CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have concurred with my vote for the adoption, by the Inter-American Court of Human Rights, of the instant Judgment in the case of *Acosta Calderón versus Ecuador,* since I agreed with its operative paragraphs and with that stated by the Court in the considerations that motivated it. What I am not satisfied with is that the Court did not issue a ruling regarding other matters set forth in the instant case, which, to my understanding, should have served as the bases for another two operative paragraphs in the instant Judgment. Thus my decision to present to the Court this Concurring Vote, in which I am obliged to inform of my reasoning, clearly different to that of the Court, regarding the matters ignored by it.

2. In the case of *Suárez Rosero versus Ecuador* (1997), the Inter-American Court declared the violation of Article 2 of the American Convention on Human Rights since Article 114 *bis, in fine,* of the Ecuadorian Criminal Code, in force at that time, robbed "a part of the prison population of a fundamental right on the basis of the crime of which it is accused," and, hence, intrinsically injures "everyone in that category" (para. 98). The Court understood that the application of that legal stipulation had caused an "undue harm to the victim, and observed that, this law violates *per* se Article 2 of the American Convention, whether or not is was enforced" (para. 98). The mentioned stipulation of the Ecuadorian Criminal Code (Article 114 *bis*) was a violation to Article 2 of the Convention precisely because of its discriminatory nature, and specifically because it treated those accused of crimes related to drug trafficking (sanctioned by the Law on Narcotic and Psychotropic Substances) unequally before the law.

3. Despite not having been declared in that case, decided in 1997, a violation to Article 24 of the Convention, subsequently, in its historic Advisory Opinion No. 18 on the *Juridical Condition and Rights of Undocumented Migrants* (2003), the Court developed its jurisprudence with regard to discrimination and inequality before the law, having declared that

> "the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This

> principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens"* (para. 101).

4. In its recent Judgment in the case of *Yatama versus Nicaragua,* adopted yesterday, June 23, 2005, the Court has confirmed the great jurisprudential advances reached by its Advisory Opinion No. 18, which has reaffirmed the nature of *jus cogens* of the principle of equality and non-discrimination (para. 184), and has stated that,

> "Consequently, the States have the obligation to not introduce in their legal system discriminatory laws, eliminate regulations of a discriminatory nature, fight the practices of this nature, and establish laws and other measures that acknowledge and ensure effective equality before the law for all people. A distinction that lacks an objective and reasonable justification is discriminatory.
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> Article 24 of the American Convention prohibits discrimination of fact and of law, not only regarding the rights enshrined in said Convention, but in what refers to all laws passed by the State and their application. That is, it is not limited to repeating that stated in Article 1(1) of the same regarding the States' obligation to respect and guarantee, without discrimination, the rights acknowledged in said instrument, but instead it also enshrines a right that obligates the State to respect and guarantee the principle of equality and non-discrimination in the safeguarding of other rights and all internal legislation passed by them" (paras. 185-186).

5. In the instant case of *Acosta Calderón,* the same legal stipulation that the Court concluded caused damage to the victim in the case of *Suárez Rosero,* also caused an undue harm to the victim in the *cas d'espece,* when the facts occurred. Even though the two first paragraphs of Article 114 *bis* of the Ecuadorian Criminal Code, in force at that time, assigned the persons imprisoned the right to be freed when the indicated conditions were present, its last paragraph included an exception to said right,[1] - which this Court considered incompatible with the American Convention (Article 2).

6. Taking into account the Court's jurisprudential development, from the case of *Suárez Rosero* up to the present case of *Acosta Calderón* (Advisory Opinion No. 18 and *case of Yatama, supra* para. 3 and 4), I do not see how we can exclude from the instant Judgment that the mentioned Article 114 *bis, in fine,* of the

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[1] In detriment of the accused for alleged involvement in drug trafficking.

Ecuadorian Criminal Code, in force at the time when the facts of this case *Acosta Calderón* (including the period in which he was imprisoned) occurred, incurred in a violation of Article 2 (domestic legal effects), in combination with Article 24 (right to equality before the law), of the American Convention.[2]

7. The mentioned Article 114 *bis, in fine,* of the Ecuadorian Criminal Code, applied in the instant case, violated Article 2 of the American Convention precisely because it was discriminatory; consequently it also violated Article 24 of the same instrument. Thus, I separate myself from the Court on this point, for having the Tribunal avoided the situation and not having been consistent with their own recent jurisprudential evolution. Even more, the Court stopped following, in this sense, the criteria that oriented it in the Judgment adopted yesterday, June 23, 2005, in the case of *Yatama versus Nicaragua.* With this *superveniens* period of time, within a term of only 24 hours, in matters so relevant as the principle of *jus cogens* of equality and non-discrimination,[3] the Court, on this specific issue, has unfortunately slowed down its own jurisprudential development.

8. As has been held by the Court in its Advisory Opinion No. 18, of 2003, the States Members of the Convention may not issue measures that violate the rights enshrined in it; in virtue of the peremptory nature of the basic principle of equality and non-discrimination, "States have the obligation to combat discriminatory practices and not to introduce discriminatory regulations into their laws" (para. 88). The serious evils or our times, - drug trafficking, terrorism, organized crime, among so many others, - must be combated *from within the Law,* since they can not simply be confronted with their own weapons: said evils may only be overcome *from within the Law.*

9. Nothing justifies treating certain people with detriment to the fundamental principle of equality and non-discrimination, which also makes up the right to equality before the law,

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[2] It has been proven before the Court (in the Judgment of Reparations of 01.20.1999, in the case of *Suárez Rosero,* para. 82) that, on 12.24.1997, the Ecuadorian Constitutional Tribunal declared Article 114 *bis* of the Criminal Code unconstitutional. However, pursuant to that alleged by the representatives, on 12.18.1997 an amendment to the Code of Compliance of Judgments in which a discriminatory rule was allegedly included was introduced (*supra,* para. 129(f)). Anyway, analysis of the scope of the amendments of 12.18.1997 alleged by the representatives (i.e., its non-compatibility or not with the American Convention) would not proceed in the instant case because they occurred after the facts of the *cas d'espece,* since Mr. R. Acosta Calderón was released on 07.29.1996.

[3] On the relevance of said principle, cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos,* vol. II, Porto Alegre/ Brazil, S.A. Fabris Ed., 1999, pp. 76-82.

enshrined in Article 24 of the American Convention. This is a principle of the *jus cogens,* which cannot be ignored under any circumstance. I hope that the Court will soon recover the advanced line of its own recent jurisprudence, and recovers from the slip it has, in my opinion, incurred in regarding this matter in the instant Judgment.

10. Besides the operative paragraph missing, along with its corresponding assertion, on the violation of Article 24 (Right to Equal Protection) of the Convention in the present case, the Court also excluded the violation of Article 5 of the Convention (Right to Humane Treatment) en el *cas d'espece*. Paragraph 140 of the instant Judgment, through which the Court considered it lacked "sufficient evidence to issue a ruling regarding the violation of Article 5 of the Convention," *data venia,* is not sustainable.

11. An arbitrary arrest (as established by the Court in the instant case), that lasts five years, five months, or five weeks, in the prison conditions that prevail in both the American and European continents,[4] or in the other continents of the world (or "globalized" underworld of prisons), always causes traumas in those wrongfully imprisoned. "Substantial evidence" is not required to establish a violation to the right to humane treatment of the individual arbitrarily arrested. The Court was empowered to recur to an irrefutable presumption in this sense pursuant to its *constant jurisprudence* on this subject; this is how it should have proceeded, with the corresponding support of the operative paragraph that is missing.

12. In my Concurring Vote in the case of *Tibi versus Ecuador* (2004), I referred precisely to the effects of an arbitrary arrest and the prison conditions of those wrongfully imprisoned (paras. 2-7). In effect, the Law cannot stop coming to the *complete* rescue of those that have simply been forgotten in the underworld of prisons, in the houses of the dead so lucidly condemned in the XIX century by F. Dostoievski (*Recuerdos de la Casa de los Muertos,* 1862). In my opinion, the burden of proof is reversed on this occasion; if it is asserted or considered that the infringement of humane treatment is not proven *ipso facto* by a prolonged arbitrary imprisonment, the alleged non-infringement must be proven (*onus probandi incumbit actori)* …

13. I would like to conclude this Concurring Vote in a positive tone, if possible. In its substantiation of the determination of the violation of Article 8(2) of the Convention (judicial

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[4] As inferred from the practice of the European Commission for the Prevention of Torture and Inhuman or Humiliating Treatment or Sanctions (under the European Convention of 1987 for the Prevention of Torture). For an analysis, cf. A. Cassese, Inhuman States – Imprisonment, Detention, and Torture in Europe Today, Cambridge, Polity Press, 1996, pp. 125-126.

guarantees), in conjunction with Article 1(1) of the same, in the instant case, the Court considered that Mr. R. Acosta Calderón,

> "as a foreign detainee, was not notified of his right to communicate with a consular official from his country with the objective of offering the assistance recognized in Article 36(1)(b) of the Vienna Convention on Consular Relationships. The foreign detainee, when arrested and before offering his first statement before the authorities, must be notified of his right to establish contact with a third party, for example, a family member, a lawyer, or a consular official, as corresponds, to inform them that he is in the State's custody. In the case of the consular notice, the Court has stated that the consul may assist the detainee in different acts of defense, such as the granting or hiring of legal representation, the obtainment of evidence in the country of origin, the verification of the conditions in which the legal assistance is exercised, and the observation of the defendant's situation while he is imprisoned. In this sense, the Court has also affirmed that the individual right to request consular assistance from his country of nationality must be recognized and considered within the framework of the minimum guarantees to offer foreigners the opportunity to adequately prepare their defense and have a fair trial. The non-observance of this right affected Mr. Acosta Calderón's right to defense, which forms part of the guarantees of the due legal process" (para. 125).

14. Accordingly, the right to information on consular assistance is an *individual right*, the Court has based its correct deliberation in this regard on its previous and truly pioneering Advisory Opinion No. 16, on the *Right to Information on Consular Assistance in the Framework of the Guarantee of the Due Process of Law* (1999, paras. 106, 86, and 122). This Advisory Opinion, adopted by the Court on October 01, 1999, has acted as a source of inspiration for international jurisprudence *in statu nascendi* regarding this matter, - as has been acknowledged in great length by contemporary judicial doctrine.[5]

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[5] For example, the specialized bibliography, when referring to the later decision of the International Court of Justice (ICJ), of 06.27.2001, in the case of *LaGrand* stated that it was issued "a la lumière notamment de l'avis de la Cour Interaméricaine des Droits de l'Homme du 1er octobre 1999;" G. Cohen-Jonathan, "Cour Européenne des Droits de l'Homme et droit international général (2000)," 46 Annuaire français de Droit international (2000) p. 642. It has also been observed, in relation to Advisory Opinion n. 16 of the Inter-American Court, "le soin mis par la Cour a démontrer que son approche est conforme au droit international". Besides, "pour la juridiction régionale il n'est donc pas question de reconnaître a la Cour de la Haye une prééminence fondée sur la nécessité de maintenir l'unité du droit au sein du système international. Autonome, la juridiction est également unique. (...) La Cour Interaméricaine des Droits de l'Homme rejette fermement toute idée

15. The Inter-American Court has, in its Judgment of this case of *Acosta Calderón versus Ecuador*, reiterated its opinion regarding the individual right to information on consular assistance in the framework of the guarantees of a legal process, within a case, which is significant. Both in Advisory Opinion No. 16 and in the instant case of *Acosta Calderón,* the Court has correctly included that right within the conceptual universe of human rights.

16. I conclude this Concurring Opinion going a step further in the matter. The right to information on consular assistance, besides being within the guarantees of the due process of Law, has a

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d'autolimitation de sa compétence en faveur de la Cour mondiale fondamentalement parce que cette dernière ne serait pas en mesure de remplir la fonction qui est la sienne." Ph. Weckel, M.S.E. Helali and M. Sastre, "Chronique de jurisprudence internationale," 104 *Revue générale de Droit international public* (2000) pp. 794 and 791. It has also been stated that the Advisory Opinion of 1999 of the Inter-American Court contrasts with "la position restrictive prise par la Cour de La Haye" in its subsequent decision of 2001 in the case of *LaGrand:* - "La juridiction régionale avait exprimé son opinion dans l'exercice da sa compétence consultative. Or, statuant sur un différend entre États, la juridiction universelle ne disposait pas de la même liberté, parce qu'elle devait faire prévaloir les restrictions imposées a sa juridiction para le défendeur." Ph. Weckel, "Chronique de jurisprudence internationale," 105 *Revue générale de Droit international public* (2001) pp. 764-765. And, also: "La Cour Interaméricaine avait examiné dans quelle mesure la violation du droit d'être informé de l'assistance consulaire pouvait être considéré comme une violation de la règle fondamentale du procès équitable et si, par voie de conséquence, une telle irrégularité de procédure dans le cas d'une condamnation a mort constituait aussi une atteinte illicite a la vie humaine protégée par l'article 6 de Pacte relatif aux droits civils et politiques (…) La CIJ ne s'est pas prononcée sur ces questions qui ont trait a l'application de deux principes du droit international (la règle du procès équitable et le droit a la vie)." *Ibid.,* p. 770. In a similar manner it has been observed that the CIJ "was curiously diffident as to whether this individual right should be characterized as a human right. The Court failed to mention Advisory Opinion OC-16/99 of the Inter-American Court of Human Rights, which held that Article 36 is among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial;" J. Fitzpatrick, "Consular Rights and the Death Penalty after *LaGrand," Proceedings of the 96th Annual Meeting of the American Society of International Law* (2002) p. 309. Cf. as well, in additional acknowledgment of the truly pioneering contribution of the Inter-American Court in this matter: M. Mennecke, "Towards the Humanization of the Vienna Convention of Consular Rights – The *LaGrand* Case before the International Court of Justice", 44 *German Yearbook of International Law/ Jahrbuch für internationals Recht* (2001) pp. 430-432. 453-455, 459-460, and 467-468; M. Mennecke and C.J. Tams, "The *LaGrand* Case", 51 *International and Comparative Law Quarterly* (2002) pp. 454-455; M. Feria Tinta, "Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the *LaGrand* Case," 12 *European Journal of International Law* (2001) pp. 363-365.

direct incidence on the validity of other human rights internationally acknowledged, such as the right to personal liberty (Article 7 of the American Convention). In the heart of this Court, I have always maintained that the best hermeneutics in matters of human rights protection is the one that related the protected rights with each other, indivisible as they are, - and not one that inadequately seeks to separate them, wrongfully weakening the basis of the protection.

17. In this Court's pioneering Advisory Opinion No. 16, - a backdrop in the history of contemporary Public International Law itself, - this Tribunal has stated that Article 36(1)(b) and (c) of the Vienna Convention on Consular Relations of 1963 refers to "consular assistance in a specific situation: the deprivation of freedom" (para. 81). The individual right to information on consular assistance in the framework of human rights, in order to duly assist those deprived of their freedom is also present in this situation (para. 83). The hermeneutics I have defended in the heart of this Court, and that I continue and will continue to firmly defend, - is, in my opinion, the best option in order to achieve an *integrated* protection of the rights inherent to all human beings.

Antonio August Cançado Trindade
Judge

Pablo Saavedra Alessandri
Secretary