

CONCURRING JUDGMENT OF JUDGE JACKMAN

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

Corporal punishment

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

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

The relevant Trinidad and Tobago constitutional provision states that:

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

Pacta sunt servanda

But, will Trinidad and Tobago comply with the decision of the Court? To judge from its failure to participate in the hearing of this case, and given its previous contemptuous attitude in the *Hilaire* case, compliance is, to say the least, unlikely. This despite the State’s indisputable responsibility under international law to answer to the Inter-American human rights system for any violations of the Convention alleged to have taken place during the period from May 28 1991, the day on which the State ratified the Convention and recognised the compulsory jurisdiction of the Court, and May 26, 1999, the day on which its denunciation of the Convention took legal effect.

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

It ought to be obvious that good faith compliance is of even greater importance in the area of international human rights law, where what is at stake is not the impersonal interests of states but the protection of the fundamental rights

of the individual. Trinidad and Tobago's denunciation of the Convention was profoundly regrettable for the cause of a universal regime of human rights protection, but the State was fully within its rights to take that unprecedented step.

But its contumelious refusal to acknowledge its continuing obligations under a treaty that remained in force for it when the violations in this case took place represents a gratuitous attack on the Rule of Law, all the more astonishing in a State that, like other Commonwealth Caribbean states, prides itself on its Common Law traditions, where respect for human rights and for the Rule of Law are deeply embedded in the legal culture.

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

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

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

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

"Savings Clauses"

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

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

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

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

Oliver Jackman
Judge

Pablo Saavedra Alessandri
Secretary