

**JOINT CONCURRING OPINION OF JUDGES  
A.A. CANÇADO TRINDADE AND A. ABREU-BURELLI**

1. By will of fate the last Judgment of the Inter-American Court of Human Rights this year, on the eve of the year 2000, was to fall upon a situation which affects a particularly vulnerable sector of the population of the countries of Latin America: that of the sufferings of the children in the streets. Paragraph 144 of the present Judgment, in our view, faithfully reflects the current state of evolution of the right to life in the framework of the International Law of Human Rights in general, and under the American Convention on Human Rights (Article 4) in particular. It affirms the fundamental character of the right to life, which, besides being non-derogable, requires positive measures of protection on the part of the State (Article 1.1 of the American Convention).

2. The right to life implies not only the negative obligation not to deprive anyone of life arbitrarily, but also the positive obligation to take all necessary measures to secure that that basic right is not violated. Such interpretation of the right to life, so as to comprise positive measures of protection on the part of the State, finds support nowadays in international case-law as well as doctrine<sup>1</sup>. There can no longer be any doubt that the fundamental right to life belongs to the domain of *jus cogens*<sup>2</sup>.

3. The right to life cannot keep on being conceived restrictively, as it was in the past, by reference only to the prohibition of the arbitrary deprivation of physical life. We believe that there are distinct ways to deprive a person arbitrarily of life: when his death is provoked directly by the unlawful act of homicide, as well as when circumstances are not avoided which likewise lead to the death of persons as in the *cas d'espèce*. In the present *Villagrán Morales versus Guatemala* case (Merits), pertaining to the death of children by police agents of the State, there is the aggravating circumstance that the life of the children was already devoid of any meaning; that is, the victimized children were already deprived of creating and developing a project of life and even to seek out a meaning for their own existence.

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1. Cf., in this respect, e.g., B. G. Ramcharan (ed.), *The Right to Life in International Law*, Dordrecht, Nijhoff, 1985, pp. 1-314; J. G. C. van Aggelen, *Le rôle des organisations internationales dans la protection du droit à la vie*, Bruxelles, E. Story-Scientia, 1986, pp. 1-104; D. Prémont and F. Montant (eds.), *Actes du Symposium sur le droit à la vie - Quarante ans après l'adoption de la Déclaration Universelle des Droits de l'Homme: Évolution conceptuelle, normative et jurisprudentielle*, Genève, CID, 1992, pp. 1-91; A.A. Cançado Trindade, "Human Rights and the Environment", *Human Rights: New Dimensions and Challenges* (ed. J. Symonides), Paris/Aldershot, UNESCO/Dartmouth, 1998, pp. 117-153; F. Przetacznik, "The Right to Life as a Basic Human Right", 9 *Revue des droits de l'homme/Human Rights Journal* (1976) pp. 585-609. And cf. the general comments ns. 6/1982 and 14/1984 of the Human Rights Committee, under the United Nations Covenant on Civil and Political Rights, reproduced in: United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. doc. HRI/GEN/1/Rev. 3, of 15.08.1997, pp. 6-7 and 18-19.

2. Cf., in this respect, e.g., W. Paul Gormley, "The Right to Life and the Rule of Non-Derogability: Peremptory Norms of *Jus Cogens*", *The Right to Life in International Law*, op. cit. supra n. (1), pp. 120-159; Y. Dinstein, "The *Erga Omnes* Applicability of Human Rights", 30 *Archiv des Völkerrechts* (1992) pp. 16-37; and cf., in general, *inter alia*, Alfred Verdross, "*Jus Dispositivum* and *Jus Cogens* in International Law", 60 *American Journal of International Law* (1966), pp. 55-63; Charles de Visscher, "Positivisme et *jus cogens*", 75 *Revue générale de Droit international public* (1971) pp. 5-11; and cf. also: International Court of Justice, *South West Africa Cases* (2nd. phase, Ethiopia and Liberia versus South Africa), Dissenting Opinion of Judge K. Tanaka, *ICJ Reports* (1966) p. 298: "(...) surely the law concerning the protection of human rights may be considered to belong to the *jus cogens*".

4. The duty of the State to take positive measures *is stressed* precisely in relation to the protection of life of vulnerable and defenseless persons, in situation of risk, such as the children in the streets. The arbitrary deprivation of life is not limited, thus, to the illicit act of homicide; it extends itself likewise to the deprivation of the right to live with dignity. This outlook conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights.

5. The Inter-American Court has pointed out, in the present Judgment (par. 193) as well as in its 16th. Advisory Opinion, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999)<sup>3</sup>, that the interpretation of an international instrument of protection ought to "accompany the evolution of times and the present-day conditions of life", and that such evolutive interpretation, in accordance with the general rules of interpretation of treaties, has contributed decisively to the advances of the International Law of Human Rights.

6. Our conception of the right to life under the American Convention (Article 4, in connection with Article 1.1) is a manifestation of this evolutive interpretation of the international norms of protection of the rights of the human being. In the last years, the conditions of life of large segments of the population of the States Parties to the American Convention have deteriorated notoriously, and an interpretation of the right to life cannot make abstraction of this reality, above all when dealing with children in situation of risk in the streets of our countries of Latin America.

7. The needs of protection of the weaker, - such as the children in the streets, - require definitively an interpretation of the right to life so as to comprise the minimum conditions of life with dignity. Hence the inexorable link which we find, in the circumstances of the present case, between Articles 4 (right to life) and 19 (rights of the child) of the American Convention, so well articulated by the Court in paragraphs 144 and 191 of the present Judgment.

8. We believe that the project of life is consubstantial of the right to existence, and requires, for its development, conditions of life with dignity, of security and integrity of the human person. In our Joint Separate Opinion in the *Loayza Tamayo versus Peru* case (Reparations, 1998) we sustained that the damage to the project of life ought to be integrated to the conceptual universe of reparations under Article 63.1 of the American Convention. We expressed therein that

"The project of life is ineluctably linked to freedom, as the right of each person to choose her own destiny. (...) The project of life encompasses fully the ideal of the American Declaration [of the Rights and Duties of Man] of 1948 of proclaiming the spiritual development as the supreme end and the highest expression of human existence"<sup>4</sup>.

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3. Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* - Advisory Opinion OC-16/99, of 01.10.1999, Series A, n. 16, par. 114.

4. Inter-American Court of Human Rights, *Loayza Tamayo versus Peru* case (Reparations), Judgment of 27.11.1998, Series C, n. 42, Joint Separate Opinion of Judges A.A. Cançado Trindade and A. Abreu Burelli, pars. 15-16.

9. A person who in his childhood lives, as in so many countries of Latin America, in the humiliation of misery, without even the minimum condition of creating his project of life, experiences a state of suffering which amounts to a spiritual death; the physical death which follows to this latter, in such circumstances, is the culmination of the total destruction of the human being. These offences render victims not only those who suffered them directly, in their spirit and in their body; they project themselves painfully into the persons dear to them, in particular into their mothers, who usually also endure the state of abandonment. To the suffering of the violent loss of their sons is added the indifference with which the mortal remains of these latter are treated.

10. In circumstances such as those of the present case, as this Court has acknowledged (pars. 174-177), it is impossible not to include, in the enlarged notion of victim, the mothers of the murdered children<sup>5</sup>. The outlook which we sustain corresponds to beliefs which are deeply-rooted in the cultures of the peoples of Latin America, in the sense that the definitive death of a human being in the spiritual order is only consumed with the oblivion. The children murdered in a street and in a wood (ironically the wood of San Nicolás, of so much symbolism to many children), did not have the opportunity to reconcile themselves with the idea of their surrender to eternity; the respect to the mortal remains of the children contributes to provide their mothers, at least, with the opportunity to maintain alive, within themselves, the memory of the sons prematurely disappeared.

11. In the face of the imperative of the protection of human life, and of the concerns and thoughts aroused by death, it is very difficult to separate dogmatically the considerations of juridical order from those of moral order: we are before an order of superior values, - *substratum* of legal norms, - which help us to seek out the meaning of the existence and of the destiny of each human being. The International Law of Human Rights, in its evolution, on the eve of the year 2000, definitively ought not to remain insensible or indifferent to these questions.

Antônio Augusto Cançado Trindade  
Judge

Alirio Abreu-Burelli  
Judge

Manuel E. Ventura-Robles  
Secretary

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5. In relation to Article 5.2 of the American Convention on Human Rights.