

**SEPARATE CONCURRING OPINION OF
JUDGE SERGIO GARCÍA RAMÍREZ ON THE JUDGMENT ON
MERITS OF THE BÁMACA VELÁSQUEZ CASE**

1. The Judgment pronounced by the Inter-American Court of Human Rights in the Bámaca Velásquez case, on November 25, 2000, examines various alleged violations of rights embodied in the American Convention on Human Rights, the Pact of San José. It constitutes a valuable jurisdictional reflection on various concepts that are relevant for international human rights law and the development of the jurisprudence of the Court. It repeats and expands positions adopted previously and encourages the examination and definition of some new issues in the Court's own experience. I believe it pertinent to associate this concurring opinion with the considerations and decisions of this Judgment.

I. VICTIM OF VIOLATION

2. When examining the violation of Article 5 of the Convention (Right to humane treatment), the Judgment looks at two issues that I will examine in this opinion. One of them relates to the burden of proof in the alleged forced disappearance of persons, an issue to which I will return *infra* (*sub* V, B). The other concerns the very concept of victim of violation, a matter of fundamental importance in international human rights law, both because of its substantive implications - to identify the passive subject of the injury, holder of the affected rights and others generated by the respective conduct - and because of its procedural consequences - to define the competency and the corresponding capacity to act at different moments of the proceeding.

3. The development of the concept of victim is well known, starting from the nuclear notion centered on what would be called the direct victim, until it reaches, when applicable, the expanded notions that are expressed in the concepts of indirect victim and potential victim, issues

that have been explored and disputed at length¹. This evolution clearly reveals the guiding momentum of international human rights law, which strives to take the real protection of human rights increasingly further - in a trend that I believe to be pertinent and encouraging. The principle that favors the individual, which is summarized in the expanded version of the *pro homine* rule - a source of progressive interpretation and integration - has one of its most notable expressions here.

4. Like the European Court, the Inter-American Court has dealt with this matter (through an evolving jurisprudence that works with the figures of direct and indirect victim and beneficiaries of the victim²), through decisions in which it initiated or continued the elaboration of a broad concept of victim of violation. This judgment progresses in this sense, and distinguishes between, on the one hand, the infringement of the rights of Efraín Bámaca Velásquez and, on the other, the violation of the rights of his next of kin and of Jennifer Harbury. It is clear that some violations directly and immediately affect the former; and others affect Jennifer Harbury and the closest members of Mr. Bámaca's family, who also suffered the consequences - effects on the person with legal effects - of the violation of his rights.

5. It is probable that the Court will re-examine this issue in future decisions. To that end, it could consider that the person who suffers

1 *cf.* Rogge, Kersten, "The 'victim' requirement in article 25 of the European Convention on Human Rights", in Various, *Protecting human rights: the European Dimension/Protection des droits de l'homme: la dimension européenne*, ed. Franz Matscher-Herbert Petzhold, Carl Heymanns Verlag K. G. Köln. Berlin. Bonn. München, 1988, pp. 539 and ff.; and Cancado Trindade, A. A., *Co-existence and coordination of mechanisms of international protection of human rights (At global and regional levels)*. Academy of International Law, Offprint from the Collected Courses, vol. 202 (1987-II), pp. 243 and ff.

2 *cf.* Pasqualucci, Jo M., "Victim reparations in the Inter-American Human Rights System: a critical assessment of current practice and procedure", in *Michigan Journal of International Law*, vol. 18, no. 1, fall 1996, esp. pp. 16 and ff.; also, *cf.*, in their respective considerations, *Villagrán Morales et al. case (the "Street Children" case)*. Judgment of November 19, 1999. Series C No. 63, paras. 173-177; and *Blake case*. Judgment of January 24, 1998. Series C No. 36, paras. 97 and 116.

impairment of his fundamental rights as the immediate effect of the violation, is a direct victim; between the victim and the impairment of his rights there is a relation of cause and effect (in the juridical sense of the connection), without intermediary or interruption. Conversely, an indirect victim would be the person who experiences the impairment of his right as an immediate and necessary consequence, according to the circumstances, of the injury suffered by the direct victim. Under this hypothesis, the effect on the latter would be the source of the violation experienced by the indirect victim. The technical distinction between the two categories does not imply that one of them has a higher rank for the purposes of the protection of the law. They are equally protected by the Convention and may be dealt with in the judgment, both to consider them, substantively, as passive subjects of a violation with claims to reparations, and to attribute them procedural competency, generically and without distinction.

6. In this respect, that is, with regard to the violation of Article 5 of the Convention, the Court has begun, briefly and almost tangentially for the moment, to examine the difference between torture, on the one hand, and cruel, inhuman and degrading treatment, on the other (para. 154, where it is also recalled that all these acts "are strictly prohibited under any circumstance", as the Court has declared in the *Cantoral Benavides case*. Judgment on merits, para. 95), and the three components of the latter category can also be the object of delimitation and definition. Thus, in this case, the Court has considered that certain acts denounced "were deliberately prepared and inflicted, in order to obtain information that was relevant for the Army from Efraín Bámaca Velásquez. According to the testimonies received in this proceeding, "the alleged victim was submitted to grave acts of physical and mental violence during a prolonged period of time for the said purposes and, thus, intentionally placed in a situation of anguish and intense physical suffering, which can only be qualified as both physical and mental torture" (para. 158).

7. The difference between torture and other acts assembled under Article 5(2) of the Convention, is not to be found in the pre-ordained and deliberate nature of some of them, because, generally, they all have

these characteristics; or in the purpose for which they are inflicted, which may also be common to all. The description of torture contained in conventions on this subject - the universal and the American - offers elements that also characterize cruel and inhuman treatment. In other words, the latter could be differentiated from the former by the gravity of the suffering caused to the victim, by the intensity of the pain - physical or moral - that is inflicted, by the characteristics of the prejudicial action and of the reaction that this causes in the person who suffers it.

8. For example, the Court maintained that what Mrs. Harbury and the next of kin of Mr. Bámaca Velásquez suffered, as a result of the obstacles they confronted in their efforts to learn the truth about the facts, the concealment of the corpse of Mr. Bámaca Velásquez, and the official refusal to provide the requested information, "clearly constitutes cruel, inhuman and degrading treatment" (para. 165). Taking into account the meaning of the words and the characteristics of the facts and their impact on the victims, it is evident, in my opinion, that the treatment inflicted was cruel and inhuman. However, there would evidently be those who would question calling it degrading, a qualifier that would correspond to another type of treatment, the characteristic of which would possibly be its humiliating or offensive effectiveness.

9. It is clear that progress in the general conditions of life, and the impact this has on the development of the culture and sensitivity of the individuals who are part of it, may entail an evolution in the way in which certain treatment is perceived and, consequently, how it is characterized. Accordingly, its nature could vary in relation to the persons who suffer it at a specific time and in a specific place: cruel and inhuman treatment, and even degrading treatment, might then become torture, owing to its characteristics and its effect on the victim.

II. RECOGNITION OF JURIDICAL PERSONALITY

10. The Court considers that Article 3 of the Convention was not violated in the case referred to in this judgment. This article establishes that "every person has the right to recognition as a person before the law" and it is, therefore, in order to declare it so. Although the lack of evi-

dence about a fact merely supports the conclusion that it has not been proved, putting on record the absence of support for a claim in the judgment on merits - in this case, the lack of support for the declaration that the right to the recognition of juridical personality has been violated - should be translated into an explicit declaration with regard to the absence of violation of the respective right.

11. In order to reach the conclusion affirmed by the Court, we need to examine the meaning of the right embodied in Article 3: recognition of the juridical personality; that is, recognition of a fact that pre-existed the act of the person recognizing it. This fact is the juridical personality, which, in turn, implies the capacity of the individual to be a juridical person, because of this same fundamental condition. And the latter is characterized as the possibility of being the subject of obligations and the holder of rights.

12. The juridical personality that interests us here is that of the human being, the physical person, in the terms of Article 1(2) of the Convention which states: "For the purposes of this Convention, "person" means every human being". The concept contained in Article 3 of the said Convention should be understood through a systematic interpretation of all the legislation applicable to the matter on the American continent, which suffices to indicate its scope. Thus, the need to relate the said Article 3 to its antecedent - and source (natural and necessary reference) - Article XVII of the American Declaration of the Rights and Duties of Man, which precisely under the heading "Right to recognition of juridical personality and civil rights", establishes that "[e]very person has the right to be recognized everywhere as a person having rights and obligations and to enjoy the basic civil rights". As can be seen, the juridical personality also involves precisely this capacity to be the subject of rights and obligations, holder of the juridical consequences of a certain situation: the condition of a human being, who must be recognized and developed - normatively - by the system of laws.

13. It is evident that this title alludes to the capacity to enjoy rights, which belongs to human beings in general, but not necessarily to the enjoyment or exercise of all the rights. Indeed, the scope of the enjoy-

ment, that is, the definition or concrete integration of the said capacity, and also the possibility of exercising the rights are subject to positive law (objective) in function of the place of the individual in the totality of the juridical relations in which he participates or within which he is inserted. A minor, who lacks maturity and competence to determine his own conduct, freely and in an informed manner, and thus produce juridical consequences that may benefit or prejudice him, cannot have title to the enjoyment and exercise of rights that are, to the contrary, attributed to the adult person. There are numerous and reasonable distinctions in this area; thus, between the situation of the citizen, who is assigned full political rights, and the person who is not a citizen; or between the head of the household who has specific powers and obligations and the person who lacks them; or between the professional who has a distinctive status, and the person who does not have that preparation and activity, etcetera.

14. In view of the foregoing, disregarding the juridical personality would be equivalent to the absolute denial of the possibility that a human being could have title to rights and obligations. In this case, he would be treated as an object - the matter of a juridical relation, not the subject of it - or he would be reduced to the condition of slave. Accordingly, we can infer that the right to the recognition of juridical personality has its own substance or entity and cannot be seen as a reflection of a *de facto* situation that would deprive the individual of the possibility of exercising the rights to which, however, he has not been refused ownership. The latter would involve a juridical situation - disregard of the personality of this individual - while the former would constitute a fact, extremely deplorable or limiting perhaps, but not necessarily, in itself, annulling the juridical personality of the human being who suffers it.

15. If we maintained that forced disappearance, which is an extreme form of illegal deprivation of liberty, entails disregard of the juridical personality and, consequently, violation of Article 3 of the Convention, we would have to reach the same conclusion in the case of arbitrary detention or of absolute, or even relative, solitary confinement. Further still, in such cases, and evidently in that of forced disappearance, we would have

to conclude that the subject is also deprived of all the rights that he is unable to exercise due to the factual impediment that disappearance, solitary confinement or detention imposes on him: the right or freedom to circulate, expression, meeting, association, property, work, education and so on. It is obvious that such a conclusion would be excessive from the juridical perspective, which is the one that governs these observations.

16. Finally, the judgment points out that Article II of the Inter-American Convention on Forced Disappearance of Persons, which formulates a characterization of this on which the national criminal figure can be constructed, alludes to the violation of some rights - and in this sense, that description is related to the fifth paragraph of the preamble of the Convention, which refers to the violation of many essential rights of the human being - which do not include the recognition of juridical personality. However, the rights to liberty, to information about the disappeared person, to the recognition of the capture and the exercise of legal remedies and procedural guarantees are to be found in the above-mentioned Article II.

III. RIGHT TO THE TRUTH

17. The Inter-American Commission on Human Rights stated that the forced disappearance of Mr. Bámaca Velásquez entailed a violation of the right to the truth of the victim's next of kin and society in general. As the Court has summarized, this right would have "a collective nature, which includes the right of society to 'have access to essential information for the development of democratic systems', and a particular nature, as the right of the victims' next of kin to know what has happened to their loved ones, which permits a form of reparation" (para. 197).

18. The right to the truth has been examined from two angles, which imply the same -or a very similar- consideration: to know the reality about certain facts. Based on this knowledge a juridical, political or moral consequence will be constructed of a diverse nature. On the one hand, that right is assigned to society as a whole; on the other, the right is

attributed to the direct or indirect victim of conduct that violates human rights³.

19. In its first acceptance, the so-called right to the truth covers a legitimate demand of society to know what has happened, generically or specifically, during a certain period of collective history, usually a stage dominated by authoritarianism, when the channels of knowledge, information and reaction characteristic of democracy are not operating adequately or sufficiently. In the second, the right to know the reality of what has happened constitutes a human right that is immediately extended to the judgment on merits and the reparations that arise from this.

20. In the Court's judgment to which this opinion is associated, the Court has confined itself to the individual perspective of the right to the truth, which is the one that is strictly linked to the Convention, because it is a human right. Accordingly, in this case, this right is contained or subsumed in another that is also a subject of this judgment: that corresponding to the investigation of the violating facts and the prosecution of those responsible. Thus, the victim - or his heirs - has the right that the investigations that are or will be conducted will lead to knowing what "really" happened⁴. The individual right to the truth follows this reasoning,

3 *cf. The administration of justice and the human rights of detainees. Final report on the question of the impunity of perpetrators of human rights violations (civil and political)* prepared by L. Joinet pursuant to decision 1996/119 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities - E/CN.4/Sub.2/1997/20, 26 June 1997, para. 17, where a distinction is made between "the right of any individual victim or his nearest and dearest to know what happened, [which is] a the right to the truth" and "the right to know [which] is also a collective right".

4 *cf. Study on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms.* Final report presented by Theo van Boven, Special Rapporteur. Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub. 2/1993/8, 2 July 1993; the study notes that Chile has put great emphasis on revealing the truth about the most serious human rights violations relating to the right to life. The reparation was and is focused principally on the vindication of the victims of such serious violations and on compensation for their next of kin, para. 117.

which is supported by the Convention and, based on this, by the Court's recognition in its judgment.

21. Furthermore, the satisfaction of the right to the truth that corresponds to the victims, through the public investigation of the facts and prosecution of those responsible - as the Court has ordered in its decisions in this judgment - also allows society's demand to know what has happened to be fulfilled. This situation is similar to the one that arises with regard to the effectiveness of a judgment declaring the violation of rights, in itself, to repair the wrong perpetrated, as regards the moral satisfaction of the victim; an issue that has been dealt with by international jurisprudence and several of the Court's decisions. The Court has reiterated in its jurisprudence that, with regard to the request that the State should make a public apology as reparation of the violations committed, "the judgment on merits in the [...] case constitutes, in itself, a significant and important form of reparation and moral satisfaction for [the victim] and his relatives."⁵

22. This is the first time that the Court has explicitly referred to the right to the truth, cited in the Commission's application. The innovation that the judgment contributes on this point could lead to further examination in the future, which would help to strengthen the role of inter-American human rights jurisprudence as a factor in the fight against impunity. Society's demand for knowledge of the facts that violate human rights and the individual right to know the truth are clearly addressed at banishing impunity, which encourages human rights violations.

IV. APPLICATION OF THE GENEVA CONVENTIONS

23. The Court's decision also makes some observations about the applicability to this case of Article 3, common to the Geneva Conven-

5 Thus, in the *Suárez Rosero case. Reparations (Article 63.1 American Convention on Human Rights)*. Judgment of January 20, 1999. Series C No. 44, para. 72; *Loayza Tamayo case. Reparations (Article 63.1 American Convention on Human Rights)*. Judgment of November 27, 1998. Series C No. 42, para. 158; and *Caballero Delgado and Santana case. Reparations (Article 63.1 American Convention on Human Rights)*. Judgment of January 29, 1997. Series C No. 31, para. 58.

tions. In this respect, it is clear that the competence of the Inter-American Court to decide litigations, *ratione materiae*, is circumscribed to violations of the American Convention on Human Rights, since it is expressly invested with contentious jurisdiction to hear cases relating to "the interpretation or application" of this Convention (Article 62(1) and 3); to this could be added those expressly assigned to the Court by other treaties or conventions in force in America, such as the Inter-American Convention to Prevent and Punish Torture, a hypothesis that is also examined in this judgment. Thus, the Court cannot directly apply the rules of international humanitarian law embodied in the 1949 Geneva Conventions and, pursuant to them, decide a dispute, determining that there has been a violation of the provisions of those conventional instruments.

24. As the Court itself has indicated⁶, the foregoing does not preclude taking into consideration these provisions of international humanitarian law - another perspective of the international system - in order to interpret the American Convention. It is not an issue of directly applying Article 3 common to the Geneva Conventions in the case, but of admitting the facts provided by the whole system of laws - to which this principle belongs - in order to interpret the meaning of a norm that the Court must apply directly.

25. The Court can go further in its appreciation of this matter, even when it is not strictly required to under the terms of the application, and observe the presence of norms of *jus cogens* resulting from the evident correlation - which shows an international consensus - between the provisions of the American Convention, the Geneva Conventions, and "other international instruments" - as is indicated in para. 209 of the judgment - regarding "non-derogable human rights (such as the right to life and the right not to be submitted to torture or cruel, inhuman and degrading treatment."

6 *cf. Las Palmeras case, Preliminary objections.* Judgment of February 4, 2000, paras. 32-34; here, it is noted that the American Convention "has only attributed the Court with competence to determine whether the acts or the laws of the States are compatible with the Convention itself, and not with the 1949 Geneva Conventions."

V. PROBATIVE MATTERS

A) Admissibility of the evidence

26. Some probative matters, which should be commented on, are examined in the judgment. The importance and transcendence of the evidence in a jurisdictional proceeding is obvious. It has even been said that the proceeding constitutes, in essence, a broad probative opportunity directed at verifying the *de facto* conditions that support the legal claims. The juridical consequences are constructed on the basis of the facts. Consequently, the judge must give special attention to the issue of the evidence before beginning the juridical consideration, and, particularly, do so in a firm and reasonably certain way, so that justice may be done in the specific case. This leads to identifying some points on the admissibility, effectiveness and evaluation of the evidence, and also on the conditions for its presentation in the natural context of the accusatory system established by the Convention, its Statute and the Rules of Procedure of the Court.

27. The judgment on merits observes that certain documents "lack authentication, present defects and do not comply with the minimum formal requirements for admissibility, because it is impossible to establish precisely their source, and also the procedure by which they were obtained. Those circumstances prevent these documents from being granted value as evidence" (para. 105). In the instant case, these are documents attributed to Government agencies, which have not been confirmed by the latter; they contain deletions that prevent knowing everything that is written in them or the names of the hypothetical deponents, whose testimonies they present, and who cannot be questioned critically by the other party, in accordance with the rules of the system whereby both parties are heard, or eventually examined by the Court.

28. The Court is not denying the truth of the information contained in such documents, which it does not even discuss. It rejects them because they do not satisfy the indispensable "minimum requirements for admissibility", as the judgment indicates. Consequently, it is not possible to begin to evaluate them, because this presumes that they have been admit-

ted. I have already stated my opinion about this evidence, in a concurring opinion to the Order of the Court of June 19, 1998, in the case referred to in this judgment. In this particular opinion, I analyzed the disputed points of this evidence in greater detail and also observed that its admission would make it impracticable to fulfill the various categorical provisions of the Court's Rules of Procedure, such as those contained in Articles 41 (Questions put during the hearings), 46 (Convocation of witnesses and expert witnesses), 47 (Oath or solemn declaration by witnesses and expert witnesses) and 48 (Objections to witnesses).

29. In my opinion, the Court cannot admit evidence that does not meet the said minimum requirements for admissibility, with the argument that the Court has broad powers to examine it and evaluate it, linked to other information or circumstances. Indeed, the admission of evidence which is manifestly vitiated would alter the nature of a proceeding governed by democratic principles and would lead also to accepting other means of evidence that are rejected by the law or illegally obtained, taken to the full extent of its natural consequences. Thus, it would be decided that a confession or testimony obtained through the intimidation or even the torture of the witness is admissible, if, in the Court's opinion, it appears to corroborate other evidence and helps to clarify the facts. In this way, the proceeding would be impaired and we would return to an probative regime that has been widely overcome and condemned. Briefly, in matters of evidence - as in so many others - the end does not justify the means. To the contrary, the legitimacy of the latter helps to legitimize the end. Obtaining a hypothetical - and even remote - historical truth, does not exempt from fulfilling the requirements of the law and good faith that should govern the conduct of the judge.

B) The burden of proof

30. I have already said that, when examining the violation of Article 5 of the Convention (Right to humane treatment), the judgment emphasizes an interesting procedural issue, which is, the burden of proof in the hypothesis of forced disappearance of persons, which could also engender other possible violations. In principle, the burden of proof - *onus probandi*, which normally does not constitute an obligation, but a condi-

tion to be satisfied in order to obtain a determined procedural advantage - corresponds to the person who states a fact on which the claim put forward is totally or partially based. This rule cannot be applied in absolute terms in a process to protect human rights, nor could it be applied in any procedural process dominated by the principle of historical truth. It is evident that, in the first stage of the procedure, the Commission must investigate the facts fully and objectively, independently of the assertions made by the participants, precisely in order to learn the historical truth and, it is even more evident, that the Court must assume this same function in the procedural stage that concerns it.

31. However, there are hypotheses where the burden of proof is naturally displaced from the person who asserts a fact to the person who denies it, when the latter is in a better position to prove what is said - the fact or the situation on which his defense is based - taking into account the circumstances of the case. In my opinion, this is what the expression contained in the judgment implies, which has precedents in other decisions of the Court as well as similarities, also cited, to a decision of the United Nations Human Rights Committee: "in cases of forced disappearance, the State's defense cannot rely on the impossibility of the plaintiff to present evidence in the proceedings since, in such cases, it is the State that controls the means to clarify the facts that have occurred in its jurisdiction and, therefore, in practice, it is necessary to rely on the cooperation of the State itself in order to obtain the required evidence" (para. 152 of the Judgment).

32. In my opinion, the Court has acted correctly by not establishing a universal and rigid principle about the burden of proof, which thus maintains its relative character. Indeed, although it is certain that the rule could correspond - both when the burden is established and when it is dispensed with - to most cases, according to its usual nature, it is also certain that the circumstances in which cases are presented introduces, *a fortiori*, a pertinent corrective, whose consequence could be the inversion of the burden of proof. In other words, the non-observance of the general rule, precisely in favor of justice, which depends more on the reality of things than on the abstract rationality of principles that could be irrational, and then unjust or unfair, in the specific reality of the disputed facts.

33. In cases such as forced disappearance - and others, including, for example, the demonstration that remedies under domestic law are accessible and effective, another issue that has been explored thoroughly - the State has better possibilities of assuming the function of proving what it denies, than the individual to prove what he affirms. Nevertheless, not even this frequently corroborated experience should lead to the adoption of an immovable rule: it is possible to accept the general effectiveness of the principle, while not accepting its universal applicability.



Manuel E. Ventura-Robles
Secretary



Sergio García-Ramírez
Judge