

**IN THE  
INTER-AMERICAN COURT OF HUMAN RIGHTS**

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Winston Caesar,

*Petitioner,*

v.

The Republic of Trinidad and Tobago,

*Respondent*

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**BRIEF AMICI CURIAE OF  
HLS ADVOCATES FOR HUMAN RIGHTS and the  
GLOBAL JUSTICE CENTER  
IN SUPPORT OF THE APPLICATION OF THE  
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

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**AND THE**  
**GLOBAL JUSTICE CENTER**  
*AS AMICI CURIAE*  
**IN SUPPORT OF THE APPLICATION OF THE**  
**INTER-AMERICAN COMMISSION ON HUMAN RIGHTS<sup>1</sup>**

**I. BACKGROUND**

**A. Statement of Identity and Interest**

Harvard Law Student Advocates for Human Rights (“HLS Advocates”) is an officially registered student-run group at Harvard Law School, operating with the support of the Harvard Law School Human Rights Program. HLS Advocates promotes human rights and the rule of law in partnership with non-governmental organizations throughout the world. The views expressed in this submission do not necessarily reflect the views of Harvard Law School or Harvard University.

The Global Justice Center is a non-profit, international human rights organization dedicated to the promotion of social justice and human rights in Brazil and throughout the Americas through rigorous documentation and distribution of reports on rights abuses, as well as through the use of international mechanisms for the protection of human rights. The Global Justice Center is the petitioner of record in some twenty matters before the inter-American

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<sup>1</sup> No counsel for any party had any role in authoring this brief, and no one other than the *amici curiae* provided any monetary contribution to its preparation or submission. Both HLS Advocates and The Global Justice Center received assistance in the preparation of this brief from the international law firm of Latham & Watkins LLP.

system for the protection of human rights, and has filed more than 100 denunciations with United Nations special mechanisms. The Global Justice Center supports increased use of international mechanisms through intensive courses, on-site training and joint actions at the international level with local NGOs.

Due to the significance of the issues raised in *Winston Caesar v. The Republic of Trinidad and Tobago* (12.147) for people throughout the Americas, HLS Advocates and the Global Justice Center submit this brief in support of the Application of the Inter-American Commission on Human Rights Before the Inter-American Court of Human Rights (the “Commission Application”) filed by the Inter-American Commission on Human Rights (the “Commission”) on February 26, 2003.

## **B. Summary of Argument**

This brief *amici curiae* addresses and expands upon certain issues set forth in the Commission Application. Specifically, after discussing certain jurisdictional issues, this brief examines the numerous abuses suffered by Mr. Caesar and identifies seven distinct violations by Trinidad and Tobago (“Trinidad” or the “State”) of Article 5 of the American Convention on Human Rights (the “American Convention”).<sup>2</sup> This brief further contends that Mr. Caesar’s flogging with a cat-o-nine tails, either standing alone or combined with the other abuses suffered, constitutes “torture” under the American Convention and under international law more generally.

Part II of this brief analyzes the issue of jurisdiction and demonstrates that the Inter-American Court of Human Rights (“this Court” or the “Inter-American Court”) has jurisdiction to hear the present case pursuant to Articles 62(3) and 78(2) of the American Convention. Neither the attempts by Trinidad to limit mandatory jurisdiction through its instrument of

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<sup>2</sup> American Convention on Human Rights, *opened for signature* Nov. 22, 1969 (entered into force July 18, 1978).

acceptance in 1991, nor its denunciation of the American Convention in 1998, impedes the Court's jurisdiction over this case.

Part III explores the abuses suffered by Mr. Caesar and demonstrates that at least seven instances of abuse by Trinidad constitute individual and discrete occurrences of "cruel, inhuman, or degrading punishment or treatment" in violation of Article 5 of the American Convention, and that cumulatively, these abuses unquestionably constitute a violation of Article 5. The abuses by Trinidad include the following: (1) subjecting Mr. Caesar to degrading and inhumane detention conditions; (2) failing to provide Mr. Caesar with adequate medical treatment for his ailments, independent of those resulting from his flogging; (3) prolonging the duration of Mr. Caesar's confinement pending his flogging and repeatedly leading him to believe that his flogging was imminent; (4) deliberately exposing Mr. Caesar, prior to his own flogging, to the anguish of those persons who had recently been flogged; (5) subjecting Mr. Caesar to flogging with the cat-o-nine tails; (6) humiliating Mr. Caesar during the administration of his flogging; and (7) failing to provide Mr. Caesar with adequate medical treatment for injuries sustained through the flogging. By addressing each of these abuses separately and finding that each violates Article 5 of the American Convention, this Court can provide clear guidelines governing proper and improper treatment of prisoners, for the benefit of states parties to the American Convention as well as individuals living in those states.

Part IV demonstrates that Trinidad's flogging of Mr. Caesar with a cat-o-nine tails constitutes "torture" under international law, either as a single occurrence or combined with the other abuses suffered by Mr. Caesar.

The Commission Application asserts additional arguments and presents claims for remedy and restitution. This brief joins in those positions, but does duplicate such efforts.

### **C. Summary of Relevant Facts<sup>3</sup>**

On November 11, 1983 authorities in Trinidad arrested Mr. Caesar and charged him with rape. On February 21, 1986, judicial officials committed him to stand trial but the trial was deferred. Several months later Mr. Caesar went to the Hall of Justice to inquire about his case. He was first told by authorities that his case had not been called, but later informed that a warrant had been issued for his arrest. Unsure of his status, Mr. Caesar continued living normally at the same address. Authorities again arrested Mr. Caesar on September 10, 1991, for failure to appear in court; they incarcerated him at Golden Grove Prison pending his trial.

At his trial on January 10, 1992, Mr. Caesar was convicted of attempted rape and sentenced to 20 years in prison with hard labor, as well as 15 lashes of the cat-o-nine tails under Trinidad's Corporal Punishment (Offenders Over Sixteen) Act of 1953. Mr. Caesar filed an application for leave to appeal this ruling on November 26, 1993, and on February 28, 1996, the Court of Appeal of Trinidad and Tobago refused this application without explanation.

Between September 10, 1991 and February 28, 1996, Mr. Caesar was incarcerated at Golden Grove Prison and subjected to substandard conditions. Prison officials placed him in a hot and crowded cell with four to five men; he slept on the floor on a thin mat, had no toilet facilities and had to use a common "slop pail." Shortly after the Court of Appeal refused his application, Mr. Caesar was transferred to the Port of Spain Prison and spent 1-2 months in that prison's infirmary because he was bleeding heavily and in severe pain as he had developed chronic hemorrhoids. In June 1996, Mr. Caesar was sent to Carrera Convict Prison, where he remained until November 1999. Authorities at Carrera imposed similar hardships upon Mr.

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<sup>3</sup> This section summarizes the facts pertinent to the arguments set forth in this brief, using information provided in the Commission Application at pages 10 to 17 and in the affidavit of Winston Caesar which accompanies the Application as Annex 4. A more complete statement of the facts in this case is set forth in the Commission Application, and in the affidavit of Mr. Caesar.

Caesar to those he had endured at Golden Grove Prison, forcing him to share a small, hot, and unventilated cell with four men, sleep on a piece of old carpet, and use a common slop pail. Mr. Caesar's health deteriorated significantly during the course of his incarceration. He contracted tuberculosis, and developed hemorrhoids that caused him to bleed so severely that he refrained from using the slop pail for fear of losing consciousness. Although prison officials were aware of his condition, they did not provide him with timely medical attention. In 1992, a doctor told Mr. Caesar that his hemorrhoids required surgery, but the procedure was postponed for almost six years, until January 1998.

