

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I appear to set my opinion for the adoption, by the Inter-American Court of Human Rights, of this Judgment in the case of *Ximenes-Lopes v. Brasil*. Considering the particular relevance of the subject matter analyzed by the Court, I am obliged to set forth, in this Separate Opinion, my personal considerations on the matter discussed by the Court in this Judgment, as the arguments of my position. And I do so, as usual in this Court, under the merciless pressure of time, as I only had a few hours for the elaboration and presentation of this Opinion. For the above mentioned purpose, I shall refer, in this Separate Opinion, to the following items: a) focus on the victims suffering in International Human Rights Law; b) the acknowledgment of international liability by the Respondent Government; c) the right of access to justice *lato sensu* in the inevitable dissociability between Articles 25 and 8 of the American Convention; d) the right of access to justice as a right to a prompt response by the judicial system; e) the direct applicability of the American Convention in the domestic law and guarantees of non-repetition of libelous facts; and f) the need to enlarge the material content of *jus cogens*.

I. Focus on the Victims Suffering in International Human Rights Law.

2. There are cases of human rights violations which evoke tragedies, revealing the perennial presence of the latter, as inherent to human condition. To remember two precedents, in my Separate Opinion in the case of *Bámaca Velásquez v. Guatemala* (merit, Judgment of November 25, 2000) before this Court, the famous tragedy of Sophocles' Antigone came to my mind (paragraphs 8-9). In my Separate Opinion in the case of *Bulacio v. Argentina* (merit and reparations, Judgment of September 18, 2003) I referred to Ajax and to Sophocles's Philoctetes (paragraphs 8 and 16), to the desperation of Hecuba, by Euripides (paragraph 22), to Aeschylus's Agamemnon (paragraph 26) and the *Eumenides* (the last play of the Oresteia trilogy), also by Aeschylus (paragraph 32).¹

3. This case *Ximenes-Lopes v. Brasil* also includes tragic ingredients which immediately remind me of the imperishable and so topical Greek tragedies. I was reminded, e.g., by the testimonial declaration of the victim's sister (Mrs. Irene Ximenes-Lopes Miranda), during the public hearing on the *cas d'espèce* before this Court on November 30 and December 1, 2005. The said moving declaration of Irene reminded me of the *Electra* by Sophocles and by Euripides. Euripides's *Electra* was much more inclined towards private justice, while Sophocles's *Electra* surrenders, at an earlier time and to a much greater extent, to pain as a result of the notice (although false) of the death of her brother.

4. Sophocles's *Electra* faints when she sees in the urn the ashes she thought were her brother's, Orestes, (they were not), and desperately remembered her affection for him (without knowing that he was alive), before seeking for private justice, which was the usual practice at the time. When touching the said ashes, in tears she regretted:

¹ . Euripides, *Electra and Other Plays*, London, Penguin, 2004 [reed.], pp. 131-174

"(...) Now I carry thy poor dust in my hands; but thou wert radiant, my child, when I sped the forth from home! Would that I had yielded up my breath, ere, with these hands, I stole thee away, and sent thee to a strange land, and rescued thee from death! (...) But now, an exile from home and fatherland, thou hast perished miserably, far from thy sister (...). at the hands of strangers, hapless one, thou hast had those rites, and so art come to us, a little dust in a narrow urn.

Ah, woe is me for my nursing long ago, so vain, that I oft bestowed on thee with loving toil I For thou wast never thy mother's darling so much as mine; nor was any in the house thy nurse but I; and by thee I was ever called 'sister. But now all this hath vanished in a day, with thy death; like a whirlwind, thou hast swept all away with thee. (...).

(...) Ah me, ah me! O piteous dust! Alas, thou dear one, sent on a dire journey, how hast undone me, - undone me indeed, O brother mine! Therefore take me to this thy home, me who am as nothing, to thy nothingness, that I may dwell with thee henceforth below; for when thou wert on earth, we shared alike; and now I fain would die, that I may not be parted from thee in the grave. For I see that the dead have rest from pain.."²

5. The luck of Irene, sister of Damião Ximenes-Lopes, was worse than that of *Electra*'s: she also fainted when she knew that her brother, who left home to be taken care of by social "services" in a "resting" home, died there, and she also remembered her affection for him:

"(...) As his older sister, in a way I took care of him, (...) I accompanied him, took him to my house, visited him. (...) My relationship with him was the best possible one, more than that of a sister, a little bit of a mother too.

(...) I saw him already in the coffin, prepared to be buried. (...) I could see several signs of torture. (...) He had been beaten up. (...)

[All this] shocked me, terrified me, I had so many nightmares (...). I was terrified (...). I felt pain in the chest, but it was not a heart breaking pain, it was soul breaking. (...)

[What happened] even today has effect, (...) six years of desperation for justice. (...) I started a big struggle for justice (...). I had three years of depression, (...) I traveled a lot looking for justice (...)."³

6. Irene soon and effectively decided, beside the grave of her beloved brother, to depart determined to find public justice, as it is the usual practice at her time, our time, which so far, with the adoption of this Judgment of the Inter-American Court, she had not found. As she said before this Court,

"(...) On the day my brother was buried in the cemetery, I kneeled on his coffin and sworn that my soul would not rest until justice had been done, and I have been looking for justice for six years. (...) Now my soul can rest, I haven't left my brother's death unpunished, I claim for justice."⁴

This Judgment rendered by the Inter-American Court, to be duly fulfilled by the Brazilian State, vindicates her suffering and satisfies her thirst for justice. It also reveals the relevance of international jurisdiction in our days.

7. Electra's and Irene's stories are totally different, and they took place in times separated by centuries. Nevertheless, they present the tragedy of human condition as a common element, before the persistence of indifference and cruelty, stressed in

¹⁶⁴. <http://drama.eserver.org/plays/classical/sophocles/electra.txt>

¹⁶⁵. Inter-American Court of Human Rights, *Transcript of Public Hearing of November 30, 2005 and December 1, 2005 in the case of Ximenes-Lopes v. Brasil*, pp. 23 and 27-28.

⁴. *Ibid.*, p. 28, and regarding the liability of the State, cf. p. 32.

the treatment of the more vulnerable ones, and also the desperate and despairing search for justice (then private, today public). They unfold the inscrutable presence of tragedy in the mysteries around life, which some have tried to simplify characterizing it as fate. Human suffering hopelessly continues to be a sad trace of human condition along the centuries. With particular foresight, Sophocles warned, already in the V Century B.C., in his *Oedipus the King*⁵, that we must never say that someone is happy until the time he has overcome the extreme limit of a painless life.

8. And the evolution from private justice (of the antique Greek) to public justice (of the "modern" and "post-modern") seems to progress unfinished, acquiring a mainly ritualistic feature, contaminated by the erosion and "outsourcing" of the public services and by a merely formalist justice. To this we must add the regrettable transformation of public assets as health and education into goods. Damião Ximenes-Lopes had a violent death when he was entrusted to the public social "services" and when he was confined to a "resting" home, the one in Guararapes.

9. The violent death of defenseless Damião, who was looking for medical treatment, had a devastating effect in the life not only of his sister Irene, but also in the life of his next of kin. According to Irene's account before the Court, Cosme, Damião's twin brother, considering the proximity of the bond with the victimized brother, "was in shock" when he learned about Damião's death. However, she added, "until today Cosme does not know the details of the torture and the violence; we omitted them because that would cause too much suffering to him and we wanted to preserve his health."⁶ In other words, he was duly preserved from the truth, which under certain circumstances proves to be necessary, as the tragedy of knowledge of the human condition may be sometimes unbearable, mainly for those more vulnerable or sensitive.

10. The mother's life was "completely ruined", she is always remembering the death of her son Damião, "until today she is depressed and says that she wants to die."⁷ Mother and father were already separated, but they have preserved the family bonds of affection with the children; the father, immersed in "deep suffering" and "desire of revenge" by the death of Damião, sought "spiritual help" in an Evangelical Church, which "relieved" him.⁸ Also, human suffering has an intergenerational dimension, passing from parents to children, -as already noted in the Genesis book, which predicts that all human beings shall know good and evil (3,5).

11. The shadows of human existence are retaken by the Book of Job, where the oppressors give orders to the oppressed using violence (24.2-4.9 and 24.5-8.10-12ab). When Damião died, his sister Irene had a newborn baby girl. As a consequence of the events occurred, the baby stopped being breast-fed; as pointed out by Irene before this Court, "due to the emotional shock, I spent weeks without feeding her, and my breasts did not produce milk; my daughter was deprived of

⁵. In the piercing final phrase - verses 1529-1530.

⁶. Inter-American Court of Human Rights, *Transcript of Public Hearing...*, *op. cit. supra* n. (3), p. 27.

⁷. *Ibid.*, p. 28.

⁸. *Ibid.*, pp. 28.

natural food and had to take artificial food.”⁹ Human suffering passes from generation to generation, from the beginning to the end of life. As already predicted by the Ecclesiastes,

“... and behold, the tears of such as were oppressed, and they had no comforter, and on the side of their oppressors there was power, but they had no comforter” (4,1).

12. Sophocles sensed it well, in the verses of *Antigone* and also of *Oedipus the King*: the first stated that

“Thrice happy are they who have
never known disaster!
Once a house is shaken of heaven, disaster
Never leaves it, from generation to generation. (...)
Then pray no more; from suffering that has been
Decreed no man will ever find escape.”¹⁰

And the second inquired:

“Has any man won for himself
More than the shadow of happiness,
A shadow that swiftly fades away?”¹¹

13. As noted by Edgar Morin in the 20th Century, the history of human culture itself is built on acts of cruelty, not there being a single testimony of culture which is not of barbaric acts.¹² Which led him to add that:

“Como la propia vida, el hombre se desenvuelve en el azar, contiene el azar en si mismo, está hecho para encontrarse con el azar, combatirlo, domesticarlo, escapar a él, fecundarlo, jugar con él, correr el riesgo que supone, aprovechar las oportunidades...
(...) La vida está siempre al borde del desastre. La muerte está en el universo físico-químico en el que la vida corre constantemente el riesgo de perecer, pero en el que se ha formado, tejido, desarrollado. La muerte está en la indeterminación micro-física, pero indeterminación que al mismo tiempo está en la fuente de las mutaciones y las creaciones, de toda creación. La mutación, fuente de la muerte, es también fuente de la vida. Lo desordenado, ese caos subterráneo y permanente, es a la vez lo que crea y lo que destruye.
(...) La muerte, para el hombre, está en el tejido del mundo, de su ser, de su espíritu, de su pasado, de su futuro”.

14. However, even deprived of happiness and abandoned to fate (as, in this case before this Court was Mr. Damião Ximenes-Lopes, who, entrusted to social “services” in a “resting” home, there he found violent death), the human being cannot give up the fight for justice, as long as he maintains the capacity of indignation. On the other hand, he shall be deprived not only of happiness, but also of the search for the sense of life, although brief and ephemeral. Another lesson that can be extracted from *Electra* (and also, I add, from the reaction of Irene Ximenes-Lopes), is that “life is much more comfortable when submitted to the worst injustice and if it is forgotten

⁹. *Ibid.*, p. [9].

¹⁰. Verses 584-587 and 1335-1337.

¹¹. Verses 1189-1191. - Texts in: Sophocles, *Antigone* - *Oedipus the King*, *Electra*, Oxford, University Press, 1998 [reed. Oxford World's Classics].

¹². E. Morin, *El Hombre y la Muerte* (1970), 4th edition, Barcelona, Ed. Kairós, 2003 [reed.], p. 53.

that it is unjust."¹³ Indeed, it is more comfortable, but also entirely senseless. Therefore, the inevitability of suffering before human cruelty.

