SEPARATE CONCURRING OPINION OF JUDGE HERNÁN SALGADO PESANTES IN THE JUDGMENTS ON PRELIMINARY OBJECTIONS IN THE HILAIRE, CONSTANTINE *ET AL.* AND BENJAMIN *ET AL.* CASES

Although I am in basic agreement with the judgment in the Hilaire vs. Trinidad and Tobago case, I would like to add the following considerations:

1. With regard to reservations to treaties, as in other questions of international law, there has been a major evolution marked by constant progress. The point of departure for this evolution may well have been the intense discussions resulting from the reservations formulated by the States to the Convention on the Prevention and Punishment of the Crime of Genocide (1948) and, subsequently, as a result of the advisory opinion that the International Court of Justice (ICJ) issued on that matter (1951).

2. Those discussions established the foundations for improving the reservations system. An important element of the ICJ's advisory opinion was that reservations should be compatible with the object and purpose of the treaty and this was incorporated into the 1969 Vienna Convention on the Law of Treaties (Article 19) and, through this instrument, it is also in force in the American Convention on Human Rights (Article 75).

3. It was in recent decades that the principle that a reservation must be compatible with the object and purpose of the treaty began to take shape as an essential requirement and became a fundamental condition to assess the admissibility and validity of a reservation. However, this evolution will not be complete until reservations to human rights treaties are proscribed, due to the special nature of the latter.

4. In the instant case, the State has not formulated a reservation with regard to the substantive clauses of the Convention, but rather has attempted to do so in relation to the optional clause recognizing the competence, or more specifically, the contentious jurisdiction of the Inter-American Court.

5. The Convention contains a specific provision establishing how this recognition of the Court's jurisdiction may be made: Article 62(1) and 62(2). Consequently, the State Party that, in the exercise of its sovereign power, decides to recognize the jurisdictional organ must proceed in accordance with the provisions of the Convention.

6. In my opinion, it is not possible for a State to disregard the provisions of Article 62(2) and impose conditions on its acceptance of the Court's jurisdiction. The State Party does not have a margin of discretion, unless it is to state that it agrees to accept jurisdiction or not to do so. The interpretation that what is not prohibited in the conventional provision is allowed is only valid in the sphere of domestic private law. From the foregoing, two conclusions may be drawn.

7. First: a State may not establish conditions that limit the operation of the jurisdictional organ responsible for applying and interpreting the Convention. Any limitation in this respect would, ultimately, have serious consequences for the effectiveness of the human rights protection system.

8. Second: when reservations are allowed, as in the case of Article 75 of the American Convention, they have a limited scope, since this is an international human rights instrument. Otherwise, the obligations of the State Party would be unclear. Lastly, reservations cease to be valid when they are of a general, broad or imprecise nature not only due to a question of form but, above all, when, in some way, they contradict the object and purpose of the American Convention on Human Rights.

Hernán Salgado-Pesantes
Judge

Manuel E. Ventura-Robles
Secretary