In addition to these substandard prison conditions, prison officials subjected Mr. Caesar to severe psychological abuse. On four separate occasions during a period of more than one year prior to his flogging, authorities placed Mr. Caesar in a special cell designated for inmates that were awaiting their punishments. After being taken one-by-one to endure corporal punishment, the inmates were returned to the cell severely injured. As such, Mr. Caesar was forced to witness firsthand the adverse effects the flogging had on the inmates, who often suffered bleeding from their wounds and cried openly. As the only inmate not to be subjected to the punishment, Mr. Caesar would then be returned to his cell without explanation.

On February 5, 1998, almost two years after the confirmation of his sentence and just a few weeks after his hemorrhoids operation, Mr. Caesar received his sentence of 15 lashes of the cat-o-nine tails. This prolonged delay violated Trinidadian law, which specifies that corporal punishment sentences must be carried out within six months of the date of the sentence.<sup>4</sup> On the day of his flogging, prison officials took Mr. Caesar to the room where he was to be beaten, and

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<sup>4</sup> Corporal Punishment (Offenders Over Sixteen) Act of 1953 of Trinidad and Tobago, Chapter 13:04 Laws of Trinidad and Tobago, art. 6 states, "A sentence of flogging shall be carried out as soon as may be practicable and shall in no case be carried out after the expiration of six months from the passing of the sentence."

told him to take off his clothes. The prison doctor then examined him and told the other officials that Mr. Caesar could be flogged, ignoring Mr. Caesar's attempts to remind the doctor that he had just had surgery. Mr. Caesar was made to lie spread-eagled on a metal contraption known to prisoners as the "Merry Sandy." Prison officials then bound his hands and feet to the contraption and covered his head with a sheet, before whipping him with 15 strokes of the cat-o-nine tails.

The cat-o-nine tails is an instrument consisting of a plaited rope made up of nine knotted thongs of cotton cord approximately 30 inches long. It is designed to bruise and lacerate the skin of the person being whipped, and to cause intense pain. Mr. Caesar's flogging took place in the presence of at least seven men: the prison doctor, the Chief Infirmary Officer at the Port of Spain Prison, a Prison Supervisor, two other men who Mr. Caesar believed to be from the Ministry of National Security, and two prison officers. Mr. Caesar lost consciousness during the course of the flogging, and afterwards required hospitalization for two months. In the infirmary he received painkillers, but no other medication, for the injuries he sustained, and he continues to suffer pain in his shoulders as a result of the flogging. Following his hospitalization he returned to prison, where he remained at least until the taking of his affidavit on October 23, 2002.

## II. PRELIMINARY OBJECTIONS

### A. This Court Properly Has Jurisdiction Over this Case.

This Court has jurisdiction over the case at bar. Trinidad ratified the American Convention on Human Rights (the “American Convention”) on May 28, 1991, and recognized the compulsory jurisdiction of the Court on the same day. Mr. Caesar was first imprisoned after this date.

### B. Trinidad’s Denunciation of the American Convention Does Not Preclude Jurisdiction.

Trinidad’s denunciation of the American Convention effective May 26, 1999, does not preclude this Court’s jurisdiction over this case because all of the violations at issue occurred before the effective date of Trinidad’s denunciation.

In the *Hilaire* case, this Court rejected Trinidad’s preliminary objection to the jurisdiction of the Court, holding:

The facts, to which the instant case refers, occurred prior to the effective date of the State’s denunciation. Consequently, the Court has jurisdiction, under the terms of Articles 78(2) and 62(3) of the Convention, to entertain the present case and render a judgment.<sup>5</sup>

Similarly, the facts giving rise to Mr. Caesar’s petition pre-date the entry into force of Trinidad’s denunciation on May 26, 1999.<sup>6</sup> Mr. Caesar was convicted on January 10, 1992, and his conviction and sentence were affirmed on February 28, 1996. All four incidences of Mr. Caesar’s forced witness of the impact of flogging and the unjustified, malicious stay of his own corporal punishment (in violation of domestic law) occurred prior to February 5, 1998. He was flogged on February 5, 1998, and he received inadequate medical treatment while hospitalized

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<sup>5</sup> The *Hilaire* Case, Inter-Am. Ct. H.R. (Ser. C) No. 80 at para. 28 (2001) (Preliminary Objections).

<sup>6</sup> On May 26, 1998, Trinidad notified the Secretary General of the Organization of American States of its denunciation of the American Convention. According to the terms of Article 78 of the Convention, a denunciation by a state party shall have effect one year after the date of notification of the denunciation. See Commission Application at p. 7.

during the two months thereafter. The improper conditions of confinement and the failure to provide proper medical attention all date back to the commencement of the criminal proceedings against Mr. Caesar on January 10, 1992. In sum, all of the abuses addressed in this brief occurred prior to May 26, 1999, the date on which Trinidad's denunciation of the American Convention entered into force.

**C. Trinidad's Attempt to Impose Limits on its Instrument of Acceptance Does Not Preclude Jurisdiction.**

Trinidad's instrument of acceptance attempted to limit the compulsory jurisdiction of this Court by including an addendum stating that Trinidad only recognized jurisdiction "consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that Judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen."<sup>7</sup> However, this limitation has been deemed ineffective. The Inter-American Court is empowered by Articles 78(2)<sup>8</sup> and 62(3)<sup>9</sup> of the American Convention to exercise compulsory jurisdiction over States Parties with respect to any act that may constitute a violation of the obligations specified therein, when the act occurred prior to the effective date of denunciation. In the *Hilaire* case, this Court made clear that Trinidad cannot limit this Court's jurisdiction by way of limitations that are "incompatible with the object and purpose of the Convention."<sup>10</sup> The Court refused to subordinate the provisions of the Convention to restrictions

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<sup>7</sup> *Hilaire*, Inter-Am. Ct. H.R. (Ser. C) No. 80 at para. 44.

<sup>8</sup> American Convention on Human Rights, *supra* note 2, art. 62(3): "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction."

<sup>9</sup> American Convention on Human Rights, *supra*, art. 78(2): "Such denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation."

<sup>10</sup> *The Hilaire, Constantine and Benjamin et al.* Case, Inter-Am Ct. H.R. (Ser. C) No. 94 at para. 15 (2002) (Judgment), reaffirming its prior rulings in *Hilaire*, Inter-Am Ct. H.R. (Ser. C) No. 80 at para. 98; The

that would render inoperative the Court’s jurisdictional role, and consequently, the human rights protection system established in the Convention.<sup>11</sup> To hold that the State’s Constitution as the Court’s first point of reference, and the American Convention only as a subsidiary parameter, “would cause a fragmentation of the international legal order for the protection of human rights, and which would render illusory the object and purpose of the Convention.”<sup>12</sup> The same reasoning applies to Mr. Caesar’s case, and this Court is therefore competent according to the terms of Articles 62(3) and 78(2) of the American Convention to hear the present case and to render its judgment.

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*Benjamin et al.* Case, Inter-Am Ct. H.R. (Ser. C) No. 81 at para. 89 (2001) (Preliminary Objections); and *The Constantine et al.* Case, Inter-Am Ct. H.R. (Ser. C) No. 82 at para. 89 (2001) (Preliminary Objections).

<sup>11</sup> *Hilaire, Constantine and Benjamin et al.*, Inter-Am. Ct. H.R. (Ser. C) No. 94 at para.19.

<sup>12</sup> *Hilaire*, Inter-Am. Ct. H.R. (Ser. C) No. 80 at para. 93.

**III. TRINIDAD SUBJECTED MR. CAESAR TO AT LEAST SEVEN SEPARATE FORMS OF ABUSE, EACH OF WHICH CONSTITUTES AN INDEPENDENT, DISCRETE VIOLATION OF ARTICLE 5 OF THE AMERICAN CONVENTION.**

**A. For the Benefit of Both States and Prisoners, this Court Should Specifically Identify Each of the Abuses Suffered by Mr. Caesar that Violates Article 5 of the American Convention.**

Due to the wide range of abuses committed against Mr. Caesar by Trinidad, the present case affords this Court an opportunity to substantially clarify the scope of Article 5 of the American Convention, ruling on whether certain discrete actions by a state party to the American Convention constitute cruel, inhuman, or degrading punishment. In so doing, the Court can both clarify states' obligations under the Convention and grant prisoners in the Americas (as well as their advocates) a better understanding of detainees' rights under the Convention. Hereafter, for example, both State authorities and prisoners would know whether it is permissible for detained persons to be subjected to, *inter alia*, substandard physical conditions, inadequate medical care, severe psychological suffering, or corporal punishment. Addressing the abuses suffered by Mr. Caesar at this level of detail would mark a significant advance in international jurisprudence regarding the treatment of prisoners, and would lend a valuable degree of transparency to the notion of "humane treatment" guaranteed to detained persons under Article 5 of the American Convention. For these reasons, *amici curiae* strongly urge this Court to individually address the many abuses suffered by Mr. Caesar as potential violations of Article 5, rather than folding these abuses into a totality-of-the-circumstances standard.

**B. At Least Seven Separate Forms of Abuse Endured by Mr. Caesar Violated His Right to Humane Treatment Under Article 5 of the American Convention.**

As demonstrated by the facts set forth in the Commission Application and its accompanying Affidavit of Winston Caesar, Trinidad is responsible for a series of abuses against Mr. Caesar while he was in detention. In the *Neira Alegria et al.* case, this Court found that:

[E]very person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity, and the State must guarantee to that person the right to life and to humane treatment. Consequently, since the State is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoners.<sup>13</sup>

Considering the treatment Mr. Caesar endured while in detention, it is clear that Trinidad has flagrantly violated its duty to guarantee his rights under Article 5 of the American Convention.

Article 5, the “Right to Humane Treatment” provides, in pertinent part, as follows:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
- ...
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.<sup>14</sup>

There can be little argument that the abuses suffered by Mr. Caesar, taken together, constitute cruel, inhuman, or degrading punishment in violation of Article 5 of the American Convention.<sup>15</sup>

We further contend, however, that under international law and this Court’s jurisprudence, each of the seven autonomous instances of abuse suffered by Mr. Caesar constitutes an independent, cognizable violation of his right to humane treatment.

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<sup>13</sup> The *Neira Alegría et al.* Case, Inter-Am. Ct. H.R. (Ser. C) No. 13 at para. 60 (1991) (Preliminary Objections).

<sup>14</sup> American Convention on Human Rights, *supra* note 2, art. 5.

<sup>15</sup> *Id.*

**1. Trinidad Violated Mr. Caesar’s Article 5 Rights by Subjecting Him to Physical Conditions of Detention that were Degrading and Inhuman.**

The physical prison conditions to which Trinidadian authorities subjected Mr. Caesar constitute a violation of the right to humane treatment under Article 5 of the American Convention. In assessing the severity of prison conditions, this Court, the European Court of Human Rights (“ECHR” or “the European Court”), and the Human Rights Committee (the body charged with interpreting and applying the International Covenant on Civil and Political Rights, the “ICCPR Committee”) have considered the cumulative effects of treatment and facilities, paying particular attention to overcrowding, lack of bedding and unsanitary hygienic facilities. Based on such criteria, both this Court and the ICCPR Committee have condemned Trinidad for its consistently poor treatment of prisoners. The physical conditions under which Mr. Caesar was detained are remarkably similar to those for which Trinidad has previously been called to account, and these circumstances of incarceration clearly violated Mr. Caesar’s rights under Article 5 of the American Convention.

This Court recently concluded, on the basis of the evidence offered in the *Hilaire, Constantine and Benjamin et al.* case, that overcrowded, unsanitary conditions and other deficiencies are typical of Trinidad’s prison system.<sup>16</sup> This Court found that such conditions “compel the victims to live under circumstances that impinge on their physical and psychological integrity and therefore constitute cruel, inhuman and degrading treatment”<sup>17</sup> in violation of Article 5. The victims in the *Hilaire, Constantine and Benjamin et al.* case were subjected to grossly overpopulated and unsanitary conditions for sustained periods of time, ranging from four

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<sup>16</sup> *Hilaire, Constantine and Benjamin et al.*, Inter-Am Ct. H.R. (Ser. C) No. 94, at para. 84(l)- 84(n).

<sup>17</sup> *Id.* at para. 169.

years to nearly twelve years.<sup>18</sup> Cells measuring 90 square feet held up to 14 prisoners who were sometimes forced to sleep sitting or standing up.<sup>19</sup> The cells were hot and unventilated, and lacked adequate toilets, requiring everyone in the cell to use a single bucket, or “slop pail,” that was emptied only twice a day.<sup>20</sup>

Similarly, Mr. Caesar for nearly eight years slept on a carpet or thin mat, in a hot, unventilated, and overcrowded cell, and shared a slop pail with several other inmates. Though his cell was not as overcrowded as the almost unimaginable conditions described in the *Hilaire, Constantine and Benjamin et al.* case, Trinidadian authorities nonetheless subjected Mr. Caesar to detention conditions that qualify as inhuman and degrading under the standard articulated in that case. Namely, he was compelled him to live under circumstances that impinged on his physical and psychological integrity and therefore constituted cruel, inhuman and degrading treatment<sup>21</sup> in violation of Article 5.

This Court’s condemnation of degrading detention facilities in the *Hilaire, Constantine and Benjamin et al.* case is only its most recent statement concerning deficient detention conditions. This Court previously found violations of the right to humane treatment in the *Suárez Rosero* Case, where a detainee was held in a 15-square-meter cell shared with 16 others, obliged to sleep on newspaper, and lacked necessary hygiene facilities. The Court concluded that, “For all those reasons, the treatment to which Mr. Suárez Rosero was subjected may be described as cruel, inhuman and degrading” in violation of Article 5(2).<sup>22</sup>

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<sup>18</sup> *Id.* at para. 84(1).

<sup>19</sup> *See id.* at para. 77(c).

<sup>20</sup> *Id.*

<sup>21</sup> *See id.* at para. 169.

<sup>22</sup> The *Suárez Rosero* Case, Inter-Am Ct. H.R. (Ser. C) No. 35 at para. 91 (1997) (Judgment).

Like Mr. Suárez Rosero, Mr. Caesar was subjected to overpopulated, unsanitary facilities and lacked bedding or a mattress. He slept on a mat on the floor or on a thin carpet in two different prisons over a period of nearly eight years. Prison officials deprived him of even rudimentary toilet facilities, forcing him to endure unhygienic conditions that created significant risks of the spread of disease as well as the constant stench of human feces, thus further contributing to the violation of his right to humane treatment. Like the conditions to which Mr. Suárez Rosero was subjected, Mr. Caesar's detention conditions may accurately be described as cruel, inhuman and degrading in violation of Article 5.

