DISSENTING OPINION OF JUDGE A. A. CANÇADO TRINDADE

1. I regret not to be able to join the majority of the Court as to the criterion it adopted in paragraphs 60 and 62 and the decision it took in resolutory point n. 5 of the present Judgment on reparations. In my Separate Opinion in the previous Judgment (of 18 January 1995) in the same case *El Amparo*, I sustained that the Court should, at that stage of the procedure (recognition of responsibility made by the Republic of Venezuela), have expressly reserved the faculty also of examining and deciding on the original request of the Inter-American Commission on Human Rights as to the incompatibility or otherwise of Article 54(2) and (3) in force of the Code of Military Justice of Venezuela with the object and purpose of the American Convention on Human Rights. As, in the present Judgment, the Court decided to abstain from pronouncing on the matter, I feel obliged to present my Dissenting Opinion.

2. The remark by the Court that the provisions of Article 54(2) and (3) of the Code of Military Justice[1] "have not been applied in the present case" (paragraph 58), does not deprive it of its competence to proceed to the determination of the incompatibility or otherwise of those legal provisions[2] with the American Convention on Human Rights. In my understanding, the very existence of a legal provision may *per se* create a situation which directly affects the rights protected by the American Convention. A law can certainly violate those rights by virtue of its own existence, and, in the absence of a measure of application or execution, by the real *threat* to the person(s), represented by the situation created by such law.

3. It does not seem necessary to me to wait for the occurrence of a (material or moral) damage for a law to be impugned; it may be so without this amounting to an examination or determination *in abstracto* of its incompatibility with the Convention. If it were necessary to wait for the effective application of a law causing a damage, the duty of prevention

1 Article 54 of the Code of Military Justice confers upon the President of the Republic, an "official of military justice," the attributions of ordering "not to hold a military trial in certain cases, when he considers so convenient" to national interests (para. 2), and of ordering "the discontinuance of military trials, when he deems so convenient, at any stage of the process" (para. 3).

2 And military regulations and instructions.

could hardly be sustained. A law can, by its own existence and in the absence of measures of execution, affect the rights protected to the extent that, for example, by its being in force it deprives the victims or their relatives of an effective remedy before the competent, independent and impartial national judges or tribunals, as well as of the full judicial guarantees (in the terms of Articles 25 and 8 of the American Convention).

4. In abstaining from pronouncing on the matter, the Court failed to proceed, as it was incumbent upon it, to the examination or determination of the incompatibility of Article 54(2) and (3) in force of the Code of Military Justice of Venezuela with the general duties provided for in the American Convention of *ensuring* respect for the rights recognized therein (Article 1) and of adopting provisions of domestic law (legislative or other measures) as may be necessary to give effect to those rights (Article 2). I consider the Court fully competent to rule on this specific point, despite the allegation of non-application of the above-mentioned provisions of the Code of Military Justice in the *cas d'espèce*.

5. It was necessary to await many years for the possibility to be admitted of raising the question of the incompatibility of legislative measures and administrative practices with the international conventional obligations pertaining to human rights, in the context of concrete cases[3]. The international case-law in the present domain, at both regional and global levels, has evolved to the point of admitting nowadays that an individual may, under certain circumstances, claim to be victim of a violation of human rights perpetrated by the simple existence of measures permitted by the legislation, without their having being applied to him[4]. He may actually do so in face of the simple *risk* of being directly affected by a law[5], under the continuous threat represented by the maintenance in force of the impugned legislation[6]. It is acknowledged nowadays that an indivi-

3 As occurred, for example, in the *Kjeldsen* (1972) and *Donnelly* (1973) cases before the European Commission of Human Rights.

4 European Court of Human Rights, *Klass and Others* case, Judgment of 06.09.1978, para. 34.

5 European Court of Human Rights, *Marckx* case, Judgment of 13.06.1979, para. 27; European Court of Human Rights, *Johnston and Others* case, Judgment of 18.12.1986, para. 42.

6 European Court of Human Rights, *Dudgeon* case, Judgment of 22.10.1981, paras. 41 and 63. In the case of *De Jong, Baljet and van den Brink*, the European Court referred to its *jurisprudence constante* ("well-established case-law") whereby the existence of a violation of the Convention was "conceivable even in the absence of detriment;" Judgment of 22.05.1984, para. 41.

dual may effectively challenge a law that has not yet been applied to his detriment, sufficing to that effect that such law be *applicable* in such a way that the *risk* or *threat* that he may suffer its effects is real, is something more than a simple theoretical possibility[7].

6. An understanding to the contrary would undermine the *duty of prevention*, upheld in the case-law of this Court. Precision has been given to the wide scope of this duty, which comprises all the measures, legislative and administrative and others, which promote the safeguard of human rights and ensure that the violations of these latter are effectively treated as unlawful acts bringing about sanctions on those responsible for them[8]. Reparation, as a generic concept, encompasses also these elements, besides the indemnities due to the victims. Full reparation, which in the present context appears as the reaction of the juridical order of protection to the facts in breach of the guaranteed rights, has a wide scope. It includes, besides the *restitutio in integrum* (restoration of the previous situation of the victim, whenever possible) and the indemnities (in the light of the general principle of the *neminem laedere*), the rehabilitation, the satisfaction and -significantly- the guarantee of non-repetition of the acts in violation of human rights (the duty of prevention).

7. As from the moment in which violations of protected human rights are found, the examination of the incompatibility of legal provisions of domestic law with the American Convention on Human Rights becomes, in my view, no longer an *abstract question*. A law can *per se* appear as incompatible with the Convention to the extent that, for instance, it inhibits the exercise of protected rights, even in the absence of a measure of application. A law can *per se* reveal itself incompatible with the Convention to the extent that, for example, it does not impose precise limits to the discretionary power conferred upon public authorities to interfere in the exercise of protected rights[9]. A law can *per se* appear incompatible

7 Human Rights Committee (under the U.N. Covenant on Civil and Political Rights), case of *Aumeeruddy-Cziffra and Others*, Views of 09.04.1981, para. 9(2). Irrespective of the conclusions as to the determination of the facts in a case, one can hardly deny that a domestic law can, by its own existence, constitute a direct violation of the protected rights; Human Rights Committee, case of the *Disabled and Handicapped* Persons in Italy, Views of 10.04.1984, para. 6(2).

8 As pointed out by the Inter-American Court in the cases of *Velásquez Rodríguez*, Judgment of 29.07.1988, para. 175; and *Godínez Cruz*, Judgment of 20.01.1989, para. 185.

9 European Court of Human Rights, *Malone* case, Judgment of 02.08.1984, paras. 67-68. A law that attributes such a discretionary power ought to indicate expressly the precise extent and limits of such power; European Court of Human

with the Convention to the extent that, for example, it renders difficult pending investigations, or raises obstructions in the judicial process, or allows the impunity of those responsible for the violations of human rights.

8. The challenging of the compatibility with the Convention of a law in force which *per se* creates a legal situation which affects the protected human rights is a *concrete question*. In my understanding, it is the *existence of victims*[10] that provides the decisive criterion for distinguishing the examination simply *in abstracto* of a legal provision, from the determination of the incompatibility of such provision with the American Convention on Human Rights in the framework of a concrete case, such as that of *El Amparo*. The existence of victims renders juridically inconsequential the distinction between the law and its application, in the context of a concrete case.

9. In the present Judgment on reparations, the decision of the Court to abstain itself from pronouncing on the incompatibility of Article 54(2) and (3) in force of the Code of Military Justice of Venezuela[11] with the American Convention on Human Rights (resolutory point n. 5) seeks to base itself (paragraphs 59-60) on an *obiter dictum* of its Advisory Opinion (on the *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, OC-14/94), of 09 December 1994, according to which "there is no provision in the Convention authorizing the Court, under its contentious jurisdiction, to determine whether a law that has not yet affected the guaranteed rights and freedoms of specific individuals is in violation of the Convention[12]." The Court fails to answer the prior question whether a law, by its own existence, affects, or can affect, the rights protected by the Convention.

10. An organ of international protection of human rights should not, in my view, start from the premise that a law, by its own existence, "has not yet affected" the protected rights, it being therefore necessary to wait for

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Rights, *Silver and Others* case, Judgment of 25.03.1983, paras. 86-88.

10 In the present domain of protection, the victims of human rights violations occupy a central position; and as the *contentieux* of reparations and indemnities clearly discloses, it is the victims themselves -and not the Inter-American Commission on Human Rights- who are the true complainant party before the Court. This is what may be unequivocally understood from this Judgment and the public hearing of 27 January 1996 before the Court in the present case.

11 And military regulations and instructions.

12 Paragraph 49 of Advisory Opinion OC-14/94.

measures of execution which bring about the occurrence of a damage. It should not do so with all the more reason when the whole evolution of the juridical order of protection[13] is oriented and inclined nowadays clearly in another sense. The decision of the Court on this specific point, based upon the *obiter dictum* referred to of its Advisory Opinion OC-14/94, conflicts, in my view, with the letter and spirit of Article 62(1) and (3) of the American Convention, by virtue of which the contentious jurisdiction of the Court extends to *all cases concerning the interpretation and application* of the provisions of the Convention. These provisions include the duties of the States Parties to guarantee the recognized rights and to harmonize their domestic law with the norms of the Convention so as to give effect to those rights.

11. Accordingly, the determination of the incompatibility of an internal or domestic law with the Convention is not an exclusive prerogative of the exercise of the advisory jurisdiction of the Court. The difference lies in that, in the exercise of the advisory jurisdiction [Article 64(2) of the Convention], the Court may deliver opinions on the incompatibility or otherwise of a domestic law (and as well of a draft law[14]) with the Convention *in abstracto*, while in the exercise of the contentious jurisdiction the Court may determine, at the request of a party, the incompatibility or otherwise of a domestic law with the Convention *in the circumstances of the concrete case*. The American Convention effectively authorizes the Court, in the exercise of its contentious jurisdiction, to determine whether a law, impugned by the complainant party, and which by its own existence affects the protected rights, is or not contrary to the American Convention on Human Rights. The Court has the competence *ratione materiae*, and should, thus, have proceeded to this determination and to the establishment of its juridical consequences.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

13 Which corresponds to the evolution of the notion of victim in the international law of human rights; cf. *Recueil des Cours de l'Académie de Droit International de La Haye*, 1987, vol. 202, pp. 243-299.

14 As admitted by the Inter-American Court in its Advisory Opinion (on the *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, OC-4/84), of 19 January 1984 (paras. 22-29).