensed by the States to the human beings under their jurisdictions, does not mean that a conservative interpretation ought thereby to apply; quite on the contrary, what applies is an interpretation in conformity with the innovative character - in relation to dogmas of the past, such as that of the "exclusive national competence" or reserved domain of the States, as an emanation of State sovereignty, - of the international norms of protection of human rights. With the development of the International Law of Human Rights, it is Public International Law itself which is enriched, in the assertion of canons and principles proper to the present domain of protection, grounded on fundamentally distinct premises from those which have guided its postulates at the level of purely inter-State relations. The International Law of Human Rights thus comes to affirm the aptitude of Public International Law to secure, in the present context, compliance with the international obligations of protection on the part of States *vis-à-vis* all human beings under their jurisdictions.

7. J. Humphrey, "The Right of Petition in the United Nations", 4 *Revue des droits de l'homme/Human Rights Journal* (1971) p. 463.

8. N. Feinberg, "La pétition en droit international", 40 *Recueil des Cours de l'Académie de Droit International de La Haye* (1932) pp. 576-639.

9. P.N. Drost, *Human Rights as Legal Rights*, Leyden, Sijthoff, 1965, pp. 67-75, and cf. pp. 91-96 and 101.

example, in the systems of minorities and mandates under the League of Nations and in the trusteeship system under the United Nations[10]. Those were some of the first international systems to grant procedural capacity directly to individuals and private groups[11]. Those antecedents, along the first half of the twentieth century, paved the way to the development, within the ambit of the United Nations and under the human rights treaties at global and regional levels, of the contemporary mechanisms of petitions or communications pertaining to violations of human rights[12].

11. With the consolidation of those mechanisms, granting direct access to individuals to the international instances, the recognition became evident, also at procedural level, that human rights, inherent to the human person, precede and are above the State and any other form of political organization, and the human being emancipated himself from the domination of the State, whenever it appeared arbitrary. The individual recovered his presence, for the vindication of his rights, at international level, presence which had been denied to him in the historical process of formation of the modern State but which manifested itself in the immediate concern with the human being in the original manuscripts of the so-called founding fathers of international law[13] (the *derecho de gentes*), notably in the perennial lessons - above all the *De Indis - Relectio Prior*, of 1538-1539 - of Francisco de Vitoria[14], the learned lecturer of Salamanca.

12. That transformation, proper of our times, corresponds to the recognition of the necessity that all the States, in order to avoid new violations of human rights, are made responsible for the way they treat all human beings who are under their jurisdiction. This would simply not have been possible without the consolidation of the right of individual petition, amidst the recognition of the objective character of

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10. Cf., e.g., J. Stone, "The Legal Nature of Minorities Petition", 12 *British Year Book of International Law* (1931) pp. 76-94; M. Sibert, "Sur la procédure en matière de pétition dans les pays sous mandat et et quelques-unes de ses insuffisances", 40 *Revue générale de Droit international public* (1933) pp. 257-272; Jean Beauté, *Le droit de pétition dans les territoires sous tutelle*, Paris, LGDJ, 1962, pp. 1-256.

11. To them one ought to add other petitioning systems (such as those of Upper Silesia, of the Aaland Islands, of the Sa1ar and of Danzig), the system of navigation of the river Rhine, the experience of the Central-American Court of Justice (1907-1917), the case-law of the Mixed Arbitral Tribunals and of the Mixed Claims Commissions, besides the International Prize Court proposed at the II Peace Conference of the Hague of 1907. Cf. C.A. Norgaard, *The Position of the Individual in International Law*, Copenhagen, Munksgaard, 1962, pp. 99-172; y, anteriormente, J.-C. Witenberg, "La recevabilité des réclamations devant les juridictions internationales", 41 *Recueil des Cours de l'Académie de Droit International de La Haye* (1932) pp. 5-135; C.Th. Eustathiades, "Les sujets du Droit international et la responsabilité internationale - nouvelles tendances", 84 *Recueil des Cours de l'Académie de Droit International de La Haye* (1953) pp. 401-614.

12. Cf. M.E. Tardu, *Human Rights - The International Petition System*, binders 1-3, Dobbs Ferry N.Y., Oceana, 1979-1985; Tom Zwart, *The Admissibility of Human Rights Petitions*, Dordrecht, Nijhoff, 1994, pp. 1-237.

13. For a general study, cf. Francisco de Vitoria, *Relecciones del Estado, de los Indios, y del Derecho de la Guerra*, México, Porrúa, 1985, pp. 1-101; P.P. Remec, *The Position of the Individual in International Law according to Grotius and Vattel*, The Hague, Nijhoff, 1960, pp. 1-245; F.S. Ruddy, *International Law in the Enlightenment*, Dobbs Ferry N.Y., Oceana, 1975, pp. 1-364; Association Internationale Vitoria-Suarez, *Vitoria et Suarez - Contribution des théologiens au Droit international moderne*, Paris, Pédone, 1939, pp. 1-278.

14. Cf. *Obras de Francisco de Vitoria - Relecciones Teológicas* (ed. T. Urdanoz), Madrid, B.A.C., 1960, pp. 1-1386, esp. pp. 491-726.

the obligations of protection and the acceptance of the collective guarantee of compliance with these latter. This is the real meaning of the *historical rescue* of the individual as subject of the International Law of Human Rights.

13. Yet, at global level, it was necessary to wait until the first half of the seventies for the right of petition to be crystallized, in the conventional (human rights treaties and conventions) as well as extra-conventional (established by resolutions) mechanisms in the ambit of the United Nations. Parallel to that, at European regional level, the right of individual petition, together with the notion of collective guarantee, came to constitute the most remarkable features of the new system of protection inaugurated by the European Convention on Human Rights of 1950, and, *a fortiori*, of the International Law of Human Rights as a whole.

14. Three decades ago, on the occasion of the twentieth anniversary of the Universal Declaration of Human Rights of 1948, René Cassin, who had participated in the preparatory process of its elaboration[15], pondered that

> "(...) S'il subsiste encore sur la terre, de grandes zones où des millions d'hommes ou de femmes résignés à leur destin n'osent pas proférer la moindre plainte ou même ne conçoivent pas qu'un recours quelconque soit possible, ces territoires se rétrécissent de jour en jour. La prise de conscience de ce qu'une émancipation est possible, est devenue de plus en plus générale. (...) La condition première de toute justice, c'est-à-dire la possibilité d'acculer les puissants à subir (...) un contrôle public, est remplie beaucoup plus souvent que jadis. (...) La plupart des Conventions et Pactes [des droits de l'homme], (...) incitent les États Parties àcréer chez eux des instances de recours et prévoient certaines mesures de protection ou de contrôle international. (...) Le fait que la résignation sans espoir, que le mur du silence et que l'absence de tout recours soient en voie de réduction ou de disparition, ouvre à l'humanité en marche des perspectives encourageantes. (...)"[16].

15. The assessment of the right of individual petition as a method of international implementation of human rights has necessarily to take into account the basic point of the *legitimatio ad causam* of the petitioners and of the conditions of the use and the admissibility of the petitions (set forth in the distinct instruments of human rights which foresee them). This is, precisely, the central aspect of the legal questions raised in the present case *Castillo Petruzzi versus Peru*, in its phase of preliminary objections. In this respect, the human rights treaties which provide for the right of individual petition[17] in their majority condition the exercise of this

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15. As *rapporteur* of the Working Group of the United Nations Commission on Human Rights, entrustred with the preparation of the Draft Declaration (May 1947 to June 1948).

16. R. Cassin, "Vingt ans après la Déclaration Universelle", 8 *Revue de la Commission Internationale de Juristes* (1967) n. 2, pp. 9-10. [Translation: "(...) If there still subsist on earth great zones where millions of men and women, resigned to their destiny, do not dare to utter the least complaint nor even to conceive that any remedy whatsoever is made possible, those territories diminish day after day. The awakening of conscience that an emancipation is possible, becomes increasingly more general. (...) The first condition of all justice, namely, the possibility of cornering the powerful so as to subject them to (...) public control, is nowadays fulfilled much more often than in the past. (...) The Conventions and Covenants [of human rights] in their majority, (...) urge the States Parties to create in them the instances of remedies and foresee certain measures of international protection or control. (...) The fact that the resignation without hope, that the wall of silence and that the absence of any remedy are in the process of reduction or disappearance, opens to moving humanity encouraging perspectives (...)".

17. At global level, the right of individual petition is provided for, e.g., in the [first] Optional Protocol to the Covenant on Civil and Political Rights (Articles 1-3 and 5), in the

right to that the author of the complaint or communication is - or claims to be - *victim* of human rights violation (e.g., European Convention on Human Rights, Article 25; [first] Optional Protocol to the Covenant on Civil and Political Rights, Article 2; Convention on the Elimination of All Forms of Racial Discrimination, Article XIV (1) and (2); United Nations Convention against Torture, Article 22).

16. The notion of victim has, significantly, experienced considerable expansion through the jurisprudential construction of the international supervisory organs, in coming to comprise direct and indirect victims, as well as "potential" victims, that is, those who sustain an admittedly valid potential personal interest in the vindication of their rights[18]. The American Convention on Human Rights (Article 44) and the African Charter on Human and Peoples' Rights (Articles 55-56) adopt, however, in this particular point, a more liberal solution, as they do not impose upon the petitioners the requisite of the condition of victim.

17. In any case, the solutions given by human rights treaties and instruments to the *jus standi* of the complainant (with variations, namely, alleged victim and "author of communication", "reasonably presumed" victim, special qualifications of the complainants, right of petition widely conferred), appear to be linked to the nature of the procedures at issue (right of petition or communication or [individual] representation)[19]. Differences in the legal nature of those procedures, however, significantly have not hindered the development, by the distinct international supervisory organs, of a converging case-law as to a more effective protection of the alleged victims.

18. It has been under the European Convention on Human Rights that a vast case-law on the right of individual petition has evolved. It is certain that Article 25 of the European Convention was originally conceived as an optional clause; nowadays, however, this latter is accepted by all the States Parties to the Convention, and, very soon, as from November 1st of this year, with the entry into force of Protocol XI to the Convention, the right of petition before the new European Court (as the sole jurisdictional organ under the modified Convention) will be mandatory (as it has been under the American Convention on Human Rights since its adoption in 1969). Two brief observations appear to me here necessary.

19. In the first place, almost half a century ago, in conceiving Article 25 originally as an optional clause, the draftsmen of the European Convention were, however, careful enough to determine, in the first paragraph *in fine* of the clause, the obligation on the States Parties which accepted it of not interposing any impediment or obstacle to the exercise of the right of individual petition. In the case *Cruz Varas and Others versus Sweden* (1990-1991), the European Court and, to a larger extent the European Commission, recognized the right of procedural nature which Article 25(1) confers upon the individual complainants, by virtue of

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Convention on the Elimination of All Forms of Racial Discrimination (Article XIV), in the United Nations Convention against Torture (Article 22). At regional level, the right of individual petition is set forth both in the European Convention on Human Rights (Article 25) as well as in the American Convention on Human Rights (Article 44) and in the African Charter on Human and Peoples' Rights (Articles 55-58).

18. The evolution of the notion of "victim" (including the potential victim) in the International Law of Human Rights is examined in my course "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987) pp. 243-299, esp. pp. 262-283.

19. *Ibid*., pp. 248-261.

which these latter can take the initiative of freely resorting to the Commission, without any impediment or difficulty being raised by the State Party at issue[20].

20. The right of individual petition is, thus, endowed with autonomy, distinct as it is from the substantive rights listed in title I of the European Convention. Any obstacle interposed by the State Party at issue to its free exercise would bring about, therefore, an *additional* violation of the Convention, parallel to other violations which become proved of the substantive rights enshrined in this latter. Its autonomy was in no way affected by the fact of having been originally foreseen in an optional clause of the Convention (Article 25).

21. In the second place, and reinforcing this point, both the European Commission and Court of Human Rights have understood that the concept itself of victim (in the light of Article 25 of the Convention) ought to be interpreted *autonomously* under the Convention. This understanding today finds solid support in the *jurisprudence constante* under the Convention. Thus, in several decisions in recent years, the European Commission has consistently and invariably warned that the concept of "victim" utilized in Article 25 of the Convention ought to be interpreted *in an autonomous way* and *independently of concepts of domestic law* such as those of the interest or quality to interpose a judicial action or to participate in a legal process[21].

22. The European Court, in its turn, in the case *Norris versus Ireland* (1988), pondered that the conditions which govern individual petitions under Article 25 of the Convention "are not necessarily the same as national criteria relating to *locus standi*", which may even serve purposes distinct from those contemplated in the above-mentioned Article 25[22]. The autonomy of the right of individual petition at international level *vis-à-vis* provisions of domestic law thus clearly ensues

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20. Compare the Judgment, of 20.03.1991, of the European Court of Human Rights in the case *Cruz Varas and Others versus Sweden* (Merits, Series A, vol. 201), pp. 33-34 and 36, pars. 92-93 and 99, with the Opinion, of 07.06.1990, of the European Commission of Human Rights in the same case (Annex, *in ibid*.), pp. 50-52, pars. 118, 122 and 125-126. The Commission went further than the Court, arguing, moreover, that, in failing to comply with a request of not deporting the individual complainant (H. Cruz Varas, Chilean), Suweden violated the obligation provided for in Article 25 *in fine* of the European Convention of not impeding the efficacy of the right of individual petition; the European Court, in a decision adopted by 10 votes to 9, did not agree with the Commission - in a less persuasive form than this latter - on this point in particular.

21. Cf. in this sense: European Commission of Human Rights (EComHR), case *Scientology Kirche Deutschland e.V. versus Germany* (appl. n. 34614/96), decision of 07.04.1997, 89 *Decisions and Reports* (1997) p. 170; EComHR, case *Zentralrat Deutscher Sinti und Roma y R. Rose versus Germany* (appl. n. 35208/97), decision of 27.05.1997, p. 4 (unpublished); EComHR, case *Greek Federation of Customs Officials, N. Gialouris, G. Christopoulos and 3333 Other Customs Officials versus Greece* (appl. n. 24581/94), decision of 06.04.1995, 81-B *Decisions and Reports* (1995) p. 127; EComHR, case *N.N. Tauira and 18 Others versus France* (appl. n. 28204/95), decision of 04.12.1995, 83-A *Decisions and Reports* (1995) p. 130 (petitions against the French nuclear tests in the atoll of Mururoa and in that of Fangataufa, in French Polinesia); EComHR, case *K. Sygounis, I. Kotsis and Police Union versus Greece* (appl. n. 18598/91), decision of 18.05.1994, 78 *Decisions and Reports* (1994) p. 77; EComHR, case *Association of Air Pilots of the Republic, J. Mata el Al. versus España* (appl. n. 10733/84), decision of 11.03.1985, 41 *Decisions and Reports* (1985) p. 222. - According to this same case-law, to fulfil the condition of "victim" (under Article 25 of the Convention) there ought to be a "sufficiently direct link" between the individual complainant and the alleged damage, resulting from the alleged violation of the Convention.

22. European Court of Human Rights, case *Norris versus Ireland*, Judgment of 26.10.1988, Series A, vol. 142, p. 15, par. 31.

therefrom. The elements singled out in this case-law of protection apply equally under procedures of other human rights treaties which require the condition of "victim" for the exercise of the right of individual petition (cf. supra).

23. Each of those procedures, despite differences in their legal nature, has contributed, in its own way, to the gradual strengthening of the procedural capacity of the complainant at international level. In an express recognition of the relevance of the right of individual petition, the Declaration and Programme of Action of Vienna, the main document adopted by the II World Conference on Human Rights (1993), urged its adoption, as an additional method of protection, by means of Optional Protocols to the Convention on the Elimination of All Forms of Discrimination against Women and to the Covenant on Economic, Social and Cultural Rights[23]. That document recomended, moreover, to the States Parties in human rights treaties, the acceptance of all the available optional procedures of individual petitions or communications[24].

II. The Right of Individual Petition under the American Convention on Human Rights.

24. In the inter-American system of protection of human rights, the right of individual petition has constituted an effective way of facing not only individual cases but also massive and systematic violations of human rights[25], even before the entry into force of the American Convention on Human Rights (i.e., in the initial practice of the Inter-American Commission on Human Rights). Its importance has been fundamental, and could never be minimized. The consolidation of the right of individual petition under Article 44 of the American Convention on Human Rights was endowed with special significance. Not only was its importance, for the mechanism of the Convention as a whole, duly emphasized in the *travaux préparatoires* of that provision of the Convention[26], as it also represented an advance in relation to what, until the adoption of the Pact of San José in 1969, had been achieved in that respect, in the ambit of the International Law of Human Rights.

25. The other regional Convention then in force, the European Convention, only accepted the right of individual petition originally enshrined in an optional clause (Article 25 of the Convention), conditioning the *legitimatio ad causam* to the demonstration of the condition of *victim* by the individual complainant, - what, in its turn, generated a remarkable jurisprudential development of the notion of "victim" under the European Convention (supra). The American Convention, in a distinct

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23. Declaration and Programme of Action of Vienna of 1993, part II, pars. 40 and 75, respectively. - The elaboration of both Draft Protocols is virtually concluded, in their essential features, now waiting for the approval on the part of the States.

24. Declaration and Programme of Action of Vienna of 1993, part II, par. 90.

25. I thus regret not to be able to share the insinuation present in part of the contemporary European specialized bibliography on the matter, in the sense that the right of individual petition would perhaps not be effective in relation to massive and systematic violations of human rights. The experience accumulated from this side of the Atlantic, in the inter-American system of protection, points exactly to the opposite sense, and thanks to the right of individual petition many lives were saved and justice was accomplished in concrete cases amidst generalized situations of violations of human rights.

26. Cf. OAS, *Conferencia Especializada Interamericana sobre Derechos Humanos - Actas y Documentos* (San José of Costa Rica, 07-22 November 1969), doc. OAS/Ser.K/XVI/1.2, Washington D.C., General Secretariat of the OAS, 1978, pp. 43, 47 and 373.

way, rendered the right of individual petition (Article 44 of the Convention) mandatory, of automatic acceptance by the ratifying States, extending it to "any person or group of persons, or any non-governmental entity legally recognized in one or more member States of the Organization" of American States (OAS), - what discloses the capital importance attributed to it[27].

26. This was, recognizedly, one of the great advances achieved by the American Convention, at conceptual and normative, as well as operational, levels. It would thus not be justified that, after twenty years of operation of our regional Convention[28], one would admit to surround with restrictions the wide extent of the *legitimatio ad causam*, on the part of *any person*, under Article 44 of the American Convention. One is to extract the consequences of the wide extent of Article 44 of the Convention, in so far as the condition of individual petitioners is concerned[29]. Furthermore, in the same line of reasoning, Article 1(1) of the American Convention provides for the general obligation of the States Parties to respect the rights set forth therein and to secure their free and full exercise to *any person* subject to its jurisdiction (whether national, foreigner, refugee or stateless person, indistinctly, irrespective of his or her legal status in the domestic law).

27. One is to bear in mind always the autonomy of the right of individual petition *vis-à-vis* the domestic law of the States. Its relevance cannot be minimized, as it may occur that, in a given internal legal order, an individual becomes unable, by the circumstances of a legal situation, to take judicial measures by himself. This does not mean that he would be deprived to do so in the exercise of the right of individual petition under the American Convention, or another human rights treaty.

28. But the American Convention goes further than that: the *legitimatio ad causam*, which it extends to every and any petitioner, can even do without a manifestation on the part of the victim himself or herself. The right of individual petition, thus widely conceived, has as an immediate effect the enlargement of the extent of protection, above all in cases in which the victims (e.g., those detained *incommunicado*, disappeared persons, among other situations) find themselves unable to act *motu propio*, and stand in need of the iniciative of a third party as petitioner in their behalf.

29. One of the distinctive features of the emancipation of the human being, *vis-à-vis* his own State, as subject of the International Law of Human Rights, lies precisely in the *denationalization* of the protection in the present context. Nationality disappears as a *vinculum juris* for the exercise of protection (differently from the discretionary diplomatic protection in the inter-State *contentieux*, based upon fundamentally distinct premises), sufficing that the individual complainant -

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27. The other type of petition, the inter-State one, was only provided for on an optional basis (Article 45 of the American Convention, contrary to the scheme of the European Convention -Article 24 - in this particular), what stresses the relevance attributed to the right of individual petition. This point did not pass unnoticed from the Inter-American Court of Human Rights, which, in its second Advisory Opinion, on the *Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (of 24.09.1982), invoked this particularity as illustrative of the "overriding importance" attributed by the American Convention to the obligations of the States Parties *vis-à-vis* the individuals, vindicated by these latter without the intermediation of another State (paragraph 32).

28. As from its entry into force, on 18 July 1978.

29. Cf., in this sense, my Dissenting Opinion in the case of *El Amparo* (Resolution on Interpretation of Judgment, of 16.04.1997), par. 29, n. 12, reproduced *in*: OAS, *Informe Anual de la Corte Interamericana de Derechos Humanos - 1997*, p. 142.

irrrespective of nationality or domicile - is (even though temporarily) under the jurisdiction of one of the States Parties to the human rights treaty at issue.

30. In relation to the question raised in the fifth and sixth preliminary objections in the present case *Castillo Petruzzi versus Peru* (pertaining to the legal personality and the *legitimatio ad causam* of the petitioning entity, FASIC), it would be inconsistent with this new conception of protection that one were to attempt to condition the *legitimatio ad causam* of a non-governmental entity to the legal requisites of a given internal legal order; it is not suprising at all, thus, that it suffices (under the American Convention) that such entity be legally recognized in *any* of the member States of the Organization. The American Convention does not require a given legal status of such entity, nor does it impose any formal requisites; the only requirement is that the entity at issue be "legally recognized in one or more member States" of the OAS.

31. To circumscribe such requisite to the domestic law of a given State would go against the letter and spirit of the American Convention. Thus, one ought not to attempt to give to this requisite a dimension which it does not have, as, ultimately, the right of individual petition under the American Convention - as pointed out by the Court in the present Judgment - is widely open to *any person* or *group of persons*. The faculty of the respondent State to seek to determine the legal recognition of a petitioning non-governmental entity, under Article 44 of the Convention, is not questioned, providing that one does not thereby pretend to subordinate it to pertinent provisions of its own internal legal order or of the domestic law of a given State.

32. Just like the right itself of individual petition *per se* under the American Convention (and other human rights treaties) in general, this requisite of legality of a non-governmental entity in particular is also *denationalized*[30]. The protection of human rights set in operation by the exercise of the right of individual petition takes place in the light of the notion of *collective guarantee*, underlying the American Convention (as well as the other human rights treaties). It is in this

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30. Under the European Convention of Human Rights, for example, the requisite of legal recognition of a petitioning non-governmental entity (under Article 25) does not even exist. The practice of the European Commission of Human Rights endorses the interpretation that the reference of Article 25 of the Convention to "non-governmental organization" *tout court*, without conditionings or qualifications, had the purpose of impeding the exclusion of any persons, other than physical persons, enabled to resort to the European Commission; cf. *Les droits de l'homme et les personnes morales* (1969 Louvain Colloquy), Brussels, Bruylant, 1970, p. 20 (intervention of H. Golsong); and cf. *Actes du Cinquième Colloque International sur la Convention Européenne des Droits de l'Homme* (1980 Frankfurt Colloquy), Paris, Pédone, 1982, pp. 35-78 (report by H. Delvaux). In its turn, the European Court of Human Rights, in its judgment of 09.12.1994 in the case of the *Holy Monasteries versus Greece*, decided to dismiss an attempt to impose restrictions (other than that of the condition of "victim") to the non-governmental organization at issue. In the *cas d'espèce*, the respondent State argued that, given the links which it maintained with the Greek Orthodox Church and the "considerable influence" of this latter in the State activities and in public administration, the complainant Monasteries were not non-governmental organizations in the sense of Article 25 of the European Convention (par. 48). The Court dismissed this argument, in finding that the Monasteries referred to did not exercise governmental powers. Their classification as entities of public law was intended only to extend to them legal protetion *vis-à-vis* third parties. As the Holy Monasteries were under the "spiritual supervision" of the local archbishop and not under the supervision of the State, they were distinct from this latter, from which they were "completely independent". Accordingly, - the European Court concluded, - the complainant Monasteries were non-governmental organizations in the sense of Article 25 of the European Convention (par. 49).

context that one is to assess the wide extent of the *legitimatio ad causam* under Article 44 of the American Convention.

33. The denationalization of the protection and of the requisites of the international action of safeguard of human rights, besides sensibly enlarging the circle of protected persons, rendered it possible to individuals to exercise rights emanated directly from international law (*derecho de gentes*), implemented in the light of the above-mentioned notion of collective guarantee, and no longer simply "granted" by the State. With the access of individuals to justice at international level, by means of the exercise of the right of individual petition, concrete expression was at last given to the recognition that the human rights to be protected are inherent to the human person and do not derive from the State. Accordingly, the action in their protection does not exhaust -cannot exhaust - itself in the action of the State.

34. Of all the mechanisms of international protection of human rights, the right of individual petition is the most dynamic one, in even granting the initiative of action to the individual himself (the ostensibly weaker party *vis-à-vis* the public power), distinctly from the exercise *ex officio* of other methods (such as those of fact-finding and reports) on the part of the international supervisory organs. It is the one which best reflects the specificity of the International Law of Human Rights, in comparison with other solutions proper to Public International Law (as it can be inferred from the judgment of 1995 of the European Court of Human Rights in the important case *Loizidou versus Turkey*, which is bound surely to become *locus classicus* on the matter)[31].

35. In the public hearings before the Inter-American Court, in distinct cases, - above all in the hearings pertaining to reparations, - a point which has particularly drawn my attention has been the observation, increasingly more frequent, on the part of the victims or their relatives, to the effect that, had it not been for the access to the international instance, justice would never have been done in their concrete cases. Let us be realistic: without the right of individual petition, and the consequent access to justice at international level, the rights enshrined into the American Convention would be reduced to a little more than dead letter. It is by the free and full exercise of the right of individual petition that the rights set forth in the Convention become *effective*. The right of individual petition shelters, in fact,

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31. It may be recalled that, in the case *Loizidou versus Turkey* (judgment on preliminary objections of 23.03.1995), the European Court of Human Rights discarded the possibility of restrictions -by the Turkish declarations - in relation to the key provisions of Article 25 (right of individual petition), and of Article 46 (acceptance of its jurisdiction in contentious matters) of the European Convention. To sustain another position, it added, "would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a constitutional instrument of the European public order (*ordre public*)" (par. 75). The Court discarded the argument of the respondent State that one could infer the possibility of restrictions to the optional clauses of Articles 25 and 46 of the Convention by analogy with the State practice under Article 36 of the Statute of the International Court of Justice. The European Court not only recalled the practice to the contrary (accepting such clauses without restrictions) of the States Parties to the European Convention, but also stressed the fundamentally distinct context in which the two tribunals operate, the International Court of Justice being "a free-standing international tribunal which has no links to a standard-setting treaty such as the Convention" (pars. 82 and 68). The Hague Court, - reiterated the European Court, - settles legal questions in the inter-State *contentieux*, distinctly from the functions of the supeRvisory organs of a "normative treaty" (*law-making treaty*) like the European Convention. Accordingly, the "unconditional acceptance" of the optional clauses of Articles 25 and 46 of the Convention does not leave margin for analogy with the practice of States under Article 36 of the Statute of the International Court of Justice (pars. 84-85).

the last hope of those who did not find justice at national level. I would not refrain myself nor hesitate to add, - allowing myself the metaphor, - that the right of individual petition is undoubtedly the most luminous star in the universe of human rights.

36. The right of individual petition is a *fundamental clause* (*cláusula pétrea*) of the human rights treaties that provide for it, - as exemplified by Article 44 of the American Convention, - upon which is erected the juridical mechanism of the emancipation of the human being *vis-à-vis* his own State for the protection of his rights in the ambit of the International Law of Human Rights. Another fundamental clause is that of the acceptance of the contentious jurisdiction of the Inter-American Court of Human Rights, which does not admit limitations other than those expressly contained in Article 62 of the American Convention.

37. It is not the function of the Court to secure the due application by the State Party of its own domestic law, but rather to secure the correct application of the American Convention in the ambit of its domestic law, so as to protect all the rights set forth in the Convention. Any understanding to the contrary would withdraw from the Court the faculties of protection inherent to its jurisdiction, unduly depriving the American Convention of effects in the domestic law of the States Parties. This being so, beyond what the human rights treaties expressly provide for in this respect, such fundamental clauses (*cláusulas pétreas*) do not admit restrictions of domestic law.

38. The above-mentioned fundamental clauses (*cláusulas pétreas*) -the right of individual petition and the compulsory jurisdiction of the Inter-American Court in contentious matters - constitute a matter of international *ordre public*, which could not be at the mercy of limitations not provided for in the treaties of protection, invoked by the States Parties for reasons or vicissitudes of domestic order. If the right of individual petition had not been originally conceived and consistently understood in this way, the international protection of human rights would have advanced very little in this half-century of evolution. The right of individual petition, so widely and liberally recognized under the American Convention on Human Rights, constitutes, as already pointed out, a definitive conquest of the International Law of Human Rights, to be always decidedly safeguarded by the Inter-American Court of Human Rights, as it has just done in the present Judgment on preliminary objections in the case *Castillo Petruzzi*.

III. The Right of Individual Petition *De Lege Ferenda*: From *Locus Standi* to *Jus Standi* before the Inter-American Court of Human Rights.

39. To these thoughts in support of the wide scope of the right of individual petition under the American Convention, may I add a final consideration *de lege ferenda*: in the inter-American system of protection, the right of indidividual petition will reach its plenitude the day it can be exercised by the petitioners no longer before the Inter-American Commission, but rather directly before the Inter-American Court of Human Rights[32]. The *jurisdictional* solution constitutes the most perfected and evolved means of international protection of human rights. The European system of protection waited almost half a century[33] to give concrete expression to this reality.

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32. As it will very soon occur, in the European system of protection, with the entry into force of Protocol XI (of 1994) to the European Convention of Human Rights, next 01 November 1998.

33. Since the adoption in 1950 and entry into force in 1953 of the European Convention of Human Rights until the iminent entry into force of its above-mentioned Protocol XI, on 01.11.1998.

40. Its institutional improvement by means of the imminent entry into force of Protocol n. 11 to the European Convention reflects, ultimately, the unequivocal recognition that human rights ought to be proteccted at international level by a permanent judicial organ, with compulsory jurisdiction in contentious matters, to which individuals have the right of direct access independently of the acceptance of an optional clause by their respective States[34]. In proceeding in this line of reasoning, those responsible for the operation of the European system of protection have at last succeeded in overcoming the hesitations projected in the original mechanism of the European Convention[35], emanated from dogmas and fears proper to a historical stage already surpassed[36].

41. This evolution singles out precisely what I have allowed myself in this Concurring Opinion to call *fundamental clauses* (*cláusulas pétreas*) of the international protection of human rights in the framework of our regional system, namely, the right of individual petition and the compulsory jurisdiction of the judicial organ of protection (accepted without limitations other than those expressly contained in the human rights treaty at issue)[37]. Under the American Convention, distinctly from the European, the right of individual petition was conceived from the start as *mandatory*; our regional Convention has extended it, in a more liberal way, *automatically* to *any person* under the jurisdiction of the States Parties. Almost thirty years after its adoption, we face today the challenge and necessity of a new qualitative advance.

42. 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 reparations[38]), 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

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34. To these elements one can add the greater agility and improvement of the procedure, and the stimulus to the development of a homogeneous and clearly consistent case-law. Cf. Council of Europe, Protocol n. 11 to the Convention for the *Protection of Human Rights and Fundamental Freedoms and Explanatory Report*, Strasbourg, C.E., 1994, pp. 3-52, esp pp. 25-28, 30, 35 and 43; and, for a particularly detailed study of Protocol n. 11, cf. A. Drzemczewski, "A Major Overhaul of the European Human Rights Convention Control Mechanism: Protocol n. 11", 6 *Collected Courses of the Academy of European Law* (1997)-II, pp. 121-244.

35. Which served as model to that of the American Convention.

36. Cf., in this sense, Rolv Ryssdall, "The Coming of Age of the European Convention on Human Rights", 1 *European Human Rights Law Review* (1996) pp. 18-29.

37. Articles 44 and 62, respectively, of the American Convention on Human Rights.

38. As occurs under the current Regulations of the Court, Article 23.

functions other than the contentious one[39], prerrogative of the future permanent Inter-American Court[40].

43. It would, therefore, be an institutional structure distinct from that of the European system of protection, attentive to the reality of the needs of protection of our continent. But it would have in common with that system, the purpose of overcoming duplications, delays and procedural imbalances, inherent to the current mechanism of protection under the American Convention[41], which require its improvement. 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 Court[42], - the logical consequence of the conception and formulation of rights to be protected under the American Convention at international level, to which it ought to correspond necessarily the full juridical capacity of the individual petitioners to vindicate them.

44. The jurisdiccionalization of the mechanism of protection becomes an imperative as from the recognition of the essentially distinct roles of the individual petitioners - the true complainant party - and of the Commission (organ of supervision of the Convention which assists the Court). Under the American Convention, the individuals mark presence at the *beginning* of the process, in exercising the right of petition in view of the alleged damages, as well as at the *end* of it, as beneficiaries of the reparations, in cases of proven violations of their rights; there is no sense in denying them presence *during* the process. The right of access to justice at international level ought in fact to be accompanied by the guarantee of procedural equality (*equality of arms/égalité des armes*) in the proceedings before the judicial organ, an element essential to any jurisdictional mechanism of protection of human rights, without which such mechanism will be irremediably mitigated.

45. In order to reach this degree of procedural improvement, we ought to count on the necessary and indispensable full belief on the part of the States that integrate the inter-American system of protection that the *jus standi* of individuals before the Court is a measure to the benefit not only of the petitioners but also of themselves (those which become respondent States), as well as of the mechanism of protection as a whole. And this by virtue of the jurisdictionalization, an additional guarantee of the prevalence of the *rule of law* in the whole *contentieux* of human rights under the American Convention.

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39. Like those of the undertaking of missions of *in loco* observation and the elaboration of reports.

40. Enlarged, functioning in chambers, and with considerably larger human and material resources.

41. As well as to that of the European Convention, which served as model to it.

42. Cf., in this sense, my Separate Opinions in cases *Castillo Páez* (Preliminary Objections, Judgment of 30.01.1996), pars. 14-17, and *Loayza Tamayo* (Preliminary Objections, Judgment of 31.01.1996), pars. 14-17, respectively, reproduced *in*: OAS, *Informe Anual de la Corte Interamericana de Derechos Humanos - 1996*, pp. 56-57 and 72-73, respectively.

46. If we really wish to act at the height of the challenges of our times, it is to the consolidation of such *jus standi* that we ought to promptly devote ourselves, with the same clear vision and lucid boldness with which the draftsmen of the American Convention originally conceived the right of individual petition. With the conventional basis which was conveyed to us by Article 44 of the American Convention, we do not need to wait half a century to give concrete expression to the *jus standi* above referred to. With the consolidation of this latter, it is the international protection that, ultimately, in the ambit of our regional system of protection, will have thereby attained its maturity.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary