DISSENTING OPINION OF JUDGE A. A. CANÇADO TRINDADE

1. In my understanding the representatives of the relatives of the victims in the *El Amparo* case, together with the Inter-American Commission on Human Rights, are fully entitled, as the respondent State would also be, to request of the Court an interpretation or clarification of its Judgment on Reparations rendered on 14 September 1996. I regret not to find convincing elements to allow me, after a reexamination of the documents concerning the case, to concur with the majority of the Court, in its conclusion in the present Resolution to the effect that the provisions of Article 54(2) and (3) of the Code of Military Justice of Venezuela were not in fact applied in the *El Amparo* case, thus reiterating what was pointed out in paragraphs 57-58 of the aforementioned Judgment on Reparations.

2. The conclusion of the Court that those provisions of the Venezuelan military legislation were not applied in the *cas d'espèce*, in its view would, *a fortiori,* prevent it from proceeding to the determination of the incompatibility or otherwise of the aforementioned Article 54(2) and (3) of the Code of Military Justice with the American Convention on Human Rights. I reiterate my dissent from the majority of the Court in this respect. May I proceed to an explanation of the foundations of my dissenting position on the matter, as to the facts and as to the law.

I. *The Determination of the Facts.*

3. As pointed out by the Court itself in the present Resolution, the Military Judge and Army Major Ricardo Pérez Gutiérrez acted indeed as judge of first instance in the *El Amparo* case (paragraph 2 of the *considerandi*). It is true, as the Court goes on to add, that, after the dismissal of that military judge and the annulment of his decisions, the process continued "in a normal way". But it is also true, as stated in the Commission's petition before the Court (of 15 January 1994, page 11), likewise recalled by the Court (same paragraph), that the Director of Human Rights of the Office of the Public Prosecutor of the Republic

informed the lawyers of the survivors in the *El Amparo* case, on 16 February 1990, that the President of the Republic, "in his character of official of military justice", and "*in accordance with the provision" of Article 54(2) of the Code of Military Justice,* "ordered the non-initiation of any pre-trial investigation" against Military Judge and Army Major Ricardo Pérez Gutiérrez.

4. In its reply (of 01 August 1994) to the Commission's petition, the respondent State affirmed, "in respect of the facts referred to in the petition (pages 2 to 11)", that "the Government of the Republic of Venezuela neither constests them nor does it express objections as to the merits" (page 3), reiterating that in the note of 11 January 1995. The Court, accordingly, in its Judgment as to the merits of 18 January 1995 in the present *El Amparo* case, given the recognition of responsibility expressed by Venezuela, asserted that there had "ceased the controversy as to the facts" which originated the present *El Amparo* case (paragraphs 19-21).

5. In its Judgment on Reparations in the *El Amparo* case, of 14 September 1996, the Court explained the juridical effect of the submission of acceptance *(allanamiento)* on the part of the respondent State: "Venezuela recognized its responsibility in this case, which means that it accepts as true the facts described in the petition of 14 January 1994, this being the meaning of the Judgment rendered by the Court on 18 January 1995" (paragraph 13). Those facts include the application, by the President of the Republic (Carlos Andrés Pérez), of Article 54(2) of the Code of Military Justice, by ordering that no investigation be initiated against Military Judge Major Ricardo Pérez Gutiérrez, who had served as judge of first instance in the case of the massacre in *El Amparo (supra).*

6. This, in my view, would suffice for the Court to reconsider the conclusion it reached in the determination of the facts in the present case. What most concerns me, as I warned in my Dissenting Opinion (*El Amparo,* Reparations, Judgment of 14 September 1996), is the failure to recognize that the very existence - and applicability - of a legal provision (invoked in a contentious case in which *victims* of human rights violations *exist*) may *per se* create a situation which affects directly the rights protected by the American Convention, to the extent that, for example, it may

inhibit the exercise of the protected rights by failing to impose precise limits upon the discretionary power conferred on public authorities to interfere in the exercise of full judicial guarantees (Articles 25 and 8 of the Convention). Even if the aforementioned discretionary faculty of Article 54(2) and (3) had not been applied in the case, its sole *applicability* would, in my view, suffice for the Court to proceed to the determination of its incompatibility or otherwise with the American Convention.

7. The major direct consequence of the decision of the Court, in the present Resolution, to maintain its previous determination of the facts in the *El Amparo* case, lies, pursuant to the position it had already taken (Judgment on Reparations), in its alleged impossibility to proceed, in such circumstances, to the determination of the incompatibility or otherwise of provisions of a national military legislation with the American Convention on Human Rights. In accordance with its criterion, it could only do so after that law had effectively been applied in the concrete case.

8. That being so, I am also obliged to sustain my dissent over that self-limitation by the Court. Beyond the sole determination of the facts, may I, faithful to my position, retake and develop the arguments as to the law, expressed in my Dissenting Opinions in the cases *El Amparo* (Reparations, Judgment of 14 September 1996) and *Caballero Delgado and Santana* (concerning Colombia, Reparations, Judgment of 29 January 1997). Paraphrasing Ionesco[1], *je ne capitule pas*...

II. *The Legislative Obligations of States Parties.*

9. The starting point, in the foundations of my position as to the law, lies, in so far as the case-law of this Court is concerned, in the so-called *Honduran Cases*. The recognized contribution of the Court in its Judgments on the merits in the *Velásquez Rodríguez* (1988) and *Godínez Cruz* (1989) cases, consisted above all in having affirmed the threefold duty of the States Parties to *prevent, investigate* and *punish,* in relation to the violations of the human rights enshrined in the American Convention,

1 Eugène Ionesco, *Le Rhinocéros,* 1958.

and in having related the violations of Articles 7, 5 and 4 of the Convention to the non-compliance with the general duty to *guarantee* the protected rights (Article 1(1) of the Convention, not expressly invoked by the Inter-American Commission in those cases). Ever since, the correlation between the specific obligations pertaining to each protected right and the aforementioned general obligation of Article 1(1) of the Convention, has crystallized in the *jurisprudence constante* of the Court as well as in the practice of the Commission.

10. However, nearly a decade having elapsed since the delivery of those two Judgments, I believe the time has come to move forward, to go beyond *Velásquez Rodríguez* and *Godínez Cruz*. At that time, the Court affirmed the *duty of prevention*, and clarified what it understood by such duty, but it did not develop its conceptual bases in the framework of the law of the international responsibility of the State. The Court affirmed the *duty of investigation* and that of *punishment,* but, in the stage of reparations, it did not order the respondent State to prosecute and punish criminally those responsible for acts in violation of human rights. The Court, as already pointed out, related the specific obligations pertaining to the protected rights to the general duty to guarantee them (Article 1(1) of the Convention), but refrained from doing the same in respect of the other general duty to adopt measures of domestic law (Article 2 of the Convention) in order to harmonize this latter with the American Convention.

11. The contribution of the Court in the so-called *Honduran Cases* constitutes, thus, a significant first step, but certainly not the last one, nor the culminating point, of its jurisprudential construction. There is a long ground still to be covered. It is incumbent upon the Court of this end of century to move ahead, developing and enriching its case-law in the *full exercise* of its faculties of protection.

12. The Court, as I see it, finds itself today at a crossroads, in regard to the point raised in the present *El Amparo* case: either it continues to insist, in relation to the national laws of States Parties to the American Convention, on the occurrence of a damage resulting from their effective application, as a *conditio sine qua non* for determining the incompatibility or

otherwise of those laws with the Convention (as maintained also in the recent *Genie Lacayo* case, concerning Nicaragua, Judgment as to the merits, of 29 January 1997), or else it decides to proceed to that determination, and of its juridical consequences, as from the existence itself and applicability of the national laws (impugned in a concrete case of human rights violations), and in the light of the duty of prevention which is incumbent on the States Parties to the American Convention. This latter is the thesis which I sustain, on the basis of the considerations developed in my Dissenting Opinions in the cases *El Amparo* (Reparations, Judgment of 14 September 1996) and *Caballero Delgado and Santana* (Reparations, Judgment of 29 January 1997), which I here retake.

13. I fear that the former thesis, followed lately by the Court, in the exercise of its contentious jurisdiction[2], may have been leading to the impunity of those materially and intellectually reponsible for acts in violation of the human rights enshrined in the American Convention, and of those who cover them up[3]. The American Convention, besides other human rights treaties, were conceived and adopted on the basis of the assumption that the domestic legal orders ought to be harmonized with the conventional provisions, and not *vice versa*.

2 A thesis which appears somewhat curious, inasmuch as, in the exercise of its advisory jurisdiction, the Court has pointed out that "at the international level, what is important to determine is whether a law violates the international obligations assumed by the State by virtue of a treaty. This the Commission can and should do" - in the light of the attributions conferred upon it by Articles 41-42 of the American Convention - "upon examining the communications and petitions submitted to it concerning violations of human rights and freedoms protected by the Convention". Inter-American Court of Human Rights, Advisory Opinion OC-13/93, of 17 July 1993, on *Certain Attributions of the Inter-American Commission on Human Rights*, paragraph 30, and cf. operative paragraph n. 1.

3 Already at the public hearing before the Court, of 27 January 1996, in the present case *El Amparo*, I had expressed my concern with the question of impunity; cf. *Verbatim Records* (of that hearing), page 72.

14. One definitively cannot legitimately expect that such conventional provisions be "adapted" or subordinated to the solutions of constitutional law or of internal public law, which vary from country to country, and even less to particularly circumscribed legal orders, such as military legislations and those pertaining to military courts, by definition of special or limited application. The American Convention, as well as other human rights treaties, seek, *a contrario sensu*, to have, in the domestic law of the States Parties, the effect of improving it, in order to maximize the protection of the recognized rights, bringing about, to that end, whenever necessary, the revision or revocation of national laws - particularly those of exception - which do not conform to its standards of protection.

III. *Conceptual Bases of the Duty of Prevention.*

15. Beyond the obligations enshrined in the American Convention, and other human rights treaties, it is in the law of the international responsibility of the State that we shall find the conceptual bases of the *duty of prevention*, already affirmed by this Court *(supra)*. One current of thought, proper of the Grotian tradition of international law, identifies in the fault on the part of the State the basis or source of its international responsibility. This thesis has roots in the subjective element of the *culpa* of Roman law, element which was rescued therefrom by classical authors like Gentili and Grotius, so as to extend it to acts or omissions on the part of sovereigns and States themselves. This venerable thesis appears to me, *data venia,* incapable of providing an explanation to the emergence of the *duty of prevention* in the International Law of Human Rights of our days.

16. On the other hand, a historically more recent current of thought identifies the basis or source of the international responsibility itself of the State in the objective element of *risk (absolute liability/responsabilité absolue)*. This is the thesis which appears to me capable of conceptually establishing the *duty of prevention* or of due diligence on the part of the States, to avoid human rights violations *both by acts as well as omissions* imputable to them.

17. This is, in my view, the thesis which best serves the common and superior interest of the States Parties to human rights treaties to safeguard such rights, and the one which best reflects the *objective character* of the conventional obligations of protection they have contracted[4]. This is the thesis which, if widely accepted in the present domain of protection, can tighten the links of solidarity *between* States and *within* them, tending to maximize the observance of human rights. Its considerable potential of application ought to be developed.

18. Thus, there does not appear to me to be any doubt that, *both an act or an omission*, on the part of any of the powers of the State - the Legislative Power making no exception, - may generate the international responsibility of the State for violations of the human rights conventionally recognized, without any need to seek for an additional subjective element of fault *(culpa)*, and the qualification of that act or omission. The responsibility of the State is, in this sense, absolute.

19. It is perfectly possible to enter the domain of the law of the international responsibility of the State, in order to identify the conceptual bases of the duty of prevention of human rights violations. More than possible, it may become necessary. This is so because such violations constitute likewise violations of the obligation of protection - enshrined in treaties, - imposed by the International Law of Human Rights, and because the international responsibility of the State for such violations is governed at a time by the norms of human rights treaties as well as the general principles of international law.

20. In fact, one cannot exclude the possibility that a given question or aspect may not be sufficiently or clearly regulated by the provisions of a human rights treaty, therefore requiring recourse to the general principles of international law in the process of its interpretation and application. This in no way affects the thesis of the specificity and autonomy of the

4 It is not surprising that this current of thought is associated with the more recent evolution of international law, amidst the new realities and circumstances of the contemporary world.

International Law of Human Rights[5], given that the distinct areas of Law appear often in contact with each other (e.g., civil or penal procedural law and constitutional and administrative law, constitutional law and international law), with the unity of the juridical solution prevailing in the long run.

21. In my understanding, the international responsibility of the State is engaged as from the moment it fails to comply with an international obligation, irrespective of the verification of fault or *culpa* on its part, and of the occurrence of an additional damage. Rather than a presumed psychological attitude or fault on the part of the agents of public power, what is really determining is the *objective conduct* of the State (the due diligence to avoid human rights violations). One can, thus, certainly arrive at the configuration of the *objective* or "absolute" responsibility of the State as from the violation of its conventional international obligations as to the protection of human rights[6]. On such objective responsibility rests the duty of prevention.

IV. *Objective Responsibility of the States Parties.*

22. A State, accordingly, may have its international responsibility engaged, in my view, by the simple approval and promulgation of a law in conflict with its conventional international obligations of protection, or by its failure to harmonize its domestic law in order to secure the faithful compliance with such obligations, or by its failure to adopt the legislation needed to comply with these latter. *Time has come to give precision to the scope of the legislative obligations of States Parties to human rights treaties.* The *tempus*

5 Autonomy which I support and develop in my *Tratado de Direito Internacional dos Direitos Humanos,* vol. 1, Porto Alegre/Brasil, S.A. Fabris Ed., 1997, pp. 17-447.

6 Jules Basdevant, "Règles générales du droit de la paix", 58 *Recueil des Cours de l'Académie de Droit International de La Haye* (1936) pp. 670-674; Eduardo Jiménez de Aréchaga, *El Derecho Internacional Contemporáneo,* Madrid, Ed. Tecnos, 1980, pp. 319-325, and cf. pp. 328-329.

commisi delicti is, in my understanding, that of the approval and promulgation of a law which, *per se,* by its existence itself, and its applicability, affects the protected human rights (in the context of a given concrete case, where *victims* of violations of the protected rights *exist*), without the need to wait for the subsequent application of that law, generating an additional damage.

23. The State at issue ought to remedy promptly such situation, since failure to do so can constitute a "continuing situation" in violation of human rights (denounced in a concrete case). It is perfectly possible to conceive of a "legislative situation" contrary to the international obligations of a given State (e.g., maintaining a legislation in conflict with the conventional obligations of protection of human rights, or failing to adopt the legislation required to give effect to such obligations in the domestic law). In this case, the *tempus commisi delicti* would extend so as to cover the whole period in which the national laws remained in conflict with the conventional international obligations of protection, entailing the additional obligation of reparation for the successive damages resulting from such "continuing situation" during the whole period at issue[7].

24. It is the *objective* or "absolute" responsibility[8], as from the element of risk, and not the *subjective* responsibility, seeking to identify fault or *culpa,* that provides the basis of the duty of prevention of human rights violations. The position appears to me quite clear in respect of the *legislative obligations* of the States Parties to human rights treaties which, like the American Convention on Human Rights (Articles 1(1) and 2), expressly set forth, along with the specific obligations in relation to each of the protected rights, the general duties to secure respect for those rights and

7 In this sense, Roberto Ago, Special *Rapporteur,* "Seventh Report on State Responsibility", *Yearbook of the International Law Commission* (1978)-II, Part I, pp. 38, 43 and 52.

8 Ian Brownlie, *System of the Law of Nations - State Responsibility - Part I,* Oxford, Clarendon Press, 1983, p. 43; Ian Brownlie, *Principles of Public International Law,* 4th. ed., Oxford, Clarendon Press, 1995 (reprint), p. 439.

to harmonize the domestic legal order with the international norms of protection. The international responsibility of the States Parties is, in this sense, *objective* or "absolute", bearing in mind *jointly* the two general duties, set forth in Articles 1(1) and 2 of the American Convention.

25. In fact, it is extremely difficult to verify a presumed psychological attitude or fault on the part of the complex contemporary State apparatus. How, - to evoke an appropriate example cited by a lucid jurist already in the mid-1950s, - can one determine the *mens rea* of the national parliamentarian in approving a legislation in conflict with a treaty previously in force? Or in allowing such legislation in conflict with a subsequently ratified treaty to remain in force and unaltered? It would be virtually impossible to do so (i.e., to determine that he acted in a culpable way), - which is why it is the thesis of the *objective* responsibility that provides the conceptual basis of the duty of prevention, non-compliance with which, in turn, is the ground for the prompt imputation to the State at issue of the delicts of legislative action or omission on the part of its organs[9].

26. One cannot fail to admit that the non-compliance with an international obligation, and the consequent responsibility for that, may arise - to evoke an example cited by another illustrious jurist, - by the sole conduct of a State whose Legislative Power fails to take measures that, by means of a treaty, it had undertaken to take[10]. There is no need to take into account the so-called element of "damage" - resulting from the subsequent application of a law - to determine the configuration of an act - or omission - that is internationally illicit[11] and that *per se* violates human rights.

9 Paul Guggenheim, *Traité de Droit International Public*, vol. II, Geneva, Georg, 1954, pp. 52 and 54.

10 Roberto Ago, Special *Rapporteur*, "Second Report on State Responsibility", *Yearbook of the U.N. International Law Commission* (1970)-II, p. 194.

11 Roberto Ago, Special *Rapporteur*, "Third Report on State Responsibility", *Yearbook of the U.N. International Law Commission* (1971)-II, Part I, p. 223, and cf. pp. 219 and 222.

27. The thesis of the *objective* responsibility correctly emphasizes the element of the due diligence on the part of the State, of the control that this latter ought to exert over all its organs and agents in order to avoid that, by action or omission, the recognized human rights are violated. This being so, this is the thesis that, in my view, most contributes to ensure the effectiveness *(effet utile)* of a human rights treaty. This is the thesis that best serves the fulfilment of the object and purpose of human rights treaties and the determination of the configuration or of the birth of the international responsibility of the States Parties, in the light of the conventional obligations of protection enshrined in those treaties and of the general principles of international law. I cannot see how to condition the determination of the non-compliance with the conventional obligations of protection to an eventual verification of the subjective element of fault or *culpa* of the States Parties, or of the occurrence of a subsequent damage.

28. The general obligations under Articles 1(1) and 2 of the American Convention on Human Rights, in their turn, validate, in my view, the thesis of the objective responsibility of the States Parties. The specific obligations pertaining to each one of the rights protected by the Convention are to be related not only to the general duty to guarantee them (Article 1(1)) as the Court has done since the *Velásquez Rodríguez* and *Godínez Cruz* cases, but equally to the other general duty to adopt measures of domestic law (Article 2) so as to harmonize this latter with the international norms of protection.

29. The interpretation followed by the Court in recent contentious cases (*El Amparo, Caballero Delgado and Santana, Genie Lacayo*) is based, in my view, on a self-imposed limitation, incomprehensible to me, of the extent of its own faculties of protection. There is nothing in the American Convention, nor in the Statute or the Regulations of the Court, that determines that such self-imposed limitation is the only possible interpretation of the extent of its faculties in the light of the legal instruments that govern its functioning. Quite the contrary, the interpretation which I firmly sustain, warranted by the Statute and the Regulations of

the Court, is the one which appears to me best to reflect the letter and spirit of the American Convention[12].

30. To the extent that the notion of obligations *erga omnes* gradually consolidates itself in respect of human rights, it will become increasingly clearer that there is no need to wait for the occurrence of a damage (material or moral), subsequent to the original violation of a protected right, by means of the application of a law. This is so because the original violation, that is, the non-compliance with a conventional obligation pertaining to any of the protected rights, entails *per se* and *ipso facto* the configuration or the birth of the international responsibility of the State.

31. In this way, in the *cas d'espèce*, even if Article 54(2) and (3) of the Code of Military Justice of Venezuela had not been applied in the *El Amparo* case, the sole fact that it is in force and its applicability affect the protected rights, by virtue of the extent of the discretionary power attributed to the President of the Republic of, as an "official of military justice", interfering in the exercise of the full judicial guarantees. The Government of Venezuela, besides having taken the positive initiative of the recognition of responsibility in the *El Amparo* case, gave another sign of good will at a given moment of the proceedings, in expressly pointing out, in the reply to the Commission's petition (of 01 August 1994), its "readiness to continue and conclude the process of revision

12 The European Court of Human Rights has, in this regard, without actually admitting the *actio popularis*, gone much further than the Inter-American Court (cf. jurisprudential references in my Dissenting Opinions in the aforementioned *El Amparo* and *Caballero Delgado and Santana* cases, Reparations). However, what should occur is exactly the opposite, since the American Convention (Article 44), distinctly from the European Convention (Article 25), not even requires, of the complainants, the condition of "victims", but only of "petitioners" *(peticionarios) lato sensu.* It is, thus, in this regard, a much more liberal system than the European (even though without going as far as providing for *actio popularis* either), and, even so, the Inter-American Court does not seem to have extracted the consequences of what the American Convention itself provides, in so far as the condition of the complainants (*peticionarios*) is concerned.

of the Code of Military Justice and of Article 54(2) and (3) in particular" (page 13)[13].

32. In the light of all the above, I understand that the Court should have included the revision of those provisions of the aforementioned Venezuelan military legislation among the measures of reparation owed to the victims of the violations of human rights in *El Amparo*. I consider the measures of non-pecuniary reparation to be much more important than the Court seems to assume.

33. I dare to nourish the hope that these brief thoughts may contribute to advances in the present domain of protection, so as to leave a better world to our descendants. I do hope, in particular, that these remarks may someday lead the Court to reassess willingly its current position on the question at issue, and thus to free itself from the strings with which it has been tightening itself, with a self-imposed limitation which undermines its faculties of protection of human rights under the American Convention.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

13 And it added that, in the meantime, "it undertakes not to apply the aforementioned provision of Article 54(2) and (3) of the Code of Military Justice, in matters that may allow grave violations of human rights to remain unpunished" (page 14). However, subsequently, in its brief on reparations (of 27 December 1995), it expressed its understanding that "the Code of Military Justice is not, by itself, incompatible with the American Convention on Human Rights. At most, it would have been so the application given to it in the *El Amparo* case, as it has been recognized by the Republic of Venezuela. The impugned articles of the Code represent only a faculty of the President of the Republic, not an imposition and, accordingly, their mere existence and their adequate application cannot mean a violation of the international order" (page 6).