SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. In the instant Judgment in the *Case of Tibi versus Ecuador*, in which I have concurred with my vote, the Inter-American Court of Human Rights has ruled on a new case that adequately reflects the contingencies of the human condition and the importance of the realization of justice and of guarantees of non-recidivism regarding acts injurious to human rights as a measure of reparation. Given the concerns raised by the instant case, and the significance of the matter addressed by the Court, I feel the obligation to state, in the instant Separate Opinion, my personal reflections as the basis for my position on the matter dealt with here. I will focus my reflections on four basic points: a) the impact of arbitrary detention and conditions of incarceration on the human conscience; b) self-rehabilitation as a defense and *reparatio* of the affronts of the world; c) the reaction of *ratione personae* Law (the central position of the victims in the legal system); and d) the reaction of *ratione materiae* Law (absolute prohibition of torture).

I. The Impact of Arbitrary Detention and Conditions of Incarceration on the Human Conscience.

2. D.D. Tibi, like Josef K., was detained without knowing why. “Somebody had slandered Josef K.", - wrote Franz Kafka at the very beginning of *The Process* (1925), - "as without having done anything wrong he was detained one morning” (chapter I). D.D. Tibi was more fortunate than banker Josef K., but they both suffered something incomprehensible, if not absurd. Josef K. could only await his summary execution, shortly before which he exclaimed: "Where was the judge whom I never saw? Where was the high court before which I never appeared?” (chapter X). From the beginning of the saga to its end, his efforts were futile in face of the arbitrariness of a cruelly virtual and discouraging “justice”.

3. D.D. Tibi was less unfortunate than Kafka's character, because he recovered his liberty and, also, he lives in a time in which, alongside the national courts (with their idiosyncrasies) there are also international human rights courts. The instant Judgment, just adopted by the Inter-American Court, can contribute to recovery of his faith in human justice. In his case, a portrait of daily life in the jails not only of Latin America but throughout the world speaks eloquently of the insensitiveness, indifference, and irrationality of the world that surrounds us all.

4. There are few testimonies of the suffering resulting from arbitrary detention as eloquent as Antonio Gramsci’s well-known *Prison Notebooks* (1926-1936). In a manner that is even literary, he wrote that, during the initial period of his detention, it already seemed to him that time was thicker, as space no longer existed for him; and he described the rose that was “completely reborn,” that flowered more the following year, and did not even exclude the possibility of another “timid little rose” from flowering during that year (so he hoped), and he confessed that he felt the seasonal cycle as “flesh of his flesh”. When he took a train, after 10 years of detention, “thrown on the fringes of the world,” and after not having seen for years those same roofs, those same walls, those same “turbid faces," he “experienced a terrible impression” when he saw that “during this time the vast world had continued to exist with its meadows, its forests, the common people, the groups of children, certain trees;” that he experienced a terrible impression especially when he saw himself in the mirror after so much time.[1]

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[1]. A. Gramsci, *Cartas do Cárcere*, Rio de Janeiro, Edit. Civilização Brasileira, 1966 (reed.), pp. 135-136 and 370.

5. Three decades before Gramsci, in the late 19th century, Oscar Wilde gave the history of universal thought his personal testimony of the suffering caused by his incarceration, in his renowned *De Profundis* (1897). From the Reading prison, he wrote that, for those unfairly detained,

> "there is only one season, the season of sorrow. The very sun and moon seem taken from us. Outside, the day may be blue and gold, but the light that creeps down through the thickly-muffled glass of the small iron-barred window beneath which one sits is grey and niggard. It is always twilight in one's cell, as it is always twilight in one's heart. And in the sphere of thought, no less than in the sphere of time, motion is no more."[2]

6. It is possible that *étranger* D.D. Tibi experienced the same feeling as *étranger* Mersault that matters pertaining to the detention and the proceeding were treated "leaving aside" the detainee, reflecting the "tender indifference" of the exterior world (chapters IV-V). As for Gramsci, almost the only thing left to the *étranger* of Albert Camus (*L'étranger*, 1949) was the passing of time; as "light and shadows alternated" it was "the same day ceaselessly passing in the cell," and the worst hour was when "the noise of the night came from all the floors of the prison in an entourage of silence" (chapter II). Mersault also had only the memories of a life that no longer belonged to him (chapter IV). For him, all days passed "watching, in their face, the decline of the colors that lead from day to night," the latter being "like a melancholic truce" (chapter V).

7. In his critical pages on conditions of incarceration, immortalized in his renowned *Memoirs from the House of the Dead* (1862), F.M. Dostoyevsky reflected that

> "le fameux système cellulaire n'atteint, j'en suis convaincu, qu'un but trompeur, apparent. Il suce la sève vitale de l'individu, l'énerve dans son âme, l'affaiblit, l'effraie, puis il vous présente comme un modèle de redressement, de repentir, une momie moralement desséchée et à demi folle. (...) Les souffrances morales pèsent plus lourdement que les tourments physiques."[3]

Hence the importance and pressing need –the great universal writer added- of humane treatment of detainees:

> "(...) un détenu, un réprouvé, il connaît les distances qui le séparent de ses supérieurs, mais ni les chaînes, ni les marques de flétrissure ne lui font oublier qu'il est un homme. (...) Un traitement *humain* peut relever jusqu'à ceux chez qui l'image de la divinité semble obscurcie! C'est précisément avec ces `malheureux' qu'il faut se comporter le plus humainement possible, pour leur salut et pour leur joie."[4]

II. Self-rehabilitation as Defense and *Reparatio* of the Injuries of the World.

8. The above does not necessarily mean that there is no antidote against the cruelty of the absurd and of indifference. In the midst of omnipresent suffering, one may seek refuge in an enhanced inner life, in remembrance of beloved ones, and in luminous moments of the past; human beings are capable of accepting their suffering and their destiny insofar as they entail, even under the most adverse

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2. O. Wilde, *De Profundis*, Madrid, Ed. Siruela, 2000 (repr.), p. 54.

3. F.M. Dostoyevski, *Souvenirs de la maison des morts*, Paris, Gallimard, 1977 (repr.), pp. 51 and 115.

4. *Ibid*., p. 174.

conditions, "adding a deeper meaning to their life".[5] Remembering does in fact have "an ethical value in and of itself. (...) The belief that remembering is an ethical action is set in the depths of our human nature (...). Insensitiveness and amnesia seem to go together." [6]

9. Writing on his detainment conditions and his efforts to flee both the suffering and the degeneration of the spirit, Oscar Wilde, referring to the "*Zeitgeist* of a heartless period", reflected that time and space are "mere accidental conditions of thought," and that in prison what he had before him was only his past.[7] There is always the possibility of refuge in one's own inner life. As Wilde expressed it, the wretched, "when they are imprisoned, although denied the beauty of the world, are at least safe, to a certain extent, from the world's deadliest blows," since

> "they can hide in the darkness of their cells, and turn their very misfortune into something akin to a sanctuary. The world, once it has obtained what it wanted, goes on its way, and it lets them suffer in peace." [8]

10. In his incisive meditations in *De Profundis*, Wilde addressed the need for rehabilitation of prison victims:

> "There is not a single degradation of the body which I must not try and make into a spiritualising of the soul. (...) I am advised by others to try on my release to forget that I have ever been in a prison at all. I know that would be equally fatal. It would mean that I would always be haunted by an intolerable sense of disgrace, and that those things that are meant for me as much as for anybody else - the beauty of the sun and moon, the pageant of the seasons, the music of daybreak and the silence of great nights, the rain falling through the leaves, or the dew creeping over the grass and making it silver - would all be tainted for me, and lose their healing power, and their power of communicating joy. (...) For just as the body absorbs things of all kinds, things common and unclean ...- so the soul in its turn has its nutritive functions also, and can transform into noble moods of thought and passions of high import what in itself is base, cruel and degrading; nay, more, may find in these its most august modes of assertion, and can often reveal itself most perfectly through what was intended to desecrate or destroy.
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> The fact of my having been the common prisoner of a common gaol I must frankly accept (...) must accept the fact that one is punished for the good as well as for the evil that one does. (...) Society takes upon itself the right to inflict appalling punishment on the individual, but it also has the supreme vice of shallowness, and fails to realise what it has done. When the man's punishment is over, it leaves him to himself; that is to say, it abandons him at the very moment when its highest duty towards him begins. It is really ashamed of its own actions, and shuns those whom it has punished (...) (...) if I realise what I have suffered, society should realise what it has inflicted on me; and (...) there should be no bitterness or hate on either side."[9]

11. These reflections, over a century ago, are today more contemporary than ever, and they are moved by recurrent abuse that continues to take place in prisons around the world. In prison, most often, contrary to what the social milieu seems to assume, one does not learn to distinguish between good and evil, but rather to live in growing intimacy with the evil of brutalization imposed by the indifference of that very social milieu. In an impressive testimony published in 1996 on the *in loco* inspections conducted in European jails, a former President of

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5. See V.E. Frankl, *El Hombre en Busca de Sentido*, 22d. ed., Barcelona, Herder Edit., 2003, pp. 63-65 and 101, and see pp. 102, 156 and 158.

6. S. Sontag, *Ante el Dolor de los Demás*, Bogota, Alfaguara, 2003, p. 134.

7. O. Wilde, *De Profundis*, *op. cit. supra* n. (2), pp. 113 and 127.

8. *Ibid.*, pp. 62-63.

9. *Ibid.*, pp. 69-71.

the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[10] pointed out that

> "conditions of detention are still very backward in most European States. (...) No European country is blameless. Many have overcrowded jails, with inadequate sanitation (...). In other cases solitary confinement is applied far too frequently. (...) What is a prison? It is a place where one loses not only one's liberty, but one's dignity, too. (...) In other States it is the police stations that invite criticism (...). In other States the detention centres for immigrants or for asylum seekers are unhygienic and inhuman. (...) In some (only three perhaps) torture is embedded in police methods; in others the police tend sporadically to ill-treat and brutalize their detainees; in other States the prisons reveal aspects censurable as inhuman or degrading; elsewhere single instances of arbitrary behaviour by law enforcement officers can be discerned, or there are single cases of unacceptable treatment or conditions in prisons or hospitals. Despite the many different degrees of substandard treatment, not one European State fully conforms to the parameters of the best and most enlightened traditions and the more recent studies in criminology."[11]

12. This is an evil that knows no borders, and one that reflects the indifference and brutalization of the world around us. Today, the characters of Kafka and Camus are dispersed and forgotten in prisons of all continents. Many of the detainees are innocent, and those who are not, having been aggressors, become new victims. Their survival no longer has a spatial dimension, and the temporal one is what they may, perhaps, fathom in the hidden depths of their inner life. Anyhow, their life, in their relations with others, is no longer theirs. And they survive in closer and closer intimacy with evil and with the overwhelming brutalization imposed on them. The Law cannot remain indifferent to all this, to the world's indifference, especially in the pathetically self-named "post-modern" societies.

13. Actually, abuse of detention and abuse against the detainees are no recent phenomenon. In his classical work on *Of Crimes and Punishments* (1764), Cesare Beccaria warned about the fact that "the punishment is often greater than the crime," and the "refined ordeals" conceived by human intellect "seem to have been invented for tyranny rather than for justice."[12] As time passed, the need for administrative and legislative as well as judicial control and oversight of detention conditions (the latter being especially important) was acknowledged, and domestic legal control was transferred to international law in the mid-20th century.

III. The Reaction of *Ratione Personae* Law: the Central Position of the Victims in the Legal System

14. It was the reaction of the Law, gaining strength, and the impact of International Human Rights Law was decisive. Today there is, for example, a vast jurisprudence on Article 5 of the European Convention on Human Rights, asserting the *ordre public* nature of the oversight, under the European Convention, of all measures that could breach the right to the human person's liberty and security; detention –necessarily ordered by law- can only be justified in regards to one of the requirements set forth in Article 5(1) of the Convention.[13] At the same time, based

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10. Of the European Council at Strassburg.

11. A. Cassese, *Inhuman States - Imprisonment, Detention and Torture in Europe Today*, Cambridge, Polity Press, 1996, pp. 125-126.

12. C. Beccaria, *De los Delitos y de las Penas* (with comments by Voltaire), 11th. repr., Madrid, Alianza Ed., 2000 (repr.), p. 129, and see p. 149.

13. J.L. Murdoch, *Article 5 of the European Convention on Human Rights - The Protection of Liberty and Security of Person*, Strasbourg, Council of Europe, 1994, pp. 7-55.

on the experience accrued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Antonio Cassese has suggested that when a person has been detained and this person has four rights (those of being promptly informed of his or her basic rights, of prompt notification of the detention to his or her next of kin, of access to an attorney, and of being promptly examined by a physician),

> "then there is an objective chance that the police will find it difficult to inflict inhuman or degrading treatment on him or her. On the other hand, if these rights, or some of them, are not enshrined in legislation or are not applied in practice, we know we have entered a `danger zone': the objective defences are lacking that make ill-treatment less likely."[14]

15. I am moved to another reflection by the instant case of *Tibi versus Ecuador,* as a microcosm of what happens in the daily life of prisons in various places. Under the infrahuman incarceration conditions that prevail in so many countries throughout the world, the detainees –including the aggressors- as stated before, often become "institutional victims," increasing the spiral of violence issuing from a "pathological social order" that especially punishes marginalized persons.[15] Punitive justice, given the conditions under which it is executed, thus becomes a sinister vicious circle,[16] as shown by the instant case, among many others.

16. In a broad dimension, International Human Rights Law has contributed to recovery of the central position of the victim[17] in the legal order. Criminology itself has sought to pay greater attention to the victim (and not only to the agent of the violation of his or her rights), but efforts in this direction are unable to transcend the approach on the victim as the passive subject of the crime, while it would be necessary to go further.[18] In the conceptual universe of International Human Rights Law the role of the victim does in fact transcend that of the passive subject of the crime, as the victim there becomes the true active subject of international legal action in defense of the rights inherent to him or her as a human being.

17. As stated above, International Human Rights Law, rather than domestic or international criminal law, recovered the central role of the victim as a subject of law –and an active subject of the juridical relationship- in the international legal order. While criminal law –both under domestic and international venues- is primarily geared toward the criminal, relegating the victim to a marginal position, International Human Rights Law, instead, restores the central position of the victim, even as an active subject of international action for implementation of the responsibility of the State for injuries to his or her rights.

18. Work for the international protection of human rights soon showed that the contraposition of the respondent States to the individual applicants was essential to it. It was precisely in this domain of protection that –as I underlined in my Separate Concurring Opinion in the *Castillo Petruzzi et al. versus Peru* case (Preliminary Objections, Judgment of 04.09.1998)- "the *historical rescue* of the position of the

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[14]. A. Cassese, *Inhuman States...*, *op. cit. supra* n. (11), p. 21.

[15]. *Ibid*., pp. 139-140.

[16]. *Ibid*., pp. 140 and 150.

[17]. As in victimology, on a rather circumscribe level; see, e.g., G. Landrove Díaz, *Victimología*, Valencia, Ed. Tirant Lo Blanch, 1990, pp. 22-23 and 25-26.

[18]. L. Rodríguez Manzanera, *Victimología - Estudio de la Víctima*, 8th. ed., Mexico, Ed. Porrúa, 2003, pp. 25 and 67.

human being as subject of International Human Rights Law, endowed with full international procedural capacity" took place" (para. 5). This recovery was implemented through enshrinement of the right to individual international petition, granted in the broadest terms, to any person, by Article 44 of the American Convention on Human Rights.

19. This right has in fact been exercised, under the American Convention, by persons who survive under extreme adversity (poor and marginalized persons, "street children," incarcerated individuals, the next of kin of missing persons, among others). It is under circumstances such as these that International Human Rights Law attains its fullness and realizes its ultimate aim. Protection of victims and reparations for the damage they have suffered constitute its *raison d'être*. This noteworthy development –I added in my aforementioned Separate Concurring Opinion in the *Castillo Petruzzi et al.* case - entailed a real transformation of the international legal order itself, by recognizing that

> "the necessity that all the States, in order to avoid new violations of human rights, are made responsible for the way they treat all human beings who are under their jurisdiction. This would simply not have been possible without the consolidation of the right of individual petition, amidst the recognition of the objective character of the obligations of protection and the acceptance of the collective guarantee of compliance with these latter. This is the real meaning of the *historical rescue* of the individual as subject of International Human Rights Law." (para. 12)

20. The victims themselves (apparently the weakest party *vis-à-vis* public authorities) took the initiative of activating the international action to defend their rights. As I reflected in my aforementioned vote in the *Castillo Petruzzi et al*. case,

> "In the public hearings before the Inter-American Court, in distinct cases, (...) a point which has particularly drawn my attention has been the observation, increasingly more frequent, on the part of the victims or their relatives, to the effect that, had it not been for the access to the international instance, justice would never have been done in their concrete cases. (...) The right of individual petition shelters, in fact, the last hope of those who did not find justice at national level. I would not refrain myself nor hesitate to add, - allowing myself the metaphor, - that the right of individual petition is undoubtedly the most luminous star in the universe of human rights." (para. 35)

The next step that needs to be taken, in the framework of the inter-American system for the protection of human rights, is –as I have argued for several years- to ensure evolution from *locus standi in judicio* to *jus standi* of the individuals before the Inter-American Court itself, thus enhancing their full international juridical capacity.[19]

IV. The Reaction of *Ratione Materiae* Law (Absolute Prohibition of Torture)

21. The practice of torture, in all its perversion, is not limited to the physical injuries inflicted on the victim; it seeks to annihilate the victim's identity and integrity. It causes chronic psychological disturbances that continue indefinitely, making the victim unable to continue living normally as before. It worsens the victim's vulnerability, causes nightmares, generates a loss of trust in others,

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[19]. On this point, see A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao/Spain, Universidad de Deusto, 2001, pp. 9-104; A.A. Cançado Trindade, *Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección*, vol. II, 2d. ed., San Jose, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 1-64.

hypertension, and depression. Several expert opinions rendered before this Court in various cases in recent years have asserted this unanimously. A person tortured in prison loses the spatial dimension and even that of time itself.

22. Furthermore, the practice of torture (whether to obtain a confession or information or to cause social fear) generates a disintegrating emotional burden that is transmitted to the next of kin of the victim, who in turn project it toward the persons they live with. The widespread practice of torture, even though it takes place within jails, ultimately contaminates all the social fabric. The practice of torture has sequels not only for its victims, but also for broad sectors of the social milieu affected by it. Torture generates psychosocial damage and, under certain circumstances, it can lead to actual social breakdown.

23. Thus, I find contemporary attempts by those who exercise power and their co-opted subservients to play down the prohibition of torture under certain circumstances, such as combating drug trafficking and the so-called "war on terrorism"[20] truly dreadful. At the appropriate time, in the recent Judgment in the case of the *Gómez Paquiyauri brothers versus Peru* (of 08.07.2004, paras. 111-112), as well as in the instant Judgment in the *Case of Tibi versus Ecuador*, the Court warned that

> "there is an international legal system of absolute prohibition of all forms of torture, both physical and psychological, a system that today falls under the domain of *jus cogens*. Prohibition of torture is complete and non-revocable, even under the most difficult circumstances, such as war, 'the struggle against terrorism' and any other crimes, states of siege or of emergency, of civil commotion or domestic conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies" (para. 145).

24. The practice of torture is a hellish threat to civilization itself. One of the infallible criteria of civilization is precisely the treatment given by public authorities of any country to detainees or incarcerated persons. F.M. Dostoyevsky warned about this in his aforementioned *Memoirs from the House of the Dead* (1862); for him, the degree of civilization attained by any social milieu can be assessed by entering its jails and detention centers.[21] Torture is an especially grave violation of human rights because, in its various forms, its ultimate objective is to annul the very identity and personality of the victim, undermining his or her physical or mental resistance; thus, it treats the victim as a "mere means" (in general to obtain a confession), flagrantly violating the basic principle of the dignity of the human person (which expresses the Kantian concept of the human being as an "end in himself"), degrading him, in a perverse and cruel manner,[22] and causing him truly irreparable damage.

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[20]. For this, there are international conventions that must be applied to combat those wrongs *under the Law.* Said attempts (of the self-proclaimed "realists") set aside more than a century of progress of the Law, and they show the way back to savagery. As Jean Pictet pointed out quite appropriately in 1966, in a visionary –if not prophetic- manner, "it would be a disastrously regressive step for humanity to attempt to struggle against terrorism with its very weapons." J. Pictet, *The Principles of International Humanitarian Law*, Geneva, ICRC, 1966, p. 36. – For a recent example of the current and alarming deconstruction of the Law (even in the field of *habeas corpus*, the *due process of law* and the presumption of innocence), in the midst of the apparent indifference or unawareness of the juridical circles in so many countries, see: "*Antiterrorisme: une cour de Londres légitime des `preuves' obtenues sous la torture*", in *Le Monde*, Paris, 14.08.2004 (in connection with the "evidence" obtained in the interrogations of ten foreign detainees at the United States base in Guantánamo, and derogation by the United Kingdom of Article 5 of the European Convention on Human Rights).

[21]. See F.M. Dostoyevski, *Souvenirs de la maison des morts*, *op. cit. supra* n. (3), pp. 35-416.

[22]. J.L. de la Cuesta Arzamendi, *El Delito de Tortura*, Barcelona, Bosch, 1990, pp. 27-28 and 70.

25. The basic principle of humanity, rooted in the human conscience, rises against torture. Torture is clearly prohibited, as a grave violation of human rights and of International Humanitarian Law, by the universal juridical conscience. This is a definitive attainment of civilization, one that admits no regression. A real international juridical system against torture has in fact developed in the present.[23] It includes the United Nations Convention (of 1984, and its recent Protocol of 2002) and the Inter-American (1985) and European (1987) Conventions against torture, in addition to the Special Rapporteur against Torture (since 1985) of the United Nations Human Rights Commission, HRC) and the Working Group on Arbitrary Detention (since 1991) of that same HRC (which pays special attention to the prevention of torture).[24] The three aforementioned co-existing Conventions to combat torture are basically complementary.[25]

26. The absolute prohibition of torture in any and all circumstances –as the Inter-American Court has asserted in the instant Judgment in the *Case of Tibi versus Ecuador*- today falls under international *jus cogens* (see *supra*). As I pointed out in my Separate Concurring Opinion in the case of the *Urso Branco prison versus Brazil* (Provisional Protection Measures, of 07.07.2004), "the State's obligation of *due diligence* applies under any and all circumstances, to avoid irreparable damage to persons under its jurisdiction and custody" (para. 16). Due diligence is an even greater obligation in regards to incarcerated persons, who are in an especially vulnerable situation, under State custody.

27. The European Court of Human Rights, in turn, asserted, in the *Soering versus the United Kingdom* case (Judgment of 07.07.1989), that the absolute prohibition of torture (even in times of war and other national emergencies) expresses one of the "fundamental values of [contemporary] democratic societies" (para. 88). More recently, in the *Kalashnikov versus Russia* case (Judgment of 15.07.2002), the European Court stated that Article 3 of the European Convention on Human Rights

> "enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour" (para. 95).

28. In the *Selmouni versus France* case (Judgment of 28.07.1999), the European Court categorically reiterated that Article 3 of the European Convention

> "enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols ns. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15(2) even in the event of a public emergency threatening the life of the nation (...)" (para. 95).

29. In that same Judgment, the European Court expressed its understanding that "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires

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[23]. See, e.g., N. Rodley, *The Treatment of Prisoners under International Law*, Paris/Oxford, UNESCO/Clarendon Press, 1987, pp. 17-143.

[24]. In addition to these mechanisms, there is the United Nations Voluntary Contributions Fund for Victims of Torture (since 1983).

[25]. See, in this regard, A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brasil, S.A. Fabris Ed., 1999, pp. 345-352.

greater firmness in assessing breaches of the fundamental values of democratic societies" (para. 101). In the *cas d'espèce*, in regards to France –as in the instant Judgment of the Inter-American Court that has found the respondent State responsible for the torture inflicted on the *étranger* Tibi (para. 165) – the European Court also found the respondent State responsible for the torture inflicted on *étranger* Selmouni (paras. 105-106).

30. The *Ad Hoc* International Criminal Tribunal for the former Yugoslavia stated unequivocally, in the *A. Furundzija* case (Judgment of 10.12.1998), that the absolute prohibition of torture is a *jus cogens* rule (paras. 137-139, 144 and 160). Jurisprudence of various international tribunals is, thus, perfectly clear in stating the reaction of *ratione materiae* Law, regarding absolute prohibition of torture, in all its forms, under any and all circumstances –a prohibition that, in our days, falls under international *jus cogens,* with all its juridical consequences for the States responsible.

31. In my Concurring Opinion to Advisory Opinion n. 18 (of 17.09.2003) on *La Condición Jurídica y los Derechos de los Migrantes Indocumentados*, I stated my understanding that *jus cogens* is not a closed juridical category, but rather one that evolves and expands (paras. 65-73). In brief,

> "On my part, I have always asserted that an ineluctable consequence of the affirmation and the very existence of *peremptory* norms of International Law is their not being limited to the conventional norms, to the law of treaties, and their encompassing every and any juridical act. Recent developments point in the same direction, that is, that the domain of the *jus cogens*, beyond the law of treaties, encompasses likewise general international law. Moreover, the *jus cogens*, in my understanding, is an open category, which expands to the extent that the universal juridical conscience (the material source of all Law) awakens to the necessity to protect the rights inherent to each human being in every and any situation.
> Evolution of International Human Rights Law has emphasized the absolute character of the *non-derogable* fundamental rights. The absolute prohibition of the practices of torture, of forced disappearance of persons, and of summary and extra-legal executions, leads us decidedly into the *terra nova* of the international *jus cogens.* (...)" (paras. 68-69).

32. And I concluded, in this regard, in that same Concurring Opinion to Advisory Opinion n. 18:

> "The concept of *jus cogens* in fact is not limited to the law of treaties, and it likewise pertains to the law of the international responsibility of the States. The Articles on the Responsibility of the States, adopted by the International Law Commission of the United Nations in 2001, bear witness of this fact. (...) In my understanding, it is in this central chapter of International Law, that of international responsibility (perhaps more than in the chapter on the law of treaties), that *jus cogens* reveals its real, wide and profound dimension, encompassing all juridical acts (including the unilateral ones), and having an incidence (even beyond the domain of State responsibility) on the very *foundations* of a truly universal international law." (para. 70)

In addition to this horizontal expansion, *jus cogens* also expands on a vertical dimension, that of the interaction between the international and national legal systems in the current domain of protection. The effect of *jus cogens*, on this second (vertical) dimension, is to invalidate any and all legislative, administrative or judicial measures that, under the States' domestic law, attempt to authorize or tolerate torture.[26]

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[26]. See E. de Wet, "The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law", 15 *European Journal of International Law* (2004) pp. 98-99.

33. The absolute prohibition of torture as a reaction of *ratione materiae* Law that we are addressing here, in both the horizontal and the vertical dimensions, has implications regarding reparations due to the victims. It is in no way surprising that reparations in cases of torture have revealed a dimension that is both individual and collective or social. Impunity worsens the psychological suffering inflicted both on the direct victim and on his or her next of kin and other persons with whom he or she lived. Actually, it causes new psychosocial damage. Covering up what happened, or indifference regarding the criminal acts, constitutes a new aggression against the victim and his or her next of kin, disqualifying their suffering. The realization of justice is, therefore, extremely important for the rehabilitation of the victims of torture (as a form of reparation), since it attenuates their suffering, and that of their beloved ones, by recognizing what they have suffered.

34. This is still an evolving matter, but the right of those victims to fair and adequate reparation is addressed today on the basis of recognition of the central role of the integrity of said victims.[27] The instant Judgment of the Inter-American Court in the *Case of Tibi versus Ecuador* is an example of the reaction of the Law to the aforementioned wrong. The Law has been unable to do much in the present context, but it is something, and at least it helps keep alive the hope of a minimum of human justice. The reaction of the Law reflects acknowledgment that rehabilitation of the victims of arbitrary detention and torture cannot be restricted merely to the psychological resources that they may have to defend themselves from that wrong, worsened by the indifference of the exterior world.

35. Realization of justice, with due reparations, helps reorganize human relations and restructure the psyche of all the victims. Realization of justice must take place from the standpoint of the integral nature of the personality of the victims. Reparations rather *soothe* the suffering of the victims when they corroborate the realization of justice. Finally, as I pointed out in my Separate Opinion in the case of the *"Street Children"* (*Villagrán Morales et al. versus Guatemala*, Reparations, Judgment of 26.05.2001),

> "Human suffering has a dimension which is both personal and social. Thus, the damage caused to each human being, however humble he might be, affects the community itself as a whole. As the present case discloses, the victims are multiplied in the persons of the surviving close relatives, who, furthermore, are forced to live with the great pain inflicted by the silence, the indifference and the oblivion of the others." (para. 22).

Reparations are, therefore a dimension that is necessarily both individual and social.

36. As the Judgment of the Inter-American Court in the instant *Case of Tibi versus Ecuador* shows, the Law also protects those who are forgotten in prison, in the house of the dead, which Dostoyevsky critically portrayed so brilliantly in the 19th century. Said reaction of the Law, both *ratione personae* and *ratione materiae*, indicates that the human conscience has awoken to the pressing need for and the aim of decisively putting an end to the scourges of arbitrary detention and torture. The general principles of the Law play a very significant role here. With this, there is a reason to hope that the D.D. Tibis, the Joseph K.s, and the Mersaults will gradually diminish in number, until they no longer suffer in the prisons of the "post-modern", insensitive, indifferent and brutalized world in which we live.

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[27]. See I. Bottigliero, *Redress for Victims of Crimes under International Law*, Leiden, Nijhoff, 2004, pp. 13-38, 111-191 and 249-253.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary