SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. The present case of the "*Street Children*" is truly paradigmatic, to the extent that, besides portraying a real situation of day-to-day life in Latin America, it discloses that human conscience has attained a degree of evolution that has rendered it possible to impart justice by means of the protection of the rights of the marginalized or excluded, in granting to them, as to every human being, direct access to an international judicial instance in order to vindicate their rights, as the true complaining party. The human being, even in the most adverse conditions, emerges as subject of the International Law of Human Rights, endowed with full international juridico-procedural capacity. The present Judgment of the Inter-American Court of Human Rights in the case of the "*Street Children*" not only resolves a concrete case as to reparations, but also contributes to raise the standards of human behaviour with regard to the dispossessed. Cases such as the present one, added to others that reveal a high intensity of human suffering, such as, e.g., that of *Paniagua Morales and Others*, further disclose that the violent death of the beloved ones can have - as it has in fact occurred - devastating effects on the close relatives and disrupting effects on the respective family units.

2. These cases, in my view, make it quite clear that the reparations of human rights violations ought to be determined as from the gravity of the facts and their impact upon the integrality of the personality of the victims, - both the direct (the murdered persons) and the indirect ones (their surviving close relatives). In voting in favour of the adoption, by the Inter-American Court of Human Rights, of the present Judgment on reparations in the case of the "*Street Children*", I feel thus obliged to present my personal thoughts on the matter. They are focussed, mainly, on three elements which, surprisingly, have been insufficiently dwelt upon in contemporary international case-law and doctrine, as well as in the practice of pleadings of litigators in the international *contentieux* to date, in the matter of reparations for violations of human rights.

3. I refer particularly to the trilogy, formed by *victimization*, *human suffering*, and *rehabilitation of the victims*, - to be considered as from the integrality of the personality of the victims. In my understanding, there is pressing need for greater reflection on this trilogy, in order to understand the true meaning and scope of *reparations* in the present context of the protection of the rights of the human being. It is not sufficient to keep in mind the basic distinction - nowadays widely recognized - between reparations and one of their forms, indemnizations. One ought to identify the real meaning of the term *reparations* in the domain of the International Law of Human Rights (cf. pars. 40-42, *infra*). The determination of the forms, amounts and extent of reparations, in my view cannot prescind from a prior comprehension of the real sense of human suffering.

4. The personal thoughts which I see it fit to develop in this Separate Opinion are not meant to submit general criteria for the settlement of problems pertaining to reparations due to the victims of human rights violations, such as those raised in the present case of the "*Street Children*". In warning as to the risks - so common nowadays - of a *reductionist* approach to the matter (with an undue emphasis on compensations in the form of simple indemnizations), my purpose is rather to draw attention to the need to contribute to secure the prevalence of superior values which are at issue, from the perspective of the centrality of the position of the victims, in their integrality, as well as to the importance of securing the measures of rehabilitation of these latter.

5. It is not by mere chance that, in cases of violations of human rights marked by extreme violence, the Inter-American Court has seen it fit to receive in public hearings the declarations of psychologists (as to reparations, as in the cases of the "*Street Children*", and of *Paniagua Morales and Others*), and of forensic doctors (as in the *Gangaram Panday* case, merits, 1994). Likewise, in other cases, with distinct characteristics (e.g., with a high density of the cultural element), the Court has deemed it appropriate to listen in pubic hearings to the declarations of anthropologists or social scientists (as in, e.g., the cases of *Aloeboetoe and Others*, reparations, 1993, and the *Community Mayagna Awas Tingni*, merits, 2001). Definitively, contrary to what in the past positivists assumed with unjustified self-sufficiency, Law has, in my view, much to learn from other branches of human knowledge, and *viceversa*.

6. In one of the declarations in the public hearing before the Court, of 11 August 2000, in the case of *Paniagua Morales and Others*, it was stressed that the torture inflicted upon, and the violent death of, a beloved one, can affect, in a disrupting way, his family circle as a whole; hence the importance of knowing the truth of the facts and of imparting justice, so as also to structure the psychic life of the indirect victims (the close relatives). The realization of justice contributes to set in order human relations, having a structuring function of the human psychism itself: the threats, the fear and the impunity, do affect the psychic life of human beings, aggravating the situation of pain, whilst the truth and justice help at least to heal, with the passing of time, the deep wounds caused by the violent death of a dear relative[1].

7. In fact, the violent death of a beloved one throws ineluctably the surviving relatives into the dense shadows of human existence:

> - "Nel mezzo del cammin di nostra vita, mi ritrovai per una selva oscura, chè la diritta via era smarrita"[2].

In the brutalized world in which we live, any person can find himself in a "*selva oscura*", at *any moment* of his life, - in the middle of it, at the very beginning, or at the end (as it may be inferred from the cases of the "*Street Children*" and of *Paniagua Morales and Others*). It is for this reason that Sophocles used to warn - with an insight which appears perennially contemporary - that one is not to consider any person truly happy, until he has passed the final limit of human existence - death - secure from pain[3].

8. In the present case of the "*Street Children*", is seems evident to me the intense suffering of the mothers of the murdered youngsters, and the grandmother of the one of them; in the case of *Paniagua Morales and Others*, in which the victims of the "White Van" had their throats cut or were tortured, the same intense suffering is experienced by the relatives - parents or sons - of the direct victims. The determination of the reparations, - in their distinct forms (among which rank the satisfaction and the rehabilitation), - due to the indirect victims, has, in my understanding, as a central

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1. Cf. Inter-American Court of Human Rights (IACtHR), *Case Paniagua Morales and Others / Reparations - Transcripción de la Audiencia Pública Celebrada en la Sede de la Corte los Días 11 y 12 de Agosto de 2000*, pp. 144-175 (unpublished document, of internal circulation).

