DISSENTING OPINION OF JUDGE ANTÔNIO A. CANÇADO TRINDADE

1. I regret not to be able to concur with the decision taken by the majority of the Court in the present Resolution on the application for judicial review of the Judgment on the merits of 29 January 1997 in the *Genie Lacayo* case. May I proceed to an explanation of the juridical foundations of my dissenting position, concentrating, first, on the question of the *admissibility* of that appeal, and then, on the question of *whether it is well-founded or not.*

I. The Admissibility of the Application for Judicial Review

2. The present appeal before the Inter-American Court is unprecedented in its history: whereas in the *Velásquez Rodríguez* (1990), *Godínez Cruz* (1990) and *El Amparo* (1997) cases the Court pronounced on appeals of *interpretation of a judgment*,[1] a recourse foreseen in the American Convention on Human Rights (Article 67) itself, in the present *Genie Lacayo* case the Court is for the first time called upon to pronounce on an appeal of *revision of a judgment*,[2] for which there is no provision either in the American Convention, or in its Statute or Regulations. The silence of these instruments on the question is not to be interpreted as amounting to *vacatio legis*, with the consequence of the inadmissibility of that appeal.

3. Nor is there any such provision in the European Convention on Human Rights, and, nevertheless, the possibility of an application for

1. Inter-American Court of Human Rights, *Velásquez Rodríguez* case, Judgment of 17.08.1990; *Godínez Cruz* case, Judgment of 17.08.1990; *El Amparo* case, Resolution of 16.04.1997.

2. That is, of a judgment on the merits. It may be recalled that, in the *Neira Alegría and others* case, Peru actually filed an appeal of revision (of 13.12.1991) of the jugment on preliminary objections, which, however, it withdrew (on 01.07.1992). Cf. Inter-American Court of Human Rights, *Neira Alegría and others* case, Resolution of 03.07.1992.

judicial review of a judgment was inserted in the Regulations of the European Court of Human Rights (Rules of Court A, Rule 58; and Rules of Court B, Rule 60).[3] Recently, in the case of *Pardo versus France*, the European Court indeed declared *admissible* an application for judicial review of a judgment (Judgment of 10.07.1996), even though it later dismissed it as *unfounded* as to the merits (Judgment of 29.04.1997).[4]

4. The Statute of the International Court of Justice, as recalled by the Inter-American Court in the present Resolution, provides for the possibility of revision (admitted since 1920)[5], when the existence is found of a new fact capable of exerting a decisive influence, and which, before the judgment, was unknown to the Court and to the party requesting the revision (Article 61). In fact, the application for review has roots in the norms of Public International Law itself, as illustrated, e. g., by the 1907 Hague Convention for the Pacific Settlement of International Disputes (Article 83).

5. No one would dare to deny the truly exceptional character of an application for judicial review, which always calls for a detailed and rigorous examination of its admissibility and content. On the other hand, the possibility of revision in no way affects the *final* character of the judgments;[6] that this is so is illustrated by the fact that both the European

3. Rules of Court A apply to cases concerning States Parties to the European Convention which have not ratified Protocol IX; and Rules of Court B to cases concerning States Parties to the Convention which have ratified Protocol IX.

4. European Court of Human Rights, case of *Pardo versus France* (Revision), Judgment (Admissibility) of 10.07.1996, p. 11, par. 25; European Court of Human Rights, case of *Pardo versus France* (Revision), Judgment (Merits) of 29.04.1997, p. 9, par. 23.

5. With the adoption of the Statute of the old Permanent Court of International Justice.

6. As pointed out by the European Court of Human Rights, in declaring admissible an appeal of revision in the above-cited case of *Pardo versus France* (decision of 10.07.1996, par. 21).

Court of Human Rights and the International Court of Justice admit that possibility. To the position of those two international tribunals one may add the practice, in the same sense, of the Administra-tive Tribunals of the International Labour Organization (ILO) and of the United Nations.[7]

6. International case-law in fact points out the exceptional character of the application for judicial review, with its exercise being admitted to consider a *new fact* (unknown at the moment of the decision and susceptible of exerting a decisive influence on this latter), or to correct an *error of fact* or *material error* (or false verification of the facts, distinct from the error as to the law), thus avoiding an injustice.[8] The fact that no provision is made for it in the American Convention on Human Rights or in its Statute or Regulations does not prevent the Inter-American Court from declaring *admissible* an application for judicial review of a judgment: the apparent *vacatio legis* ought in this particular to give way to an imperative of natural justice.

7. The Court ought thus to decide not so much by analogy with general international law (reflected in the aforementioned provision of the Statute of the International Court of Justice), as claimed by the complainant party in the present *Genie Lacayo* case, but rather on the basis -in application of the principle *jura novit curia*- of general principles of procedural law, and making use of the *powers inherent* to its judicial function. Human beings, and the institutions they integrate, are not infallible, and there is no jurisdiction worthy of this name which does not admit the

7. The Statute of the Administrative Tribunal of the United Nations provides for the appeal of revision (Article 12), and that Tribunal has on numerous occasions pronounced on appeals of revision. The ILO Administrative Tribunal has likewise developed an extensive case-law on appeals of revision (even though that appeal was not originally foreseen in its Statute or Regulations).

8. ILO Administrative Tribunal, *Villegas* case, judgment n. 442, *cit. in* 27 *Annuaire français de droit international* (1981) p. 351; ILO Administrative Tribunal, *Acosta Andres et alii* case, judgment n. 570, *cit. in* 29 *Annuaire français de droit international* (1983) pp. 400-401.

possibility -albeit exceptional- of revision of a judgment, be it at international law level, or at domestic law level.

II. The Juridical Foundation of the Application for Judicial Review

8. The present Resolution, added to the criteria followed by the Court in its Judgment on the merits of 29 January 1997 in the present *Genie Lacayo* case, give me cause for concern. The new fact, pointed out in the present application for judicial review, occurred *thirteen days after* the above-mentioned Judgment on the merits was delivered by the Inter-American Court, should, in my view, persuade the Court to reconsider its pronouncements in the Judgment on the merits as to the compliance with the provisions of Articles 25 (right to an effective remedy), 8(1) (judicial guarantees), and 2 (legislative obligations), in combination with Article 1(1) of the American Convention, in the circumstances of the *cas d'espèce.*

9. In the present Resolution, the Inter-American Court considers that the new fact pointed out in the appeal -the Judgment n. 8 of the Supreme Court of Justice of Nicaragua of 12.02.1997- not only was not alleged as being contemporary to its Judgment on the merits in *Genie Lacayo*, but furthermore does not fit into the grounds of revision and cannot, thus, exert influence in the modification of this Judgment. It can be argued that the revision can only take place on the basis of a new fact, but which occurred prior to -and not subsequently to- the delivery of the Judgment on the merits, even if known by the tribunal only after it rendered the judgment. This is certain, *except* when such fact is part of a *continuing situation* of alleged incompatibility with the international conventional obligations of protection of human rights. The notion of "continuing situation", -nowadays supported by a vast case-law in the domain of the International Law of Human Rights,[9]- comprises violations of human

9. Analyzed, from its very beginnings, e.g., in my book *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, Cambridge University Press, 1983, pp. 187-249.

rights which, e.g., cannot be divorced from the legislation from which they result (and which remains in force).

10. May I refer to the criteria which, in my view, call for revision. First of all, the thesis of the necessity of the previous application of a law for the determination of its compatibility or otherwise with the the American Convention on Human Rights is taken to an extreme in the *Genie Lacayo* case, as the Court distinguishes between provisions which were applied and provisions which presumably were not applied of the decrees ns. 591 and 600 (of 1980), as may be seen from a comparison between paragraphs 83 and 91 (and also 92) of the Judgment on the merits. With this, the Court limits itself to the point of rendering it impossible to itself to pronounce upon the legislative obligations of the respondent State. My understanding is, on the contrary, in the sense that the existence itself of a law entitles the victims of violations of the rights protected by the American Convention to require its compatibilization with the provisions of the Convention, and the Court is obliged to pronounce on the question, without having to wait for the occurrence of an additional damage by the continued application of such law.[10]

11. Secondly, the thesis that, as the Court is not an appeals tribunal or a court for the review of decisions of national tribunals, and as any eventual defects of the military legal procedure constitute a domestic question, it being incumbent upon the Court only to indicate the procedural violations of the rights enshrined in the Convention, as it can be inferred from paragraph 94 of the Judgment on the merits, - such thesis leads to a rigid compartmentalization between the international and the domestic legal orders in the present domain of protection, and deprives the Court of its attribution to pronounce on the judicial obligations of the respondent State. My understanding is, on the contrary, in the sense that, in the present domain of protection, there is a constant interaction between

10. Cf. my Dissenting Opinions in the *El Amparo* case, Judgment on reparations of 14 September 1996, and Resolution of interpretation of judgment of 16 April 1997; and *Caballero Delgado and Santana* case, Judgment on reparations of 29 January 1997.

international law and domestic law, to the benefit of the protected human beings.

12. Human rights treaties, e.g., confer functions of protection upon the organs of the States Parties, which have the *primary* responsibility of safeguard of those rights. If, on the one hand, they impose on the individual complainants the duty of prior exhaustion of domestic law remedies,[11] on the other hand they impose at the same time on the respondent States the duty to provide effective domestic law remedies. If States were not obliged to provide effective local remedies, individual complainants should not be required to exhaust such remedies as a condition of admissibility of their petitions or complaints. The duties of the respondent and the complainant, in this particular, are essentially complementary in the present domain of protection.

13. In rendering the Judgment on the merits in *Genie Lacayo*, on 29 January 1997, the Inter-American Court pointed out that the proceedings in the case at Nicaraguan domestic law level had lasted *more than five years* (paragraph 81), and even so it expressed its expectation that the Supreme Court of Justice would remedy the procedural violations of the rights enshrined in the American Convention in the ambit of domestic law in resolving the then pending application for Cassation (*recurso de casación*) (paragraph 94). But shortly after that Judgment on the merits, the Judgment n. 8 of the Supreme Court of Justice of Nicaragua (of 12 February 1997), in dismissing the Cassation (*recurso de casación*), frustrated the expectation of the Inter-American Court.

14. The Nicaraguan Supreme Court of Justice itself, in a previous judgment, of 20 December 1993, referred[12] the case to the military jurisdiction. Following the Judgment on the merits of the Inter-American Court,

11. Not as a question pertaining to the merits, but rather as a condition of *pure admissibility* of a complaint, to be resolved *in limine litis*, - as I sustain in my Dissenting Opinion in the Resolution of this Court of 18 May 1995 in the present *Genie Lacayo* case.

12. By means of the interpretation of a constitutional provision (Article 159).

the Supreme Court of Justice dismissed -on questions of form- the Cassation (*recurso de casación*), on the basis of the military legislation (decree n. 591). In sum, the 1993 judgment determined that members of the military should be tried in a special military *forum* for ordinary crimes, and the 1997 judgment found that the application of the military legislation had been correct.

15. Even so, in the first judgment (of 1993) the Supreme Court of Justice was attentive to indicate that it was aware of the shortcomings of the aforementioned military legislation: it deemed it fit to ponder, in relation to the application of the decrees ns. 591 and 600, that

> although it is not pleased with the law applicable to the case at issue, because, in its view, it is not in keeping with the new trends and doctrines on the matter, nor with its own thinking, as it considers that the members of the military ought to be tried in the ordinary courts when they are involved in facts qualified by law as ordinary crimes or offenses, and that the military courts should know only cases which did not transcend the strictly military ambit (...,) nevertheless and much to its regret, this law which it deems inappropriate is the one which it ought to apply to the case *sub-judice*, whether it likes it or not - *however hard the law is, it still is the law* (...).

And it added that it should apply the legislation in force (principle of legality), but it suggested to the National Assembly to amend it, or to promulgate a "new and better" law.

16. The last Judgment (of 1997) of the Supreme Court of Justice is not an isolated fact: it constitutes, rather, a new fact which demonstrates the existence of a *continuing situation*, up to the present time, of impunity of those responsible for violations of the rights protected by the American Convention. Such *continuing situation* already existed well *before* the Inter-American Court delivered its Judgment on the merits in *Genie Lacayo*, it already came into being as from the moment in which the Supreme Court of Justice referred the case to the military courts, whose legislation determines that members of the military are to be tried in special military

courts for ordinary crimes, even when there is a complaint of violation of the rights enshrined in the Convention.

17. The new fact, in the framework of such continuing situation, is, in my view, of decisive influence so as to lead the Inter-American Court to conclude that the present appeal of revision is well-founded and to proceed to rectify the verification of the facts on which it based itself in its Judgment on the merits in *Genie Lacayo*. The unsatisfactory picture, from the perspective of human rights, resulting from the two aforementioned judgments of the Supreme Court of Justice, derives from the applicability of the military legislation (the decrees ns. 591 and 600), as the fact that it remains in force amounts to a continuing situation affecting the human rights protected by the American Convention; this enables the Inter-American Court to revise the criteria of its Judgment on the merits in *Genie Lacayo*.

18. 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,[13] 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.

19. 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),[14] it was transplanted to the

13. Its importance was pointed out, for example, in the *Report of the Commission of Jurists of the OAS for Nicaragua*, of 04 February 1994, pp. 100 and 106-107, paragraphs 143 and 160 (unpublished to date).

14. At a moment when, in parallel, the Commission on Human Rights of the United Nations was still preparing the Draft Universal Declaration (from May

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,[15] apart from a dense doctrinal debate.

20. It could be argued that, for Article 25 of the American Convention to have effects *vis-à-vis* acts of the Legislative Power, for example, the incorporation of the American Convention into the domestic law of the States Parties would be required. Such incorporation is undoubtedly desirable and necessary, but, by the fact of not having incorporated it, a State Party would not thereby be dispensed from applying always the judicial guarantee stipulated in Article 25. Such guarantee is intimately linked to the general obligation of Article 1(1) of the American Convention, which, in turn, confers functions of protection onto the domestic law of the States Parties.

1947 until June 1948), as recalled, in a fragment of memory, by the *rapporteur* of the Commission (René Cassin); the insertion of the provision on the right to an effective remedy before national jurisdictions in the Universal Declaration (Article 8), inspired in the corresponding provision of the American Declaration (Article XVIII), took place in the subsequent debates (of 1948) of the III Committee of the General Assembly of the United Nations. Cf. R. Cassin, "Quelques souvenirs sur la Déclaration Universelle de 1948", 15 *Revue de droit contemporain* (1968) n. 1, p. 10.

15. 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.

21. Articles 25 and 1(1) of the Convention are mutually reinforcing, in the sense of securing the compliance with one and the other in the ambit of domestic law. Articles 25 and 1(1) require, jointly, the *direct* application of the American Convention in the domestic law of the States Parties. In the hypothesis of alleged obstacles of domestic law, Article 2 of the Convention comes into operation, requiring the *harmonization* with the Convention of the domestic law of the States Parties. These latter are obliged, by Articles 25 and 1(1) of the Convention, to establish a system of simple and prompt local remedies, and to give them *effective* application.[16] If de facto they do not do so, due to alleged lacunae or insufficiencies of domestic law, they incur into a violation of Articles 25, 1(1) and 2 of the Convention.

22. This is clearly illustrated by the present case. If the Legislative and Judicial Powers were to give effective application, at domestic law level, to those norms of the Convention, the situation which concerns us would be distinct today. The principle of legality does not exhaust itself in the "*sandinista* legality", as the military legislation would appear to intend[17] in the present case; for a State Party to the American Convention, the principle of legality requires the faithful compliance with the conventional precepts as well as the harmonization of national laws with such precepts.

23. This understanding leads to a revision of the decision, by the Inter-American Court, in the Judgment on the merits (paragraphs 72 and 86), of the express non-application of "the *sandinista* juridical conscience" in the military courts in the present case. As the decree n. 591 itself determines that the evaluation of evidence ought to be guided by "the *sandinista* juridical conscience",[18] this principle would hardly not have been applied. Its appli-

16. The question of the effectiveness of local remedies is intimately linked to the administration of justice itself and to the operation of the competent national organs to redress the violations of the protected rights.

17. E.g., decree n. 591, Articles 11 and 17.

18. Article 52; and cf. Article 12.

cation not only contravenes the evaluation of evidence in accordance with universally accepted criteria of value judgments based on correct logical propositions and observations of experience confirmed by reality, but it also affects the due process of law (Article 8(1) of the American Convention).

24. The question, thus, is not one solely of unreasonable delays (pointed by the Inter-American Court in its Judgment on the merits). Justice delayed is justice denied, and the denial of justice comprises the additional elements which integrate the due process of law. While a clear understanding of the wide scope of the conventional obligations of protection does not prevail in all the States Parties to the American Convention,[19] -a clear understanding that the international responsibility of a State may be engaged by any act, or omission, of any of its powers (Executive, Legislative or Judicial),- very little progress will be achieved in the international protection of human rights in our continent.

25. To the *dura lex sed lex* -which not seldom amounts to the *summum jus, summa injuria*,- one is to oppose the old English maxim: - "*Justice must*

19. That is, of the general obligations provided for in Articles 1(1) and 2 of the American Convention, along with the specific obligations pertaining to each one of the rights protected by the Convention. -It is certain, as pointed out by the Inter-American Court in its Judgment on preliminary objections (of 27 January 1995) in the present *Genie Lacayo* case, that it is to pronounce on the case only on the basis of the terms of acceptance by Nicaragua of its compulsory jurisdiction in contentious matters. But it is equally certain that such acceptance of jurisdiction refers only to the judicial means of settlement (by the Court) of a concrete human rights case, which in no way affects the responsibility of a State Party for violations of the rights enshrined in the Convention. It is as from the moment when a State becomes a Party to the Convention (in the case of Nicaragua, as from 25 September 1979) that it undertakes to respect all the rights protected by the Convention and to guarantee their free and full exercise,- starting with the fundamental right to life. Although in the circumstances the Court cannot pronounce on the particular, the conventional obligation of the State Party nevertheless subsists. And one may legitimately expect that the national tribunals of the State Party bear in mind, in their decisions, the norms of protection of the American Convention itself.

not only be done: it must also be seen to be done".[20] Moreover, if the national tribunals of the States Parties are obliged to apply the norms of protection of the American Convention, -and no one can doubt this in all conscience,- with all the more reason is the Inter-American Court obliged to proceed, in the context of concrete cases (in which the existence of victims of human rights violations has been established), to the determination of the compatibility or otherwise with the Convention of national laws and judicial decisions of national tribunals based on such laws,[21] in the exercise of its duty of protection of human rights. Once called upon to pronounce on the matter in a given *cas d'espèce*, this is, in my view, what the Inter-American Court ought to do, instead of entrusting the final solution of the case to the national tribunals.

26. At last, there is a fundamental aspect which cannot pass unnoticed. The subject of the rights enshrined in the Convention is the alleged victim, the complainant party. According to the present Regulations of the Inter-American Court, in case of violation of the rights protected by the Convention, at the stage of reparations the representatives of the victims or of their relatives may in fact appear before the Court, and "independently submit their own arguments and evidence" (Article 23), as a true party, and with the guarantee of full participation. Thus, whenever the Court establishes the violation of one or more provisions of the Convention, there arises the *obligation* of the respondent State to comply

20. A maxim which has been invoked by the European Court of Human Rights in its Judgments in the cases of *Delcourt versus Belgium* (1970, par. 31), and *De Cubber versus Belgium* (1984, par. 26).

21. It is one thing to act as an appeals tribunal or a court of review of the decisions of tribunals in the framework of domestic law, which the Inter-American Court cannot do. It is quite another thing, wholly distinct, to proceed, in the context of a concrete contentious case (in which the existence of victims of human rights violations has been established), to the determination of the compatibility or otherwise with the provisions of the American Convention of administrative acts and practices, national laws and decisions of national tribunals, which the Inter-American Court surely can and ought to do.

with the judgment of the Court, to what corresponds the *right* of the individual complainant to require that the judgment be complied with.

27. To every duty corresponds a right, and vice versa. The victim has, in my view, full *legitimatio ad causam* to act accordingly, including by means of an application for judicial review of a judgment, as in the present case. The victim is entitled to do so, with all the more reason, in case of a *continuing situation* of violation of the rights enshrined in the Convention. Such continuing situation may arise, for instance, from the persistence, either of national laws incompatible with the Convention, or of a *jurisprudence constante* of national tribunals clearly adverse to the victim.

28. It is precisely in order to redress such situations that the mechanisms of international protection of human rights were conceived and are made to operate; if this were not possible, all our labour would ineluctably be deprived of all meaning. The thesis which I sustain appears to me to be the one which most faithfully conforms to the letter and the spirit of the American Convention. It represents the understanding which should, in my view, have guided the Inter-American Court in the present Resolution. The outcome would have been the revision, by the Court, of the criteria followed in its Judgment on the merits of 29 January 1997 (in respect of Articles 25, 8(1), 1(1) and 2 of the American Convention taken jointly) in the present *Genie Lacayo* case.

A.A. Cançado Trindade

Antônio Augusto Cançado Trindade
Judge

Ventura R.

Manuel E. Ventura-Robles
Secretary