THE RIGHT OF ACCESS TO JUSTICE IN ITS WIDE DIMENSION[1]

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I. INTRODUCTION

It is with special satisfaction that I have acceded to the kind invitation of the Max-Planck Institute to return to it, in order to deliver the present keynote address, for two particular reasons: first, almost a decade ago I was here, at the Max-Planck Institute in Heidelberg, when, as then President of the Inter-American Court of Human Rights (IACtHR), I celebrated an agreement of inter-institutional cooperation with the then Director of this Institute, Professor Rüdiger Wolfrum, which enabled young scholars of the two continents to pursue their research in the place of their choice. I also keep a good memory of my dialogues with Professor Rudolf Bernhardt, also former Director of this Institute and former President of the European Court of Human Rights in Strasbourg.

Having been following the modern history of this Institute, I am particularly pleased to be here in the company of its Director, Professor Armin von Bogdandy, as well as of Professor Mariela Morales Antoniazzi, among others. Secondly, in the lecture I delivered herein, almost one decade ago (which has been published in one of my recent books),[2] I addressed the topic of the condition of the individual as subject of international law, in the light of some historical changes then introduced in the *interna corporis* of the IACtHR during my Presidency. Nowadays I have the honour to render my services to another international jurisdiction, the International Court of Justice; yet, that subject keeps on accompanying me. Two years ago, I had the occasion to lecture on it, at the International Institute of Human Rights – the René Cassin Institute – in Strasbourg, and I deem it fit to retake it in my keynote address of today, 22 June 2011, here at the Max-Planck Institute in Heidelberg.

The right of access to justice (comprising the right to an effective domestic remedy and to its exercise with full judicial guarantees of the due process of law, and the faithful execution of the judgment), at national and international levels, is a fundamental cornerstone of the protection of human rights. It is provided for, e.g., under the human rights treaties endowed nowadays with international human rights tribunals, namely, the European Convention of Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples´ Rights. The right of access to justice conforms a true *right to the Law*, disclosing a conception of access to justice *lato sensu*.

II. THE NORMATIVE DIMENSION

In so far as access to international justice is concerned, the right of individual petition has proven to be an effective means of resolving not only cases pertaining to individuals, but also cases of massive and systematic violations of human rights. At normative level, the fundamental importance of the provision on the right of individual petition was reckoned in the corresponding *travaux préparatoires* of the three aforementioned regional Conventions of Human Rights. Under each of them the right of individual petition has, in practice, and not surprisingly, had a distinct historical development. Under the three Conventions, however, the pursuance of a wide conception *ratione personae* of the right of individual petition - a wide conception of the *legitimatio ad causam*, - has had the immediate effect of en-

larging the scope of protection, mainly in cases where the alleged victims (e.g., *incommunicado* detainees, disappeared persons, among other situations) find themselves in the impossibility to act on their own, and stand in need of the initiative of a third party as petitioner on their behalf.

III. THE PROCEDURAL DIMENSION

Of all the mechanisms of international protection of human rights, the right of individual petition is in effect the most dynamic, in attributing the initiative of action to the individual petitioner himself (the ostensibly weaker party *vis-à-vis* the public power), distinctly from the exercise *ex officio* of other methods (such as those of reports and investigations) on the part of the organs of international supervision. The granting of *locus standi in judicio* to individuals before international human rights tribunals, in all stages of the procedure before them, has contributed to render the protected rights truly effective.

The human person has thus been erected as subject of the International Law of Human Rights, endowed with juridico-procedural capacity in the proceedings before the Inter-American Court. This has undoubtedly been a development of much significance; as I saw it fit to ponder in my intervention of 10.06.2003 at the plenary of the General Assembly of the OAS in Santiago of Chile, as then President of the Inter-American Court of Human Rights, this latter, in the evolution of its procedures and of its case-law, has given a relevant contribution to

> "the consolidation of the new paradigm of International Law, the new *jus gentium* of the XXIst century, which recognizes the human being as subject of rights."[3]

The consolidation of the *locus standi in judicio* of individuals before the Court is an appropriate and logical development, as it does not seem reasonable to conceive rights at international level without the corresponding capacity to vindicate them. Upon the right of individual petition is erected the legal mechanism of emancipation of the human being *vis-à-vis* the State itself for the protection of his rights in the domain of the International Law of Human Rights, - an emancipation which comes at last to confer an ethical content to the norms of both domestic public law and international law.

The necessary recognition of the *locus standi in judicio* of the alleged victims (or their legal representatives) before international human rights tribunals constitutes a most significant advance, but not necessarily the final stage of the improvement of the mechanism of protection under the American Convention: from the *locus standi*, the evolution points towards the future recognition of the right of *direct access* of individuals before them (*jus standi*), so as to lodge a complaint directly with it. This is already the case, for the last decade, in the experience of the European Court of Human Rights in particular.

In effect, to recognize the *locus standi in judicio* of the victims (or their relatives or representantives) before the Court (in cases already submitted to it by the Commission) contributes to the "jurisdictionalization" of the mechanism of protection, putting an end to the ambigüity of the role of the Commission, which rigourously is not a "party" in the process, but rather the guardian of the correct application of the Convention. The free and full exercise of the right of individual petition has also contributed to secure respect for the obligations of objective character binding States Parties.[4]

IV. THE HERMENEUTIC DIMENSION

The compulsory jurisdiction of international human rights tribunals (as in the case of the European Court) is the indispensable complement of the right of individual petition under the American Convention: both constitute the basic pillars of the international protection, of the mechanism of emancipation of the human being *vis-à-vis* his own State.[5] Furthermore, both the European and Inter-American Courts have rightly set limits to State voluntarism, have safeguarded the integrity of the respective human rights Conventions and the primacy of considerations of *ordre public* over the will of individual States, have set higher standards of State behaviour and established some degree of control over the interposition of undue restrictions by States, and have reassuringly enhanced the position of individuals as subjects of the International Law of Human Rights, with full procedural capacity.

In so far as the basis of their jurisdiction in contentious matters is concerned, eloquent illustrations of their firm stand in support of the integrity of the mechanisms of protection of the two Conventions are afforded, for example, by the decisions of the European Court in the *Belilos versus Switzerland* case (1988), in the *Loizidou versus Turkey* case (Preliminary Objections, 1995), and in the *I. Ilascu, A. Lesco, A. Ivantoc and T. Petrov-Popa versus Moldovia and the Russian Federation* case (2001), as well as by the decisions

of the Inter-American Court in the *Constitutional Tribunal* and *Ivtcher Bronstein versus Peru* cases, Jurisdiction (1999), and in the *Hilaire, Constantine and Benjamin and Others versus Trinidad and Tobago* (Preliminary Objection, 2001).

The two aforementioned international human rights tribunals, by correctly resolving basic procedural issues raised in the aforementioned cases, have aptly made use of the techniques of public international law in order to strengthen their respective jurisdictions of protection of the human person. They have decisively safeguarded the integrity of the mechanisms of protection of the American and European Conventions on Human Rights, whereby the juridical emancipation of the human person *vis-à-vis* her own State is achieved.

V. THE JURISPRUDENTIAL DIMENSION

Such jurisprudential dimension (added to the aforementioned previous dimensions) is of the utmost importance, as it discloses the endeavours of international human rights tribunals to secure the effective protection (*effet utile*) of the rights provided for in the respective regional Human Rights Conventions. In this respect, in the Judgment (on preliminary objections) of the Inter-American Court of Human Rights in the case of *Castillo Petruzzi and Others versus Peru* (of 04.09.1998), I saw it fit, in a lengthy Concurring Opinion, to single out the *fundamental* character of the right of individual petition (Article 44 of the American Convention as the "cornerstone of the access of the individuals to the whole mechanism of protection of the American Convention" (pars. 3 and 36-38).[6] After reviewing the *historia juris* of that right of petition (pars. 9-15), and the expansion of the notion of "victim" in the international case-law under human rights treaties (pars. 16-19), I referred to the *autonomy* of the right of individual petition *vis-à-vis* the domestic law of the States (pars. 21, 27 and 29), and added:

> "(...) With the access of individuals to justice at international level, by means of the exercise of the right of individual petition, concrete expression was at last given to the recognition that the human rights to be protected are inherent to the human person and do not derive from the State. Accordingly, the action in their protection does not exhaust - cannot exhaust - itself in the action of the State. (...) Had it not been for the access to the international instance, justice would never have been done in their concrete cases. (...) It is by the free and full exercise of the right of individual petition that the rights set forth in the Convention become *effective*" (pars. 33 and 35).

The *contentieux* of the leading case of the *"Street Children"* (case *Villagrán Morales and Others versus Guatemala*, 1999-2001) disclosed the importance of the direct access of individuals to the international jurisdiction, enabling them to vindicate their rights against the manifestations of the arbitrary power, and giving an ethical content to the norms of both domestic public law and international law.[7] Its relevance was clearly demonstrated before the Court in the proceedings of that historical case, in which the mothers (and one grand-mother) of the murdered children, as poor and abandoned as their sons (and one grand-son), had access to the international jurisdiction, appeared before the Court,[8] and, due to the Judgments as to the merits and reparations of the Inter-American Court,[9] which found in their support, they could at least recover the faith in human justice.

Four years later, the case of the *Institute of Reeducation of Minors versus Paraguay* (Judgment of 02.09.2004) came once again to demonstrate, as I pointed out in my Separate Opinion (pars. 3-4), that the human being, even in the most adverse conditions, has emerged as subject of the International Law of Human Rights, endowed with full international juridico-procedural capacity. The Court's Judgment in this last case duly recognized the high relevance of the historical reforms introduced in the fourth and current Rules of Court (pars. 107, 120-121 and 126), in force as from 2001.[10] in favour of the individuals' *titularity* of the protected rights. The aforementioned cases of the *"Street Children"* and of the *Institute of Reeducation of Minors* bear eloquent witness of such titularity, asserted and exercised before the Court, even in situations of the most extreme adversity.[11] To them, other cases can be added, with numerous other victims, - e.g., in infra-human conditions of detention, in forced displacement from their homes, in the condition of undocumented migrants, in situation of complete defencelessness, and even victims of massacres and their relatives, - which, despite so much adversity, have had access to international justice.

It is significant that cases of massacres, which some decades ago fell into oblivion, are nowadays brought before an international human rights tribunal, as exemplified by the Judgments of the Inter-American Court in the cases of the massacres of *Barrios Altos versus Peru* (of 14.03.2001), of *Plan de Sánchez versus Guate-*

mala (of 29.04.2004), of the *19 Tradesmen versus Colombia* (of 05.07.2004), of *Mapiripán versus Colombia* (of 17.09.2005), of the *Community Moiwana versus Suriname* (of 15.06.2005), of *Pueblo Bello versus Colombia* (of 31.01.2006), of *Ituango versus Colombia* (of 01.07.2006), of *Montero Aranguren and Others (Retén de Catia) versus Venezuela* (of 05.07.2006), of the *Prison of Castro Castro versus Peru* (of 25.11.2006), of *La Cantuta versus Peru* (of 29.11.2006).

VI. THE EPISTEMOLOGICAL DIMENSION

The International Law of Human Rights is ineluctably *victim-oriented*, and it could not be otherwise. The centrality of the victim in the international *contentieux* of human rights is inquestionable.[12] The right of access to justice, in its wide scope, is an imperative at both national and international levels. On this particular issue, there is a convergence between domestic public law and international law. From the perspective of the protected persons, effective domestic remedies integrate the international protection of human rights.[13]

1. The Right of Access to Justice *Lato Sensu*

The understanding of the matter at issue advanced by the Inter-American Court in its evolving case-law law in recent years has been to the effect that the right of access to justice (*lato sensu*) *at national and international levels* amounts to the right to the *realization of material justice*. As such, it comprises not only the formal access to a tribunal or judge, but also respect for the guarantees of due process of law, the right to a fair trial, and to reparations (whenever they are due), and the faithful execution of judgments.[14]

2. Access to Justice as an Imperative of *Jus Cogens*

Ever since the Inter-American Court, in its pioneering Advisory Opinion n. 18 (of 17.09.2003), on the *Juridical Condition and the Rights of Undocumented Migrants*, rightly enlarged the material content of *jus cogens* so as to comprise also the fundamental principle of equality and non-discrimination (including equality before the law), I began insisting on the need of widening further that material content so as to encompass likewise the right of access to justice.[15] I did so, *inter alia*, in my Separate Opinion (devoted to the right of access to justice *lato sensu*) in the Court's Judgment (of 31.01.2006) in the case of the *Massacre of Pueblo Bello versus Colombia*, drawing attention to the fundamental importance precisely of that right of access to justice (par. 65).

It was in the case of *Goiburú and Others versus Paraguay* (Judgment of 22.09.2006), concerning the sinister "Operation Cóndor" of the so-called "intelligence services" of the countries of the Southern Cone of South America (at the time of the dictatorships of three decades ago) that the Inter-American Court at last endorsed my thesis,[16] further enlarging the material content of *jus cogens*, so as to comprise the right of access to justice. In my Separate Opinions in the case *Goiburú and Others,*[17] *as well as in the subsequent cases of Almonacid Arellano versus Chile* (Judgment of 26.09.2006, pars. 58-60 of the Opinion), and of *La Cantuta versus Peru* (Judgment of 29.11.2006, pars. 49-62 of the Opinion), I stressed the considerable importance of such expansion of the material content of *jus cogens*.[18]

VII. CONCLUSION

As I had the occasion to point out, as guest speaker, in my inaugural address at the opening of the judicial year of 2004 of the European Court of Human Rights in Strasbourg, the two international human rights tribunals (the European and Inter-American Courts) have achieved remarkable advances in the realization of justice, in the correct perspective, namely, that of *the justiciable.*[19] *Both have contributed decisively to the emancipation of the human being vis-à-vis* his own State, to the establishment of a new paradigm in the present domain of international protection, and to what I coined, in my Concurring Opinion (pars. 34-35) in the Court's Advisory Opinion n. 16 (of 01.10.1999) on *The Right to Information on Consular Assistance*, as the historical process of *humanization of International Law.*[20]

The theme of the right of access to justice lato sensu (encompassing the access to a competent court or a judge, the judicial guarantees of the due process of law, and the faithful execution of the judgment) has lately been object of close attention in the debates among members and former members of the three international human rights tribunals, - the European, Inter-American and African Courts, - held in the *Palais des Droits de l'Homme* in Strasbourg, on 08-09 December 2008, of which I keep the best memory. One is to expect convergence on the approach to the matter to be pursued in their respective case-law in the future.

Accordingly, and last but not least, the human person has come to occupy, in our days, the central position which corresponds to her, as *subject of both domestic and international law*, with international procedural capacity, amidst that process of *humanization of International Law*, more directly attentive to the identification and realization of common superior values and goals. She has exercised her capacity, in the vindicating of her rights, in situations of extreme vulnerability and under circumstances of the utmost adversity.[21] This evolution, in turn, paves the way for the new primacy of the *raison d'humanité* over the old *raison d'État*. The proper interpretation and application of Human Rights Conventions has contributed decisively to that effect.

Heidelberg, 22 June 2011.

NOTAS

1. Discurso proferido pelo Autor, em um primeiro momento, no Instituto Internacional de Direitos Humanos (40ª. Sessão Anual de Estudos), em Estrasburgo, França, aos 21 de julho de 2009, e, em um segundo momento, de forma atualizada, no Instituto Max-Planck de Direito Público Comparado e Direito Internacional, em Heidelberg, Alemanha, aos 22 de junho de 2011.

2. Cf. A.A. Cançado Trindade, "Le nouveau Règlement de la Cour Interaméricaine des Droits de l´Homme: Quelques réflexions sur la condition de l´individu comme sujet du droit international", *in A Humanização do Direito Internacional*, Belo Horizonte/Brazil, Edit. Del Rey, 2006,pp. 143-156.

3. OAS, *Asamblea General, XXXIII Período Ordinario de Sesiones (Santiago de Chile, Junio de 2003) - Actas y Documentos*, vol. II, Washington D.C., OAS General Secretariat, pp. 168-171.

4. In several cases, such exercise of the right of petition has gone further, having brought about changes in the domestic legal order and in the practice of the public organs of States Parties concerned.

5. As foreseen by the so-called "founding fathers" of the law of nations; cf. A.A. Cançado Trindade, "The Emancipation of the Individual from His Own State - The Historical Recovery of the Human Person as Subject of the Law of Nations", *in Human Rights, Democracy and the Rule of Law - Liber Amicorum L. Wildhaber* (eds. S. Breitenmoser *et alii*), Zürich/Baden-Baden, Dike/Nomos, 2007, pp. 151-171.

6. By means of such right of petition, - a "definitive conquest of the International Law of Human Rights", - the "*historical rescue* of the position of the human being as subject of the International Law of Human Rights, endowed with full international procedural capacity" took place (pars. 5 and 12).

7. In my Separate Opinion in the case of the "*Street Children*" (reparations, 2001), I saw it fit to warn that the suffering of the most humble and vulnerable projects itself into the community or social *milieu* as a whole, and their close relatives are forced to live with the silence, the indifference and the oblivion of the others, permeating the whole community with suffering (par. 22).

8. Public hearings of 28-29.01.1999 and 12.03.2001 before the Court.

9. Of 19.11.1999 and of 26.05.2001, respectively.

10. Cf., in this respect, A.A. Cançado Trindade, "Le nouveau Règlement de la Cour Interaméricaine... ", *op. cit. supra* n. (3), pp. 143-156.

11. In the case of the *Institute of Reeducation of Minors*, some of the interns were hurt or died burnt amidst three fires; yet, their cause, despite the limitations of their juridical capacity given their existential condition of minors of age, reached an international tribunal of human rights, thus asserting their *titularity* of rights enmanated directly from International Law.

12. To this effect, in my Separate Opinion in the case of the "*Street Children*" (*Villagrán Morales and Others versus Guatemala*, Judgment on Reparations, of 26.05.2001), I drew attention to this, concentrating attention on the triad conformed by victimization, human suffering, and rehabilitation of the victims (pars. 1-43). Moreover, in my Separate Opinions in the Judgments of the Court on the cases *Bulacio versus Argentina* (of 18.09.2003) and *Tibi versus Ecuador* (of 07.09.2004), I sought to identify the sense of the *reparatio* as from the centrality of the suffering of the victims, which I duly emphasized also in my Separate Opinions in the Judgments in the cases of *Brothers Gómez Paquiyauri versus Peru* (of 08.07.2004) and *Ximenes Lopes versus Brazil* (of 04.07.2006). And, in my Separate Opinion in the Judgment in the case of the *Community Moiwana versus Suriname* (of 15.06.2005), I sought to demonstrate the projection of human suffering in time, with direct implications for measures of reparation to the victims and their relatives. Cf. texts of the aforementioned Separate Opinions *in*: A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006)*, México, Ed. Porrúa/Univ. Iberoamericana, 2007, pp. 251-267, 363-374, 444-456, 417-432, 748-765, 980-983, and 539-567, respectively.

13. A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, Cambridge University Press, 1983, pp. 1-445.

14. In fact, States Parties assume, each one individually, the duty to comply fully with the

judgments and decisions of the Inter-American Court, as established in Article 68 of the American Convention itself, in application of the principle *pacta sunt servanda* (this being also an obligation of their own domestic law).

15. Cf., to this effect, my Separate Opinions in the Court's Judgments in the cases of the *Massacre of Plan de Sánchez versus Guatemala* (merits, of 29.04.2004), pars. 22, 29-33 and 35 of the Opinion; and (reparations, of 19.11.2004), pars. 4-7 and 20-27 of the Opinion; of the *Brothers Gómez Paquiyauri versus Peru* (of 08.07.2004), pars. 37-44 of the Opinion; of *Tibi versus Ecuador* (of 07.09.2004), pars. 30-32 of the Opinion; of *Caesar versus Trinidad and Tobago* (of 11.03.2005), pars. 85-92 of the Opinion; of *Yatama versus Nicaragua* (of 23.06.2005), pars. 6-9 of the Opinion; of *Acosta Calderón versus Ecuador* (of 14.06.2005), pars. 4 and 7 of the Opinion; of the *Massacres of Ituango versus Colombia* (of 01.07.2006), par. 47 of the Opinion; of *Baldeón García versus Peru* (of 06.04.2006), pars. 9-10 of the Opinion; of *López Álvarez versus Honduras* (of 01.02.2006), pars. 53-55 of the Opinion.

16. Cf. the text of my Separate Opinion therein, reproduced *in*: A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006)*, Mexico, Edit. Porrúa/Universidad Iberoamericana, 2007, pp. 779-804.

17. Pars. 62-68 of the Opinion, text *in ibid*., pp. 801-804.

18. Cf., on the matter, recently, A.A. Cançado Trindade, "The Expansion of the Material Content of *Jus Cogens*: The Contribution of the Inter-American Court of Human Rights", *in La Convention Européenne des Droits de l´Homme, un instrument vivant - Mélanges en l´honneur de Chr.L. Rozakis* (eds. D. Spielmann *et alii*), Bruxelles, Bruylant, 2011, pp. 27-46.

19. A.A. Cançado Trindade, "Le développement du Droit international des droits de l'homme à travers l'activité et la jurisprudence des Cours européenne et interaméricaine des droits de l'homme", 16 *Revue universelle des droits de l'homme* (2004) n. 5-8, pp. 177-180.

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

21. Cf., recently: A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, pp. 1-236; A.A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice* (Inaugural Address, 10.11.2011), Utrecht, Universiteit Utrecht, 2011, pp. 1-71.