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

1. In voting in favour of the present Judgment on reparations delivered by the Inter-American Court of Human Rights in the *Loayza Tamayo versus Peru* case, we feel obliged to express our thoughts on the matter, given our belief in the need for greater jurisprudential development in the matter of reparations for violations of human rights. Contemporary doctrine seems to recognize this need, in beginning to provide its first contributions towards greater precision to the scope of reparations in the ambit of the International Law of Human Rights.

2. Thus, contemporary doctrine on the matter has established the relationship between the right to reparation, the right to truth and the right to justice (which starts with the access to justice). The realization of those rights is hindered by measures of domestic law, such as the so-called self-proclaimed amnesties pertaining to violations of human rights, which lead to a situation of impunity[1].

3. Those measures are incompatible with the duty of States to investigate those violations, rendering it impossible the vindication of the rights to truth and to the realization of justice, as well as, consequently, of the right to obtain reparation. One cannot thereby deny the close link between the persistence of impunity and the hindering of the very duties of investigation and of reparation, as well as of the guarantee of non-repetition of the harmful facts.

4. The aforementioned measures are, moreover, incompatible with the general obligation of States to respect and to secure respect for the

1. L. Joinet *(rapporteur), La Cuestión de la Impunidad de los Autores de Violaciones de los Derechos Humanos (Derechos Civiles y Políticos) - Informe Final,* ONU/Comisión de Derechos Humanos, doc. E/CN.4/Sub.2/1997/20, of 26.06.1997, pp. 1-34; and, for the economic, social and cultural rights, cf. El Hadji Guissé (special *rapporteur), La Cuestión de la Impunidad de los Autores de Violaciones de los Derechos Humanos (Derechos Económicos, Sociales y Culturales) - Informe Final,* ONU/Comisión de Derechos Humanos, doc. E/CN.4/Sub.2/1997/8, of 23.06.1997, pp. 1-43.

protected human rights, guaranteeing the free and full exercise of these latter (in the terms of Article 1(1) of the American Convention on Human Rights). States are under the duty to eliminate those measures (which constitute obstacles to the realization of human rights), in conformity with the other general obligation to harmonize their domestic law with the international norms of protection[2] (in the terms of Article 2 of the American Convention on Human Rights).

5. Contemporary doctrine, furthermore, has identified distinct forms of reparation (*restitutio in integrum*, satisfaction, indemnizations, rehabilitation of the victims, guarantees of non repetition of the harmful facts, among others) *from the perspective of the victims,* of their needs, aspirations and claims[3]. In fact, the terms of Article 63(1) of the American Convention on Human Rights[4] disclose to the Inter-American Court of Human Rights quite a wide horizon in the mattter of reparations[5].

2. It may be recalled that, half a decade ago, the Vienna Declaration and Programme of Action (1993), the main document adopted by the II World Conference of Human Rights, urged the States to "abrogate legislation leading to impunity for those responsible for grave violations of human rights, (...) and prosecute such violations (...)" (part II, paragraph 60).

3. Theo van Boven (special *rapporteur), Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms -Final Report,* U.N./Commission on Human Rights, doc. E/CN.4/Sub.2/1993/8, of 02.07.1993, pp. 1-65.

4. Article 63(1) of the American Convention provides that: -"If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and fair compensation be paid to the injured party".

5. Certainly much wider than that which ensues from the terms of Article 50 of the European Convention of Human Rights, restrictively interpreted and applied by the European Court of Human Rights throughout the years and until the recent entry into force of Protocol n. 11 to the European Convention, on 01 November 1998.

6. Nevertheless, the contents and scope of the measures of reparation in international law remain surrounded by a certain degree of imprecision, despite the existence of a secular case-law on the matter. This is due in great part to the fact that such case-law has developed as from analogies with solutions of private law, and, in particular, of civil law *(droit civil)*, in the ambit of national legal systems.

7. Juridical concepts, while encompassing values, are product of their time, and as such are not unchangeable. The juridical categories crystallized in time and which came to be utilized - in a context distinct from the ambit of the International Law of Human Rights - to govern the determination of reparations were strongly marked by those analogies of private law: such is the case, e.g., of the concepts of material damage and moral damage, and of the elements of *damnum emergens and lucrum cessans.*

8. Such concepts have been strongly determined by a patrimonial content and interest, - which is explained by their origin, -marginalizing what is most important in the human person, namely, her condition of spiritual being. This is disclosed by the fact that even the moral damage itself is commonly regarded, in the classical conception, as amounting to the so-called "non patrimonial damage". The point of reference still keeps on being the patrimony. The pure and simple transposition of such concepts onto the international level was bound to generate uncertainties. The criteria of determination of reparations, of an essentially patrimonial content, based upon analogies with those of civil law *(droit civil)*, have never convinced us, and do not appear to us entirely adequate or sufficient when transposed into the domain of the International Law of Human Rights, endowed with a specificity of its own.

9. In the framework of this latter, reparations ought to be determined on the basis not only of criteria which rest upon the relationship of the human being with his goods or his patrimony, or upon his capacity to work, and upon the projection of those elements in time. Contrary to what the materialist conception of the *homo oeconomicus* pretends, a conception regrettably prevailing in our times, we hold the firm and full belief that the human being is not reduced to a mere agent of economic production, to be considered solely in function of such production or of his capacity to work.

10. The human being has needs and aspirations which transcend the purely economic measurement or projection. Already in 1948, half a century ago, the American Declaration on the Rights and Duties of Man warned in its preamble that the *"spiritual development is the supreme end of human existence and the highest expression thereof"*[6]. Those words appear quite timely in this fin de siècle. In the domain of the International Law of Human Rights, the determination of reparations ought to bear in mind the integrality of the personality of the victim, and the impact upon this latter of the violation of her human rights: it ought to start from an integral and not only patrimonial perspective of her potentialities and capacities.

11. From all the aforementioned it clearly results that non-pecuniary reparations are much more important than one might *prima facie* assume. In the public hearing before the Inter-American Court of 09 June 1998, it was Mrs. María Elena Loayza Tamayo herself who, as the complainant party and as subject of the International Law of Human Rights, with full international procedural capacity at the phase of reparations, pointed out that she was aware that "the economic indemnization will not repair the whole damage" suffered[7].

12. The international case-law in the matter of reparations is to be reoriented and enriched with the approach and contribution proper to the International Law of Human Rights. Hence the importance which we attribute to the recognition, in the present Judgment of the Inter-American Court, of the *damage to the project of life of the victim*[8], as a first step in this direction and purpose. If there had been no determination of the occurrence of the damage to the project of life, how could one achieve

6. Fourth preambular paragraph (emphasis added).

7. Corte Interamericana de Derechos Humanos, *Transcripción de la Audiencia Pública Celebrada en la Sede de la Corte el 09 de Junio de 1998 sobre las Reparaciones en el Caso Loayza Tamayo,* p. 34, and cf. pp. 60-61 (mimeographed, internal circulation).

8. Paragraphs 143-153.

the *restitutio in integrum* as a form of reparation? How could one proceed to the *rehabilitation* of the victim as a form of reparation? How could one affirm in a convincing way the guarantee of non-repetition of the harmful facts in the framework of reparations?

13. No answer could be given to those questions without determining the occurrence of a damage to the project of life and establishing its consequences. We think that these considerations gain greater importance in a paradigmatic case like the present one, in which the victim is alive and, therefore, the *restitutio in integrum*, as a form *par excellence* of reparation, is possible.

14. As the juridical consequences of the violations of the conventional obligations of protection have not been sufficiently examined or developed in doctrine, one is to bear always in mind a basic principle of international law in the matter of reparations: States have the obligation to *put an end* to those violations and to remove their consequences[9]. Hence the importance of the *restitutio in integrum*, particularly apt to that purpose, given the insufficiencies of indemnizations.

9. This principle has received judicial recognition as from the well-known obiter dictum of the old Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case (Merits); cf. PCIJ, Series A, n. 17, 1928, p. 47. It has also received support in doctrine; cf., *inter alii,* Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* Cambridge, University Press, 1994 (reprint), p. 233; J.A. Pastor Ridruejo, *La Jurisprudencia del Tribunal Internacional de La Haya -Sistematización y Comentarios,* Madrid, Ed. Rialp, 1962, p. 429; F.V. García-Amador, *The Changing Law of International Claims,* vol. II, N.Y., Oceana Publs., 1984, p. 579; Roberto Ago, "[1973 Report on] State Responsibility", reproduced in *The International Law Commission's Draft Articles on State Responsibility* (ed. S. Rosenne), Dordrecht, Nijhoff, 1991, pp. 51-54. Of the Judgment itself of the PCIJ in the *Chorzów Factory* case (*cit. supra*), it may be inferred that the duty of reparation is the indispensable complement of non-compliance with a conventional obligation; cf., *inter alii*, P. Reuter, "Principes de Droit international public", 103 *Recueil des Cours de l'Académie de Droit International de La Haye* (1961) pp. 585-586; R. Wolfrum, "Reparation for Internationally Wrongful Acts", *Encyclopedia of Public International Law* (ed. R. Bernhardt), vol. 10, Amsterdam, North Holland, 1987, pp. 352-353.

15. In our understanding, the project of life is ineluctably linked to freedom, as the right of each person to choose her own destiny. The Court has in this way correctly conceptualized it in the present Judgment[10], in warning that "it could hardly be said that a person is truly free if she does not have options to direct her existence and to bring it into its natural culmination. Those options possess, in themselves, a high existential value. Accordingly, their cancellation or minimization imply the objective reduction of freedom and the loss of a value which cannot pass unnoticed from the observation of this Court"[11].

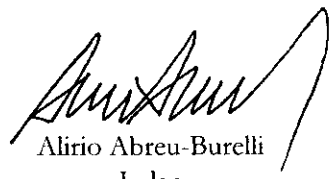
16. The project of life encompasses fully the ideal of the American Declaration of 1948 of proclaiming the spiritual development as the supreme end and the highest expression of human existence. The damage to the project of life threatens, ultimately, the very *meaning* which each human person attributes to her existence. When this occurs, a damage is caused to what is most intimate in the human being: this is a damage endowed with an autonomy of its own, which affects the spiritual meaning of life.

17. The whole chapter of reparations for violations of human rights ought to, in our view, be reassessed from the perspective of the integrality of the personality of the victim, bearing in mind her realization as a human being and the restauration of her dignity. The present Judgment of reparations in the *Loayza Tamayo* case, in recognizing the existence of the damage to the project of life linked to the satisfaction, among other measures of reparation, takes a correct and reassuring step in this direction, which, we trust, will be object of further jurisprudential development in the future.

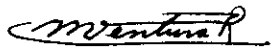
10. The Court has warned in the present Judgment that the damage to the project of life attempts against personal development itself, by factors alien to the person, and to her "imposed in an unjust and arbitrary way, with violation of the norms in force and of the trust which she had deposited on organs of the public power obliged to protect her and to grant her security for the exercise of her rights and the satisfaction of her legitimate interests" (paragraph 149).

11. Paragraph 147.

Antônio A. Cançado Trindade
Judge



Alirio Abreu-Burelli
Judge



Manuel E. Ventura-Robles
Secretary