

CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE¹

1. I vote in favour of the adoption, by the Inter-American Court of Human Rights, of the present Judgment on the merits and reparations in the *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago Case*, which is consistent with the relevant provisions and the spirit of the American Convention on Human Rights. This is the first time that an international tribunal finds that the “mandatory” death penalty violates a human rights treaty such as the American Convention, that the right to life is violated by the generic and automatic application of the death penalty, without individualization and without due process guarantees, and that, among the reparations, the violating State should modify its penal legislation to bring it into compliance with the dictates of international human rights protection and abstain, in all cases, from executing those sentenced to death.

2. Given the transcendental importance of the issue considered in this landmark Judgment of the Inter-American Court, I feel compelled to present my personal reflections on the matter, in the present Concurring Opinion. In reality, it is hard to avoid the sensation that everything one could say about the imposition of capital punishment has been written: there are, in fact, whole libraries of materials on the subject. However, a universally accepted solution to the main dilemmas regarding the termination of life in certain circumstances has yet to be achieved. I fear that it will be difficult to find a solution in the limited realm of Law, and even less so in the realm of positive rights. It is not my intention to address the many facets of this complex issue in the context of the *cas d’espèce* in this Concurring Opinion, but rather to make known my marked concerns about questions of fundamental importance that have gone unaddressed for over two centuries by those who insist on retaining capital punishment. These issues become even more important when its application is carried out, as in the present case of *Hilaire, Constantine and Benjamin et al.*, in the so-called “mandatory” manner.

I. Law and Death: *Jus Talionis* and the Arbitrary Deprivation of Life

3. Arbitrary deprivation of life is commonly associated with the crime of murder. But there are different ways to arbitrarily deprive a person of life according to the terms of the prohibition found in Article 4(1) of the American Convention: when death is a direct consequence of an illicit act of murder, as well as when circumstances (such as misery) that impede access to conditions necessary for a dignified life are not avoided.² The present Case, *Hilaire, Constantine and Benjamin et al.*, reveals that arbitrary deprivation of life can occur through “legal” actions by State actors pursuant to a law that is a source of arbitrariness, and, as such, is incompatible with the American Convention; in other words, the arbitrary deprivation of life can occur via actions or omissions not only of individuals (in inter-personal relationships), but also of the State itself as demonstrated by the *cas d’espèce*.

4. Trinidad and Tobago’s *Offences Against the Person Act* of 1925, which requires the application of the “mandatory” death penalty for the crime of murder, as

¹ This opinion was written in Spanish language and translated into English by the Secretariat of the Inter-American Court of Human Rights.

² Cf. On this issue see the I/A Court of H. R., *The “Street Children” Case (Villagrán Morales et al. v. Guatemala, Merits)*. Judgment of November 19, 1999. Series C No. 63, pp. 64-65, para. 144.

the Inter-American Court has stated in the present Judgment,³ violates the American Convention *in its mere existence*; this is aggravated by that fact that the Act has been effectively *applied* (through the imposition of death sentences) in the present case of *Hilaire, Constantine and Benjamin et al.* Indeed, the very law that applies the death penalty results in the extreme violence that it purports to prevent;⁴ by applying the age-old law of an eye for an eye, the government itself resorts to violence, disposing of – under a judicially totalitarian vision⁵ – a person's life,⁶ just as the individual deprived another of his life – and all in spite of the historic evolution of the idea, also age-old, that justice should prevail over revenge (public and private).

5. Justice that requires killing presumes that certain people have no possibility of redemption, and that the respective society has reached a degree of perfection that requires the elimination of such people, — something that to me cannot be substantiated. In effect, a legal system that requires killing, employing the same methods that it condemns in acts of murder, lacks credibility. In my opinion, the fact that such means are validated by positive law, when used by the government, does not justify it in the least; positivism has always been a slave to established power, independently of its orientation. One cannot lose sight of the fact that legal norms inevitably reflect the underlying value systems,⁷ a fact which no true legal scholar can ignore.

6. It is important to recall that, even in the eighteenth century, in his classic work *Dei Diritti e delle Pene* (1764), Cesar Beccaria stated: "what right can they claim for themselves [men] in order to tear apart their fellow men? (...) What kind of person has wanted to leave the decision whether to make him die to the whim of other men? (...) The death penalty is not useful because it gives men an example of atrocity. (...) The rules governing the conduct of these men [who commit murder],

³ Cf. paras. 103-104, 106, and 108 of the present Judgment.

⁴ In his book *Dernier jour d'un condamné* (1829), one of the greatest writers of the nineteenth century, Victor Hugo, referred to judicially-mandated executions and indicated that they were recognized as "public crimes," which affect "all members of the social community." Also in the realm of Law, in his classic monograph *La Lucha por el Derecho* (1872), Rudolph von Ihering, upon referring to capital punishment, stated that "judicial murder, as it is appropriately called in our German language, is law's true mortal sin;" R. von Ihering, *La Lucha por el Derecho*, Madrid, Ed. Civitas, 1989 (reprint), p. 110. (Translation by the Secretariat of the Court).

⁵ Even in the nineteenth century, another universal writer, Fyodor Dostoevski, in his *Souvenirs de la maison des morts* (1862) eloquently took a stance against the "unlimited power" of certain individuals over others, which generates brutality or perversion, thereby infecting society as a whole; in the opinion of the great Russian writer, such is the case with corporal punishment, applied with the plain indifference of the "already infected" society and in a state of decomposition. In the book *Recuerdos de la Casa de los Muertos*, Dostoevski warns that the degree of civilization that any society can reach could be determined upon evaluating its prisons; F. Dostoevski, *Souvenirs de la maison des morts*, Paris, Gallimard, 1997 (reprint), pp. 35-416. Based on this type of evaluation, few countries, even nowadays in the beginning of the twenty-first century would be classified as "civilized."

⁶ It does not cease to be a paradox that, in our times, a universal consensus has already reached with regards to the *absolute* prohibition against torture, forced disappearance of persons and summary, extra-judicial or arbitrary executions, but not with respect to the unfringeable, *unconditional* human life; C.K. Boyle, "the Concept of Arbitrary Deprivation of Life" in *The Right to Life in International Law* (ed. B.G. Ramcharan). Dordrecht, Nijhoff, 1985, p. 233, and cf. 241; N.S. Rodley, *The Treatment of Prisoners under International Law*, 2a. ed., Oxford, University Press, 2000 (reprint) p. 206.

⁷ Punishments also reflect the range of values that prevail in a given society. R. von Ihering, *El Fin en el Derecho*, Buenos Aires, Omeba Ed., 1960, p. 236.

should not include this savage law, made more atrocious because legalized murder is carried out according to deliberate procedures. It seems odd that the law, in other words, the expression of popular will, which detests and punishes murder, would commit the act itself, and do so in order to deter citizens from committing murder by ordering a public execution.”⁸

7. The subject has received attention in the philosophy of Law for the last two centuries. In the twentieth century, L. Recaséns Siches, for example, confessed, in the 1960s, his anguish with respect to the doctrine of retribution used to justify the penalty, in other words, the understanding that “undeserved harm that an individual inflicts on another should be inflicted on that person” (*jus talionis*); thus, the central objective of legal retribution (or retributive justice) is the reestablishment or the restoration of the act perpetrated by the crime;⁹ however, he conceded that even with this response to the law violated (expression of social censure of the crime), in the context of reintegration of the established legal regime (which does not fail to express a “vindictive side”), it is necessary to be watchful for the failings of human justice and the irreparable nature of judicial error.¹⁰

8. In one of his works, Recaséns Siches went further, discarding the “objective idea” of retribution in the following way:

The degree of guilt cannot be determined by taking into account only objective prejudices; but rather it should also depend on the level of premeditated intent and ill will. The purpose of considering subjective factors, including the motive and all the circumstances of the offender does not in any way diminish the primary purpose of punishment, as fitting or proper; on the contrary, it only reinforces this purpose. Finding the person guilty is clearly consistent with the norm of retribution, precisely because punishment is only symbolic compensation or restoration of the prior state, and consequently, should also depend on subjective factors. In the place of simple mathematical equality, proportional equality enters into the equation: for an equal crime, equal punishment *according to the measure* of the interior inequality which lies under external equality, or according to the extent of internal equality, which lies under exterior inequality.¹¹

⁸ C. Beccaria, *De los Delitos y de las Penas*, Madrid, Alianza Ed., 2000 (new edition) chapter 28, pp. 81 and 86-87 (Translation by the Secretariat of the Court). In his 1776 commentary on the aforementioned work of Beccaria, Voltaire emphasized that “much worse than death” – was the uncertainty and waiting and observed that “refined executions that human reason has invented to make death horrible seem to have been invented more by tyranny than by justice;” Ibid. pp. 129 and 149. In another essay, *The Price of Justice* (1777), Voltaire again referred to prison as “torture” and added that murder should not be punished with another murder since “death repairs nothing;” Voltaire, *O Preço da Justiça* São Paulo, Martins Fontes, 2001 pp. 17-19 and 101; for him the *raison d'Etat* did not go beyond an “invented expression to serve as an excuse for the tyrants;” *ibid.* p. 80.

⁹ L. Ricanséns Siches, “La Pena de Muerte, Grave Problema con Múltiples Facetas,” in *A Pena de Morte* (Coloquio Internacional de Coimbra of 1967), vol. II, Coimbra, University of Coimbra, 1967, pp. 12 and 14-16 (Translation by the Secretariat of the Court).

¹⁰ *Ibid.*, pp. 17, 19-20.

¹¹ L. Recaséns Siches, *Panorana del Pensamiento Jurídico en el Siglo XX*, vol. II (1a. ed.), Mexico, Editorial Porrúa, 1963, p. 796 (Translation by the Secretariat of the Court).

9. This is a very persuasive argument in support of the need for the individualization of sentences, as a capability intrinsic to the exercise of judicial power. In addition, in the 1960s, Marc Ancel pointed out the then discernible tendency, of gradual abandonment of the so-called “mandatory nature” of the death penalty,¹² which today only exists in a small number of countries (above all former British colonies). This is due, in part, to the growing influence of the French concept of “mitigating factors,” which has recognized the discretionary power of national tribunals to impose sentences other than capital punishment,¹³ upon determining the different levels of criminal responsibility.

10. In the present Judgment on the merits and reparations in the *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago Case*, the Court has correctly resolved this question in the circumstances of the *cas d'espece*,¹⁴ upon finding that the *Offences Against the Person Act* of 1925 of Trinidad and Tobago orders the automatic and generic imposition of the death penalty for the crime of murder and fails to recognize that murder can have varying degrees of severity, which should be duly taken into account and evaluated by the judge, especially when the most valuable legal right, the right to life, is at risk.

11. The arbitrary nature of the aforementioned *Offences Against the Person Act* in particular, and of Trinidad and Tobago's domestic law in general,¹⁵ is manifested in different phases of the judicial process, such as the determination of criminal responsibility (without taking into account the particular circumstances of the criminal), and sentencing (with the “requirement” that capital punishment be imposed in murder cases – paras. 103 and 104), as well as blocking the *effective* reconsideration or review (paras. 186, 188, and 189). It consists of an arbitrary Act that is *fons et origo* of further arbitrary acts. As the Inter-American Court correctly and categorically affirms in the present Judgment, “the way in which the crime of murder is punished in the *Offences Against the Person Act* is in and of itself a violation of the American Convention on Human Rights.” (para. 211)

12. Indeed, arbitrariness is found whenever a legal procedure does not conform to the dictates of reason – as determined by the *rectae rationis* – but rather is issued only by the will of power (and the unlimited use of it). It is, thus, perfectly possible that an order is arbitrary, even though it is based on a positive law. This occurs when the dictates of said law are allowing to trump reason, obeying only “the fortunate whim of the person in power.”¹⁶ Acting with discretion (duly accounting for the circumstances of a specific case) is not the same as acting arbitrarily; acting with discretion means “being guided by general principles, applying them to the

¹² Capital Punishment, N.Y., United Nations, 1962, p. 11, para. 14, cited in R. Hood, *infra* note 13, p.85.

¹³ R. Hood, *The Death Penalty: A Worldwide Perspective* (A Report to the United National Committee on Crime Prevention and Control), Oxford, Clarendon Press, 1990 (reprint), p. 87.

¹⁴ As developed in paragraphs 103-104, 106, and 108.

¹⁵ With respect to petitions for amnesty, pardon or commutation.

¹⁶ L. Recanséns Siches, *Tratado General de Filosofía del Derecho*, 7th Edition, México, Editorial Porrúa, 1981, p. 216 (Translation by the Secretariat of the Court).

particularities of each concrete case, and evaluating the consequences,”¹⁷ which is an inherent attribute of the judicial process.

13. In its Judgment on the merits in the *Suárez Rosero v. Ecuador Case* (1997), the Inter-American Court established, *inter alia*, that a certain provision of the Ecuadorian Penal Code constituted a *per se* violation of Article 2 of the American Convention, independently of whether or not it was applied in the particular case (para. 98). Later, in its Judgment on the merits in “*The Last Temptation of Christ*” (*Olmedo Bustos et al. v. Chile* Merits, 2001), the Inter-American Court made clear that the mere existence and applicability of a norm of domestic law (whether constitutional or other) can *per se* compromise the State responsibility under a human rights treaty (para. 72).

14. In my Dissenting Opinion in the *Genie Lacayo v. Nicaragua Case* (Application for judicial review of the Judgment, 1997)¹⁸, I expressed my understanding in the sense that the very *existence* of a norm of internal law “legitimises the victims of the violations of the rights protected by the American Convention to require its compatibility with the provisions of the Convention, (...) without having to wait for further harm to be done” from the norm (para. 10).¹⁹ In the present case, *Hilaire, Constantine and Benjamin et al.*, this additional harm would result from carrying out the death sentences.

15. Indeed, in the present Judgment, the Court has correctly ordered, as a *means to make reparations*,²⁰ that the respondent State abstain from continuing to apply the aforementioned Act, reform it to the standards of international human rights law (para. 212) and in addition that it abstain from executing those sentenced to death (para. 215). These non-monetary reparations comply with the objective of making the effects of the violations of the American Convention committed by the State cease, in accordance with the findings of the Inter-American Court in the present Judgment.

16. Furthermore, in my Concurring Opinion in the *Barrios Altos v. Perú Case* (Merits, Judgment of March 14, 2001) I observed that a law can, by its very existence, constitute a source (*fons et origo*) of an illicit international act, beginning

as from their own adoption (*tempus commisi delicti*), and irrespective of their subsequent application, they engage the international responsibility of the State. Their being in force creates *per se* a situation which affects in a continuing way non-derogable rights, which as I have already indicated, belong to the domain of *jus cogens*. Once established, by the adoption of such laws, the international responsibility of the State, this is under the duty to put an end to such situation in violation of the

¹⁷ *Ibid.* p. 217 (Translation by the Secretariat of the Court).

¹⁸ I/A Court H.R., *Genie Lacayo Case. Application for judicial review of the Judgment of January 29, 1997*. Order of the Court of September 13, 1997. Series C No. 45.

¹⁹ I also took the same position in my Dissenting Opinion (para. 21) in the *Caballero Delgado and Santana v. Colombia Case* (Reparations, 1997). For jurisprudence on the concept of the “potential victim,” cf. A.A. Cançado Trindade, “Co-Existence and Co-Ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)”, p. 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987) pp. 271-283.

²⁰ From the Latin *repartio*, derived from *reparare*, “prepare or arrange again.”

fundamental rights of the human person (with the prompt derogation of those laws), as well as, given the circumstances of each case, to provide reparation for the consequences of the wrongful situation created (para. 11).

17. Also in my Concurring Opinion in the above-cited cases *Barrios Altos* (para. 9) and “*The Last Temptation of Christ*” (paras. 96-98), as well as in my earlier Dissenting Opinion in the *Caballero Delgado y Santana Case* (Reparations, 1997, paras. 13, 14, and 20), I insisted in modifying the domestic laws as necessary to bring them into accordance with the system of protection established in the American Convention as part of the non-monetary reparations under Article 63(1) of the Convention. The Court has established the same reparation, in my opinion correctly, in the present Case of *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*. The violation incurred by the very existence of the *Offences Against the Person Act* (for the way in which it punishes the crime of murder) is aggravated by its *application* via death sentences. Suspending the execution of capital punishment, in addition to a form of reparation, avoids incurring an additional violation of the Convention.

18. Recall that the Human Rights Committee (under the United Nations International Covenant on Civil and Political Rights) has consistently maintained that the imposition of the death penalty following a trial without legal due process guarantees, and without the possibility of a review mechanism to challenge the sentence, constitutes a *per se* violation of the right to life (in violation of Article 6 of the Covenant).²¹ Said violation exists independently of whether the death sentence is carried out, *even if those sentenced to death are still alive*. It intends to avoid additional harm.

19. There is no way, based solely on examining the circumstances of the crime, to separate those into factors that aggravate, mitigate or discharge criminal responsibility. The consideration of said circumstances is inherent in the exercise of judicial power. Accordingly, it has been thought that legality and equity are two distinct, but inseparable, aspects of judicial consideration; and so much so that legality is impossible without equity, and equity is likewise impossible without legality.²² It is not surprising that the most articulate contemporary doctrine has distanced itself from the theory of retribution (central to the supposed objective of the death penalty), which is inconsistent with the social aim of punishment (which, in addition, should be limited by the degree of criminal responsibility of the perpetrator).²³

²¹ Cf. See its decisions in the following cases: *C. Wright v. Jamaica* (1992, para. 8.7), *L. Simmonds v. Jamaica* (1992, para. 8.5), *A. Little v. Jamaica* (1991, para. 8.6), and *R. Henry v. Jamaica* (1991, para. 8.5).

²² L. Ferrajoli, *Derecho y Razón – Teoría del Garantismo Penal*, 5th ed., Madrid, Editorial Trotta, 2001 p. 162 and *cf.* pp. 158 and 160.

²³ The punishment (in general) also attempts to achieve the objective of judicial certainty. But the death penalty (or legalized murder) goes beyond degrees of guilt, completely excluding social readaptation (of the convict); moreover, it is the most radical form of corporal punishment, which is applied to the body of the convicted.

20. More important than its radical nature, as Beccaria has already indicated, is the certainty or inevitability of the punishment,²⁴ which should be used to prevent crime and avoid impunity, without necessarily resorting to cruel and inhuman methods (for humanitarian reasons, such as the “modification of punishments”, as well as judicial reasons, such as the limits of the “social contract”). Indeed, the retributive theory seems to assume, erroneously, that the only possible equivalent to death is death itself, forgetting that the State has the ability to impose other punishments; it is undeniable that “violence generates violence in a chain without end” and also in criminal matters, it is necessary to search for “a break in this chain.”²⁵ In the poignant reflection by Karl Jaspers, moderation, in general, “creates a space for reflection, for examination, for clarification and also through it a more clear consciousness of the permanent significance of violence itself.”²⁶

II. Law and Death: The Premeditated Deprivation of Life

21. As I have previously reflected on time and the law in several of my other Concurring Opinions for the Inter-American Court, it would be difficult for me here to refrain from embarking on another central issue in the present case. In regard to the relation between the end of temporal human existence- death- and the law, allow me to weave together some brief comments on specific facets of death when it is directed, planned and carried out by man, and regulated by positive law. As I pointed out at the beginning of this Concurring Opinion, contrary to the beliefs of proponents of legal positivism, law is not wholly independent of other areas of human knowledge. When one tries to infringe upon or regulate the end of a human being’s life, and above all when it occurs through the application of an existing law, the deficiencies of the law are evident.²⁷ We are prisoners of our own conceptual universe; if, in the present context, we look to other areas of human knowledge, we still will not find satisfactory answers to the question at hand.

22. My Concurring Opinions in the *Bámaca Velásquez v. Guatemala Case* (Merits, 2000, paras. 6-23 and 40; and Reparations, 2002, paras. 2-7, 11-15, 18-19 and 25-26), and in the “*Street Children Case*,” (*Villagrán Morales et al. v. Guatemala*,

²⁴ Cf. C. Beccaria, *De los Delitos y de las Penas*, *supra* note 7, chapter 28, p. 83. This same argument, in the sense that “the real deterrent is not the level of punishment, but its inevitability,” has been, in our times, invoked by the Italian Delegation to the United Nations Commission on Human Rights in the debates of 1997-1998, since the adoption of resolution 1997/12 of April 4, 1997, presented and co-sponsored by forty-five other countries, proposing the suspension of the execution of death sentences with the aim of complete abolition. Cf. R. Toscano, “The United Nations and the Abolition of the Death Penalty,” in *The Death Penalty – Abolition in Europe*, Strasbourg, Council of Europe, 1999, pp. 95-99 and 101.

²⁵ N. Bobbio, *El Tiempo de los Derechos*, Madrid, Editorial Sistema, 1991, pp. 222, 230-231, 234, and 241 (Translation by the Secretariat).

²⁶ K. Jaspers, *El Problema de la Culpa*, Barcelona, Editorial Piados, 1998 (new edition) p.77 (Translation by the Secretariat of the Court).

²⁷ In reality, the final frontier of human existence – death – has always presented questions and challenges for all jurists, which are intensified by the transformation of cultural models and advances in scientific and technological knowledge. A great responsibility therefore falls on jurists to not merely limit themselves to the norms of positive law, but rather to also be cognizant of contemporary value systems and the evolution of human knowledge. Cf. S Rodotà, “Law and Moral Dilemmas Affecting Life and Death- A General Presentation of the Issues,” *Law and Moral Dilemmas Affecting Life and Death* (Proceeding of the Glasgow Colloquy on European Law, 1990), Strasbourg, Council of Europe, 1992, p.14, and *cf.*, pp. 11 and 25.

Reparations, 2001, para. 25), underscore the ties of solidarity between the dead and the living through the *unity* of all humankind, in the temporal sense. In my opinion, this point deserves greater attention from the International Law of Human Rights, since until now it has focused almost exclusively on the living (as the holders of those protected rights), without sufficiently considering the suffering of the dead (except for establishing reparations), which, in turn, is inevitably projected onto the living.

23. This temporal dimension helps us to always keep the victims, including the victims of the crime, in mind. The search for and attainment of justice should be carried out with the recognition of the central position of the victims (all of them) in the conceptual universe of International Human Rights Law. The current debate surrounding this issue does not distance itself from the victims of the crime at any point. On the contrary, the suffering of the victim assumes a central position in the search for justice.²⁸ In the present Judgment of the *Hilaire, Constantine and Benjamin et al. Case*, the Inter-American Court has properly taken into account, and indeed could not have refrained from doing so, the need to bear in mind the suffering of the murder victims and their families (para. 101).

24. The Court has also recognized the need that justice be served, by means of the trial (with its due process guarantees) and punishment of those responsible (para. 102). But the attainment of justice is not related to vengeance (public or private), contrary to the underlying assumption of morbid acts or rituals (with a clearly vengeful purpose) with “witnesses” to the execution of the death penalty.²⁹ These acts or rituals can be viewed as disrespectful to the memory of those victimized and the values of their families. In sum, the State cannot resort to violence and the same methods employed in the murders.

25. Always bearing in mind the suffering of the family and dependents of the deceased victims of the crime, the great dilemma between determinism (or predestination) and freedom (including the freedom to do wrong) persists without any definitive answers to be found, not even within Philosophy or Theology. In the face of the existence of evil, the resolution of this dilemma cannot be found in vengeance (public or private). We live, in effect, surrounded by the mysteries inherent to human existence from its beginning to its end, motivated by the hope that we perhaps may find answers to some of them; however, the means or resources that we rely upon to confront wrongdoing, which is part of the human condition, are limited. If we persevere in the search for some way to live with these mysteries, it is more likely that we will find it in the humanities, in literature or the arts, or in religion, than in the law, much less in positive law.

26. As such, and always conscious of our limitations, I will now refer to some of the provoking words of *Reflections on the Guillotine* (1957) by Albert Camus. According to this insightful author- one of the most influential of the 20th century, - “retribution derives from nature and instinct,” and not the law, which, “by definition, cannot obey the same laws as nature. If the act of murder is found in the nature of man, the law is not made to imitate or reproduce this nature,” but rather to correct it. Although it applies arithmetic compensation of one life (that of the victim) for

²⁸ Cf. P. Hodgkinson, “Victims of Crime and the Death Penalty,” in *The Death Penalty- Abolition in Europe*, Strasbourg, Council of Europe, 1999, pp. 37 and 47-53.

²⁹ Ibid. pp. 47 and 51.

another (that of the criminal), the execution of the death penalty is not simply death, as it carries with it certain rules of procedure, organization and a “public premeditation,” which are “the source of a moral suffering that is more terrible than death,” and therefore is not equal to other forms of death. Knowing, with great anxiety, that he will be executed (everything is “out of his hands”) and powerless before the public coalition that wills his death, the condemned is “kept in an inevitable state of inaction, but with a conscience that is his principal enemy.” In this way, the condemned is destroyed by the anticipation of the execution of the death penalty long before actually dying: “two deaths are inflicted upon him,” the first “worse than the other. (...) Compared to this torture, the punishment of an eye for an eye appears civilized.”³⁰

27. More than three decades had passed since the original publication of these thoughts, when an international human rights tribunal, the European Court in Strasbourg, held, in the July 7, 1989 judgment of *Soering v. United Kingdom*, that the respondent State was barred from extraditing the petitioner (a German national) to the United States, due to the possibility of being sentenced to the death penalty and subjected to the “intense and prolonged suffering” of awaiting execution (the so-called “death row phenomenon”); therefore, if he is extradited to the United States, the Court added, the United Kingdom would incur a violation of Article 3 of the European Convention on Human Rights, due to the “real risk” of “inhuman treatment,” which is understood, within the context of the jurisprudential interpretation of Article 3, as treatment that “deliberately causes serious physical or mental suffering.”³¹

28. The European Court, in declaring that the European Convention is a “living instrument” to be interpreted in light of contemporary conditions, took into account the evolution of national criminal systems of States Parties to the Convention towards the *de facto* abolition of the death penalty, as reflected in Protocol No. 6 (of 1983) of the European Convention, which revealed a virtual consensus that, due to the changing times, the death penalty was no longer consistent with “regional standards of justice.”³² Under the circumstances – as, *inter alia*, with a case of extradition, an example of *cas d’espèce* – in which the death penalty could pose an issue under Article 3 of the European Convention (inhuman or degrading punishment), the Court stated the following:

The manner in which it [a death sentence] is imposed or executed, the personal circumstances of the condemned person and a disproportionality to the gravity of the crime committed, as well as the conditions of detention awaiting execution, are examples of factors capable of bringing the treatment of punishment received by the condemned person within the proscription under Article 3. (para. 104)

29. In the *Soering* Case, the European Court indicated the circumstances in which the imposition of the death penalty (or its probability) could bring about a violation of Article 3 of the European Convention (prohibiting inhuman or degrading

³⁰ A. Camus, “Réflexions sur la guillotine,” in A. Camus y A.A. Koestler, *Réflexions sur la peine capitale*, Paris, Calmann-Lévy, 1979 (reprinted 1997), pp. 140-141, 143 and 146 (Translation by the Secretariat of the Court).

³¹ European Court of Human Rights, *Soering v. United Kingdom* case, Judgment of 07/07/1989, Strasbourg, Council of Europe, pp.1-42, esp. paras. 88-92, 99, 104, 106, 109 and 111.

³² *Id.* at p. 31, para. 102.

treatment), but did not affirm that the death penalty *per se* violated Article 3 of the Convention.³³ The Inter-American Court of Human Rights, bearing in mind the circumstances surrounding the *Hilaire, Constantine and Benjamin et al. Case*, has gone even farther in the present Judgment on the merits and reparations, in establishing the incompatibility of the “mandatory” death penalty with the American Convention, and ordering, as one of the means of reparation, the stay of the execution of this penalty.

30. In addition to the aforementioned considerations, it would be difficult to avoid the assertion that there is no method of carrying out the death penalty that would not be *cruel, inhuman and degrading*. In its landmark sixteenth Advisory Opinion on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999) – which serves as guidance and inspiration *in statu nascendi* for this matter, - the Inter-American Court cautioned that, in a case that leads to the application of the death penalty in the absence of due process guarantees, the violation of the right to not be arbitrarily deprived of life³⁴ will be added to the violation of the due process guarantees and becomes a premeditated, government-sanctioned judicial murder.

31. Such a violation raises questions, which, once again, transcend the sphere of positive law. An entire value system naturally underlies the wide debate that is sparked by these questions.³⁵ To affirm, in the name of society, that a person should be executed, that his life should be put to an end for being entirely evil, leads to the assumption – which no person with common sense would agree with today – that society is entirely good. As Camus stated, where nothing authorizes the government to “definitively legitimate” or “produce something irreparable”; he who judges absolutely condemns himself absolutely. The great writer wisely added that this may be explained by the assertion that

Il n'y a pas de justes, mais seulement des coeurs plus ou moins pauvres en justice. Vivre, du moins, nous permet de le savoir et d'ajouter à la somme de nos actions un peu du bien qui compensera, en partie, le mal que nous avons jeté dans le monde. Ce droit de vivre que coïncide avec la chance de réparation est le droit naturel de tout homme, même le pire. (...) Sans ce droit, la vie morale est strictement impossible. (...) Ni dans le coeur des individus ni dans les moeurs des sociétés, il n'y aura de paix durable tant que la mort ne sera pas mise hors la loi.³⁶

³³ For a general overview of the application of this provision of the European Convention, *cf.*, H. Fourteau, *L'application de l'article 3 de la Convention Européenne des Droits de l'Homme dans le droit interne des Etats membres*, Paris, LGDJ, 1996, pp. 1ss.

³⁴ For a general overview of this issue in relation to the death penalty, *cf.*, e.g., W.A. Schabas, *op. cit. infra* n. (44), pp. 3-303, esp. pp. 126, 138, 144, 229; A. Salado Osuna, *La Pena de Muerte en Derecho Internacional- Una Excepción al Derecho a la Vida*, Madrid, Tecnos, 1999, pp. 1-278; Amnesty International, *When the State Kills... The Death Penalty v. Human Rights*, London, A.I., 1989, pp.68-70.

³⁵ Paragraph 137 and resolving point No. 7 in the aforementioned Advisory Opinion.

³⁶ A. Camus, *op. cit. supra* n. (), pp. 159-160, 164, 166 and 170. [Translation: There are no just persons, only hearts that are more or less impoverished in justice. Living, at the very least, allows us to recognize and aggregate to the sum of our actions the little bit of good that will compensate, in part, for the evil that we have unleashed into the world. This right to life that coincides with the opportunity for reparation is the natural right of every man, even the worst. (...) Without this right, a moral life is strictly impossible. (...) Neither the heart, nor individuals, nor societal practices will have lasting peace while death is not placed outside the grasp of the law. (Translation by the Secretariat)

32. The basic concern for safeguarding the rights of the victims continues to be surrounded by debates about when these rights are transferred to the criminal authority.³⁷ A parallel concern has arisen by virtue of the fact that, in any national society, the criminal punishment system is based on justice and not on vengeance.³⁸ With respect to this matter, real advances have also been made through restrictions on the death penalty with the purpose of reducing its application until it is eventually abolished.³⁹ These advances have been manifested in International Human Rights Law⁴⁰ as well as International Humanitarian Law⁴¹ and International Criminal Law.⁴²

33. The understanding that the application of the death penalty *per se* constitutes cruel, inhuman and degrading treatment has been articulated in international practice.⁴³ For every possible case (even in the countries that still maintain the death penalty), due process guarantees must be enforced, without which the application of the death penalty constitutes a summary and illegal execution or government-sanctioned, premeditated murder, in violation of the right to life.⁴⁴ In sum, it has been convincingly demonstrated⁴⁵ that there is no method of applying the death penalty that is not cruel, inhuman and degrading.

³⁷ Cf. e.g., Council of Europe, *Serious Crime and the Requirement of Respect for Human Rights in European Democracies* (Seminar of Taormina, Italy, November 1996), Strassburg, Council of Europe, 1997, pp.7-199, esp. pp. 91-92 (Intervention of J. Mayer-Ladewig)

³⁸ Ibid. p. 194 (Intervention of B. Geremek)

³⁹ Cf. e.g. I/A Court H.R., *Restrictions on the Death Penalty*, Advisory Opinion OC-3/83 of August 9, 1983. pp.3-45, paras. 1-76.

⁴⁰ This tendency toward abolishing the death penalty is expressed in the [Second] Protocol of the American Convention on Human Rights on the Abolition of the Death Penalty (1990); the [Second] Optional Protocol of the International Covenant on Civil and Political Rights of the United Nations on the Abolition of the Death Penalty (1989), and in Protocol No. 6 of the European Convention on Human Rights on the Abolition of the Death Penalty (1983). These Protocols strengthen the commitments already assumed in prior treaties and conventions on human rights protection.

⁴¹ For example, the pertinent humanitarian norms of the four Geneva Conventions of 1949 on International Humanitarian Law (Convention III, Article 101; Convention IV, Article 68(1) and (4), and Article 75(1), (2) and (3); and Article 3(1)(1)(d) of all four Geneva Conventions), and the two Optional Protocols of 1977 of those Conventions (e.g., Protocol I, Articles 77(5) and 76(3); Protocol II, Article 6(2), (4) and (5)), imposing prohibitions and restrictions on the death penalty. The International Committee of the Red Cross has adopted this practice (Cf. *Le CICR condamnations à mort*, 1982, rev. 1987) of interventions to stay the executions of persons in certain categories or in certain circumstances.

⁴² It should not go unnoticed that the *ad hoc* International Criminal Tribunals for the former Yugoslavia (1993) and for Rwanda (1994) do not apply the death penalty, nor is it provided for in the Statute of Rome (of 1998) of the permanent International Criminal Tribunal.

⁴³ Cf. e.g. Human Rights Committee (under Article 7 of the United Nations International Covenant on Civil and Political Rights); cf., W.A. Schabas, op. cit. infra n. (44), p. 138 and cf., p.140.

⁴⁴ W.A. Schabas, *The Abolition of the Death Penalty in International Law*, 2a. ed., Cambridge University Press, 1997, pp. 110, 119 and 295, and c.f. p. 303. In addition, the deterrent effect of the death penalty was never actually proven. Furthermore, the death penalty, once applied, creates an irreversible situation in the face of the inevitable occurrence of judicial errors. Ibid., p. 188f R. Sapienza, "International Legal Standards on Capital Punishment," in *The Right to Life in International Law* (ed. B.G. Ramcharan), Dordrecht, Nijhoff/Kluwer, 1985, pp. 284-296.

⁴⁵ Cf. A. Camus and A. Koestler, *Réflexions sur la peine capitale*, Paris, Calmann-Lévy, 1997 (reprinted), pp.22-286.

34. In my opinion, given the encouraging intersection of purpose between domestic and international legal systems in regard to safeguarding human rights, there is no reason why domestic public law should not take into account the application of international norms of human rights protection. In a Seminar for Caribbean judicial officers in Barbados ten years ago, the participants specifically emphasized the need to reduce the *décalage* between the considerable evolution of International Human Rights Law in the past decades and the “narrower perspective” of contemporary Caribbean constitutionalism.⁴⁶ The foundation for bridging this gap appears to be already established, as in the last years, Caribbean legal doctrine has directed its attention towards the advancements made in the normative and hermeneutic realms of human rights protection at the international level;⁴⁷ this trend should continue in the same direction.

35. In an era such as the present, in today's overcrowded, mechanized world, in which fewer and fewer people actually stop to think, it seems to be the opportune moment to refer to the insight of the German jurist Gustav Radbruch, who, in his last years of teaching in Heidelberg (in the middle of the 20th century), formulated an eloquent defence of natural law, which delves into both international and criminal law. For Radbruch, the “entrance” of international law into the sphere of legal science was brought about “thanks to natural law.”⁴⁸ According to his vision, the resources provided by natural law “are immense,” namely

[Natural law] opened up the eyes of humanity to reveal its chains, thus teaching humanity to shed itself of them. In the name of the inalienable human right to freedom, it struggled against slavery (...); undermined the absolutism of government (...), it safeguarded individuality from the arbitrariness of police abuses and proclaimed the idea of the Republic of Law; it fundamentally corrected criminal law, by opposing justice that is based on arbitrariness and establishing specific categories of crimes; it eliminated the corporal punishment of mutilation as incompatible with human dignity, it abolished criminal procedures employing torture and persecuted the persecutors of witches. (...) Without the any reservations whatsoever, we should thank the proponents of natural law, particularly those that brought freedom to the 19th century, not only through the influence that they exercised over the legislative process, but also through the influence that they exercised over its practice, such as the shame brought about by the insistence to continue applying the letter of the law in applying practices of corporal punishment and torture provided for in a judicial ordinance from the times of Carlos V.⁴⁹

⁴⁶ Cf. Derrick McKoy, “Capital and Corporal Punishment in Human Rights Law,” in *Seminar for Caribbean Judicial Officers on International Human Rights Norms and the Judicial Function* (Proceedings of the 1993 Barbados Seminar, eds. O. Jackman and A.A. Cançado Trindade), San José, Bridgetown, 1995, p.51-76.

⁴⁷ Cf. e.g., Lloyd Barnett, “Human Rights and the Machinery of Justice- Caribbean Judicial Approach to Constitutional and Conventional Human Rights Provisions,” in *Seminar for Caribbean Judicial Officers...*, *op. cit. supra* n. (24), pp. 31-49; and *cf.*, M. Demerieux, *Fundamental Rights in Commonwealth Caribbean Constitutions*, Bridgetown, University of the West Indies, 1992, pp. 115-123, 134-135, 144, 152 and 301.

⁴⁸ Cf. e.g., Association Internationale Vitoria-Suárez, *Vitoria et Suárez- Contribution des théologiens au droit international moderne*, Paris, Pédone, 1939, pp. 3-170; L. Le Fur, “La theorie du droit naturel depuis le XVIIe. siècle et la doctrine moderne,” 18 *Recueil de Cours de l'Académie de Droit International de La Haye* (1927) pp. 297-399; J. Puente Egido, “Natural Law,” in *Encyclopedia of Public International Law* (ed. R. Bernhardt, Max Plack Institute), vol. 7, Amsterdam, North-Holland, 1984, pp. 344-349; A.A. Cancado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Ed. Renovar, 2002, pp. 540-550 and 1048-1109.

⁴⁹ G. Radbruch, *Introducción a la Filosofía del Derecho*, 3a ed., Mexico/ Buenos Aires, Fondo de Cultura Económica, 1965, p. 112-113 (Translation by the Secretariat of the Court).

36. The learned author added that one must ask himself

what punishment signifies for those in charge of imposing it and carrying it out, and for society as a whole, as the imposition of inhuman punishments could fracture the values that it espouses. (...) The death penalty, as with other corporal punishments, (...) is reprehensible from the human point of view to the extent that it is degrading to man by virtue of being a purely corporal punishment.

(...) In the history of the Law, landmark changes have always been initiated, more than any other factor in legal thought, by the transformations experienced in the image of man as conceived of by the law-maker. (...) Every legal system must necessarily detach itself from the general image, from a kind of average man. (...) The respect of subjective rights is almost as important for the legal system as the fulfilment of legal duties.⁵⁰

37. It has already been established that the history of punishment is equally “horrendous and infamous to humanity” as the history of crime itself; as with crime, certain punishments are “cruel,” and engender additional violence, being that “the violence inflicted by punishment is always planned, conscious, organized by the many against one.” It also may be deemed that

[h]umankind has paid for the conglomeration of punishments that have been threatened throughout history in blood, lives and suffering that is immeasurably greater than that produced by the sum of all crimes. (...) If the history of punishment is shameful, then the history of legal and philosophical thought on the issue of punishment is no less shameful, (...) for never having seriously spoken out against the inhumanity of certain punishments until the Age of Enlightenment. (...) ⁵¹

If the debate over punishment was driven by *principles*, founded on the societal conviction of the unconditional inviolability of human life, and not simply *utilitarian*,⁵² perhaps the universal legal conscience would have already have taken a definitive stand through the complete abolition of all corporal punishment, of which the death penalty constitutes a historical relic or remnant.⁵³

III. Epilogue: *Pacta Sunt Servanda*

38. The fact that Trinidad and Tobago denounced the American Convention on Human Rights and is no longer a Party could not be invoked by the respondent State in order to evade the duty to faithfully comply with the present Judgment of the Inter-American Court. In the case of D.R. Thomas and H. Hilaire (Appeal No. 60 of 1998) the Judicial Committee of the Privy Council held on January 1, 1999, *inter alia*, that, upon the ratification of the American Convention, which “provides for individual

⁵⁰ *Ibid*, p.156. For the author, the death penalty historically was the “end point” of a series of punishments, particularly corporal punishments (including the punishment of mutilation), and today is a requirement of these punishments, which “is separated from other forms of punishment by an insurmountable abyss”; G. Radbruch, *Introdução à Ciência do Direito*, São Paulo, Martins Fontes, 1999; pp. 111-112. (Translation by the Secretariat of the Court)

⁵¹ L. Ferrajoli, *Derecho y Razón...*, *op. cit. supra* n. (), pp. 385-387 (Translation by the Secretariat of the Court).

⁵² Rather, on one side, with the defenders of the death penalty invoking arguments concerning the theory of retribution, or intimidation, or social defense or “the idea of society as an organism that should amputate the injured limb;” and, on the other side, the critics of the death penalty invoking its inefficacy as a deterrent, or the “absence of benefit” derived from its application, or its irreversible nature, or its “anti-educative” effect;” *ibid*, p. 387.

⁵³ Cf. *ibid*, pp. 390-411.

access to an international body,” Trinidad and Tobago “made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution.”⁵⁴ The Judicial Committee of the Privy Council continued that, with its denouncement of the American Convention, Trinidad and Tobago “is entitled to curtail such rights of access or prescribe conditions for their exercise for the future. But (...) section 4(a) of the Constitution prevents the government from doing so retrospectively so as to affect existing applications.”⁵⁵

39. In other words, the rights protected in the American Convention, whose violation was established in the present Judgment on the merits and reparations in the *Hilaire, Constantine and Benjamin et al. Case*, are not affected in any way by Trinidad and Tobago’s denouncement of the American Convention. From the perspective of an international human rights tribunal such as the Inter-American Court of Human Rights, this is true not only by virtue of what the Judicial Committee of the Privy Council (the argument of the authority) correctly recognized, but rather can also be inferred from the provisions of the American Convention and from the general principles of international law (the authority for the argument).

40. In any case, the prior question concerning the jurisdiction of the Inter-American Court was definitively resolved by the Judgments on the preliminary objections of September 1, 2001 in the *Hilaire, Constantine et al.* and *Benjamin et al.* cases (which were then joined). In those Judgments, the Court, making use of the abilities inherent to it (due to the imperative of juridical certainty), determined the scope of its own jurisdiction, and, preserving the integrity of the protection mechanisms of the American Convention, retained jurisdiction over the present Case.⁵⁶ The respondent State, therefore, finds itself bound (*pacta sunt servanda*) by the holdings of the present Judgment on the merits and reparations.

41. The rule of *pacta sunt servanda*, enshrined in the Vienna Convention of the Law of Treaties of 1969 (Article 26 and Preamble), likewise cannot be diminished by the fact that Trinidad and Tobago has not ratified this Convention, as the Convention merely articulated existing norms of international customary law. The rule of *pacta sunt servanda*, which incorporates the concept of good faith (*bona fides*)⁵⁷ effectively transcends the law of treaties, being characterized by doctrine, whether as a norm of customary law⁵⁸ or as a general principle of international law.⁵⁹

⁵⁴ Privy Council Office/Judicial Committee, Privy Council Appeal No. 60 of 1998- D.R. Thomas and H. Hilaire (Trinidad and Tobago), Decision of January 27, 1999, p.12.

⁵⁵ Ibid. pp. 12-13.

⁵⁶ On the basis of the applicable provisions of the American Convention (Articles 62(3) and 78(2)).

⁵⁷ M. Lachs, “Some Thoughts on the Role of Good Faith in International Law,” in *Declarations on Principles, a Quest for Universal Peace- Liber Amicorum Discipulorumque B.V.A. Roling*, Leyden, Sijthoff, 1977, pp. 47-55, M.K. Yassen, “L’Interprétation des traits d’après de la Convention de Vienne sur le Droit des Traités,” 151 *Recueil des Cours de l’Académie de Droit International de La Haye* (1976) p.20; Clive Parry, “Derecho de los Tratados,” in *Manual de Derecho Público* (ed. M. Sorensen), 5th edition, Mexico, Fondo de Cultura Económica, 1994, pp. 229 and 200-201.

⁵⁸ See, e.g., B. Conforti, *Derecho Internacional*, Buenos Aires, Zavallia Ed., 1995, p. 67; also H. Mosler, “The International Society as a Legal Community,” 140 *Recueil des Cours de l’Académie de Droit International de La Haye* (1974) pp. 115-116 – Rules (such as the *pacta sunt servanda*) enshrined in treaties can very well be evidence of international customary law; R.R. Baxter, “Treaties and Custom,” 129 *Recueil des Cours de l’Académie de Droit International de La Haye* (1970) pp.31, 43, 57 and 102-103.

42. Its inclusion in the Vienna Convention reconstituted the *pacta sunt servanda* as an axiomatic paradigm: it came to form part of a convention on codification, which undeniably established its broad scope. However, long before the enshrinement of the *pacta sunt servanda* in the Vienna Convention of 1969,⁶⁰ it had become, more than a general rule of treaty interpretation, a norm of customary international law or a veritable general principle of international law, endowed with wide jurisprudential recognition.⁶¹

43. Treaty law is closely related to the tenets of International Law, including the area of law concerning the international responsibility of States.⁶² The scope of the *pacta sunt servanda* rule, as with the previous issue of the validity of International Law norms, transcends the sphere of treaty law.⁶³ Regardless, the *pacta sunt servanda* rule finds itself profoundly rooted in the system of International Law as a whole.⁶⁴ I trust that Trinidad and Tobago will know, in light of the international obligations that it has assumed, and bearing in mind the established principle of international law *pacta sunt servanda*, to fulfil, in good faith, the obligations of the present Judgment of the Inter-American Court of Human Rights on the merits and reparations in the *Hilaire, Constantine and Benjamin et al Case*.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura Robles
Secretary

⁵⁹ Ian Brownlie, *Principles of Public International Law*, 5th edition, Oxford University Press, 1998, p. 620.

⁶⁰ Cf. Lord McNair, *The Law of Treaties*, Oxford, Clarendon Press, 1961, pp. 493 and 505; and, for the historical and doctrinal evolution of the rule of *pacta sunt servanda*, cf., e.g. M. Sibert, "The *Pacta Sunt Servanda* Rule: From the Middle Ages to the Beginning of Modern Times," 5 *Indian Yearbook of International Affairs* (1956) pp. 219-226; J.B. Whitton, "La règle *pacta sunt servanda*," 49 *Recueil des Cours de l'Académie de Droit International de La Haye* (1934) pp. 151-268.

⁶¹ E. de la Guardia and M. Delpech, *El Derecho de los Tratados y la Convención de Viena*, Buenos Aires, La Ley, 1970, p. 276.

⁶² Paul Reuter, *Introduciton au droit des traits*, 2nd edition, Paris, PUF, 1985, p.32.

⁶³ Perhaps the ultimate foundation for international obligations is of metalegal origin; J.L. Brierly, *The Basis of Obligation in International Law*, Oxford, Clarendon Press, 1958, p. 65; J.L. Brierly, *The Law of Nations*, 6th edition, Oxford, Clarendon Press, 1963, p. 54.

⁶⁴ M. Lachs, "Pacta Sunt Servanda," in *Encyclopedia of Public International Law*, (edited by R. Bernhardt), vol. 7, Amsterdam, North-Holland/ Max Planck Institut, 1984, pp. 364-371.