

**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