2. Dante Allighieri, *La Divina Comedia - Inferno* (1309), verses I, 1-3.

3. Sophocles, *Oedipus the King* (428-425 before Christ), verses 1528-1530.

element, the *human suffering*, considered as from the gravity of the facts and their impact upon the integrality of the personality - and above all the condition of spiritual being - of the (direct and indirect) victims.

9. In my view, the absence of an objective criterion of assessment of human suffering should not be invoked as a justification for a "technical" - or rather mechanical - application of the relevant juridical norms. To the contrary, the lesson which appears to me necessary to extract from the present case of the "*Street Children*" (and also from the case *Paniagua Morales and Others*) is in the sense that one ought to be *guided* by the victimization and the human suffering, as well as the rehabilitation of the surviving victims[4], also in order to fill gaps in the applicable juridical norms and, furthermore, on the basis of considerations of equity, to reach a solution *ex aequo et bono* for the concrete case in conformity with Law. Ultimately, the jurisdiction (*jus dicere, jurisdictio*) of the Tribunal is summed up in its power to declare the Law, and the sentence (from the Latin *sententia*, etymologically derived from "*sentimiento*", feeling) is something more than a logical operation in the framework of predetermined juridical limits.

10. The intensity of human suffering, so eloquently demostrated in the present case of the "*Street Children*" (as well as in the case of *Paniagua Morales and Others*)[5], constitutes, in sum, in my view, the element of major importance for the consideration of the reparations for violations of human rights. In the present case of the "*Street Children*", one of the mothers, Mrs. Marta Isabel Túnchez Palencia declared in the public hearing before the Court, on 12 March 2001, that "I will still be agonizing and my

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[4]. This last element - rehabilitation - has already been identified as one of the forms of reparation: cf., e.g., Th. van Boven (special *rapporteur*), *Study concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms - Final Report*, U.N. Commission on Human Rights/Sub-Commission on Prevention of Discrimination and Protection of Minorities, doc. E/CN.4/Sub.2/1993/8, of 02.07.1993, pp. 53 and 57; D. Shelton, *Remedies in International Human Rights Law*, Oxford, University Press, 2000, pp. 302-303; but the question needs greater conceptual development, on the part of the contemporary case-law as well as doctrine on the matter.

[5]. It draws my attention the desperation which can be inferred, for example, from the declarations, in the public hearing before the Court, of 12 March 2001, in the present case of the *Street Children*, of the mothers, Mrs. Ana María Contreras and Mrs. Reyna Dalila Villagrán Morales, confronting the fact that their sons had been killed as a "small animal (*un animalito*)" (the same term utilized by both); cf. IACtHR, *Transcripción de la Audiencia Pública de 12 de Marzo de 2001 sobre Reparaciones en el Caso Villagrán Morales y Otros*, pp. 17 and 48, respectively (unpublished document); as well as from the declaration, in the public hearing before the Court, of 11-12 August 2000, in the case *Paniagua Morales y Otros*, of the mother, Mrs. María Ildefonsa Morales de Paniagua, in describing her dead daughter: "(...) she was all burnt. The nails of the fingers of the hands and of the feet had been extracted. She had a big cut here, decapitated. (...) It was a terrible death". Cf. IACtHR, *Case Paniagua Morales and Others / Reparations - Transcripción de la Audiencia Pública Celebrada en la Sede de la Corte los Días 11 y 12 de Agosto de 2000*, p. 89 (unpublished document). - I cannot omit here to to point out the respectuous way whereby they were both interrogated, as witnesses, by both the Inter-American Commission and the respondent State; it is worth leaving on the records the respectable intervention of this latter in the aforementioned hearing, in pointing out that he would ask no question, and adding: "Mrs. Ildefonsa Morales de Paniagua, on behalf of the Government and the State which we represent, we deeply regret the suffering, the pain and the damage caused to you. We perfectly know that there is no human power capable of remedying this wound, but we hope that may exist resignation in your heart so that you achieve, ultimately, some day to give us your pardon (...) [for the] damage caused to you"; *ibid*., p. 96. In my view, in that moment of the hearing, the International Law of Human Rights, moved by the human conscience, disclosed the vigour of its operation.

son (...) is still in my heart. To me my son (...) is not dead, (...) he is alive, alive. I say that wherever I go is my son. (...) Still until now, he is alive. (...) I feel my son, in each of his birthdays, in October"[6]. In the case of *Paniagua Morales and Others*, the adolescent Manuel Alberto González Chinchilla declared, likewise, that, since the murder of this father, when he played football with his colleagues, he felt as if it were his father who was playing with him, he felt as if he were his own father[7]. I saw it fit to ask him (already anticipating his answer), in the public hearing before the Court on 12 March 2001, if "[he] felt the presence of [his] father within [him]self"[8]. His answer, which was not surprising to me, was an emphatic "Yes!"[9]. What I could not anticipate was the manner in which he said it, promptly and with all firmness and conviction.

11. The arguments submitted in the public hearings before this Court, on 12 March 2001, in the case of the "*Street Children*", and on 11-12 August 2000, in the case of *Paniagua Morales and Others*, appear to me clearly to disclose the *communion* (term derived from the Latin, *communicare*) between the beloved ones who died and those who survive them. But there is a tendency, among specialists of other areas of human knowledge, to consider attitudes such as the ones described in the preceding paragraph of this Separate Opinion, as "fantasy", - as mentioned effectively by an expert at a given moment of the public hearing referred to, of 12 March 2001 in the present case of the "*Street Children*"[10].

12. I would not characterize this way, and with so much self-assurance, attitudes like the ones previously described[11]; ultimately, the so-called "objective reality" has also had its critics[12]... To me, it is not at all "fantasy", but on the contrary: it is a clear manifestation of what appears to me as the *communion* between the dead and the alive, - as I infer from the expressions, e.g., of the adolescent Manuel Alberto González Chinchilla, orphan of his father, and of Mrs. Marta Isabel Túnchez Palencia, orphan of

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6. Cf. IACtHR, *Transcripción de la Audiencia Pública de 12 de Marzo de 2001 sobre Reparaciones en el Caso Villagrán Morales y Otros*, p. 60, and cf. p. 79 (unpublished document).

7. Cf. IACtHR, *Case Paniagua Morales and Others / Reparations - Transcripción de la Audiencia Pública*..., *cit. supra* n. (1), p. 130 (unpublished document, of internal circulation). - Five months after his declaration made before the Tribunal, the adolescent referred to began to be protected by Provisional Measures ordered by the Inter-American Court, in its Resolution of 29 January 2001.

8. *Ibid*., p. 139.

9. *Ibid*., p. 139.

10. Cf. IACtHR, *Transcripción de la Audiencia Pública de 12 de Marzo de 2001 sobre Reparaciones en el Caso Villagrán Morales y Otros*, pp. 79 y 84-86 (unpublished document).

11. As already warned four centuries ago, there surely must be more things in heaven and earth than we dream of in our philosophy; W. Shakespeare, *Hamlet, Prince of Denmark*, 1600, act I, scene V.

12. In his essay *The Doors of Perception* (1954), for example, Aldous Huxley rebelled against the so-called "objective reality", which has never been able to render human beings capable of prescinding from symbols and language itself; cf. A. Huxley, *The Doors of Perception, and Heaven and Hell*, London/N.Y., Harper & Row, 1990 (reprint), pp. 23, 47, 58 and 74.

her son[13], in the public hearings referred to, pertaining to the cases of *Paniagua Morales and Others* and of the "*Street Children*" (*cit. supra*), respectively.

13. The reality of the youngster Manuel Alberto González Chincilla is that he brings his murdered father within himself; and the reality of Mrs. Marta Isabel Túnchez Palencia is that she brings her murdered son within herself. The realities of the young man and the mother, orphans, ought to be accepted, and respected; they are not a "fantasy". The damage suffered by them, from the perspective of the integrality of their personality, as victims, is truly irreparable. The personality of each victimized human being is an ineluctable reality: in face of the violation of their basic rights, one cannot attempt to deprive a (surviving) victim of his most personal beliefs, if these latter are all that is left to him to search for a meaning for his own life; one cannot underestimate the human soul[14].

14. In all rigour, one would not need to go beyond the domain of legal science to reach the same conclusion. It may be recalled that domestic penal law oriented itself, in its evolution, towards the figure of the delinquent, leaving the victim to a marginal position; this approach was for some time reflected in the collective social *milieu* itself, which began to demonstrate greater interest in the figure of the criminal than in those of his victims, abandoned to oblivion. As well warned by the *Eclesiastes*, "there is none to console the tears of the oppressed" (part I, par. 4-1). Nowadays, a whole trend of thought[15] endeavours to foster the rebirth of the figure of the victim, in considering him no longer as a "neutral" object of the juridical relationship caused by the wrongful act, but rather as the subject victimized by a human conflic.

15. International penal law appears to run the risk of incurring into the same distortion of relegating to a secondary level the figure of the victims, centring the attention rather on those responsible for crimes of particular gravity[16]. This is not a theoretical speculation: it was recently pointed out, for example, that international penal law has sometimes forgotten the centrality of the victims themselves[17]. In my view, it is the International Law of Human Rights that, clearly and decidedly, comes to rescue the central position of the victims, as it is oriented towards their protection and the satisfaction of their needs.

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[13]. With the passing of time, and as the twilight of life draws closer, the roles seem to be reversed: parents feel like sons, and sons feel like parents.

[14]. Cf., in this sense, C.G. Jung, "Approaching the Unconscious", *Man and His Symbols* (eds. C.G. Jung and M.-L. von Franz *et alii*), N.Y., Laurel, 1968, pp. 45, 76 and 93, and cf. pp. 63, 78, 84, 86 and 91. Personal beliefs help the human being to endure suffering, and reconcile him with the cruelty of destiny, particularly in the face of death; S. Freud, *The Future of an Illusion*, N.Y., Anchor, 1964, p. 24; on the destiny in human thinking, and the reality of the inner life of each one, cf., e.g., A. Schopenhauer, *Los Designios del Destino*, Madrid, Tecnos, 1994, pp. 18, 23 and 28.

[15]. E.g., on the part of those who cultivate the so-called "victimology", above all as from the seventies.

[16]. That is, acts of genocide, war crimes, and crimes against humanity.

[17]. Thus, these latter did not come to appear in the Statutes of the Nuremberg and Tokyo Tribunals, in the mid-forties, and are mentioned, but only briefly, in the nineties, in the Regulations of the *ad hoc* International Penal Tribunals for ex-Yugoslavia and Rwanda. G. Cohen-Jonathan, "Quelques considérations sur la réparation accordée aux victimes...", *op. cit. infra* n. ( ), pp. 139-140; the victims are not witnesses, but rather, unfortunately, actors (*ibid*., p. 140).

16. For a long time I have been insisting that the great juridical revolution of the XXth century has been the one consolidated by the International Law of Human Rights, in erecting the human being as subject of International Law, endowed, as a true *complaining party* against the State, with full juridico-procedural capacity at international level[18]. The present case of the "*Street Children*", in which the forgotten ones of this world succeed to resort to an international tribunal in order to vindicate their rights as human beings, gives an eloquent testimony of this. In the ambit of application of this new *corpus juris*, it is undoubtedly the victim who appropriately assumes the central position. The impact of the International Law of Human Rights in other areas of Law (both public and private) timely occurs, to the effect of humanizing them. This development appears in conformity with the very aims of Law, the addressees of whose norms are, ultimately, the human beings.

17. The impact of the International Law of Human Rights in the evolution of a specific aspect of contemporary International Law, namely, that pertaining to the right of foreign detainees to information on consular assistance in the framework of the guarantees of the due process of law, to refer to one example, is clearly inferred from the Advisory Opinion n. 16 of the Inter-American Court (of O1 October 1999). In a classic and luminous monograph (titled *The Sources of International Law*) published in 1946, the Danish jurist Max Sorensen pondered that the elements and influences which determine the *content* of legal regulation (social needs, ideal exigencies), emanate from the *social conscience* prevailing in the international community. This being so, the very *validity* of the juridical norms becomes reality also "in the psychological domain, and it is at this level that the value conceptions are manifested"; Sorensen concludes that the value criteria respond to an "interior necessity"[19].

18. One ought to go, definitively, beyond appearances, beyond shadows. But even if, along the *cammin di nostra vita*, we transcend at times the shadows and behold the light, no one can assure us that darkness will not fall again. But to this latter once more the light would follow, - like in the succession of night and day, or of day and night[20]. The tension of the clear-dark, of the advances intermingled with setbacks, is proper of the human condition, and it constitutes, in fact, one of the most precious legacies of the thinking of the ancient Greeks (always so contemporary) to the evolution of the human thinking itself, which has penetrated human conscience throughout the centuries. The

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[18]. Cf., besides my previous studies, recently, A.A. Cançado Trindade, "Las Cláusulas Pétreas de la Protección Internacional del Ser Humano: El Acceso Directo de los Individuos a la Justicia a Nivel Internacional y la Intangibilidad de la Jurisdicción Obligatoria de los Tribunales Internacionales de Derechos Humanos", *in El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI - Memoria del Seminario* (November 1999), volume I, San José of Costa Rica, Inter-American Court of Human Rights, 2001, pp. 3-68.

[19]. M. Sorensen, *Les sources du droit international*, Copenhague, Munksgaard, 1946, pp. 13-14 and 254. - It is always good to recall such lucid considerations, as the study of Law nowadays tends to be reduced to a mere reading of positive law. The positivists, in the domain of Law, and the so-called "realists", in the field of social sciences, have shown themselves indifferent to concerns such as the ones pointed out herein, and invariably subservient to power (to the established order in a given historical moment), disclosing a regrettable intellectual cowardice.

[20]. Just as darkness falls when light vanishes, likewise the first ray of light emerge out of the last shadows of obscurity.

Platonic allegory of the cave, for example, reveals, with all lucidity and its great existential density, la precariousness of the human condition, and, accordingly, the necessity of transcendence, beyond the alleged crude "reality" of the facts. In the domain of Law, well beyond legal positivism, one is to bear in mind the reality of the *human conscience*[21].

19. The necessity of formation and development of *human conscience* itself was stressed by Carl Jung[22], who used to take seriously the feelings and beliefs of the human being; such necessity is rendered even more pressing in our days, in which the perception of material "progress" threatens increasingly spiritual life[23]. According to Jung, the intense psychological suffering leads to the isolation of the individual from the rest of "normal" persons, to the extreme loneliness, but furthermore it awakens the "creativity" of the spirit[24]. In expressing his fear in face of the "frightening lack of maturity" and of the "barbaric lack of conscience" of the contemporary man[25], and in referring to the *chiaroscuro* of life, he lucidly warned that "in this world the good and the evil are more or less balanced", and this is the reason why "the victory of the good is always a special act of grace"[26].

20. The present case of the "*Street Children*" was lodged with the Inter-American Court, and it has just been decided by it; but the denounced facts form but a microcosm of the brutality prevailing in the day-to-day scenario of the streets of Latin America and, - why not admit it? - of the streets of the whole "post-modern" world of our days. A world that appears determined to protect capitals, goods and services, but not human beings, has changed the ends for the means. A world that has subjected the majority of human beings at the service of the interests and greed of a few, has forgotten that we all are born free and equal in rights, and we all follow the path of our lives ineluctably towards death (with the crossing into eternity), which restores the equality of the existential condition of all human beings.

21. This being so, it is difficult to avoid the disturbing question: if we all arrive to this world, and depart from it, with equal fragility, of which mortality, proper to the

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[21]. I fear, however, that this is bound to become increasingly difficult, above all as from this beginning of the XXIst century, with the current threat of electronic screens to the written word (with its undeniable cultural *substratum*), and the advent of the era of so-called "virtual reality" (a *contradictio in terminis*), - so much *en vogue* nowadays, - which may, by its inadequate or exagerated use, without reflection, hinder the search for transcendence, above and beyond the shadows of the contingent and precarious human condition.

[22]. C.G. Jung, *Modern Man in Search of a Soul*, San Diego/N.Y./Londres, Harvest/Harcourt Brace, 1933 [reprint without date], pp. 95, 97 and 103.

[23]. *Ibid*., pp. 204-205. To him, one had to advance towards spiritual life, so as to transcend the forces of nature (pp. 122-123 and 145); in opposing himself to the reductionism of specialized knowledge, he warned that such *specialization* (or fragmentation) of knowledge (above all scientific) led to the dehumanization of the contemporary world, with consequences not necessarily always beneficial (as assumed), but also catastrophic (p. 199).

[24]. C.G. Jung, *Psychological Reflections (1905-1961)*, Princeton/N.J., Bollingen Found./Princeton University Press, 1953 [reprint 1978], pp. 151 and 252.

[25]. *Ibid*., p. 168.

[26]. *Ibid*., pp. 234 and 236.

human condition, bears witness, why do we victimize each others during the so short path of our lives? A world which abandons its children in the streets has no future; it no longer renders it possible to create and develop a project of life. A world which neglects its elderly has no past; it no longer participates in the heritage of humankind. A world which only knows and values the ephemerous and escaping (and thereby desperating) present inspires no faith nor hope. A world which tries to ignore the precariousness of the human condition inspires no confidence. It is a world which has already lost sight of the temporal dimension of human existence. It is a world which ignores the intergenerational perspective, that is, the duties everyone has in relation to both those who have already gone through the path of their lives (our ancestors) as well as those who are still to do so (our descendants). It is a world wherein each one survives amongst a complete spiritual disintegration. It is a world that has become simply dehumanized, and which today needs urgently to awake to the true values.

22. Nowadays, there is simply no news at all of numerous other cases, similar to the *cas d'espèce*, of the "*Street Children*", daily victimizing likewise poor and humble persons, who do not achieve to reach the international jurisdiction, nor the national one, and who are not even conscious of their rights. But even if those responsible for the established order do not perceive it, the suffering of the excluded ones is ineluctably projected into the whole social *corpus*. The supreme injustice of the state of poverty inflicted upon the unfortunate ones contaminates the whole social *milieu*, which, in valuing violence and agressiveness, relegates to a secondary position the victims, forgetting that the human being represents the creative force of the whole community. Human suffering has a dimension which is both personal and social. Thus, the damage caused to each human being, however humble he might be, affects the community itself as a whole. As the present case discloses, the victims are multiplied in the persons of the surviving close relatives, who, furthermore, are forced to live with the great pain inflicted by the silence, the indifference and the oblivion of the others.

23. The considerable scientific-technological advances of our times has much increased the capacity of the human being to do all that is both good and evil. As to this latter[27], one cannot deny nowadays the importance and pressing need to devote greater attention to victimization, human suffering, and rehabilitation of the victims, - keeping in mind the current diversification of the sources of violations of human rights[28]. The systematic violations of human rights and the growth of violence (in its multiple forms) in our days and everywhere disclose that, regrettably, the much

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[27]. For an etiology of evil in the historical evolution of human thinking, cf. A.-D. Sertillanges, *Le problème du mal*, Paris, Aubier/Éd. Montaigne, 1948, pp. 5-412; and for a more recent reflection, cf., e.g., F. Alberoni, *Las Razones del Bien y del Mal*, México, Ed. Gedisa, 1988, pp. 9-196. - Besides those monographs, among others, also some great works of universal literature bear witness that, the anguish and vulnerability of the human being in the face of evil, mark presence in all social *milieux* and in all cultures. In order to evoke but one example (among others), the work of the Russian writer Fédor Dostoyevski (1821-1881), e.g., contains the warning that a human being who, abusing of his free will, victimizes another one (his fellowman), causes a harm to himself, and is punished not only by the law, but also by his own conscience; the reconquest of good (*bien*), on the part of the victim (and, ultimately, of every human being), passes through suffering, and the search for the meaning of life.

[28]. Of which bear witness the violations perpetrated by unidentified agents or death squads, by the persistence of impunity, by the manipulation of the power of communications, by the exclusions generated by the economic power (in particular by the concentration of income in a world scale, which many insist on continuing to call "globalization" of the economy).

praised material progress (enjoyed, in reality, by very few) has simply not been accompanied *pari pasu* of concomitant advances at spiritual level.

24. And this, despite the visionary allegories of Aldous Huxley and George Orwell, added to the penetrating reflections by Arnold Toynbee, Ernst Cassirer and Stefan Zweig, in the first half of the XXth century[29], - and followed by the grave warnings of thinkers of the stature of Bertrand Russell, Karl Popper, Simone Weil, Isaiah Berlin and Giovanni Sartori, among others, in the second half of the XXth century[30]. At this beginning of the XXIst century, there persist the gap between egoism and human solidarity, and the divorce between specialized knowledge and wisdom. As the recurrent violations of human rights with extremes of cruelty show, the human being of the digital era and of the fluxes of "volatile" capitals, just like his predecessors of more primitive societies, keeps on bearing the germ of good and evil, continues to be capable of victimizing his fellowmen in a growing scale[31], and remains involved - at the same time - in cosmos and chaos.

25. In my Separate Opinion in the *Bámaca Velásquez* case (Judgment on the merits, of 25.11.2000), I saw it fit to express my understanding of the unity of the human kind in the links between the alive and the dead (pars. 14-18), which, on their turn, call for the respect to the mortal remains of every person. Such remains, - I recalled, - are the object of regulation by the penal law of numerous countries, which tipify and sanction the crimes against the respect for the dead (par. 11). International Humanitarian Law likewise imposes expressly the respect for the mortal remains of the persons who died, as well as a proper grave for them[32].

26. The present Judgment on reparations in the case of the "*Street Children*", in this same line, decides that the respondent State "ought to provide the resources and adopt the other necessary measures for the transfer of the mortal remains" of one of the murdered adolescents and "the subsequent burial at the place of the choice of his relatives" (resolutory point n. 6, and cf. par. 102). In a temporal dimension, one has to keep always in mind the struggles of our ancestors for the rights we today enjoy; if for after this existence rights are not needed (as from the death of their *titulaires*), nevertheless duties subsist[33].

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[29]. A. Huxley, *Brave New World* (1932); G. Orwell, *Animal Farm* (1945), and *1984* (1949); A.J. Toynbee, *Civilization on Trial* (1948); E. Cassirer, *The Myth of State* (1946); S. Zweig, *Die Welt von Gestern* (1944).

[30]. B. Russell, "Knowledge and Wisdom", *in Essays in Philosophy* (1960); K. Popper, *The Lesson of This Century* (1997); S. Weil, *Réflexions sur les causes de la liberté et de l'oppression sociale* (1991, posthumous work); I. Berlin, "Return of the *Volksgeist*: Nationalism, Good and Bad", *in At Century's End* (1996); G. Sartori, *Homo Videns - La Sociedad Teledirigida* (1998). And cf. also, *inter alia*, Frantz Fanon, *Les damnés de la terre* (1961); Eric Hobsbawn, *Age of Extremes* (1994); Alain Finkielkraut, *L'humanité perdue* (1996).

[31]. As illustrated in our days by the scorn of the arsenals of weapons of mass destruction, which constitute a clamorous insult to human reason, and to humankind as a whole.

[32]. Geneva Convention of 1949 on the Protection of Civilians in Time of War, Article 130; Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 34.

[33]. N. Alcalá-Zamora y Torres, *La Potestad Jurídica sobre el Más Allá de la Vida*, Buenos Aires, Ed. Jur. Europa-América, 1959, p. 22.

27. Hence the importance of the *satisfaction*, as a form of non-pecuniary reparation to the close relatives of the murdered victims. It is the juridical conscience itself that establishes legal relations *throughout time*, in which we all live together. But the living and the dead succeed each other, without necessarily living together; even then, also in this circumstance, one ought to "practice the *neminem laedere* and to that end, previously, the *suum cuique tribuere*"[34]. Law is interpreted and applied *within the time*, and the reparations due to the victims - direct and indirect - of violations of human rights make no exception to that.

28. In my view, one ought to focus the whole theme of the reparations for violations of human rights as from the integrality of the personality of the victims, discarding any attempt of mercantilization - and the resulting trivialization - of such reparations. It is not a question of denying importance to the indemnizations, but rather of warning for the risks of *reducing* the wide range of reparations to simple indemnizations. It is not by mere chance that contemporary legal doctrine has been attempting to devise distinct *forms* of reparation - *inter alia*, *restitutio in integrum*, satisfaction, indemnizations, guarantees of non-repetition of the wrongful acts - *from the perspective of the victims*, so as to fulfil their needs and claims, and to seek their full rehabilitation.

29. When the European Convention of Human Rights completed 40 years of operation, in 1993, the European Court of Human Rights had granted reparationos of an invariably *pecuniary* nature in much more than a hundred cases[35]. This has generated expressions of insatisfaction in contemporary European legal doctrine, which nowadays comes to call for "a reparation more adapted to the situation of the victim"[36]. In reality, already in the sixties emerged the first criticisms to a restrictive vision of the reparations due to the victims. In an article published in 1968, Phédon Vegleris warned against the inconveniences of the practice - of those days - of the European Court of limiting the reparations of violations of human rights to simple indemnizations[37]. Criticisms of the kind have been renewed and reiterated along the years, at doctrinal level, in the framework of the European system of protection of human rights.

30. The Inter-American Court of Human Rights, on its turn, has taken a much broader position on the matter, in interpreting and applying Article 63(2) of the American Convention on Human Rights. Thus, as from its Judgment on reparations in the case of *Aloeboetoe and Others versus Suriname* (of 10 September 1993), the Court has, on some occasions, fixed - correctly, in my view - *non-pecuniary* reparations, besides indemnizations. In the *Aloeboetoe* case referred to, the Court ordered to the respondent State, as a measure of reparation, *inter alia*, to reopen a school located in

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34. *Ibid*., pp. 25-26, and cf. p. 185.

35. Cf. Th. van Boven (special *rapporteur*), *Study concerning the Right to Restitution, Compensation and Rehabilitation*..., *op. cit. supra* n. (4), p. 34.

36. Cf. G. Cohen-Jonathan, "Quelques considérations sur la réparation accordée aux victimes d'une violation de la Convention Européenne des Droits de l'Homme", *in Les droits de l'homme au seuil du troisième millénaire - Mélanges en hommage à Pierre Lambert*, Bruxelles, Bruylant, 2000, pp. 129-140.

37. Ph. Vegleris, "Modes de redressement des violations de la Convention Européenne des Droits de l'Homme - Esquisse d'une classification", *in Mélanges offerts à Polys Modinos*, Paris, Pédone, 1968, pp. 379-380.

the locality of the wrongful occurrences, so as to function regularly and permanently (as from 1994) and to put into operation a dispensary which existed in that place (resolutory point n. 5).

31. Seven and a half years later, the Court, in the present case of the "*Street Children*", in abiding by a request of the representatives of the relatives of the victims, again orders a non-pecuniary reparation, of the kind of obligations of doing, consisting in

> "designating an education centre with a name referring to the youngsters victims of this case and placing in such centre a plaque with the names"

of the five murdered adolescents (resolutory point n. 7, and cf. par. 103). As very well pointed out by the Court, this measure

> "would contribute to *awake the conscience* in order to avoid the repetition of wrongful acts such as those occurred in the present case and to keep alive the memory of the victims"[38].

32. In the *cas d'espèce*, the Court has, thus, duly valued the living conditions of abandonment of the so-called "street children", brutally victimized, bearing

> "in mind the general adverse conditions of abandonment suffered by the five youngsters in the streets, who remained in a situation of high risk and without any help as to their future" (par. 90).

In the whole present Judgment on reparations in the case of the "*Street Children*", the Court sought to fulfill the basic - material and other - needs of their relatives. And, both in the fixing of the moral damage (pars. 88-93), as in relation to the aforementioned measures of satisfaction (pars. 98-103), - to me of the greatest importance, - the Court also kept in mind the melancholic reality of the five adolescents victimized in the street.

33. In the present case of the "*Street Children*", the five direct victims, before being cruelly and arbitrarily deprived of their lives, were already deprived of creating and developing a project of life (and of seeking a meaning for their existence). They used to stay in the streets in a situation of high risk, vulnerability and defencelessness, amidst the humiliation of misery and a state of suffering amounting to a spiritual death, - like millions of other youngsters (in growing numbers) in all Latin America and all over the "globalized" - more precisely, dehumanized - world of this beginning of the XXIst century. May the present Judgment on reparations serve, thus, also of encouragement to all those who, in our countries of Latin America, have experienced the pain of losing a beloved person in similar circumstances of suffering and humiliation, aggravated by the impunity and the indifference of the social *milieu*.

34. In the case of *Loayza Tamayo versus Peru* (reparations, 1998), it was pointed out, in the same line of reasoning, that

> - "(...) Contrary to what the materialist conception of the *homo oeconomicus* pretends, a conception regrettably prevailing in our times, (...) the human being is not

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[38]. Par. 103 (emphasis added).

> reduced to a mere agent of economic production, to be considered solely in function of such production or of his capacity to work.
>
> The human being has needs and aspirations which transcend the purely economic measurement or projection. Already in 1948, half a century ago, the American Declaration on the Rights and Duties of Man warned in its preamble [fourth par.] that the "spiritual development is the supreme end of human existence and the highest expression thereof" (...). In the domain of the International Law of Human Rights, the determination of reparations ought to bear in mind the integrality of the personality of the victim, and the impact upon this latter of the violation of her human rights: it ought to start from an integral and not only patrimonial perspective of her potentialities and capacities.
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> From all the aforementioned it clearly results that non-pecuniary reparations are much more important than one might *prima facie* assume. (...)
>
> (...) The whole chapter of reparations for violations of human rights ought to, in our view, be reassessed from the perspective of the integrality of the personality of the victim, bearing in mind her realization as a human being and the restauration of her dignity. (...)"[39].

35. Within the Inter-American Court, since my Dissenting Opinions in the cases of *El Amparo*, concerning Venezuela (Judgment on reparations, of 14.09.1996, and Resolution on interpretation of sentence, of 16.04.1997) and *Caballero Delgado and Santana versus Colombia* (Judgment on reparations, of 29.01.1997), I have constantly expressed the great importance I attribute, as from the central position of the victims, to the non-pecuniary reparations (*restitutio in integrum*, satisfaction, realization of justice and the struggle against impunity, rehabilitation of the victims). I am not at all convinced by the "logic" - or rather, the lack of logic - of the *homo oeconomicus* of our days, to whom, amidst the new idolatry of the god-market, everything is reduced to the fixing of compensation in the form of amounts of indemnizations, since in his outlook human relations themselves have - regrettably - become commercialized. Definitively, to the integrality of the personality of the victim corresponds an *integral* reparation for the damages suffered, which is not at all reduced to the reparations for material and moral damages (indemnizations).

36. What is the price of a human life? What is the price of the integrity of the human person? What is the price of the liberty of conscience, or of the protection of the honour and of the dignity? What is the price of the human pain or suffering? If the indemnizations are paid, would the "problem" be "resolved"? What is certain is that all the rights protected under the American Convention on Human Rights have an autonomous value and a juridical content of their own, and moreover, are all related *inter se*, indivisible as they are. As to the fundamental right to life, I would go even further: its protection, which requires positive measures on the part of the State, falls under the domain of *jus cogens*, as acknowledged by contemporary juridical doctrine[40].

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[39]. Inter-American Court of Human Rights, case *Loayza Tamayo versus Peru* (Reparations), Judgment of 27 November 1998, Joint Separate Opinion of Judges A.A. Cançado Trindade and A. Abreu Burelli, pars. 9-11 and 17.

[40]. Cf., on the matter, e.g., W. Paul Gormley, "The Right to Life and the Rule of Non-Derogability: Peremptory Norms of *Jus Cogens*", *in The Right to Life in International Law* (ed. B.G. Ramcharan), Dordrecht, Nijhoff, 1985, pp. 120-159; Y. Dinstein, "The *Erga Omnes* Applicability of Human Rights", 30 *Archiv des Völkerrechts* (1992) pp. 16-37; International Court of Justice, *South West Africa Cases* (2nd. phase, Ethiopia and Liberia *versus* South Africa), Dissenting Opinion of Judge K. Tanaka, *ICJ Reports* (1966) p. 298; and cf., in general, J. G. C. van Aggelen, *Le rôle des organisations internationales dans la protection du droit à la vie*, Bruxelles, E. Story-Scientia, 1986, pp. 1-104; D. Prémont and F. Montant (eds.), *Actes du Symposium sur le*

37. The day when the work of determining the reparations due to the victims of violations of fundamental human rights *were to be reduced* exclusively to a simple fixing of compensations in the form of indemnizations, one would no longer need the knowledge patiently acquired, assimilated and accumulated throughtout years of readings, studies and reflection: to that end, a calculating machine would suffice. The day this were to occur, - which I hope will never come, - the labour itself of an international tribunal of human rights would be irremediably devoid of all sense. Article 63(1) of the American Convention, on the contrary, renders it possible, and requires, that reparations be enlarged, and not reduced, in their multiplicity of forms. The fixing of reparations ought to be based on the consideration of the victim as an integral human being, and not on the degraded perspective of the *homo oeconomicus* of our days.

38. The petitioners themselves and the legal representatives of the victims or their relatives will know to keep always in mind that there are superior values which ought to be affirmed and vindicated; the concern for the prominence of such values ought to have primacy over the claim of indemnizations, also to fulfill the personal needs - other than material - of the (surviving) victims themselves or their relatives. In the public hearing before this Court, of 12 March 2001, in the case of the *Street Children*, the witness Mrs. Reyna Dalila Villagrán Morales lucidly pointed out, in respect of the pain of the impact of the murder of her son upon herself and her family, that "not even all the gold of the world, (...) nor what most valuable might exist in the world, will relieve us of the suffering we feel for having lost him"[41]. The life and the integrity of each human being effectively have no price. The liberty of conscience, the protection of the honour and of the dignity of the human person have no price either. And nor does human pain or suffering. The evil perpetrated in the persons of the (direct and indirect) victims is not removed by the reparations: *the victims continue being victims*, *before and after the reparations*, - and this requires a greater importance to be attributed to the measures in favour of their *rehabilitation*.

39. With regard, in particular, to the close relatives of the direct victims of violations of human rights, I fear that only through the intense suffering that is *accepted* (which seems to me to have above all a *self-didactic* effect) they will be able, as indirect victims, in face of the loss of a beloved person, aggravated by the extreme violence, to reconstruct their *interior life*, - which is the sole safe place where each one can find

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droit à la vie - Quarante ans après l'adoption de la Déclaration Universelle des Droits de l'Homme: Évolution conceptuelle, normative et jurisprudentielle, Genève, CID, 1992, pp. 1-91; A.A. Cançado Trindade, "Human Rights and the Environment", *Human Rights: New Dimensions and Challenges* (ed. J. Symonides), Paris/Aldershot, UNESCO/Dartmouth, 1998, pp. 117-153; F. Przetacznik, "The Right to Life as a Basic Human Right", 9 *Revue des droits de l'homme/Human Rights Journal* (1976) pp. 585-609. And cf. the general comments ns. 6/1982 and 14/1984 of the Human Rights Committee (under the United Nations Covenant on Civil and Political Rights), reproduced *in*: United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. doc. HRI/GEN/1/Rev. 3, del 15.08.1997, pp. 6-7 and 18-19.

41. Cf. IACtHR, *Transcripción de la Audiencia Pública de 12 de Marzo de 2001 sobre Reparaciones en el Caso Villagrán Morales y Otros*, p. 48 (unpublished document). - In a public hearing (of 09.06.1998) on reparations in another case before the Inter-American Court, the victim, Mrs. María Elena Loayza Tamayo, pronounced in the same sense, pointing out that she was conscious that the "economic indemnization" would not redress the whole damage that she suffered. IACtHR, *Transcripción de la Audiencia Pública Celebrada en la Sede de la Corte el 09 de Junio de 1998 sobre las Reparaciones en el Caso Loayza Tamayo*, p. 34, and cf. pp. 60-61 (unpublished document).

refuge from the injustice and the insults of this world. But the evil committed does not disappear by the granting of reparations, and keeps on affecting the close relatives of the tortured and murdered person in their relations among them, and with other persons, and with the outside world[42]. The direct victims have suffered an irreparable harm, in having being deprived of their lives arbitrarily (in the terms of Article 4(1) of the American Convention on Human Rights).

40. But also the indirect victims (parents, sons, husband and wife, and, in certain circumstances, brothers) have suffered an irreparable loss, as their lives will never more be the same. The loss, at a given moment of their lives, of the beloved one, has thrown them into a "*selva oscura*", wherefrom they will have to endeavour to get out, through suffering (and only suffering), in order not only to honour the memory of their dead, but also to transcend the darkness of human existence, and to attempt to get closer to the light and to know the true reality, during the time which is left to them of the brief journey of each one in this world (the very brief *cammin di nostra vita*, which does not allow us to *know* all that we need). The realization of justice contributes at least to structure their psychic life, to reawake their faith and hope, and to set in order their human relations with their fellowmen. Every true jurist has, thus, the ineluctable duty to give his contribution to the realization of justice, from the perspective of the integrality of the personality of the victims.

41. My conclusion is in the sense that, in circumstances such as those of the present case of the *Street Children*, there is *stricto sensu* no true or full reparation possible, in the literal sense of the term (from the Latin *reparatio*, derived from *reparare*, "to prepare or dispose again"), what reveals the limits of Law (like the limits of other branches of human knowledge). As we are, in a way, prisioners of our own language, we thus have to attempt to be always aware of the proper meaning of the terms we utilize, so as to avoid that their evocation, without much thinking, renders them devoid of meaning[43]. The words bear the accumulation of human experience, and thus their use should be conscious and careful[44].

42. The impossibility of a full reparation - the *restitutio in integrum* - takes place, in my understanding, not only as to the direct victims and the fundamental right to life, as commonly assumed, but also as to the indirect (surviving) victims and other rights (such as that of not being subjected to torture, nor to cruel, inhuman or degrading treatment[45]). Juridically, above all in circumstances such as those of the present case

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42. J. Herman, *Trauma and Recovery - The Aftermath of Violence, from Domestic Abuse to Political Terror*, N.Y., Basic Books, 1992 [reprint 1997], pp. 188 and 190, and cf. pp. 210-211 and 242-243.

43. And lead to dismay and skepticism, as in the example of the legendary prince of Denmark:

- "(...) What do you read, my lord?
- Words, words, words".

W. Shakespeare, *Hamlet, Prince of Denmark*, 1600, act II, scene 2.

44. As well pointed out, "our words make our worlds"; Ph. Allott, *Eunomia - New Order for a New World*, Oxford, University Press, 1990, p. 6, and cf. pp. 14-15.

45. On the recent jurisprudential development of this latter, cf.: European Court of Human Rights, case *Selmouni versus France*, Judgment (on the merits) of 28.07.1999, pars. 95 and 101; Inter-American Court of Human Rights, case *Cantoral Benavides versus Peru*, Judgment (on the merits) of 18.08.2000, pars. 99-100 (on the torture perpetrated by acts producing in the victim "an acute physical, psychic or moral suffering").

of the *Street Children*, the reparations - of the *consequences* of the measure or situation in violation of the protected human rights (in the terms of Article 63(1) of the American Convention), - instead of truly *repairing*, rather *alleviate* the human suffering of the surviving relatives, seeking to rehabilitate them for life, - and *thereby* they become absolutely necessary.

43. This is, in my understanding, the true meaning, with the inevitable limitations of its real extent, of the juridical concept of *reparations*, in the framework of the International Law of Human Rights. The evil committed, as I have already pointed out, does not disappear: it is only fought against, and mitigated. The reparations granted render the life of the surviving relatives perhaps bearable, by the fact that, in the *cas d'espèce*, the silence and the indifference and the oblivion have not succeeded to cover the atrocities, and that the evil perpetrated has not prevailed over the perennial search for justice (proper of the spirit). In other words, the reparations granted mean that, in the concrete case, the *human conscience* has prevailed over the impulse of destruction. In *this sense*, the reparations, although not full, are endowed with an unquestionable importance in the work of safeguard of the rights inherent to the human being.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary