SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. While voting in favor of the adoption of the judgment of the Inter-American Court of Human Rights in *the Case of Yean and Bosico children versus the Dominican Republic*, with which I am basically in agreement, in this separate opinion I wish to add some brief personal observations on the central issue of the case, because this is the first time in its history that the Inter-American Court is ruling on the right to nationality under the American Convention on Human Rights when deciding a contentious case. Therefore, allow me to focus on three key aspects of this matter – to which I attribute particular relevance: (a) normative advances with regard to nationality and the troubling persistence of the causes of statelessness; (b) the legal response to the disturbing diversification of the manifestations of statelessness, and (c) the broad scope of the general protection obligations (Articles 1(1) and 2) of the American Convention.

I. Normative advances with regard to nationality and the troubling persistence of the causes of statelessness

2. Over the past three decades, I have been indicating that there is no issue that belongs intrinsically to the sphere reserved to the State or to its exclusive national jurisdiction. The *locus classicus* for examining the question continues to be the celebrated *obiter dictum* of the former Permanent Court of International Justice in its Advisory Opinion on the *Nationality Decrees in Tunis and Morocco* (1923). According to this, determination of whether or not a matter falls within the jurisdiction of a State is a relative matter, dependent on the development of international relations.[1] In fact, in regard to the right to nationality, this development has effectively removed the matter from exclusive national competence and, for some time, has raised it to the level of the international juridical system.

3. In short, the issue of nationality cannot be considered merely from the perspective of the State's discretional authority, because general principles of international law are involved, such as the obligation to protect. Consequently, I consider that certain constructs concerning nationality (original or acquired) derived from traditional doctrine that revolves around the State have been totally surpassed; these include the unlimited power of the State, the exclusive will of the State, the sole interest of the State, and also the contractualist theory (a variant of voluntarism). The emergence and impact of international human rights law has made a decisive contribution to this advancement.

4. Even at the level of domestic law, the acquisition of nationality is a matter of *ordre public* that conditions and regulates the relationship between the individual and the State, through the acknowledgement and observance of reciprocal rights and obligations. The attribution of nationality, as a matter of *ordre public,* always involves, at the level of domestic law, principles and obligations arising from international law, owing to the interaction and interpenetration of the national and international juridical systems.

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[1]. A.A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Edit. Renovar, 2002, pp. 413 and 475; and cf., for a general overview, A.A. Cançado Trindade, "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations", 25 *International and Comparative Law Quarterly* - London (1976) pp. 713-765.

5. More than a quarter of a century before the adoption of the Convention on the Reduction of Statelessness (1961), it had been observed – but only considering the need for advances in treaty-based international law and not taking into account general international law – that it was urgent to tackle the problem of stateless persons (both those who had never had a nationality and those who had had one and lost it), bearing in mind that the organization of the international community assumed that the normal condition of all individuals was to have a nationality, and that statelessness represented an anomaly with disastrous consequences for those in that situation.[2]

6. After all, in international law, according to the writings of its founders, *jus gentium* was conceived to include not only States, but also individuals (subjects of rights and holders of obligations emanating directly from the *law of the peoples*) and already, in classical international law, the regime of nationality began to be regulated by basic principles of *jus soli* and *jus sanguinis*[3] (at times in different combinations that did not exclude one another). This regime provided individuals with an important means of protecting their inherent rights, at least at the level of domestic law; these are the rights of each individual (who is the *dominus litis* when seeking their protection) and not of the State, whose *raison d'être* is based on certain fundamental principles, such as the protection of the individual.[4]

7. However, with the passage of time, it became evident that the nationality regime was not always sufficient to provide protection under any and every circumstance (as evidenced, for example, by the situation of stateless persons). Throughout the twentieth century and to date, international human rights law has sought to remedy this deficiency or vacuum, by denationalizing protection (and thus including every individual, even stateless persons). As I pointed out more than two decades ago, nationality has ceased being the *vinculum juris* (distinct from diplomatic protection), and this came to be constituted by the *condition of victim* of the alleged human rights violations (in the fundamentally different context of the international protection of human rights).[5]

8. The right to nationality is effectively a right inherent in the human being, embodied as a non-derogable right in the American Convention on Human Rights (Articles 20 and 27), as emphasized in this judgment (para. 136). It is also protected under the 1966 United Nations International Covenant on Civil and Political Rights (Article 24(3)), the United Nations 1989 Convention on the Rights of the Child (Article 7), and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 29), and also in the Universal Declaration of Human Rights (Article 15) and the American Declaration of the Rights and Duties of Man (Article 19) of 1948. Moreover, the Convention relating to the Status

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2. This observation had also been made in view of the perverse tendency (of that time) towards de-nationalization and de-naturalization (even as a punishment), which violated the "fundamental principles of the organization of the international community", and owing to the need to tackle statelessness by eliminating its causes; J.-P.-A. François, "Le problème des apatrides", 53 *Recueil des Cours de l'Académie de Droit International de La Haye* (1935), pp. 371-372.

3. *Ibid*., pp. 315 and 288.

4. *Ibid*., pp. 316 and 318. And, for more general information, cf., e.g. P. Weis, *Nationality and Statelessness in International Law*, London, Stevens, 1956, pp. 3 ff.

5. A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, University Press, 1983, pp. 16-17, 19-20, 33, 35-36, 301 and 311-312.

of Stateless Persons (1954) and the Convention on the Reduction of Statelessness (1961) appear to acquire even greater relevance nowadays, given the disturbing persistence of cases of loss of nationality and statelessness.

9. The 1954 Convention sought to protect stateless persons, without attempting to be a substitute for the attribution and acquisition of nationality. The 1961 Convention seeks the attribution and acquisition or retention of nationality, to reduce or avoid statelessness. It incorporates general principles of relevant international law, which have been a source of inspiration for both new international instruments (such as the 1997 European Convention on Nationality) and new national laws on nationality. I consider that the 1961 Convention pronounced one of those general principles that belong to both international treaty-based law and general international law when it determines in its Article 1(1), that "each Contracting State shall grant its nationality to the persons born within its territory who would otherwise be stateless," the mentioned 1961 Convention states, in my opinion, one o those general principles of treaty-based and general International Law.

II. The legal response to the disturbing diversification of the manifestations of statelessness

10. Despite normative progress in this sphere, it is regrettable that the causes of statelessness continue to exist and are perhaps compounded nowadays, insofar as they are sometimes combined with current population displacements (intrinsic to the so-called "globalized" world in which we live). Among the causes of statelessness are situations and practices such as those revealed in this *Case of the Yean and Bosico Children versus the Dominican Republic* (in which the children Dilcia Yean and Violeta Bosico, whose mothers are Dominican and whose fathers are Haitian, were deprived of nationality and remained stateless for more than four years and four months), in addition to other causes, such as conflicts concerning laws on nationality, laws on marriage (particularly, with regard to married women), situations of children who have been abandoned and whose births have not been registered, and discriminatory administrative practices.[6]

11. The persistence of causes of statelessness constitutes a disturbing picture, because the possession of a nationality is a basic requirement for the exercise of other individual rights, such as political rights, and the right of access to education and healthcare, along with so many others. Nowadays, the *de jure* stateless persons are joined by the *de facto* stateless persons, i.e., those who are unable to prove their nationality, and those without an effective nationality (for the effects of protection). Nowadays, the *de facto* stateless persons – whose registration documents have often been confiscated or destroyed by those who control and exploit them – are multiplying, owing to the barbarian practice of the "invisible" trafficking of human beings (especially children and women) throughout the world.[7] This is a widespread contemporary tragedy.

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[6]. For example, transfers of territory (in cases of dissolution or succession of States and changes in borders), loss of nationality owing to de-nationalization, loss of nationality through waiver without prior acquisition of another nationality.

[7]. *Cf*., e.g. R. Piotrowicz, "Victims of Trafficking and *De Facto* Statelessness", 21 *Refugee Survey Quarterly* - UNHCR/Geneva (2002), pp. 50-59.

12. In actual fact, international human rights protection (essential) and diplomatic protection (discretional), operating in fundamentally different ways and contexts, continue to co-exist nowadays, thereby mitigating the extreme vulnerability of many people. Diplomatic protection is conditioned by nationality (effective) as a *vinculum juris*, while international human rights protection emphasizes the general obligation of States Parties to human rights treaties, such as the American Convention, to respect and ensure the respect of the protected rights, for the benefit of all individuals subject to their respective jurisdictions, irrespective of their *nationality*.

13. In this respect, this judgment of the Court provides a timely warning – bearing in mind the general obligations of the States Parties to the American Convention stipulated in Articles 1(1) and 2 thereof - that discriminatory administrative practices and legislative measures on nationality are prohibited (starting with its attribution and acquisition - paras. 141-142). The judgment takes care to emphasize the fact that Dilcia Yean and Violeta Bosico were children, which increased their vulnerability, and jeopardized the development of their personalities, making it impossible to grant them the special protection of their rights to which they were entitled (para. 167); in this respect, the Court rightly recalled the important legacy of its own Advisory Opinion No. 17 (on *the Juridical Status and Human Rights of the Child*, 2002) as regards their protection as subjects of inalienable and inherent rights (para. 177).

14. In this case of the *Yean and Bosico children*, the Court understood that the violation of the right to nationality and the rights of the child also resulted in the violation of the rights to juridical personality, to a name and to equal protection under the American Convention (paras. 174-175, 179-180 and 186-187). Significantly, following this same line of lucid reasoning – in keeping with the challenges of our times, which the Court commenced in its historical Advisory Opinion No. 19 on *the Juridical Status and Rights of Undocumented Migrants* (2003) – it observed in this case that:

> "(...) the obligation to respect and ensure the principle of the right to equal protection and non-discrimination is irrespective of the migratory status of a person in a State. In other words, States have the obligation to ensure this fundamental principle to its citizens and to any foreigner who is on its territory, without any discrimination based on regular or irregular residence, nationality, race, gender or any other cause.
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> In view of the above, (...) the Court considers that:
> a) The migratory status of a person cannot be a condition for the State to grant nationality, because migratory status can never constitute a justification for depriving a person of the right to nationality or the enjoyment and exercise of his rights;
> b) The migratory status of a persons is not transmitted to their children, and
> c) The fact that a person has been born on the territory of a State is the only fact that needs to be demonstrated for the acquisition of nationality, in the case of those persons who would not have the right to another nationality if they did not acquire that of the State where they were born" (paras. 155-156).

III. The broad scope of the general protection obligations (Articles 1(1) and 2) of the American Convention.

15. Thus, the obligation to respect and ensure respect for the protected rights (Article 1(1) of the American Convention) is of a continuous and permanent nature; if the State does not take all possible measures to guarantee this, new victims may arise leading *per se* (owing to the State's inaction) to additional violations, without these having to be related to the rights that were originally violated. Consequently, my understanding differs fundamentally from the argument according to which there

cannot be a violation of Article 1(1) of the Convention if it is not accompanied by a parallel and associated violation of the rights protected by the Convention.

16. This argument, which I cannot accept, corresponds to a restrictive, atomized and disaggregated vision of a general obligation to guarantee under the Convention as a whole. Allow me the metaphor that it would be equivalent to observing only the nearest tree and losing sight of the forest around it. My interpretation of Article 1(1) – and also of Article 2 - of the Convention is and always has been much broader, and evidently aggregative, maximizing the protection under the Convention. I stated this clearly, in this Court, more than eight years ago, in my dissenting opinion in the *Case of Caballero Delgado and Santana versus Colombia* (judgment on reparations of January 29, 1997). Allow me to recapitulate it here in brief, as a final reflection in this separate opinion.

17. When emphasizing the "comprehensive scope" of the general obligation of States stipulated in Article 1(1) of the American Convention in that dissenting opinion, I stated that compliance with this obligation calls for a series of measures from the States Parties to the Convention:

> "... to the effect of educating and empowering individuals under their jurisdiction to make full use of all the protected rights. They include the adoption of legislative and administrative measures designed to remove obstacles, fill in lacunae, and enhance the conditions for the exercise of the protected rights (para. 3).

Thus, I added, to deny the "comprehensive scope" of Article 1(1) of the Convention would be to deprive the American Convention of its effects, since Article 1(1) "embraces all the rights" that the Convention protects (para. 4).

18. Subsequently, in the same dissenting opinion in the *Case of Caballero Delgado and Santana*, I sought to show that the two general obligations enshrined in the American Convention - Articles 1(1) and (2) – are "ineluctably intertwined" and I referred to hypothetical situations to illustrate this (para. 9). Further on, I expanded on this:

> "In my understanding, despite the assertion that there was no violation of Article 2 of the Convention, the finding of non-compliance with the general duty of Article 1(1) is *per se* sufficient to determine to the State Party that it ought to take measures, including of a legislative character, *to guarantee* to all persons under its jurisdiction the full exercise of all the rights protected by the American Convention" (para. 19).

19. Cases soon appeared in which the Inter-American Court itself took a stance in this respect. In the *Case of Five Pensioners versus Peru* (judgment of February 29, 2003), the Court concluded that the defendant State had committed an autonomous violation of the general obligation embodied in Article 2 of the Convention (of harmonizing its domestic law with the provisions of this article), in combination with the general obligation of Article 1(1) thereof (paras. 164-168). Previously, following the same line of thought, in *Case of Castillo Petruzzi et al. versus Peru* (judgment of May 30, 1999), the Court determined that a violation of Articles 1(1) and 2 of the Convention had occurred *separately* (paras. 204-208). Also, in *Case of Baena Ricardo et al. versus Panama* (judgment of February 2, 2001), the Court decided that the defendant State had failed to comply with the general obligations of Articles 1(1) and (2) of the Convention, and devoted a whole chapter (No. XIII) of the judgment to this (paras. 176-184).

20. In this regard, in the memorable *Case of Suárez Rosero versus Ecuador* (judgment of November 12, 1997), for the first time in its history, the Court decided expressly that a norm of domestic law (the Ecuadorian Penal Code) violated *per se* Article 2 of the American Convention, "*irrespective of whether it had been applied in the instant case"* (paras. 93-99, particularly para. 98). Significantly, this judgment of the court in the *Case of Suárez Rosero* also devoted a whole chapter (No. XIV) to establishing the autonomous violation of the general obligation of Article 2 of the American Convention.[8]

21. Likewise, in *Case of Hilaire, Constantine and Benjamin et al. versus Trinidad and Tobago* (judgment on merits of June 21, 2002), invoking the principle of *jura novit curia*, the Court considered that the defendant State had incurred in an autonomous violation of Article 2 of the American Convention owing to the mere existence of its "Law on Crimes against the Person," *irrespective of its application* (paras. 110-118). Lastly, in the instant case of the *Case of Yean and Bosico children versus the Dominican Republic*, when ordering reparations in the judgment it has just adopted, the Court stressed the broad scope of the general obligations of Articles 2 and 1(1) of the Convention, when it considered that:

> "(...) Pursuant to Article 2 of the American Convention, the Dominican Republic should adopt in its domestic laws, within a reasonable time, the legislative, administrative and any other measures necessary to regulate the procedure and requirements for acquiring Dominican nationality by late declaration of birth. This procedure must be simple, accessible and reasonable, because, to the contrary, applicants could remain stateless. Furthermore, there must be an effective recourse for cases in which the request is refused.
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> (...) When establishing the requirements for late registration of birth, the State should take into consideration the particularly vulnerable situation of Dominican children of Haitian origin. The requirements should not constitute an obstacle for obtaining Dominican nationality and should only be those that are essential for establishing that birth occurred in the Dominican Republic. (...) Moreover, the requirements should be specified clearly and be standardized, and their application should not be left to the discretion of State officials, in order to guarantee the legal certainty of those who use this procedure and to ensure an effective guarantee of the rights embodied in the American Convention, pursuant to Article 1(1) of the Convention.
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> The State should also take the permanent measures necessary to facilitate the early and opportune registration of children, irrespective of their parentage or origin, so as to reduce the number of individuals who resort to the procedure of late registration of birth" (paras. 239-241).

22. In brief, in this judgment, the Court has preserved the standards of protection embodied in its *consistent case law*. It has availed itself of the extremely useful contribution made by its Advisory Opinion No. 18, on the *Juridical Status and Rights of Undocumented Migrants* (2003), and also the relevant legacy of its Advisory Opinion No. 17 (on the *Juridical Status and Human Rights of the Child,* 2002); it has interrelated the violated rights (right to nationality and rights of the child, right to a name and to juridical personality, and the right to equal protection and the right to humane treatment[9]), instead of dealing with them in an unduly compartmentalized way[10]; and it has underscored the broad scope of the general obligations of Articles

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8. Shortly afterwards (on December 12, 1977), the Supreme Court of Ecuador decided to declare that the norm in question was unconstitutional; this was the first time that a provision of domestic emergency law was modified promptly owing to a decision of the Inter-American Court.

9. In this specific case, the latter violation with regard to the next of kin.

10. In my recent separate opinion in *Case of Acosta Calderón versus Ecuador* (Judgment of June 24, 2005), I reiterated my continued understanding that "the best hermeneutics for the protection of human rights is that which interrelates the indivisible protected rights – and not that which seeks incorrectly to

1(1) and 2 of the American Convention. I would greatly regret it if, in future (*tempus fugit*), the Court moved away from this case law which maximizes the protection of human rights under the American Convention.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra Alessandri
Secretary

separate them, rendering the bases of protection unduly fragile" (para. 16).