CASE OF *CAESAR V.* TRINIDAD AND TOBAGO

SEPARATE OPINION OF

JUDGE MANUEL E. VENTURA ROBLES

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

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I

Introduction

1. When concurring with the opinion of my fellow judges to determine the international responsibility of the State of Trinidad and Tobago (hereinafter "the State"

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

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

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

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

5. After the Court delivered judgment on the merits and reparations in the three cases mentioned above on June 21, 2002,[2] the State has not submitted to the Court any information on its compliance with the judgment, despite the serious nature of

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

[2] I/A Court H.R., Case of *Hilaire, Constantine and Benjamin et al*. Judgment of June 21, 2002. Series C No. 94.

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

> In "Hilaire, Constantine, Benjamin *et al. v.* Trinidad and Tobago," the State has not complied with the obligation to inform the Court about the measures it has adopted to comply effectively with the decision of the Court in its judgment on merits and reparations in this case.
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> In this regard, the Court urges the OAS General Assembly to require the State of Trinidad and Tobago to inform the Court about the measures adopted to comply with its judgment.[3]

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

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

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

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[3] I/A Court H.R. 2003 *Annual Report of the Inter-American Court of Human Rights*, OEA/Ser.L/V/III.62 Doc. 1, page. 45.

> The President of the Court, presenting the Annual Report to the Permanent Council of the OAS, placed on the record the failure by the state of Trinidad and Tobago to abide by various resolutions of the Court concerning provisional measures in the Case of James *et al.* currently pending before the Inter-American Commission.
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> The state executed Mr. Joey Ramiah on June 4, 1999 and Mr. Anthony Briggs on July 28, 1999. Both had been targeted by Court-ordered provisional measures.[4]

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

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

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

as not to hinder the processing of their cases before the Inter-American system. Said Order was communicated to the State.

On September 1, 1998, the State informed that in the future it will not consult with the Court or the Commission any further in these matters.

As of the date of drafting the present Report, the State has not presented any of the periodic reports that were ordered by the Court in its August 29, 1998, Order, despite constant requests by the Tribunal regarding this matter.[5]

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

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

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

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

Further, the Court wishes to state in this Report that, even when an international treaty gives the right of denunciation, in dealing with human rights treaties, due to their special nature, a denunciation affects the respective international or regional system for the protection of human rights as whole. In this particular instance, the aforesaid justifies an action on the part of the General Assembly of the Organization to motivate Trinidad and Tobago's reconsideration of its decision.[6]

The General Assembly made no comments on the matter.

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

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

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

fundamental rights of the individual without distinction as to race, nationality, creed, or sex"?[7] Moreover, the Heads of State and Government of the Americas, in the Declaration of Quebec City of 2001,[8] stated that their "commitment to full respect for human rights and fundamental freedoms is based on shared principles and convictions" and, as repeatedly stated by the General Assembly, supported:

> "the commitment […] to continue strengthening and improving the Inter-American human rights system, in particular the functioning of the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights."[9]

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

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

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

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

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

A comparison of both texts shows that in the European system of human rights there is a political collegiate body, the Committee of Ministers, that is in charge of monitoring the enforcement of judgments; while the Inter-American system has no similar body, for which reason the Court, in the exercise of powers inherent to its jurisdiction, has had to undertake the task of monitoring compliance with its judgments, in order to verify whether there has been or not any case of non-compliance for the purpose of reporting the event to the General Assembly, pursuant to Article 65 of the American Convention. A new question therefore arises because, after the report was submitted by the Court, as it happened once, the General

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[7] OAS Charter, signed in Bogotá in 1948, amended by the Protocol of Buenos Aires in 1967, the Protocol of Cartagena de Indias in 1985, the Protocol of Washington in 1992, and the Protocol of Managua in 1993.

[8] Third Summit of the Americas, *Declaration of Quebec City,* April 20-22, 2001.

[9] OEA *AG/RES. 1925 (XXXIII-O/03)* "Strengthening of Human Rights Systems Pursuant to the Plan of Action of the Third Summit of the Americas", Resolution adopted at the Fourth Plenary Session, held on June 10, 2003.

Assembly urged the State of Suriname to provide the Court with the requested information,[10] and such action later allowed to close the cases of *Aloeboetoe et al.* and *Gangaram Panday*.

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

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

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

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

II

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

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

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

> The judgement of the Court will be communicated to the Council of the Organization of American States.[11]

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

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

> A copy of the judgment will be delivered to the interested parties and the Council of the Organization of American States.[12]

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

Article 85 of said draft reads:

> 1. The decision of the Court will be communicated to the Council of the Organization of American States and all States that ratify this Convention.
>
> 2. The Court will report to the Council of the Organization of American States on the cases of non-compliance with its judgments.[13]

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

13. The Second Special Inter-American Conference decided to send the three aforementioned drafts, as well as the minutes of its discussions, to the OAS Council so that, after receiving the opinion of the Inter-American Commission and other organs and entities it might deem advisable, the Council would amend the the Inter-American Council of Jurists Draft as appropriate. Lastly, on May 18, 1966, the OAS Council sent the aforementioned draft to the Inter-American Commission together with the drafts by Uruguay and Chile, asking the Commission to render an opinion and to make the pertinent recommendations. The Commission prepared two reports, which were sent to the Council of the Organization on November 4, 1966 and April 10, 1967, respectively. The Council of the Organization took notice of the documents and sent them as usual to the Committee on Juridical and Political Affairs (hereinafter the "CJPA"). The consideration of these issues led to various important discussions and enquiries to the States regarding the approval, in December 1966, of the United Nations Covenants on Human Rights, issues which were put before the OAS Council, that went on to submit many enquiries to Member States until, on June 12, 1968, the OAS Council adopted a Resolution (OEA/Ser.G/IV/C-i-837 rev 3)[14] requesting the

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

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

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

[14] OAS *Inter-American Yearbook on Human Rights*, 1968, page 92.

Inter-American Commission to prepare the complete and revised text of the draft Convention, which held a Special Session of June 1 and 2, 1968. The Commission referred the draft Convention to the OAS Council on July 18, 1968, which adopted the draft Convention as the working document for the Specialized Inter-American Conference on Human Rights, including the comments and amendments made by Member States.[15]

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

> The judgment of the Court will be communicated to the Council of the Organization of American States.[16]

III

The Inter-American Specialized Conference on Human Rights of 1969

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

16. In the official publication made by the OAS of the Minutes and Documents of the Inter-American Specialized Conference on Human Rights,[17] the report submitted by the Rapporteur of the Second Committee, Robert J. Redington of the United States of America on the "Protection Organs and General Provisions" is to be found. Its relevant part reads as follows:

> Article 66, a new article, establishes that the Court shall submit a report on its work to the General Assembly of the OAS, at the annual meeting of the said General Assembly, in compliance with Article 52 of the OAS Charter, as amended by the Protocol of Buenos Aires. Besides, Article 66 provides that the Court shall be able to include in the report those cases in which a State has not complied with its judgments, and to make the recommendations it may deem proper.
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> ...

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

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

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

> Article 70 (which mirrors article 57 of the Draft) expressly provides that the judgment must be communicated to the parties to the case and to the States Party to the Convention. The requirement of the communication of the judgment to the Council of the OAS was eliminated.[18]

17. As it can be clearly concluded from the aforementioned quotations, the solution that was found was to maintain the provision of article 70 pursuant to which the judgments of the Court must be communicated to the parties of the case and to the States Party to the Convention and, due to the approaching entry into force of the Charter of the Organization, as amended by the Protocol of Buenos Aires, pursuant to which annual General Meetings are to be held, that part of the article providing that Council of the Organization must be notified of the judgment was eliminated.

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

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

> Article 66
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> To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.
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> Article 70
>
> The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the States Party to the Convention.[19]

18. During the Third Plenary Session, held on November 21, 1969, the Conference approved the wording of both articles, which had become already the current articles 65 and 69 of the Convention.[20] The final text of the American Convention, also called Pact of San Jose, Costa Rica, as per Doc. 65 Rev. 1 Corr. 2 *of* January 7, 1970,[21] includes the two final texts with their current number, the verbatim wording of which is as follows:

> Article 65

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[18] OAS "*Minutes and Documents. Inter-American Specialized Conference on Human Rights",* San Jose, Costa Rica, November 7-22, 1969, OAS/Ser.K/XVI/1.2, p. 377.

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

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

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

> To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations.
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> ...
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> Article 69
>
> The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the States Party to the Convention.[22]

IV

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

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

> 88. Now, before the CJPA, I wish to reiterate the confidence the Inter-American Court has in the States Party as guarantors of the American Convention. The States Party individually undertake to comply with the Court's judgments and decisions, as stipulated in Article 68 of the American Convention, in application of the principle of *pacta sunt servanda*, and also because they are so obliged under their own internal laws. Likewise, the States Party jointly undertake the duty to watch over the integrity of the American Convention as its guarantors. The supervision of the faithful compliance with the Court´s judgments is a task which befalls all the States Party to the Convention.[23]

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

> 60. To assure constant monitoring of due compliance with all the conventional obligations that provide protection, particularly the judgments of the Inter-American Court, in my opinion, the following sentence should be added at the end of article 65 of the Convention:

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

[23] ICHR: "The Inter-American Human Rights Protection System on the Threshold of the Twenty-first Century." *Report:* "Basis for a Draft Protocol to the American Convention on Human Rights to Strengthen its Protection Mechanism" *(2001)*, Volume II, 2nd Edition, May 2003, p. 378.

> - "The General Assembly shall convey them to the Permanent Council, which shall study and prepare a report on the matter, in order for the General Assembly to adopt a decision thereon."[24]

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

61. In the same line of thought, and with the same purpose of ensuring the faithful compliance with the Court´s judgments, at the level of the domestic law of the States Party, the following should be added at the end of article 68 of the Convention, as its third paragraph:

> - "If such procedure does not still exist in the domestic law, the States Party agree to establish it pursuant to the general obligations stipulated in articles 1(1) and 2 of this Convention."[25]

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

> 11. The Convention's States Party also assume, in concert, the obligation of monitoring its enforcement in their capacity as its guarantors. By creating obligations for the States Party with respect to all individuals under their respective jurisdictions, the American Convention requires that this *collective guarantee* be exercised in order to fully attain its objects and purposes. The Inter-American Court firmly believes that permanent exercise of that collective guarantee will help strengthen the protection mechanisms of the American Convention on Human Rights as we enter the 21st century.
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> 12. Supervision of due compliance with the Court's judgments and decisions—in exercising this collective guarantee—is a task incumbent on all the Convention's States Party . In my report of April 5, 2001, which was also given here in this "Salón Bolívar", I offered proposals for ensuring constant monitoring of due compliance with all the conventional obligations that provide protection, particularly the judgments of the Inter-American Court, including both preventive and follow-up measures.
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> 13. I also suggested that in any future Draft Protocol to the American Convention, *inter alia*, the following sentence be added at the end of Article 65 of the Convention: "The General Assembly shall convey them to the Permanent Council, which shall study and prepare a report on the matter, in order for the General Assembly to adopt a decision thereon." In this way, a need is filled as regards of a mechanism to operate on a permanent basis (and not once a year at the OAS General Assembly) for supervising due compliance of the Court's judgments by correspondent states. I would like to reiterate, before the OAS Permanent Council, the confidence that the Court has in the States Party as guarantors of the American Convention and to add one brief, final comment.[26]

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[24] Article 30 of the Statute of the Inter-American Court must be amended, with greater reason, in order to be consistent with the proposed new wording of article 65 of the Inter-American Convention.

[25] ICHR: "The Inter-American Human Rights Protection System on the Threshold of the Twenty-first Century." *Report:* "Basis for a Draft Protocol to the American Convention on Human Rights to Strengthen its Protection Mechanism," *(2001)*, Volume II, 2nd Edition, May 2003, p.369.

[26] ICHR: "The Inter-American Human Rights Protection System on the Threshold of the Twenty-first Century." *Report:* "Basis for a Draft Protocol to the American Convention on Human Rights to Strengthen its Protection Mechanism," *(2001)*, Volume II, 2nd Edition, May 2003, p. 664.

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

> Besides, a permanent working group of the CJPA, consisting of the Representatives of the States Party to the American Convention, would be in charge of the ongoing supervision of the state of compliance, by the respondent States, with the judgments and decisions of the Inter-American Court, which would submit its reports to the CJPA; on the other hand, the CJPA would report to the Permanent Council so that it could prepare its report for discussion by the General Assembly. In this way, a gap would be filled giving completeness to the law on the matter, with a mechanism to operate on a permanent basis (and not once a year at the OAS General Assembly) for supervising due compliance of the Court's judgments by respondent states party.[27]

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

> The faithful compliance or execution of their judgments is a legitimate concern of all international courts. For example, in the European protection system, which has a mechanism for the supervision of the execution of the judgments rendered by the European Court of Human Rights —a task of the Committee of Ministers of the Council of Europe (a body that has historically forerun the European Convention)—, this matter has always been in the Agenda of the abovementioned Council. Why the OAS does not assume its responsibility regarding such matter in our continent? More so, since, so far, there is no specific agency with a similar function.
>
> In this respect, the Inter-American Court now has a special concern regarding one aspect of the execution of its judgments: generally, the States comply with reparations consisting compensations of a pecuniary nature, but the same does not necessarily happen with respect to non-pecuniary reparations, especially regarding those requiring an effective investigation of the facts behind violations and the identification and punishment of the persons liable for such violations — indispensable steps to put an end to impunity (and to its negative consequences for the whole social fabric.)
>
> At the present time, due to the institutional deficit existing in the Inter-American protection system in this specific area, the Inter-American Court has been supervising *motu proprio* the execution of its judgments, devoting one or two days of its session terms to this task. But supervision of due compliance with the Court's judgments and decisions —in exercising this collective guarantee— is a task incumbent on all the States Party to the Convention. In my report submitted to the CJPA of the OAS on April 5, 2001, I offered proposals for ensuring constant monitoring of due compliance with all the conventional obligations that provide protection, particularly the judgments of the Inter-American Court, including both preventive and follow-up measures. [28]

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[27] ICHR: "The Inter-American Human Rights Protection System on the Threshold of the Twenty-first Century." *Report:* "Basis for a Draft Protocol to the American Convention on Human Rights to Strengthen its Protection Mechanism," *(2001)*, Volume II, 2nd Edition, May 2003, p. 795.

[28] ICHR: "The Inter-American Human Rights Protection System on the Threshold of the Twenty-first Century". Report: "Basis for a Draft Protocol to the American Convention on Human Rights to Strengthen its Protection Mechanism," (2001), Volume II, 2nd Edition, May 2003, pages 919 and 920.

V

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

20. By means of the written motion filed on February 27, 2003, the State of Panama challenged the power of the Court to monitor compliance with the Judgment rendered in the Case *Baena Ricardo et al.,* on February 2, 2001, as well as the procedure employed by the Court of requiring or ordering the States to submit reports so as to be able to determine, pursuant to article 65 of the Convention, whether any non-compliance had occurred and report it to the OAS General Assembly.

21. In the aforementioned motion, the State of Panama considered "that the stage of monitoring compliance with judgment is a "post-judgment" stage that "is not included in the norms that regulate the jurisdiction and the procedure of the Court…"[29] and "that does not fall within the judicial sphere of the Court, but strictly within the political sphere, which, in this case [is] exclusive to the General Assembly of the Organization of American States."[30] The State of Panama also added that "Article 65 of the American Convention establishes clearly that only the General Assembly of the Organization of American States (hereinafter "the OAS") has the function of monitoring compliance with the judgments of the Inter-American Court of Human Rights. […] This norm only establishes obligations of the Court and does not establish any obligation for the States Party, neither does it grant rights to the Court nor competence to monitor compliance with its judgments."[31]

22. Through the judgment on the issue of competence, *of* November 28, 2003, the Court rebutted the arguments of the State of Panama and decided it is competent to monitor compliance with its judgments, and that, in the exercise of its competence to monitor compliance with its decisions, the Inter-American Court of Human Rights is authorized to request the responsible States to submit reports on the steps they have taken to implement the measures of reparation ordered by the Court, to assess the said reports, and to issue instructions and orders on compliance with its judgments.[32]

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

> 90. The *travaux préparatoires* to the American Convention allow us to consult the wishes of the States, as regards of monitoring compliance with the

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[29] ICHR, *Case of Baena Ricardo y otros*. *Competence.* Judgment of November 28, 2003. Series C No. 104, para. 53

[30] Corte I.D.H., *Case of Baena Ricardo et al*. *Competence.* Judgment of November 28, 2003. Series C No. 104 para. 54(a)

[31] Corte I.D.H., *Case of Baena Ricardo et al*. *Competence.* Judgment of November 28, 2003. Series C No. 104 para. 54 (b)

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

judgments of the Court, when they adopted this treaty. The Draft Convention[33] did not include a provision similar to current article 65. However, the Second Commission, responsible for studying and drafting the articles corresponding to the procedural part of the Draft Convention,[34] proposed the text of current article 65 of the American Convention. In the report on "Organs of Protection and General Provisions" of November 21, 1969, at the Inter-American Specialized Conference on Human Rights,[35] the Second Commission indicated in its fifth meeting, held on November 17, 1969, that:

> The delegations expressed their opinion that the Court should be granted a broad competence that would enable it to be an effective instrument for the jurisdictional protection of human rights.[36]

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

> Article 65, which is a new provision, establishes that the Court shall submit a report to the General Assembly of the Organization, which is contemplated in Article 52 of the Charter of the Organization, reformed by the Protocol of Buenos Aires.
>
> But, the article also establishes the important concept that the Court must indicate the cases in which a State has not complied with its judgments, with the pertinent recommendations of the Court […]. [37]

90. The Court considers that, when adopting the provisions of Article 65 of the Convention, the intention of the States was to grant the Court the authority to monitor compliance with its decisions, and that the Court should be responsible for informing the OAS General Assembly, through its annual report, of the cases in which the decisions of the Court had not been complied with, because it is not possible to apply Article 65 of the Convention unless the Court monitors compliance with its decisions.[38]

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

> 88. The American Convention did not establish a specific body responsible for monitoring compliance with the judgments delivered by the Court, as provided for in the European Convention. When the American Convention was

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

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

[35] The Inter-American Convention on Human Rights was adopted at the Inter-American Specialized Conference on Human Rights held in San José, Costa Rica, on November 7-22, 1969.

[36] OAS/Ser. K/XVI/1.1, Doc. 71, November 21, 1969, p. 5.

[37] OAS/Ser. K/XVI/1.1, Doc. 71, November 21, 1969, p. 8.

[38] ICHR, *Caso Baena Ricardo et al*. *Competence.* Judgment of November 28, 2003. Series C No. 104 paras. 89 and 90.

> drafted, the model adopted by the European Convention was followed as regards of competent bodies and institutional mechanisms; however, it is clear that, when regulating the monitoring of compliance with the judgments of the Inter-American Court, it was not envisaged that the OAS General Assembly or the OAS Permanent Council would carry out a similar function to the Committee of Ministers in the European system.[39]

24. The absence of a specific provision in the American Convention establishing that the OAS General Assembly or the Permanent Council would have functions in this area similar to those of the Committee of Ministers of the European system, and the OAS omission to implement the application of article 65 of the American Convention, account for the events occurred in the case of *Hilaire, Constantine, Benjamin et al*. If the Court had accepted the position of the State of Panama pursuant to which the Court cannot request the States reports and reach conclusions in order to apply article 65 of the Convention, the Court should have been obliged to merely send its judgments to the OAS General Assembly, which, depending on the interest and attitude of the respondent State in the case reported under article 65 of the Convention, could not have even issue any decision. The reason is that, currently, depending on the text adopted by the CJPA, the General Assembly may issue a decision or not regarding non-compliance with a judgment of the Court.

VI

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

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

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

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

26. The Permanent Council delivers the report to its Commission on Juridical and Political Affairs, that hears the presentation thereof made by the President of the Court, conducts deliberations on the report and adopts a resolution that is communicated to the Permanent Council that, in its turn, communicates it to the General Assembly. In practice, what happens is that the decision adopted by the CJPA is the same that is communicated to and approved by the Council and the General Assembly. And the text of the resolution is approved by the CJPA by consensus. It is enough that the State that the Court mentions as not having complied with the

[39] ICHR, *Case of Baena Ricardo et al. Competence.* Judgment of November 28, 2003. Series C No. 104 para. 88.

judgment, opposes to be urged, through the resolution, to inform the Court on its compliance with the judgment, for such urging not to be made in the resolution to be approved by the CJPA and, consequently, by the Permanent Council and the General Assembly.

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

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

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

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

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

VII

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

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

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

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

Contentious Cases[40]

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

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

20. Case of Castillo Petruzzi *et al.*	Peru	1997	Monitoring compliance with judgment
21. Case of Baena Ricardo *et al*.	Panama	1998	Monitoring compliance with judgment
22. Case of Ivcher Bronstein	Peru	1999	Monitoring compliance with judgment
23. Case of Constitutional Court	Peru	1999	Monitoring compliance with judgment
24. Case of the "White Van" (Paniagua Morales *et al.* v. Guatemala)	Guatemala	1995	Monitoring compliance with judgment
25. Case of the "Street Children" (Villagran Morales *et al*. v. Guatemala)	Guatemala	1997	Monitoring compliance with judgment
26. Case of Cesti Hurtado	Peru	1998	Monitoring compliance with judgment
27. Case of the Mayagna (*Sumo*) Awas Tingni Community v. Nicaragua	Nicaragua	1998	Monitoring compliance with judgment
28. Case of Cantoral Benavides v. Peru	Peru	1996	Monitoring compliance with judgment
29. Case of Durand and Ugarte v. Peru	Peru	1996	Monitoring compliance with judgment
30. Case of Bámaca Velásquez	Guatemala	1996	Monitoring compliance with judgment
31. Case of Trujillo Oroza	Bolivia	1999	Monitoring compliance with judgment
32. Case of Hilaire, Constantine, Benjamin *at al*.	Trinidad y Tobago	1999-2000	Monitoring compliance with judgment
33. Case of Barrios Altos	Peru	2000	Monitoring compliance with judgment
34. Case of Las Palmeras	Colombia	1998	Monitoring compliance with judgment
35. Case of El Caracazo v. Venezuela	Venezuela	1999	Monitoring compliance with judgment
36. Case of Bulacio v. Argentina	Argentina	2001	Monitoring compliance with judgment
37. Case of Cantos v. Argentina	Argentina	1999	Monitoring compliance with judgment
38. Case of Juan Humberto Sánchez v. Honduras	Honduras	2001	Monitoring compliance with

			judgment
39. Case of “Five Pensioners” v. Peru”	Peru	2001	Monitoring compliance with judgment
40. Case of Mack Chang	Guatemala	2001	Monitoring compliance with judgment
41. Case of Maritza Urrutia	Guatemala	2002	Monitoring compliance with judgment
42. Case of 19 Merchants	Colombia	2001	Monitoring compliance with judgment
43. Case of Gómez Paquiyauri Brothers	Peru	2002	Monitoring compliance with judgment
44. Case of Juvenile Reeducation Institute	Paraguay	2002	Monitoring compliance with judgment
45. Case of Ricardo Canese v. Paraguay	Paraguay	2002	Monitoring compliance with judgment
46. Case of Lori Berenson Mejia	Peru	2002	Monitoring compliance with judgment
47. Case of Herrera Ulloa	Costa Rica	2003	Monitoring compliance with judgment
48. Case of Carpio Nicolle *et al.*	Guatemala	2003	Monitoring compliance with judgment
49. Case of De La Cruz Flores v. Peru	Peru	2003	Monitoring compliance with judgment
50. Case of “Plan de Sanchez Massacre”	Guatemala	2002	Monitoring compliance with judgment
51. Case of Serrano Cruz Sisters v. El Salvador	El Salvador	2003	In litigation
52. Case of Daniel Tibi v. Ecuador	Ecuador	2003	Monitoring compliance with judgment
53. Case of Molina Theissen	Guatemala	2003	Monitoring compliance with judgment
54. Case of Moiwana Village *v.* Suriname	Suriname	2002	Preliminary objections and possible merits, reparations and costs
55. Case of Caesar v. Trinidad and Tobago	Trinidad and Tobago	2003	In litigation
56. Case of Yatama v. Nicaragua	Nicaragua	2003	In litigation
57. Case of Acevedo Jaramillo *et al.* v. Peru (SITRAMUN)	Peru	2003	In litigation
58. Case of the “Mapiripán Massacre”	Colombia	2003	In litigation

59. Case of Acosta Calderón v. Ecuador	Ecuador	2003	In litigation
60. Case of Yakye Axa Community v. Paraguay	Paraguay	2003	In litigation
61. Case of the Girls Yean and Bosico v. Dominican Republic	Dominican Republic	2003	In litigation
62. Case of López Álvarez v. Honduras	Honduras	2003	In litigation
63. Case of Huilca Tecse v. Peru	Peru	2004	In litigation
64. Case of the Massacre of Pueblo Bello v. Colombia	Colombia	2004	In litigation
65. Case of Gutiérrez Soler v. Colombia	Colombia	2004	In litigation
66. Case of Palamara Iribarne v. Chile	Chile	2004	In litigation
67. Case of García Asto and Ramírez Rojas v. Peru	Peru	2004	Initial procedures (written proceedings)
68. Case of Blanco Romero *et al*. v. Venezuela	Venezuela	2004	Initial procedures (written proceedings)
69. Case of Ituango v. Colombia	Colombia	2004	Initial procedures (written proceedings)
70. Case of Juárez Cruzzat *et al.* v. Peru	Peru	2004	Inicial processing (complaint undergoing preliminary examination)
71. Case of Fermín Ramírez v. Guatemala	Guatemala	2004	Initial procedures (written proceedings)
72. Case of Gómez Palomino v. Peru	Peru	2004	Initial procedures (written proceedings)
73. Case of Raxcacó Reyes v. Guatemala	Guatemala	2004	Initial procedures (written proceedings)
74. Case of Ximenes Lopes v. Brazil	Brazil	2004	Initial procedures (written proceedings)
75. Case of Nogueira de Carvalho v. Brazil	Brazil	2005	Initial procedures (written proceedings)

Provisional Measures[41]

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

CASE NAME	State Regarding Which the Measure Has Been Adopted	Year of Submission	Status
1. Case of Velasquez Rodriguez	Honduras	1988	Closed
2. Case of Fairen Garbí and Solis Corrales	Honduras	1988	Closed
3. Case of Godinez Cruz	Honduras	1988	Closed
4. Case of Bustios-Rojas	Peru	1991	Closed
5. Case of Chunima	Guatemala	1991	Closed
6. Case of Reggiardo Tolosa	Argentina	1993	Closed
7. Case of Aleman Lacayo	Nicaragua	1996	Closed
8. Case of Vogt	Guatemala	1996	Closed
9. Case of Suarez Rosero	Ecuador	1996	Closed
10. Case of Serech and Saquic	Guatemala	1996	Closed
11. Case of Paniagua Morales *et al.* and Case of Vasquez *et al.*	Guatemala	1998	Closed
12. Case of Paniagua Morales *et al.*	Guatemala	2001	Closed
13. Case of Clemente Teherán *et al.*	Colombia	1998	Closed
14. Case of Constitutional Court	Peru	2000	Closed
15. Case of Ivcher Bronstein	Peru	2000	Closed
16. Case of Digna Ochoa y Plácido *et al.*	Mexico	1999	Closed
17. Case of Loayza Tamayo	Peru	1996/2000	Closed
18. Case of La Nación Newspaper	Costa Rica	2001	Closed
19. Case of Chipoco	Peru	1992	Not adopted
20. Case of Peruvian Prisons	Peru	1992	Not adopted
21. Case of Parker	Peru		Not adopted
22. Case of Cesti Hurtado	Peru	1997	Not adopted
23. Case of Colotenango	Guatemala	1994	Active
24. Case of Carpio Nicolle *et al.*	Guatemala	1995	Active
25. Case of Giraldo Cardona	Colombia	1996	Active
26. Case of Álvarez *et al.*	Colombia	1997	Active
27. Case of James *et al.*	Trinidad and Tobago	1998	Active
28. Case of Haitian and Dominicans of Haitian origin in the Dominican Republic	Dominican Republic	2000	Active
29. Case of Bamaca Velasquez	Guatemala	1998/2002	Active
30. Caso Blake	Guatemala	1995	Active
31. Case of Caballero Delgado and Santana	Colombia	1994	Active
32. Case of Peace Community of San José de Apartadó	Colombia	2000	Active
33. Case of Human Rights Centre Miguel Agustín Pro Juarez *et al.* (presently Pilar Norieta *et al.)*	Mexico	2001	Active
34. Case of Gallardo Rodríguez	Mexico	2001	Active
35. Case of Urso Branco Prison	Brazil	2002	Active
36. Case of Mayagna (*Sumo*) Awas Tingni Community	Nicaragua	2002	Active
37. Case of Helen Mack Chang *et*	Guatemala	2002	Active

al.			
38. Case of Luis Uzcátegui	Venezuela	2002	Active
39. Case of Liliana Ortega *et al.* v. Venezuela	Venezuela	2002	Active
40. Case of Luisiana Ríos *et al*. v. Venezuela (Radio Caracas Televisión -RCTV-)	Venezuela	2002	Active
41. Case of Lysias Fleury	Haiti	2003	Active
42. Case of Marta Colomina and Lilliana Velásquez	Venezuela	2003	Active
43. Case of Jiguamiandó and Curbaradó Communities	Colombia	2003	Active
44. Case of the Gómez Paquiyauri Brothers	Peru	2004	Active
45. Case of the Indigenous Kankuamo People	Colombia	2004	Active
46. Case of the Sarayaku Community	Ecuador	2004	Active
47. Case of "El Nacional" and "Así es la Noticia" Newspapers	Venezuela	2004	Active
48. Case of Carlos Nieto Palma *et al.*	Venezuela	2004	Active
49. Case of 19 Merchants (Sandra Belinda Montero Fuentes *et al.)*	Colombia	2004	Active
50. Case of "Globovisión" Television Broadcasting Company	Venezuela	2004	Active
51. Case of Raxcaco *et al.*	Guatemala	2004	Active
52. Case of Boyce and Joseph v. Barbados	Barbados	2004	Active
53. Case of Eloisa Barrios *et al.*	Venezuela	2004	Active
54. Case of Mendoza Prisons	Argentina	2004	Active
55. Case of Plan de Sánchez Massacre (Salvador Jerónimo *et al*.)	Guatemala	2004	Active
56. Case of Fermín Ramírez	Guatemala	2004	Active
57. Case of the "Mapiripán Massacre"	Colombia	2005	Active

VIII

Proposed Solution

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

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

32. Even though on several occasions the Court has informed the General Assembly that it has failed to receive information from a given State concerning its compliance with a judgment or provisional measures,[42] only in 1995 did the General Assembly urge a State (i.e., Suriname) to inform the Court of the fulfillment of the judgments in the cases of *Aloeboetoe and Gangaram Panday* (*supra* para. 9), which constitutes irrefutable proof of the statements in this separate opinion in the case of *Caesar* vs. Trinidad and Tobago, which deserves full consideration from the States Party to the American Convention.

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

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

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

complied with its judgment (Article 68 of the Convention), without any reaction by the political bodies of the Organization, sets a bad precedent. It is to be hoped that there will never be another case alike and that the above-mentioned State will inform the Court of the compliance with the reparations ordered in this Judgment in the case of *Caesar.*

IX

CONCLUSIONS

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

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

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

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

39. The high degree of compliance with the Court's judgments is one of the greatest achievements of the Inter-American human rights protection system.[43] However, debating the non-compliances with judgments pronounced by the Court in a permanent forum of the OAS, which could take the form of a working group, would enliven the OAS, as a debate in such a forum would show the Member States not only the strengths but also the deficiencies and weaknesses of the system, with a view to strengthening and improving it.

40. The failure to inform about compliance with the judgment in the case of *Hilaire, Constantine, Benjamin et al.* v. Trinidad and Tobago has led me to expose in this separate opinion in the case of *Caesar* v. Trinidad and Tobago the weaknesses of the system in this area, in the hope that no situations such as those described herein will

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

reoccur and that the OAS Member States, but especially the States Party to the American Convention will implement the mechanism required for the judgments pronounced by the Inter-American Court to be fully complied with, on account of the fact that, as this Court has consistently held, "[i]n a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning."[44]

Manuel E. Ventura-Robles
Judge

Pablo Saavedra-Alessandri
Secretary

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