

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have concurred with my vote in the adoption of the present Judgment of the Inter-American Court of Human Rights in the *Caesar versus Trinidad and Tobago* case. Given the relevant legal issues dealt with by the Court in its decision, as well as those underlying it and those surrounding the present case, I feel obliged to leave on the records my personal reflections on them as foundations of my position on the matter. I shall address, in the present Separate Opinion, the following points which I consider of key importance, not only for a better understanding of the Court's decision in the present *Caesar* case, but also for the handling of future cases in which such issues may possibly also be raised: a) the humanization of the law of the treaties, as illustrated by developments concerning interpretation of treaties, reservations to treaties, denunciation of treaties, and termination and suspension of the operation of treaties; b) international rule of law: non-appearance before an international tribunal and the duty of compliance with its judgment; and c) the expanding material content and scope of *jus cogens* in contemporary international law.

I. The Humanization of the Law of Treaties.

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

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

1. Considerations on the Interpretation of Treaties.

a) General Remarks.

4. When one comes to the interpretation of human rights treaties, as well as of other international treaties, one is inclined to resort at first to the provisions enshrined in Articles 31-33 of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986, respectively), and in particular to the combination under Article 31 of the elements of the ordinary meaning of the terms, the context, and the object and purpose of the treaties at issue¹. One then promptly finds that, in practice, while in traditional law there has been a marked tendency to pursue a rather restrictive interpretation which gives as much precision as possible to the obligations of States Parties, in the international law of human rights, somewhat distinctly, there has been

¹ Cf. Maarten Bos, "Theory and Practice of Treaty Interpretation", 27 *Netherlands International Law Review* (1980) pp. 3-38 and 135-170; W. Lang, "Les règles d'interprétation codifiées par la Convention de Vienne sur le Droit des Traités et les divers types de traités", 24 *Österreichische Zeitschrift für öffentliches Recht* (1973) pp. 113-173; C.H. Schreuer, "The Interpretation of Treaties by International Courts", 45 *British Year Book of International Law* (1971) pp. 255-301; Ch. de Visscher, *Problèmes d'interprétation judiciaire en Droit international public*, Paris, Pédone, 1963, pp. 9-264.

a clear and special emphasis on the element of the object and purpose of the treaty, so as to ensure an effective protection (*effet utile*)² of the guaranteed rights.

5. Whilst in general international law the elements for the interpretation of treaties evolved primarily as guidelines for the process of interpretation by States Parties themselves, human rights treaties, in their turn, have called for an interpretation of their provisions bearing in mind the essentially objective character of the obligations entered into by States Parties: such obligations aim at the protection of human rights and not at the establishment of subjective and reciprocal rights for the States Parties. Hence the special emphasis on the element of the object and purpose of human rights treaties, of which the case-law of the two regional - the Inter-American and the European - Courts of Human Rights gives eloquent testimony.

6. The interpretation and application of human rights treaties have been guided by considerations of a superior general interest or *ordre public* which transcend the individual interests of Contracting Parties. As indicated by the *jurisprudence constante* of the two international human rights tribunals, those treaties are distinct from treaties of the classic type, incorporating restrictively reciprocal concessions and compromises; human rights treaties prescribe obligations of an essentially objective character, implemented collectively by mechanisms of supervision of their own³. The rich case-law on methods of interpretation of human rights treaties has enhanced the protection of the human person at international level and has enriched International Law under the impact of the International Law of Human Rights.

7. The converging case-law to this effect has generated the common understanding, in the regional (European and inter-American) systems of human rights protection, that human rights treaties are endowed with a special nature (as distinguished from multilateral treaties of the traditional type); that human rights treaties have a normative character, of *ordre public*; that their terms are to be autonomously interpreted; that in their application one ought to ensure an effective protection (*effet utile*) of the guaranteed rights; that the obligations enshrined therein do have an objective character, and are to be duly complied with by the States Parties, which have the additional common duty of exercise of the collective guarantee of the protected rights; and that permissible restrictions (limitations and derogations) to the exercise of guaranteed rights are to be restrictively interpreted. The work of the Inter-American and European Courts of Human Rights has indeed contributed to the creation of an international *ordre public* based upon the respect for human rights in all circumstances⁴.

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

"(...) in so far as human rights treaties are concerned, one is to bear always in mind the objective character of the obligations

² 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.

³ A.A. Cançado Trindade, "The Interpretation of the International Law of Human Rights by the Two Regional Human Rights Courts, in *Contemporary International Law Issues: Conflicts and Convergence* (Proceedings of the III Joint Conference ASIL/Asser Instituut, The Hague, July 1995), The Hague, Asser Instituut, 1996, pp. 157-162 and 166-167.

⁴ A.A. Cançado Trindade, "Le développement du Droit international des droits de l'homme à travers l'activité et la jurisprudence des Cours Européenne et Interaméricaine des Droits de l'Homme" (Discours du Président de la Cour Interaméricaine des Droits de l'Homme), in *CourEDH, Cour Européenne des Droits de l'Homme - Rapport annuel 2003*, Strasbourg, CourEDH, 2004, pp. 41-50.

enshrined therein, the autonomous meaning (in relation to the domestic law of the States) of the terms of such treaties, the collective guarantee underlying them, the wide scope of the obligations of protection and the restrictive interpretation of permissible restrictions. These elements converge in sustaining the integrity of human rights treaties, in seeking the fulfilment of their object and purpose, and, accordingly, in establishing limits to State voluntarism. From all this one can detect a new vision of the relations between public power and the human being, which is summed up, ultimately, in the recognition that the State exists for the human being, and not vice-versa"⁵.

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

10. Moreover, the dynamic or evolutive interpretation of the respective human rights Conventions (the intertemporal dimension) has been followed by both the European Court⁶ and the Inter-American Court⁷, so as to fulfil the changing needs of protection of the human being; in its sixteenth and pioneering Advisory Opinion, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), which has inspired the international case-law *in statu nascendi* on the matter, the Inter-American Court has clarified that, in its interpretation of the norms of the American Convention, it should extend protection in new situations (such as that concerning the observance of the right to information on consular assistance) on the basis of pre-existing rights. The same vision has been propounded by the Inter-American Court in its subsequent forward-looking eighteenth Advisory Opinion, on the *Juridical Condition and Rights of Undocumented Migrants* (2003).

⁵. IACtHR, *Blake versus Guatemala* case (Reparations), Judgment of 22.01.1999, Series C, n. 48, Separate Opinion of Judge A.A. Cançado Trindade, pp. 52-53, par. 33, and cf. pars. 32-34.

⁶. E.g., cases *Tyrer versus United Kingdom* (1978), *Airey versus Ireland* (1979), *Marckx versus Belgium* (1979), *Dudgeon versus United Kingdom* (1981), among others.

⁷. Cf., in this sense, the *obiter dicta in*: Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-10/89, on the *Interpretation of the American Declaration on the Rights and Duties of Man in the Framework of Article 64 of the American Convention on Human Rights*, of 14.07.1989, pars. 37-38; IACtHR, Advisory Opinion OC-16/99, on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, of 01.10.1999, pars. 114-115, and Concurring Opinion of Judge A.A. Cançado Trindade, pars. 9-11; IACtHR, case of the "Street Children" (*Villagrán Morales and Others versus Guatemala*), Judgment (on the merits) of 19.11.1999, pars. 193-194; IACtHR, case *Cantoral Benavides versus Peru*, Judgment (on the merits) of 18.08.2000, pars. 99 and 102-103; IACtHR, case *Bámaca Velásquez versus Guatemala*, Judgment (on the merits) of 25.11.2000, Individual Opinion of Judge A.A. Cançado Trindade, pars. 34-38; IACtHR, case of the *Community Mayagna (Sumo) Awas Tingni versus Nicaragua*, Judgment (on the merits and reparations) of 31.08.2001, pars. 148-149; IACtHR, case *Bámaca Velásquez versus Guatemala*, Judgment (on reparations) of 22.02.2002, Individual Opinion of Judge A.A. Cançado Trindade, par. 3.

11. There is a converging case-law of the two regional Human Rights Courts - and indeed of other human rights international supervisory organs - on this issue. Thus, the European Court of Human Rights has reiteratedly pronounced to that effect⁸; in the *Loizidou versus Turkey* case (1995), for example, the European Court expressly discarded undue restrictions which would not only "seriously weaken" its role in the discharge of its functions but "would also diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)"⁹. The Inter-American Court of Human Rights, on its part, has likewise repeatedly stressed the object and purpose of human rights treaties and the objective character of the obligations ensuing therefrom¹⁰, as well as the special character of human rights treaties, as distinguished from multilateral treaties of the traditional type¹¹.

12. Such convergence of views of the two regional Human Rights Courts on the fundamental issue of the proper interpretation of human rights treaties naturally ensues from the overriding identity of the object and purpose of those treaties. General international law itself bears witness of the principle (apparently subsumed under the general rule of interpretation of Article 31 of the two Vienna Conventions on the Law of Treaties) whereby the interpretation is to enable a treaty to have appropriate effects¹², - a principle which has been resorted to against eventual calls for an unduly restrictive interpretation. There is a *jurisprudence constante* pointing towards the restrictive interpretation of provisions which limit or restrict the exercise of recognised human rights¹³.

13. An aspect which in this respect should not pass unnoticed is that derogation measures and limitations must not be inconsistent with the other obligations under international law incumbent upon the State Party concerned: thus, neither derogation clauses, nor limitation provisions, of a given human rights treaty, are to be interpreted to restrict the exercise of any human rights protected to a greater extent by other human rights treaties to which the State Party concerned is also a Party. Such understanding finds support in the rule of international law whereby the interpretation and application of a treaty cannot restrict a State's obligations ensuing from other treaties on the subject - in the present case, human rights protection - to which the State at issue is also a Party. In the present domain, international law has been made use of in order to improve and strengthen - and never to weaken or undermine - the protection of recognised human rights¹⁴.

⁸. For example, in its judgments in the *Wemhoff* (1968), *Belgian Linguistics* (1968), *Golder* (1975), *Ireland versus United Kingdom* (1978) and *Soering* (1989) cases, among others.

⁹. ECtHR, *Loizidou versus Turkey* case (preliminary objections, Judgment of 23.03.1995, par. 75).

¹⁰. IACtHR, Advisory Opinions n. 1, on "*Other Treaties*" Subject to the Advisory Jurisdiction of the Court (1982), and n. 3, on *Restrictions to the Death Penalty* (1983), among others.

¹¹. E.g., *inter alia*, IACtHR, Advisory Opinion n. 2, on *Effect of Reservations on the Entry into Force of the American Convention* (1982).

¹². Cf., e.g., IACtHR, Advisory Opinion n. 4, on the *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica* (1984).

¹³. Thus, in its judgment in the *Golder* case (1975), the European Court of Human Rights clearly stated that there was no room for implied limitations (*limitations implicites*); the view has ever since prevailed that the only limitations or restrictions permissible are those for which the human rights treaty itself makes express provision. The *obiter dicta* of the Inter-American Court of Human Rights in its seventh Advisory Opinion, on the *Enforceability of the Right to Reply or Correction* (1986) reinforce the necessarily restrictive interpretation of restrictions to the exercise of rights recognised in human rights treaties.

¹⁴. Cf. A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987) p. 401.

14. The specificity of the international law of human rights finds expression not only in the interpretation of human rights treaties in general but also in the interpretation of specific provisions of those treaties. Pertinent illustrations can be found in, e.g., provisions which contain references to general international law. Such is the case, for example, of the requirement of prior exhaustion of local remedies as a condition of admissibility of complaints or communications under human rights treaties; the local remedies rule bears witness of the interaction between international law and domestic law in the present domain of protection, which is fundamentally victim-oriented, concerned with the rights of individual human beings rather than of States. Generally recognised principles or rules of international law - which the formulation of the local remedies rule in human rights treaties refers to, - besides following an evolution of their own in the distinct contexts in which they apply, necessarily suffer, when inserted in human rights treaties, a certain degree of adjustment or adaptation¹⁵, dictated by the special character of the object and purpose of those treaties and by the widely recognised specificity of the international law of human rights¹⁶.

b) Procedural Issues.

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

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

17. In its historical Judgment in the case, concerning Peru, of the massacre of *Barrios Altos* (2001), e.g., the Inter-American Court warned that provisions of amnesty, of prescription and of factors excluding responsibility, intended to impede the investigation and punishment of those responsible for grave violations of human

¹⁵. Cf., e.g., IACtHR, Advisory Opinion n. 11, on *Exceptions to the Exhaustion of Domestic Remedies* [cf.] (1990).

¹⁶. Cf. A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, University Press, 1983, pp. 1-443.

rights (such as torture, summary, extra-legal or arbitrary executions, and forced disappearances) are inadmissible; they violate non-derogable rights recognised by the International Law of Human Rights. This case-law has been reiterated by the Court (with regard to prescription) in its decision in the *Bulacio versus Argentina* case (2003).

c) Substantive Law.

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

19. Yet another example can be recalled. The definition of the crime of torture found today in two of the three co-existing Conventions against Torture (the U.N. Convention of 1984, Article 1, and the Inter-American Convention of 1985, Article 2) owes its contents to international human rights case-law, rather than to the tipification of the crime of torture at domestic law level. In fact, the constitutive elements of torture in the definition found in the two aforementioned Conventions¹⁷ ensue from the jurisprudential construction of the old European Commission of Human Rights in the *Greek case* (1967-1970), further discussed by the Commission and the European Court in the *Ireland versus United Kingdom* case (1971-1978).

20. In this particular instance, international case-law influenced international legislation in the field of human rights protection. The extensive case-law of the European Court covers virtually the totality of the rights protected under the European Convention and some of its Protocols. The growing case-law of the Inter-American Court, in its turn, appears innovative and forward-looking with regard to the right to life, reparations in its multiple forms, and provisional measures of protection, these latter sometimes benefiting members of entire human collectivities¹⁸.

2. Considerations on the Reservations to Treaties.

21. International supervisory organs in the domain of human rights protection have in recent years disclosed their awareness - and, on some occasions, their determination - to the effect of preserving the integrity of human rights treaties. It may be recalled that, inspired in the criterion sustained by the International Court of Justice in its Advisory Opinion of 1951 on the *Reservations to the Convention against Genocide*¹⁹, the present system of reservations set forth in the two Vienna

¹⁷. Namely, severe physical or mental suffering, intentionally inflicted, to obtain information or a confession, with the consent or acquiescence of authorities or other persons acting in an official capacity.

¹⁸. Cf. A.A. Cançado Trindade, "Les Mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25; A.A. Cançado Trindade, "The Evolution of Provisional Measures of Protection under the Case-Law of the Inter-American Court of Human Rights (1987-2002)", 24 *Human Rights Law Journal* - Strasbourg/Kehl (2003) n. 5-8, pp. 162-168.

¹⁹. In which, - it may be recalled, - the Hague Court endorsed the so-called Pan-American practice relating to reservations to treaties, given its flexibility, and in search of a certain balance between the *integrity* of the text of the treaty and the *universality* of participation in it; hence the criterion of the compatibility of the reservations with the object and purpose of the treaties. Cf. *ICJ Reports* (1951) pp. 15-30; and cf., a *contrario sensu*, the Joint Dissenting Opinion of Judges Guerrero, McNair, Read and Hsu Mo (pp. 31-48), as well as the Dissenting Opinion of Judge Álvarez (pp. 49-55), for the difficulties generated by this criterion.

Conventions of the Law of Treaties (of 1969 and 1986, Articles 19-23)²⁰, in joining the formulation of reservations to the acquiescence or the objections thereto for the determination of their compatibility with the object and purpose of the treaties, is of a markedly voluntarist and contractualist character.

22. Such a system leads to a fragmentation (in the bilateral relations) of the conventional obligations of the States Parties to multilateral treaties, appearing inadequate to human rights treaties, which are inspired in superior common values and are applied in conformity with the notion of *collective guarantee*. That system of reservations²¹ suffers from notorious insufficiencies when transposed from the law of treaties in general into the domain of the International Law of Human Rights. To start with, it does not distinguish between human rights treaties and classic treaties, making abstraction of the *jurisprudence constante* of the organs of international supervision of human rights, converging in pointing out that distinction.

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

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

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

26. The present system of reservations permits even reservations (not objected) which hinder the possibilities of action of the international supervisory organs (created by human rights treaties), rendering difficult the realization of their object and purpose. The above-mentioned Vienna Conventions not only fail to establish a

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

²¹. Endorsed, e.g., by the American Convention on Human Rights (cross-reference of Article 75).

mechanism to determine the compatibility or otherwise of a reservation with the object and purpose of a given treaty²², but - even more gravely - do not impede either that certain reservations or restrictions formulated (in the acceptance of the jurisdiction of the organs of international protection)²³ come to hinder the operation of the mechanisms of international supervision created by the human rights treaties in the exercise of the collective guarantee.

27. The present system of reservations, reminiscent of the old Pan-American practice, rescued by the International Court of Justice²⁴ and the two Vienna Conventions on the Law of Treaties, for having crystallised itself in the relations between States, not surprisingly appears entirely inadequate to the treaties whose ultimate beneficiaries are the human beings and not the Contracting Parties. Definitively, human rights treaties, turned to the relations between States and human beings under their jurisdiction, do not bear a system of reservations which approaches them as from an essentially contractual and voluntarist perspective, undermining their integrity, allowing their fragmentation, leaving at the discretion of the Parties themselves the final determination of the extent of their conventional obligations.

28. As the two Vienna Conventions of 1969 and 1986 do not provide any indication for an objective application of the criterion of the compatibility or otherwise of a reservation with the object and purpose of a treaty, they leave it, on the contrary, to be applied individually and subjectively by the Contracting Parties themselves, in such a way that, at the end, only the reserving State knows for sure the extent of the implications of its reservation. Despite the efforts in expert writing to the effect of systematizing the practice of States on the matter²⁵, it is difficult to avoid the impression that such practice has been surrounded by uncertainties and ambiguities, and has remained inconclusive to date. This indefiniteness is not at all reassuring for human rights treaties, endowed as they are with mechanisms of international supervision of their own. This general picture of indefiniteness has thus, not surprisingly,

²². As neither the aforementioned Vienna Conventions, nor - prior to them - the cited Advisory Opinion of the International Court of Justice on *Reservations to the Convention against Genocide*, define what constitutes the compatibility or otherwise (of a reservation) with the object and purpose of a treaty, the determination is left to the interpretation of this latter, without it having been defined either on whom falls that determination, in what way and when it should be made. At the time of the adoption of that Advisory Opinion (1951), neither the majority of the Hague Court, nor the dissenting Judges on the occasion, foresaw the development of the international supervision of human rights by the conventional organs of protection; hence the insufficiencies of the solution then advanced, and endorsed years later by the two Vienna Conventions on the Law of Treaties referred to.

²³. There is a distinction between a reservation *stricto sensu* and a restriction in the instrument of acceptance of the jurisdiction of an international supervisory organ, even though their legal effects are similar.

²⁴. The Advisory Opinion of the ICJ on the *Reservations to the Convention against Genocide* (1951) marked the gradual passage, in the matter of reservations to treaties, from the rule of unanimity (of its approval by the States Parties), to the test of its compatibility with the object and purpose of the treaty. In a general way, the Vienna Convention incorporated the flexible Pan-American doctrine on reservations, in accordance with a tendency to this effect of the international practice already formed in the epoch; I.M. Sinclair, "Vienna Conference on the Law of Treaties", 19 *International and Comparative Law Quarterly* (1970) pp. 47-69; and cf. Articles 19-20 of the Vienna Convention.

²⁵. Cf., e.g., J.M. Ruda, "Reservations to Treaties", 146 *Recueil des Cours de l'Académie de Droit International de La Haye* (1975) pp. 95-218; D.W. Bowett, "Reservations to Non-Restricted Multilateral Treaties", 48 *British Year Book of International Law* (1976-1977) pp. 67-92; P.-H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pédone, 1979, pp. 9-464; K. Holloway, *Les réserves dans les traités internationaux*, Paris, LGDJ, 1958, pp. 1-358; K. Zemanek, "Some Unresolved Questions Concerning Reservations in the Vienna Convention on the Law of Treaties", *Essays in International Law in Honour of Judge Manfred Lachs* (ed. J. Makarczyk), The Hague, Nijhoff, 1984, pp. 323-336; Ch. Tomuschat, "Admissibility and Legal Effects of Reservations to Multilateral Treaties", 27 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1967) pp. 463-482; F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, Uppsala, Swedish Institute of International Law, 1988, pp. 184-222.

led the U.N. International Law Commission (ILC) to engage itself, as from 1998, in the preparation of a Draft Practical Guide on Reservations to Treaties²⁶ (cf. *infra*).

29. It calls the attention, for example, to find one's extensive list of reservations, numerous and at times long, and often incongruous, of States Parties to the U.N. Covenant on Civil and Political Rights²⁷; and the practical problems generated by many of the reservations (also numerous and not always consistent) of the States Parties to the U.N. Convention on the Elimination of All Forms of Discrimination against Women are well-known, - to what one may add the reservations to the U.N. Convention against Torture and the Convention on the Elimination of All Forms of Racial Discrimination²⁸.

30. With the persistence of the inadequacy and the insufficiencies of the present system of reservations, it is not at all surprising that, firstly, multiple expressions of dissatisfaction in this respect in contemporary legal doctrine (both in general studies on the matter²⁹ and in respect of specific human rights treaties³⁰); and secondly, the preparedness of human rights international supervisory organs to assert their competence to apply by themselves the criterion of the compatibility (*supra*) and to contribute thereby to secure the integrity of the respective human rights treaties.

31. At regional level, in its well-known judgment in the *Belilos versus Switzerland* case (1988)³¹, *locus classicus* on the issue, the European Court of Human Rights considered the declaration amounting to a reservation (of a general character) of Switzerland to the European Convention on Human Rights incompatible with the object and purpose of this latter (in the light of its Article 64). On its turn, the Inter-American Court of Human Rights, in its second and third Advisory Opinions³², pointed out the difficulties of a pure and simple transposition from the system of reservations of the Vienna Convention on the Law of Treaties of 1969 into the domain of the international protection of human rights.

²⁶. Cf. U.N., *Report of the International Law Commission on the Work of Its 50th Session* (1998), *General Assembly Official Records* - Supplement n. 10(A/53/10), pp. 195-214 ("Reservations to Treaties: Guide to Practice").

²⁷. Compiled by the Secretary-General of the United Nations and collected in the document: U.N., CCPR/C/2/Rev.4, of 24.08.1994, pp. 1-139 (English version), and pp. 1-160 (Spanish version).

²⁸. For a study of the problems created by the reservations to these four human rights treaties of the United Nations, cf. L. Lijnzaad, *Reservations to U.N. Human Rights Treaties - Ratify and Ruin?*, Dordrecht, Nijhoff, 1995, pp. 131-424.

²⁹. Cf. D. Shelton, "State Practice on Reservations to Human Rights Treaties", 1 *Canadian Human Rights Yearbook/Annuaire canadien des droits de la personne* (1983) pp. 205-234; C. Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties", 64 *British Year Book of International Law* (1993) pp. 245-282; L. Lijnzaad, *op. cit. supra* n. (28), pp. 3-424; M. Coccia, "Reservations to Multilateral Treaties on Human Rights", 15 *California Western International Law Journal* (1985) pp. 1-49; L. Sucharipa-Behrmann, "The Legal Effects of Reservations to Multilateral Treaties", 1 *Austrian Review of International and European Law* (1996) pp. 67-88.

³⁰. Cf. B. Clark, "The Vienna Convention Reservations Regime and the Convention on Discrimination against Women", 85 *American Journal of International Law* (1991) pp. 281-321; W.A. Schabas, "Reservations to the Convention on the Rights of the Child", 18 *Human Rights Quarterly* (1996) pp. 472-491; A. Sanchez Legido, "Algunas Consideraciones sobre la Validez de las Reservas al Convenio Europeo de Derechos Humanos", 20 *Revista Jurídica de Castilla-La Mancha* (1994) pp. 207-230; C. Pilloud, "Reservations to the Geneva Conventions of 1949", *International Review of the Red Cross* (March/April 1976) pp. 3-44.

³¹. Followed by the *Weber* case (1990).

³². In its third Advisory Opinion on *Restrictions to the Death Penalty* (1983) the Court warned that the question of reciprocity as related to reservations did not fully apply *vis-à-vis* human rights treaties (paragraphs 62-63 and 65). Earlier, in its second Advisory Opinion on the *Effect of Reservations on the Entry into Force of the American Convention* (1982), the Court dismissed the postponement of the entry into force of the American Convention by application of Article 20(4) of the 1969 Vienna Convention (paragraph 34).

32. At global level, in the *I. Gueye et alii versus France* case (1989), e.g., the Human Rights Committee (under the U.N. Covenant on Civil and Political Rights), in spite of a reservation *ratione temporis* of the respondent State³³, understood that the question at issue³⁴ was justiciable under the Covenant³⁵, and concluded that there was a violation of Article 26 of the Covenant³⁶. The same Committee, in its *general comment* n. 24(52), of November 1994, warned that the provisions of the two Vienna Conventions and the classic rules on reservations (based upon reciprocity) were not appropriate to the human rights treaties; given the special character of the Covenant as a human rights treaty, the question of the compatibility of a reservation with its object and purpose, instead of being left at the discretion of the manifestations of the States Parties *inter se*, should be objectively determined, on the basis of juridical principles, by the Human Rights Committee itself³⁷.

33. Given the specificity of the International Law of Human Rights, there appears a strong case for leaving the determination of the compatibility or otherwise of reservations with the object and purpose of human rights treaties with the international supervisory organs established by them, rather than with the States Parties themselves; it would be more in keeping with the special character of human rights treaties. To the two international human rights tribunals (the European and Inter-American Courts), the individualistic system of reservations does not seem to be in keeping with the notion of collective control machinery proper to human rights treaties. The *obiter dicta* of the two regional Human Rights Courts have been rendered despite the fact that the European Convention (Article 64)³⁸ and the American Convention (Article 75) on Human Rights do not expressly confer this function upon them; the American Convention, in fact, limits itself to referring to the pertinent provisions of the 1969 Vienna Convention on the Law of Treaties.

34. Given the uncertainties, ambiguities and lacunae in the present system of reservations to treaties of the two Vienna Conventions of 1969 and 1986 (*supra*), proposals have been advanced in contemporary doctrine³⁹ tending at least to reduce the tension as to the proper application of human rights treaties in the matter of reservations, namely: *first*, the inclusion of an express indication in human rights treaties of the provisions which do not admit any reservations (such as those pertaining to the fundamental non-derogable rights), as an irreducible minimum to participate in such treaties; *second*, as soon as the States Parties have proceeded to the harmonization of their domestic legal order with the norms of those treaties (as required by these latter), the withdrawal of their reservations to them⁴⁰; *third*, the modification or rectification, by the State Party, of a reservation considered non-permissible or incompatible with the object and purpose of the treaty⁴¹, whereby a

³³. To Article 1 of the [first] Optional Protocol to the Covenant on Civil and Political Rights.

³⁴. Pertaining to pension benefits of more than 700 retired Senegalese members of the French army.

³⁵. As the effects of the French legislation on the matter lasted until then.

³⁶. Communication n. 196/1985, decision of 03.04.1989 (and previous decision of admissibility of 05.11.1987).

³⁷. Paragraphs 17 and 20; text *in*: U.N./Human Rights Committee, document CCPR/C/21/Rev.1/Add.6, of 02.11.1994, pp. 6-7.

³⁸. Prior to Protocol n. 11, in the *Loizidou* case, *supra*.

³⁹. Cf., e.g., references in ns. (29) and (30), *supra*.

⁴⁰. Cf., in this line of reasoning, the Vienna Declaration and Programme of Action (1993), the main document adopted by the II World Conference on Human Rights, part II, paragraph 5, and cf. part I, paragraph 26.

⁴¹. Cf. note (28), *supra*.

reservation would thus be seen no longer as a formal and final element of the manifestation of State consent, but rather as an essentially temporal measure, to be modified or removed as soon as possible; *fourth*, the adoption of a possible "collegial system" for the acceptance of reservations⁴², so as to safeguard the normative character of human rights treaties, bearing in mind, in this respect, the rare example of the Convention on the Elimination of All Forms of Racial Discrimination⁴³; *fifth*, the elaboration of guidelines (although not binding) on the existing rules (of the two Vienna Conventions of 1969 and 1986) in the matter of reservations, so as to clarify them in practice⁴⁴; and *sixth*, the attribution to the depositaries of human rights treaties of the faculty to request periodic information from the reserving States on the reasons why they have not yet withdrawn their reservations to such treaties.

35. The recent work (as from 1993) of the International Law Commission of the United Nations on the topic of the *Law and Practice Concerning Reservations to Treaties* tends to identify the essence of the question in the need to determine the powers of the human rights international supervisory organs in the matter, in the light of the general rules of the law of treaties⁴⁵. This posture makes abstraction of the specificity of the International Law of Human Rights, attaching itself to the existing postulates of the law of treaties. The debates of 1997 of the International Law Commission focused effectively on the question of the applicability of the system of reservations of the Vienna Conventions in relation to human rights treaties. Although the point of view prevailed that the pertinent provisions of those Conventions should not be modified⁴⁶, it was acknowledged that that system of reservations should be improved, given its lacunae, above all in relation to non-permissible reservations⁴⁷.

36. In the debates of the Commission, it was even admitted that the conventional organs of protection of judicial character (the regional European and Inter-American Courts of Human Rights) pronounce on the permissibility of reservations when necessary to the exercise of their functions⁴⁸; such considerations were reflected in the "Preliminary Conclusions on Reservations to Multilateral Normative Treaties Including Human Rights Treaties", adopted by the Commission in 1997 (paragraphs 4-7)⁴⁹. In my understanding, there are compelling reasons to go further, and the relevant labour of the ILC on the matter could lead to solutions satisfactory to human rights international supervisory organs to the extent that it started from the recognition of the special character of human rights treaties and gave precision to the juridical consequences - for the treatment of the question of reservations - which ensue from that recognition.

⁴². Possibility that came to be considered at the Vienna Conference which adopted the Convention of 1969.

⁴³. System of the two-thirds of the States Parties, set forth in Article 20(2) of that Convention.

⁴⁴. Such as drawn up in 1998 by the International Law Commission of the United Nations; cf. note (24), *supra*.

⁴⁵. Cf. A. Pellet (special rapporteur of the U.N. International Law Commission), *Second Report on the Law and Practice Relating to Reservations to Treaties* (1997), paragraphs 164, 204, 206, 209, 227, 229 and 252.

⁴⁶. U.N., *Report of the International Law Commission on the Work of Its 49th Session* (1997), *General Assembly Official Records* - Supplement n. 10(A/52/10), p. 94, par. 47.

⁴⁷. *Ibid.*, p. 112, par. 107. In this respect, it was warned that States often and consciously formulate reservations incompatible with the object and purpose of human rights treaties for knowing that they will not be challenged, and that the lack of sanctions for such reservations thus leads States to become Parties to such treaties without truly committing themselves; *ibid.*, pp. 117-118, pars. 129-130.

⁴⁸. *Ibid.*, pp. 106-107, 119 and 121-122, pars. 82, 84, 134, 138 and 143, respectively.

⁴⁹. Text in *ibid.*, pp. 126-127.

37. It seems unlikely, however, that it is prepared to pursue that approach. In its more recent version of its *Draft Guidelines on Reservations to Treaties* (2003), provisionally adopted by the ILC, it urged States and international organizations to "undertake a periodic review" of their reservations to treaties, and to "consider withdrawing those which no longer serve their purpose"⁵⁰, - though it did not pursue the aforementioned approach. Such review, - added the ILC, - "should devote special attention to the aim of preserving the integrity of multilateral treaties"⁵¹. Thus, draft guideline 2.5.3 reflects the concerns of monitoring bodies ("particularly but not exclusively in the field to human rights"), to call often upon States to reconsider their reservations and if possible to withdraw them⁵². The ILC has conceded that

"The reference to the integrity of multilateral treaties is an allusion to the drawbacks of reservations, that may undermine the unity of the treaty regime"⁵³.

38. It may be pointed out that human rights treaties have in a way been singled out when one comes to denunciation, and termination and suspension of the operation of treaties; I see, thus, no epistemological or juridical reason why the same could not be done also in relation to reservations. In my view, the conferment of the power of determination of the compatibility or otherwise of reservations with the object and purpose of human rights treaties on the international supervisory organs themselves created by such treaties, would be much more in conformity with the special nature of these latter and with the objective character of the conventional obligations of protection⁵⁴.

39. There is a whole logic and common sense in attributing such power to those organs, guardians as they are of the integrity of human rights treaties, instead of abandoning such determination to the interested States Parties themselves, as if they were, or could be, the final arbiters of the scope of their conventional obligations⁵⁵. Such system of objective determination would foster the process of progressive institutionalisation of the international protection of human rights⁵⁶, as well as the creation of a true international public order (*ordre public*) based on the full respect to, and observance of, human rights. It is about time for the current process of *humanization* of International Law⁵⁷ to encompass likewise the domain of the law of treaties, traditionally so vulnerable to manifestations of State voluntarism.

⁵⁰. Cf. U.N./ILC, *Report of the International Law Commission* (55th Session, May-June and July-August 2003), G.A.O.R. - Suppl. n. 10 (doc. A/58/10), of 2003, p. 184.

⁵¹. *Ibid.*, p. 184.

⁵². *Ibid.*, p. 207.

⁵³. *Ibid.*, p. 208, and cf. pp. 216, 244 and 251 (on the "limitation" of the scope of previous reservations, conducive to their withdrawal).

⁵⁴. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 152-170.

⁵⁵. Cf. A.A. Cançado Trindade, "The International Law of Human Rights at the Dawn of the XXIst Century", 3 *Cursos Euromediterráneos Bancaja de Derecho Internacional* - Castellón/Spain (1999) pp. 145-221.

⁵⁶. For the conception of human rights as an "autonomous juridical imperative", cf. D. Evrigenis, "Institutionnalisation des droits de l'homme et droit universel", in *Internationales Colloquium über Menschenrechte* (Berlin, Oktober 1966), Berlin, Deutsche Gesellschaft für die Vereinten Nationen, 1966, p. 32.

⁵⁷. A.A. Cançado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* - Belo Horizonte/Brazil (2001) pp. 11-23.

40. It is my understanding that, from the perspective of a minimally institutionalised international community, the system of reservations to treaties, such as it still prevails in our days, is rudimentary and rather primitive. There is pressing need to develop a system of objective determination of the compatibility or otherwise of reservations with the object and purpose of human rights treaties, although for that it may be considered necessary an express provision in future human rights treaties, or the adoption to that effect of protocols to the existing instruments⁵⁸.

41. Only with such a system of objective determination will we succeed in guarding coherence with the special character of human rights treaties, which set forth obligations of an objective character and are applied by means of the exercise of the collective guarantee. Only thus will we succeed to establish, in the ambit of the law of treaties, standards of behaviour which contribute to the creation of a true international *ordre public* based on the respect and observance of human rights, with the corresponding obligations *erga omnes* of protection. We stand in need of the renovation and humanization of the law of treaties as a whole, comprising also the forms of manifestation of State consent.

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

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

"(...) the Contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention. Consequently, in a Convention of this type one cannot speak of individual advantages and disadvantages to States, of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the Parties, the foundation and measure of all its provisions"⁵⁹.

44. I see no sense in trying to try to escape from the acknowledgement of the specificity of the International Law of Human Rights as a whole, the recognition of which, in my understanding, in no way threatens the unity of Public International Law; quite on the contrary, it contributes to develop the aptitude of this latter to secure, in the present domain, compliance with the conventional obligations of protection of the

⁵⁸. As suggested in the aforementioned "Preliminary Conclusions" of 1997 (paragraph 7) of the International Law Commission; cf. U.N., *Report of the International Law Commission...* (1997), *op. cit. supra* n. (46), pp. 126-127.

⁵⁹. International Court of Justice, Advisory Opinion of 28.05.1951, *ICJ Reports* (1951) p. 23; and, for a study on the matter, cf. A.A. Cançado Trindade, "La jurisprudence de la Cour Internationale de Justice sur les droits intangibles / The Case-Law of the International Court of Justice on Non-Derogable Rights", *Droits intangibles et états d'exception / Non-Derogable Rights and States of Emergency* (ed. D. Prémont), Brussels, Bruylant, 1996, pp. 53-89.

States *vis-à-vis* all human beings under their jurisdictions. With the evolution of the International Law of Human Rights, it is Public International Law itself which is justified and legitimised, in affirming juridical principles, concepts and categories proper to the present domain of protection, based on premises fundamentally distinct from those which have guided the application of its postulates at the level of purely inter-State relations⁶⁰.

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

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

3. Considerations on the Denunciation of Treaties.

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

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

⁶⁰. A.A. Cançado Trindade, "The International Law of Human Rights at the Dawn of the XXIst Century", *op. cit. supra* n. (53), pp. 145-221.

those Conventions subsist, in whatever circumstances, *vis-à-vis* the denouncing power, while the conflict lasts and the release and repatriation of the persons protected are not concluded⁶¹.

49. Furthermore, the denunciation provisions of the aforementioned four Geneva Conventions (common Article 63/62/142/158) expressly preserves the obligations based on "the principles of the law of nations" as they result from "the laws of humanity" and "the dictates of the public conscience" (the Martens clause). Such obligations, as aptly remarked by B.V.A. Röling, continue governing human conduct even when treaties are no longer binding⁶², - contrary to, I would add, what positivists would mechanically argue. As I have sustained at length in my Concurring Opinion in this Court's Advisory Opinion n. 18 on the *Juridical Condition and Rights of Undocumented Migrants* (2003), the law of protection of the human being does not exhaust itself in the norms and rules of positive law, it encompasses likewise the principles (which inform and conform those norms and rules), without which there is no legal system at all.

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

"has been helpful in furthering the consolidation of the law against unilateral denunciation of international agreements without accountability therefore"⁶³.

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

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

52. And the American Convention on Human Rights (Article 78) only admits denunciation "at the expiration of a five-year period from the date of its entry into force", and by means of "notice given one year in advance". Moreover, such a denunciation shall not have the effect of releasing the denouncing State Party from the obligations contained in the Convention with respect to "any act that may

⁶¹. Traditional considerations of reciprocity are also discarded when it comes to apply, e.g., the provisions of the 1949 Geneva Conventions on International Humanitarian Law, such as those of common Article 3, pertaining to conventional obligations of the State *vis-à-vis* persons under its jurisdiction; reciprocity here yields of considerations of protection of a superior order.

⁶². B.V.A. Röling, *International Law in an Expanded World*, Amsterdam, Djambatan, 1960, pp. 37-38.

⁶³. H.W. Briggs, "Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice", 68 *American Journal of International Law* (1974) p. 68.

constitute a violation of those obligations" and that "has been taken by that State prior to the effective date of denunciation". The issue of the effects of denunciation, within such limits, became a central one in recent cases concerning Trinidad and Tobago under the American Convention on Human Rights.

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

54. As they pertained to acts taken by that State prior to the date of its denunciation, the Court retained jurisdiction and took cognizance of the cases (pursuant to Article 78(2) of the Convention), and rendered its Judgments on preliminary objections in the three cases on 01.09.2001, dismissing an undue restriction formulated by the State in its instrument of acceptance of the Court's compulsory jurisdiction (reiterated in the three cases in the form of a preliminary objection). That restriction would have limited the Court's jurisdiction to the extent that its exercise would be consistent with the national Constitution; the Court considered it incompatible with the object and purpose of the Convention, and an attempt to subordinate this latter to the national Constitution, what would be inadmissible⁶⁴.

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

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

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

57. The interpretation and application of human rights treaties bear witness of the twilight of reciprocity and of the prominence of considerations of *ordre public* in the present domain. In fact, the prohibition of the invocation of reciprocity as a subterfuge

⁶⁴. IACtHR, pars. 93 and 98-99 of the Court's Judgment in the *Hilaire* case; and pars. 84 and 89-90 of the Court's Judgments in the *Benjamin et alii* and the *Constantine et alii* cases.

for non-compliance with humanitarian conventional obligations, is corroborated in unequivocal terms by the 1969 Vienna Convention on the Law of Treaties, which, in providing for the conditions in which a breach of treaty may bring about its termination or suspension of its operation, excepts expressly and specifically the "provisions relating to the protection of the human person contained in treaties of a humanitarian character" (Article 60(5)).

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

"the law of treaties itself of our days, as confirmed by Article 60(5) of the Vienna Convention [on the Law of Treaties], discards the precept of reciprocity in the implementation of the treaties of international protection of human rights and of International Humanitarian Law, by virtue precisely of the humanitarian character of those instruments. Piercing the veil in a domain of international law - such as the one concerning treaties - so strongly infiltrated by the voluntarism of States, the aforementioned provision of Article 60(5) of the Vienna Convention de Viena constitutes a clause of safeguard in defence of the human being"⁶⁵.

59. In the account of one of the participants in the 1968-1969 Vienna Conference from which the first Vienna Convention on the Law of Treaties (1969) resulted, the provision at issue resulted from a Swiss amendment, promptly supported by several Delegations, to the effect that the grounds for termination or suspension of operation of treaties should not apply to treaties of a humanitarian character, embodying provisions of protection of the human person⁶⁶. Article 60(5) was maintained in the second Vienna Convention on the Law of Treaties (1986). Another participant in the Vienna Conference of 1968-1969 pondered that there are certain obligations - of protection of the human person - endowed with an "absolute character", which cannot be allowed to reduce, as

"l'idée d'une régression définitive de la conscience humaine est difficile à accepter. En revanche il serait souhaitable que la pratique internationale se moralise dans tous les domaines et acquière ainsi, par la reconnaissance des États, un niveau croissant de valeur: il pourrait et il devrait y avoir normalement de nouvelles règles progressives. Sans qu'il soit nécessaire d'insister sur ce point, les racines profondes d'une telle conception rejoignent la tradition du droit naturel, rajeunie de nos jours par la conception du droit naturel à contenu progressif. En ce sens aussi, on pourrait soutenir que les règles impératives ont dépassé le stade coutumier pour atteindre un niveau plus stable qui est celui des principes généraux du droit international public"⁶⁷.

60. Thus, the contemporary law of treaties itself, as attested by Article 60(5) of the 1969 and the 1986 Vienna Conventions, overcoming the precept of reciprocity in the implementation of treaties of a humanitarian character, reckons that the obligations

⁶⁵. A.A. Cançado Trindade, *A Proteção Internacional dos Direitos Humanos - Fundamentos Jurídicos e Instrumentos Básicos*, São Paulo/Brazil, Ed. Saraiva, 1991, pp. 11-12.

⁶⁶. G.E. do Nascimento e Silva, *Conferência de Viena sobre o Direito dos Tratados*, Rio de Janeiro, MRE/Imprensa Nacional, 1971, p. 81.

⁶⁷. P. Reuter, *Introduction au droit des traités*, 2nd. ed., Paris, PUF, 1985, p. 120.

enshrined therein are of *ordre public*, and may generate effects *erga omnes*. The overcoming of reciprocity in human rights protection has taken place amidst the constant search for an expansion of the ambit of protection (for the safeguard of an increasingly wider circle of individuals, in any circumstances), for achieving a higher degree of the protection due, and for the gradual strengthening of the mechanisms of supervision, in the defense of common superior values.

5. Concluding Observations.

61. Last but not least, attention should also be drawn to the interaction of human rights treaties in the process of interpretation. Given the multiplicity of those treaties, it comes as little or no surprise that the interpretation and application of certain provisions of a given human rights treaty have at times been resorted to as orientation for the interpretation of corresponding provisions of another - usually newer - human rights treaty. The practice of international supervisory organs - including under the two regional, European and Inter-American, systems of protection - affords several examples of such interpretative interaction⁶⁸.

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

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

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

65. Like International Law in general, the law of treaties in particular is undergoing a historical process of humanization as *well*. It cannot pass unnoticed, as timely recalled by Egon Schwelb three decades ago⁶⁹, that the preambles themselves of the

⁶⁸. Cf. A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms...", *op. cit. supra* n. (14), pp. 91-112, esp. pp. 101-103.

⁶⁹. In respect of the 1969 Vienna Convention on the Law of Treaties; cf. E. Schwelb, "The Law of Treaties

two Vienna Conventions on the Law of Treaties (of 1969 and 1986) contain an assertion of the principle of universal respect for, and observance of, human rights⁷⁰. The treaty-making power is no longer an exclusive prerogative of States, as it used to be in the past; the 1986 [second] Vienna Convention on the Law of Treaties came to address the treaty-making of international organizations, some of which devoted to causes of direct interest to human beings and humankind as a whole.

66. The interpretation of treaties has been considerably enriched by the methodology pursued by international supervisory organs of human rights treaties. Such interpretation has adjusted itself to the specificity of human rights treaties⁷¹. It has, moreover, favoured a harmonization of the standards of implementation of the protected rights in the domestic legal order of the States Parties to those treaties⁷². The two international human rights Tribunals (the European and Inter-American Courts) have been engaged in a converging jurisprudential construction in respect of reservations to treaties to the effect of avoiding to deprive human rights treaties of their *effet utile*, thus preserving the mechanisms of protection of the human person established by them.

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

67. Until the Inter-American Court's Judgments of 01.09.2001 dismissing Trinidad and Tobago's preliminary objections in the *Hilaire, Constantine et alii*, and *Benjamin et alii* cases (cf. *supra*), the respondent State appeared before the Court, having participated in the contentious proceedings and presented its arguments before the Court. In the *Hilaire* case, in particular, it appeared before the Court in the public hearing of 10 August 2000, wherein it submitted its views in an orderly and procedurally constructive way. After being notified of the Court's adverse decision, Trinidad and Tobago no longer appeared before the Court, neither in the proceedings on the merits in the aforementioned cases (joined), nor in the proceedings of the subsequent and present *Caesar* case.

68. Despite its non-appearance⁷³, Trinidad and Tobago remains bound by the Court's Judgments in all these cases: though rendered after its denunciation of the American Convention, they pertain to acts taken by the State before the denunciation, in accordance with the terms of Article 78 of the American Convention. Together with

and Human Rights", in *Toward World Order and Human Dignity - Essays in Honor of M.S. McDougal* (eds. W.M. Reisman and B.H. Weston), N.Y./London, Free Press, 1976, p. 265.

⁷⁰. Sixth preambular paragraph *in fine*, texts reproduced respectively in: U.N., *United Nations Conference on the Law of Treaties - Official Records*, Documents of the Conference (Vienna, 1968-1969), vol. III, N.Y., U.N., 1971, p. 289; and in: U.N., *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations - Official Records*, Documents of the Conference (Vienna, 1986), vol. II, N.Y., U.N., 1995, p. 95.

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

⁷². F. Matscher, "Methods of Interpretation of the Convention", in *The European System for the Protection of Human Rights* (eds. R.St.J. MacDonald, F. Matscher and H. Petzold), Dordrecht, Nijhoff, 1993, pp. 66 and 73.

⁷³. For a general study of non-appearance, cf. J.B. Elkind, *Non-Appearance before the International Court of Justice...*, *op. cit. infra* n. (80), pp. 1-206; H.W.A. Thirlway, *Non-Appearance before the International Court of Justice*, Cambridge, University Press, 1985, pp. 1-184.

the subsequent Judgments on the merits and reparations, the Court's decisions remain all binding upon the respondent State, and an eventual failure of this latter to comply with the Court's Judgments on the merits and reparations in those previous cases and with the present Judgment in the *Caesar* case, would amount to an additional violation of the American Convention (Article 68), as well as of general international law (*pacta sunt servanda*), with all the juridical consequences attached thereto.

69. Any interpretation to the contrary, tending to "explain" or "justify" non-compliance with the Judgments, would amount to contempt of Court, and disclose a lack of familiarity with the most elementary principles of international legal procedure. A State may, of course, choose not to appear before the Court, but in doing so it ought to bear the consequences of such non-appearance, rendering itself unable to rebut the evidence produced⁷⁴ and to defend itself. What a State is not entitled to do is to ignore a Judgment that is clearly binding upon it, as that would undermine the very foundations of international jurisdiction, which have required so much endeavour from past generations to be built and established in this part of the world.

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

71. Trinidad and Tobago seems to be aware of the temporal and material limitations of denunciation under Article 78 of the American Convention (*supra*), as it participated in proceedings before the Court afterwards, including a public hearing of 10 August 2000 in the *Hilaire* case, more than one year after its denunciation of the American Convention began to have effects (as from 26.05.1999). What is rather enigmatic is its subsequent and prolonged non-appearance - not to say "disappearance" - before the Court after its Judgments on preliminary objections (*supra*), adverse to it. Non-appearance does not at all pave the way for non-compliance. A State may choose not to appear before the Court, at any stage of the proceedings, at its own risk, but it cannot ignore the Court's Judgment without having its international responsibility thereby engaged.

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

73. Although non-appearance has occurred from time to time in inter-State litigation (e.g., before the Permanent Court of International Justice [PCIJ] and the International Court of Justice [ICJ])⁷⁵, there is no compelling reason why it should take place in proceedings in human rights cases, opposing States to individuals, the

⁷⁴. On the practice on this particular point, mainly of the Inter-American Commission on Human Rights, cf. D. Rodríguez Pinzón, "Presumption of Veracity, Non-Appearance, and Default in the Individual Complaint Procedure of the Inter-American System on Human Rights", 25 *Revista del Instituto Interamericano de Derechos Humanos* (1998) pp. 125-148.

⁷⁵. Cf., e.g., P.M. Eisemann, "Les effets de la non-comparution devant la Cour Internationale de Justice", 19 *Annuaire français de Droit international* (1973) pp. 351-375.

ostensibly weaker party. If by non-appearance the State is announcing eventual non-compliance with the decisions of the Tribunal, it should bear the juridical consequences of its attitude, - and the other States Parties should react to that, in the exercise of the *collective guarantee* underlying all human rights treaties. Non-appearance does not affect the condition of the State as a party to the case; whether it likes it or not, it remains the respondent State in the case, even *in absentia*.

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

75. It is somewhat surprising to witness that, as time goes by and the old ideal of the realization of international justice gains ground (as with, for example, the recent establishment of the International Criminal Court, pursuant to an original proposal by Trinidad and Tobago at the United Nations), some States remain resistant to the operation of the most perfected means of settlement of disputes at international level, that is, judicial settlement⁷⁶ (as illustrated, ironically, by the posture of Trinidad and Tobago in the aforementioned cases in the inter-American human rights system).

76. The precedent - among others - set up by the United States, of "withdrawal" and non-appearance before the ICJ, after a Judgment adverse to it on preliminary objections (in 1984) in the *Nicaragua versus United States* case, would be a very bad example for Trinidad and Tobago to follow. On the occasion, the United States earned much criticism from distinct corners of the international community, including from some of its own most distinguished jurists (like the late Keith Highet⁷⁷), for its disservice to the international rule of law. In the words of K. Highet, the strategy of non-appearance "may also backfire", and

"may suffer a setback, once its absurdity and overall uselessness are correctly perceived. (...) The negative forces undermining the progressive development of international law - non-production, non-cooperation and non-appearance - (...) will now be seen for what they are"⁷⁸.

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

"appears not only injurious to the efficacy of the Court's compulsory jurisdiction under Article 36(2), but detrimental to the development of international lawfulness as well. Such lawfulness cannot

⁷⁶. Ch. de Visscher, *Aspects récents du droit procédural de la Cour Internationale de Justice*, Paris, Pédone, 1966, pp. 204-205.

⁷⁷. Of whom I keep a good memory, in the meetings we had in Rio de Janeiro while he was a member of the Inter-American Juridical Committee (IAJC), particularly of a panel we both participated in, together with Daniel Bardonnet, in one of the annual *Courses of International Law* organized by the IAJC, precisely on peaceful settlement of international disputes; the transcripts of that memorable panel were unfortunately never published.

⁷⁸. K. Highet, "Evidence, the Court and the *Nicaragua* Case", 81 *American Journal of International Law* (1987) p. 56.

develop as long as States are inclined to place themselves above the law"⁷⁹.

78. Is this the sad example that Trinidad and Tobago would really wish to follow? I could hardly believe it. How would that appear to the future generations of its own jurists? Expectations from the new generations of jurists are always high, - hoping that they will succeed to right the wrongs made by their predecessors, - while, on the other hand, politicians (also referred to rather elegantly as "decision-makers") look the same everywhere in the world, and there seem to be no compelling reasons to expect much from them.

79. Not only do they look the same everywhere, but they have further looked the same at all times. Already over three centuries before our era, in his *Nicomachean Ethics*, Aristotle could hardly hide or dissimulate his concern as to what politicians might be thinking or what decisions were they about to take⁸⁰. In the XIIIth. century, in his *Treatise on the Law*, Thomas Aquinas wondered whether the *recta ratio* could ever be apprehended by the power-holders⁸¹. It would be hard to deny that, with extremely rare exceptions, politicians, always and everywhere, have appeared much more engaged in gaining and retaining power (for power's sake), than in securing the observance of the human rights of those they govern or are supposed to represent.

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

"A State which would be a judge in its own cause is an advocate pleading into a void from which no clear answer is returned"⁸².

81. Non-appearance is in fact foreseen in Article 53 of the Statute of the ICJ, its *raison d'être* being to secure that the Court carries out its functions whenever one of the parties fails to appear before it; the non-appearing State remains a party to the case, and remains fully bound by the decision rendered by the Court⁸³ (as if it had appeared before the Court). This is what ensues also from Article 27 (on default procedure) of the current Rules of Procedure of the Inter-American Court, which likewise foresee non-appearance in the same understanding, and entitle the Inter-American Court, whenever a party fails to appear in or continue with a case, to take such measures, on its own motion, as may be necessary to complete the consideration of the case. Article 27 adds that when a party enters a case at a later stage of the proceedings, it shall take up the proceedings at that stage.

⁷⁹. G.L. Scott and C.L. Carr, "The ICJ and Compulsory Jurisdiction: the Case for Closing the Clause", 81 *American Journal of International Law* (1987) p. 66. For my own criticisms of that defiance, cf. A.A. Cançado Trindade, "*Nicarágua versus Estados Unidos* (1984-1985): Os Limites da Jurisdição 'Obrigatória' da Corte Internacional de Justiça e as Perspectivas da Solução Judicial de Controvérsias Internacionais", 37-38 *Boletim da Sociedade Brasileira de Direito Internacional* (1983-1986) pp. 71-96.

⁸⁰. Cf. Aristóteles, *Ética Nicomachea - Política*, Mexico, Edit. Porrúa, 2000; book I, section XIII, p. 15; book VIII, section XI, p. 112; book X, section IX, pp. 144-146.

⁸¹. Cf. Tomás de Aquino, *Tratado de la Ley - Tratado de la Justicia - Gobierno de los Príncipes*, Mexico, Edit. Porrúa, 2000, pp. 35, 50 and 76-77.

⁸². J.B. Elkind, *Non-Appearance before the International Court of Justice - Functional and Comparative Analysis*, Dordrecht, Nijhoff/Kluwer, 1984, pp. 169 and 206.

⁸³. S.A. Alexandrov, "Non-Appearance before the International Court of Justice", 33 *Columbia Journal of Transnational Law* (1995) n. 41, pp. 41-44, 60, 63 and 68.

82. In most cases, non-appearance has been resorted to aiming at exerting pressure upon the complaining party and the Court, but experience shows that non-appearing States have hardly gained anything - except criticisms - from such harmful conduct⁸⁴. Furthermore, it is to be kept always in mind that non-appearance and non-compliance are not synonymous at all; non-appearing - or "disappeared" - States are under the duty to comply with Judgments *in absentia* (*pacta sunt servanda*).

83. On this particular subject, the *Institut de Droit International* adopted a clarifying resolution⁸⁵ in its session of Basel of 1991, in which it took into account the difficulties that non-appearance of a party may present to the other party and to the Court itself⁸⁶. In its preamble, the resolution pondered *inter alia* that "the absence of a party is such as to hinder the regular conduct of the proceedings, and may affect the good administration of justice"⁸⁷. The resolution recalled, in its operative part, the State's "duty to cooperate in the fulfilment of the Court's judicial functions" (Article 2), and added that

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

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

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

And the resolution concluded that "a State's non-appearance before the Court is in itself no obstacle to the exercise by the Court of its functions" (Article 5). This is an accurate statement of the applicable law in cases of non-appearance, which by no means can be taken to lead to non-compliance, amounting to an additional violation of international law.

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

85. May I conclude this Separate Opinion in the present *Caesar* case in a positive tone, with an expression of support for the present Judgment in *absentia* of the Inter-American Court, in respect particularly to two remaining aspects that I see it fit to dwell upon here. Firstly, the Court has expressly and rightly admitted in the present *Caesar* case that, in certain circumstances, the existence of a law (such as that of *Corporal Punishment Act* of Trinidad and Tobago), manifestly incompatible with the relevant provisions of the American Convention (Article 5(1) and (2)), may *per se* constitute - by its nature and effects - a violation of this latter⁸⁸. In support of this view, may I refer to my arguments, to this effect, in my Dissenting Opinion in the *El Amparo* case, concerning Venezuela (Judgments on reparations, of 14.09.1996), as well as in my Dissenting Opinion in the *Caballero Delgado and Santana* case,

⁸⁴. As illustrated by the regrettable and much-criticized "withdrawal" of the United States in the *Nicaragua* case, which it eventually lost in the merits (in 1986) as well; cf. *ibid.*, pp. 67 and 71-72.

⁸⁵. I.D.I., 4th. Commission, *rapporteur* G. Arango Ruiz.

⁸⁶. Institut de Droit International, Resolution on *Non-Appearance before the International Court of Justice*, of 31.08.1991, preamble, 6th. *considerandum*.

⁸⁷. *Ibid.*, 5th. *considerandum*.

⁸⁸. Paragraphs 73-74 and 93-94 of the present Judgment.

pertaining to Colombia (Judgment on reparations, of 29.01.1997), - which I do not find it necessary to reiterate literally herein.

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

87. Thus, in its historical Advisory Opinion n. 18 on *The Juridical Condition and the Rights of the Undocumented Migrants* (of 17.09.2003), the Inter-American Court significantly held that the aforementioned fundamental principle of equality and non-discrimination, in the present stage of evolution of International Law, "has entered into the domain of the *jus cogens*"; on such principle, which "permeates every legal order", - the Court correctly added, - "rests the whole juridical structure of the national and international public order"⁸⁹. The Court, moreover, referred to the evolution of the concept of *jus cogens*, transcending the ambit of both the law of treaties and of the law of the international responsibility of the State, so as to reach general international law and the very foundations of the international legal order⁹⁰.

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

"The emergence and assertion of *jus cogens* in contemporary International Law fulfil the necessity of a minimum of verticalization in the international legal order, erected upon pillars in which the juridical and the ethical are merged. (...)

On my part, I have always sustained that it is an ineluctable consequence of the affirmation and the very existence of *peremptory* norms of International Law their not being limited to the conventional norms, to the law of treaties, and their being extended to every and any juridical act⁹¹. Recent developments point out in the same sense, that is, that the domain of the *jus cogens*, beyond the law of treaties, encompasses likewise general international law⁹². Moreover, the *jus cogens*, in my understanding, is an open category, which expands itself to the extent that the universal juridical conscience (material source of all Law) awakens for the necessity to protect the rights inherent to each human being in every and any situation".

To the international *objective* responsibility of the States corresponds necessarily the notion of *objective illegality* (one of the elements underlying the concept of *jus cogens*). In our days, no one

⁸⁹. Paragraph 101, and cf. resolutory points ns. 2 and 4 of Advisory Opinion n. 18.

⁹⁰. Paragraphs 98-99 of Advisory Opinion n. 18.

⁹¹. Cf. A.A. Cançado Trindade, *Tratado de Direito Internacional...*, *op. cit. supra* n. (97), vol. II, pp. 415-416.

⁹². For the extension of *jus cogens* to all possible juridical acts, cf., e.g., E. Suy, «The Concept of *Jus Cogens* in Public International Law», in *Papers and Proceedings of the Conference on International Law* (Langonissi, Greece, 03-08.04.1966), Geneva, C.E.I.P., 1967, pp. 17-77.

would dare to deny the objective illegality of acts of genocide⁹³, of systematic practices of torture, of summary and extra-legal executions, and of forced disappearance of persons, - practices which represent crimes against humanity, - condemned by the universal juridical conscience⁹⁴, parallel to the application of treaties. Already in its Advisory Opinion of 1951 on the *Reservations to the Convention against Genocide*, the International Court of Justice pointed out that the humanitarian principles underlying that Convention were recognizedly 'binding on States, even without any conventional obligation'.

(...) In sum and conclusion on the point under examination, the emergence and assertion of *jus cogens* evoke the notions of international public order and of a hierarchy of legal norms, as well as the prevalence of the *jus necessarium* over the *jus voluntarium*; *jus cogens* presents itself as the juridical expression of the very international community as a whole, which, at last, takes conscience of itself, and of the fundamental principles and values which guide it"⁹⁵.

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

"The concept itself of *jus cogens*, in my understanding, transcends the ambit of both the law of treaties⁹⁶ and the law on the international responsibility of the States⁹⁷, so as to encompass general international law and the very foundations of the international legal order"⁹⁸.

90. And in my Separate Opinion in the *Tibi versus Ecuador* case (Judgment of 07.09.2004), I allowed myself to add that *jus cogens*, besides its *horizontal* dimension whereby it has a bearing upon the very *foundations* of international law, also expands itself in

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

⁹³. In its Judgment of 11 July 1996, in the case concerning the *Application of the Convention against Genocide*, the International Court of Justice affirmed that the rights and obligations set forth in that Convention were "rights and duties *erga omnes*"; *ICJ Reports* (1996) p. 616, par. 31.

⁹⁴. Inter-American Court of Human Rights, case *Blake versus Guatemala* (Merits), Judgment of 24.01.1998, Separate Opinion of Judge A.A. Cançado Trindade, par. 25, and cf. pars. 23-24.

⁹⁵. Paragraphs 66, 68, 71 and 73, respectively, of my Concurring Opinion.

⁹⁶. Its formulation in the two Vienna Conventions on the Law of Treaties (1969 and 1986), Articles 53 and 64.

⁹⁷. E.g., its recognition in the Articles on the Responsibility of States, adopted by the U.N. International Law Commission in 2001.

⁹⁸. Paragraph 29, and cf. also pars. 32-33 of my Separate Opinion.

91. Furthermore, in its Judgment of 08.07.2004 in the *Gómez Paquiyauri versus Peru* case, the Inter-American Court expressly admitted that, in our days, an international juridical regime has been formed of absolute prohibition of all forms of torture and of extrajudicial executions, and that such prohibition belongs today to the domain of international *jus cogens* (pars. 115-116 and 131)⁹⁹. In my Separate Opinion in that case I pondered that such acknowledgement of *jus cogens*, in constant expansion, in turn, "reveals precisely the reassuring opening of contemporary international law to superior and fundamental values", pointing towards the emergence of a truly *universal* international law (par. 44). I reaffirmed this understanding, of an absolute prohibition, of *jus cogens*, of torture, in any circumstance, in my Separate Opinion (par. 26) in the *Tibi versus Ecuador* case (Judgment of 07.09.2004).

92. The Judgment this Court has just adopted in the present *Caesar versus Trinidad and Tobago* fits squarely into its *jurisprudence constante* on the evolutive interpretation of *jus cogens* itself. The Court, here, quite rightly takes a step forward, in upholding the absolute prohibition, proper to the domain of *jus cogens*, of torture *as well as any other cruel, inhuman and degrading treatment*. It is relevant to keep on identifying the expanding material content and scope of *jus cogens*, as the Inter-American Court has been doing in the last years. The Inter-American Court has probably done for such identification of the expansion of *jus cogens* more than any other contemporary international tribunal. It is important that it continues doing so, in the gradual construction, at this beginning of the XXIst. century, of a new *jus gentium*, the international law for humankind.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary

⁹⁹. Likewise, the *Ad Hoc* International Criminal Tribunal for the Former Yugoslavia, on its turn, held, in the *A. Furundzija* case (Judgment of 10.12.1998), that the absolute prohibition of torture has the character of a norm of *jus cogens* (pars. 137-139, 144 and 160).