

**SEPARATE CONCURRING OPINION OF JUDGE SERGIO GARCIA RAMIREZ IN
THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE
CASE OF TIBI V. ECUADOR,
OF SEPTEMBER 7, 2004**

I. Meaning and significance of the rulings of the Inter-American Court

1. In this *Separate concurring opinion* that I am attaching to the Judgment on preliminary objections, merits and reparations in the *CASE OF TIBI V. ECUADOR*, issued by the Inter-American Court on September 7, 2004, I intend to refer to several issues addressed in said ruling, as well as to the meaning that the judgments and advisory opinions of the Inter-American Court of Human Rights have, and the significance they should have. In 2004, this Court is completing twenty-five years of work since it was established on September 3, 1979, in reliance on the American Convention on Human Rights, signed in San Jose, Costa Rica, on November 22, 1969. As I examine those specific issues –especially due process and conditions of detention- I will make remarks and state arguments that are an approximation to the jurisprudence of the Inter-American Court over these years.

2. As has often been said, inter-American jurisprudence is not and does not intend to be a new and ultimate instance in proceedings begun and heard under domestic venues. Its role is not to review domestic proceedings, the way this is done under domestic venue. Its purpose is a different one: to address the acts and situations generated in the national framework from the standpoint of the provisions of the international treaties that give the Court jurisdiction over adjudicatory matters, especially the American Convention on Human Rights, to issue –on this basis- guidelines with a broad value as indications for the States Party to the Convention, in addition to their mandatory efficacy –the binding nature of the judgment, as an individualized legal norm- regarding the State that is formally and materially a party to the proceeding.

3. In a certain sense, the task of the Court is similar to that of the constitutional courts. The latter examine the challenged acts –decisions with a general scope- in light of the legal standards, principles, and values of the basic laws. The Inter-American Court, in turn, analyzes the acts that are brought before it in connection with the legal standards, principles, and values of the treaties on which it bases its adjudicatory jurisdiction. In other words, if constitutional courts oversee “constitutionality,” the international human rights court decides on the “conventionality” of those acts. By controlling constitutionality, the domestic bodies seek to ensure that activities of the public authorities –and, perhaps, of other social agents- are in accordance with the order that is inherent to the Rule of Law in a democratic society. The inter-American Court, in turn, seeks to ensure that this activity is in accordance with the international order set forth in the convention that founded the inter-American jurisdiction and was accepted by the States Party exercising their sovereignty.

4. Just as a constitutional court could not and does not intend to bring before it all cases in which the constitutionality of acts and legal standards is questioned, an international human rights court does not have the aspiration –and has it even less so than the national body- of solving a large number of contentious cases that reproduce violations previously brought before it, and on whose essential themes it has already issued judgments that express its criterion as the natural interpreter of the legal standards that it has the responsibility of applying, that is, the provisions of the international treaty invoked by the litigants. This design, which clearly expresses a function of the Court, also suggests the characteristics that matters brought before it may have.

5. It would be impossible, in addition to undesirable, taking into account the ancillary or complementary nature of international jurisdiction, for it to receive a large number of contentious cases on identical or very similar facts, to reiterate, again and again, the criteria set forth in previous contentious cases. We must insist that the States themselves, guarantors of the inter-American human rights system, are at the same time essential components of this system, in which they participate through a political and juridical will that is the best guaranty of the true effectiveness of the international system for protection of human rights, based on the effectiveness of the domestic system for protection of those rights.

6. Therefore, in the logic of the system –and of the institutional aspirations of the Inter-American Court, as a component of the system- there lies the idea that the rulings of the Court must be reflected, in the manner and according to the terms set forth in domestic Law -as the bridge between the international and the national systems- in domestic legislation, in domestic jurisdictional criteria, in specific programs in this field, and in the daily actions of the State regarding human rights; they must, ultimately, be reflected in the national experience as a whole. This –a power to influence, rebuild, guide, inform- is what explains and justifies, ultimately, an international venue that does not have the possibility or the capacity to hear thousands of cases of identical litigation, reproducing both reasoning and rulings that have been set forth and reiterated previously.

II. Patterns of violation

7. The Inter-American Court of Human Rights has ruled on facts that constitute, in a way, a traditional pattern of violation of rights. Recently, the Court has addressed different themes, on the border between the so-called first generation and second generation rights, or issues pertaining to the former that had not been brought up before and that enable opening new areas of jurisdictional reflection, which in turn propose new human rights frontiers in the Americas, in accordance with the interpretation given by the Inter-American Court.

8. Despite the gradual appearance of themes that are different from those covered during the eighties and even during the nineties, in the broad set of cases brought before the Court, some that are “traditional” in nature persist. Not only have they not declined or disappeared, as would have been desirable and seemed natural, but they have undertaken new expressions or have continued to be present, and this constant presence expresses the need, which I referred to above, to review the state of these issues under domestic venue to adjust it, without more ado, to international standards. The international court does its part as best possible when it identifies the major issues in the contentious cases that it hears or in the opinions that it issues and generates the jurisdictional doctrine contained in its considerations. The following stage must be carried out by the domestic venue, not only due to its legal competence but –especially- due to the real ability that it has to encompass all the problems that arise in the domestic sphere.

9. Those international standards do, in fact, coincide to a very large extent, or perhaps completely, from the standpoint of the legal provisions in force, with the purpose and the mandates reflected in the supreme national legal orders, and even in much of the secondary legislation. Therefore, it is necessary for the political and juridical will of the States to once and for all suppress the most frequently observed violations and usher in the new stages of protection of fundamental rights. Otherwise, we will continue to face the same facts that abridge those rights, arguing the same points and issuing the same opinions or rulings, without this penetrating our nations' life as deeply as it should.

III. Criminal justice and human rights

10. In view of these considerations, it seems to me that it is useful to discuss two central themes in the adjudicatory case on which the Court decided in its September 7, 2004 judgment, and to which I attach this *Opinion*. These are themes that the Court addresses once again, in a manner and in terms that have already been expressed before, regarding its more significant aspects, in other rulings issued by means of adjudicatory decisions or advisory opinions. I am referring to due legal process in criminal matters –but also, pursuant to the Court's jurisprudence, in other types of contentious issues- and to the system of institutions regarding deprivation of liberty, whether preventive or protective, whether punitive or executive, both for adults and for minors. Proceedings and prisons have been, are and perhaps will be – although we hope not- the scene for the most reiterated, grave, and notorious violations of human rights. It is time to look at those scenes, in regards to which there are constant complaints but insufficient reforms, to radically modify them.

11. Both themes have certain common denominators. One and the other are, as has often been said, a crucial space for effective exercise of human rights. Strictly speaking, so-called criminal justice –or, in less pretentious terms, the penal system- is a critical area for human rights. In it, those rights are at very grave risk, and within it they are most severely affected, in a manner that is painfully frequent. That is due to the fact that criminal prosecution places the State, which has greater strength because it has the monopoly of –supposedly legitimate- violence, and has the greatest capacity to intervene in people's lives, with the individuals who are indicted, prosecuted or convicted, who are identified as “enemies of society” and who certainly do not have, even in the more developed legal systems, the juridical and material strength that the State does have. As I have underlined, the epigraph of some proceedings is eloquent, when it states the identity of the contenders and suggests the relative weight of each one on their pan of the scale: *The State versus X, The Republic against Y, The King against Z*, and so forth. There could hardly be a better basis for the balancing or equalizing trend that is a characteristic of modern proceedings.

12. It is therefore precisely there, in the domain of criminal justice, where it is most necessary to “work” on the issue of human rights –without neglecting other areas- through categorical proclamations, imperative legal standards and inflexible practices, all of them ensured through the vigor and effectiveness of guarantee instruments in suitable hands: competent, independent, impartial, whose strength and integrity ensure effective exercise of rights in a terrain that is especially favorable to violations. This process of ensuring essential, radical, irreducible rights, also runs into the problem of public perception running astray due to posing of false dilemmas that oppose the requirements of public security to the “weaknesses” that protection of human rights allegedly entails. Authoritarian trends that threaten the proceedings and the prisons, although not only them, circulate through the passageway opened by false dilemmas.

IV. The “guarantor” State

13. In the judgments in the *Tibi* and the “*Juvenile Reeducation Institute*” cases, as well as previously in the rulings on the cases of *Hilaire, Constantine and Benjamin* (June 21, 2002 judgment) and *Bulacio* (September 18, 2003 judgment), and also in *Advisory Opinion OC-17/02*, issued on August 28, 2002, on the juridical situation and the rights of the child, the Inter-American Court has asserted the specific role of the State as guarantor regarding the rights of those deprived of or restricted in their liberty in State institutions and under the responsibility of agents of the State.

14. In criminal law, the guarantor of the interest protected by law must answer - under the form of nonfeasance -for not impeding injurious results, when the guarantor could and should have done so. The jurisprudence of the Court has included the concept of the guarantor, in terms that are conceptually close to those of the legal systems in this regard: on the one hand, the existence of an obligation that derives from a given source; on the other hand, the presence of a typical injurious result, attributed to the obligor.

15. Of course, the State must provide certain living conditions and conditions for development to all persons under its jurisdiction. To do so -specifically, though not exclusively, regarding security and justice- even constitutes a "raison d'être" of the State, and therefore a reference point to assess the justification and efficiency of public authority. Now, this obligation and the consequent responsibility become extreme and much more intense, and they are even more enforceable, with all that this entails, when those entitled to rights are at the mercy of the State -for example, in a "total institution" where everything is regulated and supervised- and cannot, on their own, exercise their rights and impede the harassment of those who abridge them.

16. In these hypotheticals there is a situation of weakness, helplessness or vulnerability, due to procedures established by the State that place the lot of the citizen in the hands of the agents of public authority. "In the instant case -reads the judgment of the Inter-American Court- it has been proven that during March and April 1996 the (accused) was subjected by the prison guards to sessions of physical violence with the aim of obtaining his self-incrimination." What protection does the inmate have, in the darkness of the jail, in a small invisible city, against guards who violate their mission?

17. If in the hypothetical of criminal nonfeasance the position of guarantor derives from the law or the contract, in that of detention it derives from a *de jure* situation and a *de facto* one, stemming from the former. On one hand, the immense restriction of liberty in procedural detention or in punitive incarceration; on the other hand, the real situation generated by this restriction. Of course, the same applies to various conditions in which the State undertakes the almost total responsibility for the exercise of individual rights and protection of human dignity: that is the case in centers where children, adolescents and youths are committed, in public security institutions that fully control the individual's activity, in health centers, especially those in charge of caring for the mentally ill, and other similar ones.

18. In my *Concurring Opinion* in the judgment issued in the *Case of Hilaire, Constantine and Benjamin*, I referred to the role of the State as guarantor, which in this matter entails: a) omitting all that might inflict on the individual privations beyond those strictly necessary for purposes of the detention or fulfillment of the conviction, on the one hand, and b) to provide everything that is pertinent -in accordance with the applicable law- to ensure the aims of the incarceration: security and social adjustment, regularly, on the other.

19. In brief, it is necessary to continue insisting on the existence of that special position of guarantor and on its consequences for the State and for the individual. This encompasses behavior of the agents of the State -who systematically abridge the rights of the inmates in the course of prison life-. , through action or omission, as shown by the *Tibi* and *Panchito López* cases, to which we must add another recent, explosive situation in the *Urso Branco* prison, where violent deaths of inmates have continued, despite the provisional measures ordered by the Inter-American Court.

20. Reiteration of the violations, despite projects and promises, and even despite actions that will yield medium- and long-term results, led me to point out in the

Concurring Opinion that I attached to the July 7, 2004 ruling on measures, in regards to conditions prevailing in the *Urso Branco* prison: "It is good that there be a penitentiary reform, that new legislation be enacted regarding this matter, that inmates be classified, that penitentiary institutions be modernized, that the officials who will act as guards and be responsible for sentence execution be carefully recruited, that there be adequate alternatives to prison sentences, that visits to prisoners take place under decent conditions, that there be medical care to protect the inmates' health, that schools, workshops and work units be set up. All this, and more, is absolutely indispensable, because it reflects current standards regarding deprivation of liberty, both preventive and penal, a measure that currently is severely questioned. – But none of this, which must be done as soon as possible, can substitute immediate adoption of the necessary measures to avoid a single additional death in the Urso Branco Prison."

V. *Right to fair trial and judicial protection*

21. In criminal Law there is concurrence of criminal offenses, which generally entails a more severe applicable sentence. For this, an assessment of the overall situation is the basis for a ruling. Something similar happens in human rights Law. Rarely is there an isolated abridgment of a juridical right that is protected by a precept of a convention. There are many examples of this in the jurisprudence of the Inter-American Court. Abridgments are usually multiple, beginning with a single unlawful conduct (as in the case of forced disappearance: violation of various rights, as the Court pointed out already in its early judgments: thus, in the judgment on the merits in the *Velásquez Rodríguez* case, on July 29, 1988) or, in the course of successive facts or acts, in close succession. It is perfectly possible that during a criminal prosecution proceeding, which may take place rapidly, there are various violations: arbitrary detention, torture, irrational severity of preventive detention, breaches of due process, flaws in the judgment. Nevertheless, each one has its own specificity.

22. Things may have been seen otherwise –but at the time there was no protection of human rights as there is today- when there was "aggravated" capital punishment, that is, one carried out with major use of means to carry the suffering of the convict to the extreme. There are numerous examples: such is the case of Damians, referred to in the first pages of *Discipline and Punish*. Thus, torture was part of punitive death, it was incorporated into this punishment, which did not separate purgatory torment, on the one hand, and fulminating death, on the other. Even so, it is possible to naturally establish a distinction between the suffering inflicted and the death caused: the former violates –as we say today, in the language of Article 5 of the American Convention- the right to humane treatment, and the latter violates the right to life recognized in Article 4.

23. There is, therefore, a constellation of events, with barely a break in continuity, if it exists at all, which the judge must observe, analyze, and decide upon. This will be the starting point for establishing the responsibility of the State and the consequences in accordance with the violations committed. The subsequent finding that establishes its responsibility will take this set, not only each of its parts, into account, and the conceptual separation will not deny the relations that exist among certain legally protected interests, the respective rights, and the events in which the former were harmed and the latter abridged.

24. The above can be seen in various points, and especially in the analysis of Articles 8 (Right to Fair Trial) and 25 (Right to Judicial Protection). In both instances, they refer to effective judicial protection, in accordance with conditions established in the course of protracted evolution regarding this matter. Deficiencies regarding due process (abridgments of Article 8) are combated with judicial remedies (the

instrument of Article 25), in which new violations of due process may in turn occur, now in the venue of the protective proceeding established by the latter precept. Of course, it is also possible that this same instrument -habeas corpus, amparo and similar means- may be invoked to protect rights contained in all or almost all the provisions of the American Convention.

25. There is, therefore, a borderline that persists between legally protected interests and rights, in their respective hypotheticals, that may be analyzed separately. This judgment does that, for example, inasmuch as it studies abridgment of Article 25 from the standpoint of the violation of Article 7(6), regarding control over lawfulness of the detention. I do not set aside the hypothetical, more complex than the one I mention now, that there may be a distinction between the guarantees judge –or one acting as such-, who acts in the criminal trial itself, to ensure respect for legality regarding evidence and precautionary measures (which is another way to comply with the mandate of Article 7(6)) and the judge who oversees the lawfulness or constitutionality of actions by the authorities, established as a tribunal that is external to the criminal proceeding, and to whom one resorts based on Article 25 of the Convention and on the numerous domestic provisions that regulate this matter.

26. Regarding this same point, we must take into account that, under the terms of Article 27(2) of the Convention, there is the possibility of suspending the right to fair trial set forth in Article 8, but this possibility does not exist regarding those guarantees that are indispensable for the protection of the substantive rights whose suspension is forbidden, and these are precisely those mentioned in Article 25, as the Inter-American Court has pointed out in advisory opinions regarding amparo and habeas corpus and in adjudicatory matters in which this criterion has been applied. In this regard, we must consider, especially, Advisory Opinions OC-8/87, on “Habeas Corpus in Emergency Situations,” of January 30, 1987, and OC-9/87, regarding “Judicial Guarantees in States of Emergency,” of October 6, 1987. There is doubtless a need to take into account the requirements of due legal process when assessing compliance with Article 25. It would be unacceptable for the protection offered by this Article to be diminished or cancelled through procedures that disregard indispensable procedural rights before the habeas corpus or amparo jurisdiction.

VI. *Due process.*

27. The Anglo-Saxon term *due process* -translated in some countries as “garantías esenciales del procedimiento” [essential procedural guarantees]- is one of the most formidable tools for protection of rights. It is also, in itself, a right and a guarantee for the defendant. It enables or realizes effective judicial protection. It involves access to formal justice, such as a hearing, evidence, and pleadings, and to material justice, as the means to obtain a just judgment. It entails clean and balanced use of the arms that both the accuser and the defendant are allowed to use, as well as objectivity, serenity, and the will of the court to give to each one what is due; in brief, fair trial. All these concepts, each of which has been characterized and positioned in the domestic legal systems, have a common denominator in their origin, development, and objective, and they come together under the concept of due process.

28. We had gained much ground in the endeavor for due process. The Court has referred to it –thus, for example, in Advisory Opinion OC-16/99, on “The right to information on consular assistance,” of October 1, 1999, to which I added a separate *Opinion* in which I analyzed this point- as a system of guarantees with expansive power. The static aspect of due process, sheltered in certain acts, rights, and guarantees that are non-revocable, has been reinforced by the modern dynamics of

this concept: a constant progress that has brought with it, alongside consolidation of democracy and the Rule of Law, new rights and emerging guarantees, which together constitute the more advanced idea and practice of due process.

29. This evolution led to the addition and blossoming of the right to silence, timely assistance by defense counsel, the right to immediate information on the charges that give rise to the proceeding, restrictions on preventive imprisonment, judicial guarantees in adoption of precautionary measures or in conduct of certain investigative acts, the right to information on consular assistance for the benefit of foreign defendants, the public and oral nature of the proceeding, discredit of evidence based on confessions, to mention just a few breakthroughs that have become a part of due process, surpassing its original nucleus.

30. I stated that we had gained this ground, yet now we must note, once again, that no progress is definitive –the struggle for the law, in more than one sense, is the only possible banner in this field- and that a disturbing erosion of human rights has begun to take place in the scope of the proceeding. Persistence of old forms of crime, the appearance of new expressions of crime, systematic attacks by organized crime, the extraordinary virulence of certain extremely grave crimes –such as terrorism and drug trafficking- have determined a sort of “exasperation or desperation” which is ill advised: it suggests setting aside progress and going back to systems or measures that already demonstrated their enormous ethical and practical flaws. In one of its extreme versions, this has generated phenomena such as the “guantanamoization” of the criminal proceeding, recently questioned by the jurisprudence of the Supreme Court of Justice of the United States itself.

31. There is often leeway given to practices and, worse yet, to legal provisions that derogate rights and guarantees in the framework of the struggle against very grave crimes that seem to “justify” this type of regressions. The consequences of this, which by the way has not managed to prevent, impede or reduce these crimes, is clearly visible in broad areas of contemporary procedural experience. Not only do these incorporated provisions construct a special or exceptional procedural system, alongside the regular procedural system with its guarantees, lacking in the special one. Obviously, this also leads to the appearance and strengthening of a devastating practice that resorts to all kinds of arguments to “legitimize” the gravest violations. These often remain in shadows; sometimes they appear before the eyes of public opinion and of the courts, as in the case judgment to which I attach this *Opinion*.

VII. Presumption of innocence

32. The idea of “presumption of innocence” –or better, perhaps, of a “principle of innocence or non-guilt,” for the benefit of those who object to the “presumptive” nature of this concept- has existed for two hazardous centuries. One could hardly find a principle that is more consistent with democratic criminal justice, which entrusts the State as accuser with proving the allegations and the State as judge with deciding on them. Our American Convention embodies the principle: “Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law” (Article 8(2)). The Inter-American Court has also stated in its November 12, 1987 judgment on the *Suárez Rosero* case, and reiterates it in the judgment on the instant case, that the principle of presumption of innocence is the foundation for the right to fair trial. The latter is, in fact, built around the idea of innocence, which does not block criminal prosecution, but rationalizes and channels it. Historical experience supports this approach.

33. This principle is in the heading of the provisions on defendants, in the 1955 Standard Minimum Rules for the Treatment of Prisoners: “Unconvicted prisoners are presumed to be innocent and shall be treated as such” (rule 84.2). And principle 36

of the body of provisions for the protection of all persons under any form of detention or imprisonment, in 1988, sets forth: "A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

34. Of course, I am aware of the obstacles to full application of this presumption or principle. They are, undoubtedly, the often debated precautionary measures in the criminal proceeding, first and foremost preventive incarceration, to which there have always been objections. Another obstacle is the very fact that the criminal procedure is based on the opposite idea: reasonable evidence of criminality, probable criminal liability, the existence of data that provide grounds to believe that a given individual participated in a specific criminal act, and so forth.

35. Nevertheless, this presumption or this principle is an extremely valuable reference for the construction of the proceeding, to address doubts that may arise during the proceeding, to recover guarantees and to reduce disproportionate interference. The nature and outcome of the procedural acts and of the proceeding as a whole are very different when the defendant is treated "as if he were guilty," which is a trait of the inquisitorial system, and when he is treated "as if he were innocent," which is a trait of the accusatory one. Ultimately, what the presumption or principle of innocence seeks is to exclude prejudice –advanced, general and condemnatory judgment against the defendant, without being based on the evidence of the facts and of the liability- and to avoid advanced punishment based on vague appearances.

VIII. Arbitrary detention

36. The case that this *Opinion* refers to shows, once again, the great flaw at the outset of the proceeding, or at least the one that most often and overwhelmingly victimizes the defendant –the one "presumed innocent"- and weighs on the rest of the data of the prosecution by the State: arbitrary detention. It is not easy, now, to find legal standards that do not address the lawfulness of this very significant, delicate, and devastating measure. Efforts have been made to surround it with conditions: that detention must be based on the law, that it must be conducted by a competent authority, that it must be ordered by a judicial authority, that it must be recorded in writing, that the detainee must be presented. This catalogue of good intent, duly reflected in the fundamental laws, collides with frequent practice. One bad day two agents detain a person driving his car down a city street. They say that he is required for "migration control." They take him, without informing him about his rights or of the charges against him, to a prison six hundred miles away from where he was detained. He remains there twenty-eight months. Ultimately, his trial will be discontinued, if only provisionally.

37. The Inter-American Court's jurisprudence also addresses this problem. Most, if not all cases of extra-legal execution, torture, forced disappearance, irregular proceedings, etcetera, etcetera, were preceded by a detention in which there was not even a remote respect for conditions that legitimize detention and that enable a distinction between an action of the State based on the Constitution and the kidnapping of a citizen, committed by "law enforcement" agents who impose their personal will on the general will reflected in the legal principle.

38. Rather than being unheard of, cases in which there was an arbitrary detention seem to be the majority –or at least they are very numerous and evident. From then on, the proceeding can become a labyrinth that is full of traps, and which certainly is not in accordance with the idea of a legal proceeding –an "ethical," in addition to juridical, idea-, associated with the Rule of Law and which is, in fact, one of its most

eloquent expressions or one of its most revealing negations. Describing this prosecutorial labyrinth –as can be seen in the case that the Inter-American Court has decided on in this judgment- evokes in an absolutely natural manner the vicissitudes of defendant *Joseph K*, whom Kafka allows to wander around the uneven ground of the proceeding, without knowing what it is all about and where he is being taken.

IX. *Information on the charges*

39. Helplessness in the proceeding itself –against which we must strive every day, with infinite patience and perseverance- is shown by attacks against certain rights and guarantees that constitute the democratic, civilized, evolved version of prosecution. One of these is the right to information on the charges against the defendant, which are the basis for the State's action; this information goes hand in hand with the right to timely defense and that of the accused to remain silent. We cannot comprehend how these rights can still be systematically excluded, despite the accrual of constitutional provisions, legislation, and provisions of conventions, as well as the jurisprudence that asserts them and the political discourse that proclaims them.

40. What should be is set forth in Article 8(2)(b) of the American Convention: the right to “prior notification in detail to the accused of the charges against him.” And also, specifically, in principle 10 of the aforementioned set: “Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him.” However, the distance between the principle and the facts still shows up with a disquieting regularity in the cases brought before the Inter-American Court.

41. As regards the moment in which the right to information on the charges and the right to defense must become effective, the judgment issued by the Inter-American Court in the *Case of Tibi* is once again explicit: at the time of detention and before the accused renders his first statement before the authorities. It cannot be otherwise. This had already been asserted in the enlightening North American jurisprudence based on the *Miranda* formula, often defended as well as criticized, and it has been the opinion of the Court, in regards to a specific topic, when it issued Advisory Opinion OC-16/99. The former, citing significant precedents, asserts: “*The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation*”. In a similar vein, OC-16/99 asserted the right of foreign detainees to receive information on their right to seek and receive consular assistance of the State of which they are nationals, pursuant to the Vienna Convention on Consular Relations.

42. This cannot be otherwise, if we want rights to serve the purpose for which they are enacted and to have the effect attributed to them, which of course is not impunity, but justice. When we say “before the statement”, we mean: prior to any statement before any authority –not only the Public Prosecutor's Office, not only the court- on which the outcome of the prosecution and, therefore, of the accused and, ultimately of justice, which is put to a test in each concrete case, may depend. It is very well known that, despite statements and efforts to the contrary, the first statement usually defines the direction of the proceeding and determines its outcome.

X. *Judicial control*

43. The Judiciary has been conceived, essentially, to ensure the rule of law in social relations: those among private persons and those between political authorities

and citizens. It is the “guarantor power” par excellence. This is the reason why those who exercise judicial functions are required to have so many qualities, and even virtues –above and beyond those usually required of those exercising other types of authority, including those who act as representatives-, and this is also why private individuals are promised access to justice by means of independent, impartial, and competent tribunals. Procedural immediacy is party to this promise. The examining judge, the guarantees judge, the judge who hears the case, have this substantive function. This is what the defendant expects, for the hands of the police or of the public prosecutor not to be the only ones guiding his fate from the moment when the criminal controversy arises.

44. However, many circumstances hinder fulfillment of this promise, inherent to the Rule of Law and to juridical certainty of citizens, who believe they are protected by it. We must note how carefully the constitutional and international texts stipulate that the detainee –whose capture must be based on a court order, unless there is flagrancy- must be brought as soon as possible before a judge, and not before any other agent of authority, for the judge, with all the juridical and ethical authority of his mastery of the law, to ascertain whether the conditions that make his detainment legitimate have been met, whether said detainment should continue, and whether it is appropriate to take the following steps along the harsh path of the proceeding.

Any omission of this appearance before the judge impedes access to justice, renders the defendant helpless, alters the juridical project of the Rule of Law, transform lawfulness into arbitrariness. In many cases –and certainly in the one that gave rise to the judgment to which I attach my own *Opinion*- this has not been so: the accused does not meet his judge until the proceeding is well advanced; there is no immediacy; individualization becomes rarified; disclosure is lacking. Can we justify that the first judge a citizen meets is the justice of an international court, when it is not an international court but rather domestic justice that must be the front line –the indispensable, decisive, fundamental front: this we must underline- in the protection of subjective rights?

XI. Amparo

45. Article 25 of the American Convention establishes a precious guarantee, which is exactly, the “guarantee of guarantees,” the “right that serves all rights.” This guarantee, this right, is the culmination of a protective system that ultimately places its expectations in a means of defense that all may resort to and that all may satisfy. This provision states that “(e)veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights (...).” Likewise regarding this point and apropos of the judgment in the instant case, but also in a large number of cases – actually, all those heard by the Inter-American Court-, we must ask ourselves about the “effectiveness of effective recourse,” about the simplicity and promptness that define it in the strict and sufficient terms of the Convention, which does not go much farther than the point reached by many national constitutions.

46. Is the recourse foreseen truly “effective,” in the sense that it enables a real defense of fundamental rights, always and under all circumstances? Is it truly “simple”, in that it can be known, understood, used by any citizen –since it was established to protect any citizen- who needs that protection? Is it truly “prompt,” in the sense that it ensures very rapidly, not after months or years, protection of a right whose protection admits no delay without causing severe and irreparable damage to the person entitled to that right? Has an effective system of remedies been built, overcoming unnecessary complexities, useless technicalities, inadmissible obstacles? The panorama that the Court usually has before it does not attest to this, as shown by the frequency with which it finds violations of Article 25. Observance of the latter

would remove from its venue the vast majority of matters heard by the international court.

XII. Defense

47. Defense of the accused continues to be in a predicament. As far as I know, there is no domestic legal order that does not stipulate his right to defense against the charges against him, as well as the right to have legal counsel to assist him in the difficult period of prosecution, when his most valued interests are at stake. This is, even, a personage that integrates, as has been said, the procedural personality of the accused. Yet numerous cases that have been heard by the Court (and thousands more awaiting their turn: not to come before the inter-American court, but to benefit, through domestic legal systems and venues, from the progress set forth in international instruments) in which there has been no defense at all, or it has been nominal: distant and foreign to the accused, inactive, indifferent, or lacking a real possibility and genuine opportunities to fulfill a mission that is recognized, but not fostered.

48. Reform of the proceeding, based on the requirements of the national Constitutions and of international instruments, and providing full access to justice, must establish a true and effective defense system that strives to ensure the rights of the accused, with the same perseverance and consistency that Inhering recommends that we struggle for the law. Otherwise, of what use is this auxiliary means of the accused, which is also, in the best sense, an auxiliary to justice? This urges us to move toward new means to ensure access to justice. Traditional court-appointed counsel -usually overloaded with cases and with officials whose work conditions are not always, or are only rarely, appropriate to effectively carry out their responsibility- can hardly be sufficient. The problems of court-appointed counsel have been evident in several cases brought before the Inter-American Court.

49. Having an appointed counsel does not, in itself, ensure defense during the prosecution. This has been noted, very often, in the proceedings before this Court. If it is not, then, just any -nominal- defense, but rather true defense -as the satisfaction of any human right should be-, we should specify its characteristics, which would require independence, sufficiency, competence, gratuitousness, completeness and timeliness, and provide the means for it to exist. Otherwise, protection of the human rights of the accused will, once and again, stumble on the deficiencies of the defense, ultimately reflected in violation of the law, poorly disguised by apparent exercise of this right, one that does not stand up to even the slightest analysis.

XIII. Sufficient evidence

50. Another point that stands out in the Judgment to which I attach this *Opinion* is what we might call "sufficient evidence." I do not confuse probatory sufficiency for an arrest warrant with that for a definitive judgment, respectively. Obviously there is a difference. Nevertheless, all acts that involve an exercise of State power and procedural and/or criminal restriction of liberty must be based on "sufficient evidence." There can be no action without any evidence, and there should be no action based on weak evidence. Procedural law must emphasize this point, taking into account that, clearly, the proceeding is a probatory channel and its results depend on gathering, admission, and assessment of evidence. There can be no issue more delicate than this one as regards legislators' reflection and justices' performance.

51. Confession -whose excessive credence fosters torture; we see this in the instant case- was once seen as the "queen of evidence." Fortunately, that is no longer so. Yet still today certain legal systems -or certain investigative and procedural

practices- have filled this niche with devotion regarding the statement of the accomplice, of the fellow traveler along the road of crime, of the informant who seeks exoneration from liability or exemption from punishment by throwing the former or directing the latter toward another person, who may be guilty or innocent. It would be best if the conviction that the co-perpetrator's testimony, in itself, is insufficient, spread and became the rule.

52. Article 108 of the Criminal Procedures Code in force in the State when the facts took place, establishes that "in no case will a judge admit the co-defendants as witnesses." This provision may be extreme, but it states a commendable concern. In the case examined, the apparently coerced statement of a hypothetical participant in a crime, who was also the singular witness and only means of "certainty," unsupported by other evidentiary instruments, determined the prosecution and protracted incarceration of the accused, contrary to logic and even to the legal standard in force at the time of the facts brought before the Inter-American Court. Said prosecution and incarceration were groundless, as would be established years later.

XIV. *Reasonable term*

53. The issue of reasonable term also comes up in this case, as it has in many others. It is, certainly, one of the issues that have been examined most often by international human rights jurisprudence. It addresses the difficult problem of the duration of preventive detention, in addition to that of the duration of the proceeding as a whole. Justice delayed, according to the well-known adage, is justice denied. It is bad when the person awaiting that justice, which moves hesitantly and arrives very late, is deprived of his liberty; worse yet when the deprivation of liberty is an arbitrary one.

54. The Inter-American Court, in consonance with the doctrine of the European Court, has insisted on the aspects that must be taken into account to establish, in a specific case, whether there was an unacceptable delay, in other words, whether there has been disregard for the rule of the reasonable term: complexity of the matter, procedural initiative of the interested party, and conduct of the court (or whoever conducted the proceeding, as this point may be examined going beyond criminal prosecution: insofar as there is a proceeding to decide on rights that have been denied, claimed or in doubt).

55. The instant case has addressed the *dies a quo* and the *dies ad quem* of the judgment for purposes of reasonable term. It is often said that the proceeding begins when the charges are filed and it concludes when there is a definitive judgment, and that the time between both moments, with their characteristic acts, is subject to measurement under the concept of reasonable term. In principle, this specification may provide guidance and even be sufficient. However, to arrive at conclusions that respond to the concern that is at the basis of reasonable term, we must examine the characteristics of each national prosecution. The panorama is not homogeneous. Therefore, it suggests different solutions, all of them seeking to address the need for the time that an individual is subject to a criminal proceeding – which is a time of reduction, compression, suspension of rights, despite arguments, based on technicalities, that it is otherwise- to truly be the least possible time, precisely to avoid prevalence of uncertainty and to avoid affecting, beyond what is strictly indispensable, the individual's rights.

56. Saying that reasonable term begins when an individual is detained does not lead to a satisfactory solution in all cases. Actually, it may be that before that moment there has been an ongoing, protracted investigative, and even judicial,

proceeding. During this proceeding, the individual was already subjected to pressure and to oppression of his rights. The lawfulness behind this conduct of the State does not in itself –so to speak- legitimize the abuse that may result from an extreme delay in deciding matters during the initial stages of the procedure. That is why it is good that some legal systems have established a certain term –which may be more or less broad- to exhaust an investigation and to decide whether a case will be brought before a judge, when the investigation has been conducted by the Public Prosecutor's Office, or before the court that hears the case, when the investigation was conducted by an examining judge.

57. It is also possible for the proceeding to take place without the accused being subject to preventive incarceration, whether because he receives the benefit of conditional freedom, or because in his case the law does not allow precautionary measures that restrict liberty. But even in these hypotheticals, it is possible for the prosecution to last an unreasonable amount of time, even if, when it ends, the “alleged innocent” who is accused has not suffered preventive incarceration.

58. We must also pay attention to situations –as in the instant case- when the proceeding enters into a sort of fixed-term “limbo”, as well as others in which the procedure is suspended –whether in the investigative phase or during the trial- for an indefinite time, which only concludes when the statute of limitations enters into effect, but this can be interrupted by acts that seek only said result. It is not always a matter of the old acquittal of action, generally reproved, but rather a sort of “new opportunity” for investigation that hangs like a sword of Damocles over the defendant.

59. Temporary or provisional stays, debatable in themselves, must be foreseen and used with great restraint and, I would add, also with great reserve or reticence. This parenthesis of legal non-definition serves justice poorly. The State must rigorously and scrupulously pursue the investigation to open a proceeding, not trust that there will always be a “second opportunity” to correct errors, gaps or flaws of the initial investigation, and while this opportunity comes and the State takes advantage of it –if it does occur and the State does in fact take advantage of it- legal security is suspended and justice takes a vacation.

60. We must also review the *dies ad quem*. We say that measurement of the reasonable term extends until the definitive judgment. Very well, but only in principle. When measuring that term, we must take into account the second instance, when there is one, which may last several months, and sometimes several years. Should we not, then opt for the unappealable judgment, which is the definitive one that cannot be challenged through regular means of recourse? Of course, these measurements must be applied in light of the specific case and taking into account the aspects that European jurisprudence has outlined and that inter-American jurisprudence has adopted, as I mentioned before: complexity of the matter, strategy of the interested party, conduct of the court.

XV. *Preventive detention*

61. Every time the Inter-American Court examines matters such as those of the *Case of Tibi*, the problem of preventive detention comes up. Certainly, it can arise in connection with reasonable term, which in said conditions should be especially strict and restricted, but also in connection with the very justification of this precautionary deprivation of liberty. Beccaria deemed it to be the punishment before the judgment, and expression that shows the strange nature of preventive detention and its debatable justification. If it is only based on practical reasons (rooted in the inability of justice to find a substitute that at the same time ensures development of the proceeding and security of participants in it, and that enables re-floating of the

presumption of innocence), clearly there is a need to contain and contract it: for it to truly be the exception rather than the rule.

62. Despite doctrinal consensus and public discourse on the indispensable reduction of preventive incarceration –which would be another expression of the “minimal” nature of the criminal system in a democratic society, now not only regarding the legal definitions and the punishments, but also regarding the instruments of the proceeding-, what has actually occurred is something different. In our countries preventive detention is liberally applied, in association with systems of prosecution that foster slowness of the proceeding. The number of unconvicted prisoners is very high, as the Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), headquartered in San José, Costa Rica, as well as the Inter-American Court, have highlighted. A major part of the effort to further the reform of criminal prosecution –not, incidentally, a “blackboard reform” that functions in the classroom and the seminar, but not in the intractable reality- must have the objective of drastically reducing this army of accused –in other words, “alleged innocents”- who are often a greater number, in the prisons, than their already convicted companions in captivity.

63. Reference to this measure allows us to move ahead in the discussion of other topics that stand out in the set of facts and, of course, in the text of the judgment in the Case of Tibi. Imprisonment was, first, an instrument of retention while the proceeding took place and a judgment was issued. This is the stage reflected in the well-known characterizations of Ulpianus, the Seven-Part Code, and Beccaria himself, already mentioned above: it sought to secure, not punish, the accused, while the trial took place and the judgment was issued. Of course, this careful and compassionate intention was always contradicted by reality: imprisonment is imprisonment, despite any technical distinctions.

XVI. The state of prisons

64. Despite the abundant literature regarding official deprivation of liberty, the most disquieting matters that have persisted throughout the history, a long history, of this means of prevention and punishment, are in plain view, with all their obvious problems. That literature encompasses not only the accounts of prisoners and witnesses of captivity, the studies of criminologists and specialists in penitentiary matters, and critical interpretations, but also, most exuberantly, the explicit intentions in government programs and projects, as well as abundant and detailed provisions: from constitutional laws to circular letters, edicts, and regulations that announce one of the most often proclaimed and least fulfilled endeavors: penitentiary reform. A reform that goes beyond public statements and resolutions to enter, as it must and is expected to do, the prison aisles, the corridors, the cells and the dungeons that still, despite everything, are a widespread trait of the geography of prisons.

65. Criminal and penitentiary congresses of the 19th century and the 20th century efforts, including those sponsored by the United Nations, have led to multiplied recommendations, statements, provisions, principles, and programs geared toward improving the preventive or penitentiary internment system, for minors or for adults. The First United Nations Congress on the Prevention of Crime and Treatment of Offenders (Geneva, 1955) issued half a century ago a set of rules –which I mentioned above- that have provided very useful guidance. They brought together the two trends that were in vogue: a humanitarian one, derived from classical Law –the territory of reformers-, and the therapeutic or finalist one, originating in the best ideas on social defense, without sliding into the “dangerous dangerousness.” Afterwards, other documents have reaffirmed, in legal texts, the “standards” for management and treatment of inmates: for example, the aforementioned set of

principles of the United Nations for the protection of all persons subject to any form of detention or imprisonment, adopted on December 9, 1988, and the United Nations basic principles for the treatment of inmates, adopted on December 14, 1990. If these are the standards, which no one rejects –setting aside, of course, frontal challenges of criminal Law and prison itself-, how has this been reflected in the reality of prisons?

66. Prison is, ultimately –less than capital punishment, but that depends on the circumstances under which each of them operates, specifically, on the dual level of prevention and execution-, an extreme act of force by the State against a citizen, legitimized by certain conditions that make it inevitable –rather than desirable or commendable- and that, at the same time, strictly define its borders. Therefore, precautionary or penal measures that entail deprivation of liberty must be rigorously based on the requirements of lawfulness, necessity, and proportionality. This must apply throughout the prosecutorial function of the State: from criminal commination (substantive Law, preventive establishment of punishability) and concrete procedural matters (procedural law, ordering of precautionary measures) to execution of punishment (executory law, final judicial adjustment of the legal consequences ordered in the judgment of conviction or in the condemnatory section of a judgment that encompasses the declaratory ruling and conviction).

67. A deprivation of liberty is unacceptable if it is not set forth specifically in the law –understood as the Court has in Advisory Opinion OC-6/86, of May 9, 1986, regarding the term ‘laws’ in Article 30 of the American Convention on Human Rights-, if it is not truly necessary and if it is disproportionate in regards to the unlawful act: capital punishment or life sentence for trifling crimes, an excess widely documented in historical experience and not unknown in current experience. This radical moderation of the violence exercised by the State must be reflected in the conditions of compliance with procedural precautions and execution of punishment. The Court has asserted this several times.

68. This moderation –strictly speaking, rationality- in the use of force involved in measures regarding the individual’s liberty encompasses provisional measures, such as those set forth in the September 13, 1996 ruling, in the *Loayza Tamayo* case. The description given then continues to reflect the conditions of the detainees in many prisons. In that case, the accused –stated the ruling- “is subjected to a regime of inhuman and degrading treatment caused by incommunicado detention and by being enclosed for 23 1/2 hours a day in a damp, cold cell measuring approximately 2 meters by 3 meters, without direct ventilation, containing cement bunks, a latrine and a hand-basin... The cell has no direct lighting and is only dimly and indirectly lit from the fluorescent tubes in the corridors. She is not allowed neither a radio, newspapers nor magazines. She is allowed into the sunlight for only 20 to 30 minutes a day.”

69. Of course, moderation encompasses the whole process of incarceration, including acts that may have as their objective the prevention or punishment of unlawful behavior or reduction of resistance to authority. Regarding the latter type of situation, the judgments of the Court in the *Neira Alegría* and *Durán and Ugarte* cases are very significant, in regards to containment of a prisoners’ riot through a massively destructive use of explosives, which caused the death of dozens of inmates.

70. At this time of assessment of the situation of human rights in the Americas, fifty-five years after the American Declaration of the Rights and Duties of Man, thirty-five after the signing of the American Convention, and twenty-five since the establishment of the Inter-American Court, we must take note of the horrors that persist in many prisons, flagrantly violating the most basic rights of inmates. In this regard, the condition of helplessness, exposition, vulnerability that I referred to

above when I mentioned the crucial role of the “guarantor” State in this field, is especially noteworthy and evident. We have only advanced a short distance from Howard’s complaints, which continue to be valid two centuries and many years after the English philanthropist documented them in a couple of admirable works.

71. In several rulings of the Inter-American Court -both provisional measures and judgments on the merits and reparations- the true state of the prisons has been shown quite clearly, together with absolutely abusive treatment of the inmates, the irrational nature of punishment inflicted inside the prison walls, lack of training and extreme cruelty of the guards, impunity of the guilty ones. This is proven. The respondent parties are found responsible. And nothing happens, or very little. This situation not only breaches the commitments undertaken by signing the respective international instruments and the obligations to suppress obstacles and to adopt domestic legal measures –normative ones, yes, but also practical and effective ones in accordance with the former-, pursuant to Articles 1(1) and 2 of the American Convention, but also constitutes a source of very grave problems. Prisons are “time bombs,” as has been said, and they can explode at any moment. These explosions are becoming more and more frequent or visible.

72. Those who study the criminal system and the jurisprudence of the Inter-American Court, those who resort to it seeking to examine violations, prepare a diagnosis and undertake corrective measures, may take a complete census of prison wrongs based on the items provided by the adjudicatory cases and the advisory opinions. These supplement the efforts made by the domestic constitutional courts, which belatedly sought to apply to prisons, prisoners and guards the constitutional review that should apply to all public functions and agents of the State; and the still isolated, fragmentary, and insufficient efforts of the enforcement courts, which incorporate the principle of lawfulness in this generally obscure field, in which those in charge of execution controlled lives and property, and those subject to that enforcement were “objects of the administration.”

73. Just regarding recent months, and even for the session in which the judgment on the *Case of Tibi* was issued, we should mention, as I did above, the provisional measures ordered in regards to the *Urso Branco* prison, where dozens of inmates have lost their lives under very violent circumstances, or study the situations in which children and youths lived and died in the “*Juvenile Reeducation Institute*”. The situations described by Howard and those in other accounts of prison conditions can hardly reveal more violent and censurable events than those in said “institutions,” nominally geared toward social adjustment –such is the motto- of the inmates. If that is the situation in the prisons –of course, I am not saying that this is the case in all prisons-, the time has come, or rather, it came long ago, to carry out the task that this demands: immediate, in-depth, constant, rigorous reform, until the time – seemingly distant- when prisons, once welcomed hopefully, yield to other more rational and fruitful measures.

74. We need not to go very far to collect evidence of the violations that occur more and more often in prisons. Obviously, it is not merely in certain prison in a given country. This happens, clearly, in various countries –obviously not only of our hemisphere- and in many jails, which have contributed to the disrepute of preventive detention, debatable in itself, as we have said, and of sentences involving deprivation of liberty, which is nevertheless the most frequently invoked, foreseen and applied penal reaction in some places. Too much is expected of the latter, with no grounds for said expectations.

75. Reality of prisons –we must insist on the abyss that separates that reality from the ideal embodied in domestic and international standards- is far from what it would be if the States rigorously fulfilled their role as set forth in the judgment of the

European Court, for example, in the *Kudla v. Poland* case, quoted in the judgment to which I attach this *Opinion*: “the State must ensure that a person is detained in conditions which are compatible in regards for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.”

76. Growing acceptance of preventive detention, on the one hand, and excessive use of punitive incarceration, on the other, have led to overpopulation in the prisons which, in turn, is another source of violations. There, one of the basic, constantly proclaimed rules of prison classification flounders: the separation of indictees – “presumed innocent” and convicts – “found guilty”. This problem is evident in the case we are now discussing, as in some others there continues to be promiscuity between adults and minors, contrary to all recommendations and rules. An expert witness who reported to the Court on this case argued –in a description applicable to many prisons in more than a few countries of our continent- that “protracted criminalization prior to sentencing is currently the most serious problem of the criminal justice system” in the State.

77. There is a great distance between the classical, dark prisons with individual cells and the promiscuous, noisy ones, but they are both devastating for the inmate. He is destroyed both by incarceration in cells, condemned by Silvio Pellico, and by the undesirable promiscuity described by Dostoyevsky. Mateo Alemán, in his “Guzmán de Alfarache”, had already described the noisy, crowded prison in Seville: “ a jumbled republic, a brief hell, a protracted death, a bridge of sighs, a vale of tears, a madhouse where each one screams out and treats madness as his own.” At the Penitenciaría del Litoral -which is not an unheard of abyss in the landscape of prisons- there was an area, one hundred and twenty square meters, called the “quarantine,” where there were “three hundred inmates sleeping on the ground,” according to the statement of an expert witness. In the case we are discussing here, this promiscuous prison, without the slightest classification –disregarding constitutional provisions and international standards-, exercised its demolishing power.

78. The statement of the victim is an eloquent one and it is not contradicted by other information in the proceeding before the Inter-American Court. The respondent's plea addressed various aspects of the case, but not the prison conditions at the so-called Penitenciaría del Litoral. “One night (there) –stated the detainee- is like hell. A normal human being cannot bear it. Those who had no cells spent the time in the aisles, climbing the walls, moving from one cell-block to another and trying to steal through the cell bars. They also went into the cell-blocks to smoke crack. One could buy anything in this prison, there were drug deals, cocaine, alcohol and weapons. People went around armed.” One is surprised and filled with admiration that the spouse of the accused, together with their young daughter, could bear to remain with him over the weekends at the Penitenciaría del Litoral. She visited him seventy-four times, and these must have been an equal number of anguishing episodes.

79. This case and many others have been documented, throughout the contemporary world, by literature and films that reflect the worst aspects of this “black genre.” A chronicle with the suggestive title *Midnight Express en Equateur* was mentioned in the trial that led to the September 7, 2004 judgment. Part of what happened there has to do with principle 1 –a very well numbered principle that governs the rest- of the body of principles that I mentioned above, and which reads:

“All persons under any form of detention or imprisonment shall be treated in a humane manner and in regards for the inherent dignity of the human person.”

80. Precautionary and penal deprivation of liberty affect multiple rights of the inmates, and even the rights of third parties not involved in the crime, linked to the inmate by love or dependence. This is inevitable, as long as there are prisons. But it would be necessary to review penitentiary doctrine and provisions, and to ensure that the negative effects in both situations are minimal insofar as possible. However, in many cases the conditions under which incarceration is ordered and practiced are far from fostering this “minimization” of the negative effects, which would be a natural and reasonable consequence of restricted use of the penal system. Excessive severity and unwarranted restrictions may improve the lot of those in charge of the investigation or custody of the accused. This opens the panorama of corruption in the prosecution of crimes. There are jails where everything has a price –exactly like in Howard’s chronologically remote time, actually very near- and the inmate must find ways to survive.

81. Having seen the prisons through the *Case of Tibi*, which is only one observatory among thousands, not an exceptional, uncommon case, we must inquire about the “reasons” –allow me this expression- for prison, which is a complete confinement, under perfectly controlled or at least controllable conditions, to paradoxically entail the greatest insecurity for the inmates, always at risk of losing their lives or of suffering severe detriment to their physical safety –as shown by the reports on *Urso Branco*-; or the loss of their health, as happened in this case; or the absolute lack of working conditions, despite what has always and everywhere been said about the therapeutic, redeeming, adaptive virtues of work. Are these three aspects –safety, health, and work- not part of the sought-after image of the modern prison?

XVII. *Protection of possession*

82. The judgment in the *Case of Tibi* moves forward in the interpretation of Article 21 of the American Convention, which –in combination with Article 1(2) of this same instrument- refers to the property of natural persons, that is, individuals. This is the scope of subjective protection of American Convention. Now, this protection of an individual right may be exercised immediately and directly, regarding the person’s ownership of rights that he or she owns exclusively, or in a mediate and indirect manner, regarding his or her participation in collective property, which absorbs –but in no way eliminates- his or her right over goods or assets, even if this right is exercised in a way that is also indirect. This can be seen in various cases decided by the Inter-American Court, each of them with its own characteristics and in its specific context: *Mayagna (Sumo) Awas Tigni Community*, regarding the collective rights of indigenous communities, whose property, constituted and governed by an ancestral and specific legal order, involves rights for natural persons subject to protection under the American Convention, and *Ivcher*, regarding the rights of an individual, whose property rights follow the path of the commercial corporate legal system.

83. In light of a case that requires an interpretation of Article 21, the Court now deems that this Article protects real rights and legitimate forms of control over goods included in the broad scope of the person’s property. It is not possible to disregard –instead, it is necessary to acknowledge- the heterogeneous composition of said individual property, which includes not only the real property right over goods legally subject to it, but also those that were once called “detachments of property” -use, usufruct, right of habitation- and other expressions of legitimate possession that ordinary law protects in a manner similar to property.

84. Would the rights of a member of an indigenous community or an “ejidal” [community-owned land] group, who are not owners, strictly speaking, but who are entitled to certain rights over the land granted to the community or to the “ejido”, and to the products obtained from the land, be excluded from protection of Article 21? Certainly not. This was the opinion of the Court in the *Mayagna Awas Tingni* case. Would the rights of an individual in regards to a commercial company which, in turn, owned a certain property, be excluded from said protection? They would not either. This was the position of the Court in the *Ivcher* case. The same can be said of lawful possession, which is, in fact, the way in which many people, in our countries, exercise certain rights over realty and personalty. In the *Case of Tibi*, the Court has kept in mind the unequivocal fact of unchallenged possession, which in itself would merit the protection offered by the Convention to the human person’s right to property, as well as the claim to property by the one in possession of the goods, and in any case the court order to deliver them. It would be a different matter if, by other means, it were possible to challenge lawful possession of goods or the perfection of the legal act from which the property right derived.

XVII. Protection of the family and life plan

85. In the *Loayza Tamayo* case, the Court undertook the examination of a topic that still requires further development and consolidation: the life plan. This involves more than opportunities, *chances*, expectations. It is linked, as we stated in this case, to reasonable goals, well-founded hopes, accessible projects, which together constitute the course for the individual’s development, one that is deliberate and feasible, based on certain conditions that support and justify it. Let us add to this the possibility of a concrete decision by the person entitled to the rights that were infringed, a decision based on those factors, and not merely on suppositions, presumptions, or inferences of the external observer.

86. All this would seem to be so in the case that we are discussing. A project had been developed and its realization had begun. Apparently, all circumstances were favorable to it. It had to do with personal life, with the household community, with work, with the place where all this was developing and would develop, as well as with decisions reached by the adult members of the family. All of this was destroyed, abruptly and damaging many lives, due to the facts in violation of the Convention, heard by the Inter-American Court. This life plan was destroyed and another, unwanted life course appeared. This has been taken into account in the decision on reparations, which nevertheless cannot reinstate said project. This, while desirable, is not feasible in the framework of the instant case.

87. The above motivates a reflection on the right set forth in Article 17 of the convention, which the San Salvador Protocol takes up once again through Article 13: protection of the family. The application filed by the Inter-American Commission did not mention the abridgment of Article 17, which was, instead, raised in the pleadings of the representatives of the alleged victim. This argument did not bring up facts other than those included in the application, but rather the possibility that those mentioned in it might constitute abridgments of precepts not invoked in it. The Court, exercising the *jura novit curia* principle, has accepted the pertinence of considering those pleadings. Restriction of the hearing of the facts, inherent to the accusatory system –which is the one adopted in international human rights proceedings-, does not impede the court, once the former have been stated and proven, to issue such juridical considerations as may be pertinent in light of the provisions of the American Convention.

88. Paragraph one of Article 17 states, as an assumption, that “the family is the natural and fundamental group unit of society,” and it asserts that the family “is entitled to protection by society and the state,” the two institutions to which the

obligation set forth in that provision applies. Article 1(1), in turn, ensures respect for and guarantee of the person's rights set forth in the Convention, understanding that, for purposes of the Convention, "'person' means every human being" (Article 1(2)).

89. Therefore, the State is under the obligation to i) create conditions for the family to receive the recognition and protection due to it, in general, to guarantee and assert its role as "the natural and fundamental group unit of society;" and ii) respect and protect the rights of the individuals who are part of the family or intend to become part of it, and these rights must be analyzed, in the case in point, based on their connection with said references about the family unit. Said rights would be injured in several possible situations: for example –and only as an example-, if the State were to act in a way that was not consistent with recognition of the family as the "natural and fundamental group unit of society," impeding its establishment or abridging the rights set forth in the other paragraphs of Article 17.

90. Article 17 of the Convention mentions the origin of the family in marriage and, on this basis, sets forth certain protections for its members. Article 13 of the San Salvador Protocol, signed two decades after the Pact of San José, no longer refers to this juridical act as the foundation for the family, which Article VI of the American Declaration of the Rights and Duties of Man does not refer to either. Clearly, marriage, as a contract or institution of civil Law, is not –and even less so in many countries of the hemisphere- the only way to establish a family. Modern family Law has shifted substantially in the direction imposed by liberty, equity, and reality. These other ways to constitute the household unit, as a result of the free decision of individuals, merits respect and protection by the law and by institutions, as comparative Law has asserted.

91. In the case to which the judgment of the Inter-American Court refers, and to which I attach this *Opinion*, the facts involving violations severely affected Mr. Tibi and Mrs. Baruet, as well as their child and the woman's children, who lived with the couple and were members of the family unit in the manner that its adult members had freely decided. The abridgment may have influenced, together with other causes –which it is not for the Court to analyze- the breaking up of the family group and scattering of its members. In the process of hearing numerous cases of grave human rights violations, including more than a few regarding executions, forced disappearances, torture, or arbitrary detention, we have seen how the members of the family group of those who suffered those attacks directly have also suffered their consequences.

92. There could hardly be violations, among the most serious ones, to which those in closest emotional contact with the victim, based on family ties –broadly understood- were indifferent, and which did not entail dissolving pressures on the union. The facts in violation have had various types of repercussions on these individuals: scattering the members of the family, depriving them of legitimate income, forcing them to incur extraordinary expenses, interfering in communication amongst them, altering or suppressing shared life, negatively affecting legitimate plans and projects, weakening household ties, generating physical or mental ailing of the next of kin, and so forth.

93. In accordance with the circumstances of each case, it is possible to raise the possibility of analyzing these facts as a consequence or projection of other violations that were committed or as a direct violation of Article 17 of the Pact of San José, independently of said abridgments, although also in connection with them. The Court chose the first option, precisely bearing in mind the circumstances of this case. I believe that, under those circumstances, this was the right decision. Family disintegration was a consequence, among others, of the violations committed against the accused, his spouse, and the children who constituted, with them, the family group. The Court has not omitted recognition and assessment of said violations: they

were examined elsewhere in the judgment, and on this basis the Court reached the conclusion that both Mrs. Baruet and the children mentioned in said ruling are, themselves, victims of the facts in violation, and not merely entitled, for other reasons, to property-related reparations.

XVIII. Restitutio in integrum

94. It has been customary for the Court to reflect, in its judgments on reparations, the well-known idea that “reparation of the damage requires, whenever possible, full restitution (*restitutio in integrum*), which consists of reestablishment of the prior situation.” And it has also been customary for it to immediately add: “When this is not possible, as in the instant case...”. This is so in the *Tibi* judgment. I also sign this statement because I agree that the best reparation would be “reestablishment of the prior situation” before the violation. However, this is not possible, as I have stated before (for example, in my *Concurring opinion* in the judgment on the *Bámaca Velásquez* case, issued on November 25, 2000). It would be like turning the hands of the clock back and returning the person whose right was abridged to the situation before that event.

95. Full *restitutio* is logically and materially unfeasible, except regarding formal, virtual violations, with no impact on any life, which may be suppressed, like when the erroneous or undesirable words are expelled from a computer. It involves disregarding the fateful nature of the consequences –even if they cannot be perceived immediately- of the violation committed. That is why judgments on reparations invariably state that “in the instant case” it is not possible to apply *restitutio*. If *restitutio* is not possible in any case, it may be time to go directly to what is feasible. This was graphically expressed in some early judgments of the Court, regarding the impossibility of complete reparation of all the consequences of the violation committed, as they open and expand like concentric circles on a pond when a stone is thrown into it.

XIX. Taxation

96. In some of my previous Opinions I questioned the pertinence of ruling that compensations, costs and expenses –all of them items of the same type: material reparations- will be subject to no taxes. I said several times –most recently, in my Opinion attached to the November 25, 2003 judgment in the *Myrna Mack Chang* case- that this judicial provision entailed a modification of the tax system of a country, insofar as it led to establishing a specific assumption of tax exemption. This generally requires a concerted effort of the legislative and administrative authorities, through general or specific provisions, which are difficult and unnecessary for the purposes sought by the property-related reparations system for victims of violations. What the judgment seeks is to avoid taxation being imposed that diminishes the reparations ordered, making them illusory. Instead, it seeks to ensure that they reach the beneficiaries in full, as ordered. If that is so, then it is sufficient to say so in those or in similar terms –as the judgment to which I attach this *Opinion* does- without the need to generate difficult issues regarding generally observed tax rules.

Sergio García-Ramírez
Judge

Pablo Saavedra-Alessandri
Secretary