CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I am voting in favor of the adoption of the present Judgment of the Inter-American Court of Human Rights in the case of the *"Juvenile Reeducation Institute" vs. Paraguay*. This judgment follows the same line of reasoning that the Court introduced in the now historic and paradigmatic case of the *"Street Children" vs. Guatemala (Villagrán Morales et al.,* 1999-2001) and depicts a reality that is everyday life across Latin America (and other regions of the world). The case also demonstrates that the human conscience has evolved to the point where justice can be done and the rights of even the most vulnerable elements of society protected by granting them, like any other human being, direct access to an international court to lay claim to their rights, as plaintiffs with full standing. With regard to the present Judgment that the Court has just adopted, I feel compelled to share my thoughts on two points in order to explain my position on the matter. I refer, specifically, to the questions of the subjectivity [*titularité]* of rights in extremely adverse situations, and the broad scope of due process of law.

I. Subjectivity [*titularité*] of rights in extremely adverse situations

2. The *Case of the "Street Children",* which this Court concluded three years ago, pointed up how important it is that individuals be allowed direct access to international courts. This enables them to assert their rights against abuses of power and endows domestic public law and international law with an ethical content, a fact made clear to this Court in the course of the contentious proceedings in the Case of the "Street Children", where the mothers of the murdered children, who were as poor and forsaken as their children had been in life, were able to turn to an international court, appear at the proceedings[1] and, thanks to this Court's judgments on the merits and reparations[2] which supported their claims, were at least able to recoup their faith in human justice.

3. Now, three years later, this *Case of the "Juvenile Reeducation Institute"* once again demonstrates that even in the most adverse circumstances, the human being emerges as the subject of the International Law of Human Rights, endowed with full procedural standing in an international court. The individual's right of recourse to international justice is realized in the jurisprudence of the Inter-American Court. An important step in that regard was taken last year in the Court's Judgment in the *Five Pensioners vs. Peru* (February 28, 2003), which made clear the broad scope of the right of recourse to the courts (at both the domestic and international levels[3]): that right is not reduced to formal access, *stricto sensu*, to the judicial instance; the right of effective recourse to a competent court or tribunal means, *lato sensu*, the right to obtain justice, i.e., an autonomous right to the very *realization* of justice.

---

[1] Public hearings before this Court on January 28 and 29, 1999, and March 12, 2001.

[2] Of November 19, 1999 and May 26, 2001, respectively.

[3] For a study on this subject, see A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104; 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* - Montreal (2001) n. 2, pp. 207-239.

4. That was the first contentious case processed entirely under the Court's new Rules of Procedure (adopted on November 24, 2000, and in force since June 1, 2001), which granted the petitioners *locus standi in judicio* during all stages of the proceedings before the Court. Now, a year and a half later, the Court's Judgment in the *Case of the "Juvenile Reeducation Institute"* underscores the significance of the historic amendments that the Court introduced and that are now part of its current Rules of Procedure (paragraphs 106, 119-120, and 125) to protect the individual's subjectivity [*titularité]* of protected rights by giving him *locus standi in judicio* in all phases of contentious proceedings before the Court. The *"Street Children"* and *"Juvenile Reeducation Institute"* cases are eloquent testimony of *titularité*, even in the most adverse circumstances.

5. As I underscored in my Concurring Opinion in the *Case of the "Five Pensioners"*, the Court correctly held that "the consideration which ought to prevail is that of the individuals being *subjects* of all the rights protected by the Convention, as the true substantive complaining party, and as subjects of the International Law of Human Rights." (paragraph 16). This was a "significant step forward taken by the Court, since the adoption of its present Regulations" (para. 17) inasmuch as the "assertion of the international juridical personality and capacity of the human being fulfills a true *need* of the contemporary international legal order" (para. 23). I added the following:

> In fact, the assertion of that juridical personality and capacity constitutes the truly revolutionary legacy of the evolution of the international legal doctrine in the second half of the XXth 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 [it]: those rights were proclaimed as *inherent* to every human being, irrespective of […] circumstances.[4] The individual is a subject *jure suo* of International Law, and to the recognition of the rights which are inherent to him corresponds ineluctably the procedural capacity to vindicate them, at national as well as international levels. (paragraph 24).

6. More recently, in the case of the *Gómez Paquiyauri Brothers vs. Peru* (Judgment of July 8, 2004), I followed the same line of reasoning and stressed the point that the individuals' *titularité* of all Convention-protected rights must trump all other considerations, as individuals are the subjects of the International Law of Human Rights" (para. 27). That development is a "direct consequence" of the step forward that the Court took upon adoption of its current Rules of Procedure, the fourth in its history. The amended Rules of Procedure grant individual petitioners *locus standi in judicio* for all phases of the proceedings before the Court (para. 27). Furthermore, as I have maintained in recent years, "we are in the midst of an historical process of consolidating the individual's emancipation *vis-à-vis* his own State" (para. 28).

7. Six years ago, in my Concurring Opinion on the Court's Judgment in *Castillo Petruzzi et al. vs. Peru* (Preliminary Objections, 1998), I described the "qualitative advance" that was needed under the American Convention:

> 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 (...), but [also] the right of direct access of

---

[4] IACtHR, *Juridical Condition and Human Rights of the Child*, August 28, 2002, Advisory Opinion OC-17/02, operative paragraph 1, and Concurring Opinion of Judge A.A. Cançado Trindade, paragraphs 1-71.

> individuals to 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 (...)
>
> (...) Above all, this qualitative advance would fulfill, in my understanding, an imperative of justice. Individuals' unrestricted *jus standi* -no longer merely *locus standi in judicio*- before the Inter-American Court itself, represents, -as I have indicated in my Opinions in other cases before the Court-[5] the logical consequence of the conception and formulation of rights to be protected under the American Convention at [the] international level, to which it ought to correspond necessarily the full juridical capacity of the individual petitioners to vindicate them. (paragraphs 42-43).

8. The Court's Judgment in the *Case of the "Juvenile Reeducation Institute"* underscores the fact that each individual is the subject (*titulaire)* of human rights (para. 106); in other words, in the *cas d'espèce*, each child victimized by the suffering at the "Juvenile Reeducation Institute" is the subject (*titulaire)* of human rights; not to admit that fact would "unduly restrict their status as subjects of the International Law of Human Rights" (para. 125). Again, I repeat, despite the adversities that the inmates at the "Panchito López" "Juvenile Reeducation Institute" were forced to endure -adversities as extreme as three fires (that killed, burned or otherwise injured inmates at the Center)[6]- and despite the fact that their existential condition as children (minors) limited their juridical capacity-, their subjectivity of rights emanating directly from international law has been preserved intact and their case has reached an international human rights court.

9. In its Advisory Opinion OC-17/2002 (August 28, 2002) on the *Juridical Condition and Human Rights of the Child*, the Court addressed the duties that family and State alike have *vis-à-vis* children in light of children's rights under the American Convention on Human Rights and the United Nations Convention on the Rights of the Child. But the Court also made plain the fact that a child is the subject (*titulaire)* of rights, and not simply an object of protection. The Court further held that the Law accords juridical personality to every human being (child and adolescent included), irrespective of his existential condition or of his juridical capacity to exercise his rights for himself (capacity of exercise).

10. As I noted in my Concurring Opinion on Advisory Opinion No. 17:

> It is true that juridical personality and capacity are closely related. At the conceptual level, however, they are distinct from each other. It may occur that an individual may have juridical personality without enjoying, as a result of his existential condition, full capacity to act. Thus, in the present context, one understands by personality the aptitude to be *titulaire* of rights and duties, and by capacity the aptitude to exercise them by oneself (capacity of exercise). Capacity is thus closely linked to personality; nevertheless, if by any situation or circumstance an individual does not enjoy full juridical capacity, this does not mean that he ceases to be a subject of right[s]. Such is the case with the children (para. 8).

---

5 Cf., in this regard, my Separate Opinions in *Castillo Páez* (Preliminary Objections, Judgment of January 30, 1996, paragraphs 14-17) and *Loayza Tamayo* (Preliminary Objections, Judgment of January 31, 1996), paragraphs 14-17, respectively.

6 Nine inmates died as a result of the fire on February 11, 2000; nine inmates were injured or burned in the fire on February 5, 2001; and new disturbances broke out in the fire on July 25, 2001 (cf. paragraph 134.29-34 of the present Judgment).

11. In its recent jurisprudence, both in the form of advisory opinions and judgments on contentious cases, the Inter-American Court has held that a child's substantive and procedural rights are to be preserved in any and all circumstances. Underlying this notable development is the Kantian concept of the human person – children included, of course- as an end unto himself; this means all human beings, regardless of their juridical capacity (to exercise). That development is informed by the fundamental principle of respect for the dignity of the human person, irrespective of his existential condition. By virtue of that principle, every human being, no matter what his situation or circumstance, has a right to dignity. This fundamental principle is echoed in a number of international treaties and human rights instruments.[7] Indeed, in our time, the recognition and consolidation of the human being's position as a full subject of the International Law of Human Rights is an unequivocal and eloquent expression of today's *humanization* of International Law itself (the new *jus gentium* of our times)[8].

II. The Broad Scope of Due Process of Law.

12. One of the central issues in the *Case of the "Juvenile Reeducation Institute"* that the Court examined in the Judgment it just delivered, is that of preventive imprisonment [or preventive detention or preventive custody]. In practice, preventive imprisonment has become a curse now afflicting thousands and thousands of forgotten souls in detention centers around the world. In its Judgment in this case, the Court warns against the excesses and abuses of this practice, pointing out that preventive detention must be for the shortest time possible. The Court also reminds us of the special precautions that must be taken when children are deprived of their liberty. And, as the Court also points out, preventive imprisonment is limited by universally recognized general principles of law (such as the presumption of innocence and the principles of necessity and proportionality). If those principles are not being observed, then preventive detention becomes an unlawful form of advance punishment without conviction (paragraphs 229-231). At the substantive level and in keeping with the case law that the Court established in the *Case of the "Street Children" (*Merits, 1999), the Court uses the concept of the right to life *latu sensu,* so that it also encompasses the right to live in dignity (paragraphs 151-152, 156, 160-161, 164, 167-168 and 170).

13. Here, once again, the role and importance of the general principles of law that, on a broader plane, permeate and steer due process of law as a whole, become more self-evident. In Advisory Opinion OC-9/87, on *Judicial Guarantees in States of Emergency*, the Inter-American Court had occasion to clarify the broad scope of due process of law under Article 8 of the American Convention on Human Rights. The Court wrote that Article 8 includes the procedural requirements and prerequisites that courts must observe in order to ensure adequate protection of those persons whose rights or obligations are pending judicial determination; in other words, in order for those requirements and prerequisites to function as real judicial guarantees in the sense of the American Convention.[9] The concept of due process of law

---

[7] See, for example, the preambles of the United Nations' 1989 Convention on the Rights of the Child; of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, 1988), and others.

[8] See, on this subject, A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Volume III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 447-497.

[9] IACtHR, Advisory Opinion OC-9/87 (October 6, 1987) on *Judicial Guarantees in States of Emergency*, Series A, No. 9, paragraphs 27-28.

expressed in Article 8 of the Convention should be understood to apply to all judicial guarantees referred to in the American Convention (reading Article 8 in combination with Articles 7(6), 25 and 27(2) of the Convention).[10]

14. That being the case, judicial guarantees such as those protected under American Convention articles 7(6) -*habeas corpus*– and 25(1) –the petition for a writ of *amparo* or the petition for a writ of *mandamus* or any other effective remedy before the competent domestic judges or courts- are essentials that must be taken within the framework of the *principles* of Article 8 of the Convention.[11] The Court concludes Advisory Opinion OC-9 in very unambiguous terms:

> "the above judicial guarantees should be exercised within the framework and the principles of due process of law, expressed in Article 8 of the Convention. "[12]

15. More recently, in its historic and pioneering Advisory Opinion OC-16/99 (October 1, 19999) on *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, which has been a source of inspiration for the international case-law *in statu nascendi* on the matter, the Inter-American Court emphasized that the prerequisites of the judicial guarantees (protected under Article 8 of the Convention) are intended to ensure or to assert the entitlement to a protected right or the exercise thereof. The Court also pointed up the essentially evolutive nature of the very concept of due process of law, which grows and expands to accommodate new requirements for the protection of the human person.[13]

16. In my concurring opinion on the latest and equally historic Advisory Opinion OC/18 (September 17, 2003) on the *Juridical Condition and Rights of Undocumented Migrants* (the first time an international court has addressed this matter), I pointed out the great significance that I attribute to the fundamental principles of law in any legal system, as follows:

> Every legal system has fundamental principles, which inspire, inform and conform their norms. It is the principles (derived etymologically from the Latin *principium*) that, evoking the first causes, sources or origins of the norms and rules, confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole. It is the general principles of law (*prima principia*) which confer to the legal order (both national and international) its ineluctable axiological dimension; it is they that reveal the values which inspire the whole legal order and which, ultimately, provide its foundations themselves. This is how I conceive the presence and the position of the principles in any legal order, and their role in the conceptual universe of Law. (...) From the *prima principia* the norms and rules emanate, which in them find their meaning. The principles are thus present in the origins of Law itself. The principles show us the legitimate ends to seek: the common good (of all human beings, and not of an abstract collectivity), the realization of justice (at both national and international levels), the necessary primacy of law over force, the preservation of peace. Contrary to those who attempt - in my view in vain - minimize them, I understand that, if there are no principles, nor is there truly a

---

10 *Ibid*., paragraphs 29-30.

11 *Ibid*., paragraph 38 and operative paragraph No. 1.

12 *Ibid*., operative paragraph No. 3.

13 Cf. IACtHR, Advisory Opinion OC-16/99 (October 1, 1999) on *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law.* Series A, No. 16, paragraphs 117-124.

> legal system. Without the principles, the "legal order" simply is not accomplished, and ceases to exist as such. (paragraphs 44 and 46).

17. In its *jurisprudence constante,* the Court has always relied upon general principles of law.[14] Some general principles of law (such as the principles of equality and non-discrimination) are truly *fundamental* as they embody values and are built into the very foundation of the legal system. In the realm of the International Law of Human Rights, these fundamental principles include the principle of the dignity of the human person (which goes to the very purpose of law) and the principle of the inalienability of the human person's inherent rights (which ties in with a premise that is basic to the construction of any *corpus juris* of the International Law of Human Rights). As I pointed out in my Concurring Opinion on the Court's recent Advisory Opinion OC-18, in reality those principles

> "form the *substratum* of the legal order itself, revealing the *right to the Law* of which all human beings are *titulaires*,[15] independently of their [...] citizenship or any other circumstance" (paragraph 55).

18. As I see it, paragraphs 1 and 2 of Article 8 of the American Convention on Human Rights establish not just prerequisites of due process of law or guidelines for its observance, but also true general principles of law (the principle of effective recourse to a competent, independent and impartial judge or tribunal, the principle of presumption of innocence) that serve as the compass and guide of due process of law. Among these principles are the afore-mentioned judicial guarantees provided for in articles 7(6) and 25(1) of the American Convention. My approach to the relationship between articles 8 and 25 of the American Convention is, therefore, to view them as an aggregate rather than separately, and thus maximize protection of the rights upheld in the Convention. I therefore concur with the Court's finding that Article 8(1) of the American Convention was violated in the instant case; regrettably, however, I do not concur with the reasoning that the Court followed to conclude that paragraph 2 of Article 8 of the Convention was not violated in the case of the *"Juvenile Reeducation Institute"*.

19. Both in the application it filed with the Court (May 20, 2002) and in its brief of final pleadings (July 5, 2004), the Inter-American Commission on Human Rights maintained that in the instant case, the "convicted and accused inmates were never separated" at the "Panchito López" Center and "the accused were treated as if they had been convicted of a crime," which implied a violation of the principle of presumption of innocence protected under Article 8(2) of the American Convention.[16]

---

14 Cf. IACtHR, *Case of the Five Pensioners vs. Peru.* Judgment of February 28, 2003, para. 156; IACtHR, *Case of Cantos vs. Argentina,* Preliminary Objections, Judgment of September 7, 2001, para. 37; IACtHR, *Baena Ricardo et al. vs. Panama,* Judgment of February 2, 2001, para. 98; IACtHR, *Neira Alegría vs. Peru,* Preliminary Objections, Judgment of December 11, 1991, para. 29; IACtHR, *Velásquez Rodríguez vs. Honduras* (Judgment of July 29, 1988), para. 184; see also IACtHR, Advisory Opinion OC-18/2003, on the *Juridical Condition and Rights of Undocumented Migrants (*September 17, 2003), paragraphs 83-110 and 157; IACtHR, Advisory Opinion OC-17/2002, on the *Juridical Condition and Human Rights of the Child,* August 28, 2002, paragraphs 66 and 87; IACtHR, Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law,* October 1, 1999, paragraphs 58, 113 and 128; IACtHR, Advisory Opinion OC-14/94, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights),* December 9, 1994, para. 35.

15 A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. III, pp. 524-525tomo III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 524-525.

16 Docs. cits., paragraph 118 and p. 28, respectively.

The Commission added that the vast majority of the inmates were without legal representation and "almost the entire inmate population" was in preventive detention.[17] And, as the Commission pointed out in its application, "[e]ven the State acknowledged this fact in the reports it filed with the Commission." [18]

20. In my opinion, the points made by the Inter-American Commission in this regard, both in its application and in its brief of final pleadings (*supra*) –points that the State did not contest either in its briefs[19] or at the public hearing held by the Court- were proven beyond any reasonable doubt. There was a clear violation of the principle of presumption of innocence, to the detriment of almost all the inmates at the "Panchito López" Center. To expect or demand additional information from the petitioners[20] is, as I see it, to saddle the victims with too heavy a burden of proof. In circumstances such as those established in the instant case (children deprived of their liberty and living under the constant threat of danger), as the representatives of the victims and of their next of kin (Ms. Viviana Krsticevic and Ms. María Clara Galvis) pointed out in the public hearing held by the Court (May 3-5, 2004), the burden of proof is reversed and must be borne by the respondent.

21. At that public hearing, the State's representation denied the existence of a (deliberate) pattern of violations and insisted that the principle *onus probandi incumbit actori* must apply; at the same time, however, he reiterated –in very unambiguous language and with dignity- his acknowledgement of the problems in the prison system and his concern for the situation of the adolescents at the "Panchito López" Center. At no time did the State's representation obstruct the proceedings before the Court. To the contrary, at the public hearing in question he again acknowledged the facts in the complaint, which included "the high percentage of inmates awaiting or standing trial but not yet convicted." His posture was very helpful in establishing the facts in the *cas d'espèce.*[21]

22. In the present judgment, the Inter-American Court itself accepts as proven fact that "the vast majority" of the inmates at the Panchito López Center were "awaiting or standing trial, but had not yet been convicted" and that those awaiting or standing trial "were not separated from the inmates who had been convicted" (paragraphs 134.19 and 20). It was up to the Court, then, to extrapolate the consequences of its own finding on the facts. That being the case, I fail to understand why a violation of both Article 8(1) and Article 8(2)(c) and (e) was not found. The finding that, in my view, the Court should have arrived at in the section

---

17 Docs. cits., paragraph 119 and p. 28, respectively.

18 Doc. cit., paragraph 119.

19 In its brief answering the application (December 13, 2002), the State was very clear in pointing out that "the lack of means also makes it difficult to correct another problem, which is the segregation of those awaiting or standing trial from those already convicted. The State is making efforts to comply with this provision of the Constitution and the law and is already seeing results in some detention centers." (paragraph 201).

20 As indicated at paragraphs 216-218 of the present Judgment.

21 Moreover, in the present Judgment the Court has recognized the work that the State is doing through its legislative, administrative and other reforms that are particularly helpful in protecting children deprived of their liberty, given the State's obligations under Article 19 of the American Convention (*cf.* paragraphs 214 and 263-265).

on the merits, should have carried over into the section on reparations where, for reparations purposes, a distinction should have been made between the accused and those already convicted. In the instant case, there seems to be no doubt at all that the principle of the presumption of innocence protected under Article 8(2) of the Convention has been violated.

23. The broad scope of due process of law, as I perceive it, where Article 8(1) and (2) tie in with articles 25(1) and 7(6) of the American Convention, is in large part the result of the fundamental role and added importance that I attribute to general principles of law (cf. *supra*). My preference would have been to have this Judgment of the Court deal with judicial guarantees and judicial protection (articles 8 and 25 of the Convention) jointly –not separately, as was done. Both in its application and its brief of final pleadings, the Inter-American Commission made a very good case for this approach.

24. In exercising its contentious jurisdiction, the Inter-American Court has in fact linked articles 8 and 25 time and time again. It did so in its judgments in the cases of the *"Street Children"* (1999, paragraphs 219-228 and 235-237), *Durand and Ugarte vs. Peru* (2000, paragraphs 128-130), *Bámaca Velásquez vs. Guatemala* (2000, paragraphs 187-191), the *Constitutional Court* (pertaining to Peru, 2001, paragraphs 68-71 and 89-90), *Baena Ricardo et al. vs. Panama* (2001, paragraphs 124-129 and 137), *Las Palmeras* (concerning Colombia, 2001, paragraphs 58-60), *Maritza Urrutia vs. Guatemala* (2003, paragraphs 116-121), *Juan Humberto Sánchez vs. Honduras* (2003, paragraphs 120-121 and 124), and the *19 Merchants vs. Colombia* (2004, paragraphs 187 and 192-194).

25. Thus, the approach that I am advocating here, which links judicial guarantees and judicial protection (articles 8 and 25 of the Convention), is entirely consistent with the *jurisprudence constante* of the Inter-American Court both in contentious and advisory matters (cf. *supra*), and also affords a heightened degree of protection to those who need it. The abundant jurisprudence of the European Court of Human Rights under Article 6 of the European Convention on Human Rights has recognized that the provisions of that article are true general principles of law, specifically that every person has the right to bring his case to an impartial and competent authority (which by extension means that justice cannot be denied) and to the principle of presumption of innocence.

26. All this points up the prominent role reserved for due process of law in the rule of law *(État de Droit)* in a democratic society. Hence, a narrow interpretation of due process would never be justified. The Inter-American Court has always accorded broad scope to Article 8 of the American Convention. This was particularly true, for example, in the case of *Baena Ricardo et al. vs. Panama* (Judgment of February 2, 2001, paragraphs 124-127), where the Court observes that, ultimately, justice done through due process of law, as a "legally protected true value," must be ensured (para. 129). As I see it, the broad scope of due process of law follows from its close relationship to the right to effective recourse (*lato sensu)* to a competent court or tribunal.

27. The latter concept is expressed in Article 25 of the American Convention. In my Dissenting Opinion in *Genie Lacayo vs. Nicaragua (Application for judicial review of the Judgment of January 29, 1997*. Order of the Court of September 13, 1997), I underscored the sense and scope of Article 25 of the American Convention in the following terms:

> The right to a simple, prompt and effective remedy before the competent national judges or tribunals, enshrined in Article 25 of the Convention, is a fundamental judicial guarantee far more important than one may *prima facie* assume,[22] and which can never be minimized. It constitutes, ultimately, one of the basic pillars not only of the American Convention on Human Rights, but of the rule of law (*État de Droit*) itself in a democratic society (in the sense of the Convention). Its correct application has the sense of improving the administration of justice at national level, with the legislative changes necessary to the attainment of that purpose.
>
> The origin - little-known - of that judicial guarantee is Latin American: from its insertion originally in the American Declaration of the Rights and Duties of Man (of April 1948),[23] it was transplanted to the Universal Declaration of Human Rights (of December 1948), and from there to the European and American Conventions on Human Rights (Articles 13 and 25, respectively), as well as to the United Nations Covenant on Civil and Political Rights (Article 2(3)). Under the European Convention on Human Rights, in particular, it has generated a considerable case-law,[24] apart from a dense doctrinal debate. (paragraphs 18-19).

28. The Inter-American Court has recognized the importance of the right to effective recourse to a competent court or tribunal; from the time of its Judgment in *Castillo Páez vs. Peru* (November 3, 1997) (paragraph 82) to the present, the Court has repeatedly held that every individual's right to a simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights (Article 25 of the Convention) "is one of the basic pillars, not only of the American Convention but also of the rule of law itself in a democratic society, within the meaning of the Convention."[25] In the instant case, the Court has quite correctly established a violation of Article 25 of the Convention (paragraph 251).

29. In my judgment, due process requires recourse to a competent court or tribunal (*stricto sensu*), just as the realization of justice (access to a competent court *lato sensu*) requires due process. The right to avail oneself of the courts –the *right of recourse to the law*- only materializes through observance of due process of law and of the basic principles that comprise due process. It is faithful observance of these

---

22. Its importance was pointed out, for example, in the *Report of the Commission of Jurists of the OAS for Nicaragua*, of February 4, 1994, pp. 100 and 106-107, paragraphs 143 and 160 (later published in: 113/118 *Boletim da Sociedade Brasileira de Direito Internacional* (1998), pp. 335-386).

23 At a time when the Commission on Human Rights of the United Nations was still in the process of preparing the Draft Universal Declaration (from May 1947 to June 1948), as recalled by the *rapporteur* of the Commission (René Cassin); the inclusion in the Universal Declaration of the provision on the right to an effective remedy by the competent national tribunals (Article 8), inspired by the counterpart provision of the American Declaration (Article XVIII), took place in the subsequent debates (of 1948) of the III Committee of the United Nations General Assembly. Cf. R. Cassin, "*Quelques souvenirs sur la Déclaration Universelle de 1948*", 15 *Revue de droit contemporain* (1968) n. 1, p. 10.

24 At its beginnings, such case-law sustained the "accessory" character of Article 13 of the European Convention, seen - as from the eighties - as guaranteeing a subjective individual substantive right. Gradually, in its judgments in the cases of *Klass versus Germany* (1978), *Silver and Others versus United Kingdom* (1983), and *Abdulaziz, Cabales and Balkandali versus United Kingdom* (1985), the European Court of Human Rights began to recognize the autonomous character of Article 13. Finally, after years of hesitation and oscillations, the European Court, in its recent judgment, of 18 December 1996, in the case of *Aksoy versus Turkey* (paragraphs 95-100), determined the occurrence of an "autonomous" violation of Article 13 of the European Convention.

25 For the Court's holdings to this effect over the last four years, v.g., *inter alia, Ivcher Bronstein vs. Peru* (Judgment of February 6, 2001, para. 135), *Mayagna (Sumo) Awas Tingni Community vs. Nicaragua* (Judgment of August 31, 2001, para. 112), *Cantos vs. Argentina* (Judgment of November 28, 2002, para. 52); *Juan Humberto Sánchez vs. Honduras* (Judgment of June 7, 2003, para. 121); *Maritza Urrutia vs. Guatemala* (Judgment of November 27, 2003, para. 117); *19 Tradesmen vs. Colombia* (Judgment of July 5, 2004, para. 193).

principles that leads to the realization of justice, i.e., to everyone's right of recourse to the courts in its fullest sense. Hence the ineluctable and intimate interrelationship between articles 8 and 25 of the American Convention affords the maximum protection of the individual's inherent human rights.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary