

## CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. In the memorable public hearing of 08 August 2000 before the Inter-American Court of Human Rights, the Delegations of both the Inter-American Commission on Human Rights and the Dominican Republic sought to identify the context of the present case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic*, and pointed out - amidst signs of an appreciated procedural cooperation - its considerable complexity and its character of a true human tragedy. This being so, besides voting in favour of the adoption by the Court of the present Resolution on Provisional Measures of Protection, I feel obliged to leave on the records, in this Concurring Opinion, my thoughts on the matter, given the dimension and proportions which the problem dealt with herein has acquired, constituting one of the great challenges of the International Law of Human Rights at the beginning of the XXIst century.

### I. Uprootedness and Human Rights: The Global Dimension.

2. In the aforementioned public hearing, the Dominican Delegation pointed out that the present case reflects a problem which concerns also the international community and that the search for a solution to it should not be incumbent entirely upon the shoulders of the Dominican Republic. In my understanding the Dominican Delegation is right in pointing out this aspect of the problem: we cannot, in fact, make abstraction of its *causes*. The contemporary phenomenon of the *uprootedness*, which is manifested in different regions of the world, discloses a truly global dimension, which presents a great challenge to legal science, and, in particular, the International Law of Human Rights.

3. In fact, in a "globalized" world - the new euphemism *en vogue*, - the frontiers are opened to capitals, investments, goods and services, but not necessarily to the human beings. The wealth is increasingly concentrated in the hands of a few ones, at the same time that those marginalized and excluded regrettably increase, in a growing (and statistically proven) way. The lessons of the past seem to have been forgotten, the sufferings of previous generations appear to have been in vain. The current "globalizing" frenzy, shown as something inevitable and irreversible, - constituting in reality the most recent expression of a perverse social neodarwinism, - appears entirely devoid of all historical sense.

4. This framework reveals the dimension that the human being (of the era of the computers and the *Internet*) has given to his fellow-man, on this eve of the XXIst century: the human being has been placed by himself in a scale of priority inferior to that attributed to the capitals and goods, - in spite of all the struggles of the past, and of all the sacrifices of the previous generations. To the primacy of the capital over work<sup>1</sup> corresponds that of egoism over solidarity. As a consequence of this contemporary tragedy - caused essentially by man himself, - perfectly avoidable if human solidarity prevailed over egoism, there emerges the new phenomenon of the uprootedness, mainly of those who seek to escape from hunger, from illnesses and

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<sup>1</sup>. This latter being understood not as a simple occupation, or a means of production, or source of income, but rather as a way to give meaning to life, to serve the fellow-men, and to attempt to improve the human condition.

from misery, - with grave consequences and implications for the international norms themselves of protection of the human being.

5. Already in 1948, in a luminous essay, the historian Arnold Toynbee, questioning the very bases of what is understood by *civilization*, - that is, quite modest advances at the social and moral levels, - regretted that the command achieved by man over the non-human nature unfortunately did not extend itself to the spiritual level<sup>2</sup>. In fact, the need for roots is to the human spirit itself, as pointed out with such a rare lucidity by Simone Weil in a book published in 1949: every human collectivity has its roots in the past, which constitutes the only means of preserving the spiritual legacy of those who have already departed, and the only means whereby the dead can communicate with the living<sup>3</sup>.

6. With the uprootedness, one loses, for example, the familiarity with the day-to-day life, the mother-tongue as a spontaneous form of the expression of the ideas and sentiments, and the work which gives to each person the meaning of life and sense of usefulness to the others, in the community wherein one lives<sup>4</sup>. One loses the genuine means of communication with the outside world, as well as the possibility to develop a *project of life*. It is, thus, a problem which concerns the whole human kind, which encompasses the totality of human rights, and, above all, which has a spiritual dimension which cannot be forgotten, with all more reason in the dehumanized world of our days.

7. The problem of uprootedness ought to be considered in a framework of action oriented towards the eradication of social exclusion and extreme poverty, - if one indeed wishes to reach its causes and not only to fight its symptoms. One ought to develop responses to the new needs of protection, even if they are not literally contemplated in the international instruments in force of protection of the human being<sup>5</sup>. The problem can only be adequately confronted bearing in mind the indivisibility of all human rights (civil, political, economic, social and cultural).

## II. Uprootedness and Human Rights: The State Responsibility.

8. But there is another aspect which ought to be considered. Part of the difficulties of protection, in the present context of uprootedness, lies in the gaps of the existing norms of protection. No-one questions, for example, the existence of a right to *emigrate*, as a corollary of the right to freedom of movement. But the States have not yet accepted a right to *immigrate* and to *remain* wherever one happens to be. Instead of population policies, the States, in their great majority, pursue rather the police function of protecting their frontiers and controlling migratory fluxes, sanctioning the so-called *illegal* migrants. Since, in the view of the States, there does not exist a human right to immigrate and to remain wherever one is, the control of

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<sup>2</sup>. A.J. Toynbee, *Civilization on Trial*, Oxford, University Press, 1948, pp. 262 and 64.

<sup>3</sup>. The point is developed by the author, one of the great thinkers of the XXth century, who died prematurely, in her posthumous book *L'Enracinement* (of 1949, subsequently edited in English under the title *The Need for Roots*, 1952).

<sup>4</sup>. Such as perspicaciously pointed out by another great thinker of our times, Hannah Arendt (in *La Tradition cachée*, 1987).

<sup>5</sup>. It may be observed that the principle of *non-refoulement*, a cornerstone of the protection of refugees (as a principle of customary law and even of *jus cogens*), may be invoked even in distinct contexts, such as that of the collective expulsion of illegal migrants or of other groups. Such principle has been acknowledged also by human rights treaties, as illustrated by Article 22(8) of the American Convention on Human Rights.

migratory entries, added to the procedures of deportations and expulsions, are subject to their own sovereign criteria. It is not surprising that inconsistencies and arbitrary acts derive therefrom<sup>6</sup>.

9. The norms of protection pertaining to human rights continue to be insufficient, in face of the lack of agreement as to the bases of a true international cooperation relating to the protection of all those who are uprooted. There are no effective juridical norms without the corresponding and underlying values<sup>7</sup>. In relation to the problem at issue, some norms of protection already exist, but the acknowledgment of the values, and the will to apply those norms, are lacking; it is not simply casual, for example, that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>8</sup>, one decade after being approved, has not yet entered into force.

10. In relation to capital (including the purely speculative one), the world has been "globalized"; in relation to work and to the human beings (including those who attempt to escape from grave and imminent threats to their own life), the world has been atomized in sovereign units. In a "globalized" world of profound iniquities such as the one of our days, of the irruption of so many disrupting internal conflicts, how to identify the origin of so much structural violence? The evil appears to be of the human condition itself. The question of the uprootedness ought to be dealt with not in the light of State sovereignty, but rather as a problem of a truly *global* dimension that it is (requiring a concert at universal level), bearing in mind the obligations *erga omnes* of protection<sup>9</sup>.

11. In spite of being a problem which affects the whole *international community* (a concept which has already been supported by the more lucid contemporary doctrine of international law<sup>10</sup>), uprootedness continues to be treated in an atomized way by the States, with the outlook of a legal order of a purely inter-State character, without apparently realizing that the Westphalian model of such international order is, already for a long time, definitively exhausted. It is precisely for this reason that the States cannot exempt themselves from responsibility in view of the global character of the uprootedness, since they continue to apply to this latter their own criteria of domestic legal order.

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<sup>6</sup>. Nor is one to lose sight of the fact that current programs of "modernization" of justice, with international financing, do not take care of this aspect, as their main motivation is to guarantee the security of investments (capitals y and). This is a small sign of the world wherein we live...

<sup>7</sup>. It may be observed that contemporary legal doctrine itself has simply been remiss in relation to the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), - in spite of the great significance of this latter. The basic idea underlying this Convention is that all migrants - including the *undocumented* and *illegal* ones - ought to enjoy their human rights irrespective of their legal situation. Hence the central position occupied, also in this context, by the principle of *non-discrimination* (Article 7). Not surprisingly, the list of the protected rights follows a necessarily holistic or integral vision of human rights (comprising civil, political, economic, social and cultural rights).

<sup>8</sup>. Which prohibits measures of collective expulsion, and determines that each case of expulsion ought to be individually examined and decided, pursuant to the law (Article 22).

<sup>9</sup>. The conceptual development of such obligations is a high priority of contemporary legal science, such as I have been insisting in some of my Opinions in distinct Judgments of the Inter-American Court (mainly in the cases *Blake*, 1996-1999, and *Las Palmeras*, 2000).

<sup>10</sup>. As from the first systematic formulations in visionary books such as, *inter alia*, those by C.W. Jenks (*The Common Law of Mankind*, 1958) and by R.-J. Dupuy (*La communauté internationale entre le mythe et l'histoire*, 1986).

12. On this eve of the XXist century, there persists a *décalage* [cf.] between the demands of protection in a "globalized" world and the means of protection in an atomized world. The so-called "globalization", I allow myself to insist, has not yet encompassed the means of protection of the human being. Regrettably, the *universal juridical conscience* - in which I firmly believe<sup>11</sup> - does not yet appear to have awakened sufficiently either for the necessity of the conceptual development of the international responsibility other the purely of the State<sup>12</sup>. This latter ought, thus, to respond for the consequences of the practical application of the norms and public policies that it adopts in the matter of migration, and in particular of the procedures of deportations and expulsions.

### III. Uprootedness and Human Rights: The Juridical Nature of the Provisional Measures of Protection.

13. Having pointed out, in relation to the uprootedness, the complementary aspects of its global dimension and of the State responsibility, may I move on to the third and last aspect of the problem, pertaining to its place in the context of the provisional measures of protection. A special emphasis, in tackling the tragedy of uprootedness, ought to fall on the *prevention*<sup>13</sup>, of which the very adoption of provisional measures of protection in the framework of the International Law of Human Rights constitutes an eloquent manifestation. The intertemporal dimension is thus manifested in the phenomenon of uprootedness as well as in the application of provisional measures of protection.

14. Likewise, the indivisibilidad of all human rights is manifested in the phenomenon of uprootedness (cf. *supra*) as well as in the application of provisional measures of protection. It being so, there is, juridically and epistemologically, no impediment at all for such measures, which so far have been applied by the Inter-American Court in relation to the fundamental rights to life and to personal integrity (Articles 4 and 5 of the American Convention on Human Rights), to be also applied in relation to other rights protected by the American Convention. All those rights being interrelated, it is perfectly possible, in my understanding, to order provisional

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<sup>11</sup>. If it did not exist, one would not have, in the past, e.g., abolished the international trade of slaves, abandoned the practice of secret treaties, prohibited war as an instrument of foreign policy, and put an end to colonialism with the crystallization and the exercise of the right of self-determination of peoples; if it did not exist, one would not have, in our times, e.g., affirmed the existence of imperative norms of international law (*jus cogens*) and of obligations *erga omnes* of protection of the human being, and configured a true contemporary international regime against torture, forced disappearances of persons, and summary, extra-legal and arbitrary executions. Such as I have been pondering for already some time (and more recently in my essay "A Emancipação do Ser Humano como Sujeito do Direito Internacional e os Limites da Razão de Estado", in *Quem Está Escrevendo o Futuro? 25 Textos para o Século XXI*, Brasília, Ed. Letraviva, 2000, pp. 99-112), it is due to this universal juridical conscience that international law has been transformed, from a legal order of pure *regulation* (as in the past) into a new *corpus juris* of *liberation* of the human being.

<sup>12</sup>. As it can be inferred from the hesitations and uncertainties of the voluminous work on the matter, throughout so many years, of the International Law Commission of the United Nations.

<sup>13</sup>. In 1997, the United Nations High-commissioner for Human Rights observed that, in the context of mass exoduses and human rights, "the term 'prevention' ought not to be interpreted in the sense of impeding that the persons abandon a zone or country but rather in the sense of impeding that the situation of human rights is deteriorated to such an extent that the abandonment is the only option and also of impeding (...) the deliberate adoption of measures to displace by force a great number of persons, such as mass expulsions, internal displacements and forced eviction, resettlement or repatriation". U.N., *Derechos Humanos y Éxodos en Masa - Informe del Alto Comisionado para los Derechos Humanos*, document E/CN.4/1997/42, of 14.01.1997, p. 4, par. 8.

measures of protection of each one of them, whenever are met the two requisites of the "extreme gravity and urgency" and of the prevention of "irreparable damage to persons", set forth in Article 63(2) of the Convention.

15. As to the protected rights, I understand that the extreme gravity of the problem of uprootedness brings about the extension of the application of the provisional measures not only to the rights to life and to personal integrity (Articles 4 and 5 of the American Convention) but also to the rights to personal liberty, to the special protection of the children in the family, and to circulation and residence (Articles 7, 19 and 22 of the Convention), as in the present case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic*. This is the first time in its history that the Court proceeds in this way, in my view correctly, aware of the necessity to develop, by its evolutive case-law, new means of protection inspired in the reality of the intensity of human suffering itself.

16. The present Resolution of the Court reveals, furthermore, that the concept of *project of life*, recently dealt with in the exercise of its contentious function pertaining both to the merits ("*Street Children*" case, Judgment of 19.11.1999) and to reparations (*Loayza Tamayo* case, Judgment of 27.11.1998), marks likewise presence at the level of provisional measures of protection, as ensued from the facts alleged by the Delegations of both the Dominican Republic and the Inter-American Commission, as well as by the two witnesses presented by this latter, in the public hearing before the Court of 08 August 2000.

17. One ought to bear always in mind the evolution of the provisional measures of protection, which have their historical roots in the precautionary process (*proceso cautelar*) at the level of the internal legal order, originally conceived to safeguard the effectiveness of the jurisdictional function itself. Gradually the autonomy of the precautionary action (*acción cautelar*)<sup>14</sup> was affirmed, having reached the international level in the arbitral and judicial practice. The *rationale* of the provisional measures did not change substantially with this transposition to the level of Public International Law, in which they continued to seek the preservation of the rights claimed by the parties and the integrity of the decision as to the merits of the case. The change of the object of such measures only took place with the impact of the emergence of the International Law of Human Rights<sup>15</sup>.

18. With their transposition from the ambit of the traditional inter-State *contentieux* to that of the International Law of Human Rights, the provisional measures began to go beyond, in the matter of protection, revealing a scope without precedents, in moving on to protect the *sustantive rights* themselves of the human beings, to the extent that they seek to avoid irreparable damages to the human person as subject of the International Law of Human Rights. The human being is taken as such, irrespective of the collectivity which he belongs to. This gradual evolution concerning provisional measures of protection is nowadays consolidated, and the Inter-American Court of Human Rights has surely contributed to that more than any other contemporary international tribunal.

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<sup>14</sup>. Mainly due to the contribution of the Italian procedural law doctrine of the first half of the XXth century, in particular the well-known works by G. Chiovenda (*Istituzioni di Diritto Processuale Civile*, 1936), P. Calamandrei (*Introduzione allo Studio Sistematico dei Provvedimenti Cautelare*, 1936), and F. Carnelutti (*Diritto e Processo*, 1958).

<sup>15</sup>. Such as I seek to demonstrate in my Preface to volume II of the *Compendium of Provisional Measures* (June 1996 - June 2000) of the Inter-American Court of Human Rights (pp. VII-XVIII).

19. The Inter-American Court has acted, so far, at the same time with prudence and prospective vision, without indulging into the still nebulous doctrinal debate about the existence or otherwise of an *actio popularis* in international law. In his well-known and progressive Dissenting Opinion in the *South-West Africa* case (1966) before the International Court of Justice, Judge Philip Jessup did not base his reasoning on an *actio popularis* in international law either. This did not impede him to point out that international law has, nevertheless, accepted and created situations in which one recognizes "a right of action without having to prove an individual harm or an individual substantive interest, distinct from the general interest"<sup>16</sup>.

20. On his turn, in his equally well-known and visionary Dissenting Opinion in the same *South-West Africa* case, Judge Kotaro Tanaka tampoco did not need to resort either to the figure of the *actio popularis* (even though recognized in the national legal systems) in order to affirm that every member of a human society has interest in the accomplishment of social justice and of certain humanitarian principles, and that this historical evolution itself of Law shows that this latter is enriched from the cultural point of view in encompassing values which were previously outside its domain<sup>17</sup>. Hence, for example, the jurisdictionalization of social justice; in the case of the protection of social groups, - added perspicaciously Judge Tanaka, - what is protected is not the group *per se* as a whole, but rather the individuals who compose it<sup>18</sup>.

21. The domain is, in my understanding, open to an evolution towards the crystallization of an *actio popularis* in international law, to the extent that one achieves a greater conscientization of the existence of a true *international community*, formed by the States as well as by the peoples, communities, private groups and individuals (both governed and governors), - such as was propounded as from the XVIth century by the so-called founding fathers of the law of nations (*droit des gens*)<sup>19</sup>. There is a difference between to request provisional measures of protection for a community of an "indeterminate" character<sup>20</sup>, and to request them for a community or group whose members can be *individualized*<sup>21</sup>.

22. To reason, in the circumstances of the present case, as from the existence of an *actio popularis*, would present the risk of distorting the character of the provisional measures of protection, in their current stage of historical evolution. It being so, as to the persons protected by the Provisional Measures which the Court has just ordered, in the present case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic*, the Tribunal has duly individualized them, without failing to singling out the context of their situation, in further requiring from the State detailed information on the situation of the frontier communities or "bateyes" whose members may find themselves involved in the problem dealt with herein.

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<sup>16</sup>. International Court of Justice, *ICJ Reports* (1966) p. 388.

<sup>17</sup>. International Court of Justice, *ICJ Reports* (1966) pp. 252-253.

<sup>18</sup>. *Ibid.*, p. 308.

<sup>19</sup>. As can be seen, e.g., in the works by Francisco de Vitoria (*Relecciones Teológicas*, 1538-1539), Alberico Gentili (*De Jure Belli*, 1598), Francisco Suárez (*De Legibus ac Deo Legislatore*, 1612), Hugo Grotius (*De Jure Belli ac Pacis*, 1625), Samuel Pufendorf (*De Jure Naturae et Gentium*, 1672), Christian Wolff (*Jus Gentium Methodo Scientifica Pertractatum*, 1749).

<sup>20</sup>. As does the Inter-American Commission in paragraph 31 of its petition of 30 May, 2000.

<sup>21</sup>. As the Inter-American Court has already admitted, in its recent Resolutions on Provisional Measures of Protection in the cases *Digna Ochoa and Others* (of 17.11.1999) and *Clemente Teherán* (of 12.08.2000).

23. In this way, the Court, at the same time that it has innovated and taken a qualitative step in its case-law - of growing importance in the last years - in the matter of Provisional Measures of Protection, has also acted with prudence: it has listened attentively to the oral pleadings of the Commission and the State and has verified the great seriousness of both in the treatment of the theme in their interventions during the aforementioned public hearing before the Tribunal; it has recognized the high complexity of the problem dealt with herein in its distinct aspects; it has taken care not to prejudge the merits of the case pending before the Inter-American Commission (in particular as to the question of the guarantees of the due process of law); it has shown its sensitiveness to the needs of protection; and it has contributed to the definitive characterization of the *tutelary*, rather than purely *precautionary*, character of the provisional measures of protection in the conceptual universe of the International Law of Human Rights (cf. *supra*).

24. I cannot, thus, fail to express my hope that the measures which the Dominican Republic comes to take, in conformity with the Provisional Measures of Protection individualized in the present Resolution of the Court, are reverted to the benefit of all the other persons - not indicated nominally in the petition of the Inter-American Commission - who find themselves in the same situation of vulnerability and risk. Law does not operate in the vacuum; it evolves pursuant to the fulfilment of social needs and to the recognition of the values underlying its norms.

25. A role of fundamental importance is reserved to Law in order to fulfil the new needs of protection of the human being, particularly in the dehumanized world in which we live. At the beginning of the XXIst century, there is, definitively, pressing need to situate the human being in the place which corresponds to him, that is, in the centre of the public policies of the States (such as population policies) and of all process of development, and certainly above capitals, investments, goods and services. There is, moreover, pressing need to develop conceptually the law of the international responsibility, so as to comprise, besides the responsibility of the State, also that of non-State actors. This is one of the greatest challenges of public power and of legal science in the "globalized" world in which we live, from the perspective of the protection of human rights.

Antônio A. Cançado Trindade  
Judge

Manuel E. Ventura-Robles  
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