

# Inter-American Court of Human Rights

## Case of La Cantuta v. Perú

### Judgment of November 30, 2007

#### *(Interpretation of the Judgment on Merits, Reparations, and Costs)*

In the case of *La Cantuta v. Peru*,

The Inter-American Court of Human Rights (hereinafter "the Inter-American Court", "the Court", or "the Tribunal"), composed of the following judges:

Sergio García Ramírez, President;  
Antônio Augusto Cançado Trindade, Judge;  
Cecilia Medina Quiroga, Judge;  
Manuel E. Ventura Robles, Judge;  
Fernando Vidal Ramírez, Judge *ad hoc*;

also present,

Pablo Saavedra Alessandri, Secretary, and  
Emilia Segares Rodríguez, Deputy Secretary;

pursuant to Article 67 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Article 59 of the Court's Rules of Procedure (hereinafter "the Rules of Procedure"), decides on the request for interpretation of the Judgment on merits, reparations, and costs issued by the Court on November 29, 2006 in the *case of La Cantuta v. Peru* (hereinafter "the request for interpretation") presented by the representatives of the victims' next of kin (hereinafter "the representatives") on March 20, 2007.

#### I

##### **PRESENTATION OF THE REQUEST FOR INTERPRETATION AND PROCEEDINGS BEFORE THE COURT**

1. On March 20, 2007 the representatives presented a request for interpretation of the Judgment of November 29, 2006 on merits, reparations, and costs in this case<sup>1</sup> (hereinafter "the Judgment"), based on Articles 67 of the Convention and 59 of the Rules of Procedure. In its request for interpretation the representatives requested "the clarification of several matters regarding the identification and/ or individualization of the victims' next of kin in the case of reference, regarding their consideration as beneficiaries of the measures of

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<sup>1</sup> Cfr. *Case of La Cantuta v. Peru*. Merits, Reparations, and Costs. Judgment of November 29, 2006. Series C No. 162.

reparation established in the [J]udgment.”

2. On May 11, 2007, pursuant to that stated in Article 59(2) of the Rules of Procedure and following instructions of the Tribunal, the Secretariat of the Court (hereinafter “the Secretariat”) sent a copy of the request for interpretation to the Inter-American Commission of Human Rights (hereinafter “the Commission” or “the Inter-American Commission”), and the State of Peru (hereinafter “the State” or “Peru”) and informed them that they had a non-postponable term up to August 1, 2007 to present the written arguments considered appropriate. Likewise, it reminded the State that, pursuant to that stated in Article 59(4) of the Rules of Procedure, “[t]he request for interpretation does not suspend the execution of the Judgment.” On July 31 and August 1, 2007 the State and the Commission presented, respectively, the mentioned written arguments.

## II

### JURISDICTION AND COMPOSITION OF THE COURT

3. Article 67 of the Convention states that:

[t]he judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.

4. Pursuant to the above-cited provision, the Court has jurisdiction to interpret its judgments. When carrying out the exam of the request for interpretation, the Tribunal must have, whenever possible, the same composition it had when issuing the corresponding Judgment (Article 59(3) of the Rules of Procedure). On this occasion, the Court is composed of the same judges<sup>2</sup> who delivered the Judgment, whose interpretation has been requested.

## III

### ADMISSIBILITY

5. It corresponds to the Court to verify if the terms of the requests for interpretation comply with the requirements established in the applicable norms, specifically Article 67 of the Convention and 29(3) and 59 of the Rules of Procedure.

6. Article 59 of the Rules of Procedure states that:

1. The request for interpretation, referred to in Article 67 of the Convention, may be made in connection with judgments on the merits or on reparations and shall be filed with the Secretariat. It shall state with precision the issues relating to the meaning or scope of the judgment of which the interpretation is requested.

2. The Secretary shall transmit the request for interpretation to the States that are

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<sup>2</sup> The Judge Oliver Jackman, who due to reasons of force majeure had not participated in the deliberation and signing of the Judgment on merits, reparations, and costs of November 29, 2006, died on January 25, 2007. The Judge Diego García-Sayán, of Peruvian nationality, excused himself from hearing the present case pursuant to Articles 19(2) of the Statute and 19 of the Rules of Procedure, reason for which, pursuant to that stated in Articles 10 of the Statute of the Court and 18 of the Rules of Procedure, the State appointed Mr. Fernando Vidal Ramírez as judge *ad hoc* to participate in the consideration of the case, and on this occasion he forms part of the Tribunal, in the same condition as in the Judgment on merits, reparations, and costs. Due to reasons of force majeure, the Judge Alirio Abreu Burelli did not participate in the deliberation and signing of the present Judgment.

parties to the case and shall invite them to submit any written comments they deem relevant, within a time limit established by the President.

3. When considering a request for interpretation, the Court shall be composed, whenever possible, of the same judges who delivered the judgment of which the interpretation is being sought. However, in the event of death, resignation or disqualification, the judge in question shall be replaced pursuant to Article 16 of these Rules.

4. A request for interpretation shall not suspend the effect of the judgment.

5. The Court shall determine the procedure to be followed and shall render its decision in the form of a judgment.

7. Article 29(3) of the Rules of Procedure establishes that “[j]udgments and orders of the Court may not be contested in any way.”

8. The Court has verified that the representatives presented the request for interpretation within the term established by Article 67 of the Convention, since the Judgment was notified to the State, the Inter-American Commission, and the representatives on December 20, 2006.

9. On the other hand, as had been previously stated by this Tribunal,<sup>3</sup> the request for interpretation of a judgment may not be used as a means of appeal, instead its exclusive objective is to clarify the sense of a judgment when any of the parties holds that the text of its operative paragraphs or its considerations lack clarity or precision, as long as these considerations affect said operative paragraphs. Therefore, the modification or annulment of the corresponding judgment may not be asked for through a request for interpretation.

10. To analyze the validity of the requests for interpretation presented by the State and the representatives and, in its case, clarify the sense or scope of the Judgment, the Court will analyze separately the three situations presented in the same, as well as the relevant observations made by the Commission and the State. Likewise, in each of the matters any matter of admissibility will be analyzed, if necessary.

#### IV SITUATION OF MRS. MARCIA CLAUDINA MARIÑOS FIGUEROA

11. The representatives argued that Mrs. Marcia Claudina Mariños Figueroa was identified in the Judgment as the sister of Mr. Juan Gabriel Mariños Figueroa, who was also declared a victim of the violation of his rights to humane treatment and to a fair trial and judicial protection and that in operative paragraph number 17 she is appointed as beneficiary of a compensation for non-pecuniary damage. However, the representatives argued that said person is not mentioned in the Judgment in the chapter on Reparations, in the section on Beneficiaries, when they mention the next of kin of Mr. Juan Gabriel Mariños Figueroa entitled to reparations, nor is she mentioned in the section on non-pecuniary

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<sup>3</sup> *Cfr. Case of Loayza Tamayo v. Peru. Interpretation of the Judgment on Merits.* Order of the Court of March 8, 1998. Series C No. 47, para. 16; *Case of the Pueblo Bello Massacre v. Colombia. Interpretation of the Judgment on Merits, Reparations, and Costs.* Judgment of November 25, 2006. Series C No. 159, para. 13, and *Case of Acevedo Jaramillo et al. v. Peru. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs.* Judgment of November 24, 2006. Series C No. 157, para. 27.

damages when the compensations are set for each of the beneficiaries. With regard to the above, the representatives asked the Court to clarify what they considered a discordance between the corresponding paragraphs of the Judgment.

12. In this regard, the State expressed that “[t]he omission of the inclusion of [the ...] name [of Mrs. Marcia Claudina Mariños Figueroa] within paragraph 206 subparagraph i) (next of kin of the victim Juan Gabriel Mariños Figueroa considered beneficiaries of compensations) [...] must be clarified by the Court.” Likewise, it stated that “it does not see any juridical reason to oppose the acknowledgment of [said person] as next of kin[...] of the [...] victim[...] by the Court.”

13. The Commission considered that “in fact there is a possible discordance between different parts of the [J]udgment in the present case in what refers to Mrs. Marcia Claudina Mariños Figueroa.” It also indicated that “the [J]udgment is clear in what refers to the quality of victim and injured party of [said] person [...], as well as her right to receive a compensation for the non-pecuniary damage suffered, but that since paragraph 220 does not establish the specific compensation set in her favor, this affects operative paragraph number 17 of the judgment.” Therefore, the Commission considered it correct for the Court to make the clarification requested “establishing the exact amount of the compensation that proceeds with regard to Mrs. Marcia Claudina Mariños Figueroa.”

14. The Court observes that, as has been stated by the representatives, in the chapter of Facts Proven (paragraph 80(106)) of the Judgment of reference Mrs. Marcia Claudina Mariños Figueroa was identified as Mr. Juan Gabriel Mariños Figueroa’s sister; that her condition of victim due to the violation of the rights enshrined in Articles 5(1), 8(1), and 25 in relation with Article 1(1), all of the American Convention, was established in paragraphs 129 and 161 and in operative paragraphs 5 and 6 and operative paragraphs 5 and 6, and that in operative paragraph number 17 she is mentioned as beneficiary of a compensation for non-pecuniary damages. It is true that the Judgment does not include her name in the chapter on Reparations, in the section on Beneficiaries, paragraph 206(i), when determining the persons considered injured parties for the effects of the Judgment, or in the section on Non-Pecuniary Damages, paragraph 220, when determining the compensations corresponding to each of the beneficiaries.

15. However, with regard to the determination of the next of kin of the people killed or disappeared as “injured parties” in the terms of Article 63(1) of the American Convention, paragraph 205 of the Judgment of the Court established that

[...] it considers as “injured parties” the next of kin of the mentioned people, in their own nature of victims of the violation to the rights enshrined in Articles 5(1), 8(1), and 25 of the American Convention, in relation to Articles 1(1) and 2 of the same (*supra* paras. 129 and 161).

16. Likewise, in relation to payment of non-pecuniary damages in favor of the brothers and sisters of the missing or killed victims, paragraph 219(ii) the Tribunal considered it was necessary

[...] to order in equity [...] the payment of the following amounts as compensation for the non-pecuniary damages caused due to the suffering of the next of kin of the 10 victims missing or killed, who are at the same time victims of the violation of their right to humane treatment (*supra* para. 129):

[...]

- ii. US\$ 20.000,00 (twenty thousand dollars of the United States of America) in the case of each sister or brother of the 10 victims missing or killed[.]

17. Consequently, in the seventeenth operative paragraph the Court ordered that

[t]he State must pay [...] Marcia Claudina Mariños Figueroa, [...], within a one-year term, the amounts set in paragraph 220 of the Judgment, as compensation for non-pecuniary damages, in the terms of paragraphs 219, 246 through 248 and 250 through 252 of the same.

18. That is, as observed by the Commission, the Judgment is clear when it determined the condition of victim and injured party of Mrs. Marcia Claudina Mariños Figueroa. In said terms, it is equally clear that the omission of her name in paragraphs 206 (i) and 220 of the Judgment is a material error that does not affect the determinations stated. Therefore, it must be clarified that Mrs. Marcia Claudina Mariños Figueroa must be understood as included in the previously mentioned paragraphs, as beneficiary of the compensation set for non-pecuniary damages in favor of the sisters or brothers of the victims missing or killed (US\$ 20.000,00 – twenty thousand dollars of the United States of America).

19. Pursuant to the aforementioned, the Tribunal has clarified the scope of that stated in paragraphs 206(i) and 220, in relation with paragraphs 80(106) and 129 and the fifth and seventeenth operative paragraphs of its Judgment of November 29, 2006 on merits, reparations, and costs.

## V

### REGARDING THE SURNAMES OF MRS. CARMEN OYAGUE VELAZCO

20. The representatives stated that, even though they initially stated that “the aunt of Dora Oyague Fierro was Mrs. Carmen Oyague Velasco” in their brief of pleadings and motions, in a subsequent brief in which they presented documents as evidence to facilitate adjudication of the case requested by the Court, they mentioned that the full name of said person was Carmen Antonia Oyague Velazco de Huaman; that the Court in its judgment on every occasion on which it refers to her calls her Carmen Oyague Velazco; that even when this “is correct and corresponds to her identity, her full name also includes her husband’s surname (de Huaman), which is the one that figures in her national identification document and in the affidavit presented in the proceedings before the Court.” They consider it important that the Court clarify this matter and add said person’s married name, since this is relevant for the effects of compliance by the State of the measures of reparation established in the Judgment, since the error mentioned could make the payment due to her for non-pecuniary damages difficult, since state officials rigorously verify the coincidence with the complete name that appears in the national identification document, especially when dealing with married women.

21. The State expressed that “according to the National Identification and Marital Status Registry (RENIEC), Mrs. Carmen Antonia Oyague Velazco de Huamán [...] is registered in the Data Base of Citizens of said body” and that “it does not know of any juridical reason to present opposition to the acknowledgment of [said individual] as a next of kin [...] of the [...] victim [...] by the [...] Court.” Likewise, the State presented simple copies of citizenship data sheets from the RENIEC for this person.

22. The Commission considered that “even when the scope and content of the stated in the [J]udgment with regard to Mrs. Carmen Oyague Velazco is clear, it is useful to specify her last name in the manner requested in order to avoid any doubt regarding payment of the compensation ordered by the Court [and that s]aid precision may be done through a material correction of the [J]udgment, or through the criteria of usefulness that the Tribunal has employed on other occasions.”

23. Regarding the representative's request, even though it does not correspond strictly to a supposition of interpretation of the Judgment, the Court has verified in the documents presented, and the State itself has declared, that the full name of the mentioned individual is in effect Carmen Antonia Oyague Velazco de Huaman, which includes her married name. Therefore, the State must be asked to take this clarification into account for the effects of compliance with the Judgment.

**VI**  
**REGARDING THE SITUATION OF MRS. CARMEN JUANA MARIÑOS FIGUEROA**  
**AND MR. MARCELINO MARCOS PABLO MEZA**

24. The representatives asked for the clarification of the reasons why Mrs. Carmen Juana Mariños Figueroa and Mr. Marcelino Marcos Pablo Meza, despite having been identified in the chapter on "Proven Facts" as the sister and brother, respectively, of Messrs. Juan Gabriel Mariños Figueroa and Heráclides Pablo Meza, were not considered as victims of the violation of the rights to humane treatment (Article 5(1) of the American Convention and to a fair trial and judicial protection (Articles 8(1) and 25 of the American Convention) or as an "injured party", since they are not mentioned in the chapter on Reparations or as "beneficiaries of compensations for non-pecuniary damages," since they are not mentioned in the seventeenth operative paragraph either

25. The State considered that, "since the Court [...] has been very clear in its criteria when determining the beneficiaries of the compensations for pecuniary and non-pecuniary damages[...], it must be the one to explain the exclusion practiced [...] as 'injured party' and beneficiaries of reparations."

26. The Commission observed that "in paragraphs 67 and following of the [J]udgment, the Court assessed the evidence presented with regard to the next of kin of the victims of the present case [and that] in the section regarding the violation of Article 5 [... it made] considerations in reference to the next of kin of the victims missing or killed when determining who [were] victims of [this] violation." The Commission expressed that "[d]espite the fact that specific consideration regarding [Mrs. Carmen Juana Mariños Figueroa and Mr. Marcelino Marcos Pablo Meza] were not made in any of said sections, in paragraph 128 of its Judgment the Tribunal made considerations in general in what refers to the situation of the brothers and sisters of some victims." Finally, the Commission considered that "the Court could consider it useful to proceed with the interpretation requested."

27. In this matter, the Court has been asked to clarify the reasons why Mrs. Carmen Juana Mariños Figueroa and Mr. Marcelino Marcos Pablo Meza were not declared victims of the violations to Articles 5(1), 8(1), and 25 of the Convention or, consequently, beneficiaries of reparations, despite the fact that it was proven that they were next of kin of two of the victims. To determine if this matter should be clarified, it is important to remember that decided in the Judgment in this sense.

28. First of all, the Tribunal made a series of considerations *in limine litis* in the chapter on Evidence, section of Assessment of the Evidence (paragraphs 67 through 79), to determine who of the next of kin of the victims would have the condition of alleged victims for the effects of the proceedings before the Court. Of these considerations, it is appropriate to point out the following:

67. The Inter-American Commission presented in its application a list of 10 alleged victims of the facts of the present case, specifically: Hugo Muñoz Sánchez, Dora Oyague Fierro, Marcelino Rosales Cárdenas, Bertila Lozano Torres, Luis Enrique Ortiz Perea, Armando Richard Amaro Córdor, Robert Edgar Teodoro Espinoza, Heráclides Pablo Meza, Juan Gabriel Mariños Figueroa, and Felipe Flores Chipana, as well as of 55 of their next of kin. The Court points out that evidence of the relationship was not presented with the application with regard to 46 of those alleged next of kin included in the text of the same. On the other hand, the representatives presented documents regarding 38 of those next of kin of alleged victims as evidence to facilitate adjudication of the case requested by the Tribunal (*supra* paras. 33 and 36).  
[...]

69. In its brief of pleadings and motions the representatives included four people considered next of kin of the alleged victims that had not been included in the application[...]. On that opportunity the proof of the relationship was not presented. Besides, said people were included by the Commission in its brief of final arguments and the representatives presented certain documents regarding said individuals as evidence to facilitate adjudication of the case requested by the Tribunal.

70. In its final written arguments the Commission included two people that were not included in the application in the list of the next of kin of the alleged victims[...], based on their inclusion in statements offered before notary public by two of the next of kin.  
[...]

72. This Tribunal's jurisprudence with regard to the determination of alleged victims has been ample and adjusted to the circumstances of each case. The alleged victims must be included in the application and in the Commission's Report adopted in the terms of Article 50 of the Convention. Therefore, pursuant to Article 33(1) of the Rules of Procedure it corresponds to the Commission, and not to this Tribunal, to identify the alleged victims in a case before the Court with precision and on the due procedural opportunity [...]. However, in its defect, on some occasions the Court has considered as victims people that were not included as such in the application, as long as the parties' right to a defense have been respected and the alleged victims are linked to the facts described in the application and the evidence presented before the Court [...].

73. This Tribunal will use the following criteria to define who else they will consider as alleged victims and their next of kin in the present case: a) the procedural opportunity in which they were identified; b) the acknowledgment of responsibility made by the State; c) the evidence regarding the same, and d) the characteristics of this specific case.

74. On this occasion, the Tribunal has found itself in the need to carry out a laborious assessment of the evidence presented by the Commission and the representatives, as well as to request additional documents as evidence to facilitate adjudication of the case, oriented to obtaining the elements necessary for the precise identification of the alleged victims. After the analysis, the Tribunal has found the different situations mentioned in the previous paragraphs (*supra* paras. 67 through 71).  
[...]

29. Having clarified who is considered as having the nature of alleged victims for the effect of the proceedings, in effect in the chapter on Proven Facts (paragraphs 80(106) and 80(100)) the Court considered as proven, *inter alia*, that Mrs. Carmen Juana Mariños Figueroa and Mr. Marcelino Marcos Pablo Meza were the sister and brother, respectively, of Messrs. Juan Gabriel Mariños Figueroa and Heráclides Pablo Meza. Later, in the following chapters, the Court assessed if there was evidence to determine if these persons were victims themselves of the alleged violations to the Convention. That is, regardless of the fact that their relationship with the victims was proven, the Court went on to establish if the State was responsible for an alleged violation of a right protected by the Convention in their detriment.

30. Thus, for example, the Tribunal made the following considerations in the chapter regarding the alleged violation of Article 5 of the Convention:

124. Following its jurisprudence [...], the Court determines now if the suffering brought on as

a consequence of the specific circumstances of the violations perpetrated against the victims, the situations lived by some of them within this context, and the subsequent actions and omissions of the state authorities, violate the right to humane treatment of the victims' next of kin regarding the facts of the present case.  
[...]

127. The Court considers it necessary to point out that the victim Heráclides Pérez Meza lived with his aunt, Mrs. Dina Flormelania Pablo Mateo, for more than seven years, since he moved to Lima to carry out his college studies. Likewise, the victim, Dora Oyague Fierro lived, since she was a little girl, with her father and her paternal uncles, specifically, Mrs. Carmen Oyague Velazco and Mr. Jaime Oyague Velazco. Besides, the victim Robert Edgar Teodoro Espinoza was raised by his father and by Mrs. Bertila Bravo Trujillo. In the three cases, once the victims disappeared, said next of kin started their search and presented, in some cases, judicial actions before the authorities; that is, they faced the obstructive justice system, suffering the direct effects of the same (*supra* para. 80(19) through 80(21) and 80(24)).

128. The Court also observes that both the Inter-American Commission and the representatives indicated that different brothers and sisters of the people killed or missing were alleged victims of the violation to Article 5 of the Convention. *However, in several of these cases sufficient evidence was not presented to allow the Tribunal to establish a true damage regarding said next of kin. Therefore, the Court considers as victims the brothers and sisters regarding which there is sufficient evidence in this regard.* [(emphasis added)]

31. That is, not enough evidence was presented to allow the tribunal to establish that Mrs. Carmen Juana Mariños Figueroa and Mr. Marcelino Marcos Pablo Meza were victims of the alleged violation of Article 5(1) of the Convention (paragraph 129). The same occurs with Messrs. Celina Pablo Meza, Cristina Pablo Meza, Wil Eduardo Mariños Figueroa, Marilú Lozano Torres, Jimmy Anthony Lozano Torres, Miguel Lozano Torres, Augusto Lozano Torres, Celestino Eugencio Rosales Cárdenas, Saturnina Julia Rosales Cárdenas, Ronald Daniel Taboada Fierro, Gustavo Taboada Fierro, Luz Beatriz Taboada Fierro, and Rita Ondina Oyague Sulca, who were not declared victims of said violation either, despite having proven that they were siblings of the victims. According to that established in Article 63(1) of the Convention, “[i]f the Court finds that there has been a violation of a right or freedom protected by [the] Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated.” That is, the injured party is made up by those people that have been declared victims in the Judgment and in favor of who the Tribunal “[w]ill order[...] that the consequences of the measure or situation that have made up the violation of those rights be repaired.” Thus, the Court ordered different forms of reparation, among them payment in equity of compensations for the non-pecuniary damage caused to the next of kin of the 10 missing or executed victims who were at the same time victims of the violation of the right to humane treatment (paragraph 219). Mrs. Carmen Juana Mariños Figueroa and Mr. Marcelino Marcos Pablo Meza were not in that situation.

32. The Court has established that a request for interpretation of a judgment cannot consist in the presentation of matters of fact and law that were already presented on their procedural opportunity and regarding which the Tribunal already adopted a decision.<sup>4</sup> When questioning the reasons why Mrs. Carmen Juana Mariños Figueroa and Mr. Marcelino Marcos Pablo Meza were not considered as victims of the violation of the rights to humane treatment (Article 5(1) of the American Convention), or as beneficiaries of compensations for non-pecuniary damages, the representatives want the Court to reconsider through the interpretation of matters regarding the assessment of the evidence, as well as the determination of victims of the violations declared; of the injured party and the reparations

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<sup>4</sup> *Cfr. Case of Loayza Tamayo v. Peru. Interpretation of the Judgment on Reparations.* Judgment of June 3, 1999. Series C No. 53, para. 15; *Case of the Massacre of Pueblo Bello v. Colombia. Interpretation of the Judgment on Merits, Reparations, and Costs,* *supra* note 4, para. 14, and *Case of Acevedo Jaramillo et al v. Peru. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs,* *supra* note 4, para. 28.



set. Therefore, the Court considers this part of the request for interpretation presented by the representatives inadmissible.

33. On the other hand, regarding the condition of victims of the violation of the right to a fair trial and judicial protection (Articles 8(1) and 25 of the American Convention), the Court declared this violation with regard to all the next of kin of the victims killed and missing. In said terms, it is equally clear that the omission of the names of Mrs. Carmen Juana Mariños Figueroa and Mr. Marcelino Marcos Pablo Meza in paragraphs 161, 206(i), and 206(h) and the sixth operative paragraph of the Judgment is a material error that does not affect those determinations. Therefore, it must be clarified that Mrs. Carmen Juana Mariños Figueroa and Mr. Marcelino Marcos Pablo Meza must be understood included in these paragraphs of the Judgment, as victims of these violation, as an injured party and as beneficiaries of the other forms of reparation, respectively.

34. Similarly, and even though an interpretation was not requested in this sense, Messrs. Celina Pablo Meza, Cristina Pablo Meza, Wil Eduardo Mariños Figueroa, Marilú Lozano Torres, Jimmy Anthony Lozano Torres, Miguel Lozano Torres, Augusto Lozano Torres, Celestino Eugencio Rosales Cárdenas, Saturnina Julia Rosales Cárdenas, Ronald Daniel Taboada Fierro, Gustavo Taboada Fierro, Luz Beatriz Taboada Fierro, and Rita Ondina Oyague Sulca are in that same situation. Therefore, the clarification that they must also be understood included in paragraphs 161, 206, and the sixth operative paragraph of the Judgment is in order.

35. Thus, even though in the international proceedings before this Tribunal compensations were not ordered in favor of Mrs. Carmen Juana Mariños Figueroa or of Mr. Marcelino Marcos Pablo Meza, or in favor of the people mentioned in the previous paragraph, this does not exclude the possibility that, based on that stated in the Judgment, they may exercise the domestic recourses appropriate to assert the rights that correspond to them.

## VII

### OPERATIVE PARAGRAPHS

34. Therefore,

#### THE INTER-AMERICAN COURT OF HUMAN RIGHTS

pursuant with Article 67 of the American Convention on Human Rights and Articles 29(3) and 59 of the Rules of Procedure

#### DECIDES:

Unanimously,

1. To determine the scope of that stated in paragraphs 206(i) and 220, in relation to paragraphs 80(106) and 129 and the fifth and seventeenth operative paragraphs, of the Judgment issued on November 29, 2006 on merits, reparations, and costs in the *case of La Cantuta*, in the terms of paragraphs 14 through 19 of the present Judgment.
2. To request the State to take into account the full name of Mrs. Carmen Antonia Oyague Velazco de Huaman, which includes her married name, for the effects of compliance with the Judgment, in the terms of paragraph 23 of the present Judgment.
3. To declare the request for interpretation of the Judgment on merits, reparations, and costs issued on November 29, 2006 in the *case of La Cantuta* partially inadmissible since it does not adjust to that stated in Articles 67 of the Convention and 29(3) and 59 of the Rules of Procedure, pursuant to that stated in paragraphs 27 through 32 and 35 of the present Judgment.
4. To determine the scope of that stated in paragraphs 161, 206(h) and 206(i) and in the sixth operative paragraph of the Judgment issued on November 29, 2006 on merits, reparations, and costs in the *case of La Cantuta*, in the terms of paragraphs 33 through 35 of the present Judgment, in the understanding that this does not exclude the possibility that, based on that stated in the Judgment, the next of kin of the victims may exercise the domestic recourses appropriate to assert the rights that correspond to them
5. To notify the present Judgment to the representatives of the next of kin of the victims, the State, and the Commission.

Judge Antônio Augusto Cançado Trindade informed of his Concurring Opinion, which is enclosed with the present Judgment.

Written in Spanish and English, being the one in Spanish the official one, in San Jose, Costa Rica on November 30, 2007.

Sergio García Ramírez  
President

Antônio A. Cançado Trindade

Cecilia Medina

Manuel E. Ventura Robles

Fernando Vidal Ramírez  
Judge *ad hoc*

Pablo Saavedra Alessandri  
Secretary

So ordered,

Sergio García Ramírez  
President

Pablo Saavedra Alessandri  
Secretary

## CONCURRING OPINION OF THE JUDGE A.A. CANÇADO TRINDADE

1. I am a surviving Judge of the Inter-American Court of Human Rights. On 11.29.2006, I issued my last Opinion in this Tribunal, in the Judgment on merits and reparations in the present case of *La Cantuta*, regarding the State of Peru. After more than a year has gone by, I have verified that, in the world of Law an actual "last" is difficult. The present request for the Interpretation of a Judgment leads me spread upon the record new reflections on the matter presented in the case file before the Court, which I present as a true surviving Judge of the Inter-American Court. During the saga of the long 12-year exercise of two terms as of Full Judge of the Court, during which I never excused myself from participating in any deliberation and I never missed a day of work in the Court, I had the chance to, through the cases of violations to human rights the Tribunal had before it, coexist with the darkest parts of human nature, in the search for the realization of justice.

2. When I thought I had retired to *oblivion* (service offered, service lost...), I am now summoned to deliberate on the request for Interpretation of a Judgment presented by the representatives of the next of kin of the victims in the present case of *La Cantuta*. Thus, I come back to the Tribunal, with this purpose, as a surviving Judge. My imaginary lantern, which I hold within the ship (the Court) in which I still find myself within the stormy high seas of the attacks against human dignity, points now not only towards the front, facing the threatening waves that come near it, even threatening to sink it – but also backwards, towards the waves that previously made the ship tremble, and now move away from it, taking with them the experience and the lessons that I now make an effort to recover. As the experimented sailor of S.T. Coleridge,

"I viewed the ocean green,  
And looked far forth, yet little saw  
Of what had else been seen"<sup>1</sup>.

### I. *Prolegomena: Preliminary Considerations.*

3. I am – I repeat – a surviving Judge of the Inter-American Court, and, as such, I continue to insist, as I have in all my years within the Court, on spreading upon the record the grounds for my position regarding the matters treated in its Judgments, even when said grounds may deal with issues that others may find *prima facie* without greater relevance. To me, everything is important, and experience has taught me this. It is true that, from this point of view, experience takes more than it gives, since people with experience become more cautious; this is understandable and inevitable since they know a little more about human nature.

4. If human beings were born with experience they would not commit so many mistakes (specially during the first decades of their lives), which have consequences they have to live with later on, sometimes for the rest of their lives. "Experience" is a term that comes from the Latin "*experientia*", analogous of "*periculum*", danger. Therefore, those of us who have experience can at least comfort ourselves with the fact that we are survivors of dangers already lived.

5. And, as a survivor, I feel completely free and with the duty to spread upon the record my reflection, which maybe useful for the steering of the ship (the Court) in always stormy high sea of the never-ending assaults against human rights. Once more, I now offer the

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<sup>1</sup>. S.T. Coleridge, *The Rime of the Ancient Mariner* (1798), verses 443-445.

grounds for my position, as a surviving Judge of the Court, in this Judgment of Interpretation in the case of *La Cantuta v. Peru*. Maybe my reflections, which I document in the present Concurring Opinion, will actually be useful. I hope so. The imponderable has called me here to document them in the form of an *addendum* to my considerations previously developed in what I thought would be my last Opinion in the Court, in my Concurring Opinion in the Judgment on merits and reparations (of 11.29.2006) in the present case of *La Cantuta*.

6. I do not expect to convince with this the current majority of the Court in the *cas d'espèce*, whose line of thought I am already aware of and I do not share in different aspects. But maybe in the future my personal reflections, which I hereby spread upon the record, can be considered appropriate by a new composition of this Tribunal in the years to come. And even if they are not, maybe they will be of some use for those who wish to interest themselves in the lessons obtained from the work in the Court by a survivor of the same, who is aware of the dangers (of the experience) lived in it and the feeling of being able to continue to contribute with the cause of the protection of human rights, based now also on cumulative experience.

7. My considerations, developed below, return to that reasoned by the Court in the VI part of the present Judgment of Interpretation (paras. 24-35). Agreeing with the deliberation of the Court in the sense that Mrs. Carmen Juana Mariños Figueroa and Mr. Marcelino Marcos Pablo Meza, sister and brother of two fatal victims in the present case of *La Cantuta* (Messrs. Juan Gabriel Mariños Figueroa and Heráclides Pablo Meza, respectively) are victims of the violation of Articles 8(1) and 25 (taken jointly) of the American Convention (access to justice *lato sensu*, covering the guarantees of the due legal process), I have concurred with my vote to the adoption of the present Judgment of Interpretation.

8. But I do not feel completely satisfied, since the Court did not go further, in the previous Judgment of merits and reparations or in the present Judgment of Interpretation in the case of *La Cantuta*, with regard to Article 5(1) of the American Convention (right to physical, mental, and moral personal integrity), in the most lucid and advanced line of its previous *constant jurisprudence*. When demanding evidence of non-pecuniary damages in the case of *La Cantuta*, the Court self limited itself, it stopped its own jurisprudence in this sense, and it introduced a criterion that in my opinion is not sustainable and harmful for the effective international protection of human rights. Therefore, I am in the obligation to substantiate my discrepancy with this new setback, along with many others since the case of the *Serrano Cruz Sisters v. El Salvador* (Judgments of preliminary objections, of 11.23.2004, and of merits and reparations of 03.01.2005), issued in its most recent jurisprudence.

9. What moves me, to elaborate this Concurring Opinion, which is what has always moved me, continues in effect to be the search for a more effective protection of the rights protected by the American Convention on Human Rights. Thus, taking into account the matter mentioned, presented in the legal procedure of the present Judgment of Interpretation in the case of *La Cantuta*, I will focus my reflections, which I will present below, on three matters that I consider of great importance. The first consists of considerations regarding the conceptualization of person and victim within the human capacity of thought. Said considerations cover the counter-position of personality with regard to individuality, personalism beyond individualism, legal personalism and subjective law, the evolution of subjective law toward the new dimension of the international juridical protection of human beings, and the conceptualization of victim and the contribution of International Human Rights Law.

10. The second point refers to the necessary expansion – never the restriction – of the condition of *victim* under the American Convention. And the third aspect, related to the

aforementioned, consists in some considerations *de lege ferenda* on the centralization – and the expansion – of said condition of victim (direct, *lato sensu*) under the American Convention (considerations *de lege ferenda*). Thus, the field will be open to the presentation of my final considerations in the form of epilogue.

## **II. Considerations regarding the Conceptualization of Person and Victim within Human Thinking.**

11. The exam of the conceptualization of victim must not be disassociated from that of the conceptualization of person, which unravels an ample and fertile panorama of human thinking throughout the centuries. Said conceptualization leads to the comparison of personality with regard to individuality, to the formation of personalism beyond individualism, to the relation of juridical personalism with subjective law, to the evolution of subjective law to the new dimension of international juridical protection of human beings, and, in synthesis, to the conceptualization of the victim taking into account the contribution of International Human Rights Law. These are the matters I will refer to below.

### **1. The Conceptualization of Person, and the Comparison of Personality with regard to Individuality.**

12. The conceptualization of *person* has not been limited, throughout the centuries, to the science of Law. Other areas of human knowledge, such as philosophy and even theology, have also dealt with this matter. Within the framework of the latter, it has been observed, v.g., that

"C'est *par métaphore* que le mot *persona*, qui d'abord voulait dire masque, acteur, rôle, a été ensuite employé pour désigner un être capable de jouer un rôle dans le monde, un être *sui generis*, un tout indivisé et incommunicable, intelligent et libre"<sup>2</sup>.

13. But it was naturally within the field of Law that the means used by people to make their rights effective were created. Thus, the conceptual construction of legal personality, next to that of legal capacity. But, at the same time, the study of legal personality and capacity cannot, in my understanding, ignore the philosophical thoughts regarding personality and individuality. Contrary to that proclaimed by the heralds of legal positivism, jurists have a lot to learn from other areas of human knowledge, such as history, philosophy, theology, psychology, among others.

14. Just like said areas of knowledge took care of the conceptualization of the term person, they also did so with regard to the answers to the violations of the rights inherent to human beings. This is not something exclusive of juridical science, which has been highly enriched with the contributions of other fields of human knowledge. Thus, v.g., when considering the consequences of the violations to human rights, we turn to conceptions belonging to history (the determination of truth), philosophy (the realization of justice), theology (pardon as satisfaction for the victims),<sup>3</sup> and psychology (the rehabilitation of victims).<sup>4</sup>

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<sup>2</sup>. Ch. Journet, *Introduction à la Théologie*, Paris, Desclée de Brouwer Édit., 1947, p. 56, and cf. pp. 297-299. – It has been considered that "the person, the human being as a person, is subject to an existence and actions, although it is important to point out that the existence, *that*, that is *personal* and not only individual in the sense of individual nature. Therefore, actions (...) are also personal;" K. Wojtyła, *Persona y Acción*, Madrid, BAC, 1982, p. 90.

<sup>3</sup>. Cf. A.A. Caçado Trindade, "Responsabilidad, Perdón y Justicia como Manifestaciones de la Conciencia Jurídica Universal", 8 *Revista de Estudios Socio-Jurídicos* - Universidad del Rosario/Bogotá (2006) n. 1, pages 15-36.

15. Precisely, during the XX century, a school of thought took to the task of establishing the difference between personalism and individualism. For example, Jacques Maritain, stated that individuality and personality are "two metaphysical lines that cross each other in the unit" of each human being (which is individual in one sense and person in another). According to the great French thinker, each human being is *individual*, as part of "individualized fragment" of a species, as well as *person*, given of free will and spirituality, and, therefore, "an independent whole before the world."<sup>5</sup> We must not incur in the "tragic error" of confusing individuality with personality; mere individualism was, in effect, one of the errors of the XIX century.<sup>6</sup>

16. For J. Maritain, the distinction between individuality and personality "belongs to the intellectual wealth of humanity."<sup>7</sup> Human beings cannot be reduced to the individuals, and it must be guaranteed that each person is in conditions of preserving and exercising their spiritual liberty.<sup>8</sup> A person – he added - is

"un univers de nature spirituelle doué de la liberté de choix et constituant pour autant un tout indépendant en face du monde",

that must be respected by all, even the State.<sup>9</sup> For the author, the so-called "realists" are incapable of carrying out this purpose since in their primary empiricism they only believe in force, they only go by the political practice of specific historical moments and they cowardly accept that the State be superimposed over the human being.<sup>10</sup> With the same concern of ensuring respect for human beings, a school of thought that went on to be known as the *personalism* school has been developed through time, and it found a special conceptual development in the second half of the XX century.

## 2. Personalism Beyond Individualism.

17. The personalist school of thought arose in the second half of the XX century, especially in the decades of the fifties up to the seventies; it has strong historical roots in all philosophical reflections on human beings throughout the centuries. In the VI century of our era, for example, the Roman philosopher A.M.S Boecio (475-525), convicted *in absentia* and detained for alleged treason, had already written from jail his classic *De Consolatione Philosophiae* (525), which he concluded a little before his brutal execution. In his work, he covered the misfortunes of life (such as his), and he questioned if philosophy could be a comfort for the unfortunate. However, he states that human beings are given *reason*, and that *rectitude* is very important. The only aspect for which A.M.S. Boecio confessed he had not been able to

<sup>4</sup>. Cf., v.g., M. Minow, *Between Vengeance and Forgiveness*, Boston, Beacon Press, 1998, p. 147.

<sup>5</sup>. J. Maritain, *Para una Filosofía de la Persona Humana*, Buenos Aires, Club de Lectores, 1984, pages 161-162 and 198, and cf. pages 158 and 164.

<sup>6</sup>. *Ibid.*, pages 176-177 and 231.

<sup>7</sup>. *Ibid.*, page 141.

<sup>8</sup>. Cf. *ibid.*, pages 186 and 196-197.

<sup>9</sup>. J. Maritain, *Humanisme intégral* (1936), Paris, Aubier, 2000 (reed.), page 18, and cf. pages 37.

<sup>10</sup>. Cf. *ibid.*, pages 229-232.

find an explanation was for human free will v. divine omniscience (especially in what refers to the complete divine knowledge of what is going to happen).<sup>11</sup>

18. His concern was not with knowledge *in abstracto*, but instead focused on the human being. For personalism (as it became known) human beings are not objects, but instead subjects that have free will, creative capacity, and conscience. This is how it was visualized, in the beginning of the *law of people* (XVI and XVII centuries), by the great Spanish jurists and theologians, Francisco de Vitoria (1480-1546), in his department in Salamanca, and Francisco Suárez (1548-1617, born in Granada), in his department in Coimbra, Portugal. Both always had present, as of the human being, the notion of *common good*, of the *unit of human gender*,<sup>12</sup> promoting a *universalistic* vision of International Law. The human person, who has been given a conscience, understands himself as bearer of supreme value, beyond the individual.

19. The conception of personalism, as has become known in our time, has its roots in the thoughts and writings of authors such as Pascal (existential conscience), Goethe (the dynamic unit of spirit and matter), E. Kant (the fundamental importance of the human person), H. Bergson (memory and life),<sup>13</sup> besides Max Scheler, Karl Jaspers, and Gabriel Marcel. Personalism of the XX century, visualizing the *person* as a living being, that builds itself, and bearer of the supreme value as such, - and not as an abstract entity, or a simple individual as part of a species, - came to form part of the contemporary jusnaturalista thinking and it enriched it.<sup>14</sup>

20. One of the great exponents of personalism in the last century was Emmanuel Mounier, who put his ideas in order and published them one year before his death in 1950, and who confronted its solidaristic personalism to selfish individualism as well as to ideological collectivism (including financial capital, which will become the owner of human lives); he considered Law as an "institutional guarantor of people", and his conception of Law had in itself an unequivocal humanistic foundation, since it was based on human beings *per se*.<sup>15</sup> For E. Mounier, personalism affirms the primacy of human beings over material needs and collective systems; he stated that humanism consisted in the awareness of a person within their social media and tending to that universal and the person's spiritual development.<sup>16</sup>

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<sup>11</sup>. A.M.S. Boethius, *The Consolation of Philosophy* (circa 525), N.Y., B. & Noble, 2005 [reprint], pages 113, 122, 125, 127, and 134.

<sup>12</sup>. Cf., *inter alia*, v.g., Y. de la Brière, "Introduction", *Vitoria et Suarez - Contribution des théologiens au Droit international moderne*, Paris, Pédone, 1939, pages 5-12.

<sup>13</sup>. For Henri Bergson, there is no perception that is not influenced by memories and the *duration* - v.g., of life - is the accumulated past that invades the present; cf. H. Bergson, *Memória e Vida*, São Paulo, Martins Fontes, 2006 [reed.], pages 2, 47, 86, 122-123, and 162.

<sup>14</sup>. J.A. de la Torre Rangel, *Jusnaturalismo, Personalismo y Filosofía de la Liberación - Una Visión Integradora*, Sevilla, Edit. MAD/Colección Universitaria, 2005, pages 70-71, and cf. pages 65 and 68-69.

<sup>15</sup>. *Ibid.*, pp. 81, 86 y 95, y cf. pp. 62 y 113.

<sup>16</sup>. E. Mounier, *Manifesto ao Serviço do Personalismo*, Lisboa, Livr. Moraes Edit., 1967, pp. 9-319. For the author, individualism, as well as money and materialism, separate one from the others. Personalism, instead, favors the personal realization of each person. The conquest of true spiritual freedom corresponds to each person; people enjoy the natural right of the spiritual equality. *Ibid.*, pages 25, 27, 83-84, 96, 104, and 290.



21. Personalism opposes individualistic selfishness and maintains that, since one cannot find "spiritual and social salvation" in oneself, a person only exists with regard to others. Personalism states there is a *unit of human gender* (in space and time), being humanity one and undividable, and having the human gender one history and common destinations.<sup>17</sup> For personalism, values are of crucial importance for human beings and "education and persuasion" have preeminence over coercion.<sup>18</sup> In synthesis, according to Monier, human beings are "spiritual beings", constituted in such by a form of "independence in their being", through their "adhesion to a hierarchy of values freely adopted," besides being "assimilated and lived with assuming a responsible commitment."<sup>19</sup>

### 3. Juridical Personalism and Subjective Law.

22. In my opinion, personalistic thinking is forever relevant. Each human being is a subject of law. Actually, the notion of *subject* bursts into human knowledge without limiting itself to the conceptual universe of Law. It transcends it, and, with regard to human beings it always reaches the domain of the tradition of philosophical thoughts and anthropology. The condition of *subject* accompanies each human being throughout his entire existence, from the time of birth until death, and it transcends the mutations generated by the passing of time throughout a lifetime; likewise, it accompanies them in their relationships with others.<sup>20</sup> The condition of *subject* affirms the autonomy of each human being, that goes on to relate with others and their social environment guided by their conscience. In the latter, each human *subject* finds their self-affirmation and builds their life project, seeking to fulfill their aspirations during their lifetime. In synthesis, each human being self-affirms himself in his condition of *subject*.<sup>21</sup>

23. But the need to regulate human or social relationships leads one back to juridical thoughts, to the science of Law, to the construction of *subject of law* and their attributes. With this, the legal code seeks to regulate each person's sphere of liberty, in the realization of their life project and their purposes, with the due respect for the rights of others. The regulation of relationships between subjects of law covers different spheres of human activity, specifically, the relationships of each subject of law both with public power and other individuals.

24. As weighed in with lucidity by Gustav Radbruch, the concept of subject of law, as of that of *person*, is basically a concept of *equality*, "within which not only is the weak is compared to the powerful, or the rich with the poor, but also the weak personality of the individual with the gigantic personality of the collective person."<sup>22</sup> Thus the importance of always maintaining the equality of people present: equality before law and the equal legal

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<sup>17</sup>. E. Mounier, *Personalism*, Notre Dame, University of Notre Dame Press, 2001 [reprint], pages 19-21.

<sup>18</sup>. *Ibid.*, pages 69 and 42.

<sup>19</sup>. C. Díaz, *Emmanuel Mounier (Un Testimonio Luminoso)*, Madrid, Edic. Palabra, 2000, page 248, and cf. pages 249-251.

<sup>20</sup>. E. Morin, *La méthode - tome 5: L'humanité de l'humanité*, Paris, Éd. Seuil, 2001, pages 78-79 and 85.

<sup>21</sup>. *Ibid.*, pages 313, 232, and 330.

<sup>22</sup>. G. Radbruch, *Filosofia do Direito*, 4a. ed. rev., vol. II, Coimbra, A. Amado Ed., 1961, page 17.

capacity of all, for him, this constitutes the essence of the notion of person or subject of law. To be a person is a purpose in itself and of itself (*Selbstzweck*), G. Radbruch significantly adds. For the latter the philosophical-juridical concept of person or subject of law is equal to considering the latter as "a being" or an 'entity' considered a purpose in himself by the legal code."<sup>23</sup>

25. Therefore, human beings far from being reduced to a single object, occupy a central position in all type of concerns and reflections. The same occurs in the conceptual universe of Law. The human being is a *subject* of rights, and juridical personalism is directly related with the exercise of the subjective rights themselves and the search for the fulfillment of common good.<sup>24</sup> The human being goes on to vindicate his own rights. In this sense, the conceptualization of *subjective rights*, which I presented in my Concurring Opinion in Advisory Opinion n. 17 (of 08.28.2002) of this Court, on the *Juridical Condition and Human Rights of the Child* has also contributed, in a historical perspective. There I weighed in that

"(...) It may be recalled, in the present context, that the conception of individual *subjective right* already has a wide historical projection, originated in particular in the jusnaturalist thinking in the XVIIth and XVIIIth centuries, and systematized in the juridical doctrine along the XIXth century. Nevertheless, in the XIXth century and the beginning of the XXth century, that conception remained in the framework of domestic public law, emanated from public power, and under the influence of legal positivism<sup>25</sup>. The subjective right was conceived as the prerogative of the individual such as defined by the legal order at issue (the objective law).<sup>26</sup>

Notwithstanding, there is no way to deny that the crystallization of the concept of individual subjective right, and its systematization, achieved at least an advance towards a better understanding of the individual as a *titulaire* of rights. And they rendered possible, with the emergence of human rights at international level, the gradual overcoming of positive law. In the mid-XXth century, the impossibility became clear of the evolution of Law itself without the individual subjective right, expression of a de true "human right".<sup>27</sup> (...)

The emergence of universal human rights, as from the proclamation of the Universal Declaration of 1948, came to expand considerably the horizon of contemporary legal doctrine, disclosing the insufficiencies of the traditional conceptualization of the subjective right. The pressing needs of protection of the human being have much fostered this development. Universal human rights, superior to, and preceding, the State and any form of politico-social organization, and inherent to the human being, affirmed themselves as oposable to the public power itself.

The international juridical personality of the human being crystallized itself as a limit to the discretion of State power. Human rights freed the conception of the subjective right from the chains of legal positivism. If, on the one hand, the legal category of the

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<sup>23</sup>. *Ibid.*, pages 18 and 20.

<sup>24</sup>. In effect, underlying the legal personalism is the belief in the correlationship between human beings and common good (*persona et bonum commune sunt correlata*); E.G. da Mata-Machado, *Contribuição ao Personalismo Jurídico*, Rio de Janeiro, Forense, 1954, pages 174-175.

<sup>25</sup>. L. Ferrajoli, *Derecho y Razón - Teoría del Garantismo Penal*, 5th. ed., Madrid, Ed. Trotta, 2001, pages 912-913.

<sup>26</sup>. Ch. Eisenmann, "Une nouvelle conception du droit subjectif: la théorie de M. Jean Dabin", 60 *Revue du droit public et de la science politique en France et à l'étranger* (1954) pages 753-774, esp. pages 754-755 and 771.

<sup>27</sup>. J. Dabin, *El Derecho Subjetivo*, Madrid, Ed. Rev. de Derecho Privado, 1955, page 64.

international juridical personality of the human being contributed to instrumentalize the vindication of the rights of the human person, emanated from International Law, - on the other hand the *corpus juris* of the universal human rights conferred upon the juridical personality of the individual a much wider dimension, no longer conditioned by the law emanated from the public power of the State." (paras. 46-47 and 49-50).

26. As I allowed myself to previously state in my Concurring Opinion in the historic Advisory Opinion n. 16 of the Inter-American Court of Human Rights on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of 01.10.1999), we nowadays witness

"the process of *humanization* of international law, which today encompasses also this aspect of consular relations. In the confluence of these latter with human rights, the subjective individual right to information on consular assistance, of which are titulaires all human beings who are in the need to exercise it, has crystallized: such individual right, inserted into the conceptual universe of human rights, is nowadays supported by conventional international law as well as by customary international law" (par. 35).

27. On other occasions I referred to the subjective right within certain contexts.<sup>28</sup> The conceptualization of subjective right historically came before the appearance and extraordinary expansion of International Human Rights Law throughout the second half of the XX century and in this first decade of the XXI century. With the appearance and consolidation of the latter, a decisive step was taken towards the definitive emancipation of human beings before their own State.

28. This also led to the clarification of the international juridical personality of human beings, whose conceptualization, throughout the last decades, - directly related to the access of human beings to international justice, - I covered in my Concurring Opinion in the case of *Five Pensioners v. Peru* (Reparations, Judgment of 02.28.2003), as well as in my Concurring Opinions in the cases of *Yatama v. Nicaragua*, and *Goiburú et al. v. Paraguay* (Judgments of 06.23.2005 and 09.22.2006, respectively), as well as in the case of the *Members of the Team of Community Teams and Psychosocial Action - ECAP* (case of the *Massacre of Plan de Sánchez v. Guatemala*, Order on Provisional Protection Measures, of 11.29.2006).<sup>29</sup>

#### **4. From Subjective Law to the New Dimension of International Juridical Entitlement of Human Beings.**

29. The international juridical entitlement of human beings, as foreseen by the so-called "founders" of International Law, is currently a reality. Within the realm of International Human Rights Law, today the European and Inter-American protection systems – with international tribunals in operation – acknowledge, next to the individual's juridical personality, their international procedural capacity (*locus standi in judicio*). This is a logical development, since it

<sup>28</sup>. For example, in my Concurring Opinion in Advisory Opinion n. 18 (of 09.17.2003) of this Court, on the *Juridical Condition and Rights of the Undocumented Migrants*, I referred to the construction of the subjective individual right to asylum (paras. 31-43); 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)*, México, Edit. Porrúa/Universidad Iberoamericana, 2007, pages 63-68. I also referred to legal subjectivity in my Concurring Opinion (paras. 17-28) in the case of the *Castro Castro Criminal Center*, regarding Peru (Judgment of 11.25.2006); also reproduced in *ibid.*, pages 820-845.

<sup>29</sup>. Reproduced in *ibid.*, pages 355-362, 568-570, 779-804, and 1020-1025, respectively.

does not seem reasonable to conceive rights within the international realm without the corresponding procedural capacity to defend them; individuals are in fact the true petitioners in the international legal human rights processes. Regarding the right of international individual petitions the juridical mechanism of *emancipation* of the human being *vis-à-vis* the State itself for the protection of their rights within the realm of International Human Rights Law are built.

30. The grounds for all this notable development is the principle of *respect for the dignity of human beings*, regardless of their existential condition. By virtue of this principle, all human being, regardless of the situation and the circumstances that surround them, have a right to dignity.<sup>30</sup> All the extraordinary development of the international legal doctrine in this regard, throughout the XX century, finds its roots – as it had to be – on some past reflections, in both juridical and philosophical thoughts,<sup>31</sup> - for example, *inter alia*, on the well-known Kantian conception of human beings as a purpose in themselves.<sup>32</sup> This is inevitable, since it reflects the maturing and refinement process of the human spirit itself, which makes the advances in the human condition itself possible.<sup>33</sup>

31. In effect, there is no way to dissociate the acknowledgment of the individual's international juridical personality from the dignity itself of human beings. In a more ample dimension, human beings are defined as the entity that contained its supreme purpose in itself, and that fulfills it throughout their life, under their own responsibility. Effectively, it is human beings, essentially armed with dignity, who articulate, express, and introduce the "must be" of values in the reality in which they live, and only they are capable of doing so, as bearers of said ethical values. Legal personality is, at the same time, displayed as a legal category within the world of Law, as a single expression of human beings' aptitude to be the bearer of rights and obligations within the realm of regulated behavior and human relationships.<sup>34</sup>

32. The appearance of universal human rights, as well as of the proclamation of the Universal Declaration of 1948, considerably expanded the horizon of contemporary legal doctrine, revealing the insufficiencies of the traditional conceptualization of subjective law. The urgent needs of protection for human beings were greatly responsible for this development. Universal human rights, greater and previous to the State and any form of political-social

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<sup>30</sup>. On this principle, cf., v.g., B. Maurer, *Le principe de respect de la dignité humaine et la Convention Européenne des Droits de l'Homme*, Aix-Marseille/Paris, CERIC, 1999, pp. 7-491; [Several Authors,] *Le principe du respect de la dignité de la personne humaine* (Actes du Séminaire de Montpellier de 1998), Strasbourg, Conseil de l'Europe, 1999, pp. 15-113; E. Wiesel, "Contre l'indifférence", in *Agir pour les droits de l'homme au XXIe. siècle* (ed. F. Mayor), Paris, UNESCO, 1998, pages 87-90.

<sup>31</sup>. For an exam of individual subjectivity within philosophical thoughts, cf., v.g., A. Renaut, *L'ère de l'individu - Contribution à une histoire de la subjectivité*, [Paris,] Gallimard, 1991, pages 7-299.

<sup>32</sup>. E. Kant, *Fondements de la métaphysique des mœurs* (1785), Paris, Libr. Delagrave, 1999, pages 46, 103, 125-129, 136-137, 159, 164, and 166-167; I. Kant, *The Metaphysics of Morals* (1797), Cambridge, Cambridge University Press, 2006 [reprint], pages 17, 183, and 209; and cf. E. Kant, *Leçons d'éthique* (1775-1780), Paris, Livr. de Poche/Classiques de Philosophie, 1997, page 335.

<sup>33</sup>. A.A. Cançado Trindade, "A Consolidação da Personalidade e da Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", 16 *Anuario del Instituto Hispano-Luso-Americano de Derecho Internacional* - Madrid (2003) pages 278-280.

<sup>34</sup>. Cf., in this sense, v.g., L. Recaséns Siches, *Introducción al Estudio del Derecho*, 12a. ed., México, Ed. Porrúa, 1997, pages 150-151, 153, 156, and 159.

organization, and inherent to human beings, were confirmed as opposable to public power itself.

33. Human being's international legal personality was defined as a limit to the free judgment of the State's power. Human rights definitely opened the subjective law's conception of the ties of legal positivism. Yes, on one hand, the juridical category of human beings' international legal personality contributed to the instrumentalization of the vindication of the rights of human beings, which arise from International Law, - on the other hand the *corpus juris* of universal human rights provided the individual's legal personality with a much more ample dimension, no longer conditioned by the right that results from the State's public power.<sup>35</sup>

34. It is important to mention here the contribution, regarding the intangibility of the international legal personality of human beings, of the 17<sup>th</sup> Advisory Opinion of the Inter-American Court of Human Rights, on the *Juridical Condition and Human Rights of the Child* (of 08.28.2002): the Court made it clear that the Law necessarily acknowledges the legal personality of all human being (whether it is a child or teenager), regardless of their existential condition or of the scope of their legal capacity to exercise their rights for themselves (capacity to exercise). In effect, the acknowledgment and consolidation of the human being's position as a full subject of International Human Rights Law constitutes, in our days, - as I have been stating for several years, - an unequivocal and eloquent statement of the advances in the ongoing process of *humanization* of International Law itself (*jus gentium*).<sup>36</sup>

## 5. The Conceptualization of Victim and the Contribution of International Human Rights Law.

35. The victim is the human being victimized in the rights inherent *qua* person. The conceptualization of victim, the same as that of person (*supra*), has its historical roots throughout the centuries. Etymologically, the term *victim* (from the Latin *victima*) was originally used with regard to the person that was sacrificed (in rituals) or destined to be sacrificed. As of the XVII century, it acquired the sense of the person injured, tortured, or murdered by another. In the XVIII century, the term went on to refer to the person injured or oppressed by another, or by any power or situation. The term "victimize" was used in the XIX century (as of 1830).<sup>37</sup> In the XX century, the new discipline of *victimology* focused its attention on the victim,<sup>38</sup> - in opposition to criminology, which was focused on the criminal.

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<sup>35</sup>. A.A. Cançado Trindade, "A Consolidação da Personalidade e da Capacidade Jurídicas do Indivíduo...", *op. cit. supra* n. (33), pp. 280-281; A.A. Cançado Trindade, "La Persona Humana como Sujeto del Derecho Internacional: Avances de Su Capacidad Jurídica Internacional en la Primera Década del Siglo XXI", in *Jornadas de Derecho Internacional* (Buenos Aires, November 2006), Washington D.C., OAS/ General Secretariat, 2007, pages 246-249.

<sup>36</sup>. Cf., among my various articles in this sense, e.g., A.A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brasil, Edit. Del Rey, 2006, pages 3-409.

<sup>37</sup>. Cf. *The Oxford English Dictionary*, 2a. ed., tomo XIX, Oxford, Clarendon Press, 1989, p. 607; Asociación H. Capitant, *Vocabulario Jurídico* (dir. G. Cornu), Bogotá, Temis, 1995, p. 904; G. Gómez de Silva, *Breve Diccionario Etimológico de la Lengua Española*, México, El Colegio de México/FCE, 1996 [reimpr.], page 719.

<sup>38</sup>. Cf. E. Neuman, *Victimología - El Rol de la Víctima en los Delitos Convencionales y No Convencionales*, Buenos Aires, Edit. Universidad, 1994, pages 27-28.

36. Sometimes we refer to the victim as the “injured party”, as per certain current human rights treaties; the victim is the human being that has suffered an injury or damage, individually or in the company of other human beings, as a consequence of an act – or omission – that is internationally illegal.<sup>39</sup> In a historical perspective, the concept of victim is one of the “oldest of humanity”, actually belonging to “all cultures”.<sup>40</sup> Since the State gradually monopolized all forms of coercion, the role of the victims was in some way reduced (v.g., to that of a witness) or marginalized in the legal process with the State’s opposition to the accused (in criminal procedural law), with the frequent non-satisfaction of the victim.<sup>41</sup>

37. Actually, while the conceptual universe of criminology became oriented toward the figure of the criminal, locating the victim in a position that was a little tangential or marginal, the emerging discipline of victimology has tried to solve that inequality, focusing its attention on the victim, on the need to rehabilitate the latter and guarantee the correct and adequate reparations.<sup>42</sup> It was, however, the notable evolution of International Human Rights Law throughout the second half of the XX century and up to the present, what allowed the fulfillment of that objective, since it was completely and duly created in *orientation toward the victims*.<sup>43</sup> The coming and consolidation of the *corpus juris* of International Human Rights Law once again gave the victims their *central* position within the legal body.<sup>44</sup>

38. For many years now I have examined the conceptualization of the victim under human rights treaties such as the American Convention, among others.<sup>45</sup> It is not my intention to tak

<sup>39</sup>. Cf. Union Académique Internationale, *Dictionnaire de la terminologie du Droit international*, Paris, Sirey, 1960, pp. 448-449; J. Salmon (dir.), *Dictionnaire de Droit international public*, Bruxelles, Bruylant, 2001, page 1131.

<sup>40</sup>. A.-J. Arnaud *et alii* (dir.), *Dictionnaire encyclopédique de théorie et de sociologie du Droit*, 2a. ed., Paris, LGDJ, 1993, page 641 (verbete de E. Viano).

<sup>41</sup>. *Ibid.*, pages 642-643 (verbete de E.V.).

<sup>42</sup>. Cf., v.g., G. Landrove Díaz, *Victimología*, Valencia, Tirant Lo Blanch, 1990, pages. 22-26, 139-140, and 150; L. Rodríguez Manzanera, *Victimología - Estudio de la Víctima*, 8a. ed., México, Edit. Porrúa, 2003, pages 25 and 67.

<sup>43</sup>. Cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pages 447-497.

<sup>44</sup>. Besides, the victim has regained space, more recently, also in the domain of contemporary criminal law, - both domestic and international, - as indicated, v.g., by the adoption of the United Nations Declaration of 1985 on the Basic Principles of Justice for Victims of Crimes and Abuse of Power (regarding crimes within domestic legislation), and the Basic Principles and Guidelines of the United Nations of 2006 regarding the Right to a Recourse and Reparations for the Victims of Grave Violations to International Human Rights Law (regarding international crimes). Cf., v.g., M.C. Bassiouni, "International Recognition of Victims' Rights", 6 *Human Rights Law Review* (2006) pages 221-279; and cf.: I. Melup, "The United Nations Declaration on [Basic] Principles of Justice for Victims of Crime and Abuse of Power", in *The Universal Declaration of Human Rights: Fifty Years and Beyond* (eds. Y. Danieli, E. Stamatopoulou y C.J. Dias), N.Y., U.N./Baywood Publ. Co., 1999, pages 53-65; Th. van Boven, "The Perspective of the Victim", in *ibid.*, pages 13-26; B.G. Ramcharan, "A Victims' Perspective on the International Human Rights Treaty Regime", in *ibid.*, pages 27-35; G. Alfredsson, "Human Rights and Victims' Rights in Europe", in *ibid.*, 309-317.

<sup>45</sup>. Cf., v.g., A.A. Cançado Trindade, "Co-Existence and Co-Ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987), cap. XI, pp. 243-299; A.A. Cançado Trindade, "O Esgotamento dos Recursos Internos e a Evolução da Noção de 'Víctima' no Direito Internacional", 3 *Revista del Instituto*

up again, in the present Concurring Opinion, the exam of this specific aspect, since it has already been the object of my extensive considerations – to which I make reference here – in my Concurring Opinion in the case of *Castillo Petruzzi et al. v. Peru* (Preliminary Objections, Judgment of 09.04.1998), as well as in my Concurring Opinions in the case of the "*Street Children*" (*Villagrán Morales et al. v. Guatemala*, Reparations, Judgment of 05.26.2001), and of *Goiburú et al. v. Paraguay* (Judgment of 09.22.2006), and in my Concurring Opinions in the Provisional Protection Measures in the case of *Eloísa Barrios et al. v. Venezuela* (Order of 06.29.2005), of the *Community of Paz de San José de Apartadó v. Colombia* (Order of 02.02.2006), and of the *Communities of Jiguamiandó and Curbaradó v. Colombia* (Order of 02.07.2006).

### III. The Expansion – and not the Restriction – of the Condition of *Victim* under the American Convention.

39. I have introduced, within this Court, the reasoning for the *expansion* of the notion of victim for the effects of reparations, in order to include the next of kin (of fatal victims) in their own right (Concurring Opinions in the case of *Blake v. Guatemala* [merits and reparations, 1998 and 1999] and of *Bámaca Velásquez v. Guatemala* [merits and reparations, 2000-2002]). When holding this thesis, I did so based on the discovery of human suffering, that is, based on the express acknowledgment of the *centralization* of the suffering of the victims within the framework of International Human Rights Law (my Concurring Opinions, v.g., in the cases of the "*Street Children*" (*Villagrán Morales et al*) *v. Guatemala* [reparations, 2001], *Bulacio v. Argentina* [2003], *Gómez Paquiyauri Brothers v. Peru* [2004], *Tibi v. Ecuador* [2004], *Sawhoyamaxa Indigenous Community v. Paraguay* [2006], *Ximenes Lopes v. Brazil* [2006]).<sup>46</sup> I have even insisted on the configuration of the notion of victim also within the scope of provisional protection measures (my Concurring Opinions, v.g., in the cases of *Eloísa Barrios et al. v. Venezuela* [2005], *Community of Paz de San José de Apartadó v. Colombia* [2006], *Communities of Jiguamiandó and Curbaradó v. Colombia* [2006]).<sup>47</sup>

40. In the present case of *La Cantuta v. Peru* (Interpretation of Judgment, 2007), I find myself in the obligation to once more defend the reasoning I had introduced in the Court, and that was already a part of its *constant jurisprudence*, with regard to the expansion of the notion of victim under the American Convention of Human Rights, - due to a recent and regretful setback introduced by the Court in its Judgment (of merits and reparations, of 11.29.2006) in the present case of *La Cantuta*. In said Judgment, the Court stated that

"both the Inter-American Commission and the representatives [of the victims] identified several brothers and sisters of the executed or disappeared persons as alleged victims of the violation of Article 5 of the Convention. However, in several of those cases, the evidence produced was insufficient to enable the Court to establish actual damage to said next of kin. Accordingly, the Court only considers victims those siblings in respect of

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*Interamericano de Derechos Humanos* (1986) pages 5-78.

<sup>46</sup>. Cf. A.A. Cançado Trindade, "Fragmentos de Primeras Memorias de la Corte Interamericana de Derechos Humanos", in *Jornadas de Derecho Internacional* (Buenos Aires/Argentina, November 2006), Washington D.C., OAS/Subsecretariat of Legal Affairs, 2007 (in press).

<sup>47</sup>. For the texts of my Opinions quoted here, cf. A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006)*, 1a. ed., México, Edit.Porrúa/Universidad Iberoamericana, 2007, pages 156-169, 186-204, 211-223, 321-330, 363-374, 251-267, 417-432, 444-456, 694-723, 748-765, 952-958, 976-979, and 980-983.

whom sufficient evidence was furnished." (para. 128)

Thus, the Court introduced a new criterion, more restrictive for victims, that constitutes a regretful detour from its prior *constant jurisprudence*, as well as a setback that is, in my opinion, unsustainable.

41. What additional evidence does the Court require from the representatives of the victims of a massacre? Does the Court want evidence of a damage, of a non-pecuniary damage? How can it be proven if the Court has even experienced, under the circumstances of specific cases of grave violations to human rights affecting a larger group of people, difficulty in the conceptualization of said non-pecuniary damage? Does the Court want evidence of relationships (between the victims and their siblings)? Relationships are not proven, they are lived. Does the Court want evidence of the suffering (of the brothers and sisters of the victims)? Suffering is not proven, it is felt. Besides, in its *constant jurisprudence*, the Court has determined the consequences of damages of this kind, the non-pecuniary damage, through a judgment of *equity*;<sup>48</sup> therefore, why should it demand additional evidence from the next of kin of the victims? It is unlikely that they will help, not even for practical effects.

42. If the Court wishes to insist on additional evidence, - the same as the criminal courts of domestic law, - I think it would be more correct for an international human rights tribunal to proceed to the *shifting of the burden of proof*<sup>49</sup> to the State accused: it would correspond instead to the State accused to prove that any of the brothers or sisters of any of the victims does not have an "affective relationship" with the latter... But, even then, there is the question: would this be possible to prove?

43. International Human Rights Law is oriented towards the victims, towards their protection. In the present domain of protection of human beings, the procedural equality of the parts (*égalité des armes/equality of arms*) consists more in *balancing the factual inequality* between the State ("personalized", throughout centuries, as holder of coercive means, by Jean Bodin and Thomas Hobbes, among others, and, in a specifically ill-fated manner and with disastrous consequences by Georg W.F. Hegel, as final repositories of human liberty), on one hand, and, on the other, the alleged victims (in their majority in a situation of great vulnerability and adversity, if not defenseless).

44. How can an international human rights tribunal such as this Court put upon the latter or their next of kin the *onus probandi* not only of the facts, but of feelings as well? How can it demand from the alleged victims or their next of kin the evidence of a damage that can be considered a non-pecuniary damage? And, even when, with a great effort of the imagination, this were possible, what purpose would it serve, if the determination of the non-pecuniary

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<sup>48</sup>. The recourse to equity in the pacific solution of international disputes has been well-known in Public International Law for some time now; cf., v.g., Charles de Visscher, *De l'équité dans le règlement arbitral ou judiciaire des litiges de Droit international public*, Paris, Pédone, 1972, pp. 3-111; M. Akehurst, "Equity and General Principles of Law", 25 *International and Comparative Law Quarterly* (1976) pages 801-825; A. Herrero de la Fuente, *La Equidad y los Principios Generales en el Derecho de Gentes*, Valladolid, Universidad de Valladolid, 1973, pp. 9-76; Daniel Bardonnnet, "Quelques observations sur le recours au règlement juridictionnel des différends interétatiques", in *Theory of International Law at the Threshold of the 21st Century - Essays in Honour of K. Skubiszewski* (ed. J. Makarczyk), The Hague, Kluwer, 1996, pages 737-752, esp. 751-752.

<sup>49</sup>. Cf., on this matter, more than three decades ago, A.A. Cançado Trindade, "The Burden of Proof with Regard to Exhaustion of Local Remedies in International Law, 9 *Revue des droits de l'homme/Human Rights Journal* - Paris (1976) pages 81-121.



damage is normally done through a judgment of equity?

45. The inadmissibility of said burden of proof becomes even clearer in cases of grave violations of human rights: in said circumstance (v.g., in cases of massacres), this would be close to a true *probatio diabolica*,<sup>50</sup> against which I have already stated my point of view, within this Court, in other circumstances, in my Concurring Opinion (paras. 20-23) in the case of the *Sawhoyamaxa Indigenous Community v. Paraguay* (Judgment of 03.29.2006). In my understanding, in cases of massacres, or grave violations, such as the present case of *La Cantuta*, it is not correct to demand additional evidence of a non-pecuniary damage from the next of kin of the victims, but instead *presumptions* should be applied in their favor. In my opinion, what is in order here is a presumption (at least *juris tantum*, if not, in more grave circumstances, *juris et de jure*), in benefit of the next of kin of the victims.

46. It is possible to imagine, as a general rule, that in our Latin American societies, where family ties are maintained tight (or at least tighter than in other post-industrial social environments), a brother or sister of a person massacred or disappeared will not undergo a personal suffering? Is it possible to imagine, as a general rule, that they will not continue to suffer in the case of a violent death of a brother or sister? Is it possible to imagine, as a general rule, that they will not continue to suffer in the event of a forced disappearance of a brother or sister? For me, this is unimaginable, as a general rule. Even so, this Court stated, in the present case of *La Cantuta*, that it requires additional evidence of the damage to the brothers or sisters of the people illegally detained, executed, and disappeared...

47. The present Judgment of Interpretation that the Court has adopted in the case of *La Cantuta* has duly clarified that Mrs. Carmen Juana Mariños Figueroa and Mr. Marcelino Marcos Pablo Meza, sister and brother, respectively, of two of the fatal victims, Mr. Juan Gabriel Mariños Figueroa and Mr. Heráclides Pablo Meza, are victims of violations to Articles 8(1) and 25 (taken jointly), of the American Convention. Therefore, they are *ipso facto* beneficiaries of different forms of non-pecuniary reparation ordered in the previous Judgment of 11.29.2006 in the present case of *La Cantuta*. In consequence, the amounts of pecuniary reparation were not affected by the inclusion of both, through the present Judgment of Interpretation as victims also of violations to the mentioned Articles 8(1) and 25 of the Convention.

48. But the same did not occur with regard to Article 5(1) of the Convention, since the Court applied the criterion – in my opinion mistaken – it established in the Judgment on merits and reparations of 11.29.2006 (para. 128, transcribed *supra*), according to which it demands evidence of the non-pecuniary damage, of the suffering, in order to consider the siblings (of the fatal victims) as victims of a violation of Article 5(1) of the Convention, by their own right. Said criterion of “evidence of suffering” becomes, in my understanding, unsustainable, if not absurd, when facing facts of such gravity, - which are of public and notary knowledge, - such as those of the present case of *La Cantuta*.

49. As if this were not enough, Mrs. Carmen Juana Mariños Figueroa and Mr. Marcelino Marcos Pablo Meza were the sister and brother of two fatal victims (Messrs. Juan Gabriel Mariños Figueroa and Heráclides Pablo Meza) who were among those illegally and arbitrarily detained, executed, and they continue to be considered as missing. Under said circumstances, contrary to that stated by the Court in its Judgment of 11.29.2006 (para. 128) and in the present Judgment of Interpretation (paras. 30-31), the sister and brother of one and the other, as well as the sisters and brothers of the other fatal victims in the present case of *La*

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<sup>50</sup>. For criticism of the latter, cf. my Concurring Opinion (paras. 20-23) in the Judgment (of 03.29.2006) in the case of the *Sawhoyamaxa Indigenous Community v. Paraguay*.

*Cantuta*, should have all also been considered victims of Article 5(1) of the American Convention, at least by presumption *juris tantum*.

50. In my opinion, the Court must immediately abandon the unfortunate criteria *contra victim* (and not *pro victim!*), which it hastily adopted – maybe inadvertently – in the present case of *La Cantuta*, and return to its much more lucid previous jurisprudence. The criterion of paragraph 128 of the Judgment of 11.29.2006 is a setback in the Court's jurisprudence, and, as such, it must be, in my opinion, promptly abandoned; the demand included in the same for evidence of an "actual damage", is too restrictive and the vague expression used in its, "several of those cases", cannot cover the cases of preliminary execution and forceful disappearance of people. In these cases, the non-pecuniary damage, the suffering of the sisters and brothers of the fatal victims, must be presumed as true without requiring any evidence – except if the State accused is able to prove the contrary.

51. The Court itself, in its previous Judgment on merits and reparations, of 11.29.2006, pointed out the gravity of the facts, and, with regard to the fatal victims Juan Gabriel Mariños Figueroa and Heráclides Pablo Meza (along with others), it weighed in that, "while" their whereabouts "cannot be determined or their remains cannot be duly located and identified", the "adequate legal treatment" for their situation is that corresponding to the "forced disappearance of people" (para. 114). And, in relation to the circumstances of the case, it added that, "the State's international responsibility is in this case even more serious due to the context in which the facts were perpetrated." (para. 116) Thus, it is unjustifiable that the Court has demanded that the sisters and brothers of the fatal victims present evidence of the non-pecuniary damage caused due to their suffering.

52. In our Latin American countries, the feelings characteristic of strong family ties survive effectively within the social environment, maybe less so in the societies of countries more technologically "advanced". Throughout the course of the legal proceedings of several cases solved by the Inter-American Court, I have been able to verify – in public hearings – demonstrations of the intense suffering of the siblings of victims of grave violations to human rights. This is something that, as a surviving Judge of the Court, I find myself in the obligation to recommend; the Court should not now, suddenly, establish, *out of the blue*, a new more restrictive criterion for the next of kin of the victims, - also victims in their own right, - ignoring all the previous experience recollected by the Tribunal.

53. In my understanding, the Court must always have present its own experience accumulated in the search for justice under the American Convention. The Court must not try to hastily innovate, without greater reflection (due to its new desire for productivity of judgments), and through setback, sometimes seeming to forget that the entire *corpus juris* of International Human Rights Law is oriented toward the victims, that it is clearly *pro victima*. The Court must not try to stop the emancipative line of its previous jurisprudence, oriented without a doubt toward the expansion – and not the restriction – of the condition of victim under the American Convention.

54. I will never forget, as a surviving Judge of the Inter-American Court, the devastating effect within a family, revealed in consecutive public hearings before this Court by the next of in themselves of the people executed or disappeared, in the cases of, for example *Castillo Páez v. Peru* (1997-1998), *Blake v. Guatemala* (1998-1999), *Street Children (Villagrán Morales et al. v. Guatemala, 1999-2001)*, *Bulacio v. Argentina* (2003), among others. Likewise, I will not forget, as a surviving Judge of this Court, the numerous expert opinions of psychologists – which were always greatly valued by me – received from them in public hearings, confirming the profound feeling of pain of the next of kin when facing the torture of a son or daughter, a brother or sister, - without the need for any evidence in this regard. This is currently confirmed

by the specialized contemporary bibliography in what refers to the serious traumas suffered by the closest next of kin of fatal victims<sup>51</sup> (also victims), and even by the community to which the victims belonged.<sup>52</sup>

55. I allow myself to recall that, in its Judgment of 05.25.2001 in the case of the *White Van (Paniagua Morales et al. v. Guatemala - reparations)*, the Court required the *onus probandi* of the next of kin of the victims specifically in relation to material compensations, understanding as the "next of kin of the victim" an "ample concept", covering children, parents, and siblings (para. 86). But the criterion with regard to moral damage was, in the correct understanding of the Court, different:

"In the case *sub judice*, the non-pecuniary damage inflicted on the victim is evident, because it is only human nature that any person subjected to the aggression and abuse that she endured (unlawful detention, torture and death) experiences profound physical and mental suffering, which extends to the closest members of the family, particularly those who had a close affective relationship with the victim. *The Court considers that no evidence is required to reach this conclusion.*" (para. 106)<sup>53</sup>

56. And, in the same Judgment in the case of the "*White Van*" (*Paniagua Morales et al.*), the Court added that

In the case of the victim's parents, it is not necessary to demonstrate the *non-pecuniary damage, because this is presumed*. Similarly, the physical and mental suffering of the victim's daughter can be presumed.

With regard to her siblings, it is necessary to take into account the degree of relationship and affection that existed between them. In the case *sub judice*, it can be seen that there were close ties between the victim and her brother, Alberto Antonio Paniagua Morales, and her sister-in-law (...).

With regard to the victim's other siblings, it is evident that they form part of the family and even when they do not appear to have participated directly in the measures taken in the situation by the mother and by the sister-in-law, this does not mean that they were indifferent to the suffering caused by the loss of their sister, *particularly when the circumstances of death were so singularly traumatic*. Therefore, considering that they should be beneficiaries of compensation, the Court must determine the amount *according to the principle of fairness* and, consequently, establishes compensatory reparation for non-pecuniary damage for the Paniagua Morales siblings." (paras. 108-110)<sup>54</sup>

57. In the same line of reasoning, in its Judgment of 02.22.2002 in the case of *Bámaca Velásquez v. Guatemala* (reparations), the Court once again duly distinguished the reparations for the next of kin of the victims due to material compensations (regarding which the *onus probandi* would correspond, naturally, to those next of kin – para. 34), from the reparations to the next of kin – acting based on a right of their own (para. 33) – based on their suffering, for

<sup>51</sup>. Cf., v.g., *inter alia*, B. Engdahl, M. Kastrup, J. Jaranson y Y. Danieli, "The Impact of Traumatic Human Rights Violations on Victims and the Mental Health Profession's Response", in *The Universal Declaration of Human Rights: Fifty Years and Beyond* (eds. Y. Danieli, E. Stamatopoulou y C.J. Dias), Amityville/N.Y., Baywood Publ. Co., 1999, pages 345-346.

<sup>52</sup>. Cf., v.g., *inter alia*, C. Martín Beristain y G. Donà, *Enfoque Psicosocial de la Ayuda Humanitaria*, Bilbao, Universidad de Deusto, 1997, pages 67-70.

<sup>53</sup>. Emphasis added.

<sup>54</sup>. Emphasis added.

non-pecuniary damage, which *does not require evidence*:

"These sufferings extend equally to the closest members of the family, especially those who had close emotional contact with the victim. *The Court deems that evidence is not required to reach this conclusion*, even though in the instant case the suffering caused to them has been proven." (para. 63)<sup>55</sup>

58. In the case of *Bámaca Velásquez*, the Court found it "reasonable to presume that as next of kin they should not have been indifferent to the loss of their brother," (para. 65(b)), and, therefore, it set in *equity* the reparation due to them for non-pecuniary damages (para. 66). The clarifications *obiter dicta* of the Court in the mentioned cases of the "*White Van*" (*Paniagua Morales et al.*) and of *Bámaca Velásquez* present the most reasonable criterion regarding the matters in question, the criterions most in agreement with the needs for protection under the American Convention. This is, in my opinion, the most lucid jurisprudence of the Inter-American Court on the matter in question, which, in my opinion, must be taken up again by the Court promptly, abandoning the restrictive, reactionary, and unsustainable criterion it adopted in this regard in the recent Judgment on merits in the case of *La Cantuta*.

#### **IV. Centralization and Expansion of the Notion of Direct Victim *Lato Sensu*: Considerations *De Lege Ferenda*.**

59. I could not conclude this Concurring Opinion without adding any brief considerations *de lege ferenda* on a matter that has occupied my reflections for many years, that is, that of the *centralization and expansion of the notion of victim* under the American Convention of Human Rights. It would not be an exaggeration to weigh in that said notion in evolution constitutes an *open* legal category – which has responded to the recurrent grave violation of human rights, submitted to the knowledge of the Court in recent years. In this sense, the Court, when facing the cases of massacres recently brought before it, has sometimes decided to leave the list of victims open (for future additions, based on the factual complexities of the cases in question), - instead of "closing" the list in the light of a static and dogmatic categorization of the condition of victim.

60. Therefore, the Court has acted, in this sense, correctly and as long as the possible appearance of additional victims naturally has a direct relationship with the constant facts described in the petitions originally presented to the knowledge of the Court, This has provided a balance between the concomitant concerns in guaranteeing legal security in the search for justice within the complex circumstances of this kind of cases, massacres or grave violations, affecting a greater circle of people. This has been an promising development, which, in my opinion, has served the needs of protection under the American Convention, in circumstances never foreseen by the writers of the latter.

61. In the end, human evil has no limits, and the reaction of the Law must be felt promptly, taking into account the gravity of the violations to the rights protected by the American Convention. Just like the notion of *direct victim* is, in my opinion, in constant evolution and expansion (cf. *supra*), the same thing happens with the concept of *injured party* under the American Convention, especially having present the *duty of reparation*. The concept of "injured party" (Article 63(1) of the American Convention), even though *prima facie* more ample, corresponds in the end, in my opinion, to the concept itself of *victim lato sensu* (covering the direct, indirect, and possible victims), as I stated two decades ago in a course I gave in the

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<sup>55</sup>. Emphasis added; and cf. paras. 65(b) and (c), 79 and 81.

International Law Academy of the Hague.<sup>56</sup>

62. In synthesis, for me *the injured party corresponds to the ample notion of victim*, according to the jurisprudential construction of the Inter-American Court, under the American Convention. This is why I cannot accept setbacks in said jurisprudential construction, such as that occurred in the present case of *La Cantuta* (cf. *supra*), in what refers to the determination of the non-pecuniary damage. The centralization of the victims does not refer only to the direct victims, but also to their next of kin as *injured parties*. The centralization of the victims is not limited to the determinations of the Court with regard to the merits of the cases solved by it; instead it refers also to the decisions with regard to the reparations.

63. When, more than half a decade ago, I presented to the Organization of American States (in May 2001), the document I prepared on behalf of the Inter-American Court, titled "*Foundations for a Protocol Project to the American Convention on Human Rights in order to Strengthen its Protection Mechanism*," I invoked the expression "injured party" included in Article 63(1) of the American Convention in order to precise the role of the "injured" – definitely different to that of the Inter-American Commission of Human Rights – as bearer of rights and a true petitioner before the Inter-American Court.<sup>57</sup> Here, in the context of the present Interpretation of Judgment in the case of *La Cantuta*, I once again invoke the expression in order to offer precision to the expanded notion of victim – and even to that of direct victim, *lato sensu* (cf. *infra*) – under the American Convention.

64. Throughout the years of my participation as Judge of this Court, I have always emphasized the *centralization* of the victims *lato sensu*, and the assessment of their suffering, within the task of protecting the rights of human beings (para. 39, *supra*). Said centralization is ineludible and particularly eloquent in the cases of grave violations to human rights, such as those of the recent cases of massacres known by this Court. The centralization of the victims *lato sensu* and of the assessment of their suffering by the Court has been displayed, in an eloquent manner, in its Judgments on the massacres of *Barrios Altos v. Peru* (of 03.14.2001), of *Caracazo v. Venezuela* (reparations of 08.29.2002)] of *Plan de Sánchez v. Guatemala* (of 04.29.2004), of the *19 Tradesmen v. Colombia* (of 07.05.2004), of *Mapiripán v. Colombia* (of 09.17.2005), of the *Moiwana Community v. Suriname* (of 06.15.2005), of *Ituango v. Colombia* (of 07.01.2006), of *Montero Aranguren et al. v. Venezuela (Detention Center of Catia)*, of 07.05.2006),<sup>58</sup> among others.

65. To these we can add the recent Judgments of the Court in the massacres of the *Castro Castro Prison v. Peru* (of 11.25.2006) and of *La Cantuta v. Peru* (of 11.29.2006), without, in my opinion, there being any reason for the Court to adopt a more restrictive criterion with regard to the granting of compensation for moral or non-pecuniary damage to the next of kin of the fatal victims (cf. *supra*), also direct victims *lato sensu*. As I have previously stated, since the cases of *Blake v. Guatemala* [merits and reparations, 1998 and 1999] and *Bámaca Velásquez v. Guatemala* [merits and reparations, 2000-2002), followed, among others, by the

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<sup>56</sup>. A.A. Cançado Trindade, "Co-Existence and Co-Ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987), cap. XI, pp. 243-299.

<sup>57</sup>. A.A. Cançado Trindade, *Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección*, 2a. ed., tomo II, San José de Costa Rica, Corte Interamericana de Derechos Humanos, 2003, pages 42 y 51.

<sup>58</sup>. Or even in a case of a planned murder in the highest level of State power, and executed by order of the latter, as in the case of *Myrna Mack Chang v. Guatemala* (Judgment of 11.25.2003).

cases of the "*Street Children*" (*Villagrán Morales et al.*) *v. Guatemala* [reparations, 2001], and of *Bulacio v. Argentina* [2003], followed by others, the Court has welcomed my reasoning in the sense of giving legal acknowledgement to the *expansion of the notion of victim*.

66. The Court has correctly considered as *injured parties* not only the direct victims of the violation of the right to life (the tortured and executed or missing victims), but also their next of kin, direct victims - *lato sensu* – of the violation to the right to humane treatment, and as such beneficiaries of reparations, by their own right.<sup>59</sup> In the same line of reasoning, admitting the expansion of the notion of victims, in the recent cycle of the cases of massacres, the Court has considered as "*victims*" or "*injured parties*" the people that have a relationship with the facts described in the application, as well as the evidence presented or produced before it.<sup>60</sup>

67. The previously mentioned cases of massacres, solved by the Inter-American Court have, in a certain sense, in my understanding, effectively transcended the distinction between direct and indirect victims, in favor of an *expansion of the notion of direct victim* itself. Thus, the next of kin of the *direct victims* as a result of the violation to their *right to life* (i.e., the next of kin of murdered or massacred victims), also become, as a direct consequence of the violent death of their loved ones, *direct victims* by virtue of the violation of their own *right to humane treatment* (mental and moral integrity of the next of kin), followed by the violation of their *right to access justice and the guarantees of the due legal process*.<sup>61</sup>

68. Just like the list of the direct victims of the violation to the right to life is left open, in recent cases of massacres of great complexity (cf. *supra*), the list of direct victims of the violation to the right to humane treatment (the next of kin of those) may under certain circumstances be left open, as long as there are great difficulties for a prompt identification. This is the point of view that an international human rights court must adopt, different from the usual *modus operandi* of national criminal courts. Here the continued expansion, and not the restriction, of the condition of victim under the American Convention of Human Rights prevails.

69. Jurisprudential evolution in this sense is comprehensible and promising: finally, the reaction of the Law to its violations in detriment of human beings is proportional to the gravity of the facts, of the violations to the rights protected. I hope that these reflections *de lege ferenda* can help the Court to promptly take up again this jurisprudential construction and that it may know how to extract from it the experience in order to always respond, each time with a greater effectiveness, to possible grave and recurrent violations to human rights and fight impunity, thus avoiding that they repeat themselves.

## V. Epilogue: Final Considerations.

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<sup>59</sup>. Cf., v.g., *inter alia*, CtIADH, Sentencia de reparaciones en el caso de los "*Niños de la Calle*" (*Villagrán Morales y Otros*, 2001), párr. 68.

<sup>60</sup>. Cf. also in this regard, v.g., *inter alia*, the Judgments of the Court in the cases of *Goiburú et al. v. Paraguay* (of 07.22.2006), para. 29; of the massacres of *Ituango v. Colombia* (of 07.01.2006), para. 91; of the massacre of *Mapiripán v. Colombia* (of 09.15.2005), para. 183; of *Acevedo Jaramillo et al. v. Peru* (02.07.2006), para. 227.

<sup>61</sup>. Cf. ICHR, Judgments in the cases of *Vargas Areco v. Paraguay* (of 09.26.2006), paras. 95-96; of *Goiburú et al. v. Paraguay* (of 07.22.2006), para. 96; and cf. Judgments in the cases of *Ximenes Lopes v. Brazil* (of 07.04.2006), para. 156; of *Montero Aranguren et al. v. Venezuela (Catia Detention Center)*, of 07.05.2006), para. 104; and of *Baldeón García v. Peru* (of 04.06.2006), para. 128.

70. I have not yet concluded this Concurring Opinion since, before doing so, I would like to return to where I started. Participating in the Inter-American Court is like coexisting with the tragedy of the vulnerable human condition, of the injustices and the violence that surround and threaten it. It's like being on a ship in the middle of the stormy high seas, where there is no way to avoid the storms: instead, you have to face them. If grave violations to human rights occur, affecting growing circles of people, it will not be by trying to restrict the condition of beneficiaries of reparations (through, for example, the imposition of a more heavier burden of proof on the latter), it will not be trying to stop the jurisprudential expansion of the notion of victim, that the international protection of human rights will be strengthened.

71. On the contrary. If there is a growing number of beneficiaries of reparations, in their own right, this occurs as a consequence of the gravity of the violations to human rights in detriment of the people tortured, murdered, or missing, also making their next of kin direct victims. We have to assume the legal consequences of said violations, without turning to the subterfuge of demanding additional evidence of suffering from the next of kin (as if this were possible...), of non-pecuniary damages. If someone is not willing to face the great waves of the storm at high seas with determination, it is better to not get on the boat.

72. Maybe the personal reflections I am spreading upon the record in this Concurring Opinion, brought about by the matter treated in the present Judgment of Interpretation in the case of *La Cantuta*, can be taken into consideration by some new composition of the Court, in the following years. For the meantime, some jurisprudential setbacks in which the Tribunal has recently incurred, make it difficult for me to extract the lessons submerged below the waves that have already passed under the ship, and that gradually move further away in space and time. But I insist on doing it, with the same tenacity with which I faced along with my colleagues those stormy waves that the ship (of the Court) that would come towards us in a threatening manner, but without regretting today, once and again, the same as the experienced sailor (survivor of the Court) previously mentioned:

"I viewed the ocean green,  
And looked far forth, yet little saw  
Of what had else been seen."<sup>62</sup>

73. In the task of international protection of human rights there is not, in my opinion, space for pragmatism: the posture of those that act in it cannot be any other than the principalistic and humanistic one. This requires, in my judgment, the following for the correct interpretation and application of the applicable law: first, the rejection of authoritarian or hermetic or dogmatic approaches of the latter; second, trust in human reason, the *recta ratio*; third, the awareness of the needs for protection, among which I can mention the realization of justice; fourth, attention to the lessons of experience in matters of protection; and fifth, the combination of reason and persuasion, in the necessary foundation for each decision in the legal cases, and even in each Judgment of Interpretation.

Antônio Augusto Cançado Trindade  
Judge

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<sup>62</sup> S.T. Coleridge, *op. cit. supra* n. (1), verses 443-445.

Pablo Saavedra Alessandri  
Secretary