In Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), pursuant to Article 67 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Article 59 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), resolves on the request for interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs delivered by the Court on November 24, 2006 in Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru (hereinafter "the request for interpretation"), submitted by Adolfo Fernández-Saré, a victim and also the representative of one of the groups of victims, on March 8, 2007.

I. FILING OF THE REQUEST FOR INTERPRETATION AND PROCEEDINGS BEFORE THE COURT

1. On March 8, 2007, Adolfo Fernández-Saré, a victim in the case at hand and the representative of one of the groups of victims, submitted a request for the interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs rendered by the Court in the instant case on November 24, 2006 [FN1] (hereinafter "the Judgment"), based on Article 67 of the Convention, as follows:

1. [The reason why] the Court's decision does not state the (objective) reasons provided for in Article 66(1) of the American Convention.
2. [The reason why] the Court failed to strictly apply Article 63(1) of the American Convention […]
3. [The reason why] the Court's Judgment deviated from previous decisions rendered by the Court in […] similar cases in which it ordered the employee's reinstatement, settlement of back pay, moral damages, costs and other [compensatory items …]

4. [The reason why] the Judgment fails to specifically order that the State repeal Decree Law No. 25640 and Resolution No. 1239-A-92-CACL, which prevented and still prevent us from filing an Action for Amparo or an Administrative Recourse, respectively, in order to bring them in line with the American Convention, as requested in the petition the Commission filed with the Court.
5. How, in the Court's view, we will be given access to a simple, prompt and effective administrative or judicial recourse to defend our violated rights considering that, as of the date hereof, the periods therefor prescribed by domestic laws have already elapsed.
6. The Court belie[ves] that, for the benefit of 257 employees, the State of Peru will amend its Code of Constitutional Procedure, its Code of Civil Procedure, its Law on general Administrative Procedures and other related legislation that concerns the instant case just to give us access to a simple, prompt and effective recourse[.] Are the Judges really unaware that, in accordance with the Court's case-law, the Action for Amparo is the only simple, prompt and effective recourse?
7. Lastly, regarding operative paragraph No. 4 of the [J]udgment appealed by way of the request for interpretation, we request clarification on the following specific aspects:

a) For instance, said operative paragraph begins by stating that the State is under a duty to guarantee our access to a simple, prompt and effective recourse, for which purpose it is required to set up an independent, impartial body. In this respect, we are concerned about who will guarantee our access to such recourse: [t]he [S]tate of Peru or the Body (Commission) to be set up by the State as ordered in said Judgment.

b) Furthermore, we seek to learn what compensation we will be entitled to in the event that it (the Commission) should find that we were illegally and arbitrarily dismissed[.]

[FN1] Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) V. Peru. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 158.

---

2. On May 11, 2007, in accordance with Article 59(2) of the Rules of Procedure and further to the Court's instructions, the Secretariat of the Court (hereinafter "the Secretariat") transmitted a copy of the request for interpretation to the victims' representatives' common intervenors, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") and the State of Peru (hereinafter "the State" or "Peru"), advising them that they had a non-postponable deadline up to August 1, 2007 to submit such written arguments as they may deem appropriate. Furthermore, the State was thereby reminded that, pursuant to Article 59(4) of the Rules of Procedure, "[the] request for interpretation shall not suspend the effect of the judgment." The common intervenors did not file a brief in that regard.

3. On July 31, 2007, the State submitted its written arguments, the relevant portion of which stated as follows:

a) the Judgments rendered in Case of Baena-Ricardo et al. v. Panama, Constitutional Court and Acevedo-Jaramillo et al. (SITRAMUN) differ from the instant case both in the facts and the

legal grounds for access to the Inter-American Commission and, accordingly, do not constitute a binding precedent for the Court;
b) it is irrelevant that the Judgment did not specifically order the State to repeal either Decree Law No. 25640, as it was invalidated by virtue of Law No. 27487 of June 21, 2001, or Resolution No. 1239-A-CAC of October 13, 1992, as said resolution applied only for the purposes of the 1992 reorganization of the Congress of Peru; and
c) "in [c]ompliance with the Judgment[, the State] has guaranteed to the Dismissed Congressional Employees the setting up of an independent and impartial body that will determine whether the 257 former employees' dismissal from the Peruvian Congress was regular and justified or, otherwise, to determine and establish the applicable legal consequences and, as the case may be, the compensation due based on the specific circumstances pertaining to each of them."

4. On August 1, 2007, the Commission submitted said written arguments. It considered that "the brief submitted to the Court by Fernández-Saré does not seek to have the Court interpret the meaning or scope of the Judgment, […] but, rather, it is aimed at obtaining a review, reconsideration and analysis of the final [J]udgment not subject to appeal [… rendered …], as he takes issue on the contents thereof." After citing such previous decisions of the Court as it considered relevant, the Commission concluded that the arguments raised by Fernández-Faré "do[…] not constitute a request for interpretation proper."

II. JURISDICTION AND COMPOSITION OF THE COURT

5. Under Article 67 of the Convention,

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

6. Pursuant to the above-transcribed Article, the Court has jurisdiction to interpret its own judgments. When considering a request for interpretation, the Court must be composed, whenever possible, of the same judges who delivered the judgment of which the interpretation is being sought (Article 59(3) of the Rules of Procedure). In this instance, the Court is composed of the majority of the judges who delivered the Judgment [FN2] of which the interpretation is being sought.

[FN2] Judge Oliver Jackman, who due to reasons of force majeure had not taken part in the deliberation on and signing of the Judgment on preliminary objections, merits, reparations and costs of November 24, 2006, passed away on January 25, 2007. Due to reasons of force majeure, Judge Alirio Abreu-Burelli did not take part in the deliberation on and signing of this Judgment on Interpretation.

III. ADMISSIBILITY

7. The Court must verify whether the terms of the request for interpretation meet the requirements laid down in the applicable provisions, namely Article 67 of the Convention and Articles 29(3) and 59 of the Rules of Procedure.

8. Article 59 of the Rules of Procedure provides as follows:

1. The request for interpretation, referred to in Article 67 of the Convention, may be made in connection with judgments on the merits or on reparations and shall be filed with the Secretariat. It shall state with precision the issues relating to the meaning or scope of the judgment of which the interpretation is requested.
2. The Secretary shall transmit the request for interpretation to the parties to the case and shall invite them to submit any written comments they deem relevant, within the time limit established by the President.
3. When considering a request for interpretation, the Court shall be composed, whenever possible, of the same judges who delivered the judgment of which the interpretation is being sought. However, in the event of death, resignation, impediment, excuse or disqualification, the judge in question shall be replaced pursuant to Article 16 of these Rules.
4. A request for interpretation shall not suspend the effect of the judgment.
5. The Court shall determine the procedure to be followed and shall render its decision in the form of a judgment.

9. Under Article 29(3) of the Rules of Procedure, "[j]udgments and orders of the Court may not be contested in any way."

10. The Court has verified that Fernández-Saré submitted the aforementioned request for interpretation within the time limit prescribed in Article 67 of the Convention, as notice of the Judgment was transmitted to the parties on December 21, 2006.

11. Moreover, as previously held by this Court, [FN3] a request for the interpretation of a judgment should not be used as a means to appeal the ruling but, rather, its sole purpose should be to clarify the meaning of a ruling when a party maintains that the text in its operative paragraphs or its considering clauses is not clear or precise, provided that such considerations have a bearing on the operative paragraphs. Consequently, the modification or annulment of the relevant judgment cannot be sought through a request for interpretation.

[FN3] Cf. Case of Loayza-Tamayo V. Peru. Interpretation of the Judgment on the Merits. Order of the Court of March 8, 1998. Series C No. 47, para. 16; Case of the Pueblo Bello Massacre V. Colombia. Interpretation of the Judgment of Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 159, para. 13, and Case of Acevedo-Jaramillo et al. V. Peru. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2006. Series C No. 157, para. 27.

---

12. In addition, the Court has held that a request for the interpretation of a judgment may not consist in the submission of issues of fact or of law that have already been asserted at the appropriate stage of the proceedings and on which the Court has already ruled. [FN4]

[FN4] Cf. Case of Loayza-Tamayo V. Peru. Interpretation of the Judgment of Reparations. Judgment of June 3, 1999. Series C No. 53, para. 15; Case of the Pueblo Bello Massacre V. Colombia. Interpretation of the Judgment of Merits, Reparations and Costs, supra note 4, para. 14, and Case of Acevedo-Jaramillo et al. V. Peru. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs, supra note 4, para. 28.

---

13. In order to assess the admissibility of the request for interpretation filed by Fernández-Saré and, if appropriate, to clarify the meaning and scope of the Judgment of November 24, 2006, the Court will now analyze the seven questions raised by Fernández-Saré (supra para. 1).

*

14. It is the Court's view that the first, second, third and sixth questions raised in the brief submitted by Fernández-Saré are intended to challenge the substantive reasons supporting the Judgment and are not concerned with specific, concrete issues regarding the meaning and scope of the Judgment. Accordingly, they do not amount to a request for the interpretation of a Judgment under Article 67 of the Convention and Articles 29(3) and 59 of the Rules of Procedure.

*

15. Through his fourth question, Fernández-Saré has inquired into the reasons why no specific order was included for the State to repeal Decree Law No. 25640 and Resolution No. 1239-A-92-CACL. Said question is aimed at a securing a review of questions of law that were already analyzed and ruled upon in the Judgment and, therefore, it cannot be admitted for the purposes of interpretation of the Judgment. This notwithstanding, it should be noted that, following the Proven Facts section (paragraphs 89(4), 89(9), 89(10) and 89(11)), the Judgment stated as follows:

117. In relation to the norms applied to those who were dismissed, it has been established that article 9 of Decree Law No. 25640 expressly prohibited the possibility of filing an action for amparo against its effects (supra para. 89(4), 89(9), and 113). As the expert witness Abad Yupanqui has stated, at the time of the facts "in each of the decree laws where it was considered necessary, the Government began to include a provision that prevented the use of the amparo procedure" (supra para. 81(g)[…].

118. Regarding the provisions called into question by the Commission and by the common intervenors in these proceedings, the State declared that:

During the period of the process to streamline the personnel of the National Congress of the Peruvian Republic, legal and administrative provisions were in force, which are at issue in

these proceedings, that violated the rights embodied in Articles 1(1) and 2 of the American Convention.

Article 9 of Decree Law No. 25640, which has been called into question in these proceedings, violated the provisions of Articles 8(1) and 25(1) of the American Convention.

[…] It could be understood that the mere issuance of article 9 [of the said] Decree […] and article 27 of Resolution 1239-A-92CACL were incompatible with the Convention.

119. The Court finds it evident that the alleged victims were affected by the provisions under consideration in the international proceedings. The prohibition to contest the effects of Decree Law No. 25640, contained in the said article 9, constituted a norm of immediate application, since the people it affected were prevented ab initio from contesting any effect they deemed prejudicial to their interests. The Court finds that, in a democratic society, a norm containing a prohibition to contest the possible effects of its application or interpretation cannot be considered a valid limitation of the right of those affected by the decree to a genuine and effective access to justice, which cannot be arbitrarily restricted, reduced or annulled in light of Articles 8 and 25 of the Convention, in relation to Articles 1(1) and 2 thereof […].

120. In the context described above, article 9 of Decree Law No. 26540 and article 27 of Resolution 1239-A-CACL of the Administrative Commission helped promote a climate of absence of judicial protection and legal security that, to a great extent, prevented or hindered the persons affected from determining with reasonable clarity the appropriate proceeding to which they could or should resort to reclaim the rights they considered violated. […]

129. In conclusion, the Court observes that this case took place within the framework of practical and normative impediments to a real access to justice and a general situation of absence of guarantees and ineffectiveness of the judicial institutions to deal with facts such as those of the instant case. In this context and, in particular, the climate of legal uncertainty promoted by the norms that restricted complaints against the evaluation procedure and the eventual dismissal of the alleged victims, it is clear that the latter had no certainty about the proceeding they should or could use to claim the rights they considered violated, whether this was administrative, under administrative-law, or by an action for amparo.

16. Put differently, the Court considered that both article 9 of Decree Law No. 25640 and article 27 of Resolution No. 1239-A-92-CACL contributed to a climate of absence of judicial protection and legal security, for which reason, inter alia, it determined that the State had violated the rights to a fair trial and to judicial protection enshrined in Articles 8(1) and 25 of the Convention, in relation to the general obligation to respect and ensure rights and to adopt domestic legal provisions, established in Articles 1(1) and 2 thereof.

*

17. The Court considers that, through his fifth and seventh questions, Fernández-Saré brings into question the manner in which the State will provide the victims with a simple, prompt and effective administrative or judicial recourse to enforce the rights they deem to have been violated.

18. It should be noted that paragraph 148 of the Judgment provided as follows:

[…] in this case the Court considers that a reparation consequent with the violations it has declared is to decide that the State should guarantee the injured parties the enjoyment of their violated rights and freedoms through effective access to a simple, prompt and effective recourse. To this end, it should establish, as soon as possible, an independent and impartial body with powers to decide, in a binding and final manner, whether or not the said persons were dismissed in a justified and regular manner from the Congress of the Republic, and to establish the respective legal consequences, including, if applicable, the relevant compensation based on the specific circumstances of each individual.

19. Again, it is the Court's view that such argument does not concern the meaning and scope of the Judgment but, rather, it addresses the means through which the State will comply with said Judgment. Said argument must be declared inadmissible on the grounds that it does not pertain to a case of interpretation of Judgment under the applicable provisions and, if and to the extent relevant, it may be addressed at the stage for monitoring compliance with the Judgment.

20. It should be further noted that it was the State who was found internationally liable and, as such, it is the only party under a duty to adopt the ordered measures of reparation, irrespective of which specific domestic body or branch of government is actually in charge of implementing the Court's orders internally. [FN5]

[FN5] Cf. Case of Velásquez-Rodríguez V. Honduras. Merits, Judgment of July 29, 1988. Series C No. 4, paras. 164, 169 and 170; Case of Aloeboetoe et al. V. Suriname. Reparations and Costs. Judgment of September 10, 1993. Series C No. 15, para. 44; Case of Cantoral-Huamaní and García-Santa Cruz V. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 10, 2007. Series C No. 167, para. 79; and Case of the Rochela Massacre V. Colombia. Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, para. 67. Similarly, see Matter of the Mendoza Prisons. Provisional Measures. Order of the Inter-American Court of Human Rights of March 30, 2006, considering clause No. 11.

IV. OPERATIVE PARAGRAPHS

21. Therefore,

THE INTER-AMERICAN COURT OF HUMAN RIGHTS

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

DECIDES:

By four votes to one,

1. To declare the request for interpretation of the Judgment on preliminary objections, merits, reparations and costs delivered on November 24, 2006 in Case of Dismissed

Congressional Employees (Aguado-Alfaro et al.) v. Peru, submitted by Adolfo Fernández-Saré, inadmissible on the grounds that it does not conform to Article 67 of the Convention and Articles 29(3) and 59 of the Rules of Procedure, as explained in the considering clauses of this Judgment.

Judge Cançado Trindade dissents.

2. To give notice of this Judgment to Adolfo Fernández-Saré, the common interveners for the victims' representatives, the State and the Commission.

Judge Antônio Augusto Cançado Trindade informed the Court of his Dissenting Opinion, which is attached to this Judgment.

Done in Spanish and English, the Spanish text being authentic, in San José, Costa Rica, on November 30, 2007.

Sergio García-Ramírez
President

Antônio A. Cançado Trindade
Cecilia Medina
Manuel E. Ventura-Robles
Diego García-Sayán

Pablo Saavedra-Alessandri
Secretary

So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

DISSENTING OPINION OF JUDGE A.A. CANÇADO-TRINDADE

1. I regret that I cannot concur with the decision of the majority of the Inter-American Court of Human Rights in this Judgment on Interpretation rendered in Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru. The Court has declared the request for interpretation submitted by petitioners in the instant case inadmissible in its entirety based on the Court's –incorrect, in my opinion– view that such request does not raise any issue regarding the "meaning and scope" of its previous Judgment (of Nov. 24, 2006) on merits and reparations in this Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru.

2. However, paragraph 7(a) of said request [FN1] raises a question which I find to be most relevant, in connection with a matter I believe is directly related to the Judgment on merits and

reparations rendered in the case at hand and, in addition, belongs –as I have argued within this Court– in the sphere of jus cogens: the issue of the right to a fair trial, to cover both formal and substantive aspects thereof, leading to the provision of justice by the judicial system, or justice being done. In stating the reasons behind my firm dissent from the majority of the Court in this Judgment, I will start by setting forth my preliminary considerations.

[FN1] In paragraph 7(a) of the aforementioned request, petitioners do, in connection with the fourth operative paragraph of the Judgment on merits and reparations rendered by the Inter-American Court, express their "concern" over who will guarantee them a simple, prompt and effective recourse (which requires that the State set up an independent and impartial body): whether the State itself or the body to be created by it by virtue of the aforementioned Judgment.

I. Preliminary Considerations.

3. At the very beginning of my Separate Opinion to the Judgment on merits and reparations (of Nov. 24, 2006) rendered by the Inter-American Court of Human Rights in this Case of the Dismissed Congressional Employees(Aguado-Alfaro et al.) v. Peru, I stated that I had concurred on said Judgment "although I am not satisfied with the decision in this case" (para. 1); right away, I added "some clarifications of a conceptual nature" (paras. 1-7), acting under the rushing pressure of the time limitations recently set on the Court's decision-making process. I am not in the least surprised by petitioners' filing of a request for Interpretation of Judgment (brief of Feb. 5, 2007, pp. 1-2), even though they could have actually articulated it in a more careful, refined fashion.

4. Two further briefs were submitted to the Court in this proceeding for Interpretation of Judgment: one from the Inter-American Commission on Human Rights (of Aug. 1, 2007, pp. 1-3), wherein the Commission comes to the conclusion that the request "does not amount to a request for interpretation proper," without providing, however, satisfactory reasons therefor or proving how such conclusion was reached, and another one from the respondent State (of Jul. 31, 2007, pp. 1-3), whereby the State did adequately provide the Court, using appropriate language, with all such data as it deemed relevant for the Court's deliberation on this request for interpretation, without challenging the request itself.

5. Given that, in my opinion, in this Judgment on Interpretation the Inter-American Court has acted in an extremely summary and reluctant manner, failing to provide clarifications on paragraph 7(a) of petitioners' request, which paragraph is concerned with an issue – access to justice – which I consider to be part of jus cogens, I will add this Dissenting Opinion to said Judgment, setting forth my reflections as the grounds supporting my position on the matter under discussion. My reflections will revolve around four issues arising from this Case of the Dismissed Congressional Employees(Aguado-Alfaro et al.) v. Peru, which issues, in my view, bear the most relevance, namely: (a) performance of conventionality control; (b) conventional obligations of protection as obligations of result; (c) the engagement of State responsibility at the domestic-law and international-law levels; and (d) access to justice and the extension of the

material scope of jus cogens. The stage has therefore been set for the formulation of my considerations and final advice.

II. Performance of Conventionality Control.

6. It took more than a couple of centuries for domestic public law to reach a point of cohesion and get arranged into a hierarchy such that it now has a mechanism to control the “constitutionality” of laws and administrative decisions. [FN2] This control has become a means for the protection of the rights of citizens in general and, a fortiori, of all persons subject to state jurisdiction, in a State in which the Rule of Law prevails. [FN3] Such evolution of domestic law did, inevitably, have an effect on international-law scholars, who took note of such developments. [FN4] Starting in the mid 20th century, this got labeled the “internationalization” of constitutional law while, more recently, over the past two decades, there has been talk of the “constitutionalization" of International Law.

[FN2] Cf., e.g., M. Cappelletti, Judicial Review in the Contemporary World, N.Y., Bobbs-Merrill Co., 1971, pp.16-24 and 85-100; M. Fromont, La justice constitutionnelle dans le monde, Paris, Dalloz, 1996, pp. 21-22 and 75-76.

[FN3] M. Cappelletti, La Justicia Constitucional (Estudios de Derecho Comparado), Mexico, UNAM, 1987, p. 239.

[FN4] Cf., e.g., B. Mirkine-Guetzévitch, "Le droit constitutionnel et l'organisation de la paix", 45 Recueil des Cours de l'Académie de Droit International de La Haye (1933), pp.667-774; P. de Visscher, "Les tendances internationales des constitutions modernes", 80 Recueil des Cours de l'Académie de Droit International de La Haye (1952), pp.511-578; A. Cassese, "Modern Constitutions and International Law", 192 Recueil des Cours de l'Académie de Droit International de La Haye (1985) pp.331-476. In an inspired monograph published in 1944, the visionary Greek legal scholar Nicolas Politis argued that "les règles du droit des gens peuvent, moyennant certaines conditions, faire l'objet d'un contrôle juridictionnel"; N. Politis, La morale internationale, N.Y., Brentano's, 1944, p. 67.

---

7. Both currents of thought have fostered greater cohesion in the legal system, as well as greater interaction between the international and domestic legal systems in the protection of human rights. [FN5] In the context of such broader doctrinal dimension, it was recognized that, at the international level proper, human rights treaties present a “constitutional” dimension, which is herein referred to not in connection with its position within the hierarchy of domestic legal norms - domestic law being, anyway, a hostage of the provisions of national constitutions and therefrom projecting, with certain variations, onto the international sphere – but, rather, in the much more advanced sense that, in the international sphere proper, they constitute a constitutional legal system of respect for human rights.

[FN5] 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) pp. 9-435.

---

8. In reference to the European Convention on Human Rights, the European Court of Human Rights actually used the phrase "constitutional instrument of European public order (`instrument constitutionnel de l'ordre public européen')" in the Case of Loizidou v. Turkey (Preliminary Objections, 1995, para. 75), and the Inter-American Court started to address that issue in this Case of the Dismissed Congressional Employees(Aguado-Alfaro et al.) v. Peru (merits and reparations, Judgment of Nov. 24, 2006); it then could and should have elaborated on that reasoning in this Judgment on Interpretation, so as to provide clarification on its position regarding paragraph 7(a) of the request for Interpretation of Judgment submitted by the petitioners (on Feb. 5, 2007) in the cas d'espèce. For such purpose, there is a key provision of the American Convention on Human Rights available to it, namely, Article 2 – which finds no correlative provision in the European Convention on Human Rights -, which can promote the so-called “constitutionalization.”

9. The "constitutionalization" of International Law (a new challenge presented to the contemporary legal science) is, in my opinion, of much greater significance than the atomized and varying “internationalization” of Constitutional Law (the latter already studied more than five decades ago). Article 2 of the American Convention, under which State Parties are required to bring their domestic legal system in line with the protection provisions of the American Convention, does indeed open the door to a "control of conventionality" intended to determine whether the State Parties have or have not effectively complied with the general obligation laid down in Article 2 of the American Convention, as well as the one established in Article 1(1).

10. This allows a more cohesive international ordre public of respect for human rights. In my opinion, the "constitutionalization" of human rights treaties thus goes hand in hand, pari passu, with the control of their conventionality. And the latter type of control may be performed by the judges of both domestic and international tribunals, given the interaction of the international and domestic legal systems in this realm of protection.

11. Next, I will, if I may, recall that, in my Separate Opinion in Case of the Dismissed Congressional Employees(Aguado-Alfaro et al.) v. Peru (merits and reparations, Judgment of Nov. 24, 2006), I stated that:

“As I have been maintaining for many years, effective recourses under domestic law, to which specific provisions of human rights treaties refer expressly, are part of the international protection of human rights. [FN6] (...)
(…) the organs of the Judiciary of each State Party to the American Convention should have an in-depth knowledge of and duly apply not only constitutional law but also international human rights law; should exercise ex officio the control of compliance with the constitution (constitutionality) and with international treaties (conventionality), considered together, since the international and national legal systems are in constant interaction in the domain of the protection of the individual. The Case of the Dismissed Congressional Employees poses the question for future studies on the issue of access to justice of whether a lack of clarity with regard to domestic recourses as a whole can also lead to a denial of justice.

I would like to recall here that, in my separate opinion in the recent Case of Goiburú et al. v. Paraguay (Judgment of September 22, 2006), I indicated that, in that case, the Court had taken a step forward in the direction I had been advocating within the Court for some time, [FN7] by recognizing that this peremptory right also covers the right of access to justice lato sensu; in other words, the right to full jurisdictional benefits. (...)" (paras. 2-4).

[FN6] A.A. Cançado-Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law, Cambridge University Press, 1983, pages 279-287; A.A. Cançado-Trindade, O Esgotamento de Recursos Internos no Direito Internacional, 2a. ed., Brasília, Editora Universidade de Brasília, 1997, pp. 243 and 265.

[FN7] Indeed, in my Separate Opinion in Case of Myrna Mack Chang v. Guatemala (Judgment of November 25, 2003), I maintained that the right to law is necessary; in other words, the right to a legal system that effectively safeguards fundamental human rights (paras. 9-55).

---

12. Following the same line of thought, I wish to make two brief additional points in connection with the American Convention on Human Rights. In the first place, the control of conventionality lies, in my opinion and as already explained, with both domestic and international judges (i.e. the members of the Inter-American Court). It is for this reason that I have always found myself at odds, to some extent, with the pure renvoi of some issue pending before the Court to the domestic organs for resolution, as I consider that, whenever possible, the Court itself should provide such resolution. Second, the general obligation embodied in Article 2 of the American Convention on Human Rights opens the door to its “constitutionalization,” i.e. the “constitutionalization” of an international convention (which is entirely different from the so-called internationalization of constitutional law and much more advanced than it).

III. Conventional Obligations of Protection as Obligations of Result.

13. In my Separate Opinion to the Judgment rendered by this Court in the Case of Baldeón-García v. Peru (Merits and Reparations, of Apr. 6, 2006), I dissented from the line of reasoning taken by the majority of the Court, according to which state obligations to prevent, investigate and punish perpetrators would be nothing but "best efforts” obligations, “rather than [obligations] to ensure results." Unlike the majority of the Court, in that Separate Opinion I stated that:

“In my opinion, the right to fair trial is also part of the realm of the international jus cogens. As I explained in my Separate Opinion on the recent Case of Pueblo Bello Massacre v. Colombia (2006),

‘The impossibility to segregate Article 25 from Article 8, both of the American Convention (supra) involves the need to consider the right to fair trial, understood as full access to justice, as part of the realm of the jus cogens, i.e. the intangibility of all legal safeguards belong to the realm of the jus cogens as set forth in Articles 25 and 8, considered as a whole. (...)

(...) the Court could -and should- have made qualitative progress on precedent setting. I dare nurse the hope that the Court will do so as soon as possible if it effectively continues supporting its avant-garde precedents, -instead of attempting to limit them- and will courageously further on

the progress made based on the aforementioned Advisory Opinion n. 18 aimed at continuously broadening the material scope of the jus cogens' (para. 64-65).
Also in my recent Separate Opinion (paras. 52-55) in the case of López-Álvarez v. Honduras (2006), I restated my idea that the right to justice (the right to fair trial lato sensu) is a compulsory element of the jus cogens. The Court could –and should- have established so in the instant case; instead, it repeated prior obiter dicta. Thus, the Court lost the opportunity to step forward regarding its precedent setting process.
I will go even further. In my opinion, as I explained above, we are referring to compulsory laws; therefore, the State's obligations to prevent, investigate and punish perpetrators are not mere obligations "to act in a given manner, but not to achieve a given result," as stated by the Court in paragraph 93 of this Judgment. I dissent in this reasoning from the majority of the Court.
As I indicated in my Separate Opinion (para. 23) in the recent Judgment of the Court of March 29, 2006, in the city of Brasilia, in the Case of Sawhoyamaxa Indigenous Community v. Paraguay:
'(...) The State's obligations require it to act diligently and to achieve a given result, not merely to act in a given manner (such as adopting insufficient and ineffective legislative measures). Indeed, the examination of the difference between obligations to act in a given manner and to achieve a given result [FN8] has, in general, been carried out under a theoretical approach, assuming variations in the conduct of the State and even a succession of acts by the latter, [FN9] -without sufficiently and duly considering a situation that suddenly causes irreparable damage to a human being (v.g., deprivation of life due to the State's lack of diligence).'
In other words, the obligations involved are to achieve a given result and not to act in a given manner, because, otherwise, they would not refer to compulsory laws and, in addition, could result in impunity" (paras. 5-7 and 9-12).

[FN8] Especially based on the work of the United Nations Commission on the International Responsibility of States.
[FN9] Cf. A. Marchesi, Obblighi di Condotta e Obblighi di Risultato..., op. cit. infra n. (26), pp. 50-55 and 128-135.

---

14. Since, so far, the Inter-American Court has neither corrected nor left behind the incorrect position it recently adopted that obligations arising under the American Convention (such as State obligations of prevention, investigation and punishment of perpetrators) are mere obligations of means or conduct, "not to achieve a given result," I find myself under a duty to insist on my duly substantiated position in the hopes of having the Court turn back to its more enlightened line of decisions on the subject. For this purpose, I then wish to add, in this Dissenting Opinion, certain additional considerations on the subject, which I will elaborate on below.

15. When about three decades ago, Roberto Ago, the then rapporteur of the International Law Commission (ILC) of the United Nations, proposed a distinction between obligations of conduct and obligations of result, certain members of the ILC appeared hesitant as to the feasibility of a distinction between both types of obligations – as noted in the ILC's Report on the work of its 29th session (1977); after all, to achieve a given result, the State is required to engage in a given

conduct. [FN10] By setting the classic doctrine on the subject in a new direction, rendering its evolution somewhat hermetic through the introduction of the aforementioned distinction between both types of obligations, R. Ago's construction ended up creating some degree of conceptual confusion.

[FN10] Report reproduced at: Appendix I: Obligations of Result and Obligations of Means, in I. Brownlie, State Responsibility - Part I, Oxford, Clarendon Press, 2001 [reprint], pp. 241-276, particularly pp. 243 and 245.

---

16. To him, obligations of result entailed an initial freedom of the State to freely choose the means through which it would fulfill such obligation and achieve the result sought. [FN11] In addition to not being too compelling, such reasoning by R. Ago proved not to be of much help in the area of the international protection of human rights. Despite some references to human rights treaties, the essence of R. Ago's construction, as developed in his thick, substantial Reports on the International Responsibility of States (part I of the ILC's original draft) gave special consideration to the context of inter-state relations, mainly.

[FN11] Cf. ibid., pp. 255, 257, 259, 261-262 and 274.

---

17. The ILC itself, in the aforementioned Report of 1977, ended up recognizing that a State Party to a human rights treaty is burdened with obligations of result and that, upon a failure to comply with such obligations, the State is not allowed to excuse itself by claiming that it did its best to perform, that it acted as best it could in the hopes of complying; on the contrary, that State has a duty to achieve the result expected of it because of the conventional obligations of protection by which it is bound. [FN12] Conventional obligations of protection embodied in treaties show that obligations of result (e.g., bringing legislative measures and administrative practices in line with the provisions of said treaties) are much more common in International Law – in this realm of protection – than they are in domestic law. [FN13]

[FN12] Cf. ibid., pp. 270 and 276.
[FN13] Cf. ibid., pp. 250-251, 255, 257-259, 262 and 269.

---

18. State conduct needs to be oriented towards the result sought to be achieved through the application of the international laws on the protection of human rights. Some authors have identified an element that accounts for "some confusion" created by the incorporation of the distinction between obligations of conduct and obligations of result into R. Ago's original draft (Articles 20 and 21), namely: a civil law (the law of obligations) distinction was transported into International Law, [FN14] which distinction is neither clear nor of much significance at the international level. [FN15]

[FN14] I.e., a distinction related to the degree of freedom given to the obligor, to choose the means through which the obligation will be discharged and the result sought achieved.
[FN15] J. Combacau, "Obligations de résultat et obligations de comportement: quelques questions et pas de réponse", in Mélanges offerts à Paul Reuter - Le droit international: unité et diversité, Paris, Pédone, 1981, pp. 190, 198 and 200-202.

---

19. So much so that, for instance, Paul Reuter avoided reasoning in terms of such obligations, as the conditioning of the State's conduct to reach the intended result is much more important than the distinction. Thus, following Jean Combacau's perceptive observation, International Law still needs its very own theory of obligations – equipped with all relevant concepts - [FN16], rather than one "imported" from other areas of the legal science.

[FN16] Cf. ibid., pp. 203-204.

---

20. As far as legal theory is concerned, the most enlightened international legal scholars have leaned towards obligations of result insofar as the protection of human rights is concerned. Ian Brownlie has perceptively warned against the questions and uncertainty that may flow from the alleged differentiation between obligations of conduct and obligations of result, and its ex post facto application in connection with treaties that were neither drafted nor signed with such distinction in mind. [FN17] In turn, Pierre-Marie Dupuy criticized said distinction between obligations of conduct and obligations of result as "imprecise", "incomplète", "inexacte", in its pointless attempt, devoid of all practical effects, to address the coordination of the international and domestic legal systems. [FN18]

[FN17] I. Brownlie, State Responsibility - Part I, op. cit. supra n. (10), p. 241.
[FN18] P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des États", 188 Recueil des Cours de l'Académie de Droit International de La Haye (1984) pp. 47-49; and cf. also P.-M. Dupuy, "Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility", 10 European Journal of International Law (1999) pp. 376-377.

---

21. The fact that such distinction has had no real impact on international case law comes as no surprise. Thus, for instance, James Crawford, the last ILC rapporteur on the subject of State Responsibility, also a detractor of the distinction [FN19] - which was left out of the final version of the Articles on State Responsibility approved by the ILC in 2001 [FN20] - took note of the Judgment rendered by the European Court of Human Rights in the case of Colozza and Rubinat v. Italy (1985), in which it was held that the distinction between obligations of conduct and obligations of result "was not determinative" of the verified violation of Article 6(1) of the European Convention on Human Rights; actually, the European Court viewed such conventional provision as "imposing an obligation of result." [FN21]

[FN19] Cf. J. Crawford, The International Law Commission's Articles on State Responsibility, Cambridge, University Press, 2002, pp. 20-23.
[FN20] Cf. ibid., p. 344.
[FN21] Ibid., pp. 129-130.

---

22. Following the same line of reasoning, in the Case of the Hostages in Tehran (United States v. Iran, Judgment of May 24, 1980), the International Court of Justice (ICJ) categorically ordered the respondent State [FN22] to “immediately” terminate the unlawful detention of the nationals of the applicant State, and that it “immediately” release them, ensuring that they have the necessary means of leaving its territory, and “immediately” return to the respondent State the premises, property, archives and documents of its Embassy and Consulates. The ICJ even relied on "the fundamental principles enunciated in the Universal Declaration of Human Rights" (para. 91), [FN23] and stated that, in its opinion, the obligations binding on the respondent State were not "merely contractual,” but rather "obligations under general international law" (para. 62). [FN24]

[FN22] ICJ Reports (1980) p. 44, operative paragraph n. 3 (unanimously approved).
[FN23] ICJ Reports (1980) p. 42.
[FN24] ICJ Reports (1980) p. 31.

---

23. Most significantly, in its Judgment in the Case of the Hostages in Tehran, the ICJ stressed "the imperative character of the legal obligations" incumbent upon the respondent State (para. 88). [FN25] In other words, there was no room for doubt that conventional obligations and obligations under general international law were obligations of result, not merely of conduct. Indeed, where human rights are at stake, hardly may one escape the conclusion that we are necessarily faced with true obligations of result, so that the effective protection of the rights inherent in the individual is guaranteed.

[FN25] ICJ Reports (1980) p. 41.

---

24. Absolute prohibitions against violations of rights that cannot be derogated can be nothing other than obligations of result. [FN26] Basically, the whole conceptual universe of the law of the international responsibility of States needs to be reformulated in the specific context of the international protection of human rights. Luckily, efforts have already started in this regard. [FN27] Even if the so-called distinction between obligations of conduct and obligations of result is considered, such distinction still appears as "unhelpful" and "a potential source of confusion,” since the test to determine state responsibility in this area is necessarily objective in nature, given “the practical need for the effective application of International Law." [FN28]

[FN26] Cf., in this regard, in the context of the international protection of human rights, A. Marchesi, Obblighi di Condotta e Obblighi di Risultato - Contributo allo Studio degli Obblighi Internazionali, Milano, Giuffrè Ed., 2003, pp. 166-171.

[FN27] Cf., e.g., F. Urioste Braga, Responsabilidad Internacional de los Estados en los Derechos Humanos, Montevideo, Edit. B de F, 2002, pp. 1-115 and 139-203.

[FN28] L.G. Loucaides, Essays on the Developing Law of Human Rights, Dordrecht, Nijhoff, 1995, pp. 141-142 and 149, and cf. pp. 145, 150-152 and 156.

---

25. Protection obligations arise directly from International Law and are governed by the relevant provisions of human rights treaties and the general principles of International Law. If all criticism –referred to above– by the most perceptive international-law scholars to the alleged distinction between obligations of conduct and obligations of result took into consideration how inadequate such distinction was to determine the very own origin of the international responsibility of the State in a specific case, then I find such distinction even more inadequate for a determination of the consequence of the original engagement of responsibility, i.e. its implementation with the resulting duty to make reparation. In turn, such duty represents a true obligation of result.

26. To sum up and as a conclusion, the conduct of a State Party to a human rights treaty needs to conform to the result imposed by the conventional obligations of protection. In the International Law of Human Rights, it is not the result that is conditioned by a State's conduct but, conversely, it is the conduct of the State that is conditioned by the attainment of the result sought by the protection provisions. In ordering reparation, the Inter-American Court does not always go into detail regarding the conduct that the State should observe but it does, however, determine that the respondent State is required to achieve the result ordered by it: due reparation to the victims.

27. For instance, Article 68(2) of the American Convention provides that "that part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state". If the domestic procedure is insufficient or inadequate to provide reparation, the State is then required to take the necessary measures to make up for such insufficiency or inadequacy and achieve the result sought, namely the reparation. This is a conventional obligation of result that conditions the conduct of the State. The conduct must be such that it leads to the fulfillment of the obligation of result. The conduct is an integral part of the duty to repair, which is an obligation of result.

28. The authorization embodied in Article 68(2) of the Convention, which applies to monetary reparation only, does not mean that the State is not allowed to engage in such conduct as it may deem appropriate. Its conduct is conditioned by the obligation of result, which consists in providing reparation. As regards non-monetary reparation, it must be given in the terms of the Judgment rendered by the Inter-American Court. There is no question that any reparation – monetary or non-monetary – must be made effective as an obligation of result. This is the conclusion clearly inferred from Article 68(1) of the Convention, under which:

"The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties."

29. Otherwise, the State might claim that, in spite of its proper conduct, it has been prevented from adequately fulfilling its duty of reparation as a result of domestic law difficulties or insufficiencies - and this would be inadmissible. I find it obvious that such duty is not one merely of conduct: it truly is an obligation of result. The Court could not possibly hold a case over and close the file on it just because the State acted properly; it may only do so once the result, full reparation to the victims (and once the victims, their next of kin and all interested parties and parties involved in the proceedings before the Court have been consulted), has been achieved. Otherwise, we would be faced with a legal formality leading to an absurdity. To conclude, when dealing with a peremptory right such as the international protection of human persons, conventional obligations of protection are inescapable and imposed per se, and they are necessarily obligations of result.

IV. The Engagement of State Responsibility at the Domestic-Law and International-Law Levels.

30. In this decision, the Inter-American Court has let a one-time chance to provide clarification on the meaning and scope of its Judgment on merits and reparations in this Case of the Dismissed Congressional Employees in connection with paragraph 7(a) of petitioners' request for Interpretation of Judgment slip by. In my opinion, said paragraph, which is directly concerned with the core issue of access to justice – an issue I consider as belonging in the realm of jus cogens-, deserved greater attention by the Court. It is obvious we are dealing with an issue concerning the international responsibility of the State (not a domestic organ).

31. The responsibility of a State may be engaged at both the domestic and International Law levels. If a public body ceases to adequately fulfill the duties attributed to it by the constitution or a law, the State's responsibility is engaged domestically. Where a public organ created by the State to comply with a Judgment rendered by an international tribunal ceases to adequately fulfill its duty to repair the human rights violations, then the State's responsibility is engaged in the field of International Law. This is so notwithstanding the international responsibility of the State already engaged as a result of the original wrongful act (or failure to act) that had already given rise to the State's international liability and the international petition against it.

32. In either case, whether at the domestic law or the International Law level, responsibility lies with the State. This is yet another issue that should have been clarified by the Inter-American Court in this Judgment on Interpretation, in connection with paragraph 7(a) of petitioners' request in this case of the Dismissed Congressional Employees v. Peru. Actually, the Court has hardly provided any clarification, if any at all, merely reserving its inherent power to monitor compliance with its Judgments, for which this Judgment on Interpretation was not in the least necessary. And a later order on monitoring of compliance with Judgment would not be the appropriate means for providing clarification on, for instance, paragraph 7(a) of the aforementioned request of petitioners.

33. In this decision (para. 19), the Court has recognized that certain difficulties may arise in connection with the State's compliance with its Judgment on the merits and reparations in the cas d'espèce; however, it has conveniently chosen not to clarify the important issue raised in paragraph 7(a) of the request for Interpretation of Judgment or deal with the fair concern expressed by the employees dismissed from Peru's Congress. It is due to all of the above that I have chosen, as I necessarily had to, to use this Dissenting Opinion to provide the clarification which the Court has elected not to provide, without even stating compelling reasons not to do so. I find it difficult to shrug off the impression that the Court has acted as a domestic tribunal faced with a conflict of interests in a contentious proceeding between private parties, settling a dispute between equals but disregarding, however, the material importance of the (additional) protection provisions of the American Convention.

34. Regard should be had to the fact that cases such as this one only reach the Court where there is an allegation that no justice has been done domestically. In adjudicatory international proceedings on human rights, the parties enjoy their inevitable legal equality; they do, however, suffer a regrettable inequality of fact. The point is not the settling of a conflict of interests under the traditional and much criticized view of subjective rights as legally-protected interests [FN29] but, rather, the protection of the weaker party who has been turned into a victim of a human rights violation. Such imbalance needs to be corrected, even by way of a Judgment on Interpretation: this Judgment on Interpretation of the Court in the case of the Dismissed Congressional Employees hardly contributes, if it does at all, to the achievement of such goal.

[FN29] Such view of subjective rights attributed to Ihering, which is somewhat utilitarian and reductionist, received harsh criticism, e.g. from Alf Ross, as was also the case with Windscheid's construction, under which a subjective right was "a power or supremacy of will" (incapable of explaining how those who seem to lack expressions of will, such as newborns or those with certain mental inabilities, still are legal persons). In criticizing, in addition, the "never-ending debate" between both theories, Alf Ross characterized the "typical situation of a subjective right" by the "restriction of another person's freedom, the power to institute legal action and the authority to adjudicate" the right. A. Ross, Sobre el Derecho y la Justicia, 2a. ed., Buenos Aires, Eudeba, 1997, pp. 230-231 and 225.

V. Access to Justice and the Extension of the Material Scope of Jus Cogens.

35. For over a decade now, I have been fighting within this Court for the extension of the material scope of jus cogens to cover the right to justice lato sensu. To my satisfaction, the Court has adopted the line of reasoning I have strongly advocated for years. Refreshing my memory, in my Separate Opinions in the Case of Blake v. Guatemala (preliminary objections, Judgment of Jul. 2, 1996; [FN30] merits, Judgment of Jan. 24, 1998; [FN31] and reparations, Judgment of Jan. 22, 1999 [FN32]) I referred to the need to develop the case law on jus cogens prohibitions (beyond the law of treaties, covering any violation of human rights, including by way of unilateral action, so as to establish in a crystal-clear fashion the objectively unlawful nature of torture practices, summary executions and forced disappearances).

[FN30] Paras. 11 and 14 of the Opinion.
[FN31] Paras. 15, 17, 23, 25 and 28 of the Opinion.
[FN32] Paras. 31, 40 and 45 of the Opinion.

---

36. In my Separate Opinion in the paradigmatic Case of the "Street Children" (Villagrán-Morales et al. v. Guatemala, Judgment on reparations of May 26, 2001), I argued that the protection of the fundamental right to life falls under the domain of jus cogens (para. 36); along the same lines of thought are my Concurring Opinion (para. 11) in the Case of Barrios Altos v. Perú (Judgment of Mar. 14, 2001) and my Separate Opinion (para. 6) in the Case of Las Palmeras v. Colombia (Judgment on preliminary objections of Feb. 4, 2000). In my Separate Opinions (para. 38) in the cases of Hilaire, Benjamin and Constantine v. Trinidad and Tobago (Judgment on preliminary objections of Sep. 1, 2001), I made reference to the evolution of jus dispositivum into jus cogens (in the realm of the mandatory international jurisdiction).

37. I addressed the gradual broadening of the absolute prohibitions of jus cogens in my Separate Opinion (para. 34) in the Case of Servellón-García et al. v. Honduras (Judgment of Sep. 21, 2006). In the Judgment of Aug. 18, 2000 in the Case of Cantoral-Benavides v. Peru, the Court made significant progress (from its initial position regarding the protection of the fundamental right to life) by holding that

"(...) certain acts that were classified in the past as inhuman or degrading treatment, but not as torture, may be classified differently in the future, that is, as torture, since the growing demand for the protection of fundamental rights and freedoms must be accompanied by a more vigorous response in dealing with infractions of basic values of democratic societies (…)" (para. 99).

38. I tried to consolidate such progress in my Concurring Opinion (paras. 8-9 and 12) in the Case of Maritza Urrutia v. Guatemala (Judgment of Nov. 27, 2003), and in my Separate Opinions (30-32 and 85-92, respectively) in the cases of Tibi v. Ecuador (Judgment of Sep. 7, 2004) and Caesar v. Trinidad and Tobago (Judgment of Mar. 11, 2005). In the Judgment of Sep. 7, 2004 in the Case of Tibi v. Ecuador, the Court did, again, hold that "there is an international legal system that absolutely forbids all forms of torture, both physical and psychological, and this system is now part of ius cogens. Prohibition of torture is complete and non-derogable, even under the most difficult circumstances (...)" (para. 143) [FN33].

[FN33] In my Separate Opinion in the Case of Tibi, I mentioned the importance of the absolute nature of said prohibition and examined the evolution of contemporary international judgments (paras. 26 and 30-32 of the Opinion).

---

39. In my Separate Opinions in the case of the Plan de Sánchez Massacre v. Guatemala (merits, Judgment of Apr. 29, 2004; [FN34] reparations, Judgment of Nov. 19, 2004; [FN35]) I established a connection between jus cogens prohibitions and State crime, and aggravated international responsibility. [FN36] Also, I insisted on my defense of the expansion of the

material scope of jus cogens in my Separate Opinion to the Judgment (of Jul. 8, 2004) in the case of the Gómez-Paquiyauri Brothers v. Peru (of Jul. 8, 2004) [FN37] and in my Dissenting Opinion in the case of the Serrano-Cruz Sisters v. El Salvador (Judgment on preliminary objections of Nov. 23, 2004). [FN38]

[FN34] Paras. 29-33 and 35 of the Opinion.
[FN35] Paras. 4-7 and 20-27 of the Opinion.
[FN36] In my Separate Opinion to the Judgment on the merits in the Case of the Plan de Sánchez Massacre, I added that the component elements of the famous "Martens clause" (the "laws of humanity" and the "requirements of the public conscience") are part of jus cogens.
[FN37] Paras. 1, 37, 39, 42 and 44 of the Opinion.
[FN38] Paras. 2, 32 and 39-41 of the Opinion.

---

40. With its landmark Advisory Opinion n. 18 (of Sep. 17, 2003) on the Juridical Condition and Rights of Undocumented Migrants, the Court introduced another line of case-law evolution towards the extension of the material scope of jus cogens to include the basic principle of equality and non-discrimination (paras. 97-101 and 110-111); I issued an extensive Concurring Opinion on this significant step forward achieved in the Court's case law (paras. 1-89). Along the same lines, in my Separate Opinions (paras. 4 and 7, and 6-9, respectively) in the cases of Acosta-Calderón v. Ecuador (Judgment of Jun. 24, 2005) and Yatama v. Nicaragua (Judgment of Jun. 23, 2005), I reaffirmed that the principle of equality before the law is part of jus cogens. Moreover, in my Separate Opinion in the Case of the Ituango Massacres v. Colombia (Judgment of Jul. 1, 2006), I argued that jus cogens is comprehensive of the right to the Law itself. My positions, both those addressed above and the ones explained below, are all duly supported.

41. I will now address the more recent line of evolution of the Court's case law, also towards the broadening of the material scope of jus cogens. The Court reaffirmed the obiter dictum of its Judgment in the Case of Tibi v. Ecuador (cf. supra) in its Judgment of Apr. 6, 2006 in the Case of Baldeón-García v. Peru (para. 121), in which I issued a Separate Opinion arguing that the Court should have made further progress by determining that access to justice is also part of international jus cogens (para. 9). I had already expressed this view in my Separate Opinion (paras. 64-65) to the Judgment of Jan. 31, 2006 in the Case of the Pueblo Bello Massacre v. Colombia (2006), as well as in my Separate Opinion (paras. 52-55) in the Case of López-Álvarez v. Honduras (Judgment of Feb. 1, 2006). I also insisted on the extension of the material scope of jus cogens to cover access to justice as well in my Separate Opinions in the cases of Ximenes-Lopes v. Brazil (Judgment of Jul. 4, 2006, para. 38(47) of the Opinion), Almonacid-Arellano v. Chile (Judgment of Sep. 26, 2006, paras. 17-25 of the Opinion), La Cantuta v. Peru (Judgment of Nov. 29, 2006, paras. 49-62 of the Opinion), and Goiburú et al. v. Paraguay (Judgment of Sep. 22, 2006, paras. 62-68 of the Opinion). [FN39]

[FN39] All the Opinions referred to above are transcribed in: A.A. Cançado-Trindade, Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia (Votos en la Corte

Interamericana de Derechos Humanos, 1991-2006), Mexico, Edit. Porrúa/Universidad Iberoamericana, 2007, pp. 117-868.

---

42. To my particular pleasure, the Court adopted this view in the Judgment recently rendered in the case of Goiburú et al., wherein it held that

"(...) Access to justice is a peremptory norm of international law and, as such, gives rise to obligations erga omnes for the States to adopt all necessary measures (...)" (para. 131).

To act consistently with this encouraging evolution of its case law, the Court should have provided the clarification sought by petitioners in paragraph 7(a) of their request for interpretation in this Case of the Dismissed Congressional Employees. Given that, to my great dissatisfaction (since, as suggested by this, satisfaction can only last for so long), it did not, I have allowed myself to do so in this Dissenting Opinion.

43. I cannot let this rushed decision of the Court in the Case of the Dismissed Congressional Employees end up curbing the encouraging line of case-law evolution into which I have put so much effort over the years. The right to a fair trial cannot be neglected, not even in a Judgment on Interpretation: it is a matter of jus cogens. Any decision knowingly or unconsciously minimizing it will not be dignified with my silence but met with my strongest opposition.

VI. Considerations and Final Warnings.

44. It is a duty incumbent upon the Inter-American Court, in the exercise of its adjudicatory functions, to do everything in its power, including in Judgments on Interpretation, to ensure that the relevant provisions of the American Convention produce their own effects, under the principle of ut res magis valeat quam pereat (a principle widely supported by international case law), which represents the so-called effet utile (sometimes referred to as the effectiveness principle). [FN40] The object and purpose of a given treaty may also be specified and developed by the parties themselves [FN41] (as in classic treaties) under the effect of certain principles of International Law, or, in the field of the International Law of Human Rights, by the international supervision bodies created by virtue of human rights protection treaties.

[FN40] Said principle underlies the general rules of treaty interpretation enshrined in Article 31(1) of both Vienna Conventions on the Law of Treaties (of 1969 and 1986). Cf., in general, e.g., A.A. Cançado Trindade, Tratado de Direito Internacional dos Direitos Humanos, Vol. II, Porto Alegre/Brasil, S.A. Fabris Ed., 1999, pp. 24-28, particularly p. 27; 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.

[FN41] For a suggestion of a "coordination of interpretations" based on the "agreement of the interested parties," cf. S. Sur, L'interprétation en Droit international public, Paris, LGDJ, 1974, pp. 392, 397 and 399-402.

---

45. Performance of a conventionality control (cf. supra) for a human rights treaty such as the American Convention can contribute much to ensuring that said Convention will produce its own effects (effet utile) in the domestic law of the State Parties. This is a point that cannot go unnoticed by the Inter-American Court, and one that is a part of the clarification that the Court should have provided on paragraph 7(a) of petitioners' request for Interpretation of Judgment in this case of the Dismissed Congressional Employees. In my letter of June 13, 2007 to the Secretariat of the Court (in reply to a communication from the latter), [FN42] I already indicated that, in my opinion, paragraph 7(a) of said request for Interpretation, "regarding access to justice" under the circumstances of the cas d'espèce warranted "the Court's attention."

[FN42] IACHR, doc. CDH-S/1067, of Jun. 13, 2007.

---

46. Over a decade ago, in my Dissenting Opinion in the Case of Genie-Lacayo v. Nicaragua (Order of Sep. 13, 1997), among other things I used the old English adage that "Justice must not only be done: it must also be seen to be done" (para. 25). I am again relying on that adage in the instant case. The parties are persons (individuals or legal entities) appearing before a tribunal and, just as they have rights and obligations before that tribunal, they are also entitled to have their case heard with due attention. In a study published almost half a century ago, Piero Calamandrei recalled that every Judgment "must be reasoned", in the face of what he characterized as a "crisis of well-founded reasoning." To him, reasoning is "the 'rationalization' of the sense of justice," [FN43] and a person who is subject to the jurisdiction of a State (for instance, a worker) "is not a subditus left to the mercy of a legibus solutus prince, but an autonomous subject of rights and obligations." [FN44] In our time, that person also has the (additional) protection of the corpus juris of the International Law of Human Rights.

[FN43] P. Calamandrei, Proceso y Democracia, Buenos Aires, EJEA, 1960, pp. 149, 115 and 125.

[FN44] Ibid., pp. 149-150.

---

47. In its substantial Judgment on Interpretation of Nov. 26, 2003 regarding the first Judgment rendered by the Court at a session away from its headquarters (held in Santiago de Chile in 2003), in the Case of Juan Humberto Sánchez v. Honduras (Judgment on preliminary objections, merits and reparations of Jun. 7, 2003), the Inter-American Court recalled the case law of present-day international tribunals on this subject and, much to the point, it stated that

"the task of interpretation that corresponds to an international court entails the clarification of a text, not only as regards the decisions in the operative paragraphs, but also as regards determining the scope, meaning and purpose of its considerations" (para. 14).

48. This being so, the Court could perfectly well and should have provided a satisfactory clarifying response to the key paragraph 7(a) of petitioners' request for interpretation in the instant case, which, in addition to not being challenged in the brief (of Jul. 31, 2007) submitted by the respondent State, does not in the least, in my opinion, constitute a means of challenging the Judgment on the merits and reparations (of Nov. 24, 2006) in the instant Case of the Dismissed Congressional Employees v. Peru. It is both odd and sad to see that, in this proceeding, it was precisely the two bodies entrusted with supervising the American Convention – the Inter-American Court and Commission – that acted in the most hasty and unsatisfactory fashion throughout this legal Interpretation of Judgment proceeding.

49. I absolutely cannot accept, much less so when it comes to a matter of peremptory law (such as access to justice), that judicial reasoning continue to find inspiration in the discredited doctrine of obligations of means or conduct. Conventional obligations are, much to the contrary, obligations of result. Nor can I accept that the Court will excuse itself from fulfilling its duty to control conventionality in this Interpretation of Judgment proceeding, finding it enough to leave an examination of potential difficulties that it already seems to anticipate as possible to a later stage of supervision of compliance with the Judgment. [FN45]

[FN45] As inferred from para. 19 of this Judgment on Interpretation.

---

50. Paragraph 7(a) of the request for Interpretation of Judgment filed by petitioners in the instant Case of the Dismissed Congressional Employees is concerned with an issue which this very Court recently held as being a part of jus cogens. As already explained, in Opinions successively issued within this Court I have strived to achieve – successfully, I now believe – the extension of the material scope of jus cogens (cf. supra). Unfortunately, in this Judgment on Interpretation, the Court has refrained from upholding its most perceptive decisions on the right to a fair trial.

51. The Court even deviated from its own Judgment on merits and reparations (of Nov. 24, 2006) rendered in the instant Case of the Dismissed Congressional Employees, in which it had denied the so-called validity of any normative limitation to a "genuine and effective access to justice," precisely because, in the light of Articles 8 and 25 (viewed together), in relation to Articles 1(1) and 2 of the Convention, access to justice "cannot be arbitrarily restricted or annulled" (para. 119). Such statement by the Court relied on its own obiter dictum in the earlier Judgment rendered in the Case of Goiburú et al. v. Paraguay (cf. supra), in which the Court had approached access to justice as "a peremptory norm of international law" (para. 131), i.e. as being a part of jus cogens.

52. If this is so, then why did the Court choose the easiest, and also untenable, route of declaring the request for interpretation entirely inadmissible in this proceeding, thereby failing to reaffirm and strengthen its best line of decisions regarding the issue raised in paragraph 7(a) of said request? Basically, this decision by the Court seems to suggest that neither in life nor in the world of the application of the Law is it permissible to expect to have full justice or even the slightest sign of coherence.

53. In its previous Judgment on merits and reparations in the instant Case of the Dismissed Congressional Employees, the Court expressly noted that

“this case took place within the framework of practical and normative impediments to a real access to justice and a general situation of absence of guarantees and ineffectiveness of the judicial institutions to deal with facts such as those of the instant case. (...)
(...) this case occurred in the context of a situation of legal uncertainty promoted by laws that limited access to justice in relation to the evaluation procedure and eventual dismissal of the alleged victims, so that they did not have certainty about the proceedings they could or should resort to in order to claim the rights they considered had been violated. (...)" (paras. 129 and 146).

54. This being so, I was somewhat surprised when I realized that, in their oral arguments submitted at the public hearing of Jun. 27, 2006, held in the city of San Salvador before the Inter-American Court, prior to the rendering of the Judgment on merits and reparations (Nov. 24, 2006), petitioners put much more emphasis on Peru’s domestic-law provisions than on the provisions of the American Convention on Human Rights, which is the law applicable by this Court. In said Judgment, the Court ordered, inter alia, that the respondent State ensured that the injured parties enjoy the rights that had been violated, through the

"effective access to a simple, prompt and effective recourse. To this end, it should establish, as soon as possible, an independent and impartial body with powers to decide, in a binding and final manner, whether or not the said persons were dismissed in a justified and regular manner from the Congress of the Republic, and to establish the respective legal consequences, including, if applicable, the relevant compensation based on the specific circumstances of each individual" [FN46] (para. 148).

[FN46] Emphasis added.
---

55. The fourth operative paragraph of said Judgment rendered by this Court adds, in fine, that "the final decisions of the body established for these effects must be adopted within one year of notification of this J
udgment." Said Judgment was rendered by the Court on November 24, 2006. Over one year later, the case file before this Court contains no record that, as of the date hereof, such body has actually been set up. There is thus all the more reason for the concern expressed by the dismissed congressional employees in paragraph 7(a) of their request for Interpretation of Judgment, which has been unduly declared inadmissible in this decision by the Court.

56. The aforementioned state body to be created, whether arbitral or otherwise, is then, in my opinion, required to be a single-instance (to avoid undue delays), independent and impartial body, obviously enough, and certainly jurisdictional in nature. This is one further aspect that could and should have been clarified by the Court in this Judgment on Interpretation, even more so considering that, in its previous Judgment of Nov. 24, 2006, the Court made a vague renvoi to

the domestic law of the State of Peru for the purposes of reparation. In any event, I dare nurture my confidence that respondent State, which has acted correctly in this Interpretation of Judgment proceeding (without contesting the brief submitted by petitioners) will, consistently with its highly respectable tradition of legal thought, strictly comply with the Judgment on merits and reparations rendered by this Court in the instant Case of the Dismissed Congressional Employees.

57. Moreover, I will also express my concern over the stance taken by this Court – which, in something of a paradox, seems to have recently given too much freedom to respondent States to comply with certain forms of reparation through their preferred means or conduct. Underlying this stance is its questionable alignment with the untenable doctrine of the “obligations of means or conduct,” “rather than to ensure results” in this realm of human rights protection.

58. In the cas d'espèce, the Court found itself faced with a situation which, in its Judgment on merits and reparations, it characterized as one of legal uncertainty; however, all it did in this Judgment on Interpretation was perpetuate such situation of legal uncertainty to date, in a matter of jus cogens, not only formalities-wise but also in the substantive sense (i.e. the right to jurisdictional benefits). This is, without question, cause for concern.

59. Furthermore, Article 68(2) of the American Convention authorizes respondent States to execute “that part of a judgment that stipulates compensatory damages” in the respective countries in accordance with “domestic procedure governing the execution of judgments against the state." The Court does not seem to take sufficient consideration of the additional difficulties that might be faced by the beneficiaries of the reparations because of its permissive approach to the method of compliance for other related forms of reparation (consisting in obligations to do something, such as, for instance, the creation of a jurisdictional body to provide reparations), apparently under the negative influence, precisely, of its incorrect view of “obligations of means or conduct", "rather than obligations to ensure results," in this area of protection.

60. Based on the foregoing, I have thus found it necessary to issue this Dissenting Opinion to oppose such view, which I consider to be unduly permissive, taken by the majority of the Court, and to provide the legal reasons supporting my strong dissent therefrom. Lastly, as indicated in my Separate Opinion (para. 7) to the previous Judgment on merits and reparations issued in the instant Case of the Dismissed Congressional Employees, in my opinion all human rights, including economic, social and cultural rights, are promptly and immediately enforceable and justiciable, and the best way to begin to specifically express this legal position is by using the fair trial guarantee as a starting point, as I have sought to argue and justify in this Dissenting Opinion.

Antônio Augusto Cançado-Trindade
Judge

Pablo Saavedra-Alessandri
Secretary