SEPARATE OPINION BY JUDGE A.A. CANÇADO TRINDADE

1. I have concurred with my vote in the adoption, in this city of Brasilia, of the instant Judgment the Inter-American Court of Human Rights has just handed down in the Case of *Sawhoyamaxa Indigenous Community v. Paraguay*. In view of the high relevance I attach to the subject-matter of the instant Jugment, I feel the obligation to put on record my personal thoughts regarding it, as the grounds for my position on the question decided by the Court, specifically as to the following aspects: a) two core matters: the wide scope of the fundamental right to life and the right to cultural identity; b) the historical roots to be found in the situation of want affecting the members of the Community; c) forced internal displacement as a matter of human rights; d) inadmissibility of the *probatio diabolica*; d) the question of the causal connection: the lack of due diligence by public authorities; e) the right to life and cultural identity; f) the suffering of the innocent and the central position of the abandoned victim as a subject of the International Law of Human Rights. The stage will then be set for my final reflexions, dealing with two points: the rights of indigenous peoples in the genesis and the development of the law of nations (*jus gentium*); and b) the great lesson to be learned from the instant case of the *Sawhoyamaxa Indigenous Community*.

I. Two Core Matters: The Wide Scope of the Fundamental Right to Life and The Right to Cultural Identity.

2. In the case of the *"Street Children" (Villagrán-Morales et al.) v. Guatemala,* (1999), its leading case on the wide dimension or scope of the fundamental right to life, which includes the conditions necessary for a life with dignity, the Court considered that

> "The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur, and in particular, the duty to prevent its agents from violating it."[1]

3. And, and in the case of *Mayagna Awas Tingni Community v. Nicaragua (2001),* its leading case on the communal property rights over ancestral land by members of indigenous communities, the Inter-American Court pointed out that for the members of such communities the relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations[2].

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[1]. Inter-American Court of Human Rights (IACHR), Judgment on the Merits of November 19, 1999, Series C, No. 63, para. 144.

[2]. IACHR, Judgment on the merits of August, 31, 2001, Series C, No. 79, para. 149.

In a Vote pronounced in such case, the *intertemporal dimension* of the relation the members of such communities had with their lands was underscored, as well as the necessary prevalence that they attribute

> "to the element of *conservation* over the simple exploitation of natural resources. Their communal form of property, much wider than the civilist (private law) conception, ought to, in our view, be appreciated from this angle, also under Article 21 of the American Convention on Human Rights, in the light of the facts of the cas d'espèce.
> The concern with the element of conservation reflects a cultural manifestation of the integration of the human being with nature and the world wherein he lives. This integration, we believe, is projected into both space and time, as we relate ourselves, in space, with the natural system of which we are part and that we ought to treat with care, and, in time, with other generations (past and future) [3] , in respect of which we have obligations."[4]

4. The notion of culture, —originating in the Roman "*colere*", which means to till, to consider, to care for and to preserve— was originally embodied in agriculture (taking care of the land). With Cicero, the concept came to be applied to matters of the spirit and the soul (*cultura animi*)[5]. As *time went by*, it became associated with humanism, with the attitude of preserving and taking care of the things in the world, including those in the past[6]. The peoples —the human beings and their social environment—, faced with the mystery of life, develop and preserve their cultures in order to understand and relate with the outside world. Hence the importance of cultural identity, as a part or an addition of the fundamental right to life itself.

5. Both the aforementioned Inter-American Court Judgments, in the cases of the *"Street Children" (Villagrán Morales et al.)* and of the *Mayagna Awas Tingni Community*, have really pioneered regarding the two core matters hereinabove referred to, and they have been given a warm welcome by the international law scholars of today[7]; in my opinion, they also are a correct expression of the Law, and

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[3]. Future generations are starting to attract the attention of contemporary international law scholars: cf., for example, A.-Ch. Kiss, "La notion de patrimoine commun de l'humanité", 175 *Recueil des Cours de l'Académie de Droit International de La Haye* (1982) pages 109-253; E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, Tokyo/Dobbs Ferry N.Y., United Nations University/Transnational Publs., 1989, pages 1-351; E. Agius y S. Busuttil *et alii* (eds.), *Future Generations and International Law*, London, Earthscan, 1998, pages 3-197; J. Symonides (ed.), *Human Rights: New Dimensions and Challenges*, Paris/Aldershot, UNESCO/Dartmouth, 1998, pages 1-153.

[4]. IACHR, *loc. cit. supra* No. (2), Joint Separate Opinion by Judges A.A. Cançado Trindade, M. Pacheco-Gómez and A. Abreu-Burelli, paras. 9-10.

[5]. H. Arendt, *Between Past and Future*, **N.Y.**, Penguin, 1993 [reprint], pages 211-213.

[6]. *Ibid*., pages 225-226.

[7]. Cf., specifically as related to the one of the *"Street Children" (Villagrán-Morales et al. v. Guatemala)*, i.e., the books: CEJIL, *Crianças e Adolescentes - Jurisprudência da Corte Interamericana de Direitos Humanos*, Rio de Janeiro, CEJIL/Brasil, 2003, pages 7-237; Casa Alianza, *Los Pequeños Mártires...*, San José de Costa Rica, Casa Alianza/A.L., 2004, pages 13-196; and cf. as well, i.e., K. Quintana Osuna and G. Citroni, "I minori d'età di fronte alla Corte Interamericana dei Diritti dell'Uomo", 2 *Pace Diritti Umani* - Università di Padova (2005) pages 55-101, pages 69-72; among several other publications on the same case., and specifically concerning the case of the *Mayagna Awas Tingni Community v. Nicaragua*, the book: Felipe Gómez Isa (ed.), *El Caso Awas Tingni contra Nicarágua: Nuevos Horizontes para los Derechos de los Pueblos Indígenas*, Bilbao, Universidad de Deusto, 2003, pages 9-279; and cf. as well, i.e., C. Binder, "The Case of the Atlantic Coast of Nicaragua: The *Awas Tingni* Case", *in International Law and Indigenous Peoples* (eds. J. Castellino and NO. Walsh), Leiden, Nijhoff/R. Wallenberg Institute, 2005, pages 249-267; among several other publications on the same case.

today they are part of the history of international protection of human rights. Both precedents blazed the trail as far as the matters they dealt with are concerned.

6. When I verified, with particular unhappiness, in the subsequent Judgment on the merits of this Court, in the case of the *Indigenous Community Yakye Axa v. Paraguay* (merits, 2005), a serious step backwards in connection with the wide scope of the right to life, and besides a regrettable inconsistency by the Court in its new and restrictive construction, I put on the record my corporation opposition to what appeared to me —and still appears to me— an inadmissible regression. The clear warning against such step backwards in a Dissenting Opinion given in the abovementioned case of the *Indigenous Community Yakye Axa* (merits)[8], appears to have echoed in the minds of the Court majority, that was careful not to repeat its mistake (that of operative paragraph No. 4 of such Judgement) and to rectify its untenable position in the instant Judgment on the case of the *Sawhoyamaxa Indigenous Community*.

7. In my recent Separate Opinion on the Interpretation of the Judgment on the case of the *Indigenous Community Yakye Axa* (2006), I underscored the importance I attach, in the circumstances of the case, to the final conveyance of their ancestral lands to the members of that Community (paras. 2-3 and 6-7), among other things, to the protect and preserve "their own cultural identity and, in the last resort, their fundamental right to life *lato sensu* (para. 13). In the instant Judgment in the case of the *Sawhoyamaxa Community*, the Court has correctly underscored the positive measures to protect and to preserve the underogable right to life (paras. 148-153), and in ordering reparations (including the return of the ancestral lands, paras. 206-211), it has borne in mind the pressing need to preserve the cultural identity of the Community in question (paras. 218-219, 226 and 231).

II. The Historical Roots to be Found in the Situation of Want Affecting the Members of the Community.

8. In fact, the injustice the members of the *Sawhoyamaxa Community* suffer is rooted in history. In its application of February 2, 2005, the IACHR reported that

> "An Anglican missionary wrote in 1910 that the Enxet in [the Chaco] area by then still lived as owners of all their territory, unaware of the fact that the Paraguayan State had sold their land to foreigners, without consulting them on the matter, let alone offering them compensation for it"[9].

In their independent brief on arguments, petitions and evidence, of May 5, 2005, the representatives of the victims (from the [non governmental] organization Tierraviva), added that

> "By the year 1950, practically all the Enxet territory was divided into estates and some minor land holdings bought by the Anglicans. The extensive system of land use established in Chaco tolerated indigenous presence on cattle-raising ranches, as either actual or potential cheap labor"[10].

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8. Joint Dissenting Opinion of Judges A.A. Cançado Trindade and M.E. Ventura-Robles, paras. 1-24.

9. Page 9, para. 38 of the abovementioned application.

10. Page 8 of the abovementioned brief.

9. As a consequence of the sale of the ancestral lands of the indigenous Enxet people, they found themselves forcibly displaced. In its abovementioned application, the IACHR pointed out that

> "In view of the deplorable life conditions, memebers of the *Sawhoyamaxa Community* [of the Enxet people] who lived in villages located inside private estates decided to move to a public roadside, facing the reclaimed lands, while waiting for the State to decide on their petition for recognition of part of their ancestral territory "[11].

10. In fact, members of the *Sawhoyamaxa Community* of the Enxet people are, to this day, living in infra-human conditions[12], —or surviving, or in several cases, dying— on the side of the road known as Coronel Franco road, in the *Santa Elisa* and *Kilómetro 16* settlements[13]. This —as the representatives of the victims remark in their abovementioned brief— in spite of the fact that

> "The Enxet people historically preexists the Paraguayan State, as it has acknowledged on its own accord, and therefore its rights over its territories are, in consequence, previous to such State (...).
> (...) The area reclaimed by the Sawhoyamaxa Indigenous Community is part of its traditional habitat, a fact not contested by the Paraguayan State. In spite of that, the State has not guaranteed the community and its members the possession and the ownership of such territory "[14].

11. In its answer to the application, of July 13, 2005, the agent of the respondent State admits that the aforementioned indigenous peoples

> "exist as cultures from before the Paraguayan State was formed, as it is acknowledged in the National Constitution"[15] and it furthermore "accepts the legislation on the subject to be perfectible"[16], and it "deeply regrets the demise" of 31 members of the Sawhoyamaxa Community, but contests the responsibility of the State for such deaths.[17]

12. The sufferings of the members of the Sawhoyamaxa Community have lasted in time. To their struggle for survival, and for the preservation of their *modus vivendi*, the pain of facing indifference and oblivion from the social environment must be added. The conditions in which they survive seem to deprive them of their own history, Do the poor and the bereft have a history? That was the question posed in an International Forum organized, in March 1988, by UNESCO and the Universal Academy of Cultures. There, a reflection developed by J. Wresinski, founder of the ATD Fourth World movement, was remembered in its eloquent terms:

> "The other day I passed that way again, but I did not even recognize the place where the shanties had once been, nor the location of the old town. Nevertheless, how many

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11. Page 12, paragraph 50 of the abovementioned application.

12. Described in paragraph 73.61-75, subparagraphs "e" and "f", of the instant Judgment.

13. And other estates; cf. page 23 of the abovementioned independent brief on arguments, petitions and evidence by the representatives of the victims.

14. *Ibid*., page 22.

15. Page 21, para. 47, of the abovementioned answer to the application.

16. *Ibid*., page 70, para. 8.

17. Cf. *ibid*., pages 52-60, paras. 143-163.

> tears have soaked that ground, how many sufferings have hundreds of families had to endure in such places! How many shrieks have pierced the sky! There is nothing external to remind us of that pain (...). In those places humanity has suffered as nowhere else. We have seen children begging, covered in disgrace. We have witnessed great humiliations. We have seen highhandedness dominate unhindered. We have been present when legions of the poor have been debased to death by shame. Who will get to know about this? Who will bear witness to it? (...)
> The poorest often tell us: it is not just to go hungry or not to be able to read, not even to be out of work, which is the worse misfortune that can befall man, the most terrible thing is to know that we do not count at all, to the point that our suffering itself is unknown. The worst thing is to be scorned by our fellow citizens. Because it is such scorn that leaves us out of every right, that makes people reject us, and bars us from being recognized as worthy and capable of responsibilities. The greater misfortune of extreme poverty is to be some kind of living dead during all our existence. "[18].

13. The indigenous peoples continue to fight desperately to preserve, not only their culture, but their own history. And there is a great wisdom in this the irritating "moderns" no longer have and the even more irritating "post-moderns" have still less. In his little known pieces on the Greek *Herostratus and the Quest for Immortality* and *Non-permanence* (*circa* 1927), the great universal writer Fernando Pessoa accurately judged that the man who does not know his environment and his past is a "barbarian", that is to say a "totally modern" man, with no notion of the civilization which preceded and formed him, and who limits himself to find pleasure in "novelty"; but true and lasting innovation, he added,

> "is that which has taken all the threads of tradition and woven them again into a pattern tradition could not have followed."[19]

III. Forced Internal Displacement as a Matter of Human Rights.

14. The problem of internally displaced people, of which the instant case of the *Sawhoyamaxa Indigenous Community* is a case in point, is actually a human rights problem. Displaced people are in a vulnerable situation precisely because of the fact they are under the jurisdiction of the State[20] (their own State) that did not adopt enough measures to avoid or prevent the situation of virtual desertion they came to suffer. The situation of the internally displaced people may perfectly be —and should be— resolved in the light of the rules in the human rights treaties such as the Inter-American Convention. As I pointed out in my Separate Opinion (para. 17) in the case of the *Moiwana Community v. Surinam* (Judgment on the merits of June 15, 2005), the 1998 United Nations Guiding Principles on Internal Displacement referred to, determine that the displacement cannot take place in a way that violates the rights to life, to dignity, to freedom and security of the affected persons; they also assert other rights, such as the right to respect for family life, the right to an adequate standard of living, the right to equality under the law, the right to education. The basic idea underlying the whole document is in the sense that the internally

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[18]. *Cit. in*: J. Tonglet, "Tienen Historia los Pobres?", *in Por Qué Recordar? - Foro Internacional "Memoria e Historia"* (UNESCO/La Sorbonne, marzo de 1998, ed. F. Barret-Ducroq), Barcelona, Granica, 2002, pages 51-52 and 54-55.

[19]. F. Pessoa, *Eróstrato y la Búsqueda de la Inmortalidad*, Buenos Aires, Emecé Ed., 2001 [reed.], pages 21-22.

[20]. M. Stavropoulou, "Searching for Human Security and Dignity: Human Rights, Refugees, and the Internally Displaced", *in The Universal Declaration of Human Rights: Fifty Years and Beyond* (eds. Y. Danieli, E. Stamatopoulou and C.J. Dias), Amityville/**N.Y.**, Baywood Publ. Co., 1999, pages 181-182.

displaced persons do not lose their inherent rights, as a result of displacement, and can invoke the pertinent international norms of protection to safeguard their rights determine that displacement cannot be effected in violation of the right to life — including therein the right to an adequate standard of living, the right to live— of the right to personal dignity, to liberty and to security of the affected persons; of the right to respect for family life; of the right to education; of the right of being equal under the law.[21]

15. The fact of its being a human rights problem does not mean that the protective rules in International Human Rights Law be enough to solve it in each and every circumstance. As a matter of fact, in circumstances different from those in the instant case, Humanitarian International Law and Refugee International Law may have —and have had— direct incidence and have converged in the search for a solution to safeguard the rights of the human person. The matter of *return*[22] (home, to the ancestral lands), for example, common both to internally displaced people victims of the violations of human rights (such as those in the cases of the *Yakye Axa* and *Sawhoyamaxa Indigenous Communities*, 2005-2006, regarding Paraguay) and to refugees (such as those in te recent case of the *Moiwana Community v. Surinam*, 2005-2006); here the question of the ownership of ancestral land becomes one of the very essence, including the preservation of the right to life in a broad sense, which encompasses the conditions of a life with dignity and the necessary preservation of cultural identity.

16. In the instant case, the sufferings of the members of the *Sawhoyamaxa Indigenous Community* have been for long known for a public, true and notorious fact. Half a decade ago, for example, an IACHR *Report* on the general situation warned about the pressing need and the urgency "of solving the land claims is the inhuman situation suffered by the community of Sawhoyamaxa.[23]" In the case of which the Court has just disposed by handing down the instant Judgment, the representatives of the victims (of the non-governmental organization Tierraviva), in their final arguments brief of February 16, 2006, argued that the failure to adopt positive measures by State created the conditions contributing to the death of several members of the Sawhoyamaxa Community (page 45), and pointed out that

> "Most of the boys and girls who died (...) died of diseases all of which may be prevented (dysentery, tetanus, enterocolitis, pneumonia, dehydration, measles) or medically treated (...). (...) In spite of the State being acquainted with the special vulnerability condition of the members of the Sawhoyamaxa Community settling alongside the road, the State has not adopted the measures necessary to avoid the existence of objective conditions preventing the full enjoyment of the right to life of its members[24]."

17. For its part, the Commission, in its final arguments brief, warned that "the Sawhoyamaxa Community is totally destitute", and reaffirmed what it had pointed out in its application in the sense that

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[21]. Principles 8 and the following, 17-18, 20 and 23, respectively; cf. UN document E/CNO.4/1998/53/Add.2, of February 11, 1998, pages 6-10.

[22]. C. Phuong, *The International Protection of Internally Displaced Persons*, Cambridge, University Press, 2004, pages 27 and 47-48, and cf. pages 57, 62, 117, 191 and 212.

[23]. OAS/Inter-American Commission on Human Rights, *Third Report on the Situation of Human Rights in Paraguay*, doc. OAS/Ser.L/V/II.110/doc.52, of March 9, 2001, page 134, para. 48.

[24]. Pages 46-47 of the abovementioned final arguments brief, and cf. pág. 45.

> "31 members of the Community, most of them children of both sexes, had demised died of diseases that could have been prevented and cured, or better still, avoided (...). (...) Unfortunately, the number of deceased persons in the Community for lack of medical care and as a direct consequence of the infra-human conditions and total want in which they lived is larger than the one stated in the application. Therefore, the Commission considers it to be proven in the instant case that the deaths of the members of the Sawhoyamaxa Community that resulting from lack of medical care and form infra-human living conditions are attributable to the State."[25]

18. Some of the members of the Sawhoyamaxa Indigenous Community died when they were only days, or weeks, or months, old. [26] They died in total want, as they had lived, in the humiliation of total want (that is the deprivation of all human rights), along the roadside (between Pozo Colorado and Concepción), most probably unable to develop a life project. Everywhere today, in different latitudes, there is an increase in the numbers of those who are cast aside, of those who die, or perhaps just survive, in want, facing the indifference or the callousness of the public power system (rather oriented towards serving private interests, totally distorting the aims of the State), giving a new ring to Montesquieu's lament in his Lettres persanes (1721):

> "il faut pleurer les hommes à leur naissance, et non pas à leur mort "[27].

19. Or giving a new ring to the final words Machado de Assis unbosoms, in his piercing Memórias Póstumas de Brás Cubas (1881):

> "Não tive filhos, não transmiti a nenhuma criatura o legado da nossa miséria."[28]

Or still ringing in the more recent (1998) complaint by Elie Wiesel, 1986 Nobel Peace Prize, against indifference towards the suffering of others:

> "the two great mysteries —birth and death— are that which all human beings have in common. It is just the path going from one to the other that is different. And it is up to us to make it human. (...) Every human being has a right to dignity. To infringe such right is to humiliate the human being. (...) the struggle has to be against indifference. It helps but the oppressor, never the victim[29]."

IV. Inadmissibility of the *Probatio Diabolica*.

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[25]. Page 10 of the abovementioned final arguments brief, paras. 38-39.

[26]. Cf. Report in paragraphs 61 and 66 of the instant Judgment.

[27]. Montesquieu, *Lettres persannes*, Paris, Garnier-Flammarion, 1964 [reed.], page 77.

[28]. Machado de Assis, *Memórias Póstumas de Brás Cubas*, 4a. ed., São Paulo, Ateliê Ed., 2004 [reed.], page 254.

[29]. E. Wiesel, "Contre l'indifférence", *in Agir pour les droits de l'homme au XXIe. siècle* (ed. F. Mayor), Paris, UNESCO, 1998, pages 87-90.

20. In its application of February 2, 2005 in the instant case of the *Sawhoyamaxa Indigenous Community*, the Inter-American Commission on Human Rights aptly reminded us the *jurisprudence constante* of this Court in the sense that the procedural system if a means to achieve justice, and justice cannot be sacrificed to propitiate mere formalities, as long as legal certainty and the procedural equality among the parties is not affected (para. 29). In a situation such as the one in the instant case, to burden the ostensibly weaker party, wanting the means for surviving with a minimum of dignity, a higher evidence standard, would amount to, in my opinion, incurring in the unfortunate mistake of requiring a *probatio diabolica*.

21. The latter was so labeled in Roman law, percisely in the area concerning the evidence of possession (to obtain title), and owed its name of *probatio diabolica* to the high degree of difficulty with which the litigating party had to cope.[30] Such undue burden of proof standard was invoked in the Middle Ages, and has even been objected in contemporary litigation among states.[31] As I see it, *probatio diabolica* is entirely inadmissible in the area of International Human Rights Law.

22. The majority of this Court, therefore, has committed a great mistake in its previous Judgment in the case of the *Indigenous Community Yakye Axa v. Paraguay* (of June 17, 2005), in its operative paragraph No. 4, not only as to the substantive applicable law (regarding the wide scope of the fundamental right to life, and the right to cultural identity, *supra*), buy also as far as procedure is concerned. However, it has rectified such mistake in the Judgment the Court has just handed down in the instant case of the *Sawhoyamaxa Indigenous Community*, thus taking up again the line of its wisest precedents on the point.

23. In cases of continuing human rights breaches, and specifically, of the right to life, such as in those in the *cas d'espèce*, additional evidence is not needed, the cause-effect link being established (cf. *infra*). State obligations are of diligence and of result, not just of conduct (such as adopting insufficient and unsatisfactory legislation). In fact, the distinction between obligations of conduct and of result[32] has tended to be examined from a purely theoretical standpoint, asuming variations in the conduct of the State, which can even include a succession of acts by the latter[33], —and without giving enough and due consideration a situation in which an irreparable harm to the human person suddenly occurs (i.e., the deprivation of the right to life for want of due diligence by the State).

V. The Question of the Causal Connection: The Lack of Due Diligence by Public Authorities.

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30. H.F. Jolowicz, *Historical Introduction to the Study of Roman Law*, Cambridge, University Press, 1967, page 156.

31. As in the example set in the preliminary objections made by France in the case brought against it and other States by Yugoslavia, concerning the *NATO bombings* in 1999; International Court of Justice, preliminary objections of France of July 5, 2000, pages 4 and 16, paras. 25 and 33.

32. Mainly in the light of the work by the International Law Commission on the International Responsibility of States.

33. Cf. A. Marchesi, *Obblighi di Condotta e Obblighi di Risultato - Contributo allo Studio degli Obblighi Internazionali*, Milano, Giuffrè, 2003, pages 50-55 and 128-135.

24. In the instant case of the *Sawhoyamaxa Indigenous Community,* the facts are most clear, and no additional evidence is required (which would amount to an inadmissible *probatio diabolica*, *supra*) in respect to the breach of the fundamental right to life. Such right was violated by the infra-human living conditions to which the members of such Community were subjected, forcibly displaced from their ancestral lands. The demise of several members of the Sawhoyamaxa Community is, in my opinion, a *special circumstance* making the breach more serious, because spiritual death was followed by physical or biological death, in breach of Articles 4(1) and 1(1) of the Inter-American Convention.

25. In my view, the causal connection —that regrettably seems to keep disorienting the majority of this Court— is clearly established as well, on account of the lack of due diligence by the State as regards the *living conditions of all the members of the Sawhoyamaxa Community*. The international responsibility of the State arising therefrom is, then, *objective* on the grounds I already found in my Separate Opinion, to which I will here take leave to refer (paras. 1-40) —in the case of the case of *"The Last Temptation of Christ" (Olmedo-Bustos et al). v. Chile. Judgment of February 5, 2001*.

26. In the *cas d'espèce* —as it was correctly pointed out in a Joint Dissenting Opinion in the Case of the *Indigenous Community Yakye Axa* (2005)— [34] the causal connection is clearly established, in order to determine the international responsibility of the State and to fix the amount of non-pecuniary damages, by the serious and infra-human living —or surviving— conditions to which the members of the Sawhoyamaxa Community have been subjected for many years now, on account of the lack of due diligence by the State, which conditions have led to the —entirely feasible— demise of several of them.

27. In present-day melancholic "postmodernity", the purposes of the State, basically identified, in the long run, with achieving the common good. The common good is the good of all (including those left out at present) and not the good of just some. This takes us back to the historical origins, both of the national State, that exists for the human being —and not the other way round— and of International Law itself, that was not originally a strictly interstate law, but rather the *law of nations*.[35] Achieving the common good implies that all States guarantee all the individuals under their respective jurisdictions conditions allowing them to live with dignity.

VI. Right to life and Cultural Identity.

28. The right to life is, in the instant case of the *Sawhoyamaxa Community*, viewed in its close and unavoidable connection with cultural identity. Such identity is formed *over time*, along the historical development of community life. Cultural identity is a component of, or an addition to, the fundamental right to life in its wider sense. As regards members of indigenous communities, cultural identity is closely linked to their ancestral lands. If they are deprived of them, by means of forced displacement, it seriously affects their cultural identity, and finally, their very right to

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[34]. Joint Dissident Opinion of Judges A.A. Cançado Trindade and M.E. Ventura-Robles, paras. 11-13.

[35]. A.A. Cançado Trindade, "General Course on Public International Law - International Law for Humankind: Towards a New *Jus Gentium*", *in Recueil des Cours de l'Académie de Droit International* (2005), capítulos I-XXVII, 997 pages (in print).

life *lato sensu*, that is, the right to life of each and every member of each community.

29. In its *jurisprudence constante*, this Court has underscored the fundamental character of the right to life, even for the enjoyment of all the other rights,[36] and has noticed that its observance appears in "special ways" in certain circumstances[37], particularly when the individuals in question are found in a situation of serious vulnerability. That is precisely what happens in the instant case, where the Court failed to reason further —as it should have— on the fundamental right to life in the socially marginal and abandonment circumstances of the *cas d'espèce*.

30. In its final arguments brief, of February 16, 2006, in the instant case of the *Sawhoyamaxa Community*, the representatives of the victims pointed out that

> "Not being allowed to live on their land has prevented members of the Community, among other practices, from burying their dead pursuant to their rites and beliefs."[38]

Their cultural identity has thus been seriously affected. Living on their ancestral lands is essential to cultivate and preserve their values, including communication with their forebearers.

31. With regard to this, in my long Separate Opinion (paragraphs 60-61) in the case of *Moiwana Community v. Suriname* (Judgment of 06.15.2005), I allowed myself to recall that respecting the relationships between the living and their dead was present in the very origins of the law of nations, as asserted by H. Grotius, in the XVII century, in chapter XIX of book II of his classic work *De Jure Belli ac Pacis* (1625), dedicated to "the right of burial", which is inherent to all human beings, as a precept of "virtue and humanity."[39] And the *principle of humanity* itself, - as rightly remembered by erudite legal philosopher G. Radbruch, - owes a lot to ancient cultures, having been associated, *over time*, with the very spiritual formation of human beings[40].

32. In my next Separate Opinion (of February 8, 2006), in the same *Moiwana Community* case (Interpretation of Judgment), I insisted on the need for reconstruction and preservation of cultural identity (paragraphs 17-24), on which *the project of life and the project of after-life* of each member of the community largely depends; the *universal juridical conscience* – I added – has evolved in such a manner that it recognizes this urgent need, as illustrated in

> "the significant triad of the Conventions of UNESCO, formed by the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage; the 2003

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[36]. In its Judgments, for example, in the cases of the *"Street Children" (Villagrán-Morales et al.*, 1999), *Bulacio* (2003), *Juan Humberto Sánchez* (2003), *Myrna Mack Chang* (2003), *"Juvenile Reeducation Institute"* (2004), *19 Merchants* (2004), *Huilca Tecse* (2005).

[37]. IACHR, *Case of the Gómez-Paquiyauri Brothers* (2004), para. 124.

[38]. Page 48 of said brief.

[39]. H. Grocio, *Del Derecho de la Guerra y de la Paz* [1625], volume III (books II and III), Madrid, Edit. Reus, 1925, pages 39, 43 and 45, and cf. page 55.

[40]. G. Radbruch, *Introducción a la Filosofía del Derecho*, 3rd. ed., Mexico/Buenos Aires, Fondo de Cultura Económica, 1965, pages 153-154.

> Convention for the Safeguarding of the Intangible Cultural Heritage,, and more recently, the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.
> The 1972 UNESCO Convention warns in its preamble that the deterioration or disappearance of any item of the cultural or natural heritage regrettably weakens the cultural heritage of 'all the nations of the world', because that heritage is of the most significant interest and needs to be preserved as a 'part of the world heritage of mankind as a whole'; and from there on to establish 'an effective system of collective protection of the cultural and natural heritage of outstanding universal value.''[41] The 2003 UNESCO Convention seeks the safeguard of the *intangible cultural heritage* (for this it invokes the international instruments on human rights), and conceptualizes this latter as 'the practices, representations, expressions, knowledge, skills (...) that communities, groups, and in some cases individuals, recognize as part of their cultural heritage'[42].
> The recent 2005 UNESCO Convention was preceded by its 2001 Universal Declaration on Cultural Diversity, which conceptualizes cultural diversity as the *common heritage of humanity*, and it expresses its aspiration for greater solidarity on the basis of recognition of cultural diversity, of the 'awareness of the unity of humankind'[43]. After the 2001 Declaration, the 2005 Convention, which was adopted (10.20.2005) after debates in depth[44], reaffirmed the idea of cultural diversity as a *common heritage of humanity*, explaining that "culture takes diverse forms across time and space" and this diversity is incorporated `in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies making up humanity'[45]. The Convention added that cultural diversity can only be protected and promoted through the safeguard of human rights[46].
> It is my understanding that the universal juridical conscience has evolved towards a clear recognition of the relevance of cultural diversity for the universality of human rights, and vice-versa. Additionally, it has evolved toward the *humanization* of International Law, and the creation, at this beginning of the XXI century, of a new *jus gentium*, a new International Law for humankind, and the aforementioned triad of UNESCO Conventions (of 1972, 2003, and 2005) are in my view one of the many contemporary manifestations of the human conscience to this effect."[47] (paragraphs 21-24).

33. Even before the adoption of the last two Conventions of the above mentioned triad, there was already an understanding at UNESCO that the affirmation and preservation of cultural identity, including that of minorities, contributes to the "liberation of peoples":

> "Cultural identity is a treasure which vitalizes mankind's possibilities for self-fulfillment by encouraging every people and every group to seek nurture in the past, to welcome

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41. *Whereas clauses* 1 and 5.

42. Preamble and Article 2(1).

43. Preamble and Article 1 of the 2001 Declaration.

44. Cf., for example, UNESCO/General Conference, document 33-C/23, of 08.04.2005, pages 1-16, and Annexes; and cf. G. Gagné (ed.), *La diversité culturelle: vers une Convention internationale effective?*, Montréal/Québec, Éd. Fides, 2005, pages 7-164.

45. Preamble, *whereas clauses* 1, 2 and 7 of the 2005 Convention.

46. Article 2(1) of the 2005 Convention. Cf., in general, for example, A.Ch. Kiss and A.A. Cançado Trindade, "Two Major Challenges of Our Time: Human Rights and the Environment", *in Human Rights, Sustainable Development and Environment* (Seminar of Brasilia of 1992, ed. A.A. Cançado Trindade), 2nd. ed., Brasilia/San José de Costa Rica, IIDH/BID, 1995, pages 289-290; A.A. Cançado Trindade, *Direitos Humanos e Meio Ambiente: Paralelo dos Sistemas de Proteção Internacional*, Porto Alegre/Brasil, S.A. Fabris Ed., 1993, pages 282-283.

47. Cf. A.A. Cançado Trindade, "General Course on Public International Law - International Law for Humankind: Towards a New *Jus Gentium*", *Recueil des Cours de l'Académie de Droit International de la Haye* (2005), ch. XIII (in print).

> contributions from outside compatible with their own characteristics, and so to continue the process of their own creation."[48]

An attack against cultural identity, as is the case with the *Sawhoyamaxa Community*, is an attack against the right of life *lato sensu*, the right to live, with the *aggravating* circumstances of those who actually died. A State cannot release itself from the due diligence duty to safeguard the right to live[49].

34. May I now move beyond and into the field of legal deontology. As I asserted last year (2005) in my "*General Course on Public International Law*", at the International Law Academy of the Hague, humanity as such has emerged as a subject of International Law[50]. Unfortunately, humanity can be victimized, and has therefore marked its presence, of late, in the most lucid jusinternationalist doctrine. Thus, I believe that the big challenge for legal writers who belong to the new generations lies in conceiving and formulating the conceptual construction of the legal representation of humanity as a whole (encompassing both present and future generations), seeking to consolidate its international juridical personality, against the backdrop of the new *jus gentium* of our times[51].

VII. The suffering of the Innocent and the Central Position of the Abandoned Victim as a Subject of International Human Rights Law.

35. The instant case of the *Sawhoyamaxa Community* reveals the central position not of the State that invokes circumstances presumably extenuating its responsibility, but rather of the victims that, in a situation of high vulnerability, even though they are surviving in conditions of total want, and virtual abandonment, have managed to have their case examined by an international human rights court in order to determine the responsibility of the State in question. The central position of the victims, in the most adverse of circumstances, as subjects of *International Human Rights Law*, sheds light on their *right to Law,* their right to justice under the Inter-American Convention, which includes the right to judicial protection (Article 25), together with the right to a fair trial (Article 8). Such right encompasses full jurisdictional protection, all the way down to the strict compliance with the

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48. J. Symonides, "UNESCO's Contribution to the Progressive Development of Human Rights", 5 *Max Planck Yearbook of United Nations Law* - Heidelberg (2001) page 317. Regarding the projection of culture in time, cf., for example, A.Y. Gurevitch, "El Tiempo como Problema de Historia Cultural", in *Las Culturas y el Tiempo*, Salamanca/Paris, Ed. Sígueme/UNESCO, 1979, pages 261-264, 272 and 280.

49. Cf., for example, [Several Authors,] *Actes du Symposium sur le droit à la vie - Quarante ans après l'adoption de la Déclaration Universelle des Droits de l'Homme: évolution conceptuelle, normative et jurisprudentielle* (eds. D. Prémont and F. Montant), Genève, CID, 1992, pages 1-91; J.G.C. van Aggelen, *Le rôle des organisations internationales dans la protection du droit à la vie*, Bruxelles, E. Story-Scientia, 1986, pages 1-89; [Several authors,] *The Right to Life in International Law* (ed. B.G. Ramcharan), Dordrecht, Nijhoff, 1985, pages 1-314. – The great Romanian dramatist Eugène Ionesco held that "in nuestro mundo desespiritualizado, la cultura es todavía lo último que nos permite sobrepasar el mundo cotidiano y reunir a los hombres. La cultura une a los hombres, la política los separa"; E. Ionesco, *El Hombre Cuestionado*, Buenos Aires, Emecé Ed., 2002 [reed.], page 34.

50. As can be deduced, for example, from the content of some international instruments, especially in the fields of international environmental law, outer space law and international law of the sea, as well as from the case law of *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda.

51. A.A. Cançado Trindade, "General Course on Public International Law - International Law for Humankind: Towards a New *Jus Gentium*", *in Recueil des Cours de l'Académie de Droit International de la Haye* (2005), ch. XI (in print).

international Judgment (the right to access international justice *lato sensu*), duly backed by legal thinking and grounded in the law applicable to the *cas d'espèce*. Article 25 of the Inter-American Convention is in effect a pillar of the Rule of Law in a democratic society, closely related to the right to a fair trial (Article 8), duly expressing the universally recognized general principles of law, that are part of international *jus cogens*.

36. As I pointed out in my recent Separate Opinion in the Case of the *Pueblo Bello Massacre v. Colombia* (Judgment of January 31, 2006),

> "My contention that Articules 25 and 8 of the Inter-American Convention cannot be dissociated (*supra*) implies characterizing access to justice, understood as its *full enforcement*, as part of *jus cogens*, that is that the full scope of all the rights to judicial protection and to a fair trial in the sense of Articles 25 and 8 *taken as a whole* is intangible as a matter of *jus cogens*. There can be no doubt that fundamental guarantees, common to International Human Rights Law and International Humanitarian Law, are meant for universal enforcement in all and any circumstances, are imperative law (being part of *jus cogens*), and impose *erga omnes* protection obligations.
> In the wake of its historical Advisory Opinion OC-18/03 on "Legal Status and Rights of Undocumented Migrants" in 200352, the Court could have already taken that other qualitative leap forward in its case law. I dare entertain the hope that the Court will do it as soon as possible if it really goes ahead with its ground-breaking case-law, —instead of trying to halt it— and makes more headway after the advance achieved with solid grounds and courage in its abovementioned Advisory Opinion number 18 along the line of the ongoing expansion of the substantive contents of *jus cogens*" (paras. 64-65).

This is the construction emancipating the human being that I uphold, with the aim of putting an end either to the highhandedness, or to the omissions, or to the lack of due diligence on the part of the State, the role of which is to guarantee the rights of all the individuals under its jurisdiction.

37. Seven years after the Judgment on the Merits by this Court in the paradigmatic case of the *"Street Children" (Villagrán Morales et al.) v. Guatemala,* Judgment of September 19, 1999,[53] the abandoned, the forgotten of this world once again reach an international human rights court in quest for justice, in the cases of the members of the *Yakye Axa* (Judgment of June 17, 2005) and *Sawhoyamaxa* (the instant Judgment) *Communities*. In the *cas d'espèce*, the people forcibly displaced from their homes and their ancestral lands, and socially marginalized and excluded, have actually reached an international jurisdiction before which they have finally found justice.

38. A decade ago, in the Judgments of this Court on preliminary objections of January 30 and 31, 1996, in the cases of *Castillo Páez* and *Loayza Tamayo*, respectively, regarding Perú, I advanced, in my Separate Opinions, the following considerations, which were followed by the changes amended into the third and fourth (and current) Rules of the Court, that today —as I always upheld— grants the petitioners *locus standi in judicio* in all the stages of the adjudicatory proceedings before the Court:

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[52]. In which the Court upheld that the equality and the non-discrimation principles are part of international *jus cogens*.

[53]. And also cf. the Judgment on reparations in the same case, of May 26, 2001.

> "(...) Without the *locus standi in judicio* of both parties any system of protection finds itself irremediably mitigated, as it is not reasonable to conceive rights without the procedural capacity to vindicate them directly.
> In the universe of the international law of human rights, it is the individual who alleges violations of his human rights, who alleges having suffered damages, who has to comply with the requirement of prior exhaustion of domestic remedies, who actively participates in an eventual friendly settlement, and who is the beneficiary (he or his relatives) of eventual reparations and indemnities. (...)
> In our regional system of protection, the spectre of the persistent denial of the procedural capacity of the individual petitioner before the Inter-American Court, a true *capitis diminutio*, arose from dogmatic considerations, belonging to another historical era, which tended to avoid his direct access to the international judicial organ. Such considerations, in my view, in our time lack support or meaning, even more so when referring to an international tribunal *of human rights.*
>
> In the inter-American system of protection, *de lege ferenda* one gradually ought to overcome the paternalistic and anachronistic conception of the total intermediation of the Commission between the individual (the true complaining party) and the Court, according to clear and precise criteria and rules, previously and carefully defined. In the present domain of protection, every international jurist, faithful to the historical origins of his discipline, will know to contribute to the rescue of the position of the human being as a subject of international law (*droit des gens*), endowed with international legal personality and full capacity" (paras. 14-17).

39. In that same year 1996 such *locus standi* was granted at the stage dealing with reparations, under the third amendment to the Rules of the Court of which I was the Rapporteur, and four years later, under the fourth amendment of the Rules of the Court (2000), adopted during my term as President of the Court, such *locus standi* was extended to the petitioners at all stages of the proceedings before the Court. In effect, the international legal entity of human persons necessarily entails the legal capacity to act, to claim their rights, at the international level. This is materialized through their direct access —understood *lato sensu*— to international justice, which implies a true right to Law *(droit au Droit)*. Consolidation of their legal capacity marks the emancipation of individuals from their own State, which is illustrated by their *jus standi* before the international human rights courts (something which is a reality before the European Court). The right to access (lato sensu) international justice has finally crystalized as the right to have justice really done at the international level.

40. At the time when the (1996) third Rules of the Court were already in force in the Judgment of the Court (on preliminary objections) in the Case of Castillo Petruzzi et al. v. Perú, of September 4, 1998, in an extensive Concurring Opinion I allowed myself to highlight the fundamental nature of the right of individual petition (Article 44 of the American Convention) as "the cornerstone of the access of the individuals to the whole mechanism of protection of the American Convention" (paras. 3 and 36 – 38). By means of such right of individual petition, "a definitive conquest of the International Law of Human Rights" the "historical rescue of the position of the human being as subject of the International Law of Human Rights, endowed with full international procedural capacity" (paras. 5 and 12).

41. After reviewing the *historia juris* of such right of petition (paras. 9-15), I dwelt on the expansion of the notion of "victim" in international case law under the human rights treaties (paras. 16-19), as well as on the autonomy of the right of individual petition *vis-à-vis* the domestic law of the States (paras. 21 and 29), and added:

> "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.
> (…) Had it not been for the access to the international instance, justice would never have been done in their concrete cases. (…)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, the last hope of those who did not find justice at national level. (…) The right of individual petition is undoubtedly the most luminous star in the universe of human rights". " (paras. 33 and 35).

42. Since the jurisdictional solution constitutes the "most perfected and evolved" way to protect human rights, I held is the aforementioned Concurring Opinion that individuals have the right of direct access [to the Court] independently of the acceptance of an optional clause" such as that in Article 62 of the Inter-American Convention Human Rights, by their respective States (para. 40). That is to say, in my opinion both the right of individual petition and the jurisdiction of the Inter-American Court should be automatically mandatory for all States Parties to the Inter-American Convention (para. 41). And, I next considered that

> "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), but rather the right of direct access of individuals before the Court itself (jus standi), so as to bring a case directly before it, as the sole future jurisdictional organ for the settlement of concrete cases under the American Convention. To that end, individuals would do without the Inter-American Commission, which would, nevertheless, retain functions other than the contentious one[54], prerogative of the future permanent Inter-American Court.[55]
> (...)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[56] in other cases before the Court, - 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.
> The jurisdictionalization 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

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54 Such as undertaking missions for *in loco* observation and the reporting.

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

56. *Cf*., en that sense, my Separate Opinions in the cases of *Castillo-Páez* (Preliminary Objections, Judgment of January 1, 1996), paras. 14-17, and *Loayza-Tamayo* (Preliminary Objections, Judgment of 31.01.1996), paras. 14-17, respectively.
Cf.

> jurisdictional mechanism of protection of human rights, without which such mechanism will be irremediably mitigated.
> (...)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.
> 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" (paras. 42-46).

43. In 2001, I drafted and submitted, in my capacity as President and Rapporteur of the Court, to the Organization of American States (OAS), as the next stride to be taken isn such direction (and as I have been insisting for some time), a proposal to grant *jus standi* to individuals, so that they be able to file their claims directly before the Court, under the form of a basis for a Draft Protocol to the American Convention on Human Rights to strengthen its mechanism for protection[57]. I consider it is essential for the advances in the rules be consolidated into such a Protocol, to avoid future involutions and to secure a real commitment by the States Parties, on the basis of a treaty, with the cause of internationally protected human rights[58].

44. As I purported in my speech of June 10, 2003 to the OAS General Asambly in Santiago de Chile59, the Inter-American Court, in its procedural and case law evolution, has made a relevant contribution to "consolidating the new paradigm of International Law, the new *jus gentium* of 21st century, holding the human being to have international rights independently"[60]. The Draft Protocol I drew up and submitted to the OAS has invariably been on the agenda of the OAS General Assembly (as appearing from the Sessions held in San José de Costa Rica in 2001, in Bridgetown/Barbados in 2002, in Santiago de Chile in 2003, and in Quito in 2004), and is still present in the OAS pertinent 2005-2006 documents[61]. I hope for it to bear real fruit in the near future.

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[57]. A.A. Cançado Trindade, "Basis for a Draft Protocol to the American Convention on Human Rights to Strengthen its Mechanism for Protection" - Volume II, San José de Costa Rica, Inter-American Court of Human Rights, 2001, pages 1-669 (2nd ed., 2003).

[58]. Cf. A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pages 9-104; A.A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos in el Siglo XXI*, Santiago, Editorial Jurídica de Chile, 2001, pages 15-455 (2a. ed., 2006). And cf. A.A. Cançado Trindade, "El Nuevo Reglamento de la Corte Interamericana de Derechos Humanos (2000) and Su Proyección Hacia el Futuro: La Emancipación del Ser Humano como Sujeto del Derecho Internacional", *in XXVIII Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* - OAS (2001) pages 33-92.

[59]. Shortly after an historical session away from headquarters of the Inter-American Court had teken place in that city.

[60]. Cf. *Speech [by the President of the Inter-American Court of Human Rights, Judge Antônio A. Cançado Trindade], to the XXXIII General Assembly of the Organization Of American States (OAS) (Santiago de Chile, June, 2003) - Actas and Documentos*, vol. II, Washington D.C., Secretaría General de la OAS, pages 168-171.

[61]. OAS, document AG/RES.2129 (XXXV-0/050), del 07.06.2005, pages 1-3; OAS, document CP/CAJP-2311/05/Rev.2, del 27.02.2006, pages 1-3.

45. In mi Concurrent Opinion in the first adjudicatory case that fully proceeded under the new fourth Rules of the Court, that of the Five Pensioners v. Peru (Judgment of February 28, 2003), I considered, along the same line of thought, that

> "In fact, the assertion of those juridical personality and capacity constitutes the truly revolutionary legacy of the evolution of the international legal doctrine in the second half of the 20th century. The time has come to overcome the classic limitations of the legitimatio ad causam in International Law, which have so much hindered its progressive development towards the construction of a new jus gentium. An important role is here being exercised by the impact of the proclamation of human rights in the international legal order, in the sense of humanizing this latter: those rights were proclaimed as inherent to every human being, irrespectively of any circumstances[62].

Statements in this sense are to be found in recent precedents of this Court, not only adjudicatory, but advisory as well, for example its Advisory Opinion No. 17 on the Juridical Condition and Human Rights of the Child (of August 28, 2002), which went along the line of affirming the legal emancipation of the human being by emphasizing the consolidation of children as persons before the law, as true subjects in law and not simple objects of protection; that was the *Leitmotiv* permeating all the Advisory Opinion No. 17 of the Court[63].

46. Before that, the aforementioned adjudicatory leading case of the *"Street Children " (Villagrán Morales et al.) v Guatemala*, 1999-2001) revealed the importance of direct access of individuals to international jurisdiction, enabling them to vindicate their rights against the acts of arbitrary power, and giving an ethical content both to the internal public law rules and to those of international law. The relevance of such right appeared clearly in the proceedings of that historical case, wherein the mothers of the murdered minors, as poor and bereft as their children, accessed international jurisdiction and appeared before the Court[64] and, thanks to the Judgments on the merits and reparations of this Court[65], that protected them, they could at least regain faith in human Justice[66].

47. Four years later, the case of the Juvenile Reeducation Institute v. Paraguay showed once more, as I pointed out in my Separate Opinion (paras. 3-4), that the human being, even in the most adverse of conditions, barges in as a subject of International Human Rights Law, endowed with full international legal and procedural capacity. The Judgment of the Court in the latter case duly recognized the high relevance of the historical amendments introduced by the Court in its current Rules

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62 Not so long ago I recalled what I had purported then in my Concurring Opinion (para. 7) on Provisional Protection Measures in the case of two *Children and Adolescents Deprived of their Freedom in the Tatuapé FEBEM Complex v. Brasil* (Order of November 30, 2005).

63. And eloquently affirmed in paragraphs 41 and 28 therein.

64. Public Hearings of January 28-29, 1999 and March 12, 2001 before this Court.

65. Of November 19, 1999 and of May 26, 2001, respectively.

66. In my extensive Separate Opinion (paras. 1-43) in that case (Judgment on reparations, of May 26, 2001), I made precisely that point, besides another one that has been so far practically unexplored by interntional legal scholars and case law, to wit: the triad of victimization, human suffering and victim rehabilitation.

(paras. 107, 120-121 and 126), in force as from 200167, in favor of the individuals as holders of the protected rights, granting them *locus standi in judicio* at all stages of the adjudicatory procedure before the Court. The aforementioned cases of the "Street Children" and of the Juvenile Reeducation Institute bear eloquent testimony of such right holders affirming and exercising their personality before this Court, even in the direst of circumstances[68].

48. During the last five years, individual petitioners have come to participate actively in all the stages of the adjudicatory proceedings before the Inter-American Court, with very positive results during these last three years. Furtehrmore, the have also come to participate most actively in the consulting proceedings as well, as is illustrated by the developments related to the history-making Advisory Opinion No. 16, on the Right to Information on Consular Assistance in the Framework of the Guarantees of the due Process of Law (of October 1, 1999), and Advisory Opinion No. 16, on the Juridical Condition and Rights of the Undocumented Migrants (of September 17, 2003).

49. Direct participation by individuals in all the procedures before the Court, has not been limited to adjudicatory cases and advisory opinions. It has likewise extended to provisional measures of protection, in cases with which the court was already seized, starting with the cases of the Constitutional Court (2000), and of Loayza-Tamayo (2000), both concerning Peru. The foregoing shows, not only the feasibility, but also the importance of the individual accessing directly, with no intermediaries, the Inter-American Court of Human Rights, more so in an extremely serious and urgent situation. We are, actually, in the midst of a historical, and legally revolutionary, process where an early 21st century *ius gentium* new paradigm is in the making.

50. The instant case of the Sawhoyamaxa Indigenous Community, preceded by the case of the Indigenous Community Yakye Axa, are inscribed along the lines of the emancipation of human beings *vis-à-vis* his own State so that they may lay claim to the rights inherent to them that, furthermore precede and supersede such State. The members of the aforementioned indigenous communities, abandoned on the roadside, had their case examined and solved (albeit not in a fully satisfactory way) by an international tribunal such as the Inter-American Court of Human Rights. Perhaps such a universal human conscience development could not have been anticipated by the so-called "realists" a few years back. Something has actually changed in the world, and in this particular matter, for the better.

51. The impact of International Human Rights Law seems to have awakened human conscience to the suffering of those abandoned on the streets and roadsides of the world. Human beings start understanding that they cannot live in peace with themselves in the face of the silent suffering of others, including those around them.

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[67]. Cf., on the matter, A.A. Cançado Trindade, "Le nouveau Règlement de la Cour Interaméricaine des Droits de l'Homme: quelques réflexions sur la condition de l'individu comme sujet du Droit international", *in Libertés, justice, tolérance - Mélanges in hommage au Doyen G. Cohen-Jonathan*, vol. I, Bruxelles, Bruylant, 2004, pages 351-365.

[68]. As, in the case of the *"Juvenile Reeducation Institute"*, the ones suffered by the inmates of the "Panchito López", Institute, even in the midst of three fires (wherein inmates were injured or dead by burning), and further facing the legal standing limitations by reason of their being children (under age), even so, their *entitlement* to rights directly inuring to them from international law remained intact, and their case reached an international human rights court.

It is possible, and so I hope, that, by means of the instant Judgment of the Court, the "dark night [69]" of the members of the Sawhoyamaxa Community be drawing to an end. The respondent State showed signs, in parts of both the briefs it filed with the Court in the instant case, of its disposition to comply faithfully with the Judgment of the Court.

52. Human suffering still is a mystery interwoven into the existence of each and every one of us. Though the centuries, it has been reflected upon by theologists, philosophers, and writers (and, on a lower scale, even by jurists). However, in my view, they have not achieved a convincing explanation, or found a satisfactory answer to its presence all along human existence. Some —mostly theologists and philosophers— have found some consolation in dwelling on its temporary or passing character (given the brief time span life tends to have), and the quest for transcendental support to withstand it.

53. But how can we explain the suffering of innocent children? How can we understand the fate of a child born on the roadside, who fleetly passes through this life and the dies on the same roadside? More than an absurdity, it is a great injustice, a suffering caused by man to his fellow men. Great part of human suffering is caused by man; that was what was pointed out, for example, by C.S. Lewis in his study on The Problem of Pain (1940), wherein he reminds us the views by Aristotle and Thomas Aquinas on the importance of knowing the existence of evil, in order to face it and not letting it take over [70]. Almost a century before that, in his considerations On the Suffering of the World (1850), A. Schopenhauer warned on the sad predicament of those who "lived tormented lives in poverty and wretchedness, without recognition, without sympathy", while all the advantages and benefits "went to the unworthy"[71], —in order to express his own lack of conformity with such a situation:

> "(...) Existence is typified by unrest. In such aworld, where no stability of any kind, no enduring state is possible, where everything is involved in restless change and confusion and keeps itself on its tightrope only by continually striding forward, — in such a world, happiness is not so much as to be thought of 72."

54. It would be hard to find an explanation for human suffering. Those intellectually honest are likely to spend their life searching for it, and this search is all they may aspire to do. Recently a 91-years-old theologist decided to make public an account of the personal dialogues he had with Albert Camus, 40 years after the tragic death of this great 20th century writer, an agnostic and profound researcher on the human soul. In his account, he told of the desperate, and fruitless, search by A. Camus (moved by his faith, more human than religious) for an explanation of the unfortunate human condition, and of his outburst once:

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[69]. To paraphrase the famous meditations by St. John of the Cross, in the 16th century.

[70]. C.S. Lewis, *The Problem of Pain*, N.Y., Harper Collins, 1996 [reed.], pages 123-124, and cf. pages 86 and 117.

[71]. A. Schopenhauer, *On the Suffering of the World*, London, Penguin, 2004 [rred.], page 132.

[72]. *Ibid*., page 18.

> "The silence of the universe led me to the conclusion that the world is meaningless. This silence points to the evils of war, poverty and the suffering of the innocent. (...) All I can do is write about it and keep writing about it [73]."

After transcribing these words by A. Camus, the abovementioned theologist added that "one of the hardest problems facing human beings is the existence of evil. It is not an exclusively religious problem. Any feeling person is disturbed by evil and by pain [74]."

55. I could not avoid giving, in this Separate Opinion, recognition to the suffering of the silent victims in the instant case of the Sawhoyamaxa Community — as well as those of the previous related case of the Indigenous Community Yakye Axa — and addressing, in particular, the memory of the innocent who lost their lives along a roadside, and the pain of their surviving next of kin who survive, along the same roadside, in the distress imposed on them by human greed and stinginess. As I pointed out in my Separate Opinion in the Judgment on reparations int he case of the *"Street Children " (Villagrán Morales et al.) v Guatemala*, Judgment of May 26, 2001, the triad formed by victimization, human suffering and rehabilitation of the victims has not been sufficiently considered by contemporary international legal experts and in contemporary international case law, and there is a pressing need to do so, based on the integrality of the personality of the victims (paras. 2-3 and 23 of the Opinion), taking into account even their cultural identity.

56. In the same Separate Opinion in the Case of the "Street Children" (reparations), I also noted that:

> "(...) 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* (...). 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 next of kin, who, furthermore, are forced to live with the great pain inflicted by the silence, the indifference and the oblivion of the others." (para. 22).

57. Thanks to the existence of international human rights jurisdiction, the silence of the innocent in the instant case, has, however, echoed at the international level. The instant case of the Sawhoyamaxa Community shows that their legal entity and capacity were affirmed and exercised beyond question. This is particularly meaningful in the circumstances of the case, dealing with members of an indigenous community.

VIII. Final Considerations.

1. The Rights of the Indigenous Peoples in the Formation and the Development of the Law of Nations (Jus Gentium).

58. In recent years, draft declarations and studies are being developed in the framework of international organizations (both the United Nations and the

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73. Quoted in H. Mumma, *Albert Camus e o Teólogo*, São Paulo, Carrenho Edit., 2002, page 30.

74. *Ibid*., pages 31-32.

Organization of American States — OAS), tending to recognize the *jus standi* of the indigenous peoples (either before the conventional human rights organs of the United Nations, or before international human rights tribunals — the Inter-American Court or the European Court). In the context of the assertion of the international legal personality of the members of the indigenous communities, and of their practicing their international legal capacity, their rights to their ancestral lands have acquired special importance[75].

59. It has been suggested that such endeavors have resulted from an ethical imperative, in order to acquit a historical debt the international community feels it owes the indigenous peoples, to make up for the injustices caused them at both the material and spiritual levels. More so than in the case of other minorities, awakening human conscience, universal legal conscience, to the need for enshrining the *jus standi* of the indigenous peoples takes the form of a true ethical imperative to acquit an historical social debt[76]. It is therefore not at all surprising that studies oriented towards the protection of the rights of the indigenous peoples are currently spawning in the most encouraging way[77.]

60. The breaches of the human rights of the indigenous peoples, and the reparations due them are to be found, in fact, at the roots of the historical process whereby the law of nations, *jus gentium*, was formed. The renowned *Relecciones Teológicas* by Francisco de Vitoria, specifically the famous *De Indis — Relectio Prior* (1538-1539), as well as the *Tratados Doctrinales* (1552-1553) by Bartolomé de las Casas, provide overwhelming evidence thereof, dating back to the 16th century. Both authors developed their solid arguments in defense of the rights of the indigenous peoples on the grounds provided by natural law.

61. In his renowned 16th century *Relecciones*, F. de Vitoria insisted on the need of faithfully observing the humanity principle (recalling comments by Cicero), to face the "many atrocities and cruelties well beyond all humanity "[78.] F. de Vitoria affirmed that indigenous people may not be prevented from “having true and lawful

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[75]. A. Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, Antwerpen/Groningen, Intersentia-Hart, 2001, page 227, and cf. pages 134, 172, 175 and 213.

[76]. *Ibid*., pages 228 and 232-233.

[77]. Cf., *inter alia*, for example, R. Stavenhagen and D. Iturralde, *Entre la Ley y la Costumbre - El Derecho Consuetudinario Indígena in América Latina*, México, Instituto Indigenista Interamericano/IIDH, 1990, pages 15-388; R. Stavenhagen, *Derecho Indígena y Derechos Humanos in América Latina*, México, El Colegio de México/IIDH, 1988, pages 9-353; A.A. An-Na'im, *Human Rights in Cross-Cultural Perspectives - A Quest for Consensus*, Philadelphia, University of Pennsylvania Press, 1992, pages 189-384; P. Thornberry, *International Law and the Rights of Minorities*, Oxford, Clarendon Press, 1992, pages 329-382; P. Thornberry, *Indigenous Peoples and Human Rights*, Manchester, University Press/Juris Publ., 2002, pages 1-429; P. Pérez-Sales, R.B. Herzfeld and T. Durán Pérez, *Muerte and Desaparición Forzada in la Araucanía - Una Aproximación Étnica*, Santiago de Chile, Ed. LOM/Universidad Católica de Temuco, 1988, pages 7-300; S.J. Anaya, *Indigenous Peoples in International Law*, 2a. ed., Oxford, University Press, 2004, pages 3-291; N. Rouland, S. Pierré-Caps and J. Poumarède, *Direito das Minorias e dos Povos Autóctones*, Brasilia, Edit. Universidad de Brasilia, 2004, pages 9-608; J. Castellino and N. Walsh (eds.), *International Law and Indigenous Peoples*, Leiden, Nijhoff, 2005, pages 89-116 and 249-267; S. Tristán Donoso, *Régimen de Propiedad de Pueblos Indígenas*, Panamá, Centro de Asistencia Legal Popular, 1993, pages 3-62; J.E.R. Ordóñez Cifuentes (coord.), *Análisis Interdisciplinario de la Declaración Americana de los Derechos de los Pueblos Indígenas*, México, UNAM, 2001, pages 1-160.

[78]. Cf. F. de Vitoria, *Relecciones del Estado, de los Indios y del Derecho de la Guerra*, 2a. ed., México, Ed. Porrúa, 1985 [reed.], pages 95-96 and 98-99.

ownership, be it private, public or political", and added that the essential purpose of Law is

> "the dignity of the individual as a rational being. Men come to be moral persons and subjects able to of have rights and obligations due to their rationality, for, by using their rational capacity and their consequent freedom, they acquire control over their own actions and are also free to choose their own destiny (...). Rational capacity is, therefore, at the root of the formal grounds making man capable of acquiring dominion and rights."79

62. Eloquent in his defense of natural law[80], F. de Vitoria contended that natural law conforms to *recta ratio*, being therefore derived from reason and not from will and aimed at achieving common good above all[81.] As I pointed out in a recent book, even long before F. Vitoria, *recta ratio* was very well apprehended into a notion by Plato and Aristotle and later, unsurpassedly, by Cicero and Tomás Aquinas, to be right afterwards duly placed at the foundations of *jus gentium*, precisely by F. Vitoria, besides F. Suárez and H. Grotius[82]. In effect, the common good imperative is deeply rooted in the thinking of Francisco de Vitoria, for whom it constitutes a "superior purpose" of the *civitas maxima*, and the very evolution of the law of nations shall be the "collective work of the human community " as a whole[83].

63. On his part, Bartolomé de las Casas, in his Doctrinal Treatises, written in the same 16th century, denounced the "depopulation of over two thousand leagues of land", carried out with "cruelty and inhumanity" by "the Spanish in the Indies", brought about "the perdition and death of an infinite number of peoples,"[84] in addition to the

> "destruction of their State and of all of the well-being of that world, and against the right of private individuals, and against natural law, taking away and robbing and tyrannizing not only property, but also the freedom, the lives and the people to give them to others."[85]

64. According to the teachings of B. de las Casas, no person can lawfully dispossess others, do others such wrong, thus infringing natural law and the law of nations.[86] This prompted the author to make a distinction between the primary law

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79. T. Urdanoz (ed.), Obras de Francisco de Vitoria - Relecciones Teológicas (Francisco de Vitoria's Works, Theological Lectures), Madrid, BAC, 1960, page 521, and cf. page 552.

80. Cf. *ibid*., pages 564 and 675.

81. F. de Vitoria, *La Ley* [*De Lege - Commentarium in Primam Secundae*, 1533-1534], Madrid, Tecnos, 1995 [reed.], pages 5, 23 and 77. On *recta ratio* as the ultimate grounds of *jus gentium*, cf. A.A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brasil, Edit. Del Rey, 2006, pages 3-29.

82. A.A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brasil, Edit. Del Rey, 2006, pages 3-29.

83. Yves de la Brière, "Introduction", *in Vitoria et Suarez - Contribution des théologiens au Droit international moderne*, Paris, Pédone, 1939, pages 5 and 10.

84. B. de las Casas, Tratados (Treatises), Volume I, Mexico, Fondo de Cultura Económica, 1997 [reed.], page 219

85. B. de las Casas, Tratados (Treatises), Volume II, Mexico, Fondo de Cultura Económica, 1997 [reed.], page 761.

86. Ibid., Volume II, page 1249.

of nations —to preserve compacts, freedom and common good— and the secondary law of nations —facing "the evil of men", wars and captivity.[87] The role of each agent of public authority, —he added,— should be to enable all rational creatures to "attain their purpose" (especially, the spiritual one) as a human being.[88] When expressing his indignation at the depopulations, slaughters, bondages, and other cruelties perpetrated against indigenous people, B. de Las Casas —like F. de Vitoria,— expressly invoked right reason and natural law.[89]

65. The penetrating discourses of F. Vitoria and B. de las Casas in the 16th century continue to echo in the human conscience and are, sadly, topical issues today.[90]. With the passing centuries, the victimizers changed, but the victims are still the same, the indigenous peoples in a situation of high vulnerability, as it is illustrated by the instant case of the Sawhoyamaxa Community in this early 21st century. Yet, human conscience has evolved to the point that in this time and day it makes a difference: there exists an international human rights jurisdiction, the last hope for those excluded and forgotten within national jurisdictions.

66. In the instant case of the Sawhoyamaxa Community, once again, universal legal conscience awakens, — as the ultimate material source of all Law, as I have kept insisting in my many Opinions in this Court[91], — making it possible once again, after the cases of the "Street Children" (1999-2001) and that of the Indigenous Community Yakye Axa (2005), for the forgotten and the abandoned people of the world, surviving in the direst of circumstances, in the midst of the total want their fellow-men have thrust upon them, to resort to international jurisdiction in quest for having justice done.

2. The Great Lesson to be learned from the instant case of the Sawhoyamaxa Indigenous Community.

67. To my mind, in the instant case of the Sawhoyamaxa Community, as well as in its sister case of the Indigenous Community Yakye Axa, international responsibility of the State for the creation, and perpetuation in time, of a situation of infra-human living conditions leading to the death of several members of both such Indigenous Communities was proven beyond doubt. Running contrary to the findings of the majority of the Court in the case of the Indigenous Community Yakye Axa, no

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87. Ibid., Volume II, page 1255.

88. Cf.Ibid., Volume II, page 1263.

89. Cf. B. de las Casas, *Brevísima Relación de la Destrucción de las Indias* (Short Account of the Destruction of the Indies) [1552], Barcelona, Ediciones 29, 1997 [reed.], pages 7-94, esp. pages 9 and 41.

90. On the absurdity and "essential evil" of relations of dominance and oppression, cf. for example, Simone Weil, Reflexiones sobre las Causas de la Libertad y de la Opresión Social Barcelona, Publ. Paidós/Universidad Autónoma de Barcelona, 1995, pages 81-84 and 130-131.

91. Cf. My Concurring Opinion in pioneering Advisory Opinion No. 16, on *The Right to Information on Consular Assistance. in the Framework of the Guarantees of the due Process of Law* (1999), paras. 3-4, 12 and 14; Concurring Opinion on the Provisional Protection Measures in the Case of Haitians and Dominicans of Haitian-origin in the Dominican Republic (2000), para. 12; Separate Opinion in the Case of *Bámaca-Velásquez v. Guatemala* (merits, 2000), paras. 28 and 16; Concurring Opinion in Advisory Opinion No. 18 on the *Condition and Rights of the Undocumented Migrants* (2003), paras. 23-25 and 28-30, esp. par. 29; among others.

additional evidence was needed “to facilitate adjudication of the case” (the *probatio diabolica*) and the alleged absence of (additional) evidence will never be understood (as the majority of the Court wrongly found in the case of the Indigenous Community Yakye Axa) as proving the international responsibility of the State for the death of some members of the Indigenous Community Yakye Axa not to have arisen. In their endeavors to decide hastily such case (and others), the majority of the Court set aside the Tribunal’s own case law, both on the point of substantive law —regarding the fundamental and inderogable right to life— and on the point related to the law of evidence.

68. Fortunately, nine months after such a regrettable mistake, the majority of the Court rectified their position in the instant Judgment in the case of the Sawhoyamaxa Community, and returned to the more enlightened case law of the Tribunal. But the fact remains that the next of kin to the demised members of the Indigenous Community Yakye Axa did no obtain full justice before this Inter-American paramount juurisdiction, while those belonging to the Sawhoyamaxa Community did.

69. It would be worthless, to avoid admitting such a noticeable mistake, to try and suggest that both cases are not "similar" or "identical.” It would be but an unacceptable piece of sohistry. It is plainly apparent as undeniable evidence, that both in the case of the Indigenous Community Yakye Axa and in that of the Sawhoyamaxa Community, the breaches of the Inter-American Convention are the same; the evidence is the same; the expert (Mr. P. Balmaceda-Rodríguez)[92] is the same ; those victimized in both Communities belong to the same Indigenous People (Enxet-Lengua)[93] and come from the same sub-group of ancestors (Chanawatsam)[94]; the infra-human conditions of survival in want are the same for the members of both Communities; the allegations by the State (regarding the alleged provision of foodstuffs and medical care) are, in the cases concerning the two Communities, the same[95]; the representatives of the victims in both cases are[96] the same[97]; the executive order regarding the emergency of both communities (expressly mentioned jointly in such executive order) is the same; the Department *(Presidente Hayes)* where both Communities are located is the same; and even the road (from *Pozo Colorado* to *Concepción*), on the side of which the members of both Communities are still surviving in conditions of chronic poverty[98], is the same.

70. In fact, the only things that are not the same are, surprinsingly enough, the diverging criteria established by the majority of the Court in the two cases, to weigh the evidence determining the international responsibility of the State for the breach

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92. Cf. paragraph 34(h) of the instant Judgment.

93. Cf., for example, paragraph 115(f) of the instant Judgment.

94. And two families who were members of the Indigenous Community Yakye Axa joined the Sawhoyamaxa Community.

95. Cf., for example, el paragraph 57 of the instant Judgment.

96. Except CEJIL, that only participated in the adjudicatory *Case of the Indigenous Community Yakye Axa*.

97. The members of the non-governmental organization *Tierraviva*.

98. Distant 43 km from one another.

of the right to life. The decision of the majority of the Court in the sister case of the Indigenous Community Yakye Axa is on the verge of absurdity, for it found the right to life to have been infringed to the detriment of the survivors, but did not find the right to life to have been infringed to the detriment of those who actually died! *Summum jus, summa injuria*.

71. The great lesson to be derived from this regrettable case law deviation, remedied and overcome in the instant Judgment in the case of the Sawhoyamaxa Community, is clear to me. An international human rights tribunal cannot get lost in technicalities belonging in domestic tribunals (especially in criminal matters). An international human rights tribunal cannot try to halt its own case law, for we act in a protection area that forbears no backstepping, as I had already warned firmly in my extensive Dissident Opinions (paras. 1-49, and 1-75, respectively) in the Case of the Serrano Cruz Sisters v. El Salvador (Judgments on preliminary objections of September 23, 2004, and on the merits and reparations, of March 1, 2005). An international human rights tribunal can never let istself lower the international protection standards, more so when the parties are in a flagrantly vulnerable position, if not abandoned, condemned —many of them since birth— by their fellow-men to social exclusion, and to chronic poverty, which, as I see it, constitutes 99, the deprivation of all human rights.

72. Last but not least, in the instant Judgment in the case of the Sawhoyamaxa Community, the Court has, *sponte sua*, correctly decided, applying the *jura novit curia* principle, to examine for the first time the right to recognition of personality before the law (Inter-American Convention, Article 3), in the light of the circumstances in the *cas d'espèce*. Bearing in mind that the male and female children of the aforementioned Community did not have the benefit of a "birth certificate, death certificate or any other kind of identification document" (para. 73(73), the Court rightfully established the breach of Article 3 —as related to Article 1(1)— of the Convention in the instant case. It is not my intention to discuss, at the end of this Separate Opinion, the relevance of the personality before the law of human beings, both at the domestic law and the international law levels.

73. I will just refer to some of my writings on the subject[100], pointing out an important aspect springing from the instant case: even though the State fails to

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[99]. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol.., Porto Alegre/Brasil, S.A. Fabris Ed., ...; A.A. Cançado Trindade, *Direitos Humanos e Meio Ambiente - Paralelo dos Sistemas de Proteção Internacional*, Porto Alegre/Brasil, S.A. Fabris Ed., 1993, pages ... .

[100]. A.A. Cançado Trindade, "A Personalidade e Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", *in Jornadas de Direito Internacional* (Cidade do México, dez. de 2001), Washington D.C., Subsecretaría de Asuntos Jurídicos de la OAS, 2002, pages 311-347; A.A. Cançado Trindade, "Vers la consolidation de la capacité juridique internationale des pétitionnaires dans le système interaméricain des droits de la personne", 14 *Revue québécoise de droit international* (2001) No. 2, pages 207-239; A.A. Cançado Trindade, "A Consolidação da Personalidade e da Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", 16 *Anuario del Instituto Hispano-Luso-Americano de Derecho Internacional* - Madrid (2003) pages 237-288; A.A. Cançado Trindade, "Hacia la Consolidación de la Capacidad Jurídica Internacional de los Peticionarios in el Sistema Interamericano de Protección de los Derechos Humanos", 37 *Revista del Instituto Interamericano de Derechos Humanos* (2003) pages 13-52; A.A. Cançado Trindade, "El Derecho de Acceso a la Justicia Internacional and las Condiciones para Su Realización in el Sistema Interamericano de Protección de los Derechos Humanos", 37 *Revista del Instituto Interamericano de Derechos Humanos* (2003) pages 53-83; A.A. Cançado Trindade, "Le nouveau Règlement de la Cour Interaméricaine des Droits de l'Homme: quelques réflexions sur la condition de l'individu comme sujet du Droit international, *in Libertés, justice, tolérance - Mélanges in hommage au Doyen G. Cohen-Jonathan*, vol. I, Bruxelles, Bruylant, 2004, pages 351-365; A.A. Cançado Trindade, "The Procedural Capacity of the Individual as Subject of International Human Rights Law: Recent Developments", *in Les droits de l'homme*

recognize the personality before the law of the human being as a legal subject, able to exercise his rights within the framework of the domestic legal system, not even so is the human being deprived of personality before the law, for the right to such personality is a right inherent to the human being. The impact of International Human Rights Law on the national or domestic legal systems is hereby evidenced once more. Face with the shortcomings of the latter, International Human Rights Law comes to the rescue of the individuals, to secure for them the full force and effect of the basic right to personality before the law, of which no one can be deprived. Individuals, — as I have been contending over the past four decades, —- are subjects of both domestic and international law, vested in both legal systems with personality before the law, and with the appurtenant legal and procedural ability to lay claim to the rights inherent to them.

74. Hence, once more, my sorrow at the fact of the Court omitting, already in the sister case of the Indigenous Community Yakye Axa, to take this positive step regarding Article 3 of the Inter-American Convention it took in the instant Judgment in the case of the Sawhoyamaxa Community (paras. 186-194). Here, once more, the different criteria applied by the majority of the Court in the two sister cases have increased the flagrant imbalance in the legal treatment of the protection given the victimized from the two dos indigenous Communities in point, who are in the same situation, enduring the same state of want and the same sufferings. This unjustifiable imbalance is likely to happen when, in judicial deliberations, the badly needed patience and reflexion lose ground to haste and precipitation, against which I have been taking up a position during the past months, with a *vox clamantis in deserto*, within the Court.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary

à l'aube du XXIe siècle - K. Vasak Amicorum Liber, Bruxelles, Bruylant, 1999, pages 521-544; A.A. Cançado Trindade, "A Emancipação do Ser Humano como Sujeito do Direito Internacional e os Limites da Razão de Estado",_6/7 *Revista da Faculdade de Direito da Universidade do Estado do Rio de Janeiro* (1998-1999) pages 425-434.