The European Court has found that “[w]hen assessing conditions of detention, account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant.”<sup>23</sup> In *Dougoz v. Greece* the ECHR found that “[t]he serious overcrowding and absence of sleeping facilities, combined with the inordinate length of the period during which he was detained in such conditions, amounted to degrading treatment contrary to Article 3.”<sup>24</sup> The conditions of detention to which Trinidad subjected Mr. Caesar are quite similar to those at the Alexandras police headquarters where the applicant in *Dougoz* was confined from April 1998 to December 1998, except that Mr. Caesar endured such conditions for a much longer period, spending almost eight years without bedding in overpopulated cells at Golden Grove Prison and Carrera Convict Prison. Under the European Court's standards, Mr. Caesar's conditions of confinement clearly qualify as degrading treatment.

The ICCPR Committee has classified such prison conditions as inhuman in several individual communications concerning Trinidad, concluding that the conditions of confinement

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<sup>23</sup> *Dougoz v. Greece*, Eur. Ct. H.R., App. No. 00040907/98 at para. 46 (2001) (Judgment) (Merits and Just Satisfaction).

<sup>24</sup> *Id.* at para. 48.

in various sites of detention and imprisonment in Trinidad violate Articles 10 and 7 of the International Covenant on Civil and Political Rights (“ICCPR”),<sup>25</sup> to which Trinidad acceded on December 21, 1978. For instance, in *Neptune v. Trinidad and Tobago*, the Committee noted that:

[T]he author’s claims that he is sharing a 9 by 6 feet cell with six to nine fellow prisoners, that there are only three beds in the cell, that there is not enough natural light, that he was aired only half an hour once every two/three weeks and that the food is inedible...are not compatible with the requirements of article 10, paragraph 1, of the Covenant, which stipulates that prisoners and detainees shall be treated with humanity and with respect for the inherent dignity of the human person.<sup>26</sup>

In *Xavier Evans v. Trinidad and Tobago*, Trinidad detained an inmate for five years in “a cell measuring 6 by 9 feet, with no sanitation except for a slop pail, no natural light, being allowed out of his cell only once or twice a week during which he was restrained in handcuffs, and with wholly inadequate food.”<sup>27</sup> The ICCPR Committee concluded that that these conditions of detention, taken together, amount to a violation of Article 10, paragraph 1 of the ICCPR, which holds: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>28</sup> The conditions described in *Neptune* and *Xavier Evans* mirror those inflicted upon Mr. Caesar.

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<sup>25</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, arts. 7 and 10 (entered into force Mar. 23, 1976). Article 7 states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” Article 10(1) states, “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” Trinidad acceded to the First Optional Protocol of the ICCPR (accepting the ICCPR Committee’s competence to receive individual communications from persons subject to Trinidadian jurisdiction) on November 14, 1980. Trinidad denounced the First Optional Protocol on June 27, 2000.

<sup>26</sup> *Neptune v. Trinidad and Tobago*, Communication No. 523/1992, U.N. Doc. CCPR/C/57/D/523/1992 at para. 9.1 (1996).

<sup>27</sup> *Xavier Evans v. Trinidad and Tobago*, Communication No. 908/2000, U.N. Doc. CCPR/C/77/D/908/2000 at para. 6.4 (2003).

<sup>28</sup> International Covenant on Civil and Political Rights, *supra* note 23, art. 10.

The United Nations has promulgated Standard Minimum Rules for the Treatment of Prisoners<sup>29</sup> (“U.N. Standard Minimum Rules”) that establish the most fundamental responsibilities of States with regard to those who are detained. This Court has looked to these rules for guidance in assessing the appropriateness of prisoner treatment. In the *Urso Branco Prison* case, for example, this Court deemed it “pertinent and necessary...for conditions at that penitentiary to be in accordance with applicable international standards for protection of human rights.”<sup>30</sup> In *Urso Branco* this Court looked to the U.N. Standard Minimum Rules as the “applicable international standards” on a variety of issues related to prison conditions, including its ruling that, “Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments [are] completely prohibited as punishments for disciplinary offences.”<sup>31</sup>

The conditions imposed upon Mr. Caesar by Trinidad plainly violate Rules 10, 12 and 19 of the U.N. Standard Minimum Rules. Rule 10 requires that “all accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health.”<sup>32</sup> Rule 10 further establishes that cells shall have “minimum floor space, lighting, heating and ventilation.”<sup>33</sup> Trinidad violated this Rule by subjecting Mr. Caesar to severely overcrowded, unventilated, and hot cells with poor hygienic conditions highlighted by the use of a common slop pail in lieu of a toilet. Moreover, Rule 19 states that, “Every prisoner shall, in

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<sup>29</sup> United Nations, Office of the High Commissioner for Human Rights, *Standard Minimum Rules for the Treatment of Prisoners*, adopted at the First United Nations Congress on Prevention of Crime and Treatment of Prisoners, held in Geneva in 1955, and adopted by the Economic and Social Council through its resolutions 663C (XXIV) of July 31, 1957, and 2076 (LXII) of May 13, 1977.

<sup>30</sup> See, e.g., *The Urso Branco Prison Case*, Inter-Am Ct. H.R. (Ser. E) at fn. 5-8 (August 29, 2002) (Provisional Measures).

<sup>31</sup> *Id.* at para. 10, quoting *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 29, rule number 31.

<sup>32</sup> *Standard Minimum Rules for the Treatment of Prisoners*, *supra* note 29, rule 10.

<sup>33</sup> *Id.*

accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.”<sup>34</sup> The State also violated this condition by depriving Mr. Caesar of a mattress or bedding. Finally, Rule 12 requires that sanitary installations “be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.”<sup>35</sup> The State clearly violated this standard by forcing Mr. Caesar to share an unhygienic slop pail with several other prisoners.

Trinidad has a well-documented history of subjecting its prisoners to poor, often unconscionable prison conditions. The physical detention conditions to which Trinidad subjected Mr. Caesar were no exception to this pattern, and they fall far short of the standards of humane treatment articulated by this Court, the European Court, and the ICCPR Committee, as well as the standards for prisoner treatment established in the U.N. Standard Minimum Rules. The conditions under which the State detained Mr. Caesar failed to ensure respect for his human dignity, and violated his right not to be subjected to cruel, inhuman or degrading treatment under Article 5 of the American Convention.

**2. Trinidad Violated Article 5 by Failing to Provide Mr. Caesar with Adequate Medical Treatment for His Ailments, Independent of Those Resulting from His Flogging.**

The responsibility of the State for ensuring humane conditions in detention facilities within its jurisdiction has been clearly recognized by this Court, the ECHR, and the ICCPR Committee. Though this Court has not previously been asked to rule on whether failure to provide medical care to prisoners can constitute a violation of Article 5, it follows logically from

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<sup>34</sup> *Id.*, rule 19

<sup>35</sup> *Id.*, rule 12. *See also* rule 15: Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.”

the principle articulated in *Neira Alegría*<sup>36</sup> (and from other international jurisprudence) that while Mr. Caesar was in the State's custody it was Trinidad's responsibility to provide him with adequate medical treatment. Trinidad failed to meet this obligation. While incarcerated, Mr. Caesar suffered serious health problems such as tuberculosis and chronic hemorrhoids. His hemorrhoid-related bleeding was so severe that he feared fainting from loss of blood if he used the slop fail, and in 1996 his condition became so critical that he was placed in the infirmary for over a month. Though a doctor recommended surgery in 1992, Mr. Caesar did not receive adequate treatment for his ailments and had to wait six years before finally undergoing surgery on his hemorrhoids in January, 1998. Trinidad's failure to provide timely and effective treatment violated its obligation to ensure humane conditions in its detention facilities, and therefore violated Mr. Caesar's rights under Article 5 of the American Convention.

The European Court of Human Rights has expressly recognized the responsibility of States to provide adequate medical treatment to those in detention. In *McGlinchey and Others v. United Kingdom*, the ECHR held that in order to comply with Article 3 of the European Convention on Human Rights ("European Convention"),<sup>37</sup> "a State must ensure that a person is detained in conditions which are compatible with respect for her human dignity...and that, given the practical demands of imprisonment, her health and well-being are adequately secured by, among other things, providing her with the requisite medical assistance."<sup>38</sup> In *McGlinchey*, the ECHR found that the United Kingdom contravened the Article 3 prohibition against inhuman and degrading treatment with respect to the victim, by failing to respond adequately to her

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<sup>36</sup> See *Neira Alegría et al.*, Inter-Am. Ct. H.R. (Ser. C) No. 13 at para. 60.

<sup>37</sup> The European Convention on Human Rights, *opened for signature* November 4, 1950, art. 3 states, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

<sup>38</sup> *McGlinchey and others v. The United Kingdom*, Eur. Ct. H.R., App. No. 00050390/99 at para. 46 (2003) (Judgment) (Merits and Just Satisfaction).

dehydration and severe weight loss; these conditions eventually resulted in the victim's death.<sup>39</sup> In the case of *Tas v. Turkey*<sup>40</sup>, the ECHR likewise considered an allegation that a State had breached Article 3 by failing to provide adequate medical treatment to a person in detention. In *Tas*, however, the ECHR ruled that because the victim had received "prompt and effective medical treatment" an Article 3 violation had not occurred.<sup>41</sup> These two cases demonstrate that the ECHR has articulated a clear standard under which a State's failure to provide prompt and effective medical treatment to a detained person constitutes inhuman and degrading treatment. The treatment Mr. Caesar received in the present case was plainly not prompt and effective—Trinidad authorities failed to provide medically necessary surgery for a period of six years, and Mr. Caesar continues to suffer from hemorrhoid-related bleeding. We urge this Court to adopt a standard similar to the ECHR's and, in doing so, to find Trinidad in violation of Mr. Caesar's rights under Article 5 of the American Convention.

In *Linton v. Jamaica*,<sup>42</sup> the ICCPR Committee found that the failure of a State to provide sufficient medical treatment to prisoners constitutes cruel and inhuman treatment in violation of Article 7 of the ICCPR.<sup>43</sup> In *Linton*, the victim had been shot in the hip during an attempt to escape from prison and, as a result of the inadequate medical treatment he received for his injuries, was left handicapped.<sup>44</sup> The Committee found that "the denial of adequate medical care

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<sup>39</sup> See *id.* at paras. 57-58.

<sup>40</sup> *Tas v. Turkey*, Eur. Ct. H.R., App. No. 00024396/94 (2000), (Judgment) (Merits and Just Satisfaction).

<sup>41</sup> *Id.* at para. 76.

<sup>42</sup> *Linton v. Jamaica*, Communication No. 523/1992, U.N. Doc. CCPR/C/46/D/255/1987, at para. 2.7 (1992).

<sup>43</sup> Article 7 of the ICCPR, *supra* note 23, holds: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

<sup>44</sup> See *Linton v. Jamaica*, Communication No. 523/1992, U.N. Doc. CCPR/C/46/D/255/1987, at para. 2.7 (1992).

after the injuries sustained in the aborted escape attempt of January 1988 constitutes cruel and inhuman treatment within the meaning of article 7.”<sup>45</sup>

In the present case, Trinidad’s failure to provide Mr. Caesar with adequate and timely treatment for his chronic hemorrhoid condition likewise constituted cruel and inhuman punishment. Like the victim in *Linton*, Mr. Caesar endured and continues to endure physical suffering (including heavy bleeding) as a result of the State’s failure to provide him with timely medical care. Moreover, in Mr. Caesar’s case the actions of the State were even more egregious, because his medical ailments were not sustained during an attempt to escape from detention but were rather an ordinary instance of bad health, no doubt exacerbated by unhygienic prison conditions such as the shared slop pail. Whereas the ICCPR Committee went so far as to rule that States must provide adequate medical care to a prisoner even when he is arguably at fault for his own injuries, this Court is simply asked to find that Trinidad was required to treat the medical problems that Mr. Caesar developed as a matter of chance, or as a result of his poor detention conditions.

Trinidad’s failure to provide medical treatment to Mr. Caesar also contradicted the UN General Assembly’s Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the UN’s Standard Minimum Rules for the Treatment of Prisoners. Under Principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the State is responsible for ensuring that “medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided

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<sup>45</sup> *Id.* at para. 8.5.

free of charge.”<sup>46</sup> Furthermore, the UN’s Standard Minimum Rules for the Treatment of Prisoners include a number of relevant provisions:

- Rule 22.2: Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers.<sup>47</sup>
- Rule 24: The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and the taking of all necessary measures.<sup>48</sup>
- Rule 25.1: [T]he medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.”<sup>49</sup>

The grossly inadequate medical care afforded Mr. Caesar in the present case meets none of these international standards. Presuming this Court does not intend to set a standard for proper treatment of detainees under Article 5 that is lower than the UN’s Standard Minimum Rules, it should find Trinidad’s failure to provide timely and effective medical treatment a violation of Article 5 of the American Convention.

**3. Trinidad Violated Article 5 by Prolonging the Duration of Mr. Caesar’s Pre-Flogging Confinement and Repeatedly Leading Him to Believe That He Would Imminently Suffer Corporal Punishment.**

The psychological abuse to which Mr. Caesar was subjected during his pre-flogging confinement constitutes inhuman treatment in violation of Article 5 of the American Convention.

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<sup>46</sup> UN General Assembly, 43<sup>rd</sup> Session, “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment”, Principle 24, adopted by General Assembly resolution 43/173 of 9 December 1988, *available at* [http://www.unhcr.ch/html/menu3/b/h\\_comp36.htm](http://www.unhcr.ch/html/menu3/b/h_comp36.htm).

<sup>47</sup> Standard Minimum Rules for the Treatment of Prisoners, *supra* note 29, Rule 22.2

<sup>48</sup> *Id.*, Rule 24.

<sup>49</sup> *Id.*, Rule 25.1.

International tribunals have concluded that the mere threat of cruel or inhuman treatment can itself constitute such treatment. Furthermore, in the case of people scheduled to be executed, tribunals have ruled that a prolonged delay in carrying out the punishment can qualify as cruel, degrading, and inhuman treatment. In the present case, Mr. Caesar was subjected to both a prolonged delay in the execution of his corporal punishment and repeated threats that his corporal punishment would imminently be carried out. Trinidad's Court of Appeals confirmed Mr. Caesar's sentence more than two years after the application for leave to appeal was filed, and the flogging occurred a further two years later, in clear violation of Trinidad law.<sup>50</sup> This illegal period of extended waiting was made more painful by the fact that on four separate occasions prior to his flogging, during a period of over a year, prison officials took Mr. Caesar to the prison location where corporal punishment was administered without telling him whether he was going to receive his punishment. They never informed him of when his own sentence would be applied, and on each of these occasions the other prisoners were flogged while Mr. Caesar was not. By imposing this treatment, Trinidad authorities subjected Mr. Caesar to a prolonged period of mental anguish, induced by the looming threat of his impending corporal punishment and exacerbated by instances in which they deliberately led him to believe that his punishment was imminent. In doing this, Trinidad kept Mr. Caesar in a state of acute psychological distress<sup>51</sup> for an extended period of time.

This Court, the European Court, and the ICCPR Committee have all recognized that the mere threat of torture or cruel and inhuman treatment can constitute a violation of a victim's right to humane treatment, rising in some cases to the level of torture. In the *Loayza-Tamayo*

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<sup>50</sup> See Corporal Punishment (Offenders Over Sixteen) Act of 1953 of Trinidad and Tobago, *supra* note 4, art. 6, which states, "A sentence of flogging shall be carried out as soon as may be practicable and shall in no case be carried out after the expiration of six months from the passing of the sentence."

<sup>51</sup> See Affidavit of Winston Caesar, paras. 7.3, 7.4, and Commission Application, at p. 15.

case, this Court found that “intimidation with threats of further violence” against a detained person was a violation of the victim’s right to humane treatment under Article 5.<sup>52</sup> Furthermore, this Court explicitly recognized in the *Cantoral Benavides* case that the threat of serious physical injury is a form of “psychological torture.”<sup>53</sup> In the case of *Campbell v. Cosans*, the European Court similarly ruled that merely threatening someone with conduct that is cruel or inhuman can itself constitute cruel or inhuman treatment provided the threat is real and immediate.<sup>54</sup> The ICCPR Committee reached a similar conclusion in *Miguel Angel Estrella v. Uruguay*, classifying the threat of serious injury as a form of psychological torture.<sup>55</sup> This Court cited *Campbell* and *Miguel Angel Estrella* in reaching the “conclusion that a true international system prohibiting all forms of torture has been put in place.”<sup>56</sup> Under this system, both physical and psychological torture are recognized as violations of victims’ human rights, and the mere threat of cruelty may cause sufficient psychological suffering to qualify as inhuman treatment. The psychological suffering inflicted upon Mr. Caesar in the present case clearly rises to this level. By prolonging the pre-flogging detention of Mr. Caesar and repeatedly leading him to believe that his corporal punishment was imminent, Trinidad deliberately caused him tremendous mental anguish.

The jurisprudence of this Court and the European Court clearly establishes that prolonged detention in anticipation of punishment induces mental anguish that rises to the level of cruel, inhuman, and degrading treatment. In the *Hilaire, Constantine and Benjamin et al.* case, this Court found that Trinidad had subjected prisoners to cruel, inhuman and degrading treatment by

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<sup>52</sup> The *Loayza-Tamayo* Case, Inter-Am. Ct. H.R. (Ser. C) No. 33 at para. 58 (1997).

<sup>53</sup> See The *Cantoral Benavides* Case, Inter-Am. Ct. H.R. (Ser. C) No. 69 at para. 102 (2000).

<sup>54</sup> *Campbell v. Cosans*, Eur. Ct. H.R., App. No. 00007511/76 (1982), (Judgment) (Merits).

<sup>55</sup> *Miguel Angel Estrella v. Uruguay*, Communication No. 74/1980, U.N. Doc. CCPR/C/OP/2, at paras. 8.3 and 10 (1990).

<sup>56</sup> See *Cantoral Benavides*, Inter-Am. Ct. H.R. (Ser. C) No. 69 at para. 103, citing *Campbell*, *supra* note 54, and *Miguel Angel Estrella v. Uruguay*, *supra* note 55.

forcing them to anticipate punishment over a considerable period of time.<sup>57</sup> The victims in *Hilaire, Constantine and Benjamin et al.* were detained by the Trinidadian authorities for periods lasting between four years and eleven years and nine months, from the time of their arrest to the resolution of their final appeals.<sup>58</sup> After the victims were sentenced to death, officials detained them in cells that were very close to the execution chamber, the door of which was adorned by drawings of a figure with a rope around its neck and a message that read, “You have come here to be executed.”<sup>59</sup> Officials further taunted the prisoners with questions about their favorite meals as part of their last wishes during periodic checks of the prisoners’ weight.<sup>60</sup> This Court found that this pre-punishment procedure “both terrorizes and depresses the prisoners—others cannot sleep due to nightmares, much less eat.”<sup>61</sup> The constant threat that they may be hanged at any moment “impinge[d] on their physical and psychological integrity and therefore constitute[d] cruel, inhuman and degrading treatment.”<sup>62</sup> The severe mental anguish to which Mr. Caesar was subjected during his prolonged, illegal pre-flogging confinement similarly amounted to cruel, inhuman and degrading treatment. For two years he lived with the constant threat that he could at any time be subjected to the extreme physical suffering associated with flogging by cat-o-nine tails, a threat made all the more agonizing and real by the State’s unexplained stationing of him in the pre-corporal punishment prison cells on four separate occasions.

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<sup>57</sup> *Hilaire, Constantine and Benjamin et al.*, Inter-Am Ct. H.R. (Ser. C) No. 94, at paras. 168-69.

<sup>58</sup> *Id.* at para. 84(l).

<sup>59</sup> *Id.* at para. 77(c).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at para. 169.

Like this Court, the ECHR has also concluded that forcing prisoners to endure prolonged periods of detention awaiting punishment, particularly in the case of executions, causes them to suffer severe mental anxiety in violation of their right to humane treatment. For instance, in *Tyrer v. United Kingdom*, the ECHR concluded that an interval of several weeks between the applicant's conviction and the execution of the punishment subjected the defendant to the severe mental anguish of anticipating the violence he was to have inflicted on him.<sup>63</sup> In *Soering v. United Kingdom*,<sup>64</sup> the European Court concluded that condemned prisoners in the United States are subject to tension-ridden waiting periods that extend for many years prior to execution as a consequence of complex judicial proceedings. The *Soering* Court clarified that "account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of the person's mental anguish of anticipating the violence he is to have inflicted on him."<sup>65</sup> It is the element of *staying* the punishment, and the mental and psychological anguish the stay entails, that was the decisive factor in *Soering*. This Court should, in the present case, likewise focus on the stay of Mr. Caesar's punishment and on the intense psychological distress he suffered as a result of the length and circumstances of this stay.

Though Mr. Caesar suffered corporal, rather than capital, punishment in the present case, the length of his pre-flogging detention and the State's deliberate threats of imminent physical suffering justify extending the above precedents to the treatment inflicted upon him. Indeed, the focus of these legal precedents is on the extent of the psychological suffering that the State inflicts upon the victim; though the type of punishment that the victim is scheduled to endure is relevant, it is by no means the only consideration. In the present case, there can be little doubt

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<sup>63</sup> *Tyrer v. United Kingdom*, Eur. Ct. H.R., App. No. 00005856/72 at para. 33 (1978), (Judgment) (Merits).

<sup>64</sup> *Soering v. United Kingdom*, Eur. Ct. H.R., App. No. 00014038/88 (1989), (Judgment) (Merits and Just Satisfaction).

<sup>65</sup> *Id.* at para. 100.

that Trinidad's actions caused Mr. Caesar excessive mental anguish rising to the level of inhuman treatment. Counting only the time after his last appeal was turned down, Trinidad detained Mr. Caesar for a period of two years while he awaited corporal punishment. During this time, he was on four occasions deliberately subjected to the imminent threat of flogging, an experience which he described in his affidavit as follows, "It was mental torture waiting for my turn and I was shaking...I was subjected to the same thing on 3 further occasions... I suffered mental and emotional torture. I was very frightened every time."<sup>66</sup> Trinidad not only violated its own corporal punishment legislation by waiting two years (rather than the maximum six months) to flog Mr. Caesar, but State authorities made the delay an especially painful psychological experience. Examined in light of the aforementioned international standards, the circumstances of the stay of Mr. Caesar's punishment clearly give rise to the conclusion that Trinidad violated Article 5 of the American Convention by prolonging the duration of his confinement pending the flogging and repeatedly subjecting him to the real and imminent threat that his corporal punishment was about to take place.

**4. Trinidad Violated Article 5 by Repeatedly Exposing Mr. Caesar to the Anguish of the Flogging He Was Sentenced to Suffer.**

Exposing Mr. Caesar to the suffering and anguish resulting from flogging by the cat-o-nine tails prior to his own punishment constitutes another independent violation of the right to humane treatment under Article 5, separate from, but related to, the violation related to delay and threats of punishment discussed above. Trinidad severely aggravated the psychological challenges of imprisonment for Mr. Caesar by forcibly exposing him to the suffering of fellow inmates as they were subjected to corporal punishment. On four different occasions he witnessed the consequences of their flogging. He could see their wounds bleeding and hear some of them

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<sup>66</sup> See Affidavit of Winston Caesar, paras. 7.3, 7.4.

crying in pain as he awaited his own flogging. By deliberately placing Mr. Caesar in these situations, the State is responsible for violating his right to humane treatment under Article 5 of the American Convention.

This Court has explicitly recognized psychological torture as a violation of Article 5.<sup>67</sup> In the *Cantoral Benavides* case, the Court found that a victim of physical torture had also suffered psychological torture, in part because the victim was forced to listen his brother's cries as his brother was beaten by police.<sup>68</sup> Likewise, the ECHR in the case of *Akkoc v. Turkey* found that a victim's being "forced to listen to the sounds of other persons being ill-treated" contributed to her torture in violation of Article 3 of the European Convention.<sup>69</sup> In the present case, the deliberate psychological trauma caused Mr. Caesar when Trinidad repeatedly exposed him to the physical anguish of other inmates who were flogged likewise constitutes a violation of Article 5.

The ICCPR Committee has recognized that deliberately exposing detained persons to the anguish of their impending punishments qualifies as cruel and inhuman treatment within the meaning of Article 7 of the ICCPR. In the case of *Linton v. Jamaica*, an inmate who had been sentenced to death was transferred to a death cell and thereafter teased by prison warders who described in detail every stage of his impending execution.<sup>70</sup> In the view of the ICCPR Committee, the psychological trauma inflicted upon the victim when he was subjected to detailed accounts of his oncoming punishment constituted cruel and inhuman treatment.<sup>71</sup> In the present case, Trinidad prison officials exposed Mr. Caesar not just to descriptions of the flogging he was

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<sup>67</sup> *Cantoral Benavides*, Inter-Am. Ct. H.R. (Ser. C) No. 69, at para. 104.

<sup>68</sup> *Id.* at paras. 63(f) and 104.

<sup>69</sup> *Akkoc v. Turkey*, Eur. Ct. H.R., App. Nos. 00022947/93 ; 00022948/93 at paras. 25, 117 (2000) (Judgment) (Merits and Just Satisfaction).

<sup>70</sup> *Linton v. Jamaica*, Communication No.255/1987, U.N. Doc. CCPR/C/46/D/255/1987, at para. 2.6 (1992).

<sup>71</sup> *Id.* at para. 8.5.

scheduled to endure, but also to the physical scars and suffering of fellow prisoners who had just been lashed. By repeatedly exposing Mr. Caesar to the anguish he would suffer as a result of the flogging, the State deliberately caused him tremendous psychological suffering and violated his rights under Article 5 of the American Convention.

**5. Trinidad Violated Article 5 by Subjecting Mr. Caesar to a Flogging by The Cat-O-Nine Tails.**

To date, this Court has not considered whether judicially sanctioned corporal punishment, standing alone, is a violation of the American Convention. Other international adjudicative bodies, and many national governments, condemn corporal punishment as a *per se* violation of the right to humane treatment under international law, incompatible with basic human rights standards such as those enshrined in the American Convention. Mr. Caesar's case provides this Court an opportunity to condemn corporal punishment as an independent violation of Article 5.

The European Court and the ICCPR Committee have explicitly classified judicial corporal punishment as a human rights violation. In *Tyrer v. United Kingdom*, the ECHR condemned the practice as constituting “institutionalized violence...permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State” in violation of the European Convention.<sup>72</sup> Similarly, the ICCPR Committee recently considered corporal punishment in Trinidad and found that it constitutes cruel, inhuman and degrading punishment. In *Boodlal Sooklal v. Trinidad and Tobago*, where the claimant was sentenced to 12 strokes of the birch in connection with a conviction of sexual intercourse and serious indecency with minors, the ICCPR Committee strongly condemned corporal punishment: “[I]rrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman or degrading

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<sup>72</sup> *Tyrer v. United Kingdom*, Eur. Ct. H.R., App. no. 5856/72 at para. 33.

treatment or punishment contrary to article 7” of the ICCPR. The Committee found that “by imposing a sentence of whipping with the birch, the State party has violated the author’s rights under article 7.”<sup>73</sup> The ruling affirmed the ICCPR Committee’s view in General Comment 20, that the prohibition on torture and cruel, inhuman, or degrading treatment or punishment contained in Article 7 of the ICCPR “must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.”<sup>74</sup>

The U.N. Special Rapporteur on Torture has also condemned the use of judicial corporal punishment in various countries and has sought the dismissal of sentences involving corporal punishment.<sup>75</sup> U.N. Special Rapporteur Nigel Rodley has taken the view that:

[C]orporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined, *inter alia*, in the Universal Declaration of Human Rights, the ICCPR, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.”<sup>76</sup>

In his 1997 report to the U.N. Human Rights Commission, Mr. Rodley emphasized that he could not accept:

the notion that the administration of such punishments as stoning to death, flogging and amputation—acts which would be unquestionably unlawful in, say, the context of custodial interrogation—can be deemed lawful simply because the

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<sup>73</sup> *Boodlal Sooklal v. Trinidad and Tobago*, Communication No.928/2000, U.N. Doc. CCPR/C/73/D/928/2000 at para. 4.6 (2000).

<sup>74</sup> United Nations Human Rights Committee, General Comment 20, Article 7 (44th sess., 1992), Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UPDATE: U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para. 5.

<sup>75</sup> “Questions of the Human Right of all Persons subjected to any form of detention or imprisonment, in particular: torture and other Cruel, Inhuman or Degrading Treatment or Punishment”, Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights res. 1995/37 B, 10 January 1997, E/CN.4/1997/7.

<sup>76</sup> *Id.* at part I.A.

punishment has been authorized in a procedurally legitimate manner, *i.e.* through the sanction of legislation, administrative rules or judicial order.... Punishment is, after all, one of the prohibited purposes of torture. Moreover, regardless of which ‘lawful sanctions’ might be excluded from the definition of torture, the prohibition of cruel, inhuman or degrading punishment remains.”<sup>77</sup>

In addition to the broad international support for classifying corporal punishment as cruel and inhuman, there is also a wide and growing consensus among state governments that corporal punishment should be abolished. Since 1997, judicial corporal punishment has been abolished or declared unconstitutional in several countries, including Jamaica, St. Vincent and the Grenadines, South Africa and Zambia. In 1997, South Africa abolished corporal punishment as part of its penal system. Its legislature passed the Abolition of Corporal Punishment Act, repealing the statutory provisions that permitted judicial and other forms of corporal punishment.<sup>78</sup> Section 1 of the Abolition of Corporal Punishment Act provides that “[a]ny law which authorises corporal punishment by a court of law, including a court of traditional leaders, is hereby repealed to the extent that it authorises such punishment.”<sup>79</sup> Similarly, Zambia’s legislature enacted an amendment to its Penal Code in 2003. The stated aim of this law was to abolish corporal punishment as an available form of punishment.<sup>80</sup> In a 1997 ruling, a Jamaican appellate court declared that the law allowing punishments of flogging had lapsed after World War II, and corporal punishment is no longer practiced in that country.<sup>81</sup> The exclusion of

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<sup>77</sup> *Id.*

<sup>78</sup> Amnesty International 1998 Annual Report on South Africa, *available at* <http://www.amnesty.org/ailib/aireport/ar98/afr53.htm>.

<sup>79</sup> “Abolition of Corporal Punishment Act,” Act. 33, Reprinted in Government Gazette, Vol. 387, No. 18256, Republic of South Africa, 5 Sept. 1997, *available at* <http://www.gov.za/acts/1997/a33-97.pdf>.

<sup>80</sup> Penal Code (Amendment) Act, 2003, *available at* <http://www.hurid.org.zm>

<sup>81</sup> Amnesty International 1999 Annual Report on Jamaica, *available at* <http://www.amnesty.org/ailib/aireport/ar99/amr38.htm>.

corporal punishment from different countries' penal systems demonstrates the growing consensus in the international community that corporal punishment is contrary to human dignity. Indeed, a recent study by Amnesty International found that only 31 of the world's 192 countries still provide for judicial corporal punishment by national law; judicially-sanctioned punishments have been carried out in a mere 14 of these countries since 1997.<sup>82</sup>

The condemnation of corporal punishment, at both international and national levels, is approaching universal. Mr. Caesar's case gives this Court an opportunity to add its voice to the growing international consensus by expressly concluding that flogging by cat-o-nine tails specifically, and judicial corporal punishment more generally, constitute *per se* violations of the right to be free of cruel and inhuman treatment under Article 5 of the American Convention.

**6. Trinidad Violated Article 5 by Humiliating Mr. Caesar During the Administration of the Flogging.**

The circumstances under which Trinidad administered Mr. Caesar's corporal punishment constitute degrading punishment in violation of Article 5 of the American Convention. Considering facts less severe than those in the present case, international tribunals have held that debasing prisoners through degrading punishment contravenes the standards that preserve their personal dignity and integrity. This Court has yet to address this matter directly in its jurisprudence, and the present case affords the Court an ideal opportunity to condemn as a violation of Article 5 punishments that deliberately aim to humiliate and debase prisoners.

In *Tyrer*, the European Court analyzed whether the circumstances surrounding punishment with three strokes of the birch were "degrading."<sup>83</sup> The victim in *Tyrer* was whipped at a police station. Police officers forced the applicant to take down his trousers and underpants

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<sup>82</sup> Amnesty International, "Combating Torture: A Manual for Action" (2000), Section 6.4, *available at* [http://www.amnesty.org/resources/pdf/combating\\_torture/sections/section6-4.pdf](http://www.amnesty.org/resources/pdf/combating_torture/sections/section6-4.pdf).

<sup>83</sup> *Tyrer v. United Kingdom*, Eur. Ct. H.R., App. no. 5856/72 at para. 29

and bend over a table.<sup>84</sup> Two policemen held him while a third flogged him in the presence of the applicant's father and a doctor.<sup>85</sup> The Court found that "the applicant was subjected to a punishment in which the element of humiliation attained the level inherent in the notion of 'degrading punishment.'"<sup>86</sup> It reasoned that for a punishment to be "degrading," the humiliation or debasement involved must attain a particular level and the assessment is relative since "it depends on all the circumstances of the case and, in particular, on the nature and context of the punishment itself and the manner and method of its execution."<sup>87</sup> The ECHR concluded that, "[A]lthough the applicant did not suffer any severe or long-lasting physical effects, his punishment—whereby he was treated as an object in the power of the authorities—constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity."<sup>88</sup> In the case of *Polay Campos v. Peru*, the ICCPR Committee likewise focused on the victim's human dignity, specifically addressing the way in which the public nature of a punishment can degrade and debase the person being punished. In *Polay Campos*, the ICCPR Committee concluded that displaying a prisoner to the press in a cage constituted degrading treatment in violation of Article 7 of the ICCPR.<sup>89</sup>

Here, the Trinidad authorities deliberately administered Mr. Caesar's punishment under circumstances that were even more degrading than those in *Tyrer* and *Polay Campos*. They forced Mr. Caesar to strip and lie naked on a metal contraption, after which prison officers tied his hands and feet tightly and covered his head with a sheet. Unclothed and disoriented, he was

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<sup>84</sup> *Id.* at para. 10.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at para. 35.

<sup>87</sup> *Id.* at para. 30

<sup>88</sup> *Id.* at para. 33

<sup>89</sup> *Polay Campos v. Peru*, Communication No.577/1994, U.N. Doc. CCPR/C/61/D/557/1994 at para. 8.5 (1998).

then flogged with the cat-o-nine tails. Like the victim in *Tyrer*, Mr. Caesar was treated as “an object in the power of the authorities,” and suffered corporal punishment under humiliating circumstances that amounted to degrading punishment. Moreover, like the treatment inflicted upon the victim in *Polay Campos*, Trinidad further debased Mr. Caesar showcasing his punishment before a number of people. Trinidad flogged him in the presence of the prison doctor, two prison officers, the Chief Infirmary Officer, the Prison Supervisor and two other strangers—most of whom played no role in actually administering the corporal punishment. Trinidad thus debased Mr. Caesar in two ways during the course of his flogging: by treating him as an object, solely at the mercy and whim of State power; and by converting his humiliation and objectification into a public spectacle. These circumstances showed a callous disregard for Mr. Caesar’s human dignity and were sufficiently degrading to constitute an independent violation of Trinidad’s obligations under Article 5 of the American Convention.

**7. Trinidad Violated Article 5 by Failing to Provide Mr. Caesar with Adequate Medical Treatment for Injuries Sustained During his Flogging.**

As Mr. Caesar’s sole source of medical treatment while in prison, the State had an obligation to provide him with medical attention for the injuries that resulted from his flogging. Though his pain was temporarily dulled by the provision of painkillers, the State provided no further medical assistance to Mr. Caesar. Trinidad provided no treatment for his wounds, leaving them slow to heal and susceptible to infection, and to this day Mr. Caesar feels pain in his shoulders as a result of the flogging. Beyond placing him in the infirmary, the State had no regard for Mr. Caesar’s severely weakened state, brought on by the combined effects of his hemorrhoid surgery and his flogging. In failing to provide Mr. Caesar with adequate medical treatment for injuries sustained during the flogging, the State violated his right to humane treatment under Article 5 of the American Convention.

In the case of *Ilhan v. Turkey*,<sup>90</sup> the European Court found that inadequate medical treatment following physical abuse of a detainee amounted to torture in violation of Article 3 of the European Convention. In that case, agents of the State kicked and beat the detained victim, and struck him with a rifle.<sup>91</sup> They then waited 36 hours before providing him medical treatment, leading the Court to find that, “[h]aving regard to the severity of the ill-treatment suffered by Abdüllatif Ilhan and the surrounding circumstances, including the significant lapse in time before he received proper medical attention, the Court finds that he was a victim of very serious and cruel suffering that may be characterised as torture” in violation of Article 3’s prohibition of torture and inhuman or degrading treatment or punishment.<sup>92</sup> In the present case, as in *Ilhan*, Mr. Caesar received inadequate medical care in response to injuries inflicted by agents of the State. After flogging him to a state of unconsciousness, Trinidad provided only painkillers as treatment for injuries so serious that they required Mr. Caesar to remain in the infirmary for a period of two months following his punishment.

The ICCPR Committee has found that depriving detainees of medical attention for injuries inflicted by agents of the State amