In the Case of Caesar,

the Inter-American Court of Human Rights (hereinafter "the Court", "the Inter-American Court", or "the Tribunal"), pursuant to Articles 29, 31, 56, and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure" or "the Rules"), [FN1] delivers the present Judgment.

[FN1] The present Judgment is delivered according to the terms of the Court's Rules of Procedure approved by the Inter-American Court of Human Rights during its XLIX Ordinary Period of Sessions by Order of November 24, 2000, which entered into force on June 1, 2001, and according to the partial amendment approved by the Court during its LXI Ordinary Period of Sessions by Order of November 25, 2003, which entered into force on January 1, 2004.

I. INTRODUCTION OF THE CASE

1. The present Case was submitted to the Court by the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") against the State of Trinidad and Tobago (hereinafter "the State" or "Trinidad and Tobago") on February 26, 2003, originating from the petition No. 12.147, which was received at the Commission's Secretariat on May 13, 1999.

2. The Commission filed the Application pursuant to Article 61 of the American Convention, for the Court to decide whether the State violated "Mr. [Winston] Caesar's right to humane treatment under Articles 5(1) and 5(2) of the Convention, his right to be tried within a reasonable time under Article 8(1) of the Convention, and his right to judicial protection under Article 25 of the Convention, all in conjunction with violations of Article 1(1) of the Convention.

In addition, the Commission argue[d] that the State, by failing to provide for the right to be tried within a reasonable time under its domestic law and by authorizing a form of punishment that is incompatible with the right to humane treatment, is responsible for violating its obligation[…] under Article 2 of the Convention to give domestic legal effect[…] to the rights guaranteed under Articles 5(1), 5(2), 7(5) and 8(1) of the Convention". The Commission also requested that the Court order the State to adopt various pecuniary and non-pecuniary measures of reparation.

3. According to the Application of the Commission, the current legislation of Trinidad and Tobago allows for the imposition of corporal punishment. Under the Corporal Punishment Act (Offenders Over Sixteen) of 1953 (hereinafter "Corporal Punishment Act"), a court may order any male offender above the age of sixteen years to be struck, or flogged, with an object called a "cat-o-nine tails", in addition to any other punishment to which he is liable, when convicted of certain crimes [FN2]. That same law provides that a sentence of flogging shall be carried out as soon as may be practicable and in no case after the expiration of six months from the passing of the decision. The alleged victim in this case, Mr. Winston Caesar (hereinafter "Mr. Caesar" or "the alleged victim"), was convicted before the High Court of Trinidad and Tobago of the offense of attempted rape and was sentenced to serve 20 years in a penitentiary with hard labour and to receive 15 strokes of the "cat-o-nine tails". The Court of Appeal of Trinidad and Tobago confirmed his conviction and sentence and, 23 months after the final confirmation of his sentence, Mr. Caesar´s punishment of flogging was carried out.

[FN2] The 2000 amendment of the Corporal Punishment Act (Offenders Over Sixteen) provides that this law may be administered only to male offenders over the age of 18, so it changed its name to "Corporal Punishment Act (Offenders Over Eighteen)" (infra para. 49(9)).

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4. Moreover, the Commission contends that, given the nature of the violations for which the State should be held responsible, Trinidad and Tobago must provide Mr. Caesar with an effective remedy, which includes compensation for the moral damage suffered by him. In addition, the Commission seeks an order requiring the State to adopt legislative and other measures as necessary to give effect to the right to a trial within a reasonable time, to abrogate the punishment of flogging as provided under its Corporal Punishment Act, and to ensure that conditions of detention in the State's prisons satisfy the minimum standards of humane treatment provided for under the Convention.

II. JURISDICTION OF THE COURT

5. Trinidad and Tobago deposited its instrument of ratification of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") on May 28, 1991. On that same day, the State recognised the compulsory jurisdiction of the Court.

6. On May 26, 1998, Trinidad and Tobago denounced the Convention and the denunciation became effective one year later, as of May 26, 1999, pursuant to Article 78 of the Convention. According to Article 78 of the Convention, a denunciation will not release the denouncing State

from its obligations under the Convention with respect to acts of that State occurring prior to the effective date of the denunciation that may constitute a violation of the Convention.

7. Moreover, in the Hilaire, Constantine, Benjamin and others Case [FN3], the Court held in its judgments on preliminary objections that:

[…] Trinidad and Tobago cannot prevail in the limitation included in its instrument of acceptance of the optional clause of the mandatory 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.

[FN3] Cf. Hilaire Case. Preliminary Objections. Judgment of September 1, 2001. Series C No. 80, para. 98; Benjamin et al. Case. Preliminary Objections. Judgment of September 1, 2001. Series C No. 81, para. 89; and Constantine et al. Case. Preliminary Objections. Judgment of September 1, 2001. Series C No. 82, para. 89.

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8. Notwithstanding the fact that the Inter-American Court is fully competent to hear the present Case, the State did not participate in the proceedings before this Tribunal (infra paras. 24, 30, 34 and 39). Nevertheless, the Court, as is the case with any other international organ with jurisdictional functions, has the inherent authority to determine the scope of its own competence (compétence de la compétence). [FN4]

[FN4] Cf. Case of the Serrano-Cruz Sisters. Preliminary Objections. Judgment of November 23, 2004, Series C No. 118, para. 63; Case of Alfonso Martín-del Campo-Dodd. Preliminary Objections. Judgment of September 3, 2004, Series C No. 113, para. 69; and Case of Baena-Ricardo et al. Competence. Judgment of November 28, 2003, Series C No. 104, para. 68.

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9. In interpreting the American Convention in accordance with the general rules of treaty interpretation enshrined in Article 31(1) of the Vienna Convention on the Law of Treaties, bearing in mind the object and purpose of the American Convention, this Tribunal, in the exercise of the authority conferred on it by Article 62(3) of the American Convention, must act in a manner that preserves the integrity of the provisions of Article 62(1) of the Convention. It would be unacceptable to subordinate these provisions to restrictions that would render inoperative the Court's jurisdictional role, and consequently, the human rights protection system established in the Convention. [FN5]

[FN5] Cf. Hilaire Case. Preliminary Objections, supra note 3, paras. 82 and 84; Benjamin et al. Case. Preliminary Objections, supra note 3, paras. 73 to 75; and Constantine et al. Case. Preliminary Objections, supra note 3, paras. 73 to75.

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10. Furthermore, the Court considers relevant to recall a recent case law with respect to the its ratione temporis competence [FN6]:

[…] The Court cannot exercise its contentious jurisdiction to apply the Convention and declare that its provisions have been violated when the alleged facts or the conduct of the defendant State which might involve international responsibility precede recognition of the Court's jurisdiction.
[…] However, in case of a continuing or permanent violation, whose commencement occurred before the defendant State had recognized the Court's contentious jurisdiction and which persists even after this recognition, the Court is competent to consider the actions and omissions that occurred after the recognition of its jurisdiction and the effects of the violations.

[FN6] Cf. Case of the Serrano-Cruz Sisters. Preliminary Objections, supra note 4, paras. 66 and 67.
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11. With the exception of certain matters concerning the criminal proceedings, most of the facts alleged in the Application in the present case occurred before the State´s denunciation of the Convention came into effect. Taking into account the considerations set out in the preceding paragraphs, the Court reaffirms its competence, according to the terms of Articles 62(3) and 78(2) of the Convention, to hear the present Case and render judgment.

III. PROCEEDINGS BEFORE THE COMMISSION

12. On May 13, 1999, the British law firm Lovells filed a petition before the Inter-American Commission.

13. On October 10, 2001, during its 113th Regular Session, the Commission adopted Report No. 88/01, in which it found the claims in Mr. Caesar's petition to be admissible, and decided to continue with consideration of the merits of the case.

14. On October 10, 2002, during its 116th Regular Session, the Commission approved Report Nº 65/02 on the merits of the case, in which it concluded that:

The State is responsible for violating Mr. Caesar's right to humane treatment under Articles 5(1) and 5(2) of the Convention, his right to be tried within a reasonable time under Article 8(1) of the Convention, and his right to judicial protection under Article 25 of the Convention, all in conjunction with violations of Article 1(1) of the Convention. In addition, the Commission finds that the State, by failing to provide for the right to be tried within a reasonable time under its domestic law and by authorizing a form of punishment that is incompatible with the right to humane treatment, is responsible for violating its obligations under Article 2 of the Convention to give domestic legal effects to the rights guaranteed under Articles 5(1), 5(2), 7(5) and 8(1) of the Convention. Based upon the information and evidence presented, the Commission did not find a violation of Mr. Caesar's right to legal assistance under Article 8(2) of the Convention.

The Commission recommended that the State:

1. Grant Winston Caesar with an effective remedy, which includes compensation;
2. Adopt such legislative or other measures as may be necessary to give effect to the right to a trial within a reasonable time;
3. Adopt such legislative or other measures as may be necessary to abrogate the punishment of flogging as provided for under its Corporal Punishment (Offenders Over Sixteen) Act of 1953;
4. Adopt such legislative or other measures as may be necessary to ensure that Mr. Caesar's conditions of detention comply with the standards of humane treatment mandated by article 5 of the Convention.

15. On November 27, 2002, the Commission transmitted Report Nº 65/02 to the State, with the request that the State report on the measures adopted to comply with the recommendations contained therein, within two months from the date of transmission. By a communication of the same date, the Commission informed the Petitioners that it had approved Report Nº 65/02, and requested that they provide, within one month, the information referred to in Article 43(3) of its Rules of Procedure, regarding their views with respect to a possible referral of the case to the Inter-American Court.

16. On December 31, 2002, the Petitioners submitted their response to the Commission's communication of November 27, 2002, indicating that "referral to the Court is appropriate in this case, as the Court represents the only opportunity for Mr. Caesar to obtain a real and effective remedy for the violations of his human rights".

17. On February 26, 2003, the Commission decided to submit the present case to the Court, as "the State did not provide [it] with a response to its merits Report".

IV. PROCEEDINGS BEFORE THE COURT

18. On February 26, 2003, the Commission filed before the Court the Application in the present case (supra para. 1).

19. The Commission appointed Robert K. Goldman, Juan E. Méndez, Clare K. Roberts and Santiago A. Canton as delegates, and Ariel Dulitzky and Brian D. Tittemore as legal advisors.

20. On March 20, 2003, the Secretariat of the Court (hereinafter "the Secretariat"), following a preliminary examination of the Application by the President of the Court (hereinafter "the President"), notified it with its annexes to the State and informed it regarding the time limits to answer the Application and to appoint its representation for the proceeding. On the instructions of the President, the Secretariat also advised the State of its right to designate a Judge ad hoc to participate in the consideration of the case.

21. On March 24, 2003, in accordance with articles 35(1)(e) and (d) of the Rules of Procedure, the Secretariat notified the Application to the representatives of the alleged victim (hereinafter "the representatives"). Mrs. Jon Holland, Andrea Monks, Yasmin Walijje, Yvonne Gray and Peter Carter have represented Mr. Caesar in the proceedings before the Court.

22. The State failed to designate either agents or a Judge ad hoc before the time limit expired on April 20, 2003.

23. The representatives failed to submit their written brief containing pleadings, motions and evidence, before the time limit expired on April 24, 2003, as provided under the terms of Article 35.4 of the Rules of Procedure in force at the time.

24. The State failed to submit its answer to the Application before the time limit expired on May 20, 2003, as provided under the terms of Article 37.1 of the Rules of Procedures in force at the time.

25. On April 12, 2004, the non-governmental organisations Harvard Law Student Advocates for Human Rights and Global Justice Centre submitted an amici curiae brief in the present case.

26. On September 6, 2004, the non-governmental organisation Interights submitted an amicus curiae brief in the present case.

27. On October 20, 2004, the President issued an Order, pursuant to article 47(3) of the Rules of Procedure, requiring Mr. Caesar, a witness called by the Inter-American Commission, and Desmond Allum and Andrew Coyle, expert witnesses also called by the Inter-American Commission, to file their respective affidavits on the time limit of seven days, for transmission to the State and the representatives for their observations. The President also summoned the parties to present their final oral arguments on merits, possible reparations and costs at a public hearing to be held on November 15, 2004, with final written briefs to be filed no later than December 16, 2004, and ordered the appearance of Dr. Robert Ferris, an expert witness called by the Inter-American Commission.

28. On November 3, 2004, the Commission submitted the affidavits of Winston Caesar, Desmond Allum, Andrew Coyle and Robert Ferris. The State and the representatives did not submit any observations.

29. On November 15, 2004, at the public hearing on the merits and possible reparations and costs, the Court heard the expert testimony of Dr. Ferris, called by the Inter-American Commission, as well as the final oral arguments on the merits, possible reparations and costs of the Commission and the representatives.

Appearing before the Court:

for the Inter-American Commission:

Clare K. Roberts, delegate;
Brian Tittemore, advisor;

for the representatives:

Peter Carter, representative;
Andrea Monks, representative; and

expert witness proposed by the Inter-American Commission:

Robert Ferris.

30. The State did not appear in the public hearing. Accordingly, the hearing was held pursuant to Article 27 of the Rules of Procedure, which was read by the Secretary at the beginning of the hearing and states the following:

Article 27. Default Procedure
1. When a party fails to appear in or continue with a case, the Court shall, on its own motion, take such measures as may be necessary to complete the consideration of the case.
2. When a party enters a case at a later stage of the proceedings, it shall take up the proceedings at that stage.

31. During the public hearing, the representatives submitted a document titled "Skeleton Argument on behalf of [Mr.] Winston Caesar" and the Commission submitted a document titled "Oral Submissions […] on merits and possible reparations and costs", as well as Mr. Caesar's medical records from the Port of Spain Hospital, as an exhibit to the October 5, 2004 affidavit of Dr. Robert Ferris; and four exhibits to the July 13, 2004 affidavit of Mr. Andrew Coyle.

32. On December 6, 2004, following the instructions of the President and in accordance with Article 45(2) of the Rules of Procedure, the Secretariat required Trinidad and Tobago to submit, no later than January 15, 2005, all of Mr. Winston Caesar's medical records from the prisons in which he was incarcerated and where he also received medical treatment, including those relating to his medical condition and treatment prior to and following the execution of his sentence of corporal punishment. The abovementioned documents were not submitted to the Court.

33. On December 13 and 16, 2004, the representatives and the Commission, respectively, presented their final written arguments on merits and possible reparations and costs. The State did not present any final written arguments.

V. PREVIOUS CONSIDERATIONS

34. The State did not appear in the proceedings before the Commission nor before the Court. Nevertheless, the Court has, of its own motion, taken the necessary measures to complete consideration of the case and, having evaluated the arguments and the evidence tendered during the proceedings by the Inter-American Commission and by the representatives, now delivers its judgment.

35. In its final written arguments the Commission invoked Article 38(2) of the Court's Rules of Procedure, and the Court deems it pertinent to examine the scope and effect of its relevance to the circumstances of the present case.

36. Article 38(2) of the Rules of Procedure provides:

In its answer, the respondent must state whether it accepts the facts and claims or whether it contradicts them, and the Court may consider accepted those facts that have not been expressly denied and the claims that have not been expressly contested.

37. The Court has held in previous cases that when a State does not specifically contest the Application, the facts on which it remains silent are presumed to be true, provided that the evidence before the Court is found to be consistent with those facts. [FN7] In recent cases in which the State has presented no defense and has failed to appear at the hearings, the Court has ruled:

[…] that procedural inactivity does not give rise to a specific sanction against the parties, nor does it affect the development of the proceeding; but, it may eventually prejudice them, if they take the decision not to exercise fully their right to defense or to execute the appropriate procedural actions that are in their interests, in accordance with the audi alteram partem principle.
[…] International jurisprudence has recognized that the absence of one of the parties at any stage of the case, does not affect the validity of the judgment; [FN8] therefore, pursuant to Article 68(1) of the Convention, Peru's obligation to comply with this Court's judgment in this case is in force. [FN9]

[FN7] Cf. Hilaire, Constantine, Benjamin et al. Case. Judgment of June 21, 2002. Series C No. 94, para. 67; The "Street Children" Case (Villagrán Morales et al.), Judgment of November 19, 1999, Series C No. 63, para. 68; and Godínez-Cruz Case. Judgment of January 20, 1989, Series C No. 5, para. 144.
[FN8] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 23, para. 27. See also, Cf., inter alia, Fisheries Jurisdiction (United Kingdom v. Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973, p. 7, para. 12; Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment, I.C.J. Reports 1974, p. 9, para.17; Nuclear Tests (Australia v. France), Judgment of 20 December 1974, I.C.J. Reports 1974, p. 257, para. 15; Aegean Sea Continental Shelf, Judgment, I.C.J. Reports 1978, p. 7, para. 15; and United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980, p. 18, para. 33.
[FN9] Cf. Ivcher Bronstein Case. Judgment of February 6, 2001. Series C No. 74, paras. 80 and 82; and Constitutional Court Case. Judgment of January 31, 2001, Series C No. 71, paras. 60 to 62.
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38. Pursuant to Article 38(2) of the Rules of Procedure, the Court is authorized to consider as established those facts that have not been expressly denied and those claims that have not been expressly contested; nevertheless, as master of its own jurisdiction (supra para. 8 and 11) and in exercise of the authority granted by Article 55 of the Rules of Procedure, the Court is at liberty to assess the facts, alone or in conjunction with other elements from the evidence available. It

remains the case that the State's inactivity before an international human rights tribunal not only may eventually work to its detriment but is contrary to the object, purpose and spirit of the American Convention and of the collective enforcement mechanism enshrined therein.

39. It should be emphasized that in this case the State failed to discharge its procedural responsibility to submit evidence in the course of the procedural stages set out in Article 44 of the Rules of Procedure (supra para. 24). In consequence, the Court deems it appropriate to establish the proven facts of the instant case, taking into account, in addition to the aforementioned silence of the State, other elements that may assist it in establishing the truth of the facts, exercising its responsibility to protect human rights and applying, to this end, the pertinent provisions of the American Convention and of general international law.

VI. EVIDENCE

40. Before turning to the analysis of the evidence received, in this chapter the Court, pursuant to articles 44 and 45 of the Rules of Procedure, will make reference to certain general considerations applicable to the specific case, the majority of which have been previously expounded in the jurisprudence of this Tribunal.

41. The principle of the presence of parties to a dispute applies to evidentiary matters, and it involves respecting the parties' right to defense. This principle is contained in article 44 of the Rules of Procedure, regarding the opportunity in which the evidence must be submitted, in order to seek equality among the parties [FN10].

[FN10] Cf. Case of Lori Berenson-Mejía. Judgment of November 25, 2004. Series C No. 119, para. 62; Case of Carpio-Nicolle et al., Judgment of November 22, 2004. Series C No. 117, para. 54; and Case of Plan de Sánchez Massacre. Reparations (Art. 63(1) American Convention on Human Rights. Judgment of November 19, 2004. Series C No. 116, para. 27.

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42. It is well-settled law and practice that international procedures relating to the admission and evaluation of evidence are not subject to the same formalities as domestic judicial procedures. This principle is especially applicable to international human rights tribunals, which enjoy greater flexibility in assessing the evidence presented before them, in accordance with the rules of logic and on the basis of experience. The admission of evidence must be carried out with careful attention to the circumstances of the particular case, while bearing in mind the limits imposed by due respect for judicial certainty and procedural equality as between the parties. [FN11]

[FN11] Cf. Case of Lori Berenson-Mejía, supra note 10, para. 64; Case of Carpio-Nicolle et al., supra note 10, para. 55; and Case of Plan de Sánchez Massacre. Reparations, supra note 10, para 28.

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43. Therefore, the Court will proceed to examine and evaluate all the elements that comprise the corpus of evidence in the case.

a) DOCUMENTARY EVIDENCE

44. Among the documentary evidence presented by the parties, the Commission submitted the alleged victim's declaration and the reports and exhibits of the expert witnesses (affidavits) pursuant to the President's Order of October 20, 2004 (supra para. 27). The Court deems pertinent to summarize these affidavits.

a) Testimony of Mr. Winston Caesar

In his affidavit, Mr. Winston Caesar, the alleged victim of the violations pleaded in the instant case, deposed as follows:

He described the conditions of his incarceration at the Golden Grove Prision, and at the Carrera Prison where he shared a cell with four men, and slept on the floor on a thin mat. The cell was hot and had no ventilation, and did not have toilet facilities. At the Maximum Security Prison the water is turned on for only half an hour in the mornings and afternoons. He is allowed to go out in the yard for about an hour every morning and afternoon during the week; on the weekends, he is allowed to go into the yard only in the morning. Since entering prison Mr. Caesar has lost most of his teeth and has not received any dental treatment. He has also suffered from hemorrhoids; he has had surgery but still has symptoms of the malady and thus requires another operation. In 1998 he discovered that he has a cyst in his groin area, which will also require surgery.
He knew that floggings take place at the Carrera Prison two or three times a year. On three occassions, at least, he was taken to another cell block to witness the infliction of similar punishment on four other men (infra para. 77).
Mr. Caesar described the way the flogging was carried out on February 5, 1998 (infra para. 76).

b) Expert Report of Mr. Desmond Allum, S.C.

(Mr. Allum is a Senior Counsel of the Trinidad and Tobago Bar, currently President of the Criminal Bar Association, and a former President of the Bar Association of Trinidad and Tobago).

The expert witness gave details of the history of the Corporal Punishment Act pointing out, inter alia, that, as amended in 1994, that Act provides that the sentence of flogging shall be carried out within six months of conviction, except when an appeal has been filed. Moreover, he referred to the application of the “savings clause” in the Constitution of Trinidad and Tobago (infra para. 115).
He stated that the conditions in Trinidad and Tobago's prisons are unsatisfactory, characterised by overcrowding, lack of proper light and ventilation, inadequate hygiene, and the absence of satisfactory medical and dental services.

c) Expert Report of Dr. Andrew Coyle

(Professor Coyle is professor of Prison Studies at the School of Law, King´s College, University of London)

Dr. Coyle referred to international law and standards with respect to the application of corporal punishment, and to the conditions of detention in the State's prisons.

d) Testimony of Dr. Robert Ferris

(Consultant Forensic Psychiatrist and Clinical Director of Forensic and Secure Services for the Oxfordshire Mental Healthcare Trust)

Dr. Ferris interviewed Mr. Caesar in the Maximum Security Prison of Trinidad and Tobago.
The expert witness expressed that Mr. Caesar does not suffer from any specific mental illness but, during his current period of imprisonment, he has suffered from depression and anxiety. Mr. Caesar experienced the suffering to be expected in a person anticipating a painful and brutal form of physical punishment. Furthermore, the intense mental suffering resulting from the corporal punishment would have been exacerbated by the long delay in its being carried out, and by the repeated "false starts" of the execution of the punishment. Regarding the punishment itself, Mr. Caesar suffered such intense fear, pain and humiliation that he fainted. The corporal punishment caused the alleged victim bruising and possible lacerations to his back but he does not show any scarring. After being flogged, Mr. Caesar was admitted to the infirmary, where he was treated with analgesic medication.
Mr. Caesar suffered from psychological consequences after his corporal punishment, such as post-traumatic stress symptoms, including depressed mood, disturbing recollections, and a sensation of something hitting his back, which causes his shoulder to twitch involuntarily.
There is a discrepancy on the timing of the hemorrhoid operation in Mr. Caesar's account (December 1997) and that of the medical records (January 1997). Moreover, Mr. Caesar was admitted to a hospital on December 27, 1997 for a day, and received a diagnosis of ureteric colic.

b) EXPERT EVIDENCE

45. During the public hearing (supra para. 29), the Court heard oral expert testimony from Dr. Ferris proposed by the Inter-American Commission. His testimony and affidavit are summarized in the previous section of this chapter (supra para. 44 d).

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c) ASSESSMENT OF THE EVIDENCE

46. In this case, as in others, [FN12] the Court admits the probative value of those documents presented in timely fashion by the parties, the authenticity of which was not challenged or questioned.

[FN12] Cf. Case of Lori Berenson-Mejía, supra note 10, para. 77; Case of Carpio-Nicolle et al., supra note 10, para. 70; and Case of Plan de Sánchez Massacre. Reparations, supra note 10, para. 39.

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47. With respect to the declaration rendered by the alleged victim (supra para. 44(a)), the Court admits it insofar as it is in accordance with the Order of October 20, 2004 (supra para. 27). In this regard, because Mr. Caesar has a direct interest in the case, that declaration cannot be evaluated in isolation, but rather within the context of the entire corpus of evidence submitted in the proceeding. Thus, as it has held in similar cases, the Court considers that declaration to be of assistance inasmuch as it can provide information of relevance both as to the merits and as to reparations. [FN13]

[FN13] Cf. Case of Lori Berenson-Mejía, supra note 10, para. 78; Case of Carpio-Nicolle et al., supra note 10, para. 71; and Case of Plan de Sánchez Massacre. Reparations, supra note 10, para. 46.

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48. Regarding the expert testimony given during the public hearing by Robert Ferris, as well as the affidavits and accompanying exhibits presented by experts Desmond Allum, Andrew Coyle and Robert Ferris (supra para. 28), the Court rules that they are admissible, insofar as they are in conformity with the Order of October 20, 2004.

VII. PROVEN FACTS

49. The Court considers that the following facts have been proven:

Regarding Winston Caesar's criminal proceedings

49(1). On November 11, 1983, Mr. Winston Caesar was initially arrested as the suspect in connection with a rape that was alleged to have taken place in Trinidad on November 8, 1983. On November 16, 1983, he was released on bail. Between 1985 and 1986 committal proceedings took place in the Port of Spain Magistrate's 4th Court, which ordered him to stand trial on February 21, 1986.

49(2). On September 10, 1991, he was arrested and taken into custody for failing to appear in court. During his trial he was held at Port of Spain prison.

49(3). The trial was held in January 1992, before Mr. Justice Dayalsingh, in the High Court of Trinidad and Tobago. On January 10, 1992, Mr. Caesar was convicted of attempted rape under Trinidad and Tobago's Offences Against the Person Act. He was sentenced to serve 20 years in a penitentiary with hard labor and to receive 15 strokes of the cat-o-nine tails. That same day Mr. Caesar signed a Notice of Appeal and remained in detention.

49(4). On November 26, 1993 Mr. Caesar's attorney filed an application for leave to appeal at the Court of Appeal of Trinidad and Tobago, challenging the legal basis for the ruling. On February 28, 1996, the Court of Appeal of Trinidad and Tobago dismissed Mr. Caesar's application for leave to appeal apparently without giving reasons, and confirmed the conviction and sentence.

49(5). A counsel in Britain was asked by Mr. Caesar's lawyers to consider whether there were reasonable grounds of appeal to the Privy Council in this case. On November 2, 1998, in his "note for instructing solicitors", counsel indicated that an application for Special Leave to Appeal to the Privy Council was unlikely to succeed. In considering whether the delay of over 8 years between Mr. Caesar's arrest and trial was so great as to amount to a denial of justice, and thus an infringement of his constitutional rights, counsel was of the opinion that although the delay was "very great" and might be imputed to the State, he nevertheless judged as minimal the degree of risk that the miscarriage of justice had been caused by the delay. Finally, the counsel considered that, although such delay was a point on which Mr. Caesar might have applied to the High Court of Trinidad and Tobago, he discounted the chances of success at the Privy Council.

Regarding the relevant law in Trinidad and Tobago

49(6). There are two principal laws that authorize the use of corporal punishment in Trinidad and Tobago. One of them is the Corporal Punishment Act (Offenders Over Eighteen). The terms of this legislation provide for the application of corporal punishment for certain crimes by, inter alia, the following methods: whipping with a rod of tamarind or similar switch and flogging with strokes of an object called a "cat-o-nine tails".

49(7). Articles 2, 6 and 7 of the Corporal Punishment Act stipulate that:

2. Any male offender, above the age of sixteen years, on being convicted before the High Court of any of the offences mentioned in the Schedule, may be ordered by the Court to be flogged in addition to any other punishment to which he is liable.
6. A sentence of flogging shall be carried out as soon as may be practicable and shall in no case be carried out after the expiration of six months from the passing of the sentence.
7. The instrument to be used for carrying out a sentence of flogging shall be the ordinary cat-o-nine tails and for carrying out a sentence of whipping a rod of tamarind, birch or other switches or in either case such other instrument as the President may from time to time approve.

49(8). The "cat-o-nine tails" consists of a plaited rope instrument of nine knotted thongs of cotton cord, each of which is approximately 30 inches long and less than one quarter of an inch in diameter. The thongs are attached to a handle. The nine cotton thongs are lashed across the back of the subject, between the shoulders and the lower area of the spine.

49(9). The Corporal Punishment (Offenders Over Sixteen) Act of 1953 was amended in 1994 and in 2000. The 1994 amendment provided for the suspension of the original six-month time limit for the carrying out of a sentence of corporal punishment while an appeal is pending. The 2000 amendment provides that corporal punishment may be administered only to persons over the age of 18.

49(10). Sections 4 a) and b), 5 b), and 6(1) and (3) of the Constitution of Trinidad and Tobago provide as follows:

4. It is hereby recognized and declared that in Trinidad and Tobago there have existed and shall continue to exist […]:

the right of the individual to life, liberty, security of the person and enjoyment of property and the right no to be deprived thereof except by due process of law;

the right of the individual to equality before the law and the protection of the law;

5. (2) […The] Parliament may not: […]

b) impose or authorize the imposition of cruel and unusual treatment or punishment […]

c) deprive a person who has been arrested or detained-

iii. of the right to be brought promptly before an appropriate judicial authority; […]

e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations; […]

6. (1) Nothing in sections 4 and 5 shall invalidate

an existing law […]

(3) In this section- […]

"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) […]

49(11). Section 6 of the Constitution of the Republic of Trinidad and Tobago precludes individuals from challenging, under Sections 4 and 5 of the Constitution, all laws or acts carried out pursuant to any law in force in Trinidad and Tobago before 1976, the year the Constitution entered into force.

49(12). The Constitution of Trinidad and Tobago does not provide, among its prescribed fundamental rights and freedoms, the right to a trial within a reasonable time.

Regarding Mr. Caesar's detention and health conditions

49(13). Mr. Caesar has been incarcerated since September 10, 1991 (supra para. 49(2)) and has served 13 years of his 20-year sentence.

49(14). The prison system in Trinidad and Tobago consists of the following five prisons: Port of Spain Prison, Golden Grove Prison, Maximum Security Prison, Carrera Convict Prison and Tobago Prison.

49(15). During the course of his criminal proceedings, Mr. Caesar has been incarcerated at four of the five prisons in Trinidad and Tobago. After his arrest in 1991, he was held for a short time at the Port of Spain Prison, and he was then transferred to the Golden Grove Prison in Arouca, where he stayed for at least two months. Then he was returned to the Port of Spain Prison for two months. Subsequently, Mr. Caesar was sent back again to the Golden Grove Prison, where he remained until his trial in February 1996 when he was transferred to the Port of Spain Prison.

Some time after, he was transferred to the Golden Grove Prison once again. After his case was dismissed by the Court of Appeal, he was returned to the Port of Spain Prison, where he was held for at least two months. He was then sent to the Carrera Convict Prison, where he was detained until November 1999. Finally, he was transferred to the Maximum Security Prison, where he remains to date.

49(16). In Golden Grove Prison and in Carrera Convict Prison the alleged victim shared a cell with 4 or 5 other men and slept on the floor with a thin mat or on an old piece of carpet. There were no toilet facilities and a "slop pail" was used by everyone in the cell. There was always a stench of human waste in the cell, which had little ventilation and was hot.

49(17). At the Maximum Security Prison Mr. Caesar is allowed outside his prison cell for one hour during the mornings and one hour during the evenings.

49(18). Since his incarceration, he has suffered serious health problems that have not been properly treated by the State authorities. His health has deteriorated over time. He has not received adequate dental treatment while in prison (he has lost most of his teeth, with only six remaining in his lower jaw). Subsequent to incarceration, Mr. Caesar developed chronic hemorrhoids from which he continues to suffer, and he has had a cyst in his testicles since 1998.

49(19). Mr. Caesar did not receive timely treatment with respect to his hemorrhoid condition. In 1992 a doctor recommended that he undergo surgery for his hemorrhoids. The procedure was postponed at least twice and, during the delay, his condition worsened. The surgery finally took place at the end of January, 1997. At the present time he continues to suffer and bleed heavily because of this condition.

49(20). On December 27, 1997 Mr. Caesar was admitted to a hospital, where he stayed for one day, and received a diagnosis of left-sided ureteric colic, which is a condition causing acute and severe pain in the lower abdomen.

49(21). In 1998 a doctor advised Mr. Caesar that the cyst on his testicles required surgery. However, he still has not received that operation.

49(22). Mr. Caesar's detention conditions are indicative of the general conditions in Trinidad and Tobago's prison system.

Regarding Mr. Caesar's Corporal Punishment

49(23). Between April and June of 1996, Mr. Caesar was taken to the Carrera Convict Prison.

49(24). Prisoners who are sentenced to corporal punishment are usually held beforehand in the Carrera Convict Prison, with the purpose of executing the sentence. Corporal punishment is carried out in this prison only at specified times during the year.

49(25). Mr. Caesar was aware of the times designated for corporal punishment, and his emotional state deteriorated as these times approached. Between November of 1996 and the day the

flogging was inflicted, Mr. Caesar was taken on three or four separate occasions to another cell with other prisoners where they were kept overnight. Each morning the other prisoners were taken out, one by one, for their corporal punishment to be carried out. On each occasion, Mr. Caesar observed that the prisoners returned severely injured, but he was not flogged and rather was returned to his cell without any explanation.

49(26). On February 5, 1998, Mr. Caesar was subjected to 15 strokes of the "cat-o-nine tails", in accordance with his sentence.

49(27). For the administration of the flogging, Mr. Caesar was required to "lie spreadeagled and naked" and was strapped to a metal contraption, known in prison as the "Merry Sandy". His hands and feet were tied tightly to the metal structure and his head was covered with a sheet. Once strapped to the iron frame with his back exposed and his clothing removed, Mr. Caesar was then flogged with the "cat-o-nine tails".

49(28). The punishment was carried out despite his physical condition (supra para. 49(18)). There were at least six persons present in the room where the punishment was carried out, including the Supervisor of Prisons and the prison medic. Before the flogging, the doctor examined Mr. Caesar's blood pressure and other vital signs, and then gave his consent to continue. During the lashing, Mr. Caesar screamed out in pain, and eventually fainted. When he regained consciousness, the Superintendent ordered that he be taken to the infirmary.

49(29). There are no medical records regarding the administration of Mr. Caesar's corporal punishment.

Physical and psychological consequences of Mr. Caesar's corporal punishment

49(30). Mr. Caesar remained in the infirmary for two months after the corporal punishment, and did not receive any medical treatment for the flogging except for orally-administered painkillers. Mr. Caesar continues to suffer pain in his shoulders.

49(31). As a result of the punishment, Mr. Caesar has suffered depression, and acute anxiety of sufficient severity to warrant a diagnosis of, at a minimum, an adjustment disorder.

49(32). Mr. Caesar may have suffered from post-traumatic stress disorder in the the first or second year after the corporal punishment was inflicted. Although he continues to have some post-traumatic stress disorder symptoms, such as depressed mood, intrusive recollections, and a sensation of something hitting his back, which causes his shoulder to twitch involuntarily, they do not currently meet the diagnosis of that disorder.

Regarding Mr. Caesar's damages

49(33). The facts of the present case have resulted in the alteration of Mr. Caesar's physical and psychological condition, causing him damages.

VIII. ARTICLES 5(1) AND 5(2) OF THE AMERICAN CONVENTION IN CONJUNCTION WITH ARTICLES 1.1 AND 2 OF THE CONVENTION (RIGHT TO PERSONAL INTEGRITY)

Arguments of the Commission

50. With regard to Article 5 of the American Convention, the Inter-American Commission argued that:

a) the concept of "inhuman treatment" includes "degrading treatment";
b) torture is an aggravated form of inhuman treatment perpetrated with the purpose of obtaining information, confessions or inflicting a punishment. The essential criterion by which to distinguish torture from other cruel, inhuman or degrading treatments or punishment consists in the intensity of the suffering inflicted;
c) many instruments of human rights law or international humanitarian law expressly prohibit corporal punishment. Furthermore, many international and national tribunals and authorities have considered that corporal punishment is incompatible with national and international guarantees against torture and other inhuman treatment, such as the United Nations Special Rapporteur on Torture, the Human Rights Committee, the European Court on Human Rights, the European Commission on Torture and Inhuman or Degrading Treatments or Punishment Prevention;
d) the use of the "cat-o-nine tails" seeks and achieves the effect of causing serious physical, mental and psychological suffering, as well as physical damage to the alleged victim's body;
e) the waiting period for the implementation of the corporal punishment can cause serious anguish, stress and mental suffering, including the loss of intestine and bladder control;

Regarding Mr. Caesar's corporal punishment

f) by imposing upon Mr. Caesar a sentence of 15 strokes with the "cat-o-nine tails", the State violated his right to physical, mental and moral integrity under Article 5.1 of the Convention, and his right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment under article 5.2 of the Convention;
g) the lapse of time in which Mr. Caesar was waiting for the punishment caused him great anguish, stress and fear, as he was exposed to the suffering of other inmates subjected to corporal punishment on four separate occasions, without knowing whether the punishment might also be inflicted upon him;
h) the State flagrantly violated its own law in executing Mr. Caesar's punishment 23 months –and not 6 months as provided by law– after sentencing;
i) the suffering caused to Mr. Caesar by the punishment imposed was aggravated by his age (49 years); by his vulnerable physical condition; by the treatment he was subjected to before and after the flogging; and by the manner in which the corporal punishment was carried out;
j) as recognized under international standards governing detainees and prisoners (such as Principles 2 and 4(b) of the United Nations' Principles of Medical Ethics), the availability of competent medical officers to supervise and treat prisoners is fundamental to the humane treatment of detainees. The doctor present at the punishment authorized its infliction, notwithstanding his knowledge of Mr. Caesar's precarious medical condition, due to the surgery

carried out some weeks before. These circumstances raise serious questions regarding whether health personnel in the prison have complied with international law;
k) the fact that the treatment given to Mr. Caesar was imposed as a form of criminal sanction does not affect the State's obligation to comply with the requirements of articles 5.1 and 5.2 of the Convention, as the prohibition of torture and other cruel, inhuman or degrading punishment or treatment is absolute;
l) in mantaining a law that permits the infliction of corporal punishment by flogging with the "cat-o–nine tails", the State failed to meet the general obligation to give internal legal effect to the rights under Article 5 of the Convention, as imposed by Article 2;
m) the punishment of flogging with the "cat-o–nine tails" is, by its very nature, intention and effects, inconsistent with the standards of humane treatment provided by Article 5.1 and 5.2 of the Convention and, for that reason, the State has the obligation under Article 2 of the Convention to abrogate such a law;

Regarding Mr. Caesar's detention conditions

n) the State is responsible for other violations of the right to humane treatment under Articles 5.1 and 5.2 of the Convention due to the conditions in which Mr. Caesar was detained;
o) in the present case the State failed to meet domestic and international standards on conditions of detention: between January 1991 and November 1999, Mr. Caesar was subjected to the following conditions: an overcrowded cell, poor sanitation, little light and ventilation, as well as inadequate medical treatment, all of which violated his right have his physical, mental and moral integrity respected and constitutes a cruel, inhuman or degrading punishment or treatment;
p) Mr. Caesar has suffered from serious health problems, which have included contracting tuberculosis and chronic hemorrhoids. Although he has been examined by a doctor on several occasions, his medical treatment has been inadequate or unresponsive and his medical condition has deteriorated with the passage of time; and
q) the impact of these conditions has been exacerbated by his health problems and by the prolonged periods of time for which Mr. Caesar has been incarcerated.

Arguments of the representatives

51. The representatives, with respect to Article 5 of the American Convention, stated that:

a) any sentence of whipping or flogging is cruel, inhuman and degrading. Moreover, the principle of humanity requires the prohibition of all corporal punishment;
b) the term "torture" applies to the aggravated mistreatment of persons. Torture might be expected to leave long-term effects, either by way of post-traumatic stress, or serious injury, but it need not to do so. Torture is often associated with actions that subject the alleged victim to sustained and unpredictable cruelty over which there is no legal restraint. Furthermore, punishment duly prescribed by law is capable of amounting to torture. Finally, cruel, inhuman or degrading punishment inevitably causes problems that cannot be remedied;

Regarding Mr. Caesar's Corporal Punishment

c) the sentence of corporal punishment and the manner in which it was carried out violate Articles 5.1 and 5.2 of the Convention;
d) the time limit established by the Corporal Punishment Act for carrying out the flogging is absolute and cannot be extended because of the prisoner's ill-health;
e) the execution of the judgment that ordered corporal punishment or treatment is cruel, inhuman and degrading itself, even without the aggravating factors that Mr. Caesar suffered. Moreover, the corporal punishment was carried out 23 months after his sentencing and was therefore in flagrant violation of the State's own law;
f) Mr. Caesar experienced severe anguish, stress and fear as he was exposed to the suffering of other inmates, as well as during the moments immediately preceding his actual flogging, due to his recent hemorrhoid surgery;
g) the carrying out of the corporal punishment in the presence of complete strangers severely humiliated Mr. Caesar;
h) the doctor present during the corporal punishment breached his ethical code by permitting the punishment to be executed, as he was fully aware of the alleged victim's health condition; and
i) the State violated Article 2 of the Convention by failing to give domestic legal effect to the rights protected under Article 5 of the Convention;

Regarding Mr. Caesar's detention conditions

j) the conditions of detention to which Mr. Caesar has been subjected violate Articles 5.1 and 5.2 of the Convention and, moreover, fail to meet the standards required by the relevant United Nations Minumum Rules; and
k) Mr. Caesar was not given the necessary surgery until five or six years after the pertinent medical recommendation, in breach of the relevant United Nations Minimum Rules, a situation that worsened his condition. The date of the hemorrhoid operation mentioned by Mr. Caesar may be incorrect, as it may have occurred in early 1997.

The Court's assesment

52. Article 5(1) and 5(2) of the Convention provide:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

53. Article 1(1) of the American Convention stipulates:

[t]he States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political oar other opinion, national or social origin, economic status, birth, or any other social condition.

54. Article 2 of the American Convention provides:

[w]here the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

55. In this section the Court will address the following issues under Article 5(1) and 5(2), in relation to Articles 1(1) and 2, of the Convention:

a) the lawfulness of the State's imposition of the corporal punishment of flogging under said provisions and the manner in which the judicial corporal punishment was inflicted upon Mr. Caesar;
b) whether the State has failed to comply with its general obligation under Article 2 of the Convention to give domestic legal effect to the rights protected under Article 5; and
c) whether Mr. Caesar's conditions of detention amounted to a violation of said provisions on the part of the State.

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Regarding the lawfulness of the State's imposition of the corporal punishment of flogging under Article 5(1) and 5(2), in conjunction with Article 1(1), of the Convention, and the manner in which the judicial corporal punishment was inflicted upon Mr. Caesar

56. The Commission submitted that the form of punishment to which Mr. Caesar was subjected, is "by its nature, intention and effects [inherently] inconsistent with the [minimum] standards of humane treatment under Articles 5(1) and 5(2) of the American Convention".

57. To judge whether the State violated Article 5(1) and 5(2) of the American Convention in the instant case, the Court must first decide upon the compatibility of a state's imposition of corporal punishment, specifically by flogging, with regard to said provision. To this end, the Court deems it pertinent to offer an overview of this punishment under international and domestic law and practice.

58. Every international human rights instrument of general scope, whether regional or universal, contains provisions similar in content to Article 5 of the American Convention. [FN14] These general provisions are complemented by the express prohibition of torture and other cruel, inhuman or degrading treatment or punishment in particular international instruments and, of relevance to the instant case, the prohibition of the use of corporal punishment. [FN15]

[FN14] Universal Declaration of Human Rights (Article 5); American Declaration of the Rights and Duties of Man (Article 1); International Covenant on Civil and Political Rights (Article 7); European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3); African Charter of Human and Peoples' Rights (Article 5) and Arab Charter of Human Rights (Article 13).

[FN15] United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted August 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc E/5988 (1977). Rule 31 specifically provides that "[c]orporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishment shall be completely prohibited as punishment for disciplinary offences".

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59. The Inter-American Court has held that

[…] torture and cruel, inhuman or degrading punishment or treatment are strictly prohibited by international human rights law. The prohibition of torture and cruel, inhuman or degrading punishment or treatment is absolute and non-derogable, even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crimes, martial law or a state of emergency, civil commotion or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophes. [FN16]

[FN16] Cf. Case of Lori Berenson-Mejía, supra note 10, para. 100; Case of De la Cruz-Flores, Judgment of November 18, 2004. Series C No. 115, para. 125; and Case of Tibi, Judgment of September 7, 2004. Series C No. 114, para. 143.

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60. In particular, international case law and the following authorities have considered that corporal punishment is incompatible with international guarantees against torture and other cruel, inhuman or degrading treatment.

61. The United Nations Special Rapporteur on Torture has stated that Article 31 of the United Nations Standard Minimum Rules for the Treatment of Prisoners reflects the international prohibition of cruel, inhuman or degrading treatment, and, more broadly, that "corporal punishment is inconsistent with the prohibition against torture, and cruel, inhuman or degrading treatment or punishment enshrined, inter alia, in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture, Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention against Torture, Cruel, Inhuman or Degrading Treatment or Punishment." [FN17]

[FN17] "Questions of the Human Right of all Persons subjected to any form of detention or imprisonment, in particular: torture and other Cruel, Inhuman or Degrading Treatment or Punishment". Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights res. 1995/37 B, 10 January 1997, E/CN.4/1997/7.

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62. Similarly, the United Nations Human Rights Committee has concluded that the prohibition of torture and cruel, inhuman or degrading treatment or punishment contained in Article 7 of the International Covenant on Civil and Political Rights should be extended to corporal punishment, "including excessive chastisement ordered as punishment for a crime, or as an educative or disciplinary measure". [FN18] With respect to the use of corporal punishment in Trinidad and Tobago, the Committee specified in its Concluding Observations on a report submitted by Trinidad and Tobago under Article 40 of the Covenant that it was "disturbed to learn that apart from prohibiting corporal punishment for persons under 18 years of age, the State party is still practicing the punishment of flogging and whipping which are cruel and inhuman punishment prohibited by article 7." It thus recommended that the State immediately abolish all sentences of flogging or whipping. [FN19]

[FN18] UNHRC, General Comment 20, Article 7 (44th sess., 1992), Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para. 5; and UNHRC, General Comment 21, Article 10 (44th sess., 1992), Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para. 3.
[FN19] UNHRC consideration of reports submitted by states parties under Article 40 of the Covenant, Concluding observations of the Human Rights Committee: Trinidad and Tobago, Seventieth session, November 3, 2000, CCPR/CO/70/TTO, para. 13.

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63. The Human Rights Committee has reached similar conclusions in its decisions on individual complaints. For example, in the case of Sooklal v. Trinidad and Tobago, the Committee ruled that the administration of birching provided for by the law of the State as a sanction constitutes cruel, inhuman or degrading treatment or punishment contrary to Article 7 of the Covenant. Similarly, in the case Osbourne v. Jamaica, the Committee found that by carrying out a sentence of whipping with a tamarind switch, the State party had breached its obligations under said provision. [FN20] In that ruling the Committee stated that:

[i]rrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to Article 7 of the Covenant.

[FN20] Osbourne v. Jamaica, Communication No. 759/1997, Report of the Human Rights Committee, April 13, 2000, CCPR/C/68/D/759/1997, para. 9.1. See also UNHRC, Boodlal Sooklal v. Trinidad and Tobago, Communication No. 928/2000, Report of the Human Rights Committee, November 8, 2001, CCPR/C/73/928/2000, para. 4.6; and Matthews v. Trinidad and Tobago, (569/1993) Report of the Human Rights Committee, 29 May 1998, CCPR/C/62/D/569/1993, para. 7.2.

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64. In the Case of Tyrer v. United Kingdom, the European Court of Human Rights addressed the incompatibility of corporal punishment with the right to humane treatment under Article 3 of

the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the case of a minor who had been subjected to three strokes of the birch pursuant to domestic legislation in the Isle of Man (United Kingdom), the Court concluded that the treatment was degrading and as such violated Article 3 of the European Convention. The European Court held that:

[t]he very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State […] Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which it is one of the main purposes of Article 3 (art. 3) to protect, namely a person's dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects.

The institutionalized character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender. [FN21]

[FN21] Eur. Court H.R., Tyrer v. United Kingdom, (5856/72), Judgment of April 25, 1978, Series A No. 26, para. 33. In the Case of A v. United Kingdom, the European Court similarly found that the beating of a nine year-old boy with a garden cane, which had been applied with considerable force on more than one occasion, constituted a violation of Article 3 of the European Convention (Eur. Court H.R., A v. United Kingdom, (100/1997/884/1096), Judgment of September 23, 1998). For its part, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has specified that domestic laws providing for corporal punishment were "in flagrant contradiction with European Prison Rules, and generally grossly outdated" or are "clearly no longer acceptable by modern-day standards (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Maltese Government on the visit to Malta (CPT) from July 1 to 19, 1990, October 1, 1992, CPT/Inf (92) 5, at 16 and 23).

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65. Furthermore, norms of international humanitarian law absolutely prohibit the use of corporal punishment in situations of armed conflict, as well as in times of peace. [FN22]

[FN22] With respect to norms applicable in international armed conflicts, the Third Geneva Convention of August 12, 1949 relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force October 21, 1950, Art. 87 (3), 89 and 108. The Fourth Geneva Convention of August 12, 1949 relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, entered into force October 21, 1950, Arts. 32, 118 and 119. More generally, Article 75 of Additional Protocol I to the Geneva Conventions provides that corporal punishment is and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents (Protocol Additional to the Geneva Conventions Relating to the Protection of

Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force Dec. 7, 1978, Art. 75 (2) (b). See also Art. 11(4). In the case of non-international armed conflicts, Article 4 of the Additional Protocol II to the Geneva Conventions prohibits corporal punishment at any time and in any place whatsoever (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977).

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66. It should be noted that a number of those States that still retained corporal punishment have recently abolished it. [FN23] Moreover, an increasing number of domestic courts have concluded that the imposition of corporal punishment, regardless of the circumstances of the case and the modalities through which it is carried out, constitutes cruel, inhuman and degrading treatment, and represents a form of punishment no longer acceptable in a democratic society. [FN24]

[FN23] Examples of recent legislative change include: the Abolition of Corporal Punishment Ordinance 1998 (Anguilla), the of Corporal Punishment (Abolition) Act 2000 (British Virgin Islands), the Prisons (Amendment) Law 1998 (Cayman Islands), the Criminal Law (Amendment) Act (Act No 5 of 2003) (Kenya), the Punishment of Whipping Act 1996 (Pakistan) (but still permitted for "Hadood" crimes), and the Abolition of of Corporal Punishment Act 1997 (South Africa).

[FN24] Cf. State v. Ncube 1987 (2) ZLR 246 (SC); 1988 (2) SA 702 (Zimbabwe Supreme Court); Court of First Instance of the Netherlands Antilles, cited by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Government of the Netherlands on the visit to the Netherlands Antilles from 7 to 11 December 1997, December 10, 1998, CPT/Inf (98)17 [Part 1], at 10; and Hope v. Pelzer, 122 S. Ct. 2508, No. 01-309, Supreme Court of the United States of America 122 S. Ct. 2508; Gates v. Collier 501 F. 2d 1292 at 1306 (5th Cir.); Ex parte Attorney General of Namibia, In re Corporal Punishment by Organs of the State, 1991 (3) SA 76 (Namibia Supreme Court), at 95F; State v. Williams and Others, 1995 (3) SA 632 (South Africa Constitutional Court), para. 11; Simon Kyamanywa v. Uganda, Constitutional Reference No. 10/2000, 1 December 2001 (Constitutional Court of Uganda); Naushad Ali v. State, Criminal Appeal No. HAA 0083/2001L, March 21, 2002 (Fiji High Court); y John Banda v. The People, HPA/6/1998 (High Court of Zambia).

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67. The European Court of Human Rights has held that a treatment must attain a minimum level of severity in order to be considered inhuman or degrading and, in the extreme, torture. The evaluation of this minimum level is relative and depends on the circumstances of each case, such as the duration of the treatment, and its physical and mental effects. [FN25]

[FN25] Cf. Eur. Court H.R., Ireland v. United Kingdom, (1979-80), Judgment of January 18, 1978, paras. 162-163.

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68. Furthermore, in the Celebici case the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia analyzed international humanitarian law and human rights law standards, on the basis of which it defined inhuman or cruel treatment as:

[…] an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, that causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. [FN26]

[FN26] ICTFY, Prosecutor v. Delalic et al. (Celebici case), Case No. IT-96-21-T, Judgment of November 16, 1998, para. 552. See also Prosecutor v. Kunarac, Kovac and Vukovic, Case No. IT-96-23-T and IT-96-23/1-T, Judgment of February 22, 2001, para. 514; Prosecutor v. Blaskic, Case No. IT-45-14-T, Judgment of March 3, 2000, para. 186; and Prosecutor v. Jelesic, Case No. IT-95-10-T, Judgment of December 14, 1999, para. 41.

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69. For its part, the Inter-American Court has, since the case of Loayza Tamayo v. Perú, held that:

[t]he violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation. The European Court of Human Rights has declared that, even in the absence of physical injuries, psychological and moral suffering, accompanied by psychic disturbance during questioning, may be deemed inhuman treatment. The degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance. [FN27]

[FN27] Case of Loayza-Tamayo. Judgment of September 17, 1997. Series C No. 33, para. 57. See also, Eur. Cour H.R., Case of Ireland v. the United Kingdom, supra note 25, para. 167.

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70. The abovementioned international instruments and its own case law lead the Court to conclude that there is a universal prohibition of torture and other cruel, inhuman or degrading treatment or punishment, independent of any codification or declaration, since all these practices constitute a violation of peremptory norms of international law. [FN28] The Court also notes the growing trend towards recognition, at international and domestic levels, of the impermissible character of corporal punishment, with regard to its inherently cruel, inhuman and degrading nature. In consequence, a State Party to the American Convention, in compliance with its obligations arising from Articles 1(1), 5(1) and 5(2) of that instrument, is under an obligation erga omnes to abstain from imposing corporal punishment, as well as to prevent its administration, for constituting, in any circumstance, a cruel, inhuman or degrading treatment or punishment.

[FN28] Cf. Case of the Gómez-Paquiyauri Brothers, Judgment of July 8, 2004, Series C No. 110, para. 112; Case of Maritza Urrutia. Judgment of November 27, 2003, Series C No. 103, para. 92; and Cantoral-Benavides Case. Judgment of August 18, 2000, Series C No. 69, paras. 102 and 103.

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71. In the instant case, Mr. Caesar was subjected to corporal punishment by flogging, pursuant to a sentence delivered by the High Court of Trinidad and Tobago, according to the terms of Trinidad and Tobago's Corporal Punishment Act. This law authorizes domestic courts to order the application of sentences of corporal punishment for certain crimes, for any male offender, in addition to any other punishment for which he is liable, whether by flogging with a "cat-o-nine tails" or by whipping with a tamarind rod, birch or other switches, "or in either case such other instruments as the President may from time to time approve" (supra para. 49(7)).

72. According to the evidence presented to the Court, the "cat-o-nine tails" consists of a plaited rope instrument made up of nine knotted thongs of cotton cord, 30 inches long and less than one quarter of an inch in diameter, attached to a handle, which are lashed across the back of the subject, between the shoulders and the lower area of the spine (supra para. 49(8)). The instrument is designed to bruise and lacerate the skin of the subject and is also intended to cause severe physical and psychological suffering. As such, the Court is convinced that the cat-o-nine tails, as regulated and used in Trinidad and Tobago for the administration of corporal punishment by flogging, is used to inflict a cruel, inhuman and degrading form of punishment.

73. Regarding the law and practice in Trinidad and Tobago of judicial corporal punishment by flogging, the Court considers that the very nature of this punishment reflects an institutionalization of violence, which, although permitted by the law, ordered by the State's judges and carried out by its prison authorities, is a sanction incompatible with the Convention. [FN29] As such, corporal punishment by flogging constitutes a form of torture and, therefore, is a violation per se of the right of any person submitted to such punishment to have his physical, mental and moral integrity respected, as provided in Article 5(1) and 5(2), in connection with Article 1(1) of the Convention. Accordingly, Trinidad and Tobago's Corporal Punishment Act must be considered in contravention to Article 5(1) and 5(2) of the Convention (infra para. 94).

[FN29] Cf., in the same vein, Tyrer v. United Kingdom, supra note 21. In this regard, the Special Rapporteur on Torture of the United Nations Commission on Human Rights (supra note 17) has noted that "[…] the 'lawful sanctions' exclusion must necessarily refer to those sanctions that constitute practices widely accepted as legitimate by the international community, such as deprivation of liberty through imprisonment, which is common to almost all penal systems. […] By contrast, the Special Rapporteur cannot accept the notion that the administration of such punishment as stoning to death, flogging and amputation […] can be deemed lawful simply because the punishment has been authorized in a procedurally legitimate manner, i.e. through the sanction of legislation, administrative rules or judicial order. To accept this view would be to accept that any physical punishment, no matter how torturous and cruel, can be considered lawful, as long as the punishment had been duly promulgated under the domestic law of a State.

Punishment is, after all, one of the prohibited purposes of torture. […] Indeed, cruel, inhuman or degrading punishment are, then, by definition unlawful; so they can hardly qualify as 'lawful sanctions' within the meaning of Article 1 of the Convention against Torture".
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74. While the Inter-American Court is neither authorized nor required by the Convention to pronounce on the compatibility of the actions of individuals with the Convention, it is nevertheless obvious that the conduct and decisions of civil servants and state agents must be framed within those international obligations. In the instant case, where the Corporal Punishment Act of Trinidad and Tobago gives the relevant judicial officer an option to order corporal punishment in addition to imprisonment in certain circumstances, the Court feels bound to put on record its profound regret that the presiding officer in the State´s High Court saw fit to exercise an option which would manifestly have the effect of inflicting a punishment that is not merely in blatant violation of the State´s international obligations under the Convention, but also is universally stigmatized as cruel, inhuman, and degrading.

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75. The Court will now examine the particular circumstances in which Mr. Caesar's sentence of corporal punishment was carried out.

76. It is established that State agents flogged Mr. Caesar with a "cat-o-nine tails" on February 5, 1998. Mr. Caesar´s affidavit leaves little to the imagination concerning the physical and emotional impact of this punishment, as well as the anguish and suffering he experienced in the moments immediately preceding the punishment. He described the experience as follows:

[…] On 5 February 1998, I received 15 strokes with the cat-o-nine tails. […] there were 4 other men in the cell with me. I was the last to be beaten. I was even more frightened this time […] I was still recuperating and was weak when they took me to be beaten. I was afraid that I would not come out of the beating alive because of my condition. […]
[…] I was taken to the room where I was to be beaten. […] the prison doctor, […] the Chief Infirmary Officer at the Port of Spain Prison, a Prison Supervisor […], two other men who I did not know but I believe that they were from the Ministry of National Security and two prison officers were present in the room. [The prison doctor] told me to take off my clothes. I told [him] that I just had surgery. He knew this. He did not reply. I took my clothes off. [The prison doctor] took my blood pressure [and] then said "he alright, go ahead." […]
[…] I was then made to lie spread eagled and naked on a metal contraption, known among the prisoners as the "Merry Sandy." It had that kind of spread-eagled shape. I could not turn my head. I could only stare ahead. The two prison officers strapped me on to the "Merry Sandy". They tied my hands and feet tightly to it. They then covered my head with a sheet. I was scared. I was nauseous. My body was shaking. I then felt a terrible painful lash to my shoulder. My body tensed. I heard a male voice say "one". This was the man beating me. I did not know who he was. The man beating me waited for my muscles to relax, brought the cat-o-nine down on by [sic] back again and said "two". Each time he waited for my muscles to become less tense before hitting me. Each time he said out loud the number of lashes I had already received. The pain was unbearable. All this time he was lashing me I was screaming in pain, becoming hysterical,

screaming that they were trying to kill me. I cannot remember how many blows I received when I began to feel faint […] The beating nevertheless continued and I passed out. When I awoke I was lying on a stretcher in the same room. The Superintendent said that I was to be taken to the infirmary.
[…] I remained in the infirmary for 2 months after the beating. I was beaten on my back and shoulders. My shoulders were bruised and I was in a lot of pain. I was weak. […] I received no medical treatment for the beating except painkillers. I was kept in the infirmary because I was ill and weak from surgery and the authorities were afraid something might happen to me.
[…] Up to the present time I continue to feel the blows and still suffer pain in my shoulders. [FN30]

[FN30] Affidavit of Winston Caesar, sworn on October 23, 2002 (Exhibits to the Application of the Inter-American Commission, Exhibit 4).

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77. The physical harm and pain caused by the flogging were exacerbated by the anguish, stress and fear Mr. Caesar suffered during the period in which he awaited his punishment. Moreover, on three or four separate occasions, he was exposed to the suffering of other prisoners subjected to similar punishment. He stated:

I was trembling. I was taken downstairs to another cell block and put in a cell with four other men. We were kept in the cell overnight. I was tense and frightened and did not sleep that night. […] The officers [took one of the prisioners and] brought him back about half an hour after. […] I became very frightened when I saw his condition. […] It was mental torture waiting for my turn and I was shaking. […] I was subjected to the same thing on 3 further occasions. On each of those occasions I was placed in a cell downstairs with four other prisoners. On each occasion the other men were beaten and I was not. It was a lot of torture for me. […] I watched some of them cry. […] I suffered mental and emotional torture. I was very frightened each time. […] [FN31]

[FN31] Affidavit of Winston Caesar, supra note 30.

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78. Mr. Caesar was subjected to the threat of imminent physical abuse, which could have been inflicted at any moment, and was deliberately forced to witness the effects of such punishment upon the other prisoners, causing him severe anguish and fear.

79. Moreover, the Court shares the Commission's view that the sentence was carried out in a manner that severely humiliated Mr. Caesar. He was forced to lie "spread-eagled and naked" on a metal contraption before at least six persons, completely immobilized, while the strokes were delivered.

80. In keeping with domestic regulations and practice, [FN32] the prison doctor was present before and during the alleged victim's flogging to advise on the prisoner's physical condition, and to decide whether the punishment could be safely carried out. The representatives alleged

that, by authorizing the flogging despite his knowledge of Mr. Caesar's medical condition, the prison doctor acted in violation of his ethical duty. The Commission argued that such circumstances raise serious questions as to whether the medical personnel in the State's prisons comply with international standards governing the conduct of health personnel, in particular those set forth in the United Nations' Principles of Medical Ethics Relevant to the Role of Health Personnel in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. [FN33]

[FN32] Cf. Trinidad and Tobago's Prison Rules (West Indian Prisons Act of 1838 (q & 2 Vict. C67).

[FN33] United Nations' Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 37/194, annex, 37 U.N. GAOR Sup. (No. 51) at 211, U.N. Doc. A/37/51 (1982).

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81. As noted above, the Court does not assess individual responsibilites; its function is rather to protect the victims, determine when their rights have been violated and order reparation for the damage caused by the State responsible for such acts. [FN34]

[FN34] Cf. Castillo-Petruzzi et al. Case. Judgment of May 30, 1999. Series C No. 52, para. 90; The "Panel Blanca" Case (Paniagua Morales et al.). Judgment of March 8, 1998. Series C No. 37, para. 71; and Suárez-Rosero Case. Judgment of November 12, 1997. Series C No. 35, para. 37.

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82. The Commission also argued that the evidence presented confirms that the suffering experienced by Mr. Caesar was also exacerbated by his own vulnerable medical condition, specifically owing to his surgery for hemorrhoids only weeks before the flogging. The alleged victim himself affirmed this situation in his affidavit. However, the representatives stated during the public hearing that the date alleged as the day of the surgery may have been incorrect.

83. It was proven that the alleged victim developed hemorrhoids during his detention and, as a result, underwent surgery in January 1997 (supra para. 49(19)). Since there is no showing that the abovementioned surgery occurred a few weeks before the flogging, there are no grounds for finding aggravating circumstances in this context.

84. It is established that, after the flogging, the only medical treatment provided by the State consisted of painkillers, notwithstanding the fact that he had been injured and that his medical condition was already precarious. This conclusion is supported by Robert Ferris' statement that he found no medical records of any kind relating to the corporal punishment, its effects on Mr. Caesar or any treatment provided (supra para. 49(29)).

85. The Commission further argued that, since the punishment was carried out 23 months after the alleged victim's sentencing, it was in flagrant violation of the State's own domestic law, as well as contrary to Article 5(1) and 5(2) of the Convention.

86. The Court notes that Section 6 of the Corporal Punishment Act of Trinidad and Tobago requires a sentence of corporal punishment to be carried out within six months from the date of sentencing. As shown above, the 1994 amendment to the Corporal Punishment Act provided that any period of appeal would not count in reckoning the statutory limit of six months (supra para. 49(9)). This amendment, however, was not applicable to Mr. Caesar's situation, since he was sentenced prior to its entry into force. In any event, the flogging was performed some five years and seven months outside the statutory limit, so that it can be reasonably assumed that the delay both augmented and extended his mental anguish. [FN35]

[FN35] In Tyrer v. United Kingdom (supra note 21), the European Court pointed out that "admittedly, the relevant legislation provides that in any event birching shall not take place later than six months after the passing of sentence. However, this does not alter the fact that there had been an interval of several weeks since the applicant's conviction by the juvenile court and a considerable delay in the police station where the punishment was carried out. Accordingly, in addition to the physical pain he experienced, Mr. Tyrer was subjected to the mental anguish of anticipating the violence he was to have inflicted on him".

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87. The Court, thus, has endeavored to assess all of the aggravating circumstances which arose in the infliction of Mr. Caesar's punishment and has taken into account the degree of intensity of physical and mental pain suffered by him, which was in turn exacerbated by the treatment he received before and after the flogging. In that regard, the Commission argued that there has been an additional violation of the Convention in relation to those aggravating circumstances.

88. In the preceding paragraphs, the Court declared that the corporal punishment by flogging, as it was examined in the instant case, must be considered as a form of torture and is, therefore, contrary per se to Article 5(1) and 5(2) of the Convention and to peremptory norms of international law (supra para. 73). Furthermore, the Court is cognizant of the severe aggravating circumstances discussed above, namely: the extreme humiliation caused by the flogging itself; the anguish, stress and fear experienced while awaiting the punishment in prison, a period that was marked by excessive delay; and Mr. Caesar's observation of the suffering of other prisoners who had been flogged. The extreme gravity and the degree of intensity of physical and psychological suffering caused by these circumstances upon Mr. Caesar will be considered when assessing the pertinent reparations (infra para. 127).

89. In all the circumstances, therefore, the Court finds that the State violated Article 5(1) and 5(2), in connection with Article 1(1), of the Convention, to the detriment of Mr. Winston Caesar.

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On whether the State has failed to comply with its general obligation under Article 2 of the Convention to give domestic legal effect to the rights protected under Article 5 of said Convention.

90. The Court now will assess whether the State has fulfilled its general obligations under Article 2 of the Convention in this regard.

91. In interpreting Article 2 of the Convention, the Court has held that: [FN36]

[i]f the States, pursuant to Article 2 of the American Convention, have a positive obligation to adopt the legislative measures necessary to guarantee the exercise of the rights recognized in the Convention, it follows, then, that they also must refrain both from promulgating laws that disregard or impede the free exercise of these rights, and from suppressing or modifying the existing laws protecting them. These acts would likewise constitute a violation of Article 2 of the Convention.

[FN36] Cf. Hilaire, Constantine and Benjamin et al. Case, supra note 7, para. 113.

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92. The violations of Article 5(1) and 5(2) of the Convention to the detriment of Mr. Caesar resulted not only from the actions and omissions of State agents, but above all from the very existence and the terms of Trinidad and Tobago's Corporal Punishment Act (supra para. 73).

93. The Court has declared this law to be incompatible with Article 5 of the American Convention. Once the Convention entered into force for Trinidad and Tobago, the State should have adapted its legislation to the obligations set forth in that treaty, as to ensure the most effective protection of the human rights enumerated therein. It should be reaffirmed that, pursuant to Article 2 of the Convention, the duty to adapt domestic legislation is by its very nature one of results and, therefore, the denunciation of the Convention cannot extinguish the State's international obligations assumed while the treaty was in force. Such obligations have an autonomous and automatic character and do not depend upon an actual ruling of the Convention's organs of supervision regarding a specific domestic law.

94. Having declared the incompatibility of the Corporal Punishment Act with the Convention, the Court finds that, by its failure to abrogate this law following its ratification of the Convention, the State did not comply with its obligations under Article 2, in relation to Article 5(1) and 5(2) of the Convention.

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On whether Mr. Caesar's conditions of detention constitute a violation of Article 5(1) and 5(2) of the Convention.

95. The Commission argued that the State is responsible for further violations of Mr. Caesar's right to humane treatment under Article 5(1) and 5(2) of the Convention due to the

conditions in which he has been detained. The Commission submitted that, owing to these conditions of detention, the State has failed to meet domestic and international standards in its treatment of Mr. Caesar. Furthermore, the Commission argued that the impact of these conditions has been aggravated by the prolonged periods of time during which Mr. Caesar has been incarcerated in connection with his criminal proceedings.

96. In this regard, the Court has held that, in accordance with Article 5(1) and (2) of the Convention,

[…] all persons deprived of their liberty have the right to detention conditions that are compatible with their human dignity. On other occasions, the Court has indicated that detention in conditions of overcrowding, with lack of ventilation and natural light, without a bed for rest and adequate sanitary conditions, in isolation or with undue restrictions upon the visiting schedule, constitute a violation of the right to humane treatment. [FN37]

[FN37] Cf. Case of Lori Berenson-Mejía, supra note 10, para. 102; Case of Tibi, supra note 16, para. 150; and Case of the "Juvenile Reeducation Institute", Judgment of September 2, 2004, Series C No. 112, para. 151. See also United Nations Minimum Rules for the Treatment of Prisoners. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the E.S.C. res. 663 C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, Rules 10 and 11.

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97. In addressing the issue of prison conditions, the Court has taken note of other international instruments, as well as the case law of other international human rights institutions. Recently, the Court has held that the State is placed in a special position of guarantor in relation to persons deprived of their freedom, since penitentiary authorities have full control over the persons subjected to their custody. [FN38] In this very particular context of subordination between the detainee and the State, the latter has a special responsibility to ensure to those persons under its control conditions that permit them to retain a degree of dignity consistent with their inherent and non-derogable human rights. [FN39]

[FN38] Cf. Case of Tibi, supra note 16, para. 129; Case of the "Juvenile Reeducation Institute", supra note 37, para. 152; and Case of the Gómez-Paquiyauri Brothers, supra note 28, para. 98.
[FN39] Cf. Case of Lori Berenson-Mejía, supra note 10, para. 102; Case of Tibi, supra note 16, para. 150; and Case of the "Juvenile Reeducation Institute", supra note 37, para. 153.

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98. In the Case of Hilaire, Constantine and Benjamin et al., the Court found that the conditions of detention in several Trinidad and Tobago prisons were characterized by serious overcrowding, inadequate sanitation and poor hygiene and medical care. The Court concluded that the conditions in which the victims of that case were incarcerated were "in fact indicative of the general conditions in Trinidad and Tobago's prison system", compelling the victims "to live

under circumstances that impinge on their physical and psychological integrity and therefore constitute cruel, inhuman and degrading treatment". [FN40]

[FN40] Cf. Hilaire, Constantine, Benjamin et al. Case, supra note 7, paras. 169 and 170.

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99. As set out in the proven facts of this judgment, during his detention Mr. Caesar has been held along with other prisoners in small and poorly ventilated cells, equipped with a slop pail instead of a toilet, and has been obliged to sleep on the floor. Since his incarceration, Mr. Caesar has also suffered from serious health problems. Although examined by medical personnel on several occasions, Mr. Caesar's medical treatment has nonetheless been inadequate and his health conditions have deteriorated with the passage of time (supra paras. 49(16) and 49(18)).

100. The Court finds that the conditions of detention to which Mr. Caesar has been subjected have failed to respect his physical, mental, and moral integrity as required under Article 5(1) of the Convention, and constitute inhuman and degrading treatment contrary to Article 5(2) of the Convention, which enshrines provisions of jus cogens. Therefore, the Court holds that the State is also responsible for the violation of these provisions, in conjunction with Article 1(1) of the Convention, to the detriment of Mr. Winston Caesar.

IX. ARTICLES 8 AND 25 OF THE AMERICAN CONVENTION IN CONJUNCTION WITH ARTICLES 1(1) AND 2 OF THE CONVENTION (RIGHT TO A FAIR TRIAL AND JUDICIAL PROTECTION)

Arguments of the Commission

101. The Inter-American Commision, with reference to Articles 8 and 25 of the American Convention, stated that:

a) the State is responsible for violating Mr. Caesar's right to be tried within a reasonable time, under Article 8.1 of the Convention, because of the delay in his criminal proceeding;
b) Mr. Caesar suffered a total delay of 15 years between his initial arrest on November 11, 1983 and November 9, 1998, when the counsel informed Mr. Caesar's lawyers that his attempt to pursue a final appeal before the Judicial Committee of the Privy Council was unlikely to succeed. This period represents an unreasonable delay that far exceeds the delay in previous cases in which the Court has found violations of Article 8.1 of the Convention. The State has not provided any explanation for this delay, nor do any facts appear from the record that might account for such delay;
c) Section 6 of Trinidad and Tobago's Constitution precludes any appeal against the constitutionality of the Corporal Punishment Act;
d) the State is responsible for violating Mr. Caesar's right to judicial protection under Article 25 of the Convention, as well as its obligations under Article 2 of the Convention, in connection with Articles 7(5) and 8(1) of the Convention, by failing to guarantee, under its domestic law, the right to be tried within a reasonable time;

e) the Constitution of Trinidad and Tobago does not include among its prescribed fundamental rights and freedoms the right to a trial within a reasonable time, fact that has been confirmed by the Judicial Committee of the Privy Council; and
f) although Mr. Caesar was released by the State prior to his trial and therefore did not need to invoke Article 7(5) of the Convention, the evidence indicates that the State's failure to provide for the right to be tried within a reasonable time under Article 8(1) also necessarily implies, as a general proposition, failure to protect the corresponding right under Article 7(5) of the Convention.

Arguments of the representatives

102. The representatives of the alleged victim, with respect to Articles 8 and 25 of the American Convention, stated that:

a) the State violated Article 8 of the Convention by failing to provide Mr. Caesar with a trial and appeal proceedings within a reasonable time;
b) the State violated Article 25 of the Convention, as it failed to provide Mr. Caesar with a means of effective domestic recourse;
c) Mr. Caesar was subjected to a total delay of 12 years between his initial arrest and his attempt to pursue an appeal before the Judicial Committee of the Privy Council;
d) both the sentence itself and the manner in which it was carried out are inconsistent with and violate the right enshrined under Section 4(a) and Section 5(2)(b) of Trinidad and Tobago's Constitution. However, the violations of the rights enshrined in said Sections, are not capable of remedy in domestic courts because of the "savings clause" in Section 6(1) of the Constitution. Nevertheless, States cannot evade their obligations under human rights treaties by reliance upon "savings clauses" that have the effect of undermining or defeating domestic implementation of those obligations; and
e) The State violated Article 2 of the Convention by failing to give domestic legal effect to the rights protected under Article 8 of the Convention.

The Court's assesment

103. Article 8(1) of the American Convention provides for the right to a fair trial as follows:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

104. Article 25(1) of the American Convention guarantees the right to judicial protection as follows:

Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

105. There are two issues that the Court must address regarding the alleged violations of Articles 8(1) and 25, all in connection with Articles 1(1) and 2, of the American Convention:

a) the reasonableness of the length of the criminal proceedings; and
b) whether the domestic law of the State provides an effective remedy against either the existence or the application of corporal punishment.

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106. The Court notes that, after the judgment delivered by the Court of Appeal of Trinidad and Tobago on February 28, 1996, Mr. Caesar still had the possibility to apply for leave to appeal to the Privy Council. The Court cannot share the Commission's view that Mr. Caesar was subjected to a total delay of fifteen years in the proceedings, to be calculated between his initial arrest in 1983 and his "attempt to pursue an appeal before the Judicial Committee of the Privy Council in 1998". That "attempt" consisted in a legal opinion rendered in November 1998 by counsel in London, at the request of Mr. Caesar's lawyers, and therefore cannot be equated to a procedural step in a judicial process. The length of the proceedings must be calculated, therefore, on the basis that the final judgment in the case was reached with the decision of the Court of Appeal of Trinidad and Tobago on February 28, 1996.

107. Although neither the Commission nor the representatives raised the issue of the Court´s ratione temporis jurisdiction, it is incumbent on the Tribunal to consider this question in the context of the actual duration of the criminal proceedings in order to come to a conclusion as to the reasonableness of the time elapsed, for the purpose of deciding whether there was a violation of the rights enshrined in Article 8(1) of the Convention.

108. On this point, the Court has held as follows:

When codifying general law on this issue, Article 28 of the Vienna Convention on the Law of Treaties establishes that:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party. [FN41]

[FN41] Cf. Case of the Serrano-Cruz Sisters. Preliminary Objections, supra note 4, paras. 60, 61 and 64; Case of Alfonso Martín-del Campo-Dodd. Preliminary Objections, supra note 4, para. 68; and Cantos Case. Preliminary Objections. Judgment of September 7, 2001, Series C No. 85, para. 35.

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109. In cases where the Court decided that it had no ratione temporis jurisdiction to decide upon certain facts, it has made it clear that this situation does not imply a judgment about the existence of those facts. [FN42]

[FN42] Cf. Case of Alfonso Martín-del Campo-Dodd. Preliminary Objections, supra note 4, paras. 79 to 84.

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110. In cases where the applicant alleged the violation of Articles 5(3) or 6(1) of the European Convention on Fundamental Rights and Freedoms, the European Court of Human Rights has restricted its considerations to the time period that falls into its ratione temporis jurisdiction, starting from the date on which the State recognized the right of individual petition or ratified the Convention. It is significant, however, that the European Court nevertheless takes into account the amount of time that has elapsed before this effective date – in cases of detention or in a legal proceeding, for example – in its assessment of rights violations. [FN43]

[FN43] Cf. Eur. Court H.R., Kudla v. Poland, Grand Chamber, (30210/96), Judgment of October 26, 2000, paras. 102-103 and 119-123; Eur. Court H.R., Humen v. Poland, Grand Chamber, (26614/95), Judgment of October 15, 1999, paras. 58-59. See also, Eur. Court H.R., Ilaşcu v. Moldova and Russia, (48787/99), Judgment of July 8, 2004, paras. 395-400.

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111. The Court notes that the criminal proceedings lasted for more than 12 years, if calculated from the first arrest of Mr. Caesar on November 11, 1983, as the Commission and the representatives have done. However, as Trinidad and Tobago's recognition of the Court's compulsory jurisdiction took effect on May 28, 1991, the Court can only consider the period between the date of that recognition and the decision of the Court of Appeal on February 28, 1996, the final judgment delivered in the criminal proceedings. Mr. Caesar was convicted on January 10, 1992 by the High Court of Trinidad and Tobago. His lawyers waited for almost two years to request leave to appeal and, on February 28, 1996, the Court of Appeal dismissed the appeal and confirmed the sentence. Therefore, the Court finds that the duration of the criminal proceedings between May 28, 1991, and February 28, 1996 – discounting the period of almost two years before that leave to appeal was sought – does not constitute a delay that can be considered unreasonable, in the terms of Article 8(1) of the Convention.

112. For the aforementioned reasons, the Court considers that the State is not responsible for a violation of Article 8(1) of the Convention.

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113. The Court must now turn to examine whether the domestic law of the State provides an effective remedy against either the existence or the application of corporal punishment.

114. In the instant case, domestic judges were authorized to sentence Mr. Caesar to flogging with the "cat-o-nine-tails" under the laws of Trinidad and Tobago – specifically, the Corporal Punishment Act.

115. It is important to note that, even if Mr. Caesar had been able to appeal to the Privy Council, such an appeal would have been most unlikely to succeed. In this regard the expert witness Desmond Allum commented that:

[o]ne of the fundamental reasons why there has been no substantial challenge to the legality of a sentence of corporal punishment is the "savings clause". This clause effectively ensured that it was not open to [domestic] courts to impugn the constitutionality of a sentence of corporal punishment as this [clause] predated the coming into force of the 1976 Constitution, and accordingly, was "saved" into [Trinidad and Tobago's] law as good law.
In the recent case of Matthew v The State of Trinidad and Tobago, the Judicial Committee of the Privy Council considered the "savings clause" in the context of the death penalty. The majority of the Board of the Privy Council held that the mandatory death penalty is a cruel and unusual punishment, and is therefore inconsistent with Sections 4(a) and 5(2)(b) of the Constitution. However, a majority of the Board held that the legislation imposing the mandatory death penalty was passed prior to the Constitution, and, because of the "savings clause" in Section 6, it could not be invalidated by reference to the fundamental rights for which Sections 4 and 5 of the Constitution provide. Accordingly, the majority upheld the validity of the mandatory death penalty. [FN44]

[FN44] Affidavit of expert witness Mr. Desmund Allum, sworn on October 26, 2004 (Exhibits to the Case File).
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116. Similarly, in a 2002 judgment with regard to a case in the Bahamas, the Judicial Committee of the Privy Council observed that "[…] it is accepted that flogging is an inhuman and degrading punishment and, unless protected from constitutional challenge under some other provision of the Constitution, is rendered unconstitutional by [the provision of the Constitution prohibiting torture and inhuman or degrading treatment or punishment]". [FN45] Nevertheless, on the basis of the "savings clause" in the Constitution of the Bahamas, the Privy Council upheld the constitutionality of the legislation authorising corporal punishment.

[FN45] Prince Pinder v. The Queen, Privy Council Appeal No. 40/2001 (Bahamas), September 23, 2002, [2003] 1 AC 620, para. 5.
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117. It follows from the above that the State did not provide the alleged victim with an effective remedy to challenge the application of the aforementioned corporal punishment. Therefore, the Court considers that Trinidad and Tobago is responsible for the violation of Article 25, in relation to Articles 1(1) and 2, of the Convention, to the detriment of Mr. Caesar.

X. REPARATIONS (Application of Article 63(1) of the American Convention)

Arguments of the Commission

118. The Commission argued that:

a) the State must pay the reasonable and justified material and moral damages related to the violations suffered by Mr. Caesar;
b) Mr. Caesar is entitled to receive a sum of compensation sufficient to reflect the fundamental and serious nature of the violations committed against him, both to provide adequate reparation as well as to deter similar violations in the future;
c) it has no objection to the submission by the representatives of Mr. Caesar regarding Mr. Caesar's early release from prison, due to the circumstances of the present case; and
d) measures to ensure non-repetition of the violations suffered by Mr. Caesar are crucial to a just and effective resolution of the matter before the Court. In particular, the State must be compelled to adopt such legislative or other measures as may be necessary to:

give effect to the right to a trial within a reasonable time under Articles 7(5) and 8(1) of the Convention;

abrogate or otherwise prohibit the punishment of flogging as provided for under its Corporal Punishment Act;

ensure that conditions of detention in state prisons, including those of Mr. Caesar, comply with the standards of humane treatment mandated by Article 5 of the Convention; and

abrogate the "savings clause" under Section 6 of Trinidad and Tobago's Constitution, insofar as that provision denies persons effective recourse to a competent court or tribunal for protection against acts that violate their fundamental rights recognized by Trinidad and Tobago's Constitution.

Arguments of the Representatives

119. The representatives claimed no sum of compensation for Mr. Caesar, considering that monetary compensation, which might normally be an appropriate remedy, would be of limited use to him in his present situation in a maximum security prison. The representatives maintained that in cases where a violation has taken place and cannot be undone, mitigation of penalty is a suitable remedy for a victim who remains in custody serving a sentence. Therefore, an appropriate remedy for the violation of Mr. Caesar's rights would be his immediate release from his sentence and that the remainder of that sentence be remitted. Moreover, as a consequence of having violated Article 2 of the Convention, the State is obliged to take the necessary measures to ensure consistency between its law and the protections under the American Convention. Finally, the representatives claimed no costs or expenses before the Court, as they are acting pro bono.

The Court's assessments

120. In accordance with the analysis set forth in previous chapters, the Court declared, based on the facts of the case, violations of Article 5(1) and 5(2) in conjunction with Article 1(1) of the American Convention, Article 2, in relation to Article 5(1) and 5(2) of the Convention, and Article 25 in conjunction with Articles 1(1) and 2 of said instrument. The Court has held, on a number of occasions, that any violation of an international obligation resulting in harm carries with it an obligation to provide adequate reparations. [FN46] Article 63(1) of the American Convention states that:

[i]f 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 (emphasis added).

[FN46] Cf. Case of Lori Berenson-Mejía, supra note 10, para. 230; Case of Carpio-Nicolle et al., supra note 10, para. 85; and Case of De la Cruz-Flores, supra note 16, para. 138.

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121. This provision constitutes a rule of customary law that enshrines one of the fundamental principles of contemporary international law on state responsibility. Thus, when an illicit act is imputed to the state, there immediately arises a responsibility on the part of that state for the breach of the international norm involved, together with the subsequent duty to make reparations and put an end to the consequences of said violation. [FN47]

[FN47] Cf. Case of Carpio-Nicolle et al., supra note 10, para. 86; Case of Plan de Sánchez Massacre. Reparations, supra note 10, para. 52; and Case of De la Cruz-Flores, supra note 16, para. 139.

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122. The reparation of harm caused by a violation of an international obligation requires, whenever possible, full restitution (restitutio in integrum), which consists in restoring the situation that existed before the violation occurred. When this is not possible, as in the present case, it is the task of this Tribunal to order the adoption of a series of measures that, in addition to guaranteeing respect for the rights violated, will ensure that the damage resulting from the infractions is repaired, by way, inter alia, of payment of an indemnity as compensation for the harm caused. [FN48] The obligation to make reparations, which is regulated in all its aspects (scope, nature, modalities, and designation of beneficiaries) by international law, cannot be altered or eluded by the State´s invocation of provisions of its domestic law. [FN49]

[FN48] Cf. Case of Carpio-Nicolle et al., supra note 10, para. 87; Case of Plan de Sánchez Massacre. Reparations, supra note 10, para. 53; and Case of Tibi, supra note 16, para. 224.
[FN49] Cf. Case of Lori Berenson-Mejía, supra note 10, para. 231; Case of Carpio-Nicolle et al., supra note 10, para. 87; and Case of De la Cruz Flores, supra note 16, para. 140.

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123. Reparations, as the term indicates, consist in those measures necessary to make the effects of the committed violations disappear. The nature and amount of the reparations depend on the harm caused at both the material and moral levels. Reparations cannot, in any case, entail either the enrichment or the impoverishment of the victim or his or her family. [FN50]

[FN50] Cf. Case of Carpio Nicolle et al., supra note 10, para. 89; Case of Tibi, supra note 16, para. 225; and Case of the "Juvenile Reeducation Institute", supra note 37, para. 261.

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124. In light of the abovementioned criteria, the Court will proceed to analyze the submissions of the Commission and the representatives regarding reparations, in order to determine the pertinent remedial measures to be adopted in the instant case.

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A) MORAL DAMAGES

125. Moral damage may include suffering and affliction caused to the direct victims and their next of kin, detriment to very significant personal values, as well as non-pecuniary alterations in the conditions of existence of a victim or his or her family. Since it is not possible to assign a precise monetary equivalent to non-pecuniary damage, for purposes of comprehensive reparation to victims, the Court must turn to other alternatives: first, payment of an amount of money or delivery of goods or services that can be estimated in monetary terms, which the Court will establish through reasonable application of judicial discretion and equity; and second, acts or works which are public in their scope or effects, commitment to efforts seeking to avoid the repetition of violations, as well as recognition of the victim's dignity. [FN51]

[FN51] Cf. Case of Plan de Sánchez Massacre. Reparations, supra note 10, para. 80; Case of De la Cruz-Flores, supra note 16, para. 155; and Case of Tibi, supra note 16, para. 242.

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126. It is well settled in international jurisprudence that a judgment constitutes, per se, a form of reparation. However, considering the circumstances of the present case and its non-pecuniary consequences, the Court deems it appropriate that the moral damages must also be repaired, on grounds of equity, through the payment of compensation. [FN52]

[FN52] Cf. Case of Lori Berenson-Mejía, supra note 10, para. 235; Case of Carpio-Nicolle et al., supra note 10, para. 177; and Case of Plan de Sánchez Massacre. Reparations, supra note 10, para. 81.

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127. In order to determine compensation for the moral damage suffered by the victim, the Court has taken into account the aggravating circumstances of his corporal punishment with the "cat-o-nine tails", namely the anguish, deep fear and humiliation suffered by Mr. Caesar prior to and during the flogging. Moreover, the Court notes that the delay in executing the sentence increased his anguish while he was waiting to be punished. As a result of the corporal punishment, Mr. Caesar continues to experience pain in his shoulders and he has also suffered, inter alia, from symptoms of depression, fear, and anxiety of a severity sufficient to allow the

expert witness Robert Ferris to diagnose, at a minimum, an adjustment disorder. And finally, since his incarceration, the victim has suffered from serious health problems that have not been properly treated by state authorities (supra paras. 49(18), 49(19), 49(21), 49(31), 49(32) and 89).

128. Taking all of the elements of the present case into account, the Court sees fit, on grounds of equity, to direct Trinidad and Tobago to grant an indemnity of US $ 50.000,00 (fifty thousand United States of America dollars) to Mr. Winston Caesar for moral damages. The Court notes here that no specific arguments or requests regarding Mr. Caesar's next-of-kin were submitted.

B) OTHER FORMS OF REPARATION (SATISFACTION MEASURES AND NON-REPETITION GUARANTEES)

129. In this chapter, the Court will determine the satisfaction measures to repair non-pecuniary damages; such measures seek to impact the public sphere. [FN53]

[FN53] Cf. Case of De la Cruz-Flores, supra note 16, para. 164; Case of Plan de Sánchez Massacre. Reparations, supra note 10, para. 52; and Case of the "Juvenile Reeducation Institute", supra note 37, para. 310.

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130. The Court declared that the imposition of corporal punishment by flogging is in absolute contravention to the Convention. The aberrant character of such punishment has led the Court to conclude that Mr. Caesar was subjected to torture, as well as to other inhuman and degrading treatment due to the conditions of his detention (supra paras. 70, 73 and 100).

131. Furthermore, having examined the body of evidence submitted in the instant case, it is clear that Mr. Caesar's physical and psychological problems persist and have not been properly treated (supra para. 49(32)). Consequently, as it has on other occasions, [FN54] the Court directs the State to provide Mr. Caesar, with effect from the date of notification of this judgment, through its national health services, free of charge and for such period as may be necessary, such medical and psychological care and medication as may be recommended by appropriately qualified specialists.

[FN54] Cf. Case of Lori Berenson-Mejía, supra note 10, para. 238; Case of Plan de Sánchez Massacre. Reparations, supra note 10, paras. 106 and 107; and Case of De la Cruz Flores, supra note 16, para. 168.

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132. Having found that the Corporal Punishment Act is incompatible with the terms of Article 5(1) and 5(2) of the Convention (supra paras. 73 and 94), the Court directs the State to adopt, within a reasonable time, such legislative or other measures as may be necessary to abrogate the Corporal Punishment Act.

133. The Court has held that "Section 6 of the Constitution of the Republic of Trinidad and Tobago of 1976 establishes that no law in effect prior to the date the Constitution entered into force may be the object of constitutional challenge under Sections 4 and 5 […]. The Mandatory Death Penalty Act was declared incompatible with the American Convention and thus any provision that establishes that Act's immunity from challenge is likewise incompatible, by virtue of the fact that Trinidad and Tobago, as a Party to the Convention at the time that the acts took place, cannot invoke provisions of its domestic law as justification for failure to comply with its international obligations". [FN55] Similarly, inasmuch as it immunises the Corporal Punishment Act from challenge, the "savings clause" under Section 6 of Trinidad and Tobago's Constitution is incompatible with the Convention. Therefore, the Court orders the State to amend, within a reasonable time, Section 6 of Trinidad and Tobago's Constitution insofar as that provision denies persons effective recourse to a competent court or tribunal for remedy against violations of their human rights.

[FN55] Cf. Hilaire, Constantine, Benjamin et al. Case, supra note 7, para. 152.c).

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134. The Commission and the representatives also argued that the State's penitentiary system permits prisoners to be detained in conditions that fail to respect their rights to physical and mental integrity and to humane treatment. In this regard, the Court has also found that the prison conditions to which Mr. Caesar has been subjected are contrary to Article 5(2) of the Convention and are representative of Trinidad and Tobago's prison system (supra para. 49(22) and 100). Therefore, the Court deems it necessary to order the State, as it did in the Case of Hilaire, Constantine, Benjamin et al. [FN56], and as a guarantee of non-repetition, to adopt, within a reasonable time, all necessary measures to bring the conditions of its prisons into compliance with the relevant international human rights norms.

[FN56] Cf. Hilaire, Constantine, Benjamin et al. Case, supra note 7, para. 217.

C) COSTS AND FEES

135. Since the representatives claimed no costs or expenses before the Court, as they are acting pro bono, and the Commission did not submit any observations on this point, the Court makes no award with regard to costs and expenses in the present case.

XI. MEANS OF COMPLIANCE

136. The State is directed to pay the compensation ordered (supra para. 128) within one year of the notification of this judgment and to adopt the other measures of reparation ordered in accordance with the provisions of paragraphs 131 to 134 of this judgment.

137. The payment of the compensation ordered in favor of the victim shall be made directly to him. If he has died, the payment shall be made to his heirs.

138. The State may comply with its obligations by payment in United States dollars or the equivalent amount in national currency, using the rate of exchange between the two currencies in force on the market in New York, United States of America, the day before payment, in order to make the respective calculation.

139. If, due to causes that can be attributed to the beneficiary of the compensation, he is unable to claim such compensation within the said period of one year, the State shall deposit such amount in his favour in an account or a deposit certificate in a reputable national banking institution, in United States dollars or the equivalent in Trinidad and Tobago currency and in the most favourable financial conditions allowed by legislation and banking practice. If, after ten years, the compensation has not been claimed, the sum shall be returned to the State, with the interest earned.

140. The payment ordered in this judgment as compensation for moral damages may not be affected, reduced or conditioned by any current or future taxes or charges. Consequently, it shall be paid in full to the victim in accodance with the present judgment.

141. If the State falls in arrears, it shall pay interest on the amount owed, corresponding to bank interest on arrears in Trinidad and Tobago.

142. In accordance with its consistent practice, the Court retains the authority, inherent in its competence, to monitor compliance with this judgment. The instant case shall be closed when the State has fully implemented all of the provisions of this judgment. Within one year of notification of this judgment, the State shall provide the Court with a first report on the measures taken in compliance.

XII. OPERATIVE PARAGRAPHS

143. Therefore,

THE COURT,

DECLARES,

Unanimously, that:

1. The State violated the right enshrined in Article 5(1) and 5(2) in conjunction with Article 1(1) of the American Convention on Human Rights, to the detriment of Mr. Winston Caesar, in the terms of paragraphs 70, 73, 89 and 100 of this judgment.
2. The State breached its obligations established in Article 2 of the American Convention on Human Rights, in relation to Article 5(1) and 5(2) of the Convention, to the detriment of Mr. Winston Caesar, in the terms of paragraph 94 of this judgment.
3. The State did not violate the right enshrined in Article 8(1) of the American Convention on Human Rights, for the reasons set forth in paragraphs 106 to 112 of this judgment.

4. The State violated the right enshrined in Article 25 in conjunction with Articles 1(1) and 2 of the American Convention on Human Rights, to the detriment of Mr. Winston Caesar, in the terms of paragraphs 113 to 117 of this judgment.
5. This judgment constitutes, per se, a form of reparation, in the terms of paragraph 126 of this judgment.

AND DECIDES,

Unanimously, that:

1. The State shall pay the compensation ordered in paragraph 128 of this judgment to Winston Caesar for moral damages.
2. The State shall, with effect from the date of notification of this judgment, provide Mr. Winston Caesar, through its national health services, free of charge and for such period as may be necessary, such medical and psychological care and medication as may be recommended by appropriately qualified specialists, in the terms of paragraph 131 of this judgment.
3. The State shall adopt, within a reasonable time, such legislative or other measures as may be necessary to abrogate the Corporal Punishment Act (Offenders Over Eighteen), in the terms of paragraph 132 of this judgment.
4. The State shall amend, within a reasonable time, Section 6 of Trinidad and Tobago's Constitution, in the terms of paragraph 133 of this judgment.
5. The State shall adopt, within a reasonable time, such measures as may be necessary to bring the conditions of detention in its prisons into compliance with the relevant international human rights norms, in the terms of paragraph 134 of this judgment.
6. The State shall pay the compensation ordered in favor of Mr. Winston Caesar directly to him within one year of the notification of this judgment, in the terms of paragraph 128 of this judgment.
7. The State may comply with the pecuniary dispositions in this judgment by payment in United States dollars or the equivalent amount in national currency, using the rate of exchange between the two currencies in force on the market in New York, United States of America, on the day preceding the day of payment.
8. If, for reasons attributable to the recipient of the compensation herein ordered, he is unable to claim such compensation within the stipulated period of one year, the State shall deposit such amount in his favour in an account or a deposit certificate in a reputable national banking institution, in the terms of paragraph 139 of this judgment.
9. The payment for moral damages ordered in this judgment shall not be subject to or affected or reduced by any existing or future taxes or charges, in the terms of paragraph 140 of this judgment.
10. If the State falls into arrears in the payments ordered, it shall pay interest on the amount owed at the going bank rate in Trinidad and Tobago.
11. It shall monitor compliance with this judgment and shall close the instant case when the State has fully implemented all of its provisions. Within one year of the notification of this judgment, the State shall provide the Court with a report on the measures taken in compliance, in the terms of paragraph 142 of this judgment.

Judges García-Ramírez, Jackman, Cançado-Trindade and Ventura-Robles advised the Court of their Concurring Opinions, which accompany this judgment.

Drafted in San José, Costa Rica, on March 11, 2005, in English and Spanish, both texts being authenticated.

SEPARATE OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE CASE OF CAESAR V. TRINIDAD AND TOBAGO (MARCH 11, 2005)

1. The judgment of the Inter-American Court of Human Rights to which I append this Separate Opinion, issued on March 11, 2005 in the Case of Caesar v. Trinidad and Tobago, raises several issues related to important matters, such as the scope and effectiveness of the obligations undertaken by a State party to an international convention; the legality of certain forms of punishment in the light of domestic and international laws on torture and other cruel, inhuman or degrading treatment; some aspects of the due process of the law, particularly compliance with the "reasonable time" requirement; conditions of arrest for accused or convicted persons; and the proportionality between the offense committed and the punishment prescribed by law and enforced by the court.

2. All of these issues, with the exception of the latter, were covered by the Inter-American Court when considering the instant case and in the operative paragraphs of the respective judgment. Of course, the issue of whether the Court had competence to hear this matter has been also examined, notwithstanding the denunciation of the American Convention by the State, which did not enter an appearance in the proceeding, and the possible challenge to the competence of the Inter-American Court on the basis of the reservation — or limitation on the recognition of competence — to which the State subjected its ratification of the Convention when effecting it.

I. COMPETENCE OF THE COURT

3. As regards the denunciation, it is important to consider that the facts sub judice occurred at a time when the State was a party to the American Convention. Therefore, they are subject to the Court's competence ratione temporis. Even though the State did not appear in court, the Court prosecuted the case on its own motion. Current regulations confer this power on the Court, which is, at the same time, an obligation for the judicial organ.

4. With respect to the restriction in the recognition of the competence ratione materiae, it is meet to consider the view previously held by the Court in this regard in the Cases of Hilaire, Constantine and Benjamín et al. (Trinidad and Tobago). Preliminary Objections. Judgments of September 1, 2001). On that occasion, the restriction established by the State at the time of ratifying the Convention was dismissed and the State accepted the contentious jurisdiction the Inter-American Court had. Such restriction was rejected because it was framed in such general terms as to defeat the object and purpose of the treaty and imply the conditioning of international jurisdiction by the organs of the domestic judiciary. If such a restriction were upheld, it would be

impossible to determine the scope of international jurisdiction, the activity of which would be subject to assessment and admission by domestic authorities, on a case by case basis.

5. In my Separate Opinion accompanying the aforementioned judgment of September 1, 2001 I stated, and repeat today, that: "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 (of 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.'

"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."

"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."

"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."

"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."

6. I think it is relevant to underscore that such dismissal by the Court of a restriction established by a State in no way implies that the Court would disregard or ignore just any limitation that such State could establish. The Court, as an instrument of certainty and justice, must be careful to safeguard both legal values. If it imposed a competence on the State that the latter had specifically excluded, it would be affecting, at least, the principle of legal certainty. The American Convention and the actions of the Court vested by it pay all due attention to the legitimate decisions taken by the States within the framework of admissible restrictions and reservations.

7. Respect for this circumstance —which in its turn does not imply denying there might have been violations of human rights, regardless of the fact that the Court may abstain from passing judgment on them— has been observed before in this Court's decisions when it had to weigh the effects of a reservation or a restriction. The decision handed down in the Case of Serrano Cruz is the most recent example of the Court fulfilling its duty in this area. The situation under consideration in the instant case is different from the one in such case. Hence, the different determinations adopted. Whereas in one case, competence is restricted in terms that are admissible, though maybe not desirable, in the instant case competence is limited altogether.

8. From the point of view of the effectiveness of the Inter-American human rights protection system, refusal by a State to fully honor the commitments undertaken, from which the international liability affirmed by the Inter-American Court derives, constitutes a cause for major concern. It is possible for a State to abstain from signing or ratifying a treaty; likewise, it is possible for it to include in the recognition of the contentious jurisdiction of the Court the restrictions expressly authorized by the Convention; and, finally, it is also possible for it to denounce the Convention. However, it seems at least inexplicable that, having agreed to the Pact, a State would later decide to disregard the obligations derived therefrom, or to subject them to conditions, or to fulfill them in ways that are not provided in the treaty.

9. It is highly desirable that careful consideration of these issues and the need to strengthen the human rights protection system will prompt a review that can contribute to attain the lofty purposes set by the Charter of the Organization of the American States, the American Declaration and the Pact of San José, in accordance with the decisions adopted by the States that are part of the Inter-American community themselves.

II. PUNISHMENT BY FLOGGING

10. Probably, the most notorious issue as to the merits of the case is the persistence and imposition of flogging —as provided in the State's law— as corporal punishment, administered with a whip called the "cat o' nine tails". The characteristics of this instrument are described in the judgment according to the evidence on the record. There is no doubt that its use causes the person receiving the punishment most severe pain. The Court's stance on this issue, as stated in the judgment, is of complete and outright rejection. In this regard, the Court has taken into account a reasoned line of thought which is dominant both nationally and internationally, repudiating the use of any form of punishment that is, because of its characteristics and because of the pain it inflicts on the convict, incompatible with human dignity, on the one hand, and with the generally recognized purposes of the punishment imposed on convicts, on the other.

11. As a result of this, the convict becomes a victim of the State whose role in punishing criminal behavior has gone astray from its purpose and overstepped its mark. Certainly, the need — and the public duty — to decisively fight crime and punish offenders is undeniable. What is objectionable is that this punitive role, in itself lawful, be carried out in such a manner and by such means as to render it grievous to human dignity and that conflict with the ethical standards that must be the hallmark of the democratic State in the exercise of all of its powers, including the power to punish. As I have stated in the past, it is in the punitive order, perhaps more than in others, that the political convictions and moral design of a State become apparent.

12. The foregoing is applicable regardless of whether the individual involved be, in turn, a victimizer in the commission of a punishable offense. If his criminal liability is established, the individual must be punished. It seems unnecessary to say —though perhaps suitable to insist on making the point once more—that in human rights violation proceedings the perpetration of this kind of violations is only and exclusively on trial and not the criminal liability of the individual, which must be established by the appropriate domestic courts in accordance with domestic law, and punished in a lawful manner, i.e. compatible with the provisions of the relevant domestic Constitution and with international provisions embraced by the State by way of conventions, or imperative provisions within the framework of jus cogens. Once again, it should be noted that a lawful purpose must be attained through equally lawful means.

13. The survival of measures, such as flagellation of an individual, exposes once again the existence, in the midst of the XXI century, of parallel chapters in the histories of crime and the justice system developed to fight against it on behalf of society and the State. It is, of course, a strange and dreadful parallelism, the chronicle of which is beyond the scope of this Separate Opinion, accompanying a judgment. The existence of a clear and exact borderline between crime and criminal justice —which must separate the unfair use of violence displayed by the criminal from the sanctioning role performed by the State— has not always been the case. This role should be justified, as mentioned earlier, on the ethical quality of its grounds, its means and its purposes. Criminal "justice" has frequently overstepped such mark. In this order, the Inter-American Court has joined the European Court in its eloquent reflection in the case of Tyrer v. United Kingdom, regarding corporal punishment: it is but institutionalized violence, an "assault" on a person's dignity and physical integrity. Hence, it violates jus cogens and, for that very reason, it is deemed completely unacceptable. Rejection is absolute, beyond all historical, sociological or disciplinary reasons that may be used to support such punishment.

14. The obstinate presence of these forms of punishment, which constitute reminiscences of old oppressive practices, prompts a review of the purposes of the punishment imposed by the State on the offender. I do not deny the retributive nature the criminal sanction formally has and that has occasionally contributed to limit the display of violence, grading the punishment according to the weight of the offense committed. Nor do I oppose at this time its efficacy — more notional than real— as a way to deter (general deterrence) the commission of offenses. However, I believe it is convenient to retain for the moment, and in the absence of a better safeguard option, the project of social readaptation, reintegration or rehabilitation which has been ascribed to the penal consequences of crime and that is laid down extensively in many domestic

and international documents, particularly in those concerning imprisonment, which, in the history of punishment has replaced capital punishment and corporal punishment.

15. Certainly, relevant criticisms have been made regarding this project associated with punishment. More often than not, these are reasonable remarks it is possible to share. However, we still lack —in real, effective terms rather than notional or conceptual— proper substitutes to replace it immediately, effectively and advantageously. Behind the decline of the rehabilitative theory of punishment await the eliminative and afflictive options, such as capital punishment and corporal punishment —e.g. mutilation, branding or flogging— respectively. That is why readaptation continues to be, in spite of its weaknesses and contradictions, a reasonable check on the absolute penal power of the State, which would otherwise know no limits.

16. The rehabilitative intention is to be found in Article 6(5) of the American Convention, which ascribes to punishment consisting of deprivation of liberty the "essential aim" of promoting "the reform and social readaptation of the prisoners." If this is the purpose of such punishment —its teleological mission, which provides the basic sense to the "positive" action of the State towards convicts— the limit to such action —a boundary that may not be crossed by any authority— lies in the preservation of human dignity. Thus, "all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person" (Article 5(2) of the Convention).

17. It is true that these provisions relate to deprivation of liberty, but it is also true that the ideas shaping these provisions permeate the punishment system as a whole, notwithstanding other purposes related to such system —such as satisfying the rights and interests of the offended— or to certain forms of punishment specifically. It is impossible to suppose, even remotely, that flogging inflicted on a convict does not undermine "the respect for the inherent dignity of the human person", or that it tends to achieve the "reform or readaptation" of the convict, in the only sense that may be meant in a democratic society and that are certainly far from being the intellectual or moral devastation of the subject, his absolute submission through violence, the imposition of pure physical pain, the humiliation of the flagellated person. All of this characterized the notion of punishment for society and the state in an increasingly distant past, which we should confine, once and for all, to the attic of history.

18. Censure of the form of punishment used in the instant case —flogging with the "cat o' nine tails"— has its grounds in Article 5 of the American Convention, in the view of the Court. It entails, beyond any doubt, a brutal attack on a person's integrity. This precept of the Convention, which refers to acts that violate the jus cogens, as has repeatedly occurred, condemns torture and cruel, inhuman or degrading punishment or treatment, types of attack on a person's integrity and of the violation of the right to humane treatment guaranteed to all persons. In my opinion, the flagellation under analysis has the characteristics of torture, whichever the international text where one may find its definition: be it the United Nations Convention of 1984 or the Inter-American Convention of 1985, beyond the differences between the two of them.

19. The elements described in said documents are present in the facts at issue here, among others: sufferings —which in the instant case were very intense— intentionally caused for the purpose of punishment. It is undoubtedly a form of imposing harsh punishment, deliberately and

at the hands of an officer of the State, for the purpose of inflicting corporal punishment. All of which falls perfectly into the international definition of torture. Certainly, when referring to the Inter-American Convention I do not intend to render it applicable to the State, which has not ratified the Convention. I refer to the Convention as a useful instrument to interpret the references contained in Article 5 of the American Convention. The Court has mentioned treaties, the direct application of which is outside its purview, for the purpose of gaining proper understanding of the rules it must apply, such as those contained in Articles 5(1) and (2) of the Convention.

20. In other cases, the Inter-American Court has expressed its view on the existence of torture or cruel, inhuman or degrading treatment. In doing so, it has taken into account, among other factors —therefore, not exclusively— the extent of the suffering inflicted upon the victim as a result of the attack on the person's integrity. In this regard, the Court's opinion is that there is torture when the kind of suffering inflicted is particularly severe, more so than the lesser —though certainly reprehensible always— one in other instances of mistreatment included in Article 5(2) of the American Convention. It is evident that the suffering caused to the victim by means of flagellation with the "cat o' nine tails" corresponds to the kind that may be classified as torture.

21. It is obvious that this classification of the punishment ordered and inflicted in the instant case cannot be dismissed on the grounds that said punishment is provided for in domestic law, as it has been in other provisions before, fortunately repealed long ago by the vast majority of States. The formal "legality" of an action does not necessary modify its intrinsic "injustice" or "illegitimacy", which is a frequently relevant issue when considering the compatibility of provisions or actions by domestic authorities with the principles and rules of the international law on human rights, which is the natural function of the courts within this purview. In this regard, I found the statements made by Mr. Nigel S. Rodley enlightening: "it is not possible to accept the notion that the administration of such punishments as stoning to death, flogging and amputation (…) can be deemed lawful simply because the punishment has been authorized in a procedurally legitimate manner (…)."

22. Therefore, the sufferings in the instant case are not naturally derived from the imposition of a lawful sanction —that is to say, a sanction that does not, in itself, undermine human dignity, which is the justification referred to in the last sentence of Article 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984. I have asserted and hereby emphasize that flogging is in itself contrary to human dignity.

23. We are not faced with an inevitable and inflexible, absolutely necessary sanction, the omission or replacement of which may jeopardize collective security or public peace, in such a manner that the preservation the legal order and the preponderance of justice may not be secured through less cruel means. This type of sanction is intended solely and exclusively to cause suffering, unable —and not even willing— to attain a plausible moral objective. It humiliates the person being punished and degrades the person administering the punishment. In raising his hand against a fellow man, brandishing an element devised to harm the body and overpower the spirit of the offender, even if ordered by the State, the person administering the punishment retrogrades several centuries in the history of our species. Flagellation is, ultimately, pure violence, which as

such falls on the punished and the punisher alike and is far from being indicative of moral authority and righteous serenity in the State imposes and implements flagellation.

24. When a State becomes a party to an international treaty which prohibits this kind of punishment, it undertakes, as a general obligation, the duty to amend its domestic legislation to honor the international commitment made and follow the rules contained in the treaty. This may give rise to some tension between domestic law and international order— to which the State adheres through an act of its own sovereign will— as well as between domestic constitutional law and the secondary legal system.

25. The foregoing has occurred under a provision known as the "savings clause". In the judgment of the instant case, reference is made to an order of the Judicial Committee of the Privy Council of 2002 related to a case prosecuted in the Bahamas and precisely concerning flagellation (Prince Pinder v. The Queen, Privy Council Appeal No. 40/2001 (Bahamas), September 23, 2002 (2003) 1 AC 620, para. 5). The Judicial Committee states that this punishment is inhuman and degrading, and as such it is proscribed by the constitutional provisions that condemn torture and inhuman or degrading treatment or punishment. However, the unlawful sanction survives thanks to the "savings clause" of the domestic Constitution.

26. Amending domestic law so that it conforms to the international standard accepted by the State is an obvious consequence of adherence to an international agreement. The exception contained in the aforementioned savings clause is irrelevant to such purposes, as it purports to exempt certain old provisions laid down by State legislation from constitutional provisions, which in the instant case are provisions related to the protection of human rights and, therefore, to the main and most essential issue of the Rule of Law. In this regard, it should further be noted that the State ratified the American Convention and accepted the contentious jurisdiction of the Court in 1991, i.e. many years after the enactment of the Corporal Punishment Act (1953) and the Constitution (1976).

27. In the instant case, the abovementioned clause entails an anticipated repeal of the Constitution, which will not apply to situations governed by preexisting laws, even though the major concerns safeguarding the individual —the citizen, for whose benefit the State is designed— are enshrined in the new supreme law and the old law persists in ideas that date back even further than the date of its enactment. The sense of a new progressive law is precisely to create a new plausible scenario. This is hampered by the savings clause, which has the past prevail into the future. It makes a superior purpose —the safeguarding of human rights— subservient to an inferior decision —the retention of a form of punishment excluded by the Constitution itself.

28. It is surprising how such clause may suspend the application of nothing less than the provisions that constitute the cornerstone of the modern Rule of Law, the very essence of the Constitution and the reason itself whereby political society stands, that is the fundamental rights of the individual, recognized by a current supreme provision but ignored —effectively ignored— by a secondary provision petrified in the past, yet still operative —running counter to the Constitution itself— at present intending to remain so forever, since it is effective sine die.

III. REASONABLE TIME

29. Non-compliance with the "reasonable time" to close a proceeding and impose a sanction has been noted in the instant case, non-compliance that would undermine due process of law. This problem has been analyzed from the point of view of the proceeding itself, which ends with a court decision, as well as from the point of view of the execution of the punishment for which such final decision is an enforceable order. There has been no consideration by the Court of the procedural nature the execution may have, or in a different light, the applicability to it of the principles inherent in criminal due process.

30. It is evident that the disregard of the reasonable time remains a crucial problem for criminal justice, the reforms of which have been ineffective in sufficiently and definitely addressing the need for a brief, diligent and expeditious administration of justice. Now then, in the circumstances of the case sub judice it is apparent that the Inter-American Court could not deem that punishment by flogging, in itself unlawful, should have been administered without delay —in accordance with the provisions of domestic law— in order to conform to due process requirements. The punishment is flagrantly illegitimate, irrespective of the delay and the date chosen to impose and inflict it. The delay contra legem does not originate a violation; rather it exposes its existence and aggravates its consequences.

IV. CONDITIONS OF ARREST

31. It is also notorious, in relation to the facts in the instant case, the persistence of a major problem in the field of criminal justice, constantly observed in a large number of cases submitted to the contentious jurisdiction of this Court and even analyzed in some consultative opinions. I am referring to the conditions of arrest existent in the vast majority of prisons —whether adult or juvenile institutions— which are entirely incompatible with the American Convention and with the so-called international "standards" on this matter, described in several global and regional documents, especially after the United Nations Standard Minimum Rules for the Treatment of Prisoners (Geneva, 1995) which have been with us for half a century now, and despite being widely known they are frequently ignored. Once again, reality has rebelled against the law. Speeches and facts go different ways.

32. Based on the prevailing circumstances —as evidenced by the judgments of the Inter-American Court and by several provisional measures ordered by the Court— and on the notion, stated by this Court on several occasions, regarding the role of the State as guarantor with respect to the persons in custody —adults or juveniles, healthy or ill— it becomes apparent that there is a pressing need to embark as soon as possible on a comprehensive and true reform of the arrest systems. This includes laws, measures, facilities, security personnel and alternatives to imprisonment, among others. Certainly, the paradoxes and deficiencies of imprisonment are many. To which must be added, worsening the state of affairs before us, the recurrent or constant violation of rules which, if observed, could contribute at least a somewhat acceptable arrest system.

33. It has been asserted, on abundant evidence, that correctional facilities are usually the scene of constant, systematic and deep-rooted violations of human rights, which also are

frequently of the most serious nature. In this regard, it is important to look back on a large number of judgments or orders regarding provisional measures pronounced in the past few years, such as Urso Branco Prison, Juvenile Reeducation Institute, Bulacio, Neira Alegría, Mendoza Prisons, Lori Berenson, Hilaire, Constantine and Benjamin et al., etc. The judgment on the Case of Caesar v. Trinidad and Tobago now adds to this list. The violation of rights resulting from the intolerable conditions prevailing in many prisons already constitutes one of the major issues brought before the Inter-American jurisdiction.

V. PROPORTIONALITY OF PUNISHMENT

34. In the instant case, consideration could have been given to the reasonableness —which, in the instant case, implies lawfulness— of the punishment consisting of the deprivation of liberty prescribed by law and imposed by the judge. Within the framework of criminal law in a democratic society, which entails careful classification of unlawful conduct and the reasonable assessment of its consequences, an adequate gradation of punitive reactions according to the legal interests attained and to the damage or the risk caused. The greater the legal interest protected through the classification of offenses and the damage or risk caused, the harsher the punishment imposable. It is not admissible to punish attempt, which is the offense referred to in the records submitted in the instant case by the competent authorities, with the heavy sanctions that should be imposed on a perfected criminal act. If this principle is set aside, as is the case here, the principle of proportionality of punishment will be attained.

35. The problem of the sanction becomes more apparent in the light of its legal quantitative imprecision, with the potential excesses that may result from it, which became a reality in the case brought before the domestic jurisdiction, which provides no ground whatsoever to opt for a specific term of imprisonment. As a result of this lack of sufficient grounds, the punishment imposed becomes discretionary. Section 31(1) of the Offences against the Person Act, which contains the type of offense (purportedly) considered in the instant case, sets forth that: "Any person who is convicted of the offense of rape is liable to imprisonment for life or for any term of years." It follows that, any rape, regardless of the surrounding circumstances, and even the degree of perpetration reached in the iter criminis —which, in the instance case, amounted to attempt— is subject to a sanction that may range from one year to life imprisonment, at the discretion of the Court.

36. Thus, the law provides for a single punishment for two distinctively different situations: actual rape and attempted rape. The law contains no rule whatsoever to determine the sanction that may result from, in a specific case, this identity in terms of punishment. All of this follows not only from reading the statutes but also from the explicit assessment made by the judge and the attorneys —for the defense and for the prosecution— regarding the meaning and the scope of the relevant law, assessment which is included in the records of the case. Such gross lack of determination could hardly be deemed natural when considering the legality principle in criminal law and the rights of the accused.

37. Once again we are faced with a situation of lack of reference as was the case with the Mandatory Death Penalty, on which the Court found in the Case of Hilaire, Constantine and Benjamín et al. v. Trinidad and Tobago, judgment of June 21, 2002, to which I appended a

Separate Opinion, certain considerations of which are applicable to the case at hand insofar as they refer to general principles of criminal law, ignored by the legislation applied then as well as now. It is obvious that the reasonableness of punishment entails, in itself, no conflict whatsoever between the rights of the accused, on the one hand, and public safety and protection to the victim, on the other.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING JUDGMENT OF JUDGE JACKMAN

The present judgment, with which I wholly concur, is of particular importance for at least three reasons: its reaffirmation that the practice of corporal punishment by States Parties to the American Convention on Human Rights ("the Convention") is in flagrant breach of that treaty; its insistence on the absolute necessity that States should respect their treaty obligations; and its rejection of the dismal device known as "savings clauses" which have the effect of permitting certain states in the Commonwealth Caribbean the luxury of simultaneously reprobating and approbating internationally illicit behaviours.

Corporal punishment

The Court's judgment adequately details the extent to which international human rights jurisprudence has outlawed this cruel, inhuman, and degrading punishment, so that there is no need for me to dilate on it further. It is, however, worth noting that, quite apart from the international opprobrium which this practice has attracted, the Supreme Curt of a jurisdiction with great constitutional similarity to Trinidad and Tobago had no difficulty, in the Barbadian case of Hobbs et al v R, in finding that flogging with the cat-o´-nine-tails is, in the words of Chief Justice Sir Denys Williams, "…inhuman within the meaning of section 15(1) [of the Constitution of Barbados]" and "…degrading within the meaning of section 15(1)". The section referred to by the learned Chief Justice reads as follows:

15.(1) No person shall be subjected to torture or to inhuman or degrading punishment of other treatment.

The relevant Trinidad and Tobago constitutional provision states that:

[…The] Parliament may not… impose or authorize the imposition of cruel and unusual treatment or punishment […]

Pacta sunt servanda

But, will Trinidad and Tobago comply with the decision of the Court? To judge from its failure to participate in the hearing of this case, and given its previous contemptuous attitude in the

Hilaire case, compliance is, to say the least, unlikely. This despite the State's indisputable responsibility under international law to answer to the Inter-American human rights system for any violations of the Convention alleged to have taken place during the period from May 28 1991, the day on which the State ratified the Convention and recognised the compulsory jurisdiction of the Court, and May 26, 1999, the day on which its denunciation of the Convention took legal effect.

The principle that states should abide in good faith by the terms of treaties into which they voluntarily enter (pacta sunt servanda) is the bedrock of international comity and international law. Article 26 of the Vienna Convention on the Law of Treaties ("the Vienna Convention") reads as follows: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". (Emphasis added.)

It ought to be obvious that good faith compliance is of even greater importance in the area of international human rights law, where what is at stake is not the impersonal interests of states but the protection of the fundamental rights of the individual. Trinidad and Tobago's denunciation of the Convention was profoundly regrettable for the cause of a universal regime of human rights protection, but the State was fully within its rights to take that unprecedented step. But its contumelious refusal to acknowledge its continuing obligations under a treaty that remained in force for it when the violations in this case took place represents a gratuitous attack on the Rule of Law, all the more astonishing in a State that, like other Commonwealth Caribbean states, prides itself on its Common Law traditions, where respect for human rights and for the Rule of Law are deeply embedded in the legal culture.

At present, in the wake of Trinidad and Tobago's brief sojourn and precipitous withdrawal, only four of those states are party to the Convention. Only one, Barbados, has accepted the contentious jurisdiction of the Court. On the evidence of that State's recent refusal, in the context of its very first procedural contact with the Court, to obey an interlocutory Order of the Court in a matter referred to the Court by the Inter-American Commission under the terms of Article 63.2 of the Convention, it seems that Barbados is bent on following the scofflaw example of its CARICOM colleague and neighbour.

Although - unlike Trinidad and Tobago in the instant case - Barbados has displayed a minimum of courtesy in actually making a response to the Order of the Court, that response is in the form of a claim that the State is exempt from the Court's jurisdiction, on the juridically incoherent ground that to obey any such order would conflict with its Constitution. This is in direct antithesis to the precept contained in Article 27 of the Vienna Convention: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

There is, unfortunately, no evidence that any of the Commonwealth Caribbean States Parties to the Convention has taken action to meet the obligation set out in Article 2, "Domestic Legal Effects", viz:

"Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance

with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

"Savings Clauses"

As the Court has found both in the instant case and, previously, in the Hilaire case, Section 6 of the Trinidad and Tobago Constitution, the so-called "savings clause", (mirrored in similar constitutional provisions in the Commonwealth Caribbean) has the effect of protecting from scrutiny in the national Courts certain State acts that would otherwise be in breach of the fundamental rights provisions of the said Constitution. However, by virtue of the principle set out in Article 26 of the Vienna Convention, this does not exempt the State from its duty under international law; to the extent that such a provision purports so to do, it constitutes a clear breach of the relevant international obligations.

Countries that enter voluntarily and sovereignly into treaties cannot pick and choose which treaty obligations to obey and which to flout. Even where reservations are entered, it is clearly settled international law and practice that such reservations must not be "incompatible with the object and purpose of the treaty". (Vienna Convention: Article 19).

Trinidad and Tobago has exercised its sovereign right to denounce and withdraw from the Convention. No State, however, having committed itself to an international agreement, can in good faith refuse to abide by those obligations which it unambiguously undertook to honour during the period of the treaty's validity. This would make a mockery of international law and, in the particular case of human rights treaties, would undermine a regime of international concern for the individual human being that dates back at least to the Universal Declaration of Human Rights.

That there is emerging a clear tendency on the part of Commonwealth Caribbean states in this dismal direction, with its implications for the integrity and inclusiveness of the Inter-American system, is a matter of the very gravest concern.

Oliver Jackman
Judge

Pablo Saavedra Alessandri
Secretary

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have concurred with my vote in the adoption of the present Judgment of the Inter-American Court of Human Rights in the Caesar versus Trinidad and Tobago case. Given the relevant legal issues dealt with by the Court in its decision, as well as those underlying it and those surrounding the present case, I feel obliged to leave on the records my personal reflections on them as foundations of my position on the matter. I shall address, in the present Separate Opinion, the following points which I consider of key importance, not only for a better understanding of the Court's decision in the present Caesar case, but also for the handling of

future cases in which such issues may possibly also be raised: a) the humanization of the law of the treaties, as illustrated by developments concerning interpretation of treaties, reservations to treaties, denunciation of treaties, and termination and suspension of the operation of treaties; b) international rule of law: non-appearance before an international tribunal and the duty of compliance with its judgment; and c) the expanding material content and scope of jus cogens in contemporary international law.

I. The Humanization of the Law of Treaties.

2. It is hardly surprising that basic considerations of humanity surround recently emerged domains of international law, such as that of the international protection of human rights. But the incidence of those considerations upon more traditional areas of international law, which were in the past approached, almost invariably, from the angle of the "will" of States, is indicative of the new times, and a new mentality centred rather on the ultimate addressees of international norms, the human beings.

3. The law of treaties affords a pertinent illustration, disclosing that it is no longer entirely at the mercy of the "will" of States and that it, too, acknowledges certain superior common values that the international community as a whole deems should be preserved. Pertinent examples can be found in such areas of the law of treaties pertaining to interpretation of treaties, reservations to treaties, denunciation of treations, and termination and suspension of the operation of treaties. I shall review, however succinctly, each of them, before presenting my concluding observations on the matter.

1. Considerations on the Interpretation of Treaties.

a) General Remarks.

4. When one comes to the interpretation of human rights treaties, as well as of other international treaties, one is inclined to resort at first to the provisions enshrined in Articles 31-33 of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986, respectively), and in particular to the combination under Article 31 of the elements of the ordinary meaning of the terms, the context, and the object and purpose of the treaties at issue [FN1]. One then promptly finds that, in practice, while in traditional law there has been a marked tendency to pursue a rather restrictive interpretation which gives as much precision as possible to the obligations of States Parties, in the international law of human rights, somewhat distinctly, there has been a clear and special emphasis on the element of the object and purpose of the treaty, so as to ensure an effective protection (effet utile) [FN2] of the guaranteed rights.

[FN1] Cf. Maarten Bos, "Theory and Practice of Treaty Interpretation", 27 Netherlands International Law Review (1980) pp. 3-38 and 135-170; W. Lang, "Les règles d'interprétation codifiées par la Convention de Vienne sur le Droit des Traités et les divers types de traités", 24 Österreichische Zeitschrift für öffentliches Recht (1973) pp. 113-173; C.H. Schreuer, "The Interpretation of Treaties by International Courts", 45 British Year Book of International Law

(1971) pp. 255-301; Ch. de Visscher, Problèmes d'interprétation judiciaire en Droit international public, Paris, Pédone, 1963, pp. 9-264.
[FN2] M.K. Yasseen, "L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités", 151 Recueil des Cours de l'Académie de Droit International de La Haye (1976) p. 74; J.B. Acosta Estévez and A. Espaliat Larson, La Interpretación en el Derecho Internacional Público y Derecho Comunitario Europeo, Barcelona, PPU, 1990, p. 105, and cf. pp. 105-107.
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5. Whilst in general international law the elements for the interpretation of treaties evolved primarily as guidelines for the process of interpretation by States Parties themselves, human rights treaties, in their turn, have called for an interpretation of their provisions bearing in mind the essentially objective character of the obligations entered into by States Parties: such obligations aim at the protection of human rights and not at the establishment of subjective and reciprocal rights for the States Parties. Hence the special emphasis on the element of the object and purpose of human rights treaties, of which the case-law of the two regional - the Inter-American and the European - Courts of Human Rights gives eloquent testimony.

6. The interpretation and application of human rights treaties have been guided by considerations of a superior general interest or ordre public which transcend the individual interests of Contracting Parties. As indicated by the jurisprudence constante of the two international human rights tribunals, those treaties are distinct from treaties of the classic type, incorporating restrictively reciprocal concessions and compromises; human rights treaties prescribe obligations of an essentially objective character, implemented collectively by mechanisms of supervision of their own [FN3]. The rich case-law on methods of interpretation of human rights treaties has enhanced the protection of the human person at international level and has enriched International Law under the impact of the International Law of Human Rights.

[FN3] A.A. Cançado Trindade, "The Interpretation of the International Law of Human Rights by the Two Regional Human Rights Courts, in Contemporary International Law Issues: Conflicts and Convergence (Proceedings of the III Joint Conference ASIL/Asser Instituut, The Hague, July 1995), The Hague, Asser Instituut, 1996, pp. 157-162 and 166-167.
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7. The converging case-law to this effect has generated the common understanding, in the regional (European and inter-American) systems of human rights protection, that human rights treaties are endowed with a special nature (as distinguished from multilateral treaties of the traditional type); that human rights treaties have a normative character, of ordre public; that their terms are to be autonomously interpreted; that in their application one ought to ensure an effective protection (effet utile) of the guaranteed rights; that the obligations enshrined therein do have and objective character, and are to be duly complied with by the States Parties, which have the additional common duty of exercise of the collective guarantee of the protected rights; and that permissible restrictions (limitations and derogations) to the exercise of guaranteed rights are to be restrictively interpreted. The work of the Inter-American and European Courts of Human Rights has indeed contributed to the creation of an international ordre public based upon the respect for human rights in all circumstances [FN4].

[FN4] A.A. Cançado Trindade, "Le développement du Droit international des droits de l'homme à travers l'activité et la jurisprudence des Cours Européenne et Interaméricaine des Droits de l'Homme" (Discours du Président de la Cour Interaméricaine des Droits de l'Homme), in CourEDH, Cour Européenne des Droits de l'Homme - Rapport annuel 2003, Strasbourg, CourEDH, 2004, pp. 41-50.

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8. As I have pondered in my Separate Opinion in the Blake versus Guatemala case (reparations, 1999) before the Inter-American Court of Human Rights,

"(...) 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 fulfilment 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" [FN5].

[FN5] IACtHR, Blake versus Guatemala case (Reparations), Judgment of 22.01.1999, Series C, n. 48, Separate Opinion of Judge A.A. Cançado Trindade, pp. 52-53, par. 33, and cf. pars. 32-34.

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9. Another aspect to be here recalled is that of the autonomous meaning of the terms of human rights treaties (as distinct from their meaning, e.g., in domestic law). The point, stressed by the Human Rights Committee (under the U.N. Covenant on Civil and Political Rights) in the adoption of its views in the Van Duzen versus Canada case (in 1982), has also been taken up by the two regional - European and Inter-American - Courts of Human Rights. The European Court has endorsed the doctrine of autonomous interpretation in its judgments, for example, in the Ringeisen (1971), König (1978) and Le Compte (1981 and 1983) cases. The Inter-American Court, in its turn, in its sixth Advisory Opinion, on The Word "Laws" in Article 30 of the American Convention on Human Rights (1986), clarified that the word "laws" in Article 30 of the American Convention, to be examined in accordance not only with the principle of legality but also with that of legitimacy, means a juridical norm of a general character, turned to the "general welfare", emanated from the legislative organs constitutionally foreseen and democratically elected, and elaborated according to the procedure for law-making established by the Constitutions of States Parties.

10. Moreover, the dynamic or evolutive interpretation of the respective human rights Conventions (the intertemporal dimension) has been followed by both the European Court [FN6] and the Inter-American Court [FN7], so as to fulfil the changing needs of protection of the human being; in its sixteenth and pioneering Advisory Opinion, on The Right to Information on

Consular Assistance in the Framework of the Guarantees of the Due Process of Law (1999), which has inspired the international case-law in statu nascendi on the matter, the Inter-American Court has clarified that, in its interpretation of the norms of the American Convention, it should extend protection in new situations (such as that concerning the observance of the right to information on consular assistance) on the basis of pre-existing rights. The same vision has been propounded by the Inter-American Court in its subsequent forward-looking eighteenth Advisory Opinion, on the Juridical Condition and Rights of Undocumented Migrants (2003).

[FN6] E.g., cases Tyrer versus United Kingdom (1978), Airey versus Ireland (1979), Marckx versus Belgium (1979), Dudgeon versus United Kingdom (1981), among others.

[FN7] Cf., in this sense, the obiter dicta in: Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-10/89, on the Interpretation of the American Declaration on the Rights and Duties of Man in the Framework of Article 64 of the American Convention on Human Rights, of 14.07.1989, pars. 37-38; IACtHR, Advisory Opinion OC-16/99, on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, of 01.10.1999, pars. 114-115, and Concurring Opinion of Judge A.A. Cançado Trindade, pars. 9-11; IACtHR, case of the "Street Children" (Villagrán Morales and Others versus Guatemala), Judgment (on the merits) of 19.11.1999, pars. 193-194; IACtHR, case Cantoral Benavides versus Peru, Judgment (on the merits) of 18.08.2000, pars. 99 and 102-103; IACtHR, case Bámaca Velásquez versus Guatemala, Judgment (on the merits) of 25.11.2000, Individual Opinion of Judge A.A. Cançado Trindade, pars. 34-38; IACtHR, case of the Community Mayagna (Sumo) Awas Tingni versus Nicaragua, Judgment (on the merits and reparations) of 31.08.2001, pars. 148-149; IACtHR, case Bámaca Velásquez versus Guatemala, Judgment (on reparations) of 22.02.2002, Individual Opinion of Judge A.A. Cançado Trindade, par. 3.

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11. There is a converging case-law of the two regional Human Rights Courts - and indeed of other human rights international supervisory organs - on this issue. Thus, the European Court of Human Rights has reiteratedly pronounced to that effect [FN8]; in the Loizidou versus Turkey case (1995), for example, the European Court expressly discarded undue restrictions which would not only "seriously weaken" its role in the discharge of its functions but "would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (ordre public)" [FN9]. The Inter-American Court of Human Rights, on its part, has likewise repeatedly stressed the object and purpose of human rights treaties and the objective character of the obligations ensuing therefrom [FN10], as well as the special character of human rights treaties, as distinguished from multilateral treaties of the traditional type [FN11].

[FN8] For example, in its judgments in the Wemhoff (1968), Belgian Linguistics (1968), Golder (1975), Ireland versus United Kingdom (1978) and Soering (1989) cases, among others.

[FN9] ECtHR, Loizidou versus Turkey case (preliminary objections, Judgment of 23.03.1995, par. 75.

[FN10] IACtHR, Advisory Opinions n. 1, on "Other Treaties" Subject to the Advisory Jurisdiction of the Court (1982), and n. 3, on Restrictions to the Death Penalty (1983), among others.

[FN11] E.g., inter alia, IACtHR, Advisory Opinion n. 2, on Effect of Reservations on the Entry into Force of the American Convention (1982).

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12. Such convergence of views of the two regional Human Rights Courts on the fundamental issue of the proper interpretation of human rights treaties naturally ensues from the overriding identity of the object and purpose of those treaties. General international law itself bears witness of the principle (apparently subsumed under the general rule of interpretation of Article 31 of the two Vienna Conventions on the Law of Treaties) whereby the interpretation is to enable a treaty to have appropriate effects [FN12], - a principle which has been resorted to against eventual calls for an unduly restrictive interpretation. There is a jurisprudence constante pointing towards the restrictive interpretation of provisions which limit or restrict the exercise of recognised human rights [FN13].

[FN12] Cf., e.g., IACtHR, Advisory Opinion n. 4, on the Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica (1984).

[FN13] Thus, in its judgment in the Golder case (1975), the European Court of Human Rights clearly stated that there was no room for implied limitations (limitations implicites); the view has ever since prevailed that the only limitations or restrictions permissible are those for which the human rights treaty itself makes express provision. The obiter dicta of the Inter-American Court of Human Rights in its seventh Advisory Opinion, on the Enforceability of the Right to Reply or Correction (1986) reinforce the necessarily restrictive interpretation of restrictions to the exercise of rights recognised in human rights treaties.

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13. An aspect which in this respect should not pass unnoticed is that derogation measures and limitations must not be inconsistent with the other obligations under international law incumbent upon the State Party concerned: thus, neither derogation clauses, nor limitation provisions, of a given human rights treaty, are to be interpreted to restrict the exercise of any human rights protected to a greater extent by other human rights treaties to which the State Party concerned is also a Party. Such understanding finds support in the rule of international law whereby the interpretation and application of a treaty cannot restrict a State's obligations ensuing from other treaties on the subject - in the present case, human rights protection - to which the State at issue is also a Party. In the present domain, international law has been made use of in order to improve and strengthen - and never to weaken or undermine - the protection of recognised human rights [FN14].

[FN14] Cf. A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 Recueil des Cours de l'Académie de Droit International de La Haye (1987) p. 401.

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14. The specificity of the international law of human rights finds expression not only in the interpretation of human rights treaties in general but also in the interpretation of specific

provisions of those treaties. Pertinent illustrations can be found in, e.g., provisions which contain references to general international law. Such is the case, for example, of the requirement of prior exhaustion of local remedies as a condition of admissibility of complaints or communications under human rights treaties; the local remedies rule bears witness of the interaction between international law and domestic law in the present domain of protection, which is fundamentally victim-oriented, concerned with the rights of individual human beings rather than of States. Generally recognised principles or rules of international law - which the formulation of the local remedies rule in human rights treaties refers to, - besides following an evolution of their own in the distinct contexts in which they apply, necessarily suffer, when inserted in human rights treaties, a certain degree of adjustment or adaptation [FN15], dictated by the special character of the object and purpose of those treaties and by the widely recognised specificity of the international law of human rights [FN16].

[FN15] Cf., e.g., IACtHR, Advisory Opinion n. 11, on Exceptions to the Exhaustion of Domestic Remedies [cf.] (1990).

[FN16] Cf. A.A. Cançado Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law, Cambridge, University Press, 1983, pp. 1-443.

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b) Procedural Issues.

15. Both the European and Inter-American Courts have rightly set limits to State voluntarism, have safeguarded the integrity of the respective human rights Conventions and the primacy of considerations of ordre public over the will of individual States, have set higher standards of State behaviour and established some degree of control over the interposition of undue restrictions by States, and have reassuringly enhanced the position of individuals as subjects of the International Law of Human Rights, with full procedural capacity. In so far as the basis of their jurisdiction in contentious matters is concerned, eloquent illustrations of their firm stand in support of the integrity of the mechanisms of protection of the two Conventions are afforded, for example, by the decisions of the European Court in the Belilos versus Switzerland case (1988), in the Loizidou versus Turkey case (Preliminary Objections, 1995), and in the I. Ilascu, A. Lesco, A. Ivantoc and T. Petrov-Popa versus Moldovia and the Russian Federation case (2001), as well as by the decisions of the Inter-American Court in the Constitutional Tribunal and Ivcher Bronstein versus Peru cases (Jurisdiction, 1999), and in the Hilaire, Constantine and Benjamin and Others versus Trinidad and Tobago (Preliminary Objection, 2001).

16. The two international human rights Tribunals, by correctly resolving basic procedural issues raised in the aforementioned cases, have aptly made use of the techniques of public international law in order to strengthen their respective jurisdictions of protection of the human person. They have decisively safeguarded the integrity of the mechanisms of protection of the American and European Conventions on Human Rights, whereby the juridical emancipation of the human person vis-à-vis her own State is achieved. They have, furthermore, achieved a remarkable jurisprudential construction on the right of access to justice (and of obtaining reparation) at international level.

17. In its historical Judgment in the case, concerning Peru, of the massacre of Barrios Altos (2001), e.g., the Inter-American Court warned that provisions of amnesty, of prescription and of factors excluding responsibility, intended to impede the investigation and punishment of those responsible for grave violations of human rights (such as torture, summary, extra-legal or arbitrary executions, and forced disappearances) are inadmissible; they violate non-derogable rights recognised by the International Law of Human Rights. This case-law has been reiterated by the Court (with regard to prescription) in its decision in the Bulacio versus Argentina case (2003).

c) Substantive Law.

18. As to substantive law, the contribution of the two international human rights Courts to this effect is illustrated by numerous examples of their respective case-law pertaining to the rights protected under the two regional Conventions. The European Court has a vast and impressive case-law, for example, on the right to the protection of liberty and security of person (Article 5 of the European Convention), and the right to a fair trial (Article 6). The Inter-American Court has a significant case-law on the fundamental right to life, comprising also the conditions of living, as from its decision in the paradigmatic case of the so-called "Street Children" (Villagrán Morales and Others versus Guatemala, Merits, 1999).

19. Yet another example can be recalled. The definition of the crime of torture found today in two of the three co-existing Conventions against Torture (the U.N. Convention of 1984, Article 1, and the Inter-American Convention of 1985, Article 2) owes its contents to international human rights case-law, rather than to the tipification of the crime of torture at domestic law level. In fact, the constitutive elements of torture in the definition found in the two aforementioned Conventions [FN17] ensue from the jurisprudential construction of the old European Commission of Human Rights in the Greek case (1967-1970), further discussed by the Commission and the European Court in the Ireland versus United Kingdom case (1971-1978).

[FN17] Namely, severe physical or mental suffering, intentionally inflicted, to obtain information or a confession, with the consent or acquiescence of authorities or other persons acting in an official capacity.

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20. In this particular instance, international case-law influenced international legislation in the field of human rights protection. The extensive case-law of the European Court covers virtually the totality of the rights protected under the European Convention and some of its Protocols. The growing case-law of the Inter-American Court, in its turn, appears innovative and forward-looking with regard to the right to life, reparations in its multiple forms, and provisional measures of protection, these latter sometimes benefiting members of entire human collectivities [FN18].

[FN18] Cf. A.A. Cançado Trindade, "Les Mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", 4 Revista do Instituto Brasileiro de Direitos Humanos (2003) pp. 13-25; A.A. Cançado Trindade, "The Evolution of Provisional Measures of Protection under the Case-Law of the Inter-American Court of Human Rights (1987-2002)", 24 Human Rights Law Journal - Strasbourg/Kehl (2003) n. 5-8, pp. 162-168.

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2. Considerations on the Reservations to Treaties.

21. International supervisory organs in the domain of human rights protection have in recent years disclosed their awareness - and, on some occasions, their determination - to the effect of preserving the integrity of human rights treaties. It may be recalled that, inspired in the criterion sustained by the International Court of Justice in its Advisory Opinion of 1951 on the Reservations to the Convention against Genocide [FN19], the present system of reservations set forth in the two Vienna Conventions of the Law of Treaties (of 1969 and 1986, Articles 19-23) [FN20], in joining the formulation of reservations to the acquiescence or the objections thereto for the determination of their compatibility with the object and purpose of the treaties, is of a markedly voluntarist and contractualist character.

[FN19] In which, - it may be recalled, - the Hague Court endorsed the so-called Pan-American practice relating to reservations to treaties, given its flexibility, and in search of a certain balance between the integrity of the text of the treaty and the universality of participation in it; hence the criterion of the compatibility of the reservations with the object and purpose of the treaties. Cf. ICJ Reports (1951) pp. 15-30; and cf., a contrario sensu, the Joint Dissenting Opinion of Judges Guerrero, McNair, Read and Hsu Mo (pp. 31-48), as well as the Dissenting Opinion of Judge Álvarez (pp. 49-55), for the difficulties generated by this criterion.

[FN20] That is, the Vienna Convention on the Law of Treaties of 1969, and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986, - to which one may add, in the same sense, the Vienna Convention on Succession of States in the Matter of Treaties of 1978 (Article 20).

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22. Such a system leads to a fragmentation (in the bilateral relations) of the conventional obligations of the States Parties to multilateral treaties, appearing inadequate to human rights treaties, which are inspired in superior common values and are applied in conformity with the notion of collective guarantee. That system of reservations [FN21] suffers from notorious insufficiencies when transposed from the law of treaties in general into the domain of the International Law of Human Rights. To start with, it does not distinguish between human rights treaties and classic treaties, making abstraction of the jurisprudence constante of the organs of international supervision of human rights, converging in pointing out that distinction.

[FN21] Endorsed, e.g., by the American Convention on Human Rights (cross-reference of Article 75).

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23. It allows reservations (not objected) of a wide scope which threaten the very integrity of human rights treaties; it allows reservations (not objected) to provisions of these treaties which incorporate universal minimum standards (undermining, e.g., the basic judicial guarantees of inviolable rights). If certain fundamental rights - starting with the right to life - are non-derogable (in the terms of the human rights treaties themselves), thereby not admitting any derogations which, by definition, are of an essentially temporal or transitory character, - with greater reason, it would seem to me, a fortiori they do not admit any reservations, perpetuated in time until and unless withdrawn by the State at issue; such reservations would be, in my understanding, without any caveat, incompatible with the object and purpose of those treaties.

24. Although the two Vienna Conventions on the Law of Treaties prohibit the acceptance of reservations incompatible with the object and purpose of the treaty at issue, they leave, however, various questions without answers. The criterion of the compatibility is applied in the relations with the States which effectively objected to the reservations, although such objections are often motivated by factors - including political - other than a sincere and genuine concern on the part of the objecting States with the prevalence of the object and purpose of the treaty at issue. For the same reason, from the silence or acquiescence of the States Parties in relation to certain reservations one cannot infer a belief on their part that the reservations are compatible with the object and purpose of the treaty at issue.

25. Such silence or acquiescence, moreover, appears to undermine the application of the criterion of the compatibility of a reservation with the object and purpose of the treaty. And the two Vienna Conventions referred to are not clear either, as to the legal effects of a non-permissible reservation, or of an objection to a reservation considered incompatible with the object and purpose of the treaty at issue. They do not clarify, either, who ultimately ought to determine the permissibility or otherwise of a reservation, or to pronounce on its compatibility or otherwise with the object and purpose of the treaty at issue.

26. The present system of reservations permits even reservations (not objected) which hinder the possibilities of action of the international supervisory organs (created by human rights treaties), rendering difficult the realization of their object and purpose. The above-mentioned Vienna Conventions not only fail to establish a mechanism to determine the compatibility or otherwise of a reservation with the object and purpose of a given treaty [FN22], but - even more gravely - do not impede either that certain reservations or restrictions formulated (in the acceptance of the jurisdiction of the organs of international protection) [FN23] come to hinder the operation of the mechanisms of international supervision created by the human rights treaties in the exercise of the collective guarantee.

[FN22] As neither the aforementioned Vienna Conventions, nor - prior to them - the cited Advisory Opinion of the International Court of Justice on Reservations to the Convention against Genocide, define what constitutes the compatibility or otherwise (of a reservation) with the object and purpose of a treaty, the determination is left to the interpretation of this latter, without it having been defined either on whom falls that determination, in what way and when it should

be made. At the time of the adoption of that Advisory Opinion (1951), neither the majority of the Hague Court, nor the dissenting Judges on the occasion, foresaw the development of the international supervision of human rights by the conventional organs of protection; hence the insufficiencies of the solution then advanced, and endorsed years later by the two Vienna Conventions on the Law of Treaties referred to.
[FN23] There is a distinction between a reservation stricto sensu and a restriction in the instrument of acceptance of the jurisdiction of an international supervisory organ, even though their legal effects are similar.
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27. The present system of reservations, reminiscent of the old Pan-American practice, rescued by the International Court of Justice [FN24] and the two Vienna Conventions on the Law of Treaties, for having crystallised itself in the relations between States, not surprisingly appears entirely inadequate to the treaties whose ultimate beneficiaries are the human beings and not the Contracting Parties. Definitively, human rights treaties, turned to the relations between States and human beings under their jurisdiction, do not bear a system of reservations which approaches them as from an essentially contractual and voluntarist perspective, undermining their integrity, allowing their fragmentation, leaving at the discretion of the Parties themselves the final determination of the extent of their conventional obligations.

[FN24] The Advisory Opinion of the ICJ on the Reservations to the Convention against Genocide (1951) marked the gradual passage, in the matter of reservations to treaties, from the rule of unanimity (of its approval by the States Parties), to the test of its compatibility with the object and purpose of the treaty. In a general way, the Vienna Convention incorporated the flexible Pan-American doctrine on reservations, in accordance with a tendency to this effect of the international practice already formed in the epoch; I.M. Sinclair, "Vienna Conference on the Law of Treaties", 19 International and Comparative Law Quarterly (1970) pp. 47-69; and cf. Articles 19-20 of the Vienna Convention.
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28. As the two Vienna Conventions of 1969 and 1986 do not provide any indication for an objective application of the criterion of the compatibility or otherwise of a reservation with the object and purpose of a treaty, they leave it, on the contrary, to be applied individually and subjectively by the Contracting Parties themselves, in such a way that, at the end, only the reserving State knows for sure the extent of the implications of its reservation. Despite the efforts in expert writing to the effect of systematizing the practice of States on the matter [FN25], it is difficult to avoid the impression that such practice has been surrounded by uncertainties and ambiguities, and has remained inconclusive to date. This indefinition is not at all reassuring for human rights treaties, endowed as they are with mechanisms of international supervision of their own. This general picture of indefinition has thus, not surprisingly, led the U.N. International Law Commission (ILC) to engage itself, as from 1998, in the preparation of a Draft Practical Guide on Reservations to Treaties [FN26] (cf. infra).

[FN25] Cf., e.g., J.M. Ruda, "Reservations to Treaties", 146 Recueil des Cours de l'Académie de Droit International de La Haye (1975) pp. 95-218; D.W. Bowett, "Reservations to Non-Restricted Multilateral Treaties", 48 British Year Book of International Law (1976-1977) pp. 67-92; P.-H. Imbert, Les réserves aux traités multilatéraux, Paris, Pédone, 1979, pp. 9-464; K. Holloway, Les réserves dans les traités internationaux, Paris, LGDJ, 1958, pp. 1-358; K. Zemanek, "Some Unresolved Questions Concerning Reservations in the Vienna Convention on the Law of Treaties", Essays in International Law in Honour of Judge Manfred Lachs (ed. J. Makarczyk), The Hague, Nijhoff, 1984, pp. 323-336; Ch. Tomuschat, "Admissibility and Legal Effects of Reservations to Multilateral Treaties", 27 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1967) pp. 463-482; F. Horn, Reservations and Interpretative Declarations to Multilateral Treaties, Uppsala, Swedish Institute of International Law, 1988, pp. 184-222.

[FN26] Cf. U.N., Report of the International Law Commission on the Work of Its 50th Session (1998), General Assembly Official Records - Supplement n. 10(A/53/10), pp. 195-214 ("Reservations to Treaties: Guide to Practice").

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29. It calls the attention, for example, to find one's extensive list of reservations, numerous and at times long, and often incongruous, of States Parties to the U.N. Covenant on Civil and Political Rights [FN27]; and the practical problems generated by many of the reservations (also numerous and not always consistent) of the States Parties to the U.N. Convention on the Elimination of All Forms of Discrimination against Women are well-known, - to what one may add the reservations to the U.N. Convention against Torture and the Convention on the Elimination of All Forms of Racial Discrimination [FN28].

[FN27] Compiled by the Secretary-General of the United Nations and collected in the document: U.N., CCPR/C/2/Rev.4, of 24.08.1994, pp. 1-139 (English version), and pp. 1-160 (Spanish version).

[FN28] For a study of the problems created by the reservations to these four human rights treaties of the United Nations, cf. L. Lijnzaad, Reservations to U.N. Human Rights Treaties - Ratify and Ruin?, Dordrecht, Nijhoff, 1995, pp. 131-424.

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30. With the persistence of the inadequacy and the insufficiencies of the present system of reservations, it is not at all surprising that, firstly, multiple expressions of dissatisfaction in this respect in contemporary legal doctrine (both in general studies on the matter [FN29] and in respect of specific human rights treaties [FN30]); and secondly, the preparedness of human rights international supervisory organs to assert their competence to apply by themselves the criterion of the compatibility (supra) and to contribute thereby to secure the integrity of the respective human rights treaties.

[FN29] Cf. D. Shelton, "State Practice on Reservations to Human Rights Treaties", 1 Canadian Human Rights Yearbook/Annuaire canadien des droits de la personne (1983) pp. 205-234; C. Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral

Treaties", 64 British Year Book of International Law (1993) pp. 245-282; L. Lijnzaad, op. cit. supra n. (28), pp. 3-424; M. Coccia, "Reservations to Multilateral Treaties on Human Rights", 15 California Western International Law Journal (1985) pp. 1-49; L. Sucharipa-Behrmann, "The Legal Effects of Reservations to Multilateral Treaties", 1 Austrian Review of International and European Law (1996) pp. 67-88.

[FN30] Cf. B. Clark, "The Vienna Convention Reservations Regime and the Convention on Discrimination against Women", 85 American Journal of International Law (1991) pp. 281-321; W.A. Schabas, "Reservations to the Convention on the Rights of the Child", 18 Human Rights Quarterly (1996) pp. 472-491; A. Sanchez Legido, "Algunas Consideraciones sobre la Validez de las Reservas al Convenio Europeo de Derechos Humanos", 20 Revista Jurídica de Castilla-La Mancha (1994) pp. 207-230; C. Pilloud, "Reservations to the Geneva Conventions of 1949", International Review of the Red Cross (March/April 1976) pp. 3-44.

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31. At regional level, in its well-known judgment in the Belilos versus Switzerland case (1988) [FN31], locus classicus on the issue, the European Court of Human Rights considered the declaration amounting to a reservation (of a general character) of Switzerland to the European Convention on Human Rights incompatible with the object and purpose of this latter (in the light of its Article 64). On its turn, the Inter-American Court of Human Rights, in its second and third Advisory Opinions [FN32], pointed out the difficulties of a pure and simple transposition from the system of reservations of the Vienna Convention on the Law of Treaties of 1969 into the domain of the international protection of human rights.

[FN31] Followed by the Weber case (1990).

[FN32] In its third Advisory Opinion on Restrictions to the Death Penalty (1983) the Court warned that the question of reciprocity as related to reservations did not fully apply vis-à-vis human rights treaties (paragraphs 62-63 and 65). Earlier, in its second Advisory Opinion on the Effect of Reservations on the Entry into Force of the American Convention (1982), the Court dismissed the postponement of the entry into force of the American Convention by application of Article 20(4) of the 1969 Vienna Convention (paragraph 34).

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32. At global level, in the I. Gueye et alii versus France case (1989), e.g., the Human Rights Committee (under the U.N. Covenant on Civil and Political Rights), in spite of a reservation ratione temporis of the respondent State [FN33], understood that the question at issue [FN34] was justiciable under the Covenant [FN35], and concluded that there was a violation of Article 26 of the Covenant [FN36]. The same Committee, in its general comment n. 24(52), of November 1994, warned that the provisions of the two Vienna Conventions and the classic rules on reservations (based upon reciprocity) were not appropriate to the human rights treaties; given the special character of the Covenant as a human rights treaty, the question of the compatibility of a reservation with its object and purpose, instead of being left at the discretion of the manifestations of the States Parties inter se, should be objectively determined, on the basis of juridical principles, by the Human Rights Committee itself [FN37].

[FN33] To Article 1 of the [first] Optional Protocol to the Covenant on Civil and Political Rights.
[FN34] Pertaining to pension benefits of more than 700 retired Senegalese members of the French army.
[FN35] As the effects of the French legislation on the matter lasted until then.
[FN36] Communication n. 196/1985, decision of 03.04.1989 (and previous decision of admissibility of 05.11.1987).
[FN37] Paragraphs 17 and 20; text in: U.N./Human Rights Committee, document CCPR/C/21/Rev.1/Add.6, of 02.11.1994, pp. 6-7.

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33. Given the specificity of the International Law of Human Rights, there appears a strong case for leaving the determination of the compatibility or otherwise of reservations with the object and purpose of human rights treaties with the international supervisory organs established by them, rather than with the States Parties themselves; it would be more in keeping with the special character of human rights treaties. To the two international human rights tribunals (the European and Inter-American Courts), the individualistic system of reservations does not seem to be in keeping with the notion of collective control machinery proper to human rights treaties. The obiter dicta of the two regional Human Rights Courts have been rendered despite the fact that the European Convention (Article 64) [FN38] and the American Convention (Article 75) on Human Rights do not expressly confer this function upon them; the American Convention, in fact, limits itself to referring to the pertinent provisions of the 1969 Vienna Convention on the Law of Treaties.

[FN38] Prior to Protocol n. 11, in the Loizidou case, supra.

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34. Given the uncertainties, ambiguities and lacunae in the present system of reservations to treaties of the two Vienna Conventions of 1969 and 1986 (supra), proposals have been advanced in contemporary doctrine [FN39] tending at least to reduce the tension as to the proper application of human rights treaties in the matter of reservations, namely: first, the inclusion of an express indication in human rights treaties of the provisions which do not admit any reservations (such as those pertaining to the fundamental non-derogable rights), as an irreducible minimum to participate in such treaties; second, as soon as the States Parties have proceeded to the harmonization of their domestic legal order with the norms of those treaties (as required by these latter), the withdrawal of their reservations to them [FN40]; third, the modification or rectification, by the State Party, of a reservation considered non-permissible or incompatible with the object and purpose of the treaty [FN41], whereby a reservation would thus be seen no longer as a formal and final element of the manifestation of State consent, but rather as an essentially temporal measure, to be modified or removed as soon as possible; fourth, the adoption of a possible "collegial system" for the acceptance of reservations [FN42], so as to safeguard the normative character of human rights treaties, bearing in mind, in this respect, the rare example of the Convention on the Elimination of All Forms of Racial Discrimination [FN43]; fifth, the elaboration of guidelines (although not binding) on the existing rules (of the two Vienna Conventions of 1969 and 1986) in the matter of reservations, so as to clarify them in practice

[FN44]; and sixth, the attribution to the depositaries of human rights treaties of the faculty to request periodic information from the reserving States on the reasons why they have not yet withdrawn their reservations to such treaties.

[FN39] Cf., e.g., references in ns. (29) and (30), supra.
[FN40] Cf., in this line of reasoning, the Vienna Declaration and Programme of Action (1993), the main document adopted by the II World Conference on Human Rights, part II, paragraph 5, and cf. part I, paragraph 26.
[FN41] Cf. note (28), supra.
[FN42] Possibility that came to be considered at the Vienna Conference which adopted the Convention of 1969.
[FN43] System of the two-thirds of the States Parties, set forth in Article 20(2) of that Convention.
[FN44] Such as drawn up in 1998 by the International Law Commission of the United Nations; cf. note (24), supra.

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35. The recent work (as from 1993) of the International Law Commission of the United Nations on the topic of the Law and Practice Concerning Reservations to Treaties tends to identify the essence of the question in the need to determine the powers of the human rights international supervisory organs in the matter, in the light of the general rules of the law of treaties [FN45]. This posture makes abstraction of the specificity of the International Law of Human Rights, attaching itself to the existing postulates of the law of treaties. The debates of 1997 of the International Law Commission focused effectively on the question of the applicability of the system of reservations of the Vienna Conventions in relation to human rights treaties. Although the point of view prevailed that the pertinent provisions of those Conventions should not be modified [FN46], it was acknowledged that that system of reservations should be improved, given its lacunae, above all in relation to non-permissible reservations [FN47].

[FN45] Cf. A. Pellet (special rapporteur of the U.N. International Law Commission), Second Report on the Law and Practice Relating to Reservations to Treaties (1997), paragraphs 164, 204, 206, 209, 227, 229 and 252.
[FN46] U.N., Report of the International Law Commission on the Work of Its 49th Session (1997), General Assembly Official Records - Supplement n. 10(A/52/10), p. 94, par. 47.
[FN47] Ibid., p. 112, par. 107. In this respect, it was warned that States often and consciously formulate reservations incompatible with the object and purpose of human rights treaties for knowing that they will not be challenged, and that the lack of sanctions for such reservations thus leads States to become Parties to such treaties without truly committing themselves; ibid., pp. 117-118, pars. 129-130.

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36. In the debates of the Commission, it was even admitted that the conventional organs of protection of judicial character (the regional European and Inter-American Courts of Human Rights) pronounce on the permissibility of reservations when necessary to the exercise of their

functions [FN48]; such considerations were reflected in the "Preliminary Conclusions on Reservations to Multilateral Normative Treaties Including Human Rights Treaties", adopted by the Commission in 1997 (paragraphs 4-7) [FN49]. In my understanding, there are compelling reasons to go further, and the relevant labour of the ILC on the matter could lead to solutions satisfactory to human rights international supervisory organs to the extent that it started from the recognition of the special character of human rights treaties and gave precision to the juridical consequences - for the treatment of the question of reservations - which ensue from that recognition.

[FN48] Ibid., pp. 106-107, 119 and 121-122, pars. 82, 84, 134, 138 and 143, respectively.
[FN49] Text in ibid., pp. 126-127.

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37. It seems unlikely, however, that it is prepared to pursue that approach. In its more recent version of its Draft Guidelines on Reservations to Treaties (2003), provisionally adopted by the ILC, it urged States and international organizations to "undertake a periodic review" of their reservations to treaties, and to "consider withdrawing those which no longer serve their purpose" [FN50], - though it did not pursue the aforementioned approach. Such review, - added the ILC, - "should devote special attention to the aim of preserving the integrity of multilateral treaties" [FN51]. Thus, draft guideline 2.5.3 reflects the concerns of monitoring bodies ("particularly but not exclusively in the field to human rights"), to call often upon States to reconsider their reservations and if possible to withdraw them [FN52]. The ILC has conceded that

"The reference to the integrity of multilateral treaties is an allusion to the drawbacks of reservations, that may undermine the unity of the treaty regime" [FN53].

[FN50] Cf. U.N./ILC, Report of the International Law Commission (55th Session, May-June and July-August 2003), G.A.O.R. - Suppl. n. 10 (doc. A/58/10), of 2003, p. 184.
[FN51] Ibid., p. 184.
[FN52] Ibid., p. 207.
[FN53] Ibid., p. 208, and cf. pp. 216, 244 and 251 (on the "limitation" of the scope of previous reservations, conducive to their withdrawal).

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38. It may be pointed out that human rights treaties have in a way been singled out when one comes to denunciation, and termination and suspension of the operation of treaties; I see, thus, no epistemological or juridical reason why the same could not be done also in relation to reservations. In my view, the conferment of the power of determination of the compatibility or otherwise of reservations with the object and purpose of human rights treaties on the international supervisory organs themselves created by such treaties, would be much more in conformity with the special nature of these latter and with the objective character of the conventional obligations of protection [FN54].

[FN54] A.A. Cançado Trindade, Tratado de Direito Internacional dos Direitos Humanos, vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 152-170.

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39. There is a whole logic and common sense in attributing such power to those organs, guardians as they are of the integrity of human rights treaties, instead of abandoning such determination to the interested States Parties themselves, as if they were, or could be, the final arbiters of the scope of their conventional obligations [FN55]. Such system of objective determination would foster the process of progressive institutionalisation of the international protection of human rights [FN56], as well as the creation of a true international public order (ordre public) based on the full respect to, and observance of, human rights. It is about time for the current process of humanization of International Law [FN57] to encompass likewise the domain of the law of treaties, traditionally so vulnerable to manifestations of State voluntarism.

[FN55] Cf. A.A. Cançado Trindade, "The International Law of Human Rights at the Dawn of the XXIst Century", 3 Cursos Euromediterráneos Bancaja de Derecho Internacional - Castellón/Spain (1999) pp. 145-221.

[FN56] For the conception of human rights as an "autonomous juridical imperative", cf. D. Evrigenis, "Institutionnalisation des droits de l'homme et droit universel", in Internationales Colloquium über Menschenrechte (Berlin, Oktober 1966), Berlin, Deutsche Gesellschaft für die Vereinten Nationen, 1966, p. 32.

[FN57] A.A. Cançado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", 40 Revista da Faculdade de Direito da Universidade Federal de Minas Gerais - Belo Horizonte/Brazil (2001) pp. 11-23.

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40. It is my understanding that, from the perspective of a minimally institutionalised international community, the system of reservations to treaties, such as it still prevails in our days, is rudimentary and rather primitive. There is pressing need to develop a system of objective determination of the compatibility or otherwise of reservations with the object and purpose of human rights treaties, although for that it may be considered necessary an express provision in future human rights treaties, or the adoption to that effect of protocols to the existing instruments [FN58].

[FN58] As suggested in the aforementioned "Preliminary Conclusions" of 1997 (paragraph 7) of the International Law Commission; cf. U.N., Report of the International Law Commission... (1997), op. cit. supra n. (46), pp. 126-127.

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41. Only with such a system of objective determination will we succeed in guarding coherence with the special character of human rights treaties, which set forth obligations of an objective character and are applied by means of the exercise of the collective guarantee. Only thus will we succeed to establish, in the ambit of the law of treaties, standards of behaviour which contribute to the creation of a true international ordre public based on the respect and

observance of human rights, with the corresponding obligations erga omnes of protection. We stand in need of the renovation and humanization of the law of treaties as a whole, comprising also the forms of manifestation of State consent.

42. I do not see how not to take into account the experience of international supervision accumulated by the conventional organs of protection of human rights in the last decades. Any serious evaluation of the present system of reservations to treaties cannot fail to take into account the practice, on the matter, of such organs of protection. It cannot pass unnoticed that the International Court of Justice, in its already mentioned Advisory Opinion of 1951, effectively recognised, in a pioneering way, the special character of the Convention for the Prevention and Punishment of the Crime of Genocide of 1948, but without having extracted from its acknowledgement all the juridical consequences for the regime of reservations to treaties.

43. Almost half a century having lapsed, this is the task which is incumbent upon us, all of us who have the responsibility and the privilege to act in the domain of the international protection of human rights. The words pronounced by the Hague Court in 1951 remain topical nowadays, in pointing out that, in a Convention such as that of 1948, adopted for a "purely humanitarian" purpose,

"(...) the Contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the Convention. Consequently, in a Convention of this type one cannot speak of individual advantages and disadvantages to States, of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the Parties, the foundation and measure of all its provisions" [FN59].

[FN59] International Court of Justice, Advisory Opinion of 28.05.1951, ICJ Reports (1951) p. 23; and, for a study on the matter, cf. A.A. Cançado Trindade, "La jurisprudence de la Cour Internationale de Justice sur les droits intangibles / The Case-Law of the International Court of Justice on Non-Derogable Rights", Droits intangibles et états d'exception / Non-Derogable Rights and States of Emergency (ed. D. Prémont), Brussels, Bruylant, 1996, pp. 53-89.

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44. I see no sense in trying to try to escape from the acknowledgement of the specificity of the International Law of Human Rights as a whole, the recognition of which, in my understanding, in no way threatens the unity of Public International Law; quite on the contrary, it contributes to develop the aptitude of this latter to secure, in the present domain, compliance with the conventional obligations of protection of the States vis-à-vis all human beings under their jurisdictions. With the evolution of the International Law of Human Rights, it is Public International Law itself which is justified and legitimised, 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 [FN60].

[FN60] A.A. Cançado Trindade, "The International Law of Human Rights at the Dawn of the XXIst Century", op. cit. supra n. (53), pp. 145-221.

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45. One is not, therefore, here proposing that the development of the International Law of Human Rights be brought about to the detriment of the law of treaties: my understanding, entirely distinct, is in the sense that the norms of the law of treaties (such as those set forth in the two above-mentioned Vienna Conventions, anyway of a residual character) 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. In sustaining the development of a system of objective determination - which seems to us wholly necessary - of the compatibility or otherwise of reservations with the object and purpose of human rights treaties in particular, in which the organs of international protection created by such treaties would exert an important role, we do not see in that any threat to the "unity" of the law of treaties.

46. Quite on the contrary, there could hardly be something more fragmenting and underdeveloped than the present system of reservations of the two Vienna Conventions, for which reason it would be entirely illusory to assume that, to continue applying it as until now, one would thereby be fostering the "unity" of the law of treaties. The true unity of the law of treaties, in the framework of Public International Law, would be better served by the search for improvement in this area, overcoming the ambiguities, uncertainties and lacunae of the present system of reservations, through the development of a system of objective determination (supra), in conformity with the special nature of human rights treaties and the objective character of the conventional obligations of protection. The unity of Public International Law itself is measured rather by its aptitude to regulate legal relations in distinct contexts with equal adequacy and effectiveness.

3. Considerations on the Denunciation of Treaties.

47. The two Vienna Conventions on the Law of Treaties (1969 and 1986) determine that a treaty which contains no provision on denunciation is not subject to denunciation, unless it can be established that the parties intended to admit the possibility of denunciation of that this latter "may be implied by the nature of the treaty" (Article 56(1)). The two Vienna Conventions thus open the way to the taking into account of the nature or specificity of certain treaties. As already seen, the special nature of treaties of a humanitarian character (such as human rights treaties) has indeed been taken into account, and has been widely acknowledged. Accordingly, certain limits have been established with regard to the denunciation of such treaties.

48. In fact, basic considerations of humanity have permeated also the clauses of denunciation of certain treaties. This is aptly illustrated, e.g., by the provisions on denunciation of the four Geneva Conventions on International Humanitarian Law of 1949. According to those provisions (common Article 63/62/142/158), the denunciation, which will take effect one year after its notification, shall not, however, while the denouncing power is engaged in a conflict, take any effect "until peace has been concluded", and until the "operations connected with the release and

repatriation of the persons protected" by the Geneva Conventions "have been terminated". In this way, the obligations of the Parties as to the safeguard of the persons protected under those Conventions subsist, in whatever circumstances, vis-à-vis the denouncing power, while the conflict lasts and the release and repatriation of the persons protected are not concluded [FN61].

[FN61] Traditional considerations of reciprocity are also discarded when it comes to apply, e.g., the provisions of the 1949 Geneva Conventions on International Humanitarian Law, such as those of common Article 3, pertaining to conventional obligations of the State vis-à-vis persons under its jurisdiction; reciprocity here yields of considerations of protection of a superior order.

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49. Furthermore, the denunciation provisions of the aforementioned four Geneva Conventions (common Article 63/62/142/158) expressly preserves the obligations based on "the principles of the law of nations" as they result from "the laws of humanity" and "the dictates of the public conscience" (the Martens clause). Such obligations, as aptly remarked by B.V.A. Röling, continue governing human conduct even when treaties are no longer binding [FN62], - contrary to, I would add, what positivists would mechanically argue. As I have sustained at length in my Concurring Opinion in this Court's Advisory Opinion n. 18 on the Juridical Condition and Rights of Undocumented Migrants (2003), the law of protection of the human being does not exhaust itself in the norms and rules of positive law, it encompasses likewise the principles (which inform and conform those norms and rules), without which there is no legal system at all.

[FN62] B.V.A. Röling, International Law in an Expanded World, Amsterdam, Djambatan, 1960, pp. 37-38.

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50. Half a decade after the adoption of the 1969 Vienna Convention on the Law of Treaties, H.W. Briggs pertinently pointed out that the consideration of that Convention in international case-law

"has been helpful in furthering the consolidation of the law against unilateral denunciation of international agreements without accountability therefore" [FN63].

The 1984 U.N. Convention against Torture, in this line of concern, provides (Article 31(2)) that a denunciation of it shall not have the effect of releasing the denouncing Party from its obligations under the Convention with regard to "any act or omission which occurs prior to the date at which the denunciation becomes effective", nor shall the denunciation prejudice in any way the "continued consideration" of any matter already under scrutiny by the U.N. Committee against Torture "prior to the date at which the denunciation becomes effective".

[FN63] H.W. Briggs, "Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice", 68 American Journal of International Law (1974) p. 68.

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51. At regional level, the European Convention on Human Rights, as amended by Protocol n. 11, provides (Article 58) likewise that a denunciation of it shall not have the effect of releasing the denouncing Party from its obligations under the Convention in respect of "any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective". On its turn, in a similar line of thinking, the 1999 Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities determines (Article XIII) that a denunciation of it "shall not exempt" the State Party from the obligations imposed upon it under the Convention in respect of "any action or omission prior to the date on which the denunciation takes effect".

52. And the American Convention on Human Rights (Article 78) only admits denunciation "at the expiration of a five-year period from the date of its entry into force", and by means of "notice given one year in advance". Moreover, such a denunciation shall not have the effect of releasing the denouncing State Party from the obligations contained in the Convention with respect to "any act that may constitute a violation of those obligations" and that "has been taken by that State prior to the effective date of denunciation". The issue of the effects of denunciation, within such limits, became a central one in recent cases concerning Trinidad and Tobago under the American Convention on Human Rights.

53. Trinidad and Tobago became a Party to the American Convention on Human Rights on 28.05.1991, and accepted the Inter-American Court's jurisdiction in contentious matters on that same date. Later on, on 26.05.1998, it denounced the American Convention; pursuant to Article 78 of the Convention, such denunciation began to have effects one year later, on 26.05.1999. One day before this date the Inter-American Commission on Human Rights filed before the Court the Hilaire case; subsequently, after that date, it lodged with the Court the Constantine et allii case (on 22.02.2000) and the Benjamin et allii case (on 05.10.2000), - the three of them concerning Trinidad and Tobago.

54. As they pertained to acts taken by that State prior to the date of its denunciation, the Court retained jurisdiction and took cognizance of the cases (pursuant to Article 78(2) of the Convention), and rendered its Judgments on preliminary objections in the three cases on 01.09.2001, dismissing an undue restriction formulated by the State in its instrument of acceptance of the Court's compulsory jurisdiction (reiterated in the three cases in the form of a preliminary objection). That restriction would have limited the Court's jurisdiction to the extent that its exercise would be consistent with the national Constitution; the Court considered it incompatible with the object and purpose of the Convention, and an attempt to subordinate this latter to the national Constitution, what would be inadmissible [FN64].

[FN64] IACtHR, pars. 93 and 98-99 of the Court's Judgment in the Hilaire case; and pars. 84 and 89-90 of the Court's Judgments in the Benjamin et allii and the Constantine et allii cases.

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55. The Court then ordered the joinder of the three cases and their respective proceedings (on 30.11.2001), and delivered its Judgment on the merits, finding violations of the American Convention, on 21.06.2002. Parallel to that, also after the denunciation by Trinidad and Tobago became effective (on 26.05.1999), the Court ordered successive Provisional Measures of Protection, from 27.05.1999 to 02.12.2003, in the case James et allii versus Trinidad and Tobago (as they also pertained to acts taken by the State prior to the date of its denunciation of the Convention). All these decisions of the Court remain binding upon the respondent State; its denunciation of the Convention does not have the sweeping effect that one might prima facie tend to assume, as the denunciation clause under the American Convention (supra) was surrounded by temporal limitations so as not to allow it to undermine the protection of human rights thereunder.

56. Thus, not even the institution of denunciation of treaties is so absolute in effects as one might prima facie tend to assume. Despite its openness to manifestations of State voluntarism, denunciation has, notwithstanding, been permeated with basic considerations of humanity as well, insofar as treaties of a humanitarian character are concerned. Ultimately, one is here faced with the fundamental, overriding and inescapable principle of good faith (bona fides), and one ought to act accordingly.

4. Considerations on the Termination and Suspension of the Operation of Treaties.

57. The interpretation and application of human rights treaties bear witness of the twilight of reciprocity and of the prominence of considerations of ordre public in the present domain. In fact, the prohibition of the invocation of reciprocity as a subterfuge for non-compliance with humanitarian conventional obligations, is corroborated in unequivocal terms by the 1969 Vienna Convention on the Law of Treaties, which, in providing for the conditions in which a breach of treaty may bring about its termination or suspension of its operation, excepts expressly and specifically the "provisions relating to the protection of the human person contained in treaties of a humanitarian character" (Article 60(5)).

58. The provision of Article 60(5) of the two Vienna Conventions on the Law of Treaties (1969 and 1986), acknowledging the special nature of "treaties of a humanitarian character" and setting forth one of the juridical consequences ensuing therefrom, constitutes a safeguard clause in defence of the human person. In this sense I saw it fit to point out, in a study on the matter published 14 years ago, that

"the law of treaties itself of our days, as confirmed by Article 60(5) of the Vienna Convention [on the Law of Treaties], discards the precept of reciprocity in the implementation of the treaties of international protection of human rights and of International Humanitarian Law, by virtue precisely of the humanitarian character of those instruments. Piercing the veil in a domain of international law - such as the one concerning treaties - so strongly infiltrated by the voluntarism of States, the aforementioned provision of Article 60(5) of the Vienna Convention de Viena constitutes a clause of safeguard in defence of the human being" [FN65].

[FN65] A.A. Cançado Trindade, A Proteção Internacional dos Direitos Humanos - Fundamentos Jurídicos e Instrumentos Básicos, São Paulo/Brazil, Ed. Saraiva, 1991, pp. 11-12.
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59. In the account of one of the participants in the 1968-1969 Vienna Conference from which the first Vienna Convention on the Law of Treaties (1969) resulted, the provision at issue resulted from a Swiss amendment, promptly supported by several Delegations, to the effect that the grounds for termination or suspension of operation of treaties should not apply to treaties of a humanitarian character, embodying provisions of protection of the human person [FN66]. Article 60(5) was maintained in the second Vienna Convention on the Law of Treaties (1986). Another participant in the Vienna Conference of 1968-1969 pondered that there are certain obligations - of protection of the human person - endowed with an "absolute character", which cannot be allowed to reduce, as

"l'idée d'une régression définitive de la conscience humaine est difficile à accepter. En revanche il serait souhaitable que la pratique internationale se moralise dans tous les domaines et acquière ainsi, par la reconnaissance des États, un niveau croissant de valeur: il pourrait et il devrait y avoir normalement de nouvelles règles progressives. Sans qu'il soit nécessaire d'insister sur ce point, les racines profondes d'une telle conception rejoignent la tradition du droit naturel, rajeunie de nos jours par la conception du droit naturel à contenu progressif. En ce sens aussi, on pourrait soutenir que les règles impératives ont dépassé le stade coutumier pour atteindre un niveau plus stable qui est celui des principes généraux du droit international public" [FN67].

[FN66] G.E. do Nascimento e Silva, Conferência de Viena sobre o Direito dos Tratados, Rio de Janeiro, MRE/Imprensa Nacional, 1971, p. 81.
[FN67] P. Reuter, Introduction au droit des traités, 2nd. ed., Paris, PUF, 1985, p. 120.
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60. Thus, the contemporary law of treaties itself, as attested by Article 60(5) of the 1969 and the 1986 Vienna Conventions, overcoming the precept of reciprocity in the implementation of treaties of a humanitarian character, reckons that the obligations enshrined therein are of ordre public, and may generate effects erga omnes. The overcoming of reciprocity in human rights protection has taken place amidst the constant search for an expansion of the ambit of protection (for the safeguard of an increasingly wider circle of individuals, in any circumstances), for achieving a higher degree of the protection due, and for the
gradual strengthening of the mechanisms of supervision, in the defense of common superior values.

5. Concluding Observations.

61. Last but not least, attention should also be drawn to the interaction of human rights treaties in the process of interpretation. Given the multiplicity of those treaties, it comes as little or no surprise that the interpretation and application of certain provisions of a given human rights treaty have at times been resorted to as orientation for the interpretation of corresponding provisions of another - usually newer - human rights treaty. The practice of international

supervisory organs - including under the two regional, European and Inter-American, systems of protection - affords several examples of such interpretative interaction [FN68].

[FN68] Cf. A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms...", op. cit. supra n. (14), pp. 91-112, esp. pp. 101-103.

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62. Moreover, given the possible concurrent interpretation of equivalent provisions of two or more human rights treaties, there is room for the search of the most favourable norm to the alleged victim. This test - primacy of the most favourable norm to the individual, - gathers express support in certain provisions of such human rights treaties such as Article 29(b) of the American Convention on Human Rights, and has found application in practice.

63. The essential motivation underlying the interpretation of human rights treaties has been, rather than to ensure the uniformity of international law in general and in all circumstances whatsoever, to respond effectively to the needs and imperatives of the international protection of human beings. In proceeding in this way, international supervisory organs - such as the two regional Human Rights Courts - have constructed a converging jurisprudence as to the special nature of human rights treaties and the implications and consequences ensuing therefrom. This has been largely due to the overriding identity of the object and purpose of those treaties. The reassuring result has been a uniform interpretation of the International Law of Human Rights. This, in turn, has contributed significantly to the development of international law in the present domain of protection.

64. Thus, a chapter of international law usually approached in the past from the outlook of State voluntarism, comes nowadays to be seen in a different light, under the influence of basic considerations of humanity. Although this chapter of international law, - the law of treaties, - has been opened to manifestations of the individual "will" of States, as from the issue of the treating-making power itself, - the fact cannot keep on being overlooked that basic considerations of humanity have marked their presence also in the law of treaties. As demonstration of this evolution, developments pertaining to the interpretation of treaties, reservations to treaties, denunciation of treaties, and termination and suspension of operation of treaties disclosed a certain preparedness to elaborate freely on areas such as those, so as to search for responses to the contemporary needs of the international community.

65. Like International Law in general, the law of treaties in particular is undergoing a historical process of humanization as well. It cannot pass unnoticed, as timely recalled by Egon Schwelb three decades ago [FN69], that the preambles themselves of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986) contain an assertion of the principle of universal respect for, and observance of, human rights [FN70]. The treaty-making power is no longer an exclusive prerogative of States, as it used to be in the past; the 1986 [second] Vienna Convention on the Law of Treaties came to address the treaty-making of international organizations, some of which devoted to causes of direct interest to human beings and humankind as a whole.

[FN69] In respect of the 1969 Vienna Convention on the Law of Treaties; cf. E. Schwelb, "The Law of Treaties and Human Rights", in Toward World Order and Human Dignity - Essays in Honor of M.S. McDougal (eds. W.M. Reisman and B.H. Weston), N.Y./London, Free Press, 1976, p. 265.

[FN70] Sixth preambular paragraph in fine, texts reproduced respectively in: U.N., United Nations Conference on the Law of Treaties - Official Records, Documents of the Conference (Vienna, 1968-1969), vol. III, N.Y., U.N., 1971, p. 289; and in: U.N., United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations - Official Records, Documents of the Conference (Vienna, 1986), vol. II, N.Y., U.N., 1995, p. 95.

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66. The interpretation of treaties has been considerably enriched by the methodology pursued by international supervisory organs of human rights treaties. Such interpretation has adjusted itself to the specificity of human rights treaties [FN71]. It has, moreover, favoured a harmonization of the standards of implementation of the protected rights in the domestic legal order of the States Parties to those treaties [FN72]. The two international human rights Tribunals (the European and Inter-American Courts) have been engaged in a converging jurisprudential construction in respect of reservations to treaties to the effect of avoiding to deprive human rights treaties of their effet utile, thus preserving the mechanisms of protection of the human person established by them.

[FN71] R. Bernhardt, "Thoughts on the Interpretation of Human Rights Treaties", in Protecting Human Rights: The European Dimension -Studies in Honour of G.J. Wiarda (eds. F. Matscher and H. Petzold), Köln, C. Heymanns, 1988, pp. 66-67 and 70-71. And cf. Erik Suy, "Droit des traités et droits de l'homme", (eds. R. Bernhardt et alii), Berlin, Springer-Verlag, 1983, pp. 935-947; E. Schwelb, "The Law of Treaties and Human Rights", op. cit. supra n. (69), pp. 262-283; G.E. do Nascimento e Silva, Conferência de Viena... , op. cit. supra n. (66), pp. 80-81; E. de la Guardia and M. Delpech, El Derecho de los Tratados y la Convención de Viena, Buenos Aires, La Ley, 1970, pp. 458 and 454; F. Capotorti, "Il Diritto dei Trattati Secondo la Convenzione di Vienna", in Convenzione di Vienna sul Diritto dei Trattati, Padova, Cedam, 1984, p. 61.

[FN72] F. Matscher, "Methods of Interpretation of the Convention", in The European System for the Protection of Human Rights (eds. R.St.J. MacDonald, F. Matscher and H. Petzold), Dordrecht, Nijhoff, 1993, pp. 66 and 73.

III. International Rule of Law: Non-Appearance and the Duty of Compliance.

67. Until the Inter-American Court's Judgments of 01.09.2001 dismissing Trinidad and Tobago's preliminary objections in the Hilaire, Constantine et allii, and Benjamin et allii cases (cf. supra), the respondent State appeared before the Court, having participated in the contentious proceedings and presented its arguments before the Court. In the Hilaire case, in particular, it appeared before the Court in the public hearing of 10 August 2000, wherein it submitted its views in an orderly and procedurally constructive way. After being notified of the Court's

adverse decision, Trinidad and Tobago no longer appeared before the Court, neither in the proceedings on the merits in the aforementioned cases (joined), nor in the proceedings of the subsequent and present Caesar case.

68. Despite its non-appearance [FN73], Trinidad and Tobago remains bound by the Court's Judgments in all these cases: though rendered after its denunciation of the American Convention, they pertain to acts taken by the State before the denunciation, in accordance with the terms of Article 78 of the American Convention. Together with the subsequent Judgments on the merits and reparations, the Court's decisions remain all binding upon the respondent State, and an eventual failure of this latter to comply with the Court's Judgments on the merits and reparations in those previous cases and with the present Judgment in the Caesar case, would amount to an additional violation of the American Convention (Article 68), as well as of general international law (pacta sunt servanda), with all the juridical consequences attached thereto.

[FN73] For a general study of non-appearance, cf. J.B. Elkind, Non-Appearance before the International Court of Justice..., op. cit. infra n. (80), pp. 1-206; H.W.A. Thirlway, Non-Appearance before the International Court of Justice, Cambridge, University Press, 1985, pp. 1-184.

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69. Any interpretation to the contrary, tending to "explain" or "justify" non-compliance with the Judgments, would amount to contempt of Court, and disclose a lack of familiarity with the most elementary principles of international legal procedure. A State may, of course, choose not to appear before the Court, but in doing so it ought to bear the consequences of such non-appearance, rendering itself unable to rebut the evidence produced [FN74] and to defend itself. What a State is not entitled to do is to ignore a Judgment that is clearly binding upon it, as that would undermine the very foundations of international jurisdiction, which have required so much endeavour from past generations to be built and established in this part of the world.

[FN74] On the practice on this particular point, mainly of the Inter-American Commission on Human Rights, cf. D. Rodríguez Pinzón, "Presumption of Veracity, Non-Appearance, and Default in the Individual Complaint Procedure of the Inter-American System on Human Rights", 25 Revista del Instituto Interamericano de Derechos Humanos (1998) pp. 125-148.

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70. Having always been a strong supporter of the cause of international justice, I feel obliged to state in the present Separate Opinion that international jurisdiction cannot be left at the mercy of the caprice of governments, usually under the pressure of haphazard domestic factors, - and those who have no constraints to undermine it are to bear the historical responsibility for such deconstruction. I feel confident that Trinidad and Tobago will not come to this extreme.

71. Trinidad and Tobago seems to be aware of the temporal and material limitations of denunciation under Article 78 of the American Convention (supra), as it participated in proceedings before the Court afterwards, including a public hearing of 10 August 2000 in the

Hilaire case, more than one year after its denunciation of the American Convention began to have effects (as from 26.05.1999). What is rather enigmatic is its subsequent and prolonged non-appearance - not to say "disappearance" - before the Court after its Judgments on preliminary objections (supra), adverse to it. Non-appearance does not at all pave the way for non-compliance. A State may choose not to appear before the Court, at any stage of the proceedings, at its own risk, but it cannot ignore the Court's Judgment without having its international responsibility thereby engaged.

72. Trinidad and Tobago's sudden non-appearance before the Court, - or rather, disappearance from it, - is certainly to be regretted. It does not foster the rule of law at international level, to say the least. If it is meant to be a prior notice of eventual non-compliance with decisions of the Court, then the respondent State has strong reasons for concern, as the Law would not stand on its side. Let us hope this will prove not to be the case. But were it to be so, Trinidad and Tobago would then stand outside the Law, thus incurring into an additional violation of the American Convention.

73. Although non-appearance has occurred from time to time in inter-State litigation (e.g., before the Permanent Court of International Justice [PCIJ] and the International Court of Justice [ICJ]) [FN75], there is no compelling reason why it should take place in proceedings in human rights cases, opposing States to individuals, the ostensibly weaker party. If by non-appearance the State is announcing eventual non-compliance with the decisions of the Tribunal, it should bear the juridical consequences of its attitude, - and the other States Parties should react to that, in the exercise of the collective guarantee underlying all human rights treaties. Non-appearance does not affect the condition of the State as a party to the case; whether it likes it or not, it remains the respondent State in the case, even in absentia.

[FN75] Cf., e.g., P.M. Eisemann, "Les effets de la non-comparution devant la Cour Internationale de Justice", 19 Annuaire français de Droit international (1973) pp. 351-375.

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74. Article 68(1) of the American Convention is clear in determining that "the States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties". Non-appearing States remain parties to the cases at issue. Their duty of compliance corresponds to a basic principle of the law on the international responsibility of the State, strongly supported by international case-law, whereby States ought to comply with their conventional obligations in good faith (pacta sunt servanda).

75. It is somewhat surprising to witness that, as time goes by and the old ideal of the realization of international justice gains ground (as with, for example, the recent establishment of the International Criminal Court, pursuant to an original proposal by Trinidad and Tobago at the United Nations), some States remain resistant to the operation of the most perfected means of settlement of disputes at international level, that is, judicial settlement [FN76] (as illustrated, ironically, by the posture of Trinidad and Tobago in the aforementioned cases in the inter-American human rights system).

[FN76] Ch. de Visscher, Aspects récents du droit procédural de la Cour Internationale de Justice, Paris, Pédone, 1966, pp. 204-205.

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76. The precedent - among others - set up by the United States, of "withdrawal" and non-appearance before the ICJ, after a Judgment adverse to it on preliminary objections (in 1984) in the Nicaragua versus United States case, would be a very bad example for Trinidad and Tobago to follow. On the occasion, the United States earned much criticism from distinct corners of the international community, including from some of its own most distinguished jurists (like the late Keith Highet [FN77]), for its disservice to the international rule of law. In the words of K. Highet, the strategy of non-appearance "may also backfire", and

"may suffer a setback, once its absurdity and overall uselessness are correctly perceived. (...) The negative forces undermining the progressive development of international law - non-production, non-cooperation and non-appearance - (...) will now be seen for what they are" [FN78].

[FN77] Of whom I keep a good memory, in the meetings we had in Rio de Janeiro while he was a member of the Inter-American Juridical Committee (IAJC), particularly of a panel we both participated in, together with Daniel Bardonnet, in one of the annual Courses of International Law organized by the IAJC, precisely on peaceful settlement of international disputes; the transcripts of that memorable panel were unfortunately never published.

[FN78] K. Highet, "Evidence, the Court and the Nicaragua Case", 81 American Journal of International Law (1987) p. 56.

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77. In the same line of thinking, it was further pointed out, in other commentaries, that the United States' defiant behaviour of withdrawing from that case and no longer appearing in its proceedings before the ICJ

"appears not only injurious to the efficacy of the Court's compulsory jurisdiction under Article 36(2), but detrimental to the development of international lawfulness as well. Such lawfulness cannot develop as long as States are inclined to place themselves above the law" [FN79].

[FN79] G.L. Scott and C.L. Carr, "The ICJ and Compulsory Jurisdiction: the Case for Closing the Clause", 81 American Journal of International Law (1987) p. 66. For my own criticisms of that defiance, cf. A.A. Cançado Trindade, "Nicarágua versus Estados Unidos (1984-1985): Os Limites da Jurisdição `Obrigatória' da Corte Internacional de Justiça e as Perspectivas da Solução Judicial de Controvérsias Internacionais", 37-38 Boletim da Sociedade Brasileira de Direito Internacional (1983-1986) pp. 71-96.

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78. Is this the sad example that Trinidad and Tobago would really wish to follow? I could hardly believe it. How would that appear to the future generations of its own jurists?

Expectations from the new generations of jurists are always high, - hoping that they will succeed to right the wrongs made by their predecessors, - while, on the other hand, politicians (also referred to rather elegantly as "decision-makers") look the same everywhere in the world, and there seem to be no compelling reasons to expect much from them.

79. Not only do they look the same everywhere, but they have further looked the same at all times. Already over three centuries before our era, in his Nicomachean Ethics, Aristotle could hardly hide or dissimulate his concern as to what politicians might be thinking or what decisions were they about to take [FN80]. In the XIIIth. century, in his Treatise on the Law, Thomas Aquinas wondered whether the recta ratio could ever be apprehended by the power-holders [FN81]. It would be hard to deny that, with extremely rare exceptions, politicians, always and everywhere, have appeared much more engaged in gaining and retaining power (for power's sake), than in securing the observance of the human rights of those they govern or are supposed to represent.

[FN80] Cf. Aristóteles, Ética Nicomaquea - Política, Mexico, Edit. Porrúa, 2000; book I, section XIII, p. 15; book VIII, section XI, p. 112; book X, section IX, pp. 144-146.
[FN81] Cf. Tomás de Aquino, Tratado de la Ley - Tratado de la Justicia - Gobierno de los Príncipes, Mexico, Edit. Porrúa, 2000, pp. 35, 50 and 76-77.

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80. The States which, in the history of international adjudication, have "withdrawn" from contentious proceedings instituted against them (particularly after an initial decision of the Tribunal adverse to them), have adopted a "self-judging conduct", harmful to the international rule of law, and, ultimately, also to themselves, to their own reputation, as

"A State which would be a judge in its own cause is an advocate pleading into a void from which no clear answer is returned" [FN82].

[FN82] J.B. Elkind, Non-Appearance before the International Court of Justice - Functional and Comparative Analysis, Dordrecht, Nijhoff/Kluwer, 1984, pp. 169 and 206.

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81. Non-appearance is in fact foreseen in Article 53 of the Statute of the ICJ, its raison d'être being to secure that the Court carries out its functions whenever one of the parties fails to appear before it; the non-appearing State remains a party to the case, and remains fully bound by the decision rendered by the Court [FN83] (as if it had appeared before the Court). This is what ensues also from Article 27 (on default procedure) of the current Rules of Procedure of the Inter-American Court, which likewise foresee non-appearance in the same understanding, and entitle the Inter-American Court, whenever a party fails to appear in or continue with a case, to take such measures, on its own motion, as may be necessary to complete the consideration of the case. Article 27 adds that when a party enters a case at a later stage of the proceedings, it shall take up the proceedings at that stage.

[FN83] S.A. Alexandrov, "Non-Appearance before the International Court of Justice", 33 Columbia Journal of Transnational Law (1995) n. 41, pp. 41-44, 60, 63 and 68.

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82. In most cases, non-appearance has been resorted to aiming at exerting pressure upon the complaining party and the Court, but experience shows that non-appearing States have hardly gained anything - except criticisms - from such harmful conduct [FN84]. Furthermore, it is to be kept always in mind that non-appearance and non-compliance are not synonymous at all; non-appearing - or "disappeared" - States are under the duty to comply with Judgments in absentia (pacta sunt servanda).

[FN84] As illustrated by the regrettable and much-criticized "withdrawal" of the United States in the Nicaragua case, which it eventually lost in the merits (in 1986) as well; cf. ibid., pp. 67 and 71-72.

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83. On this particular subject, the Institut de Droit International adopted a clarifying resolution [FN85] in its session of Basel of 1991, in which it took into account the difficulties that non-appearance of a party may present to the other party and to the Court itself [FN86]. In its preamble, the resolution pondered inter alia that "the absence of a party is such as to hinder the regular conduct of the proceedings, and may affect the good administration of justice" [FN87]. The resolution recalled, in its operative part, the State's "duty to cooperate in the fulfilment of the Court's judicial functions" (Article 2), and added that

"Each State entitled (...) to appear before the Court and with respect to which the Court is seized of a case is ipso facto (...) a party to the proceedings, regardless of whether it appears or not" (Article 1).

[FN85] I.D.I., 4th. Commission, rapporteur G. Arangio Ruiz.
[FN86] Institut de Droit International, Resolution on Non-Appearance before the International Court of Justice, of 31.08.1991, preamble, 6th. considerandum.
[FN87] Ibid., 5th. considerandum.

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84. The resolution of the Institut further provided that, notwithstanding the non-appearance of a State, this latter remains

"bound by any decision of the Court in that case, whether on jurisdiction, admissibility or the merits" (Article 4).

And the resolution concluded that "a State's non-appearance before the Court is in itself no obstacle to the exercise by the Court of its functions" (Article 5). This is an accurate statement of

the applicable law in cases of non-appearance, which by no means can be taken to lead to non-compliance, amounting to an additional violation of international law.

IV. The Expanding Material Content and Scope of Jus Cogens in Contemporary International Law.

85. May I conclude this Separate Opinion in the present Caesar case in a positive tone, with an expression of support for the present Judgment in absentia of the Inter-American Court, in respect particularly to two remaining aspects that I see it fit to dwell upon here. Firstly, the Court has expressly and rightly admitted in the present Caesar case that, in certain circumstances, the existence of a law (such as that of Corporal Punishment Act of Trinidad and Tobago), manifestly incompatible with the relevant provisions of the American Convention (Article 5(1) and (2)), may per se constitute - by its nature and effects - a violation of this latter [FN88]. In support of this view, may I refer to my arguments, to this effect, in my Dissenting Opinion in the El Amparo case, concerning Venezuela (Judgments on reparations, of 14.09.1996), as well as in my Dissenting Opinion in the Caballero Delgado and Santana case, pertaining to Colombia (Judgment on reparations, of 29.01.1997), - which I do not find it necessary to reiterate literally herein.

[FN88] Paragraphs 73-74 and 93-94 of the present Judgment.

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86. Secondly, and most importantly, in the present Judgment in the Caesar case, the Court has rightly acknowledged that the prohibition of torture as well as of other cruel, inhuman and degrading treatment, has entered into the domain of jus cogens. Corporal punishment, such as the one examined in the cas d'espèce, is per se in breach of the Convention (Article 5(1) and (2)) and of peremptory norms of international law (paragraphs 70, 88 and 100). In several of my Individual Opinions presented in this Court, I have drawn attention to the relevance of the expanding material content and scope of jus cogens. The present Judgment is inserted into this reassuringly evolutive jurisprudential construction.

87. Thus, in its historical Advisory Opinion n. 18 on The Juridical Condition and the Rights of the Undocumented Migrants (of 17.09.2003), the Inter-American Court significantly held that the aforementioned fundamental principle of equality and non-discrimination, in the present stage of evolution of International Law, "has entered into the domain of the jus cogens"; on such principle, which "permeates every legal order", - the Court correctly added, - "rests the whole juridical structure of the national and international public order" [FN89]. The Court, moreover, referred to the evolution of the concept of jus cogens, transcending the ambit of both the law of treaties and of the law of the international responsibility of the State, so as to reach general international law and the very foundations of the international legal order [FN90].

[FN89] Paragraph 101, and cf. resolutory points ns. 2 and 4 of Advisory Opinion n. 18.
[FN90] Paragraphs 98-99 of Advisory Opinion n. 18.

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88. In support of this view, in my Concurring Opinion in that pronouncement of the Court (Advisory Opinion n. 18), after summarizing the history of the entry of jus cogens into the conceptual universe of international law, I maintained that

"The emergence and assertion of jus cogens in contemporary International Law fulfil the necessity of a minimum of verticalization in the international legal order, erected upon pillars in which the juridical and the ethical are merged. (...)
On my part, I have always sustained that it is an ineluctable consequence of the affirmation and the very existence of peremptory norms of International Law their not being limited to the conventional norms, to the law of treaties, and their being extended to every and any juridical act [FN91]. Recent developments point out in the same sense, that is, that the domain of the jus cogens, beyond the law of treaties, encompasses likewise general international law [FN92]. Moreover, the jus cogens, in my understanding, is an open category, which expands itself to the extent that the universal juridical conscience (material source of all Law) awakens for the necessity to protect the rights inherent to each human being in every and any situation".
To the international objective responsibility of the States corresponds necessarily the notion of objective illegality (one of the elements underlying the concept of jus cogens). In our days, no one would dare to deny the objective illegality of acts of genocide [FN93], of systematic practices of torture, of summary and extra-legal executions, and of forced disappearance of persons, - practices which represent crimes against humanity, - condemned by the universal juridical conscience [FN94], parallel to the application of treaties. Already in its Advisory Opinion of 1951 on the Reservations to the Convention against Genocide, the International Court of Justice pointed out that the humanitarian principles underlying that Convention were recognizedly `binding on States, even without any conventional obligation'.
(...) In sum and conclusion on the point under examination, the emergence and assertion of jus cogens evoke the notions of international public order and of a hierarchy of legal norms, as well as the prevalence of the jus necessarium over the jus voluntarium; jus cogens presents itself as the juridical expression of the very international community as a whole, which, at last, takes conscience of itself, and of the fundamental principles and values which guide it" [FN95].

[FN91] Cf. A.A. Cançado Trindade, Tratado de Direito Internacional..., op. cit. supra n. (97), vol. II, pp. 415-416.
[FN92] For the extension of jus cogens to all possible juridical acts, cf., e.g., E. Suy, «The Concept of Jus Cogens in Public International Law», in Papers and Proceedings of the Conference on International Law (Langonissi, Greece, 03-08.04.1966), Geneva, C.E.I.P., 1967, pp. 17-77.
[FN93] In its Judgment of 11 July 1996, in the case concerning the Application of the Convention against Genocide, the International Court of Justice affirmed that the rights and obligations set forth in that Convention were "rights and duties erga omnes"; ICJ Reports (1996) p. 616, par. 31.
[FN94] Inter-American Court of Human Rights, case Blake versus Guatemala (Merits), Judgment of 24.01.1998, Separate Opinion of Judge A.A. Cançado Trindade, par. 25, and cf. pars. 23-24.
[FN95] Paragraphs 66, 68, 71 and 73, respectively, of my Concurring Opinion.

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89. In the same line of reasoning, in my Separate Opinion in the case of the Massacre of Plan de Sánchez case, concerning Guatemala (Judgment of 29.04.2004), I saw it fit to insist on the point that

"The concept itself of jus cogens, in my understanding, transcends the ambit of both the law of treaties [FN96] and the law on the international responsibility of the States [FN97], so as to encompass general international law and the very foundations of the international legal order" [FN98].

[FN96] Its formulation in the two Vienna Conventions on the Law of Treaties (1969 and 1986), Articles 53 and 64.
[FN97] E.g., its recognition in the Articles on the Responsibility of States, adopted by the U.N. International Law Commission in 2001.
[FN98] Paragraph 29, and cf. also pars. 32-33 of my Separate Opinion.
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90. And in my Separate Opinion in the Tibi versus Ecuador case (Judgment of 07.09.2004), I allowed myself to add that jus cogens, besides its horizontal dimension whereby it has a bearing upon the very foundations of international law, also expands itself in

"a vertical dimension, of the interaction of the international and national legal orders in the present domain of protection. The effect of jus cogens, in this second (vertical) plane, is in the sense of invalidating every and any legislative, administrative or judicial measure which, at the level of the domestic law of the States, attempts to authorize or tolerate torture" (par. 32).

91. Furthermore, in its Judgment of 08.07.2004 in the Gómez Paquiyauri versus Peru case, the Inter-American Court expressly admitted that, in our days, an international juridical regime has been formed of absolute prohibition of all forms of torture and of extrajudicial executions, and that such prohibition belongs today to the domain of international jus cogens (pars. 115-116 and 131) [FN99]. In my Separate Opinion in that case I pondered that such acknowledgement of jus cogens, in constant expansion, in turn, "reveals precisely the reassuring opening of contemporary international law to superior and fundamental values", pointing towards the emergence of a truly universal international law (par. 44). I reaffirmed this understanding, of an absolute prohibition, of jus cogens, of torture, in any circumstance, in my Separate Opinion (par. 26) in the Tibi versus Ecuador case (Judgment of 07.09.2004).

[FN99] Likewise, the Ad Hoc International Criminal Tribunal for the Former Yugoslavia, on its turn, held, in the A. Furundzija case (Judgment of 10.12.1998), that the absolute prohibition of torture has the character of a norm of jus cogens (pars. 137-139, 144 and 160).
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92. The Judgment this Court has just adopted in the present Caesar versus Trinidad and Tobago fits squarely into its jurisprudence constante on the evolutive interpretation of jus cogens itself. The Court, here, quite rightly takes a step forward, in upholding the absolute prohibition, proper to the domain of jus cogens, of torture as well as any other cruel, inhuman and degrading treatment. It is relevant to keep on identifying the expanding material content and scope of jus cogens, as the Inter-American Court has been doing in the last years. The Inter-American Court has probably done for such identification of the expansion of jus cogens more than any other contemporary international tribunal. It is important that it continues doing so, in the gradual construction, at this beginning of the XXIst. century, of a new jus gentium, the international law for humankind.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary

SEPARATE OPINION OF JUDGE MANUEL E. VENTURA ROBLES

The need to establish a permanent working group within the Organization of American States to monitor the compliance by the States Party to the American Convention on Human Rights with the judgments and provisional measures passed by the Inter-American Court of Human Rights.

I. Introduction.
II. The proposals submitted by the Inter-American Juridical Committee, the States of Chile and Uruguay, and the Inter-American Commission of Human Rights, contained in their drafts of the American Convention on Human Rights regarding the current text of Article 65 thereof.
III. The Inter-American Specialized Conference on Human Rights of 1969.
IV. Proposed Solution submitted by the Inter-American Court of Human Rights to the appropriate organs of the OAS regarding the implementation of Article 65 of the American Convention.
V. Request for interpretation of judgment in the case of Baena Ricardo et al. submitted by the State of Panama.
VI. Current operation of the system at the Committee on Juridical and Political Affairs of the Permanent Council of the OAS, and the need for an amendment.
VII. Consequences of the completeness gap in the American Convention on Human Rights to render Article 65 valid.
VIII. Proposed solution.
IX. Conclusions.

I. Introduction

1. When concurring with the opinion of my fellow judges to determine the international responsibility of the State of Trinidad and Tobago (hereinafter “the State” or “Trinidad and Tobago”) for violations to the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) in the case of Caesar, I developed very specific

concerns about the attitude of said State Party to the Organization of American States (hereinafter "the OAS" or "the Organization") towards the performance of its international obligations regarding the role played by the Inter-American Commission and the Inter-American Court of Human Rights (hereinafter "the Commission" or "the Inter-American Commission" and "the Court" or "the Inter-American Court") in the Inter-American human rights protection system. As Court Secretary from 2000 to 2003, I felt identical concerns during proceedings in the Case of Hilaire, Constantine, Benjamin et al. against the aforementioned State, which I am able now to state explicitly in my capacity as Judge of the instant case.

2. Firstly, it is worth recalling that Trinidad and Tobago deposited its instrument of ratification of the American Convention on May 28, 1991, with the General Secretariat of the OAS and on the same date, the State recognized the contentious jurisdiction of the Court. Later, pursuant to Article 78 of the American Convention, the State denounced such jurisdiction; that denouncement became effective one year later, on May 26, 1999. Consequently, at that time, the Court held it had jurisdiction to hear the Case of Hilaire, Constantine, Benjamin et al., and the present case of Winston Caesar, since the events involved in all such cases occurred prior to the effective date of the denunciation effected by the State.

3. It is also worth noticing the fact that while, between 1997 and 2000, the State submitted to the Inter-American Commission briefs related to the Case of Hilaire, Constantine, Benjamin et al.; in the case of Caesar, Trinidad and Tobago, after it had filed the denunciation with the Commission on May 13, 1999, did not file with this conventional protection organ any brief on its admissibility, despite the Commission's requests to such effect, and further failed to submit the information requested by the Commission during the procedures on the merits of the case. On October 10, 2001, the Inter-American Commission approved Report No. 88/01 on Admissibility and, on October 10, 2002, issued Report No. 35/02 on the Merits of the Case. Lastly, on February 16, 2003, the Commission brought the case to the jurisdiction of the Court.

4. It is to be pointed out as well that, despite the fact that Trinidad and Tobago did appear before the Court in the initial procedures of the Case of Hilaire, Constantine, Benjamin et al., and raised preliminary objections as to the Court's jurisdiction to hear the case; once the Court overruled said preliminary objections on September 1, 2001, [FN1] and assumed jurisdiction, the State, in the proceedings on the merits before the Court, failed to respond to the application, to appoint representatives and to appoint a Judge ad hoc. Similar circumstances occurred during the proceedings on the merits of the case of Caesar before the Inter-American Court.

[FN1] I/A Court H.R. Hilaire Case. Preliminary Objections. Judgment of September 1, 2001. Series C No. 80; I/A Court H.R., Benjamin et al. Case. Preliminary Objections. Judgment of September 1, 2001. Series C No. 81; and I/A Court H.R., Constantine et al. Case. Preliminary Objections. Judgment of September 1, 2001. Series C No. 82.

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5. After the Court delivered judgment on the merits and reparations in the three cases mentioned above on June 21, 2002, [FN2] the State has not submitted to the Court any information on its compliance with the judgment, despite the serious nature of the issues

involved, among which the right to life. This made the Court, on its 2003 Annual Report, under Article 65 of the American Convention, communicated the following to the General Assembly:

In "Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago," the State has not complied with the obligation to inform the Court about the measures it has adopted to comply effectively with the decision of the Court in its judgment on merits and reparations in this case.
In this regard, the Court urges the OAS General Assembly to require the State of Trinidad and Tobago to inform the Court about the measures adopted to comply with its judgment. [FN3]

This communication from the Court to the General Assembly had no effect whatsoever, for reasons to be given hereinbelow.

[FN2] I/A Court H.R., Case of Hilaire, Constantine and Benjamin et al. Judgment of June 21, 2002. Series C No. 94.
[FN3] I/A Court H.R. 2003 Annual Report of the Inter-American Court of Human Rights, OEA/Ser.L/V/III.62 Doc. 1, page. 45.

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6. Moreover, the right to life of the victims in the aforementioned cases, who had been sentenced to death, was protected through provisional measures ordered by the Court and, in spite of that, the State proceeded to execute two of them; Mr. Joey Ramiah and Mr. Anthony Briggs, in blatant contempt of the Court's orders. This happened on June 4 and July 28, 1999, respectively; therefore, in its 1999 Annual Report, the Court, also without success, communicated the following to the General Assembly:

On 24 May 1999, the Court sent a note to the President of the Permanent Council of the Organization of American States, Mr. Julio César Aráoz, concerning the failure of Trinidad and Tobago to abide by the resolutions delivered by the Inter-American Court. This non-compliance, outlined in the Court's 1998 Annual Report, had not been included in the operative part of the recommendations that the Commission on Juridical and Political Affairs of the Organization had given to the General Assembly. The Court asked the President of the Permanent Council to include an operative paragraph to be submitted to the General Assembly to urge the State Party to fulfill what had been ordered by the Court regarding the provisional measures in the Case of James et al. and also the Court asked the President of the Permanent Council to submit his note to the session that the Council was to hold the following May 26.
On May 25, 1999, the Court sent a second note to the President of the Permanent Council of the OAS, acknowledging receipt of its note of the previous day and reiterating the need to include an operative paragraph on the failure of Trinidad and Tobago to comply with the mandates of the Court. This would allow the Permanent Council of the OAS to discuss the issue and make a decision.
On May 28, 1999, the Court sent a note to the General Secretariat of the OAS, Mr. César Gaviria-Trujillo, addressing the failure of Trinidad and Tobago to abide by the resolutions of the Court. Because this non-compliance had not been mentioned in the operative part of the draft resolution by the Commission on Juridical and Political Affairs or by the Permanent Council of

the Organization, the Court asked the General Secretariat to call this note to the attention of "the authorities of the Twenty-ninth Regular Session of the General Assembly of the OAS."
The President of the Court, presenting the Annual Report to the Permanent Council of the OAS, placed on the record the failure by the state of Trinidad and Tobago to abide by various resolutions of the Court concerning provisional measures in the Case of James et al. currently pending before the Inter-American Commission.
The state executed Mr. Joey Ramiah on June 4, 1999 and Mr. Anthony Briggs on July 28, 1999. Both had been targeted by Court-ordered provisional measures. [FN4]

In the previous 1998 Report, given the lack of cooperation by the State as to the enforcement of the provisional measures mentioned hereinbefore in the cases of Hilaire, Constantine, Benjamin et al., the Court had to inform the OAS General Assembly of the following:

On May 22, 1998, the Inter-American Commission; according to article 63(2) of the American Convention and Article 25 of the Court Rule, presented a request to the Court for the adoption of provisional measures on behalf of five persons who are subject to the jurisdiction of the State of Trinidad and Tobago (Wenceslaus James, Anthony Briggs, Anderson Noel, Anthony Garcia and Christopher Bethel). These cases are under the consideration of the Inter-American Commission.
On June 14, 1998, the Court ratified the May 27, 1998, Order of the President, in which he had adopted urgent measures in order to preserve the life of the above-mentioned persons, since their execution would render purposeless any decision issued by the Tribunal on them.
Later, the Commission presented three requests for the expansion of the measures adopted in this case. By Orders of June 29, July 13, and July 22, 1998, issued on behalf of Darrin Roger Thomas, Haniff Hilaire and Denny Baptiste, respectively, the President called upon the State to adopt the measures necessary to preserve the life and personal integrity of said persons.
The Court summoned the State of Trinidad and Tobago and the Inter-American Commission to a public hearing at its seat on August 28, 1998. On August 11 and 27, 1998, the State of Trinidad and Tobago informed the Court that it will decline the summons, and will not accept any responsibility for the consequences which ensue from the failure of the Inter-American Commission to organize its proceedings so as to ensure that cases submitted to it by those under sentence of death are processed, heard and determined within the time periods required under the municipal law of Trinidad and Tobago.
On August 19, 1998, the President of the Court sent a note to the Prime Minister of Trinidad and Tobago in which he communicated the Tribunal's concern in regard to the States declination of the Court's summons to appear at the public hearing.
On August 28, 1998, the Court held at its seat the public hearing it had summoned. After hearing the observations of the Commission, the Court, issued an Order on August 29, 1998, by which it ratified the Orders of its President of June 29, July 13, and July 22, 1998, and requested that Trinidad and Tobago take all of the measures necessary to preserve the life and physical integrity of Wenceslaus James, Anthony Briggs, Anderson Noel, Anthony Garcia, Christopher Bethel, Darrin Roger Thomas, Haniff Hilaire and Denny Baptiste, so as not to hinder the processing of their cases before the Inter-American system. Said Order was communicated to the State.
On September 1, 1998, the State informed that in the future it will not consult with the Court or the Commission any further in these matters.

As of the date of drafting the present Report, the State has not presented any of the periodic reports that were ordered by the Court in its August 29, 1998, Order, despite constant requests by the Tribunal regarding this matter. [FN5]

The ourt has verified the refusal of the State to recognize the obligatory nature of the Court's decisions in this matter, and in particular, its lack of appearance before the Court despite being duly summoned, and the lack of compliance with the Orders regarding the periodic reports.

Therefore, in accordance with Article 65 of the American Convention, the Court informs the General Assembly of the Organization of American States that the Republic of Trinidad and Tobago, State Party to the American Convention on Human Rights, has not complied with its decision regarding the provisional measures ordered in the James et al. Case, and as a result requests that the General Assembly urge that the Republic of Trinidad and Tobago comply with the Orders of the Court.

The Court also wishes to state in this Report its concern regarding Trinidad and Tobago's denunciation of the American Convention, which was notified to the General Secretariat on May 26, 1998. This decision, which has no precedents in the history of the Inter-American System for the protection of human rights, has no effect on the compliance of the provisional measures in accordance with Article 78(2) of the American Convention, which states that:

> … Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation.

Further, the Court wishes to state in this Report that, even when an international treaty gives the right of denunciation, in dealing with human rights treaties, due to their special nature, a denunciation affects the respective international or regional system for the protection of human rights as whole. In this particular instance, the aforesaid justifies an action on the part of the General Assembly of the Organization to motivate Trinidad and Tobago's reconsideration of its decision. [FN6]

The General Assembly made no comments on the matter.

[FN4] I/A Court H.R. 1999 Annual Report of the Inter-American Court of Human Rights, OEA/Ser.L/V/III.47 Doc. 6, page. 41.

[FN5] After the drafting of the 1998 Report, of February 5, 1999, the State of Trinidad and Tobago sent a communication to the Court requesting confirmation of the measures adopted in favor of Mr. Anthony Briggs, which had been suspended as a result of the Inter-American Commission's Report No. 64/98 of November 3, 1998. In that respect, the State alleged that said report had been submitted to the Advisory Pardon Committee, which would "review the Commission's recommendation regarding the compensation and consideration for release or remittance of sentence in the case of Mr. Anthony Briggs during its next session."

[FN6] I/A Court H.R., 1998 Annual Report of the Inter-American Court of Human Rights, OEA/Ser.L/V/III.43 Doc. 11, pages. 35, 36 and 37.

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7. The question at hand is: how is this situation possible if the OAS Charter Chapter II, Principles, Article 3(L), provides that "The American States proclaim the fundamental rights of

the individual without distinction as to race, nationality, creed, or sex"? [FN7] Moreover, the Heads of State and Government of the Americas, in the Declaration of Quebec City of 2001, [FN8] stated that their "commitment to full respect for human rights and fundamental freedoms is based on shared principles and convictions" and, as repeatedly stated by the General Assembly, supported:

"the commitment […] to continue strengthening and improving the Inter-American human rights system, in particular the functioning of the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights." [FN9]

[FN7] OAS Charter, signed in Bogotá in 1948, amended by the Protocol of Buenos Aires in 1967, the Protocol of Cartagena de Indias in 1985, the Protocol of Washington in 1992, and the Protocol of Managua in 1993.
[FN8] Third Summit of the Americas, Declaration of Quebec City, April 20-22, 2001.
[FN9] OEA AG/RES. 1925 (XXXIII-O/03) "Strengthening of Human Rights Systems Pursuant to the Plan of Action of the Third Summit of the Americas", Resolution adopted at the Fourth Plenary Session, held on June 10, 2003.

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8. Furthermore, it is also worth asking why Article 65 of the American Convention, which sets forth the Court's obligation to report to the OAS General Assembly on non-compliance with judgments, does not contemplate a procedure or agency within the Organization in charge of implementing such provision?

9. The relevance of these questions is even clearer if we consider that, as mentioned before, the text of the American Convention was largely inspired in the [European] Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, Article 46 of which provides as follows:

Binding force and execution of judgments

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

However, the text of Article 65 of the American Convention, on the other hand, only states:

To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.

A comparison of both texts shows that in the European system of human rights there is a political collegiate body, the Committee of Ministers, that is in charge of monitoring the enforcement of

judgments; while the Inter-American system has no similar body, for which reason the Court, in the exercise of powers inherent to its jurisdiction, has had to undertake the task of monitoring compliance with its judgments, in order to verify whether there has been or not any case of non-compliance for the purpose of reporting the event to the General Assembly, pursuant to Article 65 of the American Convention. A new question therefore arises because, after the report was submitted by the Court, as it happened once, the General Assembly urged the State of Suriname to provide the Court with the requested information, [FN10] and such action later allowed to close the cases of Aloeboetoe et al. and Gangaram Panday.

That is not what happened in the case of Trinidad and Tobago. The question is: does the American Convention have an evident completeness gap, specifically in the wording of Article 65? How can we redress this situation which, as we will explain below, is seriously affecting the work carried out by the Commission, the Court and the Inter-American Human Rights Protection System as a whole?

The answer this question there is a call for some research on the background and preliminary drafting of the American Convention regarding Article 65.

[FN10] OEA AG/Res.1330 (XXV-0/95) "Observations and Recommendations Concerning the Annual Report of the Inter-American Court of Human Rights", Resolution adopted by the Ninth Plenary Session, held on June 9, 1995.

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10. My concern regarding Trinidad and Tobago's attitude towards compliance with the judgment on the merits and reparations in the Case of Hilaire, Constantine, Benjamin et al. and the attitude said State might assume regarding the judgment delivered by the Court in the Case of Caesar lies in that, in general, States Party have adopted an exemplary attitude regarding compliance with judgments and provisional measures. Moreover, I believe that the lack of a political forum to analyze the large number of partial compliances, in the presence of State representatives, the victims and the Commission, was precisely a circumstance that in many cases prevented progress regarding some aspects of execution of the judgments delivered by the Court. A report by the Court similar in nature to the aforementioned, will probably allow us to find solutions at a working group level and, possibly, to close those cases which have remained in the pending list for a long time, as explained below. This solution is likely to be the right way to avoid repeating the experience of the Case of Hilaire, Constantine, Benjamin et al.. That precedent should not be repeated.

The OAS is basically a political forum and the defense of human rights is a subject that should be dealt with by States Party courageously and openly. Dodging the discussion of these subjects prevents the Organization from fulfilling one of its main purposes, as set out in the OAS Charter.

II.

The proposals submitted by the Inter-American Juridical Committee, the States of Chile and Uruguay, and the Inter-American Commission of Human Rights contained in their drafts of the current text of Article 65 of the American Convention on Human Rights.

11. The first relevant precedent of the American Convention is the "Draft Convention on Human Rights" prepared by the Inter-American Council of Jurists in 1959, upon request by the Fifth Consultative Meeting of Ministers of Foreign Affairs, held in Santiago de Chile that same year. The text of that draft is the first precedent of current Article 65 of the American Convention, since Article 80 of said draft provided as follows:

The judgement of the Court will be communicated to the Council of the Organization of American States. [FN11]

[FN11] OAS Inter-American Yearbook on Human Rights, 1968, page 268.

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12. It befell on the Second Special Inter-American Conference held in Rio de Janeiro on November 1965, to consider the draft Convention prepared by the Inter-American Council of Jurists, together with two additional drafts submitted by the Governments of Chile and Uruguay, respectively.

The draft "Convention on Human Rights" prepared by the State of Chile revisits the rule contained in the previous draft, for in Article 72 it sets forth:

A copy of the judgment will be delivered to the interested parties and the Council of the Organization of American States. [FN12]

The provisions of the "Draft Convention on Human Rights" submitted by Uruguay are more accurate and similar to the current Article 65 of the American Convention.

Article 85 of said draft reads:

1. The decision of the Court will be communicated to the Council of the Organization of American States and all States that ratify this Convention.
2. The Court will report to the Council of the Organization of American States on the cases of non-compliance with its judgments. [FN13]

At this point, it is worth noticing that the OAS Charter, amended by the Protocol of Buenos Aires, did not become effective until 1970, and provides that the General Assembly will be the paramount authority within the Organization and that the aforementioned drafts were prepared before 1970, for which reason they only refer to the "Council of the Organization", which today is the OAS Permanent Council.

[FN12] OAS Inter-American Yearbook on Human Rights, 1968, page 295.

[FN13] OAS Inter-American Yearbook on Human Rights, 1968, page 315.

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13. The Second Special Inter-American Conference decided to send the three aforementioned drafts, as well as the minutes of its discussions, to the OAS Council so that, after receiving the opinion of the Inter-American Commission and other organs and entities it might deem advisable, the Council would amend the the Inter-American Council of Jurists Draft as appropriate. Lastly, on May 18, 1966, the OAS Council sent the aforementioned draft to the Inter-American Commission together with the drafts by Uruguay and Chile, asking the Commission to render an opinion and to make the pertinent recommendations. The Commission prepared two reports, which were sent to the Council of the Organization on November 4, 1966 and April 10, 1967, respectively. The Council of the Organization took notice of the documents and sent them as usual to the Committee on Juridical and Political Affairs (hereinafter the "CJPA"). The consideration of these issues led to various important discussions and enquiries to the States regarding the approval, in December 1966, of the United Nations Covenants on Human Rights, issues which were put before the OAS Council, that went on to submit many enquiries to Member States until, on June 12, 1968, the OAS Council adopted a Resolution (OEA/Ser.G/IV/C-i-837 rev 3) [FN14] requesting the Inter-American Commission to prepare the complete and revised text of the draft Convention, which held a Special Session of June 1 and 2, 1968. The Commission referred the draft Convention to the OAS Council on July 18, 1968, which adopted the draft Convention as the working document for the Specialized Inter-American Conference on Human Rights, including the comments and amendments made by Member States. [FN15]

[FN14] OAS Inter-American Yearbook on Human Rights, 1968, page 92.
[FN15] OEA/Ser.G/V/C-d-1631, in: OAS Inter-American Yearbook on Human Rights, 1968, page 156; and OEA/Ser.G/IV/C-i-871 rev. 3., in: OAS Inter-American Yearbook on Human Rights, 1968, page 157.

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14. The "Draft Inter-American Convention on the Protection of Human Rights" prepared by the Inter-American Commission went back from the text of the Uruguay proposal and adopted the prior proposal made by the Inter-American Council of Jurists and Chile. Indeed, Article 57 of the draft sets forth:

The judgment of the Court will be communicated to the Council of the Organization of American States. [FN16]

[FN16] OAS Inter-American Yearbook on Human Rights, 1968, page 150.

III.

The Inter-American Specialized Conference on Human Rights of 1969

15. Finally, it was during the Inter-American Specialized Conference on Human Rights, held in San José, Costa Rica, from November 7 to November 22, 1969, that the American Convention on Human Rights was signed and, consequently, the current text —former article 57 of the draft document submitted by the Commission— was approved as paragraph 69. It is at this very time that a new article was adopted, that is current article 65 of the American Convention.

16. In the official publication made by the OAS of the Minutes and Documents of the Inter-American Specialized Conference on Human Rights, [FN17] the report submitted by the Rapporteur of the Second Committee, Robert J. Redington of the United States of America on the "Protection Organs and General Provisions" is to be found. Its relevant part reads as follows:

Article 66, a new article, establishes that the Court shall submit a report on its work to the General Assembly of the OAS, at the annual meeting of the said General Assembly, in compliance with Article 52 of the OAS Charter, as amended by the Protocol of Buenos Aires. Besides, Article 66 provides that the Court shall be able to include in the report those cases in which a State has not complied with its judgments, and to make the recommendations it may deem proper.
…
Article 70 (which mirrors article 57 of the Draft) expressly provides that the judgment must be communicated to the parties to the case and to the States Party to the Convention. The requirement of the communication of the judgment to the Council of the OAS was eliminated. [FN18]

[FN17] OAS "Minutes and Documents. Inter-American Specialized Conference on Human Rights", San Jose, Costa Rica, November 7-22, 1969, OAS/Ser.K/XVI/1.2.
[FN18] OAS "Minutes and Documents. Inter-American Specialized Conference on Human Rights", San Jose, Costa Rica, November 7-22, 1969, OAS/Ser.K/XVI/1.2, p. 377.
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17. As it can be clearly concluded from the aforementioned quotations, the solution that was found was to maintain the provision of article 70 pursuant to which the judgments of the Court must be communicated to the parties of the case and to the States Party to the Convention and, due to the approaching entry into force of the Charter of the Organization, as amended by the Protocol of Buenos Aires, pursuant to which annual General Meetings are to be held, that part of the article providing that Council of the Organization must be notified of the judgment was eliminated.

For the same reason mentioned hereinbefore, a new paragraph —number 66— was introduced, which establishes that the Court must submit an annual report to the General Assembly of the OAS, wherein it shall inform to the Assembly on those cases in which a State has not complied with the judgments of the Court, making the pertinent recommendations.

Therefore, the verbatim wording of the new paragraphs is as follows:

Article 66
To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.
Article 70
The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the States Party to the Convention. [FN19]

[FN19] OAS "Minutes and Documents. Inter-American Specialized Conference on Human Rights", San Jose, Costa Rica, November 7-22, 1969, OAS /Ser.K/XVI/1.2, pp. 392 and 393.

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18. During the Third Plenary Session, held on November 21, 1969, the Conference approved the wording of both articles, which had become already the current articles 65 and 69 of the Convention. [FN20] The final text of the American Convention, also called Pact of San Jose, Costa Rica, as per Doc. 65 Rev. 1 Corr. 2 of January 7, 1970, [FN21] includes the two final texts with their current number, the verbatim wording of which is as follows:

Article 65
To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.
…
Article 69
The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the States Party to the Convention. [FN22]

[FN20] OAS "Minutes and Documents. Inter-American Specialized Conference on Human Rights", San Jose, Costa Rica, November 7-22, 1969, OAS /Ser.K/XVI/1.2, p. 457.
[FN21] OAS "Minutes and Documents. Inter-American Specialized Conference on Human Rights", San Jose, Costa Rica, November 7-22, 1969, OAS /Ser.K/XVI/1.2, p. 480.
[FN22] OAS "Minutes and Documents. Inter-American Specialized Conference on Human Rights", San Jose, Costa Rica, November 7-22, 1969, OAS Ser.K/XVI/1.2, p. 498.

IV. Solution proposed by the Inter-American Court Of Human Rights to the Pertinent Organs of the OAS Regarding the implementation of Article 65 of the American Convention

19. In connection with this matter, it is worth pointing out that on April 5, 2001, the current President of the Inter-American Court at that moment, Judge Antônio A. Cançado Trindade; during the dialogue with the Commission of Juridical and Political Affairs of the Permanent

Council of the OAS on the strengthening for the Inter-American system for the protection of human rights, stated:

88. Now, before the CJPA, I wish to reiterate the confidence the Inter-American Court has in the States Party as guarantors of the American Convention. The States Party individually undertake to comply with the Court's judgments and decisions, as stipulated in Article 68 of the American Convention, in application of the principle of pacta sunt servanda, and also because they are so obliged under their own internal laws. Likewise, the States Party jointly undertake the duty to watch over the integrity of the American Convention as its guarantors. The supervision of the faithful compliance with the Court´s judgments is a task which befalls all the States Party to the Convention. [FN23]

The President of the Court made the abovementioned remarks since, in the same speech, when referring to the content of a possible Protocol of Amendment to the American Convention on Human Rights to Strengthen its Mechanism for Protection, he had stated, as regards the issue in point, that:

60. To assure constant monitoring of due compliance with all the conventional obligations that provide protection, particularly the judgments of the Inter-American Court, in my opinion, the following sentence should be added at the end of article 65 of the Convention:
- "The General Assembly shall convey them to the Permanent Council, which shall study and prepare a report on the matter, in order for the General Assembly to adopt a decision thereon." [FN24]

In this way, a gap is filled giving completeness to the law on the matter, with a mechanism to operate on a permanent basis (and not once a year at the OAS General Assembly) for supervising due compliance of the Court's judgments by respondent states party.

61. In the same line of thought, and with the same purpose of ensuring the faithful compliance with the Court´s judgments, at the level of the domestic law of the States Party, the following should be added at the end of article 68 of the Convention, as its third paragraph:
- "If such procedure does not still exist in the domestic law, the States Party agree to establish it pursuant to the general obligations stipulated in articles 1(1) and 2 of this Convention." [FN25]

Afterwards, on April 17, 2002, in his speech addressed to the Permanent Council of the OAS, the President recalled:

11. The Convention's States Party also assume, in concert, the obligation of monitoring its enforcement in their capacity as its guarantors. By creating obligations for the States Party with respect to all individuals under their respective jurisdictions, the American Convention requires that this collective guarantee be exercised in order to fully attain its objects and purposes. The Inter-American Court firmly believes that permanent exercise of that collective guarantee will help strengthen the protection mechanisms of the American Convention on Human Rights as we enter the 21st century.

12. Supervision of due compliance with the Court's judgments and decisions—in exercising this collective guarantee—is a task incumbent on all the Convention's States Party . In my report of April 5, 2001, which was also given here in this "Salón Bolívar", I offered proposals for

ensuring constant monitoring of due compliance with all the conventional obligations that provide protection, particularly the judgments of the Inter-American Court, including both preventive and follow-up measures.

13. I also suggested that in any future Draft Protocol to the American Convention, inter alia, the following sentence be added at the end of Article 65 of the Convention: "The General Assembly shall convey them to the Permanent Council, which shall study and prepare a report on the matter, in order for the General Assembly to adopt a decision thereon." In this way, a need is filled as regards of a mechanism to operate on a permanent basis (and not once a year at the OAS General Assembly) for supervising due compliance of the Court's judgments by correspondent states. I would like to reiterate, before the OAS Permanent Council, the confidence that the Court has in the States Party as guarantors of the American Convention and to add one brief, final comment. [FN26]

Two days later, before the CJPA, and in the framework of the dialogue on the strengthening of the Inter-American system for the protection of human rights, the President of the Court reiterated:

Besides, a permanent working group of the CJPA, consisting of the Representatives of the States Party to the American Convention, would be in charge of the ongoing supervision of the state of compliance, by the respondent States, with the judgments and decisions of the Inter-American Court, which would submit its reports to the CJPA; on the other hand, the CJPA would report to the Permanent Council so that it could prepare its report for discussion by the General Assembly. In this way, a gap would be filled giving completeness to the law on the matter, with a mechanism to operate on a permanent basis (and not once a year at the OAS General Assembly) for supervising due compliance of the Court's judgments by respondent states party. [FN27]

Again, on October 16, 2002, the current President of the Court at that time, Judge Antônio A. Cançado Trindade, referred most explicitly to the matter of supervision of the execution of the Court´s judgments, before the OAS Permanent Council. He said:

The faithful compliance or execution of their judgments is a legitimate concern of all international courts. For example, in the European protection system, which has a mechanism for the supervision of the execution of the judgments rendered by the European Court of Human Rights —a task of the Committee of Ministers of the Council of Europe (a body that has historically forerun the European Convention)—, this matter has always been in the Agenda of the abovementioned Council. Why the OAS does not assume its responsibility regarding such matter in our continent? More so, since, so far, there is no specific agency with a similar function.

In this respect, the Inter-American Court now has a special concern regarding one aspect of the execution of its judgments: generally, the States comply with reparations consisting compensations of a pecuniary nature, but the same does not necessarily happen with respect to non-pecuniary reparations, especially regarding those requiring an effective investigation of the facts behind violations and the identification and punishment of the persons liable for such violations — indispensable steps to put an end to impunity (and to its negative consequences for the whole social fabric.)

At the present time, due to the institutional deficit existing in the Inter-American protection system in this specific area, the Inter-American Court has been supervising motu proprio the execution of its judgments, devoting one or two days of its session terms to this task. But supervision of due compliance with the Court's judgments and decisions —in exercising this collective guarantee— is a task incumbent on all the States Party to the Convention. In my report submitted to the CJPA of the OAS on April 5, 2001, I offered proposals for ensuring constant monitoring of due compliance with all the conventional obligations that provide protection, particularly the judgments of the Inter-American Court, including both preventive and follow-up measures. [FN28]

[FN23] ICHR: "The Inter-American Human Rights Protection System on the Threshold of the Twenty-first Century." Report: "Basis for a Draft Protocol to the American Convention on Human Rights to Strengthen its Protection Mechanism" (2001), Volume II, 2nd Edition, May 2003, p. 378.
[FN24] Article 30 of the Statute of the Inter-American Court must be amended, with greater reason, in order to be consistent with the proposed new wording of article 65 of the Inter-American Convention.
[FN25] ICHR: "The Inter-American Human Rights Protection System on the Threshold of the Twenty-first Century." Report: "Basis for a Draft Protocol to the American Convention on Human Rights to Strengthen its Protection Mechanism," (2001), Volume II, 2nd Edition, May 2003, p.369.
[FN26] ICHR: "The Inter-American Human Rights Protection System on the Threshold of the Twenty-first Century." Report: "Basis for a Draft Protocol to the American Convention on Human Rights to Strengthen its Protection Mechanism," (2001), Volume II, 2nd Edition, May 2003, p. 664.
[FN27] ICHR: "The Inter-American Human Rights Protection System on the Threshold of the Twenty-first Century." Report: "Basis for a Draft Protocol to the American Convention on Human Rights to Strengthen its Protection Mechanism," (2001), Volume II, 2nd Edition, May 2003, p. 795.
[FN28] ICHR: "The Inter-American Human Rights Protection System on the Threshold of the Twenty-first Century". Report: "Basis for a Draft Protocol to the American Convention on Human Rights to Strengthen its Protection Mechanism," (2001), Volume II, 2nd Edition, May 2003, pages 919 and 920.

V.

Request for the interpretation of the judgment renderedin the case of Baena Ricardo et al. filed by the State of Panama

20. By means of the written motion filed on February 27, 2003, the State of Panama challenged the power of the Court to monitor compliance with the Judgment rendered in the Case Baena Ricardo et al., on February 2, 2001, as well as the procedure employed by the Court of requiring or ordering the States to submit reports so as to be able to determine, pursuant to

article 65 of the Convention, whether any non-compliance had occurred and report it to the OAS General Assembly.

21. In the aforementioned motion, the State of Panama considered "that the stage of monitoring compliance with judgment is a "post-judgment" stage that "is not included in the norms that regulate the jurisdiction and the procedure of the Court…" [FN29] and "that does not fall within the judicial sphere of the Court, but strictly within the political sphere, which, in this case [is] exclusive to the General Assembly of the Organization of American States." [FN30] The State of Panama also added that "Article 65 of the American Convention establishes clearly that only the General Assembly of the Organization of American States (hereinafter "the OAS") has the function of monitoring compliance with the judgments of the Inter-American Court of Human Rights. […] This norm only establishes obligations of the Court and does not establish any obligation for the States Party, neither does it grant rights to the Court nor competence to monitor compliance with its judgments." [FN31]

[FN29] ICHR, Case of Baena Ricardo y otros. Competence. Judgment of November 28, 2003. Series C No. 104, para. 53
[FN30] Corte I.D.H., Case of Baena Ricardo et al. Competence. Judgment of November 28, 2003. Series C No. 104 para. 54(a)
[FN31] Corte I.D.H., Case of Baena Ricardo et al. Competence. Judgment of November 28, 2003. Series C No. 104 para. 54 (b)

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22. Through the judgment on the issue of competence, of November 28, 2003, the Court rebutted the arguments of the State of Panama and decided it is competent to monitor compliance with its judgments, and that, in the exercise of its competence to monitor compliance with its decisions, the Inter-American Court of Human Rights is authorized to request the responsible States to submit reports on the steps they have taken to implement the measures of reparation ordered by the Court, to assess the said reports, and to issue instructions and orders on compliance with its judgments. [FN32]

[FN32] ICHR, Case of Baena Ricardo et al. Competence. Judgment of November 28, 2003. Series C No. 104 para. 139.

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23. When giving the grounds of position, the Court cited article 30 of the Statute, approved by the General Assembly of the OAS held in La Paz, Bolivia, in 1979, which mainly reiterates article 65 of the American Convention, and recalled, as already described in the instant reasoned opinion in the case of Caesar v. Trinidad y Tobago, that:

90. The travaux préparatoires to the American Convention allow us to consult the wishes of the States, as regards of monitoring compliance with the judgments of the Court, when they adopted this treaty. The Draft Convention [FN33] did not include a provision similar to current article 65. However, the Second Commission, responsible for studying and drafting the articles

corresponding to the procedural part of the Draft Convention, [FN34] proposed the text of current article 65 of the American Convention. In the report on "Organs of Protection and General Provisions" of November 21, 1969, at the Inter-American Specialized Conference on Human Rights, [FN35] the Second Commission indicated in its fifth meeting, held on November 17, 1969, that:

The delegations expressed their opinion that the Court should be granted a broad competence that would enable it to be an effective instrument for the jurisdictional protection of human rights. [FN36]

In this report, when explaining the wording of the provisions of the draft treaty corresponding to the Court, the Second Commission referred to the draft of current Article 65 as follows:

Article 65, which is a new provision, establishes that the Court shall submit a report to the General Assembly of the Organization, which is contemplated in Article 52 of the Charter of the Organization, reformed by the Protocol of Buenos Aires.

But, the article also establishes the important concept that the Court must indicate the cases in which a State has not complied with its judgments, with the pertinent recommendations of the Court […]. [FN37]

90. The Court considers that, when adopting the provisions of Article 65 of the Convention, the intention of the States was to grant the Court the authority to monitor compliance with its decisions, and that the Court should be responsible for informing the OAS General Assembly, through its annual report, of the cases in which the decisions of the Court had not been complied with, because it is not possible to apply Article 65 of the Convention unless the Court monitors compliance with its decisions. [FN38]

Besides, the Court pointed out the completeness gap existing in the American Convention as regards this issue, which is the subject matter of this reasoned opinion. The Court stated as follows:

88. The American Convention did not establish a specific body responsible for monitoring compliance with the judgments delivered by the Court, as provided for in the European Convention. When the American Convention was drafted, the model adopted by the European Convention was followed as regards of competent bodies and institutional mechanisms; however, it is clear that, when regulating the monitoring of compliance with the judgments of the Inter-American Court, it was not envisaged that the OAS General Assembly or the OAS Permanent Council would carry out a similar function to the Committee of Ministers in the European system. [FN39]

[FN33] Draft Inter-American Convention on the Protection of Human Rights drawn by the Inter-American Commission of Human Rights and approved as "working document" for the Inter-American Specialized Conference on Human Rights, through Resolution of the Council of the Organization of American States, at the meeting held on October 2, 1968. Cf. OAS/Ser. K/XVI/1.2, Inter-American Specialized Conference on Human Rights, Minutes and Documents, OAS Doc. 5, September 22, 1969, pp.12-35.

[FN34] At the first plenary session of the Inter-American Conference on Human Rights, held on November 8, 1969, it was decided to create the Second Commission.

[FN35] The Inter-American Convention on Human Rights was adopted at the Inter-American Specialized Conference on Human Rights held in San José, Costa Rica, on November 7-22, 1969.
[FN36] OAS/Ser. K/XVI/1.1, Doc. 71, November 21, 1969, p. 5.
[FN37] OAS/Ser. K/XVI/1.1, Doc. 71, November 21, 1969, p. 8.
[FN38] ICHR, Caso Baena Ricardo et al. Competence. Judgment of November 28, 2003. Series C No. 104 paras. 89 and 90.
[FN39] ICHR, Case of Baena Ricardo et al. Competence. Judgment of November 28, 2003. Series C No. 104 para. 88.
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24. The absence of a specific provision in the American Convention establishing that the OAS General Assembly or the Permanent Council would have functions in this area similar to those of the Committee of Ministers of the European system, and the OAS omission to implement the application of article 65 of the American Convention, account for the events occurred in the case of Hilaire, Constantine, Benjamin et al. If the Court had accepted the position of the State of Panama pursuant to which the Court cannot request the States reports and reach conclusions in order to apply article 65 of the Convention, the Court should have been obliged to merely send its judgments to the OAS General Assembly, which, depending on the interest and attitude of the respondent State in the case reported under article 65 of the Convention, could not have even issue any decision. The reason is that, currently, depending on the text adopted by the CJPA, the General Assembly may issue a decision or not regarding non-compliance with a judgment of the Court.

VI.

Current Operation of the System within the Commission on Juridical and Political Affairs of the Permanent Council of the OAS and the need of reform

25. Once the Inter-American Court has approved its annual report to the OAS General Assembly, which can include or not statements regarding non-compliance with its judgments, it forwards the report to the President of the OAS Permanent Council, and a copy is also forwarded to the General Secretary of the Assembly, so that the report be submitted to the consideration of the General Assembly.

The reason for doing so is that, pursuant to article 91 (f) of the OAS Charter, the Permanent Council must:

Consider the reports of the Inter-American Council for Integral Development, of the Inter-American Juridical Committee, of the Anti-American Commission on Human Rights, of the General Secretariat, of specialized agencies and conferences, and of other bodies and agencies, and present to the General Assembly any observations and recommendations it deems necessary…

26. The Permanent Council delivers the report to its Commission on Juridical and Political Affairs, that hears the presentation thereof made by the President of the Court, conducts

deliberations on the report and adopts a resolution that is communicated to the Permanent Council that, in its turn, communicates it to the General Assembly. In practice, what happens is that the decision adopted by the CJPA is the same that is communicated to and approved by the Council and the General Assembly. And the text of the resolution is approved by the CJPA by consensus. It is enough that the State that the Court mentions as not having complied with the judgment, opposes to be urged, through the resolution, to inform the Court on its compliance with the judgment, for such urging not to be made in the resolution to be approved by the CJPA and, consequently, by the Permanent Council and the General Assembly.

That is, the procedure established by the OAS causes the information on a decision pronounced by the Court pursuant to article 65 of the Convention not to be known, let alonediscussed by the General Assembly. And this is what happened in the case of Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago, and the same may occur to the reparations ordered by the Court in the instant case of Caesar v. Trinidad and Tobago.

27. However, Resolution AG/RES. 2043 (XXXIV-0-04), "Observations and Recommendations on the Annual Report of the Inter-American Court of Human Rights", approved by the General Assembly at the meeting held in Quito, in 2004, includes as its operative paragraph 4 the exact words that follow:

To reiterate the need for States Party to provide the information requested by the Court in order to enable it to fully meet its obligation to report to the General Assembly on compliance with its judgments.

A very significant step forward, albeit not sufficient as it does not mention which State or States must provide such information. But in the same Resolution, as well as in that approved by the General Assembly in Santiago de Chile, in 2003, AG/RES. 1918 (XXXIII-0-03), also on the "Observations and Recommendations to the Annual Report of the Inter-American Court of Human Rights", Trinidad and Tobago requested recording of its reservation made regarding operative paragraphs 9 and 7, respectively, both of which have a similar wording:

To urge OAS member states to consider signing and ratifying or acceding to, as the case may be, the American Convention on Human Rights and other instruments of the system, including acceptance of the binding jurisdiction of the Inter-American Court of Human Rights.

VII.

The consequences of the completeness gap in the American Convention on Human Rights making Article 65 thereof ineffective

28. The consequence of the American Convention failing to establish a mechanism to implement and make Article 65 thereof effective, in addition to the processing in the Organization of American States of the Court's annual report, is that, upon reviewing the list of cases and provisional measures submitted to the Court for consideration pursuant to its judicial functions, a false impression is created of the satisfactory level of compliance with judgments and orders of the Court by the States Party to the American Convention.

This is so because a case is not concluded until the judgment has been fully complied, in spite of the very high level of partial compliance with judgments. This situation could be reversed if the States Party would always furnish the Court timely with information it requests from them about the compliance with judgments and provisional measures.

29. Below is a list of all the contentious cases and provisional measures submitted to the Court up to February 2005, specifying which cases have been closed and which provisional measures have been rescinded.

Contentious Cases [FN40]

Case Name	Respondent Government	Year of Submission	Status
Case of Velasquez Rodriguez	Honduras	1986	Closed
Case of Fairen Garbi and Solís Corrales	Honduras	1986	Closed
Case of Godinez Cruz	Honduras	1986	Closed
Case of Aloeboetoe et al.	Suriname	1990	Closed
Case of Gangaram Panday	Suriname	1990	Closed
Case of Genie Lacayo	Nicaragua	1994	Closed
Case of Cayara	Peru	1992	Closed
Case of Maqueda	Argentina	1994	Closed
Case of "The Last Temptation of Christ" (Olmedo Bustos et al. v. Chile)	Chile	1999	Closed
Case of Alfonso Martin del Campo Dodd	Mexico	2003	Closed
Case of Neira Alegría et al.	Peru	1990	Monitoring compliance with judgment
Case of Caballero Delgado y Santana	Colombia	1992	Monitoring compliance with judgment
Case of El Amparo	Venezuela	1994	Monitoring compliance with judgment
Caso of Loayza Tamayo	Peru	1995	Monitoring compliance with judgment
Case of Castillo Páez	Peru	1995	Monitoring compliance with judgment
Case of Garrido and Baigorria	Argentina	1995	Monitoring compliance with judgment
Case of Blake	Guatemala	1995	Monitoring compliance with judgment
Caso Suárez Rosero	Ecuador	1995	Monitoring compliance with judgment
Case of Benavides Cevallos	Ecuador	1996	Monitoring compliance with judgment

Case of Castillo Petruzzi et al.	Peru	1997	Monitoring compliance with judgment
Case of Baena Ricardo et al.	Panama	1998	Monitoring compliance with judgment
Case of Ivcher Bronstein	Peru	1999	Monitoring compliance with judgment
Case of Constitutional Court	Peru	1999	Monitoring compliance with judgment
Case of the "White Van" (Paniagua Morales et al. v. Guatemala)	Guatemala	1995	Monitoring compliance with judgment
Case of the "Street Children" (Villagran Morales et al. v. Guatemala)	Guatemala	1997	Monitoring compliance with judgment
Case of Cesti Hurtado	Peru	1998	Monitoring compliance with judgment
Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua	Nicaragua	1998	Monitoring compliance with judgment
Case of Cantoral Benavides v. Peru	Peru	1996	Monitoring compliance with judgment
Case of Durand and Ugarte v. Peru	Peru	1996	Monitoring compliance with judgment
Case of Bámaca Velásquez	Guatemala	1996	Monitoring compliance with judgment
Case of Trujillo Oroza	Bolivia	1999	Monitoring compliance with judgment
Case of Hilaire, Constantine, Benjamin at al.	Trinidad y Tobago	1999-2000	Monitoring compliance with judgment
Case of Barrios Altos	Peru	2000	Monitoring compliance with judgment
Case of Las Palmeras	Colombia	1998	Monitoring compliance with judgment
Case of El Caracazo v. Venezuela	Venezuela	1999	Monitoring compliance with judgment
Case of Bulacio v. Argentina	Argentina	2001	Monitoring compliance with judgment
Case of Cantos v. Argentina	Argentina	1999	Monitoring compliance with judgment
Case of Juan Humberto Sánchez v. Honduras	Honduras	2001	Monitoring compliance with judgment
Case of "Five Pensioners" v. Peru"	Peru	2001	Monitoring compliance with judgment
Case of Mack Chang	Guatemala	2001	Monitoring compliance with judgment
Case of Maritza Urrutia	Guatemala	2002	Monitoring compliance with

			judgment
Case of 19 Merchants	Colombia	2001	Monitoring compliance with judgment
Case of Gómez Paquiyauri Brothers	Peru	2002	Monitoring compliance with judgment
Case of Juvenile Reeducation Institute	Paraguay	2002	Monitoring compliance with judgment
Case of Ricardo Canese v. Paraguay	Paraguay	2002	Monitoring compliance with judgment
Case of Lori Berenson Mejia	Peru	2002	Monitoring compliance with judgment
Case of Herrera Ulloa	Costa Rica	2003	Monitoring compliance with judgment
Case of Carpio Nicolle et al.	Guatemala	2003	Monitoring compliance with judgment
Case of De La Cruz Flores v. Peru	Peru	2003	Monitoring compliance with judgment
Case of "Plan de Sanchez Massacre"	Guatemala	2002	Monitoring compliance with judgment
Case of Serrano Cruz Sisters v. El Salvador	El Salvador	2003	In litigation
Case of Daniel Tibi v. Ecuador	Ecuador	2003	Monitoring compliance with judgment
Case of Molina Theissen	Guatemala	2003	Monitoring compliance with judgment
Case of Moiwana Village v. Suriname	Suriname	2002	Preliminary objections and possible merits, reparations and costs
Case of Caesar v. Trinidad and Tobago	Trinidad and Tobago	2003	In litigation
Case of Yatama v. Nicaragua	Nicaragua	2003	In litigation
Case of Acevedo Jaramillo et al. v. Peru (SITRAMUN)	Peru	2003	In litigation
Case of the "Mapiripán Massacre"	Colombia	2003	In litigation
Case of Acosta Calderón v. Ecuador	Ecuador	2003	In litigation
Case of Yakye Axa Community v. Paraguay	Paraguay	2003	In litigation
Case of the Girls Yean and Bosico v. Dominican Republic	Dominican Republic	2003	In litigation
Case of López Álvarez v. Honduras	Honduras	2003	In litigation
Case of Huilca Tecse v. Peru	Peru	2004	In litigation
Case of the Massacre of Pueblo Bello v. Colombia	Colombia	2004	In litigation

Case of Gutiérrez Soler v. Colombia	Colombia	2004	In litigation
Case of Palamara Iribarne v. Chile	Chile	2004	In litigation
Case of García Asto and Ramírez Rojas v. Peru	Peru	2004	Initial procedures (written proceedings)
Case of Blanco Romero et al. v. Venezuela	Venezuela	2004	Initial procedures (written proceedings)
Case of Ituango v. Colombia	Colombia	2004	Initial procedures (written proceedings)
Case of Juárez Cruzzat et al. v. Peru	Peru	2004	Inicial processing (complaint undergoing preliminary examination)
Case of Fermín Ramírez v. Guatemala	Guatemala	2004	Initial procedures (written proceedings)
Case of Gómez Palomino v. Peru	Peru	2004	Initial procedures (written proceedings)
Case of Raxcacó Reyes v. Guatemala	Guatemala	2004	Initial procedures (written proceedings)
Case of Ximenes Lopes v. Brazil	Brazil	2004	Initial procedures (written proceedings)
Case of Nogueira de Carvalho v. Brazil	Brazil	2005	Initial procedures (written proceedings)

[FN40] Out of all the contentious cases heard by the Inter-American Court of Human Rights, 13.33% have been closed, 30.66% are currently pending before the Court and 56% are in the stage of overseeing compliance with judgment.

Provisional Measures [FN41]

Case Name	State Regarding Which the Measure Has Been Adopted	Year of Submission	Status
Case of Velasquez Rodriguez	Honduras	1988	Closed
Case of Fairen Garbí and Solis Corrales	Honduras	1988	Closed
Case of Godinez Cruz	Honduras	1988	Closed
Case of Bustios-Rojas	Peru	1991	Closed
Case of Chunima	Guatemala	1991	Closed
Case of Reggiardo Tolosa	Argentina	1993	Closed
Case of Aleman Lacayo	Nicaragua	1996	Closed
Case of Vogt	Guatemala	1996	Closed
Case of Suarez Rosero	Ecuador	1996	Closed
Case of Serech and Saquic	Guatemala	1996	Closed

Case of Paniagua Morales et al. and Case of Vasquez et al.	Guatemala	1998	Closed
Case of Paniagua Morales et al.	Guatemala	2001	Closed
Case of Clemente Teherán et al.	Colombia	1998	Closed
Case of Constitutional Court	Peru	2000	Closed
Case of Ivcher Bronstein	Peru	2000	Closed
Case of Digna Ochoa y Plácido et al.	Mexico	1999	Closed
Case of Loayza Tamayo	Peru	1996/2000	Closed
Case of La Nación Newspaper	Costa Rica	2001	Closed
Case of Chipoco	Peru	1992	Not adopted
Case of Peruvian Prisons	Peru	1992	Not adopted
Case of Parker	Peru		Not adopted
Case of Cesti Hurtado	Peru	1997	Not adopted
Case of Colotenango	Guatemala	1994	Active
Case of Carpio Nicolle et al.	Guatemala	1995	Active
Case of Giraldo Cardona	Colombia	1996	Active
Case of Álvarez et al.	Colombia	1997	Active
Case of James et al.	Trinidad and Tobago	1998	Active
Case of Haitian and Dominicans of Haitian origin in the Dominican Republic	Dominican Republic	2000	Active
Case of Bamaca Velasquez	Guatemala	1998/2002	Active
Caso Blake	Guatemala	1995	Active
Case of Caballero Delgado and Santana	Colombia	1994	Active
Case of Peace Community of San José de Apartadó	Colombia	2000	Active
Case of Human Rights Centre Miguel Agustín Pro Juarez et al. (presently Pilar Norieta et al.)	Mexico	2001	Active
Case of Gallardo Rodríguez	Mexico	2001	Active
Case of Urso Branco Prison	Brazil	2002	Active
Case of Mayagna (Sumo) Awas Tingni Community	Nicaragua	2002	Active
Case of Helen Mack Chang et al.	Guatemala	2002	Active
Case of Luis Uzcátegui	Venezuela	2002	Active
Case of Liliana Ortega et al. v. Venezuela	Venezuela	2002	Active
Case of Luisiana Ríos et al. v. Venezuela (Radio Caracas Televisión -RCTV-)	Venezuela	2002	Active
Case of Lysias Fleury	Haiti	2003	Active
Case of Marta Colomina and Lilliana Velásquez	Venezuela	2003	Active
Case of Jiguamiandó and Curbaradó Communities	Colombia	2003	Active
Case of the Gómez Paquiyauri Brothers	Peru	2004	Active
Case of the Indigenous Kankuamo People	Colombia	2004	Active

Case of the Sarayaku Community	Ecuador	2004	Active
Case of "El Nacional" and "Así es la Noticia" Newspapers	Venezuela	2004	Active
Case of Carlos Nieto Palma et al.	Venezuela	2004	Active
Case of 19 Merchants (Sandra Belinda Montero Fuentes et al.)	Colombia	2004	Active
Case of "Globovisión" Television Broadcasting Company	Venezuela	2004	Active
Case of Raxcaco et al.	Guatemala	2004	Active
Case of Boyce and Joseph v. Barbados	Barbados	2004	Active
Case of Eloisa Barrios et al.	Venezuela	2004	Active
Case of Mendoza Prisons	Argentina	2004	Active
Case of Plan de Sánchez Massacre (Salvador Jerónimo et al.)	Guatemala	2004	Active
Case of Fermín Ramírez	Guatemala	2004	Active
Case of the "Mapiripán Massacre"	Colombia	2005	Active

[FN41] Out of all the provisional measures submitted to the Inter-American Court of Human Rights, 31.57% have been closed, 7% have not been adopted and 61.4% are active.

VIII.

Proposed Solution

30. It has been demonstrated that, as a result of the absence of a conventional rule provided for implementation of Article 65 of the Convention and because of the manner in which the annual report on the work of the Court is processed and considered by relevant authorities of the OAS, reports of non-compliance with a Court judgment are not directly known or debated by the OAS General Assembly, or by the Permanent Council or by its Committee on Juridical and Political Affairs. The latter confines itself to discussing and issuing a draft resolution for the Permanent Council, which is later submitted to the General Assembly, concerning the annual report on tne work of the Court. However, neither the specific non-compliance of the case at hand nor, consequently, the defense arguments of the State are heard or debated.

31. Undoubtedly, the best solution would be to adopt a protocol for amending the procedural provisions of the American Convention, as the Court in due time proposed. For the moment, however, failing a long-term solution, a short-term solution must be found, making it possible for the OAS appropriate authorities to debate the reports on the non-compliance with judgments pronounced by the Court, which in many cases could allow for such judgments to be promptly and fully complied with and to be closed by the Court. This would enhance the Inter-American human rights system, which erroneously appears to be ineffective as a result of the above data. (supra para. 29).

32. Even though on several occasions the Court has informed the General Assembly that it has failed to receive information from a given State concerning its compliance with a judgment or provisional measures, [FN42] only in 1995 did the General Assembly urge a State (i.e., Suriname) to inform the Court of the fulfillment of the judgments in the cases of Aloeboetoe and Gangaram Panday (supra para. 9), which constitutes irrefutable proof of the statements in this separate opinion in the case of Caesar vs. Trinidad and Tobago, which deserves full consideration from the States Party to the American Convention.

[FN42] Cf. Inter-American Court of Human Rights. Informe Anual de la Corte Interamericana de Derechos Humanos, 1990, OEA/Ser.L/V/III.23 doc.12, pp. 15 and 16; Inter-American Court of Human Rights. Informe Anual de la Corte Interamericana de Derechos Humanos, 1991, OEA/Ser.L/V/III.25 doc.7, p. 9; Inter-American Court of Human Rights. Informe Anual de la Corte Interamericana de Derechos Humanos, 1994, OEA/Ser.L/V/III.31 doc.9, pp. 18 and 19; Inter-American Court of Human Rights. Informe Anual de la Corte Interamericana de Derechos Humanos, 1996, OEA/Ser.L/V/III.35 doc.4, p. 27; Inter-American Court of Human Rights. Informe Anual de la Corte Interamericana de Derechos Humanos, 1997, OEA/Ser.L/V/III.39 doc.5, pp. 29 and 30; Inter-American Court of Human Rights. Informe Anual de la Corte Interamericana de Derechos Humanos, 1998, OEA/Ser.L/V/III.43 doc.11, pp. 32-35; Inter-American Court of Human Rights. Informe Anual de la Corte Interamericana de Derechos Humanos, 1999, OEA/Ser.L/V/III.47 doc.6, pp. 37-45; Inter-American Court of Human Rights. Informe Anual de la Corte Interamericana de Derechos Humanos, 2000, OEA/Ser.L/V/III.50 Doc.4, pp. 39-44; Inter-American Court of Human Rights. Informe Anual de la Corte Interamericana de Derechos Humanos, 2001, OEA/Ser.L/V/III.54 doc.4, pp. 46-55; Inter-American Court of Human Rights. Informe Anual de la Corte Interamericana de Derechos Humanos, 2002, OEA/Ser.L/V/III.57 doc.5, pp. 21, 25, 26, 32, 35, 45 and 46; Inter-American Court of Human Rights. Informe Anual de la Corte Interamericana de Derechos Humanos, 2003, OEA/Ser.L/V/III.61 doc.1, pp. 44-46; and Inter-American Court of Human Rights. Informe Anual de la Corte Interamericana de Derechos Humanos, 2004, OEA/Ser.L/V/III.65 doc.1, pp. 24 and 25.

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33. In order to stop this from happening over and over again, the most immediate solution would be for the CJPA to create a permanent working group to consider the non-fulfillment reports pronounced by the Court and for its members to receive written and oral reports from the Court, the Commission and the victims' representatives, and defense arguments or explanations the States Party may have, with a view to refer the relevant recommendations to the CJPA, to the Permanent Council and ultimately to the General Assembly.

34. Although the OAS is an essentially political entity, the great political issues i.e., those concerning the legal and political principles that gave birth to the organization and constitute its purpose, have not formed part of its daily agenda. The Organization cannot overlook and eschew debating issues surrounding the failure by some of its Member States to comply with the pacta sunt servanda principle and with a judgment ordering reparations issued by the human rights jurisdictional body of the Organization. If the OAS is to be revitalized, it will have to address these issues and to avoid becoming a mere international cooperation agency. The development in

the case of Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago, where a State Party to a case before the Court refuses to inform the Court of the manner in which it complied with its judgment (Article 68 of the Convention), without any reaction by the political bodies of the Organization, sets a bad precedent. It is to be hoped that there will never be another case alike and that the above-mentioned State will inform the Court of the compliance with the reparations ordered in this Judgment in the case of Caesar.

IX. CONCLUSIONS

35. The Organization of American States is by nature a political forum, essentially designed to promote democracy and, consequently, the dignity of the human being.

36. To this end, the Inter-American human rights system was established, having among its protection organs the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The latter jurisdictional body issues judgments which are binding upon the States Party to the American Convention on Human Rights (Article 68 thereof).

37. Although the American Convention on Human Rights was based on the [European] Convention for the Protection of Human Rights and the Fundamental Freedoms of 1950, it failed to establish a body such as the Council of Ministers to Monitor compliance with the judgments pronounced by the Court, as the European Convention did.

38. As a result, Article 65 of the American Convention has a completeness gap that must be filled, because even though it prescribes that the Court must inform the OAS of a failure to comply with any of its judgments, it failed to establish an institutional procedure within the OAS to carry that out, and because the procedure established by the Organization does not provide the General Assembly, the Organization's highest decision-making body, with the means either to learn about non-compliances with judgments pronounced by the Court or to make decisions concerning such non-compliance.

39. The high degree of compliance with the Court's judgments is one of the greatest achievements of the Inter-American human rights protection system. [FN43] However, debating the non-compliances with judgments pronounced by the Court in a permanent forum of the OAS, which could take the form of a working group, would enliven the OAS, as a debate in such a forum would show the Member States not only the strengths but also the deficiencies and weaknesses of the system, with a view to strengthening and improving it.

[FN43] Cf. GARCÍA RAMÍREZ, SERGIO: La Jurisdicción Internacional. Derechos Humanos y la Justicia Penal, Porrúa, Mexico, 2003, pp. 126-130 and 557; and SAAVEDRA ALESSANDRI, PABLO: La Corte Interamericana de Derechos Humanos. Las Reparaciones Ordenadas y el Acatamiento de los Estados, in "Los Instrumentos de Protección Regional e Internacional de los Derechos Humanos", Seminar Proceedings, Cooperation Program on Human Rights, Mexico-European Commission, Ministry of Foreing Relations, pp. 185-220.

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40. The failure to inform about compliance with the judgment in the case of Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago has led me to expose in this separate opinion in the case of Caesar v. Trinidad and Tobago the weaknesses of the system in this area, in the hope that no situations such as those described herein will reoccur and that the OAS Member States, but especially the States Party to the American Convention will implement the mechanism required for the judgments pronounced by the Inter-American Court to be fully complied with, on account of the fact that, as this Court has consistently held, "[i]n a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning." [FN44]

[FN44] ICourtHR, Hábeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 26; ICourtHR, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9. para. 35; and ICourtHR, Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 American Convention on Human Rights). Advisory Opinion OC-13/93 of July 16, 1993. Series A No. 13, para. 31

Manuel E. Ventura-Robles
Judge

Pablo Saavedra-Alessandri
Secretary