15. In my *Tratado de Direito Internacional dos Direitos Humanos*, I allow myself to stress precisely the projection of human suffering in time and the *focus centered on the victims* in the Human Rights International Law. As I state therein, *inter alia*, regarding that matter:

"Human Rights International Law, as essentially inclined to the victim condition, has contributed, to a great extent, to return them the core position they have today in the legal world, - which is its *raison d'être*. The focusing on the victims in the conceptual universe of Human Rights International Law, not enough analyzed by the legal contemporary doctrine until now, is of paramount relevance and it entails practical consequences. Indeed, it is the very essence of Human Rights International Law, as it reaches its plenitude in the protection extended to the victims. But the *rationale* of its protection rules and regulations is not exhausted with the protection granted to people already victimized. Human Rights International Law, by its sole existence, universally recognized in our time, protects human beings also by means of the prevention of victimization. The scope of its *corpus juris* must be appreciated also from that perspective. (...)

Human Rights International Law thus contributes to the process of *humanization* of International Law.¹⁴ The treatment given to human beings by the public power is no longer alien to International Law. On the contrary, it is a part thereof, as the rights to which every human being is entitled derive directly from International Law. Individuals are, in fact, subjects of domestic as well as international law. And they have a central position in the scope of Human Rights International Law, whether or not they are victims of violations of their internationally consecrated rights."¹⁵

II. Acknowledgment of International Liability by the Respondent Government.

16. Regarding to the preliminary considerations of this Judgment in the case of *Ximenes-Lopes*, we must not disregard that the Inter-American Court pondered the acknowledgment of international liability by the Respondent State as a "positive contribution to the development of this process and to the enforcement of the principles that inspire the American Convention in Brazil" (para. 80), particularly regarding the acknowledgment of the violation of Articles 4 and 5 of the Convention (paragraphs 119 and 122). With that, the controversy regarding certain facts of the case was over, although the Court wouldn't have been naturally exempted from proceeding, as it was the case, according to its own assessment of the facts.

17. Moreover, as it arises from the public hearing before this Court of November 1 and December 1, 2005, the parties involved showed a constructive spirit of procedural cooperation and common sense and professionalism when forwarding the

¹³. Simone Weil, *La Fuente Griega*, Madrid, Ed. Trotta, 2005 [reed.], p. 66.

¹⁴. As we repeatedly pointed out in our Separate Opinions in Judgments of the Inter-American Court of Human Rights, as, *inter alia*, in the cases of "Meninos de Rua" (Street Children) (Villagrán Morales et al. v. Guatemala (Reparations, 2001), of Blake v. Guatemala (Merit, 1998, and Reparations, 1999), of Bámaca Velásquez v. Guatemala (Merit, 2000, and Reparations, 2002), as well as in our Concurring Opinion in the Inter-American Court of Human Rights Opinion on the Right to Information on Consular Assistance within the Scope of Due Process of Law Guarantees (1999).

¹⁵. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre, S.A. Fabris Ed., 2003, pp. 434-436, paras. 48 and 50.

documentation to the Court and during the presentation of their oral arguments. This allowed the Court to fulfill its duty of effective response by the judicial system within a reasonable time under the American Convention,- in contrast with the events occurred in the scope of domestic law, - which stresses the relevance of international jurisdiction.

18. Regarding the correct ruling by this Court of the preliminary objection filed by the Respondent Government, there is no need to entirely repeat my concurring opinion in the former Judgment of November 30, 2005 in this case of *Ximenes-Lopes*, but only the last paragraph, where, regarding to the need of a greater degree of reflection on the improvement of the proceedings under the American Convention and a clearer explanation of the role of the Commission under the Convention, I stated:

"My opinion regarding this matter is very clear, and it is recorded in the Protocol Project for the Human Rights American Convention (*Projeto de Protocolo à Convenção Americana sobre Direitos Humanos*) where I submitted, in the name of the Inter-American Court, before the competent bodies of the Organization of American States (OAS) in 2001¹⁶, which sets forth the human being right to international justice, to the automatically compulsory jurisdiction of the Inter-American Court, to the jurisdictionalization of the Inter-American system of protection and to the retention, within the scope of the latter and at present, of the role of district attorney by the Inter-American Convention" (para. 3).

III. The Right Of Access To Justice *Lato Sensu* In The Inevitable Dissociability Between Articles 25 And 8 Of The American Convention

19. Next, I will refer to one of the central issues analyzed by the Court in this Judgment in the case of *Ximenes-Lopes* (and treated in its *jurisprudence constante*, and in several Opinions that I have rendered in adversarial cases submitted before this Court), that is, the access to justice *lato sensu*, based on the inevitable dissociability - which I have supported for years in this Court - between Articles 25 and 8 of the American Convention. With regard to that issue, in my recent and long Separate Opinion in the case of *Massacre of Pueblo Bello v. Colombia* (Judgment of January 31, 2006) I referred, in a logic sequence, to the broad scope of the general duty of guarantee (Article 1(1) of the American Convention) and to the *erga omnes* protection duty (paras. 2-13), to the genesis, ontology and hermeneutics of Articles 25 and 8 of the American Convention (paras. 14-21), to the irrelevance of allegation of domestic law difficulties (paras. 22-23), to the right to an effective remedy in the jurisprudential construction of the Inter-American Court (paras. 24-27); then I examined the inevitable dissociability between access to justice (right to an effective remedy) and the guarantees of due legal process (Articles 25 and 8 of the American Convention) (paras. 28-34), and came to the conclusion that such impossibility of dissociation, consecrated in the Court's *jurisprudence constante* to date (paras. 35-43), constitutes "a legal heritage of the Inter-American system of protection and of the people of our region," reason for which "I firmly oppose to any attempt to deconstruct it" (para. 33).

¹⁶. A.A. Cançado Trindade, *Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección*, vol. II, 2nd. ed., San José de Costa Rica, Inter-American Court of Human Rights, 2003, pp. 1-1015.

20. In the same Separate Opinion in the case of *Massacre de Pueblo Bello*, I supported the above mentioned impossibility of dissociation between Articles 25 and 8 of the American Convention as an "intangible jurisprudential advance" (paras. 44-52).¹⁷ Then I referred to the right of access to justice *lato sensu*, remarking that:

"In the *Reports* I presented, in my then capacity as President of the Inter-American Court, to the competent bodies of the American States Association (ASO), e.g., on April 19, 2002 and on October 16, 2002, I defended my understanding in the sense of the broad scope of the right of access to justice at international level, the right of access to justice *lato sensu*.¹⁸ Such a right not only boils down to the formal access, *stricto sensu*, to the judicial instance (both domestic and international), but it also encompasses the right to the prompt response by the judicial system, and it underlies in interrelated regulations of the American Convention (as Articles 25 and 8), apart from permeating the domestic law of the States Party.¹⁹ The right of access to justice, with its own legal content, means, *lato sensu*, the right to obtain justice. It is thus configured as the right to the *realization* of justice itself.

One of the main elements of that right is precisely the direct access to a competent court through an effective and quick remedy, and the right to be immediately heard by said court – independent and unbiased – at both national and international level (Articles 25 and 8 of the American Convention). As I remarked in a recent work, here we can see a real *right to Law*, that is to say, the right to a legal system – both at national and international level – which effectively safeguards the fundamental rights of the human being"²⁰ (paras. 61-62).

21. Finally, in the same Separate Opinion in the case of *Massacre de Pueblo Bello*, I repeated my understanding in the sense that the right to Law constitutes a "*jus cogens* imperative:"

"The inevitable dissociation between Articles 25 and 8 of the American Convention (*supra*) I support leads to characterize access to justice as part of the *jus cogens*, understanding said access as the *complete realization* of justice, that is, taking the intangibility of all legal guarantees in the sense of Articles 25 and 8 taken *jointly* as part of the *jus cogens*. There can be no doubt that the fundamental guarantees, common to International Human Rights Law and International Humanitarian Law,²¹ which are of universal vocation as they apply in all and every circumstance, form an imperative right (of the *jus cogens* scope), and entail *erga omnes* protection obligations.²²

¹⁷. In the same Concurring Opinion, I also referred to the overcoming of difficulties regarding to the right to an effective remedy in the jurisprudential construction of the European Court of Human Rights (paras. 53-59).

¹⁸. Cf. also A.A. Cançado Trindade, "El Derecho de Acceso a la Justicia Internacional y las Condiciones para Su Realización en el Sistema Interamericano de Protección de los Derechos Humanos", 37 *Revista del Instituto Interamericano de Derechos Humanos* (2003) pp. 53-83; A.A. Cançado Trindade, "Hacia la Consolidación de la Capacidad Jurídica Internacional de los Peticionarios en el Sistema Interamericano de Protección de los Derechos Humanos", 37 *Revista del Instituto Interamericano de Derechos Humanos* (2003) pp. 13-52.

¹⁹. In that sense, cf. E.A. Alkema, "Access to Justice under the ECHR and Judicial Policy - A Netherlands View", in *Afmaelisrit þór Vilhjálmsón*, Reykjavík, Bókaútgafa Orators, 2000, pp. 21-37.

²⁰. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brasil, S.A. Fabris Ed., 2002, chapter XX, p. 524, para. 187.

²¹. E.g., Article 75 of Protocol I (of 1977) to the Geneva Convention (of 1949) on International Humanitarian Law.

²². Cf., also in that sense, e.g., M. El Kouhene, *Les garanties fondamentales de la personne en Droit humanitaire et droits de l'homme*, Dordrecht, Nijhoff, 1986, pp. 97, 145, 148, 161 and 241.

Subsequently to its historical Consultative Opinion No. 18 on the *Legal Status and Rights of Undocumented Migrants* of 2003, the Court could and should have already taken this other qualitative step in its jurisprudence. I dare cherish hope that the Court shall do so as soon as possible, if it really carries on with its vanguard jurisprudence, - instead of trying to refrain it, - and it may extend the progress attained with grounds and courage as with the above mentioned Consultative Opinion No. 18 in the line of constant expansion of the *jus cogens* material content" (paras. 64-65).

22. To my personal satisfaction, the Inter-American Court, in this Judgment of the case *Ximenes-Lopes*, was unanimously true to its best *jurisprudence constante* regarding the matter, repeating with the highest clarity its understanding of the inevitable dissociability between Articles 25 and 8 of the American Convention, as it unmistakably arises from paragraph 191 of this Judgment, when pointing out that "the effective remedy of Article 25 must follow the process according to the rules of due process of law set forth in Article 8 of the Convention." Also, the Court reminded that the international liability of the State for the violation of international rules differs from its liability in domestic law (para. 193).

23. Concurrently with the position assumed by the Court in this regard, I cannot help remarking that, as a reply to the questions I posed during the public hearing of November 30, 2001 and December 1, 2005 before the Court, both the Inter-American Commission of Human Rights (CIDH) and the victim's representatives and next of kin expressed that the best hermeneutics of Articles 8(1) and 25 of the American Convention is the one which effectively and necessarily relates them. The CIDH ruled defending "the integrated combination of due process of law and effective protection of rights of Article 8(1) and Article 25" of the Convention,²³ and the above mentioned representatives affirmed in the same sense that the "clearer understanding of those provisions within the Inter-American system would be to analyze both sections jointly, even because that is precisely what most of the jurisprudence of that Honorable Court does."²⁴

IV. The Right of Access to Justice as the Right to the Prompt Response by the Judicial System.

24. The right of access to justice *lato sensu* presumes the understanding that it means the right to a prompt response by the judicial system. Its faithful fulfillment was not verified in the case of *Ximenes-Lopes*, as it is clearly inferred from the facts themselves. For instance, on March 27, 2000, the Public Prosecutor's representative filed a criminal complaint in Sobral county against four people allegedly involved in the penalties of the Brazilian Penal Code (Article 136(2)) for mistreatment resulting in the death of Mr. Damião Ximenes-Lopes. Two months later, the prosecutors of the Operational Support Center for Socially Discriminated Groups of the Attorney General's Office expressed to the acting Prosecutor of the case that the supplemental complaint constituted a "legal and institutional imposition;" despite the above, it was only on September 22, 2003, when presenting the closing arguments, that the Public Prosecutor's Office filed a supplemental complaint to include other two people.

²³. Inter-American Court of Human Rights, *Transcript of Public Hearing...*, *op. cit. supra* n. (3), p. 125.

²⁴. *Ibid.*, p. 126.

25. The delay in processing the supplemental complaint took even longer, as it was only on June 17, 2006 that the Judge of Sobral County received it. When doing so, he sought to justify his own delay due to the "high volume of work of the 3rd County Court of Sobral" and to a "30-day holidays" plus "60 days of sick-leave." That is, the supplemental complaint was received only 8 months and 25 days after having been filed. At that time, the above mentioned County Judge summoned the new defendants and ordered the issuance of an "urgent" summons for the deputy prosecutor and the defense attorneys to submit their closing arguments. That is to say, the so called "urgent" summons was for the others, and not for himself, thus constituting a portrait of the "justice" ritual of the domestic law, not only of the Responsive Government sued before this Court, but also of so many other Governments in different latitudes. At that time, the criminal action of the *cas d'espèce* had already taken more than 4 years and 2 months without even a first instance judgment having been rendered.

26. In the public hearing of November 30 and December 1 before this Inter-American Court on this case, I reminded the acting parties of the State duty of "effective response by the judicial system within a reasonable time" under the American Convention, and mentioned the permanent need – not only as a Brazilian issue, but as an issue concerning every country – "of training national judges in human rights matters, which was evident in this case, both in this hearing and in its examination."²⁵ Let me remind you of a warning following the same reasoning, expressed a decade and a half ago, during a historic and pioneer Seminar of national mobilization regarding Brazil's adherence to the American Convention and to the two Human Rights Treaties of the United Nations; at that time, emeritus Professor Washington Peluso Albino de Souza, when referring -during the debates- to the "organization dynamics of the judicial power" focused on the "career" and on the type of "formation" offered by the Law Schools, quite lucidly stated that:

"The need of reality penetration for the knowledge of the Law is rarely fostered. Instead, the dogmatic method is practiced, forming judges who turn to be legalist by conviction. If the law is set aside from reality, the resulting judgment shall also be so. This is how, with full professional certainty, injustice is committed in the name of Law. That explains the lack of confidence in justice of the citizenship in our country, with consequent adages such as "a bad agreement is better than a good lawsuit."²⁶

V. Direct Applicability of the American Convention in Domestic Law and Guarantees of Non-Repetition of Libelous Acts.

27. Fortunately, today the *justifiable* in the Respondent Government also count on international jurisdiction for the vindication of their rights. As I said in my opening speech of the judicial year of the European Human Rights Court in 2004, -as

²⁵. Inter-American Court of Human Rights, *Transcript of Public Hearing...*, *op. cit. supra* n. (3), pp. 123-124.

²⁶. *Cit. in*: A.A. Cançado Trindade, *A Proteção dos Direitos Humanos nos Planos Nacional e Internacional: Perspectivas Brasileiras* (Minutes of the Brasília Seminar of 1991), Brasília/San José de Costa Rica, IIDH/F.-Naumann-Stiftung, 1992, p. 170 (intervenção do Prof. Washington P. Albino de Souza).

a guest for the above mentioned ceremony in Strasbourg, - the two international courts of human rights have made remarkable progress in the realization of international justice, of the *right perspective*, to wit, that of the *justifiable*.²⁷ Both courts have decisively contributed to the human being emancipation *vis-à-vis* his own State, to the settlement of a new paradigm in the present scope of international protection, and to the *humanization* of International Law.²⁸

28. In a lapidary paragraph of this Judgment, regarding to the satisfaction measures for those victimized and the guarantees of non-repetition of libelous acts (as non-pecuniary reparation measures), the Court states:

"the State must guarantee that within a reasonable time the internal process tending to inquire and sanction those responsible for the facts herein yields the corresponding effects, thus giving direct applicability of the protection rules and regulations of the American Convention in domestic law" (paragraph 244).

29. In the above mentioned public hearing of this case, of November 30 and December 1 before this Court, as a reply to one of the questions I posed with regard to the present general perspectives on the matter, one of the witnesses expressed that "the fairest constitutionalists are extremely pessimistic regarding the outcome of what may take place considering the degree of petrification of the Brazilian judicial power."²⁹ My question born in mind the new paragraph 3 of Article 5 of the Brazilian Federal Constitution.³⁰ My purpose here is not to analyze that Article (it does not even deserve such an analysis), but to refer to it from the American Convention point of view, as applicable law in the *cas d'espèce*.

30. This new provision seeks to grant, in an inexperienced way, constitutional *status*, in the scope of the Brazilian domestic law, only to human rights treaties that are approved by a 3/5 majority of the members of both the House of Representatives and the Senate (thus becoming equivalent to constitutional amendments). Badly conceived, badly drafted and badly formulated, it represents a regrettable backward step regarding to the open model consecrated by paragraph 2 of Article 5 of the Federal Constitution of 1988, which was the result of a proposal of my authorship to the National Constitutional Assembly, as historically documented.³¹

²⁷. A.A. Cançado Trindade, "Le développement du Droit international des droits de l'homme à travers l'activité et la jurisprudence des Cours européenne et interaméricaine des droits de l'homme", 16 *Revue universelle des droits de l'homme* (2004) n. 5-8, pp. 177-180; A.A. Cançado Trindade, "The Development of International Human Rights Law by the Operation and the Case-Law of the European and Inter-American Courts of Human Rights", 25 *Human Rights Law Journal* (2004) n. 5-8, pp. 157-160. And, for a broader study, cf. A.A. Cançado Trindade, "Approximations and Convergences in the Case-Law of the European and Inter-American Courts of Human Rights", in *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme* (eds. G. Cohen-Jonathan e J.-F. Flauss), Bruxelles, Nemesis/Bruylant, 2005, pp. 101-138.

²⁸. A.A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte, Edit. Del Rey, 2006, pp. 3-409.

²⁹. Inter-American Court of Human Rights, *Transcript of Public Hearing...*, *op. cit. supra* n. (3), p. 98 (statement of Mr. João Alfredo Teles Melo).

³⁰. According to constitutional amendment No. 45, of December 08, 2004.

³¹. For a circumstantial background of paragraph 2 of Article 5 of the Brazilian Federal Constitution, with the references corresponding to documentary sources, cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre, S.A. Fabris Ed., 2003, pp. 597-643; A.A. Cançado Trindade, *A Proteção Internacional dos Direitos Humanos e o Brasil (1948-1997): As Primeiras*

Regarding to previously approved treaties, it creates an *imbroglio* that state-centered publicists -insensitive to the needs of protection of the human being- like so much; with regard to the treaties yet to be approved, it creates a possibility of differentiation that autistic and short-sighted publicists -so little acquainted with the achievements of International Human Rights Law - like so much, as well as the representatives that pay attention to them.

31. This backward step creates a risk to the interrelation or indivisibility of the rights protected by the respondent Government (provided for in the treaties that bind it), threatening them with fragmentation or atomization, in favor of the excess of a legal formalism and inscrutability tainted by obscurantism. The new provision is seen with complacency and sympathy by the so called "internationalist constitutionalists," who claim to be jusinternationalists when in fact they are not even close to that, as they only conceive the international legal system through the national Constitution. The constitutionality of the regrettable paragraph 3 of Article 5 is not even proved, and my intention here is not to express an opinion on the matter; what I do affirm in this Opinion, -just as I supported in the conference I lectured on March 31, 2006 in the crowded auditorium of the *Superior Tribunal de Justiça* (STJ) in Brasília, at the end of the public hearings before this Court which took place at the historical External Session of the said Court recently held in Brazil, - is that, as long as the new paragraph 3 of Article 5 of the Brazilian Federal Constitution opens the possibility of undue restrictions in the direct applicability of the set of provisions for the protection of certain human rights treaties in the Brazilian domestic law (being even capable of turning it inapplicable), it openly proves incompatibility with the *American Convention on Human Rights* (Articles 1(1), 2 e 29).

32. From the International Human Rights Law perspective in general, and the provisions of the American Convention in particular, the new paragraph 3 of Article 5 of the Brazilian Federal Constitution is nothing but a regrettable legal aberration. The serious backwards step that it represents, once more reveals that the struggle to safeguard human rights at national and international level is never-ending, as in the constant restart immortalized by the myth of Sisyphus. When descending the mountain to push the rock upward again, we become *aware* of the human condition and of the tragedy surrounding it (as illustrated by the stories of *Electra* and Irene Ximenes-Lopes Miranda).

33. But the struggle has to continue, so that public justice reacts immediately and *ex officio* against the commission of the crime and against victimization, and not encouraged by apparent disgust or hardly by the impulse of the victims' next of kin. The struggle has to continue, because, honestly, there is no choice:

"Sisyphé, revenant vers son rocher, contemple cette suite d'actions sans lien qui devient son destin, créé par lui, uni sous le regard de sa mémoire et bientôt scellé par sa mort. (...) Sisyphé enseigne la fidélité supérieure qui (...) soulève les rochers. (...) La lutte elle-même vers les sommets suffit à remplir un coeur d'homme. Il faut imaginer Sisyphe heureux."³²

Cinco Décadas, 2nd ed., Brasília, Edit. Universidade de Brasília (Ed. Humanidades), 2000, pp. 1-214; G.R. Bandeira Galindo, *Tratados Internacionais de Direitos Humanos e Constituição Brasileira*, Belo Horizonte, Edit. Del Rey, 2002; Sílvia M. da Silveira Loureiro, *Tratados Internacionais sobre Direitos Humanos na Constituição*, Belo Horizonte, Edit. Del Rey, 2005.

³². A. Camus, *Le mythe de Sisyphe*, Paris, Gallimard, 1942, p. 168.

34. Those who feel triumphant with the recent insertion of paragraph 3 in Article 5 of the Brazilian Federal Constitution, hostages of a formalist Law and having forgotten material Law, do not seem to realize that, from the point of view of International Law, a treaty such as the American Convention ratified by a State, binds the latter *ipso jure*, thus resulting immediately and directly applicable, whether it has previously obtained parliamentary approval by either simple or qualified majority. Such domestic provisions, -or let alone, *interna corporis* provisions- are mere *facts* from the international legal system perspective, that is, from the point of view of the legal international system and the international responsibility of the State, they are entirely irrelevant.

35. The international liability of the State for proven violations to human rights remains intangible, regardless of pseudo-legal maneuvers of certain publicists (as the creation of different modalities of prior parliamentary approval of certain treaties with expected legal consequences, the requirement of previous conditions for the direct applicability of humanitarian treaties within domestic law, among others), who merely offer the States empty excuses to try to avoid their commitments of protection of human life in the international adversarial environment of human rights. To sum up, the international protection of human rights constitutes an irreversible human conquest, which shall not be defeated by melancholic circumstances.

36. As we live in a surrealistic world, if not irrational, I had already expressed - in the *Memorial* that I submitted to the inauguration panel of the III National Conference of Human Rights at the National Congress in Brasilia in May 1998 - a warning against eventual and future restrictive constitutional amendments. More than a decade has gone by, and that was exactly and regrettably what has just happened. The empty legal formalism prevailed over the identity of purpose between domestic and international law regarding to the integral protection of rights inherent to the human being. In my 1998 premonition, I warned about the risks of future restrictions to the provisions of Article 5(2) of the Federal Constitution of 1988:

"Modify it to adapt it - that is, to imprison it - to the hermetic and positivist thesis of the "constitutionalization" of treaties, would imply, in my opinion, a conceptual regression in our country in that respect. We have to go beyond the static "constitutionalization" of human rights treaties. Here, again, a fundamental change of mentality becomes essential, with a better understanding of the subject matter. It is not possible to continue thinking within legal categories and schemes created decades ago, facing the reality of a world which no longer exists."³³

37. The guarantee of non-repetition of human rights violations, set forth by this Judgment of the Inter-American Court in this case of *Ximenes-Lopes* (paragraph 246, *supra*), is necessarily based on the education and training in the human rights area. In my above mentioned participation of 1998 at the National Congress in Brasilia, I added that the "new mentality" I defended, "shall have to be shown more vigorously," - I emphasized,- "in the core of a more integrated society, characterized

³³. A.A. Cançado Trindade, "Memorial em Prol de uma Nova Mentalidade quanto à Proteção dos Direitos Humanos nos Planos Internacional e Nacional", 51 *Boletim da Sociedade Brasileira de Direito Internacional* (1998) pp. 90-91.

by a strong feeling of human solidarity, without which little can the Law progress."³⁴ That explains the relevance of the formal and non-formal education on human rights; regarding to that, the release and a better knowledge of the jurisprudence of protection of human beings rights of the Inter-American Court become essential, the direct applicability of which is imposed in the domestic law of the States Party.

VI. The Need to Enlarge the Material Content of the *Jus Cogens*.

38. In this Judgment in the case of *Ximenes-Lopes v. Brasil*, the Inter-American Court noticed that the right to personal integrity, consecrated in the American Convention, has as "main purpose" the "imperative prohibition of torture and penalties or cruel, inhuman or degrading treatment," not admitting, therefore, any suspension under "any circumstances" (para. 126). The Court had already noticed it in its Judgment dated August 18, 2000, in the case of *Cantoral Benavides v. Peru* (paras. 95-96). In other words, the above mentioned prohibition falls in the scope of the *jus cogens*.

39. The fact that the direct victim in this case was a mentally disabled person (the first case of this nature before the Court) characterizes the case with an *aggravating circumstance*. In this Judgment, the Court recognizes the "special protection" required by particularly vulnerable people, bearers of a mental disability, -as in the case of *Damião Ximenes-Lopes*, a fatal victim in the *cas d'espèce* (paras. 103-105), - and states that:

"(...) The inherent vulnerability of mentally disabled people is aggravated by the high degree of intimacy which characterizes the treatment of psychiatric diseases, which cause that those people become more susceptible to abusive treatment when they are hospitalized" (para. 106).

40. The protection obligations, - and even more in situation like this, where the victim had a high degree of vulnerability,- are characterized by their *erga omnes* aspect (para. 85), also encompassing interindividual relationships, taking into account the obligation of prevention and due diligence of the State, mainly regarding to people under its care. Public health is a public asset, not a merchandise. In my many papers and Opinions in the core of this Court, I have expressed for so many years my understanding in the sense that all conventional obligations of protection have an *erga omnes* feature. It is particularly hard for me to escape the impression that overwhelms me when I think that during all this time I might have been writing and continue to write for the birds....

41. I would have appreciated it if the Court had done its best when supporting its own *obiter dicta* regarding the matter, but there was no time for such a thing due to the almost unnecessarily frantic rhythm that lately it has imposed upon itself - against my opinion - for making decisions in record time. As I have repeatedly expressed to the majority of the Court, I am against sacrificing the complete grounds of its judgments in the name of productivity. I herein repeat my understanding that I do not consider myself a "production agent" (nor a "human resource"), and I cannot accept that the highest value of a Court is its productivity, due to the chronic deficiencies of the American States Organization (ASO) in the allocation of its resources to the Inter-American Human Rights Court and Commission.

³⁴. *Ibid.*, p. 94.

42. The Court could and should have devoted more time to the support of the above mentioned prohibition of *jus cogens*, as it was proceeding until the issue of its transcendental Opinion No. 18 of 2003 (cf. *infra*). This being the first case of mentally disabled people before this Court (para. 123), it could and should have gone deeper on the matter. Bear in mind that an important legacy of the II World Conference of Human Rights (Vienna, 1993), -of which I participated from the first to the last minute, and even during its preparation process, - laid on the recognition of legitimacy of the concern of the whole international community on the living conditions of the population worldwide, especially of its most vulnerable segments.³⁵

43. Disabled people (more than 600 million, that is, approximately 10% of the world population) form these most vulnerable segments of the population, and the basic principle of equality and non-discrimination gains transcendental importance regarding those people.³⁶ The Inter-American Convention on the Elimination of All Forms of Discrimination against People with Disabilities of 1999 grants paramount importance to this principle, repeatedly invoked not only in its preamble³⁷ but also in its operating parts (Articles I(2)(a) e (b), II, III(1), IV(1), V(2) and VI(1) and (5)). However, in this Judgment, the Court refers to it in a way, to my opinion, merely oblique and unsatisfactory (para. 105), when in its own jurisprudence, there are precious elements which could have strengthen its arguments.

44. Thus, in its pioneer and historical Consultative Opinion No. 18 on the *Legal Status and Rights of Undocumented Migrants*, (dated September 17, 2003), internationally claimed and ahead of its time, the Court states that the above mentioned principle of equality and non-discrimination:

"influences all acts of State power, in any of its manifestations, related to the respect and guarantee of human rights. Said principle can effectively be considered as imperative of general international law, as it is applicable to every State, regardless of being a party or not of a certain international treaty, and generates effects regarding third parties, even individuals.

(...) This Court considers that the equality and non-discrimination principle (...) belongs to the scope of *jus cogens* (...). Today no legal act which conflicts with that fundamental principle is admitted, nor is any discriminatory treatment for the prejudice of anyone (...).

(...) Non-compliance of these obligations generates the international liability of the State, and this is much more serious as that non-compliance violates peremptory provisions of International Human Rights Law" (paras. 100-101 and 106).

45. Regarding this item, I issued, in the above mentioned Consultative Opinion No. 18, a long Concurring Opinion (paras. 1-89), in defense of the broadening of the *jus cogens* material content and the wide scope of the corresponding *erga omnes* protection obligations. That has invariably been my position in the core of this Court, as proved by my Separate Opinions in the cases of *Massacre de Mapiripán v. Colombia* (Judgment of September 15, 2005, paras. 25-29 of the Opinion), *Acosta*

³⁵. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. I, 2nd. ed., Porto Alegre, S.A. Fabris Ed., 2003, pp. 39, 91-100 and 242-251.

³⁶. Cf., e.g., G. Quinn and T. Degener *et alii*, *Derechos Humanos y Discapacidad - Uso Actual y Posibilidades Futuras de los Instrumentos de Derechos Humanos de las Naciones Unidas en el Contexto de la Discapacidad*, N.Y./Geneva, United Nations (doc. HR/PUB/02/1), 2002, pp. 1-202.

³⁷. *Consideranda* 1, 3 and 5.

Calderón v. Ecuador (Judgment of June 24, 2005, para. 7 of the Opinion), *Yatama v. Nicaragua* (Judgment of June 23, 2005, paras. 6-8 of the Opinion), *Comunidade Moiwana v. Suriname* (Judgment of June 15, 2005, para. 30 of the Opinion), *Caesar v. Trinidad e Tobago* (Judgment of March 11, 2005, paras. 85-92 of the Opinion), *Massacre de Plan de Sánchez v. Guatemala* (merits, Judgment of April, 2004, paras. 29-33 of the Opinion; and reparations, Judgment of November 19, 2004, para. 5-6 of the Opinion), *Tibi v. Ecuador* (Judgment of September 7, 2004, paras. 26-35 of the Opinion), *Irmãos Gómez Paquiyauri v. Peru* (Judgment of July 8, 2004, paras. 37-44 of the Opinion), *Myrna Mack Chang v. Guatemala* (Judgment of November 25, 2003, para. 29 of the Opinion), *Hilaire, Constantine e Benjamin e Outros v. Trinidad e Tobago* (preliminary objections, Judgment of September 1, 2001, para. 38 of the Opinions; and merit, Judgment of June 21, 2002, para. 16 of the Opinion), *Trujillo Oroza v. Bolívia* (Judgment of February 27, 2002, para. 18 of the Opinion), *"Meninos de Rua" (Villagrán Morales e Outros) v. Guatemala* (reparations, Judgment of May 26, 2001, para. 36 of the Opinion), *Bámaca Velásquez v. Guatemala* (Judgment of November 25, 2000, para. 27 of the Opinion), *Las Palmeras v. Colômbia* (preliminary objections, Judgment of February 4, 2000, para. 6 of the Opinion); and *Blake v. Guatemala* (preliminary objections, Judgment of July 2, 1996, paras. 11 and 14 of the Opinion; and merit, Judgment of January 24, 1998, paras. 23-30 of the Opinion; and reparations, Judgment of January 22, 1999, para. 39-42 of the Opinion); and, apart from that, as corroborated in my Concurring Opinions in the cases *Maritza Urrutia v. Guatemala* (Judgment of November 27, 2003, paras. 5-10 of the Opinion), *Barrios Altos v. Peru* (Judgment of March 14, 2001, para. 11 of the Opinion), and by my Dissenting Opinion in the case of *Irmãs Serrano Cruz v. El Salvador* (preliminary objections, Judgment of November 23, 2004, paras. 32 and 39-43), plus many other Opinions by myself in precautionary protection ordered by this Court.³⁸

46. Therefore, I believe that the Court could and should have taken the arguments of its most advanced jurisprudence for the matter at issue when analyzing this Judgment in the case of *Ximenes-Lopes*. Perhaps it would have done so had it given itself more time for discussion. As stated by the renown adage, *you cannot rush perfection*. Moreover, until the beginning of 2004, the Inter-American Court was one of the contemporary international Courts which mostly contributed to the evolution of the material content of the *jus cogens*, followed by the Criminal International Court *ad hoc* for former Yugoslavia. For any reason which escapes my understanding, lately it seems to have refrained its doctrinal and jurisprudential construction on the matter.

47. To my belief, in this Judgment in the case of *Ximenes-Lopes*, when determining the violations not only of Articles 4 and 5 of the Convention (acknowledged by the State itself), but also of Articles 8(1) and 25 of the Convention, it should have gone beyond regarding the latter, broadening the *jus cogens* scope also to the right of access to justice *lato sensu*, including the

³⁸. Cases of *Crianças e Adolescentes Privados de Liberdade no Complexo do Tatuapé da FEBEM v. Brasil* (of November 30, 2005, paras. 24-26 of my Concurring Opinion); *Prisões de Mendoza v. Argentina* (of June 18, 2005, paras. 7-20 of my Concurring Opinion); *Povo Indígena de Sarayaku v. Equador* (of July 6, 2004, para. 8 of my Concurring Opinion; and of June 17, 2005, paras. 20-26 of my Concurring Opinion); *Comunidades do Jiguamiandó e do Curbaradó v. Colômbia* (of March 15, 2005, paras. 8-10 of my Concurring Opinion); *Comunidade de Paz de San José de Apartadó v. Colômbia* (of March 15, 2005, paras. 8-10 of my Concurring Opinion); *Emissora de Televisão 'Globovisión' vs. Venezuela* (of September 4, para. 13 of my Concurring Opinion); *Prisão de Urso Branco vs. Brasil* (of July 7, 2004, para. 8 of my Concurring Opinion); and *Povo Indígena Kankuamo v. Colômbia* (of July 5, 2004, para. 10 of my Concurring Opinion).

guarantees of due legal process therein. In that sense, I have ruled within this Court in the two last years, for example, *inter alia*, in the arguments of my Separate Opinions in the cases of *López Álvarez v. Honduras* (Judgment of February 01, 2006, paras. 53-55 of the Opinion), *Massacre de Pueblo Bello v. Colombia* (Judgment of January 31, 2006, paras. 63-65 of the Opinion), *Baldeón García v. Perú* (Judgment of April 6, 2006, para. 10 of the Opinion), and *Comunidade Indígena Sawhoyamaxa v. Paraguai* (Judgment of March 29, 2006, para. 36 of the Opinion). I hope this Court soon has the courage to take this new qualitative step in its jurisprudential construction, since it did not take it in this Judgment of this case of *Ximenes-Lopes*. From the very day on which it takes it - I hope very soon - it shall be contributing to make it more difficult to repeat stories like Electra's and Irene's without punishment.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary