

SEPARATE OPINION OF JUDGE DE ROUX RENGIFO

I share the point of view, according to which, the right to the recognition of juridical personality, that is, to be considered a subject of rights by the legal system, is not related to the question of whether or not a person is allowed to exercise such rights in the practice.

In this respect, there is a valid distinction between the juridical personality (which would be the *who* of the condition of subject of rights and obligations), the legal capacity (which would be the *how much*, the quantitative expression of this condition, and which could be measured and compared in order to say, for example, that it is more in an adult and less in a minor), and the effective exercise of this capacity (which could be affected in many different ways, by the legal or illegal action of the State or of individuals).

It would be possible to mention numerous examples of behaviors that signify severe illegal restrictions to the exercise of rights, without it being viable to affirm that they suppress the juridical personality of the victim. This would be the case, to mention the first thing that comes to mind, of arbitrary detention (particularly when this is accompanied by the prolonged, solitary confinement of the person detained), of submitting a person to a regime of restraint due to madness or dissipation without previously conducting a due process, or of abduction.

However, we could imagine that certain restrictions to the exercise of rights are so intense and so profound that they are equivalent to a derogation of the recognition of juridical personality, and that forced disappearance constitutes an exemplary case in this respect. Nevertheless, it will always be pertinent to counter this with the argument that the question of juridical personality belongs to a completely different legal category to that of the use and enjoyment of the rights of the subject, in the context of the facts that we are discussing. And not because the recognition of juridical personality is a sort of entelechy that lacks points of contact with the reality of real men and women, but rather because the nor-

mative embodiment of the right to that recognition is addressed at countering a scourge that merits combating, in its specificity, with the greatest vigor: that by which some legal systems establish, by definition, that certain categories of human beings lack the condition of subjects of rights and obligations and are, to all intents and purposes, comparable to things¹.

In any case, in recent decades, international human rights law has been considering the issue of whether forced disappearance does or does not violate the right to recognition of juridical personality.

The Declaration on the Protection of All Persons from Enforced Disappearances adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992, without pretending to be exhaustive, devotes an article to enunciating the rights violated by disappearances and heads this list with the right to recognition of juridical personality (Article 1(2)). The 1994 Inter-American Convention on Forced Disappearance of Persons - the first international conventional instrument against this scourge - abstains, however, from making that type of statement, although in a "whereas clause" it indicates that forced disappearance violates numerous essential, non-derogable human rights.

As regards the jurisprudence of the Inter-American Court, an interesting point should be emphasized. In two of its notable judgments in the

1 In the preparatory work for the International Covenant on Civil and Political Rights, there are traces of the fact that, at that time, the members of the Drafting Committee faced the question of the level at which the right to the recognition of juridical personality should be placed. In this respect, the differences should be noted between the pertinent part of the Drafting Committee's report on the first working session in 1947 and the text that emerged from the Commission on Human Rights in 1950, corresponding to *Article 16* of the Covenant. The formula contained in the 1947 report united in the same provision the issue of the exercise of rights and that of "judicial personality"; it said: "no person shall be restricted in the personal exercise of his civil rights or deprived of judicial personality, save in case of: a) minors, b) ...". The final text concentrates on the issue of juridical personality and states: "everyone shall have the right to recognition everywhere as a person before the law."

"Honduran cases" (Velásquez Rodríguez and Godínez Cruz), the Court abstained from declaring that Article 3 of the American Convention, which refers to juridical personality, had been violated, on the occasion of separate cases of forced disappearance of persons. In other words, it restricted the scope of forced disappearance to the violation of Article 7 (right to personal liberty), Article 5 (right to humane treatment) and Article 4 (right to life) of the said Convention. Twelve years later, in the judgment in the Trujillo Oroza case, referring to a forced disappearance that occurred in Bolivia this time, the Court declared that, in addition to Articles 4, 5 and 7 of the above-mentioned international instrument, its Article 3 had also been violated. However, it should be noted that this declaration was made, as the judgment itself says, "pursuant to the terms of the State's recognition of responsibility", and that the Court did not construct an explicit reasoning on the basic juridical question to which we have been referring.

Behind the recurring question of whether forced disappearance of persons violates the right to recognition of juridical personality, we find, among other issues, concern about the fact that certain very aggressive and offensive aspects of the corresponding conduct are not covered by the scope of the provisions on the rights to liberty, humane treatment and life.

Forced disappearance is characterized, among other matters, by creating a situation of overwhelming uncertainty about whether the victim is alive or dead; in other words, about whether he continues or has ceased to exist. This situation arises from the fact that the authors of the disappearance, not only cut off all forms of communication between the person who has disappeared and the society to which he belongs, but also eliminate any trace or information, about either the survival or death of the person in question (except for the mere passage of time as a growing sign of the probability that the victim is dead). In other words, the abductors create a state of uncertainty about the existence of the person who has disappeared².

2 The motives that lead to this are fairly complex. Despite what is usually said, it is not only a case of eliminating evidence in order to guarantee the

The Declaration on the Protection of All Persons from Enforced Disappearance of the General Assembly of the United Nations and the Inter-American Convention on the Forced Disappearance of Persons, clearly capture this aspect of the scourge, which is related to a radical *disinformation* of the social environment of the person who has disappeared with regard to his whereabouts, and survival or death. Consequently, according to those instruments, the fight against this is mainly engaged in the area of recording and conserving information on persons who are at risk of being disappeared, and in reconstructing the lost thread of information about the fate and whereabouts of the victims of an actual disappearance. Much of the content of these instruments is devoted to prescribing the adoption of measures towards these ends³.

However, it does not seem possible to relate this aspect of forced disappearance to the provision of the American Convention (not to mention other protection treaties) on the right to recognition of juridical personality. During discussions on the draft of this judgment, I have been wondering whether this aspect of a disappearance attacks some of the basic presumptions of the right to recognition of juridical personality. And I have been reflecting on the possibility of arguing that, for a human being to be recognized as a subject of rights and obligations or, more precisely, for maintaining in effect the recognition of his condition of subject of rights and obligations, which jurisprudence grants him, it is important that he should not fall into this nebulous limbo of uncertainty about his existence that disappearance implies. However, I have finally been obliged to conclude that matters relating to this state of uncertainty belong to the order of the exercise of rights and not to the recognition of juridical personality, in the terms and for the purposes for which it is embodied in Article 3 of the American Convention.

impunity of the abductors. It is also, among other matters, a question of breaking the resistance of the victim through torture, making him feel that he has lost all hope, taking the aggression against the victim to limits that go beyond death, by disrespecting and hiding his corpse, and, above all, terrorizing and immobilizing the groups and communities that make up the social environment of the disappeared person.

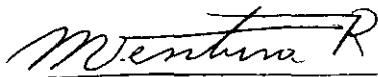
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I must express my dissatisfaction with paragraph 180 of the judgment, which forms part of the Court's considerations about the issue of whether or not Article 3 of the Convention was violated. In my opinion, this paragraph combines issues that should be treated separately and also introduces a reflection on the arbitrary deprivation of life, the relationship of which to the right to the recognition of juridical personality needs to be developed further in order to make the thread of the argument comprehensible.

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I share the Court's assertion, formulated in the context of examining the compliance or non-compliance with Article 1(1) of the American Convention, about its lack of competence to declare that a State has violated the 1949 Geneva Conventions on international humanitarian law.

I regret, however, that the issue of humanitarian laws was not introduced in relation to Article 2 of the American Convention. In a country undergoing an internal armed conflict, such as that experienced by Guatemala when the facts of the case occurred, the "legislative or other measures" that are needed in order to make the rights established in the Convention effective, undoubtedly include those that consist in assuming, disseminating and fulfilling the rules of humanitarian law applicable to that type of conflict and in investigating and punishing violations against them.



Manuel E. Ventura-Robles
Secretary



Carlos Vicente de Roux-Rengifo
Judge