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Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Haniff Hilaire v. Trinidad and Tobago
Doc. Type:	Judgment (Preliminary Objections)
Decided by:	President: Antonio A. Cancado Trindade; Vice President: Maximo Pacheco-Gomez; Judges: Hernan Salgado-Pesantes; Alirio Abreu-Burelli; Sergio Garcia-Ramirez; Carlos Vicente de Roux-Rengifo Judge Oliver Jackman informed the Court that because he did not participate in the public hearing on the preliminary objection in this case, he could not participate in the deliberation and signing of this judgment.
Dated:	1 September 2001
Citation:	Hilaire v. Trinidad and Tobago, Judgment (IACtHR, 1 Sep. 2001)
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In the Hilaire case,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court", "the Court" or "the Tribunal"), pursuant to Article 36(6) of its Rules of Procedure [FN1] (hereinafter "the Rules of Procedure"), delivers the following judgment on the preliminary objection filed by the State of Trinidad and Tobago (hereinafter "the State" or "Trinidad and Tobago").

[FN1] In accordance with the Court's Order of March 13, 2001 regarding Transitory Provisions of the Court's Rules of Procedure, the instant Judgment on preliminary objections is delivered according to the norms of the Rules of Procedure adopted in the Court's Order of September 16, 1996.

I. INTRODUCTION OF THE CASE

1) The present case was submitted to the Court by the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") on May 25, 1999. The Commission's application originates from petition number 11,816 (Haniff Hilaire), received by its Secretariat on October 9, 1997.

II. FACTS SET FORTH IN THE APPLICATION

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2) The Inter-American Commission set forth in its application the facts on which it is based. In the following paragraphs, the Court summarizes the facts and claims relevant to the consideration of the preliminary objection:

The State of Trinidad and Tobago has violated the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") by sentencing Mr. Haniff Hilaire (hereinafter "Mr. Hilaire") to a "mandatory death penalty", thereby violating his rights under Articles: 4(1), 5(1), 5(2), 5(6), 7(5) and 25; all in relation to Article 1(1) of the Convention. The State is also in breach of Article 2, which requires the State to adopt such legislative and other measures as may be necessary to give effect to the rights and freedoms guaranteed in the Convention, in relation to Article 25 of the same (infra 16).

The Inter-American Commission supports its statements, inter alia, with the following facts:

a) On May 29, 1995, Mr. Hilaire was convicted, together with his two co-defendants, Mrs. Indravani Ramjattan and Mr. Denny Baptiste, of the murder of Mr. Alexander Jordan on February 13, 1991. This conviction was delivered by the First Criminal Court of Port of Spain (Assizes), Trinidad and Tobago;
b) Mr. Alexander Jordan was the common-law husband of Mrs. Indravani Ramjattan, who "according to the record", was the victim of spousal abuse at the hands of Mr. Jordan;
c) "Owing in part to the abusive nature of the marriage", a relationship developed between Mrs. Ramjattan and Mr. Baptiste, and she became pregnant with his child. When her husband discovered this, he further abused her and, as a result, she fled her house with their two children and moved to Mr. Baptiste's home. Mr. Hilaire was also living with Mr. Baptiste and, during her time with the two, Mrs. Ramjattan confided in them about the abusive relationship to which she was subjected;
d) Mr. Jordan subsequently discovered where his wife was, broke into Mr. Baptiste's home and took her back to his house, where he held her as a virtual hostage. Mrs. Ramjattan was able to send a message to Mr. Hilaire, imploring him to rescue her. Consequently, Messrs. Hilaire and Baptiste went to Mr. Jordan's house "with the intent to beat him". The beating had consequences much more severe than anticipated, and Mr. Jordan died as a result thereof;
e) The record discloses no evidence that Mr. Hilaire had a prior criminal record or a tendency to re-offend;
f) Mr. Hilaire and his co-defendants were found guilty of murder under the Trinidad and Tobago Offences Against the Person Act and, on May 29, 1995, the trial judge "was required to impose upon the defendants the sentence of death" pursuant to section 4 of the said Act, and stated: "The jury has found each of you guilty of murder. The sentence of this Court upon each of you is that you be taken from this place to a lawful prison and there to a place of execution and that you will there suffer death by hanging, and may the Lord have mercy upon your souls";
g) On May 29, 1995, Mr. Hilaire applied for leave to appeal his conviction to the Court of Appeal of Trinidad and Tobago. This application was dismissed on November 7, 1996. On October 30, 1997, Mr. Hilaire filed a petition for special leave to appeal his conviction to the Judicial Committee of the Privy Council in London, which dismissed it on November 6, 1997. Mr. Hilaire filed a second petition for special leave to appeal to the Judicial Committee of the Privy Council in London on or about January 25, 1999. This second petition was also dismissed on February 3, 1999;

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h) The Offences Against the Person Act provides a definition of "murder", permits a jury to consider certain circumstances of a killing in determining whether the offender ought to be found guilty of murder or of a lesser offence, mandates the imposition of the death penalty on an offender found guilty of murder, but does not permit a judge or jury to consider the personal circumstances of an offender or his or her offence;

i) The Constitution of Trinidad and Tobago provides for an Advisory Committee on the Power of Pardon, which is charged with considering and making recommendations to the Minister of National Security as to whether an offender sentenced to death ought to benefit from the President's discretionary power of pardon under the said Constitution. No criteria are prescribed in law for the exercise of the Committee's functions or the President's discretion, and the offender has no legal right to make submissions to the Committee to present, receive or challenge evidence the Committee chooses to take into account. The exercise of the power of pardon is an act of clemency not a matter of legal right, and therefore not subject to judicial review.

III. PROCEEDING BEFORE THE COMMISSION

3) On October 9, 1997, the British firm of Solicitors, Simmons & Simmons (hereinafter "the petitioners"), presented to the Commission a petition against Trinidad and Tobago on behalf of Mr. Haniff Hilaire. On October 16, 1997, the Commission opened case No. 11,816, sent the State the pertinent parts of the petition and requested a reply. The Commission also requested the State, pursuant to Article 29(2) of its Rules of Procedure, to stay the execution of Mr. Hilaire, until such time as the Commission had an opportunity to examine the case and issue a decision.

4) On October 30, 1997, the petitioners informed the Commission that they were awaiting a decision by the Judicial Committee of the Privy Council on Mr. Hilaire's application for special leave to appeal. On November 6 of the same year, the petitioners informed the Commission that leave to appeal to the Privy Council had been refused.

5) On December 19, 1997, the State submitted its observations on the petition, making reference to the merits. On January 12, 1998, these observations were transmitted to the petitioners, who filed their own observations on February 25 of the same year. On March 16, 1998, the Commission forwarded the petitioners' observations to the State and requested a reply.

6) Also on December 19, 1997, the petitioners supplied the Commission with a supplementary written submission providing further evidence, case law and other information in support of the admissibility of the petition, and specified the relief sought on behalf of Mr. Hilaire. The communication was forwarded to the State on January 12, 1998 and it presented its rejoinder on April 1, of the same year. This rejoinder was transmitted to the petitioners on May 13, 1998. On June 24, 1998, the petitioners filed their observations and these were transmitted to the State on July 13, 1998, accompanied by a request for a reply.

7) On September 25, 1998, the Commission issued Report No. 43/98, in which it concluded that the petition was admissible. On October 23 of the same year, the Commission forwarded this Report to the State and the petitioners, and placed itself at their disposal with a view to seeking a friendly settlement of the matter.

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8) On September 28, 1998, the petitioners presented a second supplementary written submission, which was transmitted to the State on October 6 of the same year, with a request for a reply.

9) On or about February 12, 1999, the petitioners delivered a third supplementary written submission with appendices, and on or about March 12 of the same year, they delivered additional written submissions to the Commission. On April 5, 1999, the Commission forwarded the pertinent parts of the additional written submissions to the State with a request for observations. The State did not respond to this request.

10) On April 21, 1999, the Commission adopted the Report on the merits No. 66/99, which it transmitted to the State on April 26, 1999. In the operative part of the said Report, the Commission recommended that the State:

(I) Grant the petitioner an effective remedy which includes consideration for an early release or commutation of sentence and compensation;
(II) Adopt such legislative or other measures as may be necessary to insure that the death penalty is imposed in compliance with the rights and freedoms guaranteed under the Convention; [and]
(III) Adopt such legislative or other measures as may be necessary to ensure that the right under Article 7(5) of the Convention to trial within a reasonable time or to be released is given effect in Trinidad and Tobago, including effective recourse to a competent court or tribunal for protection against acts that violate that right.

11) On May 18, 1999, the State delivered to the Commission its response to this Report.

12) On May 23, 1999, the Inter-American Commission, pursuant to Article 51 of the American Convention, decided to submit the case to the Court.

IV. PROVISIONAL MEASURES [FN2]

[FN2] On May 22, 1998, the Inter-American Court of Human Rights received from the Inter-American Commission on Human Rights a request for provisional measures in the James et al. matter, related to five cases before the Commission which involved five death row inmates in Trinidad and Tobago. On June 14, 1998, during its XL Regular Period of Sessions, the Court ordered the adoption of the requested measures.

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13) On July 10, 1998, prior to the submission of the application, the Commission requested that the Court expand the provisional measures that had been ordered by the President in the matter of James et al. on May 27, 1998, and ratified by the Court on June 14 of the same year, in order to include Mr. Hilaire in such provisional measures. The Commission considered that the circumstances of Mr. Hilaire were similar to those of the other inmates to whom the existing

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Order for provisional measures in Trinidad and Tobago applied, and that because Mr. Hilaire's execution was imminent, he was particularly vulnerable to irreparable harm.

14) On July 13, 1998, the President of the Court (hereinafter "the President") ordered the State, inter alia, to take all measures necessary to preserve Mr. Hilaire's life so that the Court could examine the pertinence of the Commission's request for extension of the provisional measures. On August 29, 1998, the plenary of the Court ratified the President's Order of July 13, 1998 in relation to Mr. Hilaire, among others [FN3].

[FN3] In the said Order the Court amplified the Provisional Measures in the matter of James et al in favor of Darrin Roger Thomas, Haniff Hilaire and Denny Baptiste. Messrs. Thomas and Baptiste are not included in the instant application.

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15) As of this date, the State has presented the relevant reports with respect to the situation of Mr. Hilaire and the Commission has delivered its observations on the State's reports.

V. PROCEEDING BEFORE THE COURT

16) On May 25, 1999, the Inter-American Commission filed its application in the following terms:

The Inter-American Commission on Human Rights respectfully petitions the Honorable Inter-American Court of Human Rights to declare violations of the Convention by the State, establish reparations for those violations, and determine costs and expenses to be paid to the representatives of the victims.

A. Declarations of violations

The Inter-American Commission on Human Rights respectfully petitions the Honorable Inter-American Court of Human Rights to:

Find that the Republic of Trinidad and Tobago is responsible for violating Mr. Hilaire's right:

(I) not to be arbitrarily deprived of his life in violation of Article 4(1) of the American Convention.

(II) to have his physical, mental and moral integrity respected in violation of Article 5(1) of the American Convention.

(III) not to be subjected to cruel, inhumane, or degrading punishment or treatment in violation of Article 5(2) of the American Convention.

All in conjunction with a violation of Article 1(1) of the American Convention;

Find that the State of Trinidad and Tobago is responsible for violating Article 5(6), in conjunction with Article 1(1) of the American Convention, by failing to have as an essential aim of Mr. Hilaire's punishment his reform and social readaptation;

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Find that the State of Trinidad and Tobago is responsible for violating the right of Mr. Haniff Hilaire to be tried within a reasonable time or to be released, contrary to Article 7(5), in conjunction with Article 1(1) of the American Convention;
Find that, by failing to adopt legislative or other measures necessary to give effect to the right to be tried within a reasonable time or to be released under Article 7(5) of the Convention, the State of Trinidad and Tobago has violated its obligation under Article 2 to provide the Convention with domestic legal effect, as well as Mr. Hilaire's right to judicial protection under Article 25, in conjunction with Article 1(1) of the Convention.

B. Reparations

The Inter-American Commission on Human Rights respectfully petitions the Honorable Inter-American Court of Human Rights to:

Direct that the State of Trinidad and Tobago grant the petitioner an effective remedy which includes early release or commutation of sentence and compensation;

Direct that the State of Trinidad and Tobago adopt such legislative or other measures as may be necessary to ensure that the death penalty is imposed in compliance with the rights and freedoms guaranteed under the Convention;

Direct that the State of Trinidad and Tobago adopt such legislative or other measures as may be necessary to ensure that the right under Article 7(5) of the Convention to trial within a reasonable time or to be released is given effect in Trinidad and Tobago, including effective recourse to a competent court or tribunal for protection against acts that violate that right.

C. Compensation

The Commission has requested that the Honorable Court require the State of Trinidad and Tobago to remedy the consequences of the violations which are the subject of this application.

Article 63(1) of the American Convention provides:

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

This Honorable Court has stated that Article 63(1) of the Convention codifies a rule of customary law and constitutes one of the fundamental principles of customary law (Aloeboetoe Case, Judgment of September 10, 1993, para. 43). The obligation to repair a breach may give rise to a number of measures to remedy the consequences. The State must, to the extent possible, reestablish the statu quo ante, which in the present case could be achieved by commuting the complainant's death sentence and adjusting the domestic law of Trinidad and Tobago accordingly. Where reestablishing the statu quo ante is no longer possible, the consequences must be remedied through other means. The Commission therefore seeks to obtain a decision of

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the Court as to the compensation owing to the victim as a result of the State's violation of his rights under the Convention.

D. Costs and expenses

The Commission seeks a determination from the Court respecting the costs and expenses incurred by the representatives of the victims during the processing of the case before the domestic courts and the organs of the Inter-American system.

17) The Commission appointed Messrs. Jean Joseph Exumé, Robert K. Goldman and Nicholas Blake as delegates, and as legal advisors Messrs. David J. Padilla and Brian D. Tittemore. The Commission also designated Messrs. Peter Carter, Owen Davies and Mrs. Andrea Dahlberg as assistants.

18) On June 11, 1999, the Secretariat of the Court (hereinafter "the Secretariat"), following the preliminary examination of the application by the President of the Court, notified the State of the application and its annexes. On the same day, the Secretariat, following instructions of the President, informed the State of its right to designate an ad hoc judge, pursuant to Articles 18 of the Rules of Procedure and 10(3) of the Statute of the Court (hereinafter "the Statute").

19) On August 16, 1999, Trinidad and Tobago submitted a preliminary objection to the compulsory jurisdiction of the Court in this case and requested a two-month extension in order to present its legal arguments. It also requested the Court to convene a special hearing on the preliminary objection in accordance with Article 36(6) of the Rules of Procedure and to suspend proceedings on the merits until the Court rendered a judgment on the preliminary objection.

20) On August 19, 1999, the Secretariat acknowledged receipt of the State's communication of August 16 and informed the State and the Commission that the President of the Court had granted an extension until October 15, 1999, in order for Trinidad and Tobago to present its legal arguments with respect to the submitted preliminary objection. At this time, the Court advised that the State's request for a special hearing and suspension of the proceedings would be considered in its XLV Regular Period of Sessions.

21) On October 1, 1999, the Court issued an Order in the following terms:

1. To grant the Republic of Trinidad and Tobago an extension for the presentation of its Reply to the Application in the Hilaire Case until December 15, 1999, due to the particular circumstances of the [...] case.
2. To decline the request of the Republic of Trinidad and Tobago for a postponement of the proceedings on the merits of the Hilaire Case until the preliminary objection has been decided.
3. To continue the consideration of the Hilaire Case in its current procedural stage.
4. To commission the President of the Inter-American Court of Human Rights to summon the Republic of Trinidad and Tobago and the Inter-American Commission on Human Rights in due course to a public hearing on the preliminary objection in the Hilaire Case, to be held at the seat of the Inter-American Court of Human Rights.

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22) On October 15, 1999, the State presented its legal arguments with respect to the preliminary objection to the Court's jurisdiction in the instant case.

23) On October 20, 1999, the Secretariat of the Court transmitted to the Inter-American Commission the State's arguments in relation to the preliminary objection. The Commission responded on November 19, 1999.

24) On June 16, 2000, the President of the Court resolved to convene the parties to a public hearing, to take place at the seat of the Court on August 10, 2000, to hear the arguments on the preliminary objection.

25) The public hearing was held at the seat of the Court on the established date.

There appeared:

for the Republic of Trinidad and Tobago

Russell Martineau, S.C.;
Howard Stevens, Barrister; and
Peter Pursglove, Barrister and Attorney-at-Law, Legal Adviser in the Ministry of the Attorney General and Legal Affairs.

for the Inter-American Commission on Human Rights

Robert K. Goldman, Delegate;
Nicholas Blake Q.C., Delegate; and
Brian Tittemore, Legal Advisor.

26) On May 7, 2001, the Secretariat received from the Commission copies of two decisions pertinent to cases on the imposition of the "mandatory death penalty", issued by the United Nations Human Rights Committee and the Court of Appeals for the Eastern Caribbean. These decisions were transmitted to the State on May 15, 2001. On December 13, 1999 and August 10, 2000, Messrs. Vaughan Lowe and Carlos Vargas Pizarro, respectively, also filed amicus curiae briefs.

VI. JURISDICTION

27) Trinidad and Tobago deposited its instrument of ratification to the American Convention on May 28, 1991. On the same date, the State recognized the compulsory jurisdiction of the Court.

28) On May 26, 1998, Trinidad and Tobago denounced the Convention and, pursuant to Article 78 of the same instrument, this denunciation took effect one year later, on May 26, 1999. The facts, to which the instant case refers, occurred prior to the effective date of the State's denunciation. Consequently, the Court has jurisdiction, under the terms of Articles 78(2) and

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62(3) of the Convention, to entertain the present case and render a judgment on the State's preliminary objection.

VII. PRELIMINARY OBJECTION: INADMISSIBILITY OF THE COMPLAINT AND LACK OF JURISDICTION OF THE COURT

29) In its preliminary objection, Trinidad and Tobago sustained that the Inter-American Court does not have jurisdiction to hear the case in light of three main arguments:

I. The application in so far as it alleges a breach of Article 4(1) of the American Convention on Human Rights is inadmissible for breach of Article 46(1)(b) of the Convention.
II. The State's second reservation precludes any jurisdiction of the Court in this case.
III. Alternatively, the State has never recognised the jurisdiction of the Court.

30) The Court will consider the arguments presented by the State in the case sub judice.

A. INADMISSIBILITY OF THE COMPLAINT

Written arguments of the State

31) The State notes that Article 46 of the American Convention establishes that:

1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:
[…]
b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment[.]

32) According to Trinidad and Tobago, one of the allegations in the Commission's application states that the imposition of the death penalty in the present case constituted a violation of Article 4(1) of the Convention. This argument was not presented in the original petition or in the complementary petition lodged by the petitioner before the Commission, but rather in a "second supplementary petition" lodged before it on September 28, 1998.

33) This "second supplementary petition" was presented ten months after the final domestic judgment, and therefore outside the six-month time period provided for in Article 46(1)(b) and after the Commission's September 25, 1998 Report on the admissibility of the petition and complementary petition. It also contains an argument that the petitioner could have presented in his petition and his complementary petition and, as a result, the allegation in reference to Article 4(1) of the Convention is in breach of Article 46(1)(b) of the same. For the aforementioned reasons, this should be considered a separate petition requiring a separate decision on admissibility. Moreover, the State indicated that the date of the Privy Council's dismissal of Mr. Hilaire's petition and the date accepted by the Commission as the date of the final judgment was November 6, 1997. As a result, the six-month time period to present the petition before the Commission expired on May 5, 1998.

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Written arguments of the Commission

34) The Inter-American Commission contended that the State should be estopped from raising issues of admissibility in the instant case because, during the proceedings before the Inter-American Commission, Trinidad and Tobago "waived its right to challenge the admissibility of the petition based upon the exhaustion of domestic remedies rule and submitted its observations on the merits of the case". It alleged that the circumstances in which the Commission determined a violation of Article 4(1) conformed to the Convention and the Commission's Statute and Rules of Procedure.

35) When the petitioners presented their complaint before the Commission, they did not state a specific violation of Article 4(1). However, in the "second supplementary petition" of September 28, 1998, the petitioners alleged a violation of Article 4(2) of the Convention with respect to Mr. Hilaire. It was the Commission, through its Article 50 Report, that determined that the State had violated Article 4(1) of the Convention, based on the petitioner's original complaint, and for this reason the violation should be considered by the Court.

36) The Commission considered that the six-month period stipulated in Article 46(1)(b) of the Convention is not applicable to the breach of Article 4(1) because the domestic legislation of the State does not provide due process for the protection of rights that have been violated. This is the case because Article 46(2)(a) of the Convention establishes that the provisions of paragraphs 1(a) and 1(b) of the above mentioned article shall not be applicable when "the domestic legislation of the State concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated."

37) In the instant case, the Commission determined a violation of Article 4(1) of the Convention based on the fact that Mr. Hilaire was sentenced to a "mandatory death penalty". Article 6 of the Constitution of Trinidad and Tobago [FN4] hinders individuals from challenging laws that were part of the domestic legislation of Trinidad and Tobago before the Constitution entered into force. The "mandatory death penalty" for the crime of murder was part of the law of Trinidad and Tobago before the Constitution went into effect and for this reason is not open to challenge before the courts.

[FN4] Article 6 of the Constitution of Trinidad y Tobago indicates:
Exceptions for Existing Law
(1) Nothing in sections 4 and 5 shall invalidate-
(a) an existing law;
(b) an enactment that repeals and re-enacts an existing law without alteration; or
(c) an enactment that alters an existing law but does not derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right.
(2) Where an enactment repeals and re-enacts with modifications an existing law and is held to derogate from any fundamental right guaranteed by this Chapter in a manner in which or to an extent to which the existing law did not previously derogate from that right then, subject to sections 13 and 54, the provisions of the existing law shall be substituted for such of the

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provisions of the enactment as are held to derogate from the fundamental right in a manner in which or to an extent to which the existing law did not previously derogate from that right.
(3) In this section-
"alters" in relation to an existing law, includes repealing that law and re-enacting it with modifications or making different provisions in place of it or modifying it;
"existing law" means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution, and includes any enactment referred to in subsection (1);
"right" includes freedom.

Oral arguments of the State

38) In the public hearing held before the Court, Trinidad and Tobago refuted the arguments presented by the Commission in its written memorial. The State indicated that the doctrines of waiver and estoppel do not apply in the instant case because the "second complementary petition" was submitted outside the six-month time limit. It also alleged that although the Commission had determined the admissibility of the complaint based on the first petition, it had determined that there was a violation of Article 4(1) based on the "second supplementary petition." Finally, it stated that in Trinidad and Tobago there exists due process under the law and that the State's Constitution provides for the right to not be arbitrarily deprived of life.

Oral arguments of the Commission

39) At the said hearing, the Commission stated that the six-month rule with respect to exhaustion of domestic remedies established in Article 46(1)(b) could be waived expressly or implicitly. In the instant case, the State did not object to the admissibility of the petition and, by its conduct it should be considered to have irrevocably waived its right to do so and hence should be estopped from disputing the admissibility before the Court. In the same manner, the Commission indicated that, in accordance with the Convention, the petitioner needed only to present the facts or the situation which constituted a possible violation of his rights; he was not obligated to name the specific articles which were considered violated. Finally, the Commission argued that the domestic law of Trinidad and Tobago does not provide due process of law for the protection of rights alleged to have been violated and that the "mandatory death penalty" for the crime of murder could not be challenged before the courts under the Constitution of the State.

Considerations of the Court

40) Article 46(1) of the American Convention establishes the necessary requirements for a petition to be admitted by the Inter-American Commission. Article 32 of the Commission's Rules of Procedures, in effect at the time when the complaint was initially lodged, lists the elements that the petition must contain at the time of its presentation. Neither Article 46(1) nor Article 32 establishes that the petitioners must specify the articles they consider to have been violated. Moreover, Article 32(c) of the Commission's Rules of Procedure [FN5] allows for the possibility that "no specific reference [be] made to the article(s) alleged to have been violated" and, paragraph (b) of the said Article 46 refers to a deadline for the lodging of the complaint.

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[FN5] In conformity with Article 32(c) of the Commission's Rules of Procedure, petitions presented before the Commission must include: "an indication of the state in question which the petitioner considers responsible, by commission or omission, for the violation of a human right recognized in the American Convention on Human Rights in the cases of the States Parties thereto, even if no specific reference is made to the article alleged to have been violated".

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41) In their original application the petitioners set out the facts on which they based their claims of violations of the Convention. They were under no legal obligation to specify which precise provisions of the Convention were violated in order to justify their complaint. In subsequent submissions they made reference to the same facts, adding certain legal considerations. In sum, the original petition contained all the facts that might be relevant for the purposes of a legal determination.

42) For this reason, and in the light of the guarantees contained in the American Convention on Human Rights, as well as the Rules of Procedure and Statutes governing the organs of the Inter-American system, the Court is of the opinion that the proper interpretation is that, when there are additional arguments, with respect to rights, on the same essential facts as are pleaded in the petitioner's original complaint, such a pleading cannot be dismissed for the mere failure to invoke a specific article of the Convention. Article 32(c) of the Commission's Rules of Procedure, in effect when the complaint was lodged before it, expressly allows for the possibility that "no specific reference [need be] made to the article(s) alleged to have been violated" in order for a complaint to be processed before it. Therefore, the Court dismisses the first argument of the State's preliminary objection regarding the inadmissibility of the complaint.

B. LACK OF JURISDICTION OF THE COURT

Written arguments of the State

43) As previously stated by Trinidad and Tobago, the State deposited its instrument of adherence of the Convention on May 28, 1991, dated April 3, 1991, recognizing the compulsory jurisdiction of the Court, but subjected this recognition to a "reservation." The State's "reservation" reads that

[a]s regards Article 62 of the Convention, the Government of the Republic of Trinidad and Tobago, recognizes the compulsory jurisdiction of the Inter-American Court of Human Rights, as stated in the said article, only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that Judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen.

44) The State indicated that Article 75 of the Convention declares that it can only be subject to reservations in conformity with the provisions of the Vienna Convention on the Law of

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Treaties signed on May 23, 1969 (hereinafter "the Vienna Convention"). In this respect, Article 19 of the same provides

[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

a) the reservation is prohibited by the treaty;
b) the treaty provides, that only specified reservations, which do not include the reservation in question, may be made; or
c) in cases not falling under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

45) The State also mentioned that in its Advisory Opinion on The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (OC-2/82), the Court had stated that the reference in Article 75 to the Vienna Convention was intended to be a reference to paragraph (c) of Article 19 of the Vienna Convention and "makes sense only if it is understood as an express authorization designed to enable States to make whatever reservations they deem appropriate, provided the reservations are not incompatible with the object and purpose of the treaty. As such they can be said to be governed by Article 20(1) of the Vienna Convention and, consequently, do not require acceptance by any other State party" [FN6].

[FN6] The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75), Advisory Opinion OC-2/82 of September 24, 1982. Series A No. 2, para. 35. To this respect, Article 20 of the Vienna Convention "Acceptance of and objection to reservations" establishes the following in paragraph 1:
1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

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46) The State argued that its "reservation" was made relative to its acceptance of the Court's jurisdiction and is limited to Article 62 of the American Convention. According to Trinidad and Tobago, Article 62 of the Convention is an optional clause that States can freely "accept or reject". Those States that accept and so declare are expressly authorized to do so subject to conditions. The Convention permits restrictions at the moment of acceptance of the Court's jurisdiction under Article 62, which does not affect the enjoyment or exercise of the rights and liberties recognized in the Convention. Consequently, given that the "reservation" does not deny the exercise of any of the rights provided for in the Convention, it can be considered compatible with the object and purpose of the same.

47) Trinidad and Tobago contended that the American Convention does not contain a provision parallel to Article 64(c) (sic) of the European Convention [FN7] and that, in fact, the framers of the American Convention preferred to follow the provisions of the Vienna Convention on the Law of Treaties, which "does not prohibit" (sic) reservations of a general character.

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[FN7] Article 64(1) of the European Convention before Protocol 11 went into effect corresponds to current Article 57(1) and reads:
Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of general character shall not be permitted under this article.

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48) The State added that the Constitution of Trinidad and Tobago is and was, at the moment of ratification of the Convention, compatible with the same. It argued that its "reservation" cannot be interpreted as contrary to the object and purpose of the Convention because the "reservation" is only related to the optional procedure contained in Article 62 of the Convention, which in no way affects the substantive rights guaranteed in the Convention. The "reservation," as presented, it argued, does not restrict the obligations assumed by the State under the Convention in relation to individuals within its jurisdiction.

49) Trinidad and Tobago also maintained that, if the Court declares the State's Article 62 "reservation" incompatible with the object and purpose of the American Convention, the effect of such a determination would be to render the State's declaration accepting the Court's compulsory jurisdiction null and void ab initio.

50) The State added that the International Court of Justice, in its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1951), indicated that

[…] if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider the reserving State is not a party to the Convention […]

51) The State indicated that, in its legal system, it is the Legislative Power that makes the laws. The Executive cannot, at the moment of ratification of a treaty, alter the laws of the Republic and create a constitutional breach. For this reason, the Executive, at the time of accession to the Convention and acceptance of the compulsory jurisdiction of the Court, formulated the "reservation" under Article 62. In this same manner, the State denounced the Convention in May of 1998, in virtue of the need to observe the provisions of the Constitution of the Republic of Trinidad and Tobago.

52) If the "reservation" of the State were, for any reason, considered invalid, it would not mean that the State declared its unlimited acceptance of the compulsory jurisdiction of the Court. On the contrary, it is clear that the State never intended to accept, in its totality, the jurisdiction of the Court. If the "reservation" is invalid, then the declaration was invalid, and the State never made a declaration.

Written arguments of the Commission

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53) The Commission sustained that the impugned term in the State's declaration of acceptance of the Court's jurisdiction should be considered invalid because it is impossible to determine its exact nature or scope. It is excessively vague and should not be interpreted in a manner that affects the Court's jurisdiction to decide cases against the State. If a meaning is to be attributed, it should be interpreted in a manner that limits the legal effects of the Court's judgments, and not the Court's jurisdiction to decide cases against the State.

54) The Commission indicated that the United Nations Human Rights Committee has stated that reservations to human rights treaties must be specific and transparent so that courts, individuals under the jurisdiction of a reserving State, and other States parties can know which human rights obligations have or have not been undertaken. The term contained in the State's "reservation" appears to modify the degree of acceptance of the compulsory jurisdiction of the Court. However, a simple reading of the term makes it difficult to determine the restrictions that the State has purported to establish under Article 62 to its obligations assumed under the Convention.

55) The term can also be interpreted in various ways. For example, it could be interpreted to mean that the Court is precluded from hearing and deciding a case related to allegations of violations of a Convention right if the same right is not protected under the State's Constitution. Alternatively, it could be interpreted to mean that "while the Court has jurisdiction to hear and determine a matter, the Court's judgment must be consistent with certain unstipulated sections of Trinidad and Tobago's Constitution".

56) The Commission noted that the State only relies upon the first part of the declaration in concluding that the Court has no jurisdiction. It pointed out that the State makes no reference to the portion of the declaration, which reads "and provided that any judgment of the Court does not infringe, create, or abolish any existing rights or duties of any private citizen", and considered that it is apparent that the State specifically acknowledges in this second part of the declaration that the Court has competence to give judgments in cases against Trinidad and Tobago. "It may therefore be that, taking the first and second parts of the declaration together, the State was concerned that the giving effect in Trinidad and Tobago to the judgments of the Court should not have an adverse effect on the existing private rights of the citizens, and deprive them of rights they already enjoyed or impose on them duties to which the were not already subject".

57) The term could be interpreted to mean that provided that, there is no provision in the Constitution expressly prohibiting the State from accepting the compulsory jurisdiction of the Court, the recognition of this jurisdiction is complete and effective. In this sense, the State does not suggest that there are provisions of the Constitution of Trinidad and Tobago that prohibit the State from accepting the jurisdiction of the Court.

58) In light of the various possible interpretations of the term, it appears so ambiguous that its meaning and scope will depend upon a subjective judgment by the State as to what provisions of the Constitution are "relevant" and in what respect the State's acceptance of the Court's jurisdiction must be "consistent" with those provisions, the term, would undermine the Court's exclusive authority to determine its own jurisdiction, and thereby also render the term invalid.

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59) The Commission also indicated that the term in the State's declaration of acceptance, as it stands and as interpreted by the State, is not authorized by Articles 62 or 75 of the Convention and is incompatible with the Convention's object and purpose.

60) In conformity with Article 62(2) of the Convention, the "declaration may be made unconditionally, on the condition of reciprocity, for a specific period or for specific cases". The State's "reservation" does not invoke the requirement of reciprocity, or temporal limitations, nor does it define specific cases in which the Court will apply its jurisdiction.

61) Secondly, and in conformity with Article 75 of the Convention and, specifically Article 19 of the Vienna Convention, the State's "reservation" is not permitted, as it is contrary to the object and purpose of the Convention. The "reservation" is also contrary to general principles of International Law.

62) Finally, the term, as interpreted by the State, would limit the ability of the Court to interpret and apply certain provisions of the Convention in all cases against Trinidad and Tobago before the Court, as it would permit the Tribunal to interpret and apply Convention rights only to the extent that such rights are protected in the State's Constitution.

63) The Commission considered that the State's position ignores the fact that it is the responsibility of the Court, not the State, to determine whether the domestic laws of the State, including its Constitution, are consistent with the rights protected by the Convention. It noted that the Inter-American Court has emphasized that the issue of jurisdiction in a particular case is one that only the Court, not States parties, can decide. This clearly extends to the interpretation of the terms included in declarations of acceptance made by various States parties under Article 62 of the Convention.

64) In the abovementioned circumstances, interpreting Article 62 of the American Convention as authorizing the terms of the State's acceptance would contravene Article 29(a) of the Convention because it would effectively permit the State to violate Articles 4(1), 5(1), and 5(2) of the same with respect to Mr. Hilaire. The State has interpreted its declaration in a manner that prohibits the Court from considering the specific aspects of the "mandatory death penalty".

65) The Commission also contended that the impugned term could be severed from the State's acceptance of the Court's compulsory jurisdiction, so that the State is considered to have accepted it absent the condition, "only to the extent that said recognition is compatible with the relevant sections of the Constitution of the Republic of Trinidad and Tobago".

66) The Convention protects the human rights of individuals subject to the jurisdiction of the States parties, so the State's "reservation" should be interpreted in a manner that strengthens rather than weakens this regime, and, as such, increases, not diminishes, the protection of human rights in the entire hemisphere.

67) Severing the impugned term from the State's declaration of acceptance, instead of annulling the declaration in toto, serves to guarantee Mr. Hilaire's fundamental human rights and

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those of individuals in similar situations who would not otherwise have effective domestic remedies of protection.

68) Trinidad and Tobago was the only State party at its moment of accession to have attached conditions of this nature to its acceptance of the Court's jurisdiction. In contrast, the majority of States have accepted the jurisdiction of the Court unconditionally. It is a principle of International Law and a "fundamental precept of the American Convention", that States cannot invoke their internal law as a justification for not complying with a treaty. Nonetheless, this is what the State purports to do with its interpretation of the impugned term.

69) The Inter-American Commission argued that the Court could follow the reasoning of the European Court of Human Rights (hereinafter "the European Court") in the case of Loizidou v. Turkey, which declared that ratione loci restrictions could be severed from the declaration of acceptance, in a manner that the State could be considered to have accepted the contentious jurisdiction of the Court absent the qualification "only to the extent to which that recognition is compatible with the relevant provisions of the Constitution of Trinidad and Tobago".

Oral arguments of the State

70) The State sustained in the public hearing held before the Court that Trinidad and Tobago had the intention of accepting, in a limited way, the jurisdiction of the Court, and never accepted nor had the intention of accepting its complete jurisdiction. This was the case because, in Trinidad and Tobago, any law that is contrary to a provision of the Constitution is invalid. Any inconsistency between the Constitution and the Convention would require an amendment of the State's Constitution, and only Parliament can alter the Constitution. The Executive, on behalf of Trinidad and Tobago, ratified the Convention, and for this reason included the "reservation" in its declaration of acceptance of the Court's jurisdiction.

71) The State also indicated that the Court only had jurisdiction if the provision in the Convention under which a violation is alleged is not inconsistent with the Constitution of Trinidad and Tobago, in other words, to the extent that it is not inconsistent with the meaning that the courts of the State have given to the relevant sections of the Constitution.

72) The State sustained that its "reservation" is in accordance with Article 62 of the American Convention because the latter authorizes the making of reservations in specific cases; and with Article 19 of the Vienna Convention because its "reservation" is compatible with the object and purpose of the Convention.

73) The State concluded that the requirements of compatibility with the object and purpose refer to the object and purpose of the Convention, and not of the Court; the recognition of the Court's jurisdiction is optional under the American Convention; the instant case merely addresses the the Court's jurisdiction, and not the withdrawal of jurisdiction or the denunciation of the Convention; it does not affect the supervisory jurisdiction of the Inter-American Commission; International Law permits reservations, and this is expressly recognized in paragraph 25 of the Advisory Opinion of the Court on The Effect of Reservations on the Entry

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into Force of the American Convention on Human Rights (OC-2/82); and, the "reservation" of the State does not deprive the Court of the authority to decide whether or not it has jurisdiction.

74) Finally, the State alleged that the "reservation" is clear, consistent with the object and purpose of the Convention, and was made at the moment of the acceptance; therefore, it forms a part of the terms of Trinidad and Tobago's acceptance of the Treaty. In the event that it is considered unclear or incompatible with the Convention, it is clear that the intention of the State was not to accept the jurisdiction of the Court unconditionally.

Oral arguments of the Commission

75) In the public hearing before the Court, the Commission presented various general arguments: first, it indicated that it is the Court that should determine its own jurisdiction; second, that in the determination of the nature its jurisdiction and of the meaning that should be given to any declaration, the Court is guided by the nature of the Convention as a human rights instrument, and strives to give practical effect to the object of the treaty; and, finally, that the Court has developed specific jurisprudence in relation to declarations that purport to restrict its jurisdiction.

76) The Commission also indicated that once the jurisdiction of the Court has been accepted, it cannot be terminated or modified by a unilateral act of the State. It added that the State, in its 1991 declaration, intended to recognize the jurisdiction of the Court in all matters relating to the interpretation of the Convention and did not purport to exclude this jurisdiction. It argued that, alternatively, any reservation purporting to limit the Court's jurisdiction to interpret the Convention by vague and ambiguous references to domestic laws is not permitted under the Convention or under general principles of International Law.

77) Finally, it indicated that where there has been recognition of the Court's jurisdiction subject to impermissible restrictions, these restrictions should be severed from the remainder of the instrument of acceptance, and the recognition should remain intact and effective, unless the State withdraws from the Convention system as a whole.

Considerations of the Court

78) The Court must settle the matter of the purported "reservation" with which the State of Trinidad and Tobago accompanied its acceptance of the contentious jurisdiction of the Inter-American Court. The Court, as with any court or tribunal, has the inherent authority to determine the scope of its own competence (compétence de la competence/Kompetenz-Kompetez).

79) The Court must give an interpretation to the declaration of the State, as a whole, that is in accordance with the canons and practice of International Law in general, and with International Human Rights Law specifically, and which awards the greatest degree of protection to the human beings under its guardianship.

80) The Court cannot abdicate this prerogative, as it is a duty that the American Convention imposes upon it, requiring it to exercise its functions in accordance with Article 62(3) thereof.

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That provision reads that "[t]he jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement".

81) As this Tribunal has indicated in its judgments on jurisdiction in the Cases of Constitutional Court and Ivcher Bronstein:

The jurisdiction of the Court cannot be contingent upon events extraneous to its own actions. The instruments consenting to the optional clause concerning recognition of the Court's binding jurisdiction (Article 62(1) of the Convention) presuppose that the States submitting them accept the Court's right to settle any controversy relative to its jurisdiction. An objection or any other action taken by the State for the purpose of somehow affecting the Court's jurisdiction has no consequence whatever, as the Court retains the compétence de la compétence, as it is master of its own jurisdiction [FN8].

[FN8] Constitutional Court Case. Competence. Judgment of September 24, 1999. Series C No. 55, para. 33 and Ivcher Bronstein Case. Competence. Judgment of September 24, 1999. Series C No. 54, para. 34.

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82) Interpreting the Convention in accordance with its object and purpose, the Court must act in a manner that preserves the integrity of the mechanism provided for in Article 62(1) of the Convention. It would be unacceptable to subordinate the said mechanism to restrictions that would render the system for the protection of human rights established in the Convention and, as a result, the Court's jurisdictional role, inoperative.

83) As this Court has indicated in the Cases of Constitutional Court and Ivcher Bronstein

[t]he States Parties to the Convention must guarantee compliance with its provisions and its effects (effet utile) within their own domestic laws. This principle applies not only to the substantive provisions of human right treaties (in other words, the clauses on the protected rights), but also to the procedural provisions, such as the one concerning recognition of the Tribunal's contentious jurisdiction. That clause, essential to the efficacy of the mechanism of international protection, must be interpreted and applied in such a way that the guarantee that it establishes is truly practical and effective, given the special nature of human rights treaties [...] and their collective enforcement [FN9].

[FN9] Cf. Constitutional Court Case. Competence. Supra note 8, para. 36 and Ivcher Bronstein Case. Competence. Supra note 8, para. 37.

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84) Article 31(1) of the 1969 Vienna Convention provides that

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[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

85) The Court's duty, at this stage, is to decide, as the present case requires, whether Trinidad and Tobago's "reservation" has the effect of excluding the Court's jurisdiction in the manner alleged by the State.

86) As previously noted, the purported "reservation" contains two parts. The first intends to limit the recognition of the Court's compulsory jurisdiction in the sense that said recognition is only valid to the extent that it is "consistent with the relevant sections" of the Constitution of Trinidad and Tobago. These expressions can lead to numerous interpretations. Nonetheless, it is clear to the Court that they cannot be given a scope that would impede this Tribunal's ability to judge whether the State had or had not violated a provision of the Convention. The second part of the purported restriction relates to the State's "recognition" of the Court's compulsory jurisdiction so that its judgments do not "infringe, create or abolish any existing rights or duties of any private citizen" (sic). Again, though the precise meaning of this condition is unclear, without a doubt it cannot be utilized with the purpose of suppressing the jurisdiction of the Court to hear and decide an application related to an alleged violation of the State's conventional obligations.

87) In this respect, paragraphs 1 and 2 of Article 62 of the American Convention establish:

1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies there to the other states of the Organization and to the Secretary of this Court.

88) The Court observes that the instrument of acceptance of the Court's compulsory jurisdiction on the part of Trinidad and Tobago is not consistent with the hypothesis stipulated in Article 62(2) of the American Convention. It is general in scope, which completely subordinates the application of the American Convention to the internal legislation of Trinidad and Tobago as decided by its courts. This implies that the instrument of acceptance is manifestly incompatible with the object and purpose of the Convention. As a result, the said article does not contain a provision that allows Trinidad and Tobago to formulate the "restriction" it made.

89) An interpretation of the American Convention done "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose" leads this Court to the view that a State party to the Convention can only release itself of its obligations under the Convention by following the provisions that the treaty itself stipulates [FN10].

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[FN10] Cf. Constitutional Court Case. Competence. Supra note 8, para. 39 and Ivcher Bronstein Case. Competence. Supra note 8, para. 40.

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90) Article 29(a) of the American Convention stipulates that no provision of the Convention shall be interpreted as "permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein". Consequently, it would be meaningless to suppose that a State which had freely decided to accept the compulsory jurisdiction of the Court had decided at the same time to restrict the exercise of its functions as foreseen in the Convention. On the contrary, the mere acceptance by the State leads to the overwhelming presumption that the State will subject itself to the compulsory jurisdiction of the Court.

91) The effect of the State's third allegation would be to limit its recognition of the Court's completely mandatory jurisdiction, with negative consequences for the exercise of the rights protected by the Convention.

92) The declaration formulated by the State of Trinidad and Tobago would allow it to decide in each specific case the extent of its own acceptance of the Court's compulsory jurisdiction to the detriment of this Tribunal's compulsory functions. In addition, it would give the State the discretional power to decide which matters the Court could hear, thus depriving the exercise of the Court's compulsory jurisdiction of all efficacy.

93) Moreover, accepting the said declaration in the manner proposed by the State would lead to a situation in which the Court would have the State's Constitution as its first point of reference, and the American Convention only as a subsidiary parameter, a situation which would cause a fragmentation of the international legal order for the protection of human rights, and which would render illusory the object and purpose of the Convention.

94) The American Convention and the other human rights treaties are inspired by a set of higher common values (centeredaroundtheprotection of the human being), are endowed with specific supervisory mechanisms, are applied as a collective guarantee, embody essentially objective obligations, and have a special character that sets them apart from other treaties. The latter govern mutual interests between and among the States parties and are applied by them, with all the juridical consequences that follow there from for the international and domestic systems [FN11].

[FN11] Cf. Constitutional Court Case. Competence. Supra note 8, para. 41 and Ivcher Bronstein Case. Competence. Supra note 8, para. 42.

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95) In this respect, in its Advisory Opinion on The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (OC-2/82), the Court found that

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[m]odern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction [FN12].

[FN12] The Effect of Reservations on the Entry into Force of the American Convention on Human Rights, Advisory Opinion OC-2/82. Supra note 6, para. 29.

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96) That finding is consistent with the case law of other international jurisdictional bodies [FN13].

[FN13] Cf. See International Court of Justice, Advisory Opinion, Reservations to the Convention on the Prevention and Punishment for the Crime of Genocide (1951); European Commission of Human Rights, Decision as to the Admissibility of Application No. 788/60, Austria vs. Italy case, Yearbook of the European Convention on Human Rights, The Hague, M. Nijhoff, 1961; Eur. Court HR, Ireland vs. United Kingdom case, Judgment of 18 January 1978, Series A No. 25; Eur. Court H.R., Soering Case, decision of 26 January 1989, Series A No. 161; Eur. Court of H.R., Case of Loizidou vs. Turkey (Preliminary Objections), judgment of 23 March 1995, Series A Nº 310.

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97) As this Court has stated in the cases of Constitutional Court and Ivcher Bronstein

[n]o analogy can be drawn between the State practice detailed under Article 36(2) of the Statute of the International Court of Justice and acceptance of the optional clause concerning recognition of the binding jurisdiction of this Court, given the particular nature and the object and purpose of the American Convention. The European Court of Human Rights ruled similarly in its judgment on preliminary objections in the Loizidou v. Turkey case (1995), in connection with optional recognition of the European Court's binding jurisdiction (Article 46 of the European Convention, before Protocol XI to the European Convention entered into force on 01.11.1998). The European Court held that the European Convention was a law-making treaty [FN14].

[FN14] Cf. Constitutional Court Case. Competence. Supra note 8, para. 46 and Ivcher Bronstein Case. Competence. Supra note 8, para. 47.

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98) For the foregoing reasons, the Court considers that Trinidad and Tobago cannot prevail in the limitation included in its instrument of acceptance of the optional clause of the mandatory

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jurisdiction of the Inter-American Court of Human Rights in virtue of what has been established in Article 62 of the American Convention, because this limitation is incompatible with the object and purpose of the Convention. Consequently, the Court considers that it must dismiss the second and third arguments in the preliminary objection submitted by the State insofar as they refer to the Court's jurisdiction.

VIII. OPERATIVE PARAGRAPHS

99) Now therefore,

THE COURT

DECIDES

Unanimously,

1. To dismiss the preliminary objection presented by the State in its totality.
2. To continue to examine and process the instant case.
3. To commission its President, at the appropriate time, to convene the State and the Inter-American Commission to a public hearing on the merits of the case, to be held at the seat of the Inter-American Court of Human Rights.
4. To notify the State and the Inter-American Commission on Human Rights of this judgment.

Judges Cançado Trindade, Salgado-Pesantes, and García-Ramírez informed the Court of their Individual Opinions, which are attached to this Judgment.

Done in Spanish and English, the Spanish version being the authentic, in San José, Costa Rica, on September 1, 2001.

Antônio A. Cançado Trindade
President

Máximo Pacheco-Gómez
Hernán Salgado-Pesantes
Alirio Abreu-Burelli
Sergio García-Ramírez
Carlos Vicente de Roux-Rengifo

Manuel E. Ventura-Robles
Secretary

So ordered,

Antônio A. Cançado Trindade
President

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Manuel E. Ventura-Robles
Secretary

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I vote in favour of the adoption by the Inter-American Court of Human Rights of the present Judgment on Preliminary Objections in the case of Hilaire versus Trinidad and Tobago, which, in my view, represents a significant contribution of the International Law of Human Rights to the evolution of a specific aspect of contemporary International Law, namely, that pertaining to the international compulsory jurisdiction (based on the acceptance of the optional clause of compulsory jurisdiction) of an international tribunal of human rights. Given the transcendental importance of this matter, I feel obliged to present, as the juridical foundation of my position on the matter, the thoughts that I allow myself to develop in this Separate Opinion, concerning the following points: first, the prior question of the compétence de la compétence (Kompetenz Kompetenz) of the Inter-American Court; second, the origin and the evolution of the institute of the optional clause of compulsory jurisdiction, and the examination of the international practice on the matter; third, an evaluation lex lata of the international compulsory jurisdiction; fourth, the legal effect of the precise formulation of the optional clause in Article 62 of the American Convention on Human Rights (numerus clausus); and fourth, my considerations de lege ferenda on the international compulsory jurisdiction in the framework of the American Convention.

I. The Prior Question: The Compétence de la Compétence of the Inter-American Court of Human Rights.

2. The starting-point of my personal reading of the meaning and extent of the present Judgment of the Inter-American Court in the case of Hilaire versus Trinidad and Tobago lies in the prior question of the inherent faculty of the Court to determine the extent of its own competence. In fact, the instruments of acceptance of the optional clause of compulsory jurisdiction of international tribunals presuppose the admission, on the part of the States which present them, of the competence of the international tribunal at issue to resolve any controversy pertaining to its own jurisdiction, - this being a basic principle of international procedural law [FN1]. That is a competence which is inherent to every international tribunal, which fulfils an imperative of juridical security, as the determination of the extent of its own jurisdiction cannot be in the hands of the States Parties [FN2].

[FN1] Inter-American Court of Human Rights (IACtHR), Advisory Opinion Consultiva n. 15, of 14.11.1997, on the Reports of the Inter-American Commission on Human Rights (1997), Series A, n. 15, Concurring Opinion of Judge A.A. Cançado Trindade, pp. 87 and 97-98, pars. 7 and 37.
[FN2] It is as guardian and master of its own jurisdiction (jurisdictio, jus dicere, the power to declare the Law) that, to the Inter-American Court, as judicial organ of supervision of the American Convention, is reserved the role of establishing the juridical bases for the construction of an international ordre public of observance and safeguard of human right, in the ambit of the application of the Convention. IACtHR, Resolution on Provisional Measures of Protection (of

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25.05.1999), case James et all versus Trinidad and Tobago, Concurring Opinion of Judge A.A. Cançado Trindade, pars. 7-8.

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3. A reservation or objection or any other act interposed by the State aiming at safeguarding to itself the last word in relation to any aspect of the competence of the Court is not only innocuous, but also invalid, as in any circumstances the Court retains the compétence de la compétence. This is what is inferred from the Judgments on Preliminary Objections which the Court has just adopted in the cases of Hilaire, Benjamin and Constantine, concerning Trinidad and Tobago, as well as the previous Judgments on Competence in the cases of the Constitucional Tribunal and Ivcher Bronstein (1999), concerning Peru. This important case-law of protection of the Inter-American Court has, thus, discarded an analogy with the permissive practice of the States under the optional clause of compulsory jurisdiction of the International Court of Justice (Article 36(2) of the Statute of this latter). May I pass on to the examination of this specific point in historical perspective, so as to disclose the meaning and extent of what has been decided by the Inter-American Court.

II. The Optional Clause of Compulsory Jurisdiction: From the Professed Ideal to a Distorted Practice.

4. The optional clauses of recognition of the contentious jurisdiction of the European Court (prior to Protocol n. 11) [FN3] and the Inter-American Court of Human Rights found inspiration in the model of the optional clause of compulsory jurisdiction of the ICJ, - a formula originally conceived more than 80 years ago. Despite the common origin, in search of the realization of the ideal of international justice, the rationale of the application of the optional clause has been interpreted in a fundamentally distinct way, on the one hand in inter-State litigation, and on the other hand in that of human rights. In the former, considerations of contractual equilibrium between the Parties, of reciprocity, in the light of the juridical equality of the sovereign States have prevailed to date; in the latter, there has been a primacy of considerations of ordre public, of the collective guarantee exercised by all the States Parties, of the accomplishment of a common goal, superior to the individual interests of each Contracting Party (cf. infra).

[FN3] Protocol n. 11 to the European Convention of Human Rights entered into force on 01.11.1998. On the original optional clause (Article 46) of the European Convention, cf. Council of Europe/Conseil de l'Europe, Collected Edition of the `Travaux Préparatoires' of the European Convention on Human Rights/Recueil des Travaux Préparatoires de la Convention Européenne des Droits de l'Homme, vol. IV, The Hague, Nijhoff, 1977, pp. 200-201 and 266-267; and vol. V, The Hague, Nijhoff, 1979, pp. 58-59.

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5. One may initially recall the legislative history of the provision of Article 36(2) of the Statute of the International Court of Justice (ICJ), which is essentially the same as the corresponding provision of the Statute of its predecessor, the old Permanent Court of International Justice (PCIJ). The aforementioned Article 36(2) establishes that

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"The States Parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
a) the interpretation of a treaty; b) any question of international law; c) the existence of any fact which, if established, would constitute a breach of an international obligation; d) the nature or extent of the reparation to be made for the breach of an international obligation".

Article 36(3) adds that "the declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time" [FN4].

[FN4] And Article 36(6) determines that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court".

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6. The origin of the provision quoted above is found in the travaux préparatoires of the original Statute of the PCIJ. This latter was drafted in 1920 by an Advisory Committee of Jurists (of 10 members) [FN5], appointed by the Council of the League of Nations, and which met at The Hague, in the months of June and July of 1920. On that occasion there were those who favoured the pure and simple recognition of the compulsory jurisdiction of the future PCIJ, to what the more powerful States were opposed, alleging that they had gradually to come to trust the international tribunal to be created, before conferring upon it compulsory jurisdiction tout court. In order to overcome the deadlock within the Committee of Jurists referred to, one of its members, the Brazilian jurist Raul Fernandes, proposed the ingenuous formula which was to become Article 36(2) of the Statute - the same as the one of the present Statute of the ICJ, - which came to be known as the "optional clause of the compulsory jurisdiction" [FN6]. The Statute, approved on 13.12.1920, entered into force on 01.09.1921 [FN7].

[FN5] Namely: Mr. Adatci (Japan), Altamira (Spain), Fernandes (Brazil), Baron Descamps (Belgium), Hagerup (Norway), De La Pradelle (France), Loder (The Netherlands), Lord Phillimore (Great Britain), Ricci Busatti (Italy) and Elihu Root (United States).
[FN6] Cf. R.P. Anand, Compulsory Jurisdiction of the International Court of Justice, New Delhi/Bombay, Asia Publ. House, 1961, pp. 19 and 34-36.
[FN7] For an account, cf., inter alia, J.C. Witenberg, L'organisation judiciaire, la procédure et la sentence internationales - Traité pratique, Paris, Pédone, 1937, pp. 22-23; L. Gross, "Compulsory Jurisdiction under the Optional Clause: History and Practice", The International Court of Justice at a Crossroads (ed. L.F. Damrosch), Dobbs Ferry/N.Y., ASIL/Transnational Publs., 1987, pp. 20-21.

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7. At that time, the decision that was taken constituted the initial step that, during the period of 1921-1940, contributed to attract the acceptance of the compulsory jurisdiction - under the optional clause - of the PCIJ by a total of 45 States [FN8]. This principle was firmly supported by the Latin-American States, and, in bearing it in mind, the formula of Raul Fernandes [FN9], incorporated into the Statute of the PCIJ, was acclaimed as a Latin-American contribution to the

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establishment of the international jurisdiction [FN10]. Such formula served its purpose in the following two decades.

[FN8] Cf. the account of a Judge of the old PCIJ, M.O. Hudson, International Tribunals - Past and Future, Washington, Carnegie Endowment for International Peace/Brookings Institution, 1944, pp. 76-78. - That total of 45 States represented, en reality, a high proportion, at that epoch, considering that, at the end of the thirties, 52 States were members of the League of Nations (of which the old PCIJ was not part, distinctly from the ICJ, which is the main judicial organ of the United Nations, and whose State forms an organic whole with the United Nations Charter itself).

[FN9] In his book of memories published in 1967, Raul Fernandes revealed that the Committee of Jurists of 1920 was faced with the challenge of establishing the basis of the jurisdiction of the PCIJ (as from the mutual consent among the States) and, at the same time, of safeguarding and reaffirming the principle of the juridical equality of the States; cf. R. Fernandes, Nonagésimo Aniversário - Conferências e Trabalhos Esparsos, vol. I, Rio de Janeiro, M.R.E., 1967, pp. 174-175.

[FN10] J.-M. Yepes, "La contribution de l'Amérique Latine au développement du Droit international public et privé", 32 Recueil des Cours de l'Académie de Droit International de La Haye (1930) p. 712; F.-J. Urrutia, "La Codification du Droit International en Amérique", 22 Recueil des Cours de l'Académie de Droit International de La Haye (1928) pp. 148-149; and cf. M. Bourquin, "Règles générales du droit de la paix", 35 Recueil des Cours de l'Académie de Droit International de La Haye (1931) pp. 195-196.

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8. At the San Francisco Conference of 1945, the possibility was contemplated to take a step forward, with an eventual automatic acceptance of the compulsory jurisdiction of the new ICJ; nevertheless, the great powers - in particular the United States and the Soviet Union - were opposed to this evolution, sustaining the retention, in the Statute of the new ICJ, of the same "optional clause of compulsory jurisdiction" of the Statute of 1920 of the predecessor PCIJ. The rapporteur of the Commission of Jurists entrusted with the study of the matter at the San Francisco Conference of 1945, the French jurist Jules Basdevant, pointed out that, although the majority of the members of the Commission favoured the automatic acceptance of the compulsory jurisdiction, there was no political will at the Conference (and nor in the Dumbarton Oaks proposals) to take this step forward [FN11].

[FN11] Cf. the account of R.P. Anand, op. cit. supra n. (6), pp. 38-46; and cf. also, on the issue, S. Rosenne, The Law and Practice of the International Court, vol. I, Leyden, Sijthoff, 1965, pp. 32-36; Ian Brownlie, Principles of Public International Law, 4th. ed., Oxford, Clarendon Press, 1995 (reprint), pp. 715-716; O.J. Lissitzyn, The International Court of Justice, N.Y., Carnegie Endowment for International Peace, 1951, pp. 61-64.

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9. Consequently, the same formulation of 1920, which corresponded to a conception of international law of the beginning of the XXth century, was maintained in the present Statute of the ICJ. Due to the intransigent position of the more powerful States, a unique opportunity was

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lost to overcome the lack of automatism of the international jurisdiction and to foster a greater development of the compulsory jurisdiction of the international tribunal [FN12]. It may be singled out that all this took place at the level of purely inter-State relations. The formula of the optional clause of compulsory jurisdiction (of the ICJ) which exists today, is nothing more than a scheme of the twenties, stratified in time [FN13], and which, rigorously speaking, no longer corresponds to the needs of the international contentieux not even of a purely inter-State dimension [FN14].

[FN12] As human unreasonableness seems to have no limits, the chapter of international law pertaining to the peaceful settlement of international disputes continued to suffer from the old ambivalence - a true vexata quaestio - which has always characterized it, also in our days, namely, the ineluctable tension between the general duty of peaceful settlement and the free choice by the States of the methods of settlement of the dispute.

[FN13] For expressions of pessimism as to the practice of States under that optional clause, at the end of the seventies, cf. J.G. Merrills, "The Optional Clause Today", 50 British Year Book of International Law (1979) pp. 90-91, 108, 113 and 116.

[FN14] In a recent article, a former President of the ICJ, after pointing out that "nowadays a very considerable part of international law directly affects individuals, corporations and legal entities other than States", and of recalling that, nevertheless, the Statute of the ICJ still sustains - according to a conception of international law proper of the twenties - that only the States can be parties in cases before the Court (Article 34(1)), admitted and regretted that this outdated position has insulated the Hague Court from the great corpus of contemporary international law. R.Y. Jennings, "The International Court of Justice after Fifty Years", 89 American Journal of International Law (1995) p. 504.

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10. Such is the case that, in 1997, for example, of the 185 member States of the United Nations, no more than 60 States were subject to the compulsory jurisdiction of the ICJ by acceptance of the optional clause of Article 36(2) of its Statute [FN15], - that is, less than a third of the international community of our days. And several of the States which have utilized it, have made a distorted use of it, denaturalizing it, in introducing restrictions which militate against its rationale and which deprive it of all efficacy. In reality, almost two thirds of the declarations of acceptance of the aforementioned clause have been accompanied by limitations and restrictions which have rendered them "practically meaningless" [FN16].

[FN15] International Court of Justice, Yearbook 1996-1997, vol. 51, The Hague, ICJ, 1997, p. 84, and cf. pp. 84-125.

[FN16] G. Weissberg, "The Role of the International Court of Justice in the United Nations System: The First Quarter Century", The Future of the International Court of Justice (ed. L. Gross), vol. I, Dobbs Ferry N.Y., Oceana Publs., 1976, p. 163; and, on the feeling of frustration that this generated, cf. ibid., pp. 186-190. Cf. also Report on the Connally Amendment - Views of Law School Deans, Law School Professors, International Law Professors (compiled under the auspices of the Committee for Effective Use of the International Court by Repealing the Self-Judging Reservation), New York, [1961], pp. 1-154.

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11. One may, thus, seriously question whether the optional clause keeps on serving the same purpose which inspired it at the epoch of the PCIJ [FN17]. The rate of its acceptance in the era of the ICJ is proportionally inferior to that of the epoch of its predecessor, the PCIJ. Furthermore, throughout the years, the possibility opened by the optional clause of acceptance of the jurisdiction of the international tribunal became, in fact, object of excesses on the part of some States, which only accepted the compulsory jurisdiction of the ICJ in their own terms, with all kinds of limitations [FN18]. Thus, it is not at all surprising that, already by the mid-fifties, one began to speak openly of a decline of the optional clause [FN19].

[FN17] Cf. statistic data in G. Weissberg, op. cit. supra n. (16), pp. 160-161; however, one ought to recall the clauses compromissoires pertaining to the contentious jurisdiction of the ICJ, which, in the mid-seventies, appeared in about 180 treaties and conventions (more than two thirds of which of a bilateral character, and concerning more than 50 States - ibid., p. 164).
[FN18] Some of them gave the impression that they thus accepted that aforementioned optional clause in order to sue other States before the ICJ, trying, however, to avoid themselves to be sued by other States; J. Soubeyrol, "Validité dans le temps de la déclaration d'acceptation de la juridiction obligatoire", 5 Annuaire français de Droit international (1959) pp. 232-257, esp. p. 233.
[FN19] C.H.M. Waldock, "Decline of the Optional Clause", 32 British Year Book of International Law (1955-1956) pp. 244-287. And, on the origins of this decline, cf. the Dissenting Opinion of Judge Guerrero in the Norwegian Loans case (Judgment of 06.07.1857), ICJ Reports (1957) pp. 69-70.

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12. Those excesses occurred precisely because, in elaborating the Statute of the new ICJ, one failed to follow the evolution of the international community. One abandoned the very basis of the compulsory jurisdiction of the ICJ to a voluntarist conception of international law, which prevailed at the beginning of the last century, but subsequently disauthorized by its harmful consequences to the conduction of international relations, - such as vehemently warned by the more authoritative contemporary international juridical doctrine. There can be no doubt whatsoever that the distorted and incongruous practice, developed under Article 36(2) of the Statute of the ICJ, definitively does not serve as an example or model to be followed by the States Parties to treaties of protection of the rights of the human being such as the American Convention on Human Rights, in relation to the extent of the jurisdictional basis of the work of the Inter-American Court of Human Rights.

III. The International Compulsory Jurisdiction: Reflections Lex Lata.

13. Contemporary international law has gradually evolved, putting limits to the manifestations of a State voluntarism which revealed itself as belonging to another era [FN20]. The methodology of interpretation of human rights treaties [FN21], developed as from the rules of interpretation set forth in international law (such as those formulated in Articles 31-33 of the two Vienna Conventions on the Law of Treaties, of 1969 and 1986), comprise not only the

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substantive norms (on the protected rights) but also the clauses that regulate the mechanisms of international protection.

[FN20] When this outlook still prevailed to some extent, in a classic book published in 1934, Georges Scelle, questioning it, pointed out that the self-attribution of discretionary competence to the rulers, and the exercise of functions according to the criteria of the power-holders themselves, were characteristics of a not much evolved, imperfect, and still almost anarchical international society; G. Scelle, Précis de droit des gens - Principes et systématique, part II, Paris, Rec. Sirey, 1934 (reed. 1984), pp. 547-548. And cf., earlier on, to the same effect, L. Duguit, L'État, le Droit objectif et la loi positive, vol. I, Paris, A. Fontemoing Ed., 1901, pp. 122-131 and 614.

[FN21] As can be inferred from the vast international case-law in this respect, analysed in detail in: A.A. Cançado Trindade, El Derecho Internacional de los Derechos Humanos en el Siglo XXI, Santiago/México/Buenos Aires/Barcelona, Editorial Jurídica de Chile, 2001, pp. 15-58.

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14. The Inter-American Court of Human Rights has the duty to preserve the integrity of the regional conventional system of protection of human rights as a whole. It would be inadmissible to subordinate the operation of the conventional mechanism of protection to restrictions not expressly authorized by the American Convention, interposed by the States Parties in their instruments of acceptance of the optional clause of compulsory jurisdiction of the Inter-American Court (Article 62 of the American Convention). This would not only immediately affect the efficacy of the operation of the conventional mechanism of protection, but, furthermore, it would fatally impede its possibilities of future development.

15. By virtue of the principle ut res magis valeat quam pereat, which corresponds to the so-called effet utile (sometimes called principle of effectiveness), widely supported by case-law, the States Parties to human rights treaties ought to secure to the conventional provisions the proper effects at the level of their respective domestic legal orders. Such principle applies not only in relation to the substantive norms of human rights treaties (that is, those which provide for the protected rights), but also in relation to the procedural norms, in particular those relating to the right of individual petition and to the acceptance of the contentious jurisdiction of the international judicial organ of protection [FN22]. Such conventional norms, essential to the efficacy of the system of international protection, ought to be interpreted and applied in such a way as to render their safeguards truly practical and effective, bearing in mind the special character of the human rights treaties and their collective implementation.

[FN22] Cf., to this effect, the decision of the old European Commission of Human Rights (EComHR) in the case Chrysostomos et alii versus Turkey (1991), in EComHR, Decisions and Reports, vol. 68, Strasbourg, C.E., [1991], pp. 216-253; and cf., earlier on, the obiter dicta of the Commission, to the same effect, in its decisions i the Belgian Linguistic Cases (1966-1967) and in the cases Kjeldsen, Busk Madsen and Pedersen versus Denmark (1976).

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16. The European Court of Human Rights had the occasion to pronounce in this respect. Thus, in its Judgment on Preliminary Objections (of 23.03.1995) in the case of Loizidou versus Turkey, it warned that, in the light of the letter and the spirit of the European Convention the possibility cannot be inferred of restrictions to the optional clause relating to the recognition of the contentious jurisdiction of the European Court [FN23], by analogy with the permissive State practice under Article 36 of the Statute of the ICJ; under the European Convention, a practice of the States Parties was formed precisely a contrario sensu, accepting such clause without restrictions [FN24].

[FN23] Article 46 of the European Convention, prior to the entry into force, on 01.11.1998, of Protocol n. 11 to the European Convention.

[FN24] To that it added, moreover, the fundamentally distinct context in which international tribunals operate, the ICJ being "a free-standing international tribunal which has no links to a standard-setting treaty such as the Convention"; cf. European Court of Human Rights (ECtHR), Case of Loizidou versus Turkey (Preliminary Objections), Strasbourg, C.E., Judgment of 23.03.1995, p. 25, par. 82, and cf. p. 22, par. 68. On the prevalence of the conventional obligations of the States Parties, cf. also the Court's obiter dicta in its previous decision anterior, in the case Belilos versus Switzerland (1988). - The Hague Court, in its turn, in its Judgment of 04.12.1998 in the Fisheries Jurisdiction case (Spain versus Canada), yielded to the voluntarist subjectivism of the contending States (cf. ICJ Reports (1998) pp. 438-468), the antithesis of the very notion of international compulsory jurisdiction, - provoking Dissenting Opinions of five of its Judges, to whom the ICJ put at risk the future itself of the mechanism of the optional clause under Article 36(2) of its Statute, paving the way to an eventual desertion from it (cf. ibid., pp. 496-515, 516-552, 553-569, 570-581 and 582-738, respectively). - On more than one occasion the undue emphasis on the consent of States led the ICJ to incongruous decisions, as its Judgment of 1995 in the case of East Timor; cf. criticisms in, e.g., J. Dugard, "1966 and All That: the South West African Judgment Revisited in the East Timor Case", 8 African Journal of International and Comparative Law (1996) pp. 549-563; A.A. Cançado Trindade, "O Caso do Timor-Leste (1999): O Direito de Autodeterminação do Povo Timorense", 1 Revista de Derecho de la Universidad Católica del Uruguay (2000) pp. 68-75. As well pointed out by Shabtai Rosenne, the international judicial procedure of the Hague Court unfortunately continues to follow nowadays the model of bilateralism in international litigation, proper of the XIXth century; S. Rosenne, "Decolonisation in the International Court of Justice", 8 African Journal of International and Comparative Law (1996) p. 576.

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17. In the domain of the international protection of human rights, there are no "implicit" limitations to the exercise of the protected rights; and the limitations set forth in the treaties of protection ought to be restrictively interpreted. The optional clause of the compulsory jurisdiction of the international tribunals of human rights makes no exception to that: it does not admit limitations other than those expressly contained in the human rights treaties at issue, and, given its capital importance, it could not be at the mercy of limitations not foreseen therein and invoked by the States Parties for reasons or vicissitudes of domestic order [FN25].

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[FN25] Cf. Inter-American Court of Human Rights, case of Castillo Petruzzi and Others versus Peru (Preliminary Objections), Judgment of 04.09.1998, Series C, n. 41, Concurring Opinion of Judge A.A. Cançado Trindade, pars. 36 and 38.

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18. In their classic studies on the basis of the international jurisdiction, two distinguished scholars, C.W. Jenks and C.H.M. Waldock, warned, already in the decades of the fifties and the sixties, as to the grave problem presented by the insertion, by the States, of all kinds of limitations and restrictions in their instruments of acceptance of the optional clause of compulsory jurisdiction (of the ICJ) [FN26]. Although those limitations had never been foreseen in the formulation of the optional clause, the States, in the face of such legal vacuum, have felt, nevertheless, "free" to insert them. Such excesses have undermined, in a contradictory way, the basis itself of the system of international compulsory jurisdiction. As well pointed out in a classic study on the matter, the instruments of acceptance of the contentious jurisdiction of an international tribunal should be undertaken "on terms which ensure a reasonable measure of stability in the acceptance of the jurisdiction of the Court" [FN27], - that is, in the terms expressly provided for in the international treaty itself (cf. infra).

[FN26] Examples of such excesses have been the objetions of domestic jurisdiction (domestic jurisdiction/compétence nationale exclusive) to the States (criticized in my essay "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations", 25 International and Comparative Law Quarterly (1976) pp. 744-751), the foreseeing of withdrawal at any moment of the acceptance of the optional clause, the foreseeing of subsequent modification of the terms of acceptance of the clause, and the foreseeing of insertion of new reservations in the future; cf. C.W. Jenks, The Prospects of International Adjudication, London, Stevens, 1964, p. 108, and cf. pp. 113, 118 and 760-761; C.H.M. Waldock, "Decline of the Optional Clause", op. cit. supra n. (19), p. 270.
[FN27] C.W. Jenks, op. cit. supra n. (26), pp. 760-761.

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19. The clause pertaining to the compulsory jurisdiction of the international tribunals of human rights constitutes, in my view, a fundamental clause (cláusula pétrea) of the international protection of the human being, which does not admit any restrictions other than those foreseen in the human rights treaties. This has been so established by the Inter-American Court in its Judgments on Competence in the cases of the Constitutional Tribunal and Ivcher Bronstein:

- "Recognition of the Court's compulsory jurisdiction is a fundamental clause (cláusula pétrea) to which there can be no limitations except those expressly provided for in Article 62(1) of the American Convention. Because the clause is so fundamental to the operation of the Convention's system of protection, it cannot be at the mercy of limitations not already stipulated but invoked by States Parties for reasons of domestic order" [FN28].

The permissiveness of the insertion of limitations, not foreseen in the human rights treaties, in an instrument of acceptance of an optional clause of compulsory jurisdiction [FN29], represents a

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regrettable historical deformation of the original conception of such clause, in my view unacceptable in the field of the international protection of the rights of the human person.

[FN28] IACtHR, case of the Constitutional Tribunal (Competence), Judgment of 24.09.1999, Series C, n. 55, p. 44, par. 35; CtIADH, case of Ivcher Bronstein (Competence), Judgment of 24.09.1999, Series C, n. 54, p. 39, par. 36.

[FN29] Exemplified by State practice under Article 36(2) of the ICJ Statute (supra).

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20. It is the duty of an international tribunal of human rights to look after the due application of the human rights treaty at issue in the framework of the domestic law of each State Party, so as to secure the effective protection in the ambit of this latter of the human rights set forth in such treaty [FN30]. Any understanding to the contrary would deprive the international tribunal of human rights of the exercise of the function and of the duty of protection inherent to its jurisdiction, failing to ensure that the human rights treaty has the appropriate effects (effet utile) in the domestic law of each State Party. It is for this reason that I sustain that the optional clause of compulsory jurisdiction of the international tribunal of human rights constitutes a fundamental clause (a cláusula pétrea) of the international protection of the human being, which does not admit any restrictions other than those expressly provided for in the human rights treaty at issue itself.

[FN30] If it were not so, there would be no juridical security in international litigation, with harmful consequences above all in the domain of the international protection of human rights. The intended analogy between the classic inter-State contentieux and the international contentieux of human rights - fundamentally distinct domains - is manifestly inadequate, as in this latter the considerations of a superior order (international ordre public) have primacy over State voluntarism. The States cannot count on the same latitude of discretionality which they have reserved to themselves in the traditional context of the purely inter-State litigation.

IV. The Precise Formulation of the Optional Clause of Article 62 of the American Convention on Human Rights (Numerus Clausus).

21. The present case of Hilaire versus Trinidad and Tobago leads one to a more detailed examination of this specific point. Paragraphs 1 and 2 of Article 62 of the American Convention on Human Rights provide that

"A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.

Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the

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Organization, who shall transmit copies thereof to the other member States of the Organization and to the Secretary of the Court" [FN31].

[FN31] Paragraph 3 of Article 62 of the Convention adds that: -"The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement".

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22. In fact, the modalities of acceptance, by a State Party to the Convention, of the contentious jurisdiction of the Inter-American Court, are expressly stipulated in the aforementioned provisions; the formulation of the optional clause of compulsory jurisdiction of the Inter-American Court, in Article 62 of the American Convention, is not simply illustrative, but clearly precise. No State is obliged to accept an optional clause, as its own name indicates. Thus, a "reservation" to the optional clause of compulsory jurisdiction of the Inter-American Court of Article 62 of the American Convention would amount simply to the non-acceptance of that clause, what is foreseen in the Convention. But if a State Party decides to accept it, it ought to do so in the terms expressly stipulated in such clause.

23. According to Article 62(2) of the Convention, the acceptance, by a State Party, of the contentious jurisdiction of the Inter-American Court, can be made in four modalities, namely: a) unconditionally; b) on the condition of reciprocity; c) for a specified period; and d) for specific cases. Those, and only those, are the modalities of acceptance of the contentious jurisdiction of the Inter-American Court foreseen and authorized by Article 62(2) of the Convention, which does not authorize the States Parties to interpose any other conditions or restrictions (numerus clausus).

24. In my understanding, in this matter, it cannot be sustained that what is not prohibited, is permitted. This posture would amount to the traditional - and surpassed - attitude of the laisser-faire, laisser-passer, proper to an international legal order fragmented by the voluntarist State subjectivism, which in the history of Law has ineluctably favoured the more powerful ones. Ubi societas, ibi jus... At this beginning of the XXIst century, in an international legal order wherein one seeks to affirm superior common values, among considerations of international ordre public, as in the domain of the International Law of Human Rights, it is precisely the opposite logic which ought to apply: what is not permitted, is prohibited.

25. If we are really prepared to extract the lessons of the evolution of International Law in a turbulent world throughout the XXth century, if we intend to keep in mind the endeavours of past generations to construct a more equitable and just world, if we believe that the same norms, principles and criteria ought to apply to all States (juridically equal despite factual disparities), and if we are really prepared to advance the ideals of the true international jurists who preceded us, - we cannot abide by an international practice which has been subservient to State voluntarism, which has betrayed the spirit and purpose of the optional clause of compulsory jurisdiction, - to the point of entirely denaturalizing it, - and which has led to the perpetuation of

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a world fragmented into State units which regard themselves as final arbiters of the extent of the contracted international obligations, at the same time that they do not seem truly to believe in what they have accepted: the international justice.

26. Not every practice consubstantiates into custom so as to conform general international law, as a given practice may not be in conformity with Law (ex injuria jus non oritur). Thus, it is not the function of the jurist simply to take note of the practice of States, but rather to say what the Law is. Since the classic work of H. Grotius in the XVIIth century, there is a whole trend of international law thinking which conceives international law as a legal order endowed with an intrinsic value of its own (and thereby superior to a simply "voluntary" law), - as well recalled by H. Accioly [FN32], - as it derives its authority from certain principles of sound reason (est dictatum rectae rationis).

[FN32] H. Accioly, Tratado de Derecho Internacional Público, volume I, Rio de Janeiro, Imprensa Nacional, 1945, p. 5.

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27. In the present Judgment in the case of Hilaire versus Trinidad and Tobago, the Court has rightly pondered that, if restrictions interposed in the instrument of acceptance of its contentious jurisdiction were accepted, in the terms proposed by the respondent State in the cas d'espèce, not expressly foreseen in Article 62 of the American Convention, this

"would lead to a situation in which the Court would have as first parameter of reference the Constitution of the State and only subsidiarily the American Convention, situation which would bring about a fragmentation of the international legal order of protection of human rights and would render illusory the object and purpose of the American Convention" (par. 93).

28. And the Court has, furthermore, in the present Judgment, correctly observed that

" (...) The instrument of acceptance, on the part of Trinidad and Tobago, of the contentious jurisdiction of the Tribunal, does not fit into the hypotheses foreseen in Article 62(2) of the Convention. It has a general scope, which ends up by subordinating the application of the American Convention to the domestic law of Trinidad and Tobago in a total way and pursuant to what its national tribunals decide. All this implies that this instrument of acceptance is manifestly incompatible with the object and purpose of the Convention" (par. 88).

29. This conclusion of the Court finds clear support in the precise, and quite clear, formulation of Article 62(2) of the American Convention. Bearing in mind the three component elements of the general rule of interpretation bona fides of treaties - text in the current meaning, context, and object and purpose of the treaty - set forth in Article 31(1) of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986), it can be initially inferred that the text, in the current meaning (numerus clausus), of Article 62(2) of the American Convention, fully corroborates the decision taken by the Court in the present Judgment.

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30. In the theory and practice of international law one has sought to distinguish a "reservation" from an "interpretative declaration" [FN33], in conformity with the legal effects which are intended to be attributed to one and the other [FN34]: thus, if one intends to clarify the meaning and scope of a given conventional provision, it is an interpretative declaration, while if one intends to modify a given conventional provision or to exclude its application, it is a reservation. In practice, it is not always easy to draw the dividing line between one and the other [FN35], as illustrated by the controversy which has surrounded, in the last decades, the question of the legal effects of declarations inserted into the instruments of acceptance of the optional clause of compulsory jurisdiction, given the sui generis character of such clause.

[FN33] Cf. U.N./International Law Commission, "Draft Guidelines on Reservations to Treaties", in: U.N., Report of the International Law Commission on the Work of Its 51st Session (May/July 1999), G.A.O.R. - Suppl. n. 10 (A/54/10/Corr.1-2), 1999, pp. 18-24, item 1.3; and in: Report of the International Law Commission on the Work of Its 52nd Session (May/June and July/August 2000), G.A.O.R. - Suppl. n. 10 (A/55/10), 2000, pp. 229-272, item 1.7; and cf. also, more recently, A. Pellet (special rapporteur), Sixth Report on Reservations to Treaties (Addendum), U.N./I.L.C. doc. A/CN.4/518/Add.1, of 21.05.2001, pp. 3-31, pars. 38-133.

[FN34] For an examination of the question, cf., e.g., F. Horn, Reservations and Interpretative Declarations to Multilateral Treaties, The Hague/Uppsala, T.M.C. Asser Institut/Swedish Institute of International Law, 1988, pp. 98-110 and 229-337, and cf. pp. 184-222; D.M. McRae, "The Legal Effect of Interpretative Declarations", 49 British Year Book of International Law (1978) pp. 155-173.

[FN35] Itg may be recalled that in the well-known case of Belilos versus Switzerland (1988), the European Court of Human Rights considered that a declaration interposed by Switzerland amounted to a reservation - of a general character - to the European Convention on Human Rights, incompatible with the object and purpose of this latter. European Court of Human Rights, Belilos versus Switzerland case, Judgment of 29.04.1988, Series A, n. 132, pp. 20-28, pars. 38-60.

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31. In any way, in considering the meaning and scope of a declaration of acceptance of an optional clause of compulsory jurisdiction, - such as the one presented by Trinidad and Tobago under Article 62 of the American Convention and interposed as preliminary objection in the present case Hilaire, - one has to bear in mind the nature of the treaty in which that clause appears. This corresponds to the "context", precisely the second component element of the general rule of interpretation of treaties set forth in Article 31 of the two Vienna Conventions on the Law of Treaties. In the present Judgment, the Court has duly done so, in stressing the special character of the human rights treaties (pars. 94-97).

32. Likewise, the Court has kept constantly in mind the third component element of that general rule of interpretation, namely, the "object and purpose" of the treaty at issue, the American Convention on Human Rights (pars. 82-83 and 88). Thus, the understanding advanced in the cas d'espèce by the respondent State of the scope of its own acceptance of the optional clause of compulsory jurisdiction of the Inter-American Court, does not resist the proper

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interpretation of Article 62 of the American Convention, developed in the light of the canons of interpretation of the law of treaties.

33. As I saw it fit to point out in my Separate Opinion in the case Blake versus Guatemala (Reparations, 1999),

"(...) In contracting conventional obligations of protection, it is not reasonable, on the part of the State, to assume a discretion so unduly broad and conditioning of the extent itself of such obligations, which would militate against the integrity of the treaty.

The principles and methods of interpretation of human rights treaties, developed in the case-law of conventional organs of protection, can much assist and foster this necessary evolution. Thus, in so far as human rights treaties are concerned, one is to bear always in mind the objective character of the obligations enshrined therein, the autonomous meaning (in relation to the domestic law of the States) of the terms of such treaties, the collective guarantee underlying them, the wide scope of the obligations of protection and the restrictive interpretation of permissible restrictions. These elements converge in sustaining the integrity of human rights treaties, in seeking the fulfillment of their object and purpose, and, accordingly, in establishing limits to State voluntarism. From all this one can detect a new vision of the relations between public power and the human being, which is summed up, ultimately, in the recognition that the State exists for the human being, and not vice-versa.

The juridical concepts and categories, inasmuch as they enshrine values, are a product of their time, and, as such, are in constant evolution. The protection of the human being in any circumstances, against all the manifestations of arbitrary power, corresponds to the new ethos of our times, which is to be reflected in the postulates of Public International Law. (...)" [FN36].

[FN36] IACtHR, case Blake versus Guatemala (Reparations), Judgment of 22.01.1999, Series C, n. 48, Separate Opinion of Judge A.A. Cançado Trindade, pp. 114-115, pars. 32-34.

V. The International Compulsory Jurisdiction: Reflections De Lege Ferenda.

34. I could not conclude this Separate Opinion in the present case of Hilaire versus Trinidad and Tobago without a last line of reflections, de lege ferenda, on the international compulsory jurisdiction. The "judicial decisions", referred to in the enumeration of the formal sources and evidences of International Law, set forth in Article 38(1)(d) of the Statute of the ICJ [FN37], certainly are not limited to the case-law of the ICJ itself [FN38]. They likewise comprise, nowadays, the judicial decisions of the international tribunals (Inter-American and European Courts) of human rights, of the ad hoc International Criminal Tribunals (for ex-Yugoslavia and for Rwanda), of the International Tribunal for the Law of the Sea, of other international and arbitral tribunals, as well as of national tribunals in matters of international law [FN39]. Throughout the last years the old ideal of international justice has been revitalized and has gained ground, with the considerable expansion of the international judicial function, reflected in the creation of new international tribunals; the work of these latter has been enriching contemporary international case-law, contributing to assert the aptitude of International Law to regulate adequately the juridical relations in distinct domains of human activity.

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[FN37] As "subsidiary means for the determination of rules of law".

[FN38] As this latter itself has acknowledged, e.g., in its Judgment of 18.11.1960 in the case of the Arbitral Award of the King of Spain of 1906 (Honduras versus Nicaragua), ICJ Reports (1960) pp. 204-217.

[FN39] I. Brownlie, Principles of Public International Law, 4th. ed., Oxford, Clarendon Press, 1990, pp. 19-24; A.A. Cançado Trindade, Princípios do Direito Internacional Contemporâneo, Brasília, Editora Universidade de Brasília, 1981, pp. 19-20; R.A. Falk, The Role of Domestic Courts in the International Legal Order, Syracuse University Press, 1964, pp. 21-52 and 170; J.A. Barberis, "Les arrêts des tribunaux nationaux et la formation du droit international coutumier", 46 Revue de droit international de sciences diplomatiques et politiques (1968) pp. 247-253; F. Morgenstern, "Judicial Practice and the Supremacy of International Law", 27 British Year Book of International Law (1950) p. 90.

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35. In this sense, in my aforementioned Separate Opinion in the case of Blake versus Guatemala, in warning as to the necessity to establish the juridical bases of a minimally institutionalized international community, I pointed out that

"(...) With the evolution of the International Law of Human Rights, it is Public International Law itself which is justified and legitimized, in affirming juridical principles, concepts and categories proper to the present domain of protection, based on premises fundamentally distinct from those which have guided the application of its postulates at the level of purely inter-State relations.

(...) The norms of the law of treaties (...) can greatly enrich with the impact of the International Law of Human Rights, and develop their aptitude to regulate adequately the legal relations at inter-State as well as intra-State levels, under the respective treaties of protection. (...)" [FN40].

[FN40] IACtHR, case Blake versus Guatemala (Reparations), Judgment of 22.01.1999, Series C, n. 48, Separate Opinion of Judge A.A. Cançado Trindade, pp. 110 and 112, pars. 23 and 27-28.

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36. The Inter-American Court of Human Rights, by means of the Judgments on Preliminary Objections which it has just adopted in the cases of Hilaire, Benjamin, and Constantine, as well as its earlier Judgments on Competence in the cases of the Constitutional Tribunal and Ivcher Bronstein, has safeguarded the integrity of the American Convention on Human Rights, has been master of its own jurisdiction and has acted in accordance with the high responsibilities accorded to it by the American Convention. The same can be said of the European Court of Human Rights, by means of its Judgment on Preliminary Objections in the case Loizidou versus Turkey, in so far as the European Convention on Human Rights is concerned. Thus, the two existing international tribunals of human rights to date, in their converging case-law on the question, have refused to yield to undue manifestations of State voluntarism, have fully performed the functions attributed to them by them by the human rights treaties which created them, and have given a

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worthy contribution to the strengthening of the international jurisdiction and to the realization of the old ideal of international justice.

37. There is pressing need for the States to be convinced that the international legal order is, more than voluntary, necessary. In the ambit of general international law, in my understanding, the time has come to advance decidedly in the improvement of the judicial settlement of international disputes. In the last 80 years, the advances in this field could have been much greater if State practice would not have betrayed the purpose which inspired the creation of the mechanism of the optional clause of compulsory jurisdiction (of the PCIJ and the ICJ), that is, the submission of political interests to Law by means of the development in the realization of justice at international level.

38. The time has come to overcome definitively the regrettable lack of automatism of the international jurisdiction. With the distortions of their practice on the matter, the States face today a dilemma which should have been overcome a long time ago: either they return to the voluntarist conception of international law, abandoning for good the hope in the primacy of Law over political interests [FN41], or they retake and achieve with determination the ideal of construction of an international community with greater cohesion and institutionalization in the light of Law and in search of Justice, moving resolutely from jus dispositivum to jus cogens [FN42].

[FN41] In fact, more advances have not been achieved in the judicial settlement of international disputes precisely because States have shown themselves reluctant with regard to it, paying more attention to political factors; Ch. de Visscher, Aspects récents du droit procédural de la Cour Internationale de Justice, Paris, Pédone, 1966, p. 204; and cf. also L. Delbez, Les principes généraux du contentieux international, Paris, LGDJ, 1962, pp. 68, 74 and 76-77. - More recently, a former President of the ICJ criticized as unsatisfactory the bad use made by the States of the mechanism of the optional clause (of the compulsory jurisdiction of the ICJ) of the Statute of the Court; in his words, the States may consider that "there is some political advantage in remaining outside a system which permits States to join more or less on their own terms at an opportune moment". R.Y. Jennings, "The International Court of Justice after Fifty Years", op. cit. supra n. (14), p. 495. Cf. also the criticisms of another former President of the ICJ: E. Jiménez de Aréchaga, "International Law in the Past Third of a Century", 159 Recueil des Cours de l'Académie de Droit International de La Haye (1978) pp. 154-155; and cf. also the criticisms in: H.W. Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice", 93 Recueil des Cours de l'Académie de Droit International de La Haye (1958) p. 273. And cf. also: P. Guggenheim, Traité de Droit international public, vol. I, Genève, Georg, 1967, p. 279; and, in general, J. Sicault, "Du caractère obligatoire des engagements unilatéraux en Droit international public", 83 Revue générale de Droit international public (1979) pp. 633-688. - Such distorted State practice cannot, definitively, serve as model to the operation of the judicial organs created by human rightgs treaties.

[FN42] And always bearing in mind that the protection of fundamental rights places us precisely in the domain of jus cogens. In this respect, in an intervention in the debates of 12.03.1986 of the Vienna Conference on the Law of Treaties between States and International Organizations or between International Organizations, I saw it fit to warn as to the manifest incompatibility with

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the concept of jus cogens of the voluntarist conception of international law, which is not able even to explain the formation of the rules of general international law; cf. U.N., United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 1986) - Official Records, volume I, N.Y., U.N., 1995, pp. 187-188 (intervention of A.A. Cançado Trindade).

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39. The time has come to consider, in particular, in a future Protocol of amendments to the procedural part of the American Convention on Human Rights, aiming at strengthening its mechanism of protection, the possibility of an amendment to Article 62 of the American Convention, in order to render such clause also mandatory, in conformity with its character of fundamental clause (cláusula pétrea), thus establishing the automatism [FN43] of the jurisdiction of the Inter-American Court of Human Rights [FN44]. There is pressing need for the old ideal of the permanent international compulsory jurisdiction [FN45] to become reality also in the American continent, in the present domain of protection, with the necessary adjustments in order to face its reality of human rights and to fulfill the growing needs of effective protection of the human being.

[FN43] Which is already a reality, as to the European Court of Human Rights, as from the entry into force, on 01.11.1998, of Protocol n. 11 to the European Convention of Human Rights. Another example of compulsory jurisdiction is that of the Court of Justice of the European Communities; cf. H. Steiger, "Plaidoyer pour une juridiction internationale obligatoire", Theory of International Law at the Threshold of the 21st Century - Essays in Honour of K. Skubiszewski (ed. J. Makarczyk), The Hague, Kluwer, 1996, pp. 821-822 and 832.

[FN44] With the necessary amendment, - by means of a Protocol, - to this effect, of Article 62 of the American Convention, putting an end to the restrictions therein foreseen and expressly discarding the possibility of any other restrictions, and also putting and end to reciprocity and the optional character of the acceptance of the contentious jurisdiction of the Court, which would become compulsory to all the States Parties.

[FN45] In a monograph published in 1924, four years after the adoption of the Statute of the old PCIJ, Nicolas Politis, in recalling the historical evolution from private justice to public justice, advocated likewise for the evolution, at international level, from optional justice to compulsory justice; cf. N. Politis, La justice internationale, Paris, Libr. Hachette, 1924, pp. 7-255, esp. pp. 193-194 and 249-250.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

SEPARATE CONCURRING OPINION OF JUDGE HERNÁN SALGADO PESANTES IN THE JUDGMENTS ON PRELIMINARY OBJECTIONS IN THE HILAIRE, CONSTANTINE ET AL. AND BENJAMIN ET AL. CASES

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Although I am in basic agreement with the judgment in the Hilaire vs. Trinidad and Tobago case, I would like to add the following considerations:

1. With regard to reservations to treaties, as in other questions of international law, there has been a major evolution marked by constant progress. The point of departure for this evolution may well have been the intense discussions resulting from the reservations formulated by the States to the Convention on the Prevention and Punishment of the Crime of Genocide (1948) and, subsequently, as a result of the advisory opinion that the International Court of Justice (ICJ) issued on that matter (1951).

2. Those discussions established the foundations for improving the reservations system. An important element of the ICJ's advisory opinion was that reservations should be compatible with the object and purpose of the treaty and this was incorporated into the 1969 Vienna Convention on the Law of Treaties (Article 19) and, through this instrument, it is also in force in the American Convention on Human Rights (Article 75).

3. It was in recent decades that the principle that a reservation must be compatible with the object and purpose of the treaty began to take shape as an essential requirement and became a fundamental condition to assess the admissibility and validity of a reservation. However, this evolution will not be complete until reservations to human rights treaties are proscribed, due to the special nature of the latter.

4. In the instant case, the State has not formulated a reservation with regard to the substantive clauses of the Convention, but rather has attempted to do so in relation to the optional clause recognizing the competence, or more specifically, the contentious jurisdiction of the Inter-American Court.

5. The Convention contains a specific provision establishing how this recognition of the Court's jurisdiction may be made: Article 62(1) and 62(2). Consequently, the State Party that, in the exercise of its sovereign power, decides to recognize the jurisdictional organ must proceed in accordance with the provisions of the Convention.

6. In my opinion, it is not possible for a State to disregard the provisions of Article 62(2) and impose conditions on its acceptance of the Court's jurisdiction. The State Party does not have a margin of discretion, unless it is to state that it agrees to accept jurisdiction or not to do so. The interpretation that what is not prohibited in the conventional provision is allowed is only valid in the sphere of domestic private law. From the foregoing, two conclusions may be drawn.

7. First: a State may not establish conditions that limit the operation of the jurisdictional organ responsible for applying and interpreting the Convention. Any limitation in this respect would, ultimately, have serious consequences for the effectiveness of the human rights protection system.

8. Second: when reservations are allowed, as in the case of Article 75 of the American Convention, they have a limited scope, since this is an international human rights instrument.

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Otherwise, the obligations of the State Party would be unclear. Lastly, reservations cease to be valid when they are of a general, broad or imprecise nature not only due to a question of form but, above all, when, in some way, they contradict the object and purpose of the American Convention on Human Rights.

Hernán Salgado-Pesantes
Judge

Manuel E. Ventura-Robles
Secretary

SEPARATE CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN THE JUDGMENT ON PRELIMINARY OBJECTIONS IN THE HILAIRE, CONSTATINE ET AL. AND BENJAMIN ET AL. CASES

1. I have added my vote to those of my colleagues of the Inter-American Court of Human Rights in the judgments on preliminary objections in the Hilaire, Constantine et al. and Benjamin et al. cases of September 1, 2001, which are based on similar reasoning and reach the same decisions with regard to the allegation that the Court is not competent to hear these cases.

2. I believe that the Court has proceeded appropriately by analyzing the arguments of the State and setting out its own arguments with specific reference to the cases under consideration and, for the time being, not examining the general issue of reservations to treaties and State declarations about the scope they allocate to the acceptance of the contentious jurisdiction of the Court, in accordance with the optional clause contained in Article 62 of the American Convention on Human Rights.

3. In this context, I agree with the judges of the Court when they indicate that the effect of the reservation or declaration with regard to the contentious jurisdiction of the Inter-American Court, formulated by Trinidad and Tobago in the instrument ratifying the Convention (dated April 3, 1991, and deposited on May 28, that year), would be to exclude the State from the jurisdictional system which it declares that it accepts in that same instrument, since it contains a general condition that subordinates the exercise of the jurisdiction almost entirely to the provisions of domestic law. Indeed, this declaration accepts the aforesaid contentious jurisdiction – a key element in the effective exercise of the inter-American human rights system – "only insofar as (its exercise) is compatible with the pertinent sections of the Constitution of the Republic of Trinidad and Tobago."

4. It is evident that – contrary to the usual practice in declarations of a similar nature – the formula that the State has used does not specifically define the matters that cannot be heard or decided upon by the Court (which of necessity applies the American Convention and not the provisions of a State's domestic law). Thus, this international court would be deprived of the possibility of exercising the powers that the Convention assigns to it autonomously and would have to subject itself to a method of casuistic comparison between the provisions of the Convention and those of domestic law, which, in turn, would be subject to interpretation by the national courts.

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5. Obviously, a restriction of this nature – established, as mentioned above, in a general and indeterminate manner – is not consequent with the object and purpose of the American Convention on Human Rights and does not correspond to the nature of the inter-American jurisdiction designed to protect those rights.

6. Furthermore, the formula analyzed also includes some expressions that are very difficult to understand and that are ambiguous – and which could totally obstruct the Court's jurisdictional task – such as the statement that the compulsory jurisdiction of the international court is recognized "provided that a judgment of (the latter) does not infringe, establish or annul existing rights or obligations of certain individuals." We could cite some examples of the implications that this imprecise expression could have. Obviously, a judgment of the Court could have implications for so-called "obligations of individuals" deriving from acts or measures which, in the Court's opinion, violate the Convention. The decisions of the Inter-American Court would also have repercussions on "the rights of individuals" if they recognized certain juridical consequences in their favor, owing to the violations that had been committed: for example, the right to reparations. Moreover, it is not clear what is meant by indicating that the judgments of the Court may not establish "existing right or obligations" of certain individuals.

7. In brief, based on the foregoing – which expands the reasoning on which the Court's judgments in the cases referred to in this opinion are based – it is not possible to recognize the validity of the declaration formulated by the State in the ratification instrument of May 28, 1991, and use it as grounds for the preliminary objection that has been raised.

8. In the judgments delivered in these three cases, the Inter-American Court has referred exclusively to the objection filed by Trinidad and Tobago and, consequently, has examined the characteristics of the declaration on which the State seeks to base itself, in the context of these cases. The issue of reservations and declarations that limit the jurisdictional exercise of the Court in general, and which are usually presented in different terms, is a separate matter. This does not negate the desirability of eliminating reservations and conditions that ultimately signify restrictions of a greater or lesser extent to the full exercise of such rights, in honor of the universality of human rights, a conviction that is common to the States that have contributed to constructing the corresponding inter-American system.

Sergio García-Ramírez
Judge

Manuel E. Ventura-Robles
Secretary

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