

**CONCURRING OPINION OF
JUDGE A.A. CANÇADO TRINDADE**

1. In voting in favour of the adoption, by the Inter-American Court of Human Rights, of the present Judgment on the merits of the case "*The Last Temptation of Christ*" (*Olmedo Bustos and Others versus Chile*), which safeguards the right to the freedom of thought and expression, I feel obliged to express my thoughts on the highly relevant juridical implications of the decision of the Court, as the foundation of my position in this respect. The present Judgment of the Court on the case "*The Last Temptation of Christ*" has a bearing on the fundamental question of the very origin of the international responsibility of the State, as well as on the extent of the conventional obligations of protection of human rights. This can be inferred from its categorical paragraph 72, in which the Court expresses, in my view correctly and lucidly, its understanding to the effect that

"(...) the international responsibility of the State can generate by acts or omissions on the part of any of its powers or organs, irrespective of their hierarchy, which violate the American Convention. That is, any act or omission, imputable to the State, in breach of the norms of the International Law of Human Rights, engages the international responsibility of the State. In the present case this latter was generated by the fact that Article 19.12 of the Constitution establishes prior censorship in movie production and, thereby, determines the acts of the Executive, Legislative and Judicial Powers".

2. The question of the compatibility of a norm of domestic law of a State Party with the American Convention on Human Rights thus returns to the consideration of the Court, - and, in the present case, the norm at issue being one of constitutional level. This is a question that, by its implications, has led me to develop, on earlier occasions, some thoughts, in my Dissenting Opinions in the cases *El Amparo, Caballero Delgado and Santana*, and *Genie Lacayo*. It is not my intention here to reiterate them, as the object of my dissenting position in those cases (in my view a self-limitation of the Court of the extent of its own faculties of protection) no longer exists in the subsequent and contemporary case-law of our Tribunal, which has much evolved in this respect, above all as from the new criterion on the matter established in the case *Suárez Rosero* (cf. *infra*). Nevertheless, as it is a central question in the *cas d'espèce*, I deem it proper to recall the main points raised in those thoughts, in so far as they have a direct bearing on the examination of the matter in the circumstances of the present case "*The Last Temptation of Christ*".

3. In the case of *El Amparo* (Reparations, 1996)¹, concerning Venezuela, I sustained, in my Dissenting Opinion referred to, that the very existence of a legal provision of domestic law can *per se* create a situation that directly affects the rights protected by the American Convention, by the *risk* or the real *threat* that its applicability represents, without it being necessary to wait for the occurrence of a damage; otherwise, the duty of prevention, set forth in the case-law of the Inter-American Court itself, could hardly be sustained (pars. 2-3 and 6). After I referred to the international case-law in support of this position (pars. 5 and 10), I added that, as from the moment that violations of the protected human rights were found, the examination of the incompatibility of norms of domestic law with the American Convention is no longer "an *abstract question*"; that is, the questioning of the compatibility with the Convention of the existence of a norm of domestic law in force,

¹. Inter-American Court of Human Rights (IACtHR), Judgment of 14.09.1996, Series C, n. 28.

which "*per se* creates a legal situation that affects the protected human rights", is in fact "a *concrete question*" (pars. 7-8).

4. I then expressed, in that Opinion, my understanding in the sense that "it is the existence of victims that provides the decisive criterion for distinguishing the examination simply *in abstracto* of a legal provision, from the determination of the incompatibility of such provision with the American Convention (...) in the framework of a concrete case (...). The existence of victims renders juridically inconsequential the distinction between the law and its application, in the context of a concrete case" (pars. 7-8 and 11)². In the same case of *El Amparo* (Interpretation of Judgment, 1997)³, in a subsequent Dissenting Opinion, I insisted on my understanding that that responsibility of the State is engaged as from the moment in which the State fails to comply with an international obligation irrespective of the occurrence of an additional damage (pars. 24-25, 21 and 26). The American Convention, together with other human rights treaties, "were conceived and adopted on the basis of the assumption that the domestic legal orders ought to be harmonized with the conventional provisions, and not *vice-versa*" (par. 13). Definitively, - I warned, - one

"cannot legitimately expect that such conventional provisions be 'adapted' or subordinated to the solutions of constitutional law or of internal public law, which vary from country to country (...). The American Convention, as well as other human rights treaties, seek, *a contrario sensu*, to have in the domestic law of the States Parties, the effect of improving it, in order to maximize the protection of the recognized rights, bringing about, to that end, whenever necessary, the revision or revocation of national laws (...) which do not conform to its standards of protection" (par. 14).

5. This being so, sustaining the thesis of the *objective* international responsibility of the States Parties as the one which provides the conceptual basis of the duty of prevention, I added that

"A State, accordingly, may have its international responsibility engaged, in my view, by the simple approval and promulgation of a law in conflict with its conventional international obligations of protection, or by its failure to harmonize its domestic law in order to secure the faithful compliance with such obligations, or by its failure to adopt the legislation needed to comply with these latter. *Time has come to give precision to the scope of the legislative obligations of States Parties to human rights treaties*. The *tempus commisi delicti* is, in my understanding, that of the approval and promulgation of a law which, *per se*, by its existence itself, and its applicability, affects the protected human rights (in the context of a given concrete case, where *victims* of violations of the protected rights *exist*), without the need to wait for the subsequent application of that law, generating an additional damage.

². And I added: - "(...) In the exercise of the contentious jurisdiction the Court may determine, at the request of a party, the incompatibility or otherwise of a domestic law with the Convention *in the circumstances of the concrete case*. The American Convention effectively authorizes the Court, in the exercise of its contentious jurisdiction, to determine whether a law, impugned by the complainant party, and which by its own existence affects the protected rights, is or not contrary to the American Convention on Human Rights" (pars. 7-8 and 11).

³. IACtHR, Resolution of 16.04.1997, Series C, n. 46.

The State at issue ought to remedy promptly such situation, since failure to do so could constitute a 'continuing situation' in violation of human rights (denounced in a concrete case). It is perfectly possible to conceive of a 'legislative situation' contrary to the international obligations of a given State (e.g., maintaining a legislation in conflict with the conventional obligations of protection of human rights, or failing to adopt the legislation required to give effect to such obligations in the domestic law). In this case, the *tempus commisi delicti* would extend so as to cover the whole period in which the national laws remained in conflict with the conventional international obligations of protection, entailing the additional obligation of reparation for the successive damages resulting from such "continuing situation" during the whole period at issue" (pars. 22-23).

The facts in the present case of "*The Last Temptation of Christ*" disclose, in my view, that these considerations are valid for all norms of domestic law (comprising the norms of both infraconstitutional as well as constitutional levels).

6. Further on, in another Dissenting Opinion, in the case of *Genie Lacayo versus Nicaragua* (Revision of Sentence, 1997)⁴, I observed that "the notion of 'continuing situation', - nowadays supported by a vast case-law in the domain of the International Law of Human Rights, - comprises violations of human rights which, e.g., cannot be divorced from the legislation from which they result (and which remains in force). (...) Such continuing situation may arise, for instance, from the persistence, either of national laws incompatible with the Convention, or of a *jurisprudence constante* of national tribunals clearly adverse to the victim" (pars. 9 and 27).

7. Accordingly, - I added, - in my understanding, the *existence* itself of a norm of domestic law "entitles the victims of violations of the rights protected by the American Convention to require its compatibilization with the provisions of the Convention, (...) without having to wait for the occurrence of an additional damage by the continued application" of such law (par. 10)⁵. I sustained the same position, likewise, in my Dissenting Opinion (par. 21) in the case of *Caballero Delgado and Santana versus Colombia* (Reparations, 1997)⁶, in which I pointed out the indissociability between the two general obligations set forth in the American Convention, namely, that of respecting and of ensuring respect for the protected rights (Article 1.1) and that of harmonizing the domestic law with the international norms of protection (Article 2) (pars. 6 and 9).

8. Such general obligations undoubtedly require from the States Parties the adoption of legislative and other measures to *guarantee* the rights set forth in the Convention and to improve the conditions of their exercise (par. 3). Such obligations, in their wide scope, are incumbent upon all the powers of the State, which are "under the obligation to take the necessary measures to give effectiveness to the American Convention at domestic law level. Non-compliance with the conventional obligations, as

⁴. IACtHR, Resolution of 13.09.1997, Series C, n. 45.

⁵. In this respect, I saw it fit to warn that "while a clear understanding of the wide scope of the conventional obligations of protection does not prevail in all the States Parties to the American Convention, - a clear understanding that the international responsibility of a State may be engaged by any act, or omission, of any of its powers (Executive, Legislative or Judicial), - very little progress will be achieved in the international protection of human rights in our continent" (par. 24).

⁶. IACtHR, Judgment of 29.01.1997, Series C, n. 31.

known, engages the international responsibility of the State, for acts or omissions, either of the Executive Power, or of Legislative, or of the Judiciary" (par. 10). And I pointed out:

"In fact, those two general obligations, - which are added to the other specific conventional obligations concerning each of the protected rights, - are incumbent upon the States Parties by the application of International Law itself, of a general principle (*pacta sunt servanda*) whose source is metajuridical, in seeking to be based, beyond the individual consent of each State, on considerations concerning the binding character of the duties derived from international treaties. In the present domain of protection, the States Parties have the general obligation, arising from a general principle of International Law, to take all measures of domestic law to *guarantee* the effective protection (*effet utile*) of the recognized rights" (par. 8).

9. Seeking to stress the importance of the adoption of such positive measures on the part of the States, I pondered that they can bring about changes in the domestic law which transcend the particular circumstances of the concrete cases; "examples of cases", - I added, - "in which national laws were in fact modified, in accordance with the decisions of the international human rights supervisory organs in individual cases, abound in international practice. The efficacy of human rights treaties is measured, to a large extent, by their impact upon the domestic law of the States Parties" (par. 5).

10. Nevertheless, at this beginning of the XXist century, the circumstances of the present case of "*The Last Temptation of Christ*" seem to indicate that the advances in this respect are slow. In the last century, already in 1937, a distinguished *scholar* of human rights pondered that the day when the historical evolution were to enter into "an era of conscious consolidation of international law", States will not only adopt this latter as an "integral part of their Constitution", but will also no longer adopt laws that obstruct international law forming an "integral part of its system" of domestic law⁷. Nowadays, in the year 2001, it may be said, in the light, e.g., of the present case, that we have not yet succeeded to achieve this degree of development of the domestic law of the States Parties to human rights treaties. One ought, thus, to keep on insisting on their legislative and judicial obligations, besides the executive ones⁸.

11. It would not be exact to deny all progress in this domain either. There have been advances, but we remain regrettably far from fulfilling the ideal of the full compatibilization of the domestic legal order with the norms of the international protection of human rights. One of the advances is found in the more recently case-law

⁷. Hersch Lauterpacht, "Règles générales du droit de la paix", 62 *Recueil des Cours de l'Académie de Droit International de La Haye* (1937) pp. 145-146; text reproduced subsequently, in English, in *International Law Being the Collected Papers of Hersch Lauterpacht*, vol. I, Cambridge, University Press, 1970, p. 229.

⁸. Cf., in this respect, e.g., Hildebrando Accioly, *Tratado de Direito Internacional Público*, 2nd. ed., vol. I, Rio de Janeiro, Ed. MRE, 1956, pp. 280-310; H. Dipla, *La responsabilité de l'État pour violation des droits de l'homme - Problèmes d'imputation*, Paris, Pédone, 1994, pp. 17-32. César Sepúlveda, for example, was quite clear in admitting "the responsibility of a State for the promulgation of laws contrary to this [internacional] legal order, and more clearly, of those which result in contraposition to a treaty"; and he added that "responsibility is also deduced for a member of the international community if it does not adopt a law that it had committed itself by a treaty to adopt, or to promulgate it in accordance with international law. Likewise, responsibility may ensue when it does not act to derogate a law which is incompatible with the international obligations contracted by the State"; C. Sepúlveda, *Derecho Internacional*, 13th. ed., Mexico, Ed. Porrúa, 1983, pp. 237-238.

itself of the Inter-American Court on the matter⁹. Thus, in the case of *Loayza Tamayo versus Peru* (Merits, 1997)¹⁰, the Court determined the incompatibility with the American Convention (Article 8(4)) of the decrees-laws which typified the crimes of "traición a la patria" and of "terrorism" (pars. 66-77). Subsequently, in the case of *Castillo Petruzzi versus Peru* (Merits, 1999)¹¹, the Court held that such decrees-laws violated Article 2 of the Convention, which requires not only the suppression of norms in breach of the guarantees enshrined therein, but also the adoption of norms in order to secure the observance of those guarantees (pars. 207-208); this being so, the Court ordered the respondent State to reform the norms of domestic law declared to be in violation of the American Convention (resolutive point n. 14).

12. In the case *Garrido and Baigorria versus Argentina* (Reparations, 1998)¹², the Court dedicated a whole section of the Judgment (part IX) to the State's duty to take action in the ambit of domestic law, in which it recalled, *inter alia*, that "under the law of nations, a customary norm prescribes that a State that has concluded and international agreement must introduce into its domestic law whatever changes are needed to ensure execution of the obligations it has undertaken" (par. 68). In sum, this is the duty of the State to take *positive measures of effective* protection (par. 69) of the human rights of all persons under its jurisdiction.

13. But the great qualitative step forward in the recent case-law of the Court, the true landmark on the question at issue, occurred in the case of *Suárez Rosero versus Ecuador* (Merits, 1997); in its Judgment, the Court, in declaring *inter alia* that a provision of the Ecuadorean Penal Code was in breach of Article 2 of the American Convention, in combination with Articles 7.5 and 1.1 of the latter (resolutive point n. 5), the Court pointed out not only that the impugned legal provision had been applied in the *cas d'espèce*, but also that, in its view, that provision of the Ecuadorean Penal Code violated *per se* Article 2 of the Convention, "*whether or not it was enforced in the instant case*" (par. 98)¹³. In this way, the Court endorsed, at last, the thesis of the international *objective* responsibility of the State, admitting that a norm of domestic law can, in the circumstances of a concrete case, by its own existence and applicability breach the American Convention on Human Rights.

14. If any doubt were still to persist as to this point, i.e., that the very existence and applicability of a norm of domestic law (be it infraconstitutional or constitutional) can *per se* engage the responsibility of the State under a human rights treaty, the facts

⁹. In my aforementioned Dissenting Opinion in the case of *El Amparo* (Interpretation of Sentence, 1997), I pondered that the Inter-American Court was, at that time (April 1997), "at a crossroads" in relation to the question dealt with herein: either it continued to insist, as to the national laws of the States Parties to the American Convention, on the occurrence of a damage resulting from its effective application as a precondition to determine the incompatibility or otherwise of such laws with the Convention (as it did in the cases of *El Amparo* and *Genie Lacayo, supra*), or else it would come to proceed to such determination (and of its juridical consequences in concrete cases) as from the very existence and applicability of the national laws, bearing in mind the duty of prevention incumbent upon the States Parties to the Convention (as I sustained in my Dissenting Opinions in the cases of *El Amparo, Caballero Delgado and Santana, and Genie Lacayo, supra*) (par. 12).

¹⁰. IACtHR, Judgment of 17.09.1997, Series C, n. 33.

¹¹. IACtHR, Judgment of 30.05.1999, Series C, n. 52.

¹². IACtHR, Judgment of 27.08.1998, Series C, n. 39.

¹³. Emphasis added.

of the present case of "*The Last Temptation of Christ*" contribute, in my view decisively, to dissipate such doubt. From the facts in this case of "*The Last Temptation of Christ*" it is rather inferred that, in circumstances such as those of the *cas d'espèce*, the attempt to distinguish between the existence and the effective application of a norm of domestic law, for the purpose of determining the configuration or otherwise of the international responsibility of the State, becomes irrelevant, and discloses an extremely formalist outlook of Law, devoid of any sense.

15. In fact, in the present case of "*The Last Temptation of Christ*", new elements have been introduced which require a more detailed examination of the question at issue. In its brief of 17.08.1999, the respondent State argued that it was not possible for its international responsibility to be engaged in the concrete case by one sole sentence of the Judiciary, without compliance with "other requisites"; according to that brief, in the view of the State, it did not suffice for a judicial decision to be considered contrary to international law, as it became necessary that such decision were "endorsed by the support or at least the inactivity of the legislative or executive organs". In other words, according to the State, there should be a concurrence of all powers of the State, in a same sense, for its international responsibility to be engaged.

16. Nevertheless, there is a vast and long international case-law clearly oriented a *contrario sensu*, sustaining that the origin of the international responsibility of the State can lie in any act or omission of any of the powers or agents of the State (be it of the Executive, or of the Legislative, or of the Judiciary)¹⁴. If it were necessary to seek support for the assertion of the existence of legislative obligations in earlier international case-law, therein we would, anyway, find it, e.g., as from the *locus classicus* on the matter, in the Judgment on the case concerning *Certain German Interests in Polish Upper Silesia* (Germany versus Poland, 1926), and in the Advisory Opinion on *German Settlers in Poland* (1923), both of the old Permanent Court de International Justice (PCIJ)¹⁵. To resort to classic international case-law on the matter, however, does not seem strictly necessary to me, as I have already pointed out on another occasion¹⁶: given the specificity of the International Law of Human Rights, the pronouncements, on the matter, on the part of distinct organs of international supervision of human rights, appear to me more than sufficient to affirm the existence of *legislative obligations* - besides the *judicial*, as well as the *ejecutive* ones - of the States Parties to human rights treaties like the American Convention¹⁷.

¹⁴. Cf., e.g., the digest of case-law in United Nations, *Yearbook of the International Law Commission* (1969)-II, especially pp. 105-106.

¹⁵. In the exercise of its contentious as well as advisory jurisdiction, the PCIJ pronounced clearly on the matter: in the Judgment above-mentioned, it asserted that national laws are facts which express the will and constitute the activities of the States, in the same way as the judicial decisions or the administrative measures, and concluded that the Polish legislation at issue was contrary to the German-Polish Convention which protected the German interests in question; and in the Advisory Opinion referred to, it sustained that the Polish legislative measures at issue were not in conformity with the international obligations of Poland. *Cit. in* United Nations, *Yearbook of the International Law Commission* (1964)-II, p. 138.

¹⁶. In my aforementioned Dissenting Opinion in the case *Caballero Delgado and Santana versus Colombia* (Reparations, 1997), par. 21, n. 24.

¹⁷. Besides the case-law to this effect already quoted in my aforementioned Opinions (e.g., the judgments of the European Court of Human Rights in the cases *Klass and Others* (1978), *Marckx* (1979), *Johnston and Others* (1986), *Dudgeon* (1981), *Silver and Others* (1983), *De Jong, Baljet and van den Brink* (1984), *Malone* (1984), *Norris* (1988), as well as the Views of the Human Rights Committee - under the Covenant on Civil and Political Rights of the United Nations - in the cases *Aumeeruddy-Cziffra and Others* (1981), and of the *Handicapped Italians* (1984)), - I could add, as an additional illustration, other decisions. Thus, e.g., in its Views (of 31.03.1993) in the case *J. Ballantyne, E. Davidson and G. McIntyre versus Canada* (communications 359/1989 y 385/1989), the Human Rights Committee urged the State

17. As to doctrine, if it were not sufficient to count on the previously summarized considerations, developed in my Opinions in earlier cases before this Court (cf. pars. 3-9, *supra*, of the present Concurring Opinion), I would limit myself to refer, in addition, to the writings, on the subject, of two great jusinternationalists of the XXth century, Eduardo Jiménez de Aréchaga and Roberto Ago. In a study published in 1968, Jiménez de Aréchaga, - who was later to become President of the International Court of Justice, - recalled that the unsuccessful Hague Conference on the Codification of International Law (1930), at least contributed with the "general recognition" of the responsibility of States for judicial decisions clearly incompatible with the international obligations contracted by the respective States. On the occasion, several Delegates pointed out that, though it was certain that the independence of the Judicial Power constituted a "fundamental principle in constitutional law", nevertheless it was an "irrelevant" factor in international law¹⁸.

18. This being so, - added the Uruguayan jurist, - one had to admit that the activity of the Judicial Power of a State effectively engaged the responsibility of the State whenever it appeared contrary to the international obligations of such State. Although independent from the Executive Power, the Judicial Power is not independent from the State, but quite on the contrary, it is part of the State, for international purposes, as much as the Executive Power¹⁹. Thereby, already seventy years ago, there were no longer traces of the surpassed doctrinal attempts, of the XIXth and beginning of the XXth centuries, that sought in vain to avoid the extension to the Judicial Power of the principle of the international responsibility of the State for acts or omissions of all its powers and organs.

19. On his turn, Roberto Ago, as special *rapporteur* of the United Nations International Law Commission on the theme of the Responsibility of the State, was categorical in that respect, in his substantial Third Report (of 1971), titled "*The Internationally Wrongful Act of the State, Source of International Responsibility*":

Party to put an end to the violation of Article 19 (right to freedom of expression) of the Covenant on Civil and Political Rights, "amending the [national] law" as it ought to; U.N., document CCPR/C/47/D/359/1989-385/1989/Rev.1, of 05.05.1993, p. 17, par. 13 (restricted circulation). Likewise, in its Views (of 31.03.1994) in the case *N. Toonen versus Australia* (communication 488/1992), the Human Rights Committee pointed out that "except in Tasmania, all the laws which sanctioned homosexuality have been derogated all over Australia", and that in the present case it was necessary to derogate the "wrongful law" (provisions of the Criminal Code of Tasmania), in breach of Articles 17(1) and 2(1) (right to private or family life, and general obligation to respect the protected rights, respectively) of the Covenant on Civil and Political Rights; U.N., document CCPR/C/50/D/488/1992, of 04.04.1994, p. 13, pars. 8-11 (restricted circulation). In its turn, the African Commission on Human and Peoples' Rights, in the cases (ns. 60/91 y 87/93) of the *Constitutional Rights Project* (1994), concerning Nigeria, established a violation *inter alia* of Article 7 (right to a *fair trial*) of the African Charter on Human and Peoples' Rights, resulting from the operation of "special tribunals" by a decree; cf. *Decisions of the African Commission on Human and Peoples' Rights* (1986-1997), Series A, vol. 1, Banjul, 1997, pp. 55-59 and 101-104. And the old European Commission on Human Rights, even in the examination of petitions which it rejected as inadmissible, admitted, however, that, in principle, an individual can complain of a law which, by its existence itself, would be incompatible with the European Convention of Human Rights, if he runs the *risk* of being directly affected by it. Cf., to this effect, e.g., application n. 24877/94, *A. Casotti and Others versus Italy*, decision of 16.10.1996, in *87 Decisions and Reports* (1996) pp. 63 and 65; and application n. 24581/94, *N. Gialouris, G. Christopoulos and 3333 Other Customs Workers versus Greece*, decision of 06.04.1995, in *81-B Decisions and Reports* (1995) pp. 123 and 127.

¹⁸. Eduardo Jiménez de Aréchaga, "International Responsibility", in *Manual of Public International Law* (ed. Max Sorensen), London/N.Y., MacMillan/St. Martin's Press, 1968, p. 551.

¹⁹. *Ibid.*, p. 551.

"(...) No-one now supports the old theories which purported to establish an exception in the case of legislative organs on the basis of the 'sovereign' character of Parliament, or in the case of jurisdictional organs by virtue of the principle of independence of the courts or the *res judicata* authority of their decisions. The cases in which certain States have resorted to arguments based on principles of this kind, and have found arbitral tribunals willing to accept them, belong to the distant past. Today, the belief that the respective positions of the different powers of the State have significance only for constitutional law and none for international law (which sees the State only in its entity) is firmly rooted in international jurisprudence, the practice of States and the doctrine of international law.

(...) The doctrine of the impossibility of invoking international responsibility for the acts of legislative or judicial organs has not been advanced for a long time. On the other hand, the possibility of invoking international responsibility for such acts has been directly or indirectly recognized on many occasions. (...)"²⁰.

20. In the correct understanding of the Italian jurist, expressed as from his Second Report (of 1970), on "*The Origin of International Responsibility*", any conduct of a State classified by international law as internationally wrongful entails the responsibility of that State in international law; thus, any internationally wrongful act (or omission) constitutes "a source of international responsibility"; as an illustration, Ago mentioned the failure of a State to abide by the international obligation to adopt certain legislative measures required by the treaty at issue, to which it is a Party²¹. The damage can be taken into account, for the purpose of the determination of the reparations, "but is not a prerequisite for the determination that an internationally wrongful act has been committed"²².

21. Moreover, the independence of the characterization of a given act (or omission) as wrongful in international law from the characterization - similar or otherwise - of such act by the domestic law of the State, constitutes a general principle of the law on the international responsibility²³. The fact that a given State conduct conforms itself with the provisions of domestic law, or even is required by this latter, does not mean that its internationally wrongful character can be denied, whenever it constitutes a violation of an international obligation; as pointed out by the well-known *obiter dictum* of the old Permanent Court of International Justice (PCIJ) in the case of *Certain German Interests in Polish Upper Silesia* (Merits, 1926), from the standpoint of international law, the norms of domestic law are nothing more than simple facts²⁴.

²⁰. Roberto Ago (special *rapporteur*), "Third Report on State Responsibility: The Internationally Wrongful Act of the State, Source of International Responsibility", in United Nations, *Yearbook of the International Law Commission* (1971)-II, part I, pp. 246-247, pars. 144 and 146.

²¹. Roberto Ago (special *rapporteur*), "Second Report on State Responsibility: The Origin of International Responsibility", in United Nations, *Yearbook of the International Law Commission* (1970)-II, pp. 179, 187 and 194, pars. 12, 31 and 50.

²². Roberto Ago, "Third Report on State Responsibility...", *op. cit. supra* n. (17), p. 223, par. 74.

²³. *Ibid.*, pp. 226, 232 and 238, pars. 86, 88, 103-104 and 120.

²⁴. *Ibid.*, pp. 227, 237 and 246, pars. 92, 117 and 145. - Likewise, it is *jurisprudence constante* of the International Court of Justice (ICJ) the principle whereby a State cannot invoke difficulties of domestic law in order to evade the observance of its international obligations, - a principle which is set forth in the two Vienna Conventions on the Law of Treaties (of 1969 and 1986, Article 27), and which was also singled out, in his work of codification, in 1957 and 1961, by the previous special *rapporteur* on the matter of the International Law Commission of the United Nations, the Cuban jurist F.V. García Amador, duly recalled by Roberto Ago (*ibid.*, pp. 228 and 231, pars. 94 and 100).

Thus, it is not the task of international law to occupy itself with the "organization" of the State²⁵.

22. In fact, the question of the distribution of competences, and the basic principle of the separation of powers, are of the greatest relevance in the ambit of constitutional law, but in that of international law they are nothing but facts, which have no incidence on the configuration of the international responsibility of the State. The frustrated attempts, in an already distant past, to place the legislative and judicial powers of the State out of international contacts (under the influence, to some extent, of some of the earlier manifestations of legal positivism), would have no sense in our days. They belong to a world which no longer exists.

23. The world has substantially changed already some decades ago, and no one, in sound conscience, would today pretend to advance a reasoning to that effect. The State, as an indivisible whole, remains a center of *imputation*, bound to answer for the internationally wrongful acts or omissions, of any of its powers, or of its agents, irrespective of hierarchy. As very well pointed out by the Swiss jurist Max Huber, in his well-known arbitral award of 1925 in the case of the *Island of Palmas* (The Netherlands *versus* United States), the competences (territorial and jurisdictional) exercised by the States have as a counterpart the duties incumbent upon them, emanated from international law, in their relations with other States²⁶, - and, I would allow myself to add, also, under the impact of the International Law of Human Rights in the last decades, in relation to all human beings under their respective jurisdictions.

24. It is today recognized as a contribution - a clarifying element - of the prolonged labour, still unfinished, of the United Nations International Law Commission (ILC) on the Responsibility of the State (in particular of its part I), the distinction adopted between *primary* rules of international law, those which impose specific obligations to the States, and *secondary* rules of international law, those which determine the juridical consequences of the non-compliance by the States of the obligations established by the primary rules. This distinction contributes to clarify that the responsibility of the State is engaged as from the moment of the international wrongful act (or omission), there arising therefrom a subsidiary obligation to put an end to the consequences of the violation (what may mean, in the circumstances of a concrete case, e.g., to modify a national law) and to provide reparation for the damages.

25. The present Judgment of the Inter-American Court on the merits in the case of "*The Last Temptation of Christ*" represents, in this respect, in my view, a sensible jurisprudential advance. As known, once established the international responsibility of a State Party to a human rights treaty, such State has the duty to reestablish the situation that secures to the victims the enjoyment of their violated right (*restitutio in integrum*), putting an end to the situation in breach of that right, as well as, in the light of the case, to provide reparation for the consequences of such violation. The present Judgment of the Court, besides establishing the indissociability between the general duties of Articles 1.1 and 2 of the American Convention (pars. 85-90), places such duties in the framework of reparations, under Article 63.1 of the Convention: the Court

²⁵. As recalled by R. Ago, in *ibid.*, p. 236, par. 113.

²⁶. U.N., *Reports of International Arbitral Awards / Recueil des sentences arbitrales*, vol. II, pp. 838-839.

correctly determines that, in the circumstances of the *cas d'espèce*, the modifications in the domestic legal order required to harmonize this latter with the norms of protection of the American Convention constitute a form of non-pecuniary reparation under the Convention²⁷ (pars. 96-98). And in a case like the present one, pertaining to the safeguard of the right to freedom of thought and of expression, such non-pecuniary reparation is considerably more important than an indemnization.

26. Another distinction found in part I of the aforementioned project of the ILC, between the obligations of *behaviour* and those of *result*, despite all the doctrinal debate it has entailed in the last three decades, has, at least, exercised the role of demonstrating the necessity to promote a better articulation between the domestic and international legal orders²⁸. I consider such articulation of particular importance for the future of the international safeguard of human rights, with special emphasis on the *positive obligations* of protection on the part of the State, on the basis of its *objective* international responsibility engaged as from the violation of its international obligations²⁹.

27. The harmonization of the norms of domestic law with the provisions of human rights treaties can in fact be considered an obligation of result. But this does not mean that compliance with it can be postponed indefinitely. The whole doctrinal and jurisprudential construction of the last decades about the positive obligations of the States Parties to human rights treaties represents a reaction against the inertia, or the slowness, or the omissions of the public power in the present domain of protection. Such construction contributes to explain, and to set the foundations of, the legislative obligations of the States Parties to human rights treaties.

28. There remains a last point for me to consider in this Concurring Opinion, which was object of attention and debate in the public hearing before the Inter-American Court on the present case of "*The Last Temptation of Christ*", held on 18 and 19 November 1999: I refer to the argument of the respondent State according to which the domestic remedies would not have been exhausted, given the fact that a project of

²⁷. Precisely to this effect I had already pronounced in my Dissenting Opinion in the case *Caballero Delgado and Santana versus Colombia* (Reparations, 1997 - IACtHR, Judgment of 29.01.1997, Series C, n. 31), pars. 6 and 9 (on the indissociability between the general duties of Articles 1.1 and 2 of the American Convention), and pars. 13-14 and 20 (on the modifications of norms of domestic law as a form of non-pecuniary reparation under the Convention).

²⁸. P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des États", 188 *Recueil des Cours de l'Académie de Droit International de La Haye* (1984) pp. 50 and 25; and cf. P.A. Fernández Sánchez, *Las Obligaciones de los Estados en el Marco del Convenio Europeo de Derechos Humanos*, Madrid, Ministerio de Justicia Publs., 1987, pp. 59-83 and 193-194.

²⁹. Cf., on the matter, e.g., Jules Basdevant, "Règles générales du droit de la paix", 58 *Recueil des Cours de l'Académie de Droit International de La Haye* (1936) pp. 670-674; Eduardo Jiménez de Aréchaga, *El Derecho Internacional Contemporáneo*, Madrid, Ed. Tecnos, 1980, pp. 319-325, and cf. pp. 328-329; Ian Brownlie, *System of the Law of Nations - State Responsibility - Part I*, Oxford, Clarendon Press, 1983, p. 43; Ian Brownlie, *Principles of Public International Law*, 4th. ed., Oxford, Clarendon Press, 1995 (reprint), p. 439; Paul Guggenheim, *Traité de Droit International Public*, volume II, Genève, Georg, 1954, pp. 52 and 54; L.G. Loucaides, *Essays on the Developing Law of Human Rights*, Dordrecht, Nijhoff, 1995, pp. 146 and 149-152; Paul Reuter, "Principes de Droit international public", 103 *Recueil des Cours de l'Académie de Droit International de La Haye* (1961) pp. 592-594 and 598-603; C.W. Jenks, "Liability for Ultra Hazardous Activities in International Law", 117 *Recueil des Cours de l'Académie de Droit International de La Haye* (1966) pp. 105-110 and 176-196; Karl Zemanek, "La responsabilité des États pour faits internationalement illicites, ainsi que pour faits internationalement licites", in *Responsabilité internationale* (org. Prosper Weil), Paris, Pédone, 1987, pp. 36-38 and 44-46; Benedetto Conforti, *Diritto Internazionale*, 5th. ed., Napoli, Ed. Scientifica, 1997, pp. 360-363; J.A. Pastor Ridruejo, *Curso de Derecho Internacional Público y Organizaciones Internacionales*, 6a. ed., Madrid, Tecnos, 1996, pp. 571-573.

constitutional reform was pending before the Legislative Poder (to replace the system in force of movie censorship); moreover, as the Executive Power did not share the interpretation of the Judicial Power on the matter, seeking to remedy the situation, the State would be exempt from international responsibility³⁰.

29. The Government of Chile affirmed, in the hearing before the Court referred to, not to have substantive discrepancies, as to the merits, with the Inter-American Commission on Human Rights (IACHR), about the need to secure freedom of expression, and so it was that the Government took distance from the Judicial Power in this respect, and sought a solution to the problem raised in the *cas d'espèce*³¹. The agent of the State of Chile, Dr. Edmundo Vargas Carreño, commented in a timely way that "the theme of the international responsibility of the State in general is today the most difficult theme of international law"³², - and so it was that, after decades, the ILC has not yet concluded its work of codification on the matter.

30. The theme of the international responsibility of the State, besides being complex, has always seemed to me to be a truly central and fundamental chapter of Public International Law as a whole. The degree of consensus that one succeeds to attain in relation to its multiple aspects, - starting with the very bases of the configuration of such responsibility, - appears to me as ultimately revealing the degree of evolution and cohesion of the international community itself. Despite the undeniable and high juridical quality which they managed to give to their presentations in the memorable public hearing before the Court on the merits of the case of "*The Last Temptation of Christ*", both the IACHR and the Government of Chile, in their oral arguments, as well as, in their declarations, both the witnesses and experts proposed by the IACHR and the experts originally presented by the Chilean Government and convened by the Court, - I cannot omit to formulate some precisions which seem to me indeed necessary, given the complexity and high relevance of the matter dealt with.

31. Firstly, the rule of prior exhaustion of the remedies of domestic law, as set forth in Article 46 of the American Convention, encompasses the available, adequate and effective judicial remedies, in conformity with recognized principles of international law, which the formulation of the rule in that provision of the Convention refers to. If one were to pretend unduly to extend the scope of such rule to a project of constitutional reform, or of legislative reform, it would be transformed into an unsurmountable obstacle to the petitioners, besides having its juridical content distorted.

32. Secondly, if interposed, the objection of non-exhaustion ought to be definitively resolved *in limine litis*, that is, at the stage of admissibility of the case, and not in the proceedings on the merits of it. This is, in my view, a question of pure admissibility, as I have consistently sustained, within this Court, since 1991³³. In the last years, the Inter-American Court itself has correctly established, as from its Judgments on

³⁰. Cf. IACtHR, *Transcripción de los Alegatos Finales en el Caso "La Última Tentación de Cristo" - Audiencia Pública sobre el Fondo Celebrada el 18 y 19 de Noviembre de 1999*, San José de Costa Rica, pp. 68-69, 70, 76-77 and 79-80.

³¹. *Ibid.*, pp. 76-77 and 79.

³². *Ibid.*, p. 84.

³³. Cf. my Separate Opinions in the Judgments on Preliminary Objections in the cases *Gangaram Panday versus Suriname* (1991, Series C, n. 12), *Loayza Tamayo versus Peru* (1996, Series C, n. 25), and *Castillo Páez versus Peru* (1996, Series C, n. 24), as well as my Dissenting Opinion in the case *Genie Lacayo versus Nicaragua* (Resolution of 18.05.1995), pars. 11-17, in: OAS, *Informe Anual de la Corte Interamericana de Derechos Humanos - 1995*, pp. 85-87.

Preliminary Objections in the cases of *Loayza Tamayo* and *Castillo Páez*³⁴, pertaining to Peru, that, if the respondent State failed to invoke the objection of non-exhaustion in the proceedings of admissibility before the IACHR, it is precluded from raising it subsequently before the Court (*estoppel*). In this way, the Court modified the earlier criterion - in my view inadequate - followed originally by it on this point, in the cases of *Velásquez Rodríguez*, *Godínez Cruz* and *Fairén Garbi and Solís Corrales*³⁵ (1987), concerning Honduras.

33. And thirdly, in any way, in the present context of the international protection of human rights, - fundamentally distinct from that of discretionary diplomatic protection at inter-State level³⁶, - the rule of domestic remedies is endowed with a *procedural* rather than *substantive* nature. It thus conditions the *implementation (mise-en-oeuvre)* of the responsibility of the State (as a requisite of admissibility of an international petition or complaint), but not the *birth* of such responsibility.

34. This is the thesis which I have been constantly sustaining for more than twenty years, as from the publication of my essay on "*The Birth of State Responsibility and the Nature of the Local Remedies Rule*", in 1978 in Geneva³⁷. Ever since, I have always maintained that the *birth* and the *implementation* of the international responsibility of the State correspond to two distinct moments; in the present context of the international protection of human rights, the requisite of prior exhaustion of remedies of domestic law conditions the implementation, but not the birth, of that responsibility, which is conformed as from the occurrence of an internationally wrongful act (or omission) (which may have its source, e.g., in a legal provision of domestic law, or in an administrative act, or else in a judicial decision).

35. Last but not least, I would like to refer briefly to the declaration of one of the experts proposed by the IACHR: in singling out the *good faith* of the initiative of the project of constitutional reform pending in the State of Chile, Dr. José Zalaquett Daher pondered judiciously that "the most important reform in this case would be that which (...), by means of a Chilean legislative act, (...) were to remind imperatively the Judiciary" that "there exists the full incorporation *de jure* and that it ought to apply" directly the international norms of human rights protection at domestic law level³⁸. This

³⁴. IACtHR, Series C, ns. 25 and 24, respectively.

³⁵. IACtHR, Judgments on Preliminary Objections, Series C, ns. 1, 3 and 2, respectively.

³⁶. The basic differences of context require that the local remedies rule, in the ambit of the international safeguard of human rights, is applied with special attention to the needs of protection of the human being. The rule referred to is far from having the dimension of an immutable or sacrosanct principle of international law, and nothing impedes that it is applied with greater or lesser rigour in distinct contexts. Ultimately, local remedies form an integral part of the very system of international human rights protection, the emphasis falling on the element of redress rather than on the process of exhaustion (of those remedies). The local remedies rule bears witness of the interaction between international law and domestic law in the present context of protection. We are here before a *droit de protection*, endowed with a specificity of its own, fundamentally oriented towards the victims, towards the rights of human beings rather than of States. Generally recognized rules of international law (which the formulation of the local remedies rule in human rights treaties such as the American Convention refers to), besides following an evolution of their own in the distinct contexts in which they apply, necessarily suffer, when inserted into human rights treaties, a certain degree of adjustment or adaptation, dictated by the special character of the object and purpose of those treaties and by the widely recognized specificity of the international protection of human rights. A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, University Press, 1983, pp. 1-443, esp. pp. 6-56, 279-287, 290-322 and 410-412.

³⁷. A.A. Cançado Trindade, "The Birth of State Responsibility and the Nature of the Local Remedies Rule", 56 *Revue de Droit international de sciences diplomatiques et politiques* - Sottile (1978) pp. 157-188.

is a point to which I attribute the greatest importance, as it implies the need, ultimately, of a true *change of mentality*, in the high courts of almost all countries of Latin America.

36. This would hardly be achieved with attention to the merely formal aspect of legislative reforms, which ought to be accompanied by the permanent in-training in human rights of national judges in Latin America, particularly the promising new generations of judges. The sentences of the national tribunals ought to take in due account the applicable norms both of domestic law as well as of human rights treaties which bind the State Party. These latter, in setting forth and clearly defining an individual right, susceptible of vindication before a national tribunal or judge, are *directly* applicable at domestic law level.

37. If greater advances have not been achieved to date in the present domain of protection, this is not due to legal obstacles, - which in reality do not exist, - but rather to the lack of will (*animus*) of public power to promote and secure a more effective protection of human rights. This applies today to almost all Latin American countries, - and, I understand, also to Caribbean countries³⁹, - singling out the pressing need for a change of mentality, to which I have already referred. A new mentality will emerge, with regard to the Judiciary, as from the understanding that the direct application of the international norms of human rights protection is beneficial to the inhabitants of all countries, and that, instead of the adherence to juridico-formal constructions and syllogisms and to a hermetic normativism, what is truly required is to proceed to the correct interpretation of the applicable norms, whether of international or national origin, so as to secure the full protection of the human being.

38. In a visionary book published in 1944, the Chilean jurist Alejandro Álvarez forcefully called for a reconstruction of the law of nations (*derecho de gentes*) and a renewal of the social order itself⁴⁰. We live today, at the beginning of the XXist century, in a world entirely distinct from that of half a century ago, but the theme which in his days inspired A. Álvarez - and which nowadays would be developed in a distinct way, in the light of the evolution itself of the law of nations (*derecho de gentes*) in the last five decades, - is effectively a recurrent theme, which keeps on retaining in our days a great up-to-date relevance.

39. I cannot see how not to sustain and foster, again, at the dawn of a new century, a reconstruction and renewal of the law of nations (*derecho de gentes*), as from, in my view, a necessarily anthropocentric outlook, and with emphasis on the identity of the ultimate objective both of international law and of public domestic law as to the safeguard of the rights of the human being. This being so, the international norms of protection, incorporated to domestic law, cannot fail to be *directly* applied by the national tribunals in all the countries of Latin America and the Caribbean, which have given the good example of professing their commitment to human rights by means of the ratification of the American Convention, or the accession to it.

40. The case of "*The Last Temptation of Christ*", which the Inter-American Court has just decided in the present Judgment on the merits, is truly emblematic, not only

³⁸. Cf. IACtHR, *Transcripción de los Alegatos Finales...*, *op. cit. supra* n. (28), pp. 15-16.

³⁹. I regret not to be able to refer to the countries of North America (Canada and the United States), which so far have not even ratified the American Convention on Human Rights.

⁴⁰. Cf. Alejandro Álvarez, *La Reconstrucción del Derecho de Gentes - El Nuevo Orden y la Renovación Social*, Santiago of Chile, Ed. Nascimento, 1944, pp. 3-523.

for being the first case on freedom of thought and of expression resolved by the Court, at the first working session held by it in the XXth century, but also - and above all - for having a bearing on a question which is common to so many Latin American and Caribbean countries, and which touches on the foundations of the law on the international responsibility of the State and the very origin of such responsibility. In the light of the thoughts developed in this Concurring Opinion, may I conclude, in sum, that:

- *first*, the international responsibility of a State Party to a human rights treaty arises at the moment of the occurrence of an international wrongful act - or omission - (*tempus commisi delicti*), imputable to that State, in violation of the treaty at issue;

- *second*, any act or omission of the State, on the part of any of the Powers - Executive, Legislative or Judicial - or agents of the State, irrespective of their hierarchy, in breach of a human rights treaty, engages the international responsibility of the State Party at issue;

- *third*, the distribution of competences between the powers and organs of the State, and the principle of the separation of powers, although of the greatest relevance in the ambit of constitutional law, do not condition the determination of the international responsibility of a State Party to a human rights treaty;

- *fourth*, any norm of domestic law, irrespective of its rank (constitutional or infraconstitutional), can, by its own existence and applicability, *per se* engage the responsibility of a State Party to a human rights treaty;

- *fifth*, a norm of domestic law which, by being in force, *per se* creates a legal situation which affects the rights protected by a human rights treaty, constitutes, in the context of a concrete case, a *continuing* violation of such treaty;

- *sixth*, the existence of victims provides the decisive criterion for distinguishing an examination *in abstracto* of a norm of domestic law, from a determination of the incompatibility *in concreto* of such norm with the human rights treaty at issue;

- *seventh*, in the context of the international protection of human rights, the rule of exhaustion of remedies of domestic law is endowed with a procedural rather than substantive nature (as a condition of admissibility of a petition or complaint to be resolved *in limine litis*), thus conditioning the implementation but not the birth of the international responsibility of a State Party to a human rights treaty;

- *eighth*, the rule of exhaustion of remedies of domestic law has a juridical content of its own, which determines its extent (comprising the effective judicial remedies), which is not extended to reforms of a constitutional or legislative order;

- *ninth*, the substantive norms - pertaining to the protected rights - of a human rights treaty are *directly* applicable in the domestic law of the States Parties to such treaty;

- *tenth*, there exists no legal obstacle or impossibility at all for the direct application at domestic law level of the international norms of protection, but what is rather required is the will (*animus*) of the public power (above all the Judiciary) to apply them, amidst the understanding that one will thereby be giving concrete

expression to common superior values, consubstantiated in the effective safeguard of human rights;

- *eleventh*, once established the international responsibility of a State Party to a human rights treaty, such State has the duty to reestablish the situation which guarantees to the victims the enjoyment of their violated right (*restitutio in integrum*), putting an end to the situation in breach of that right, as well as, in the light of the case, to provide reparation for the consequences of such violation;

- *twelfth*, the modifications in the domestic legal order of a State Party necessary for its harmonization with the norms of a human rights treaty can constitute, in the framework of a concrete case, a form of non-pecuniary reparation under such treaty; and

- *thirteenth*, at this beginning of the XXIst century, a reconstruction and renewal of the law of nations (*derecho de gentes*) as from a necessarily anthropocentric outlook, and no longer a State-centred one as in the past, are required, given the identity of the ultimate objective of both international law and public domestic law as to the full safeguard of the rights of the human person.

Antônio A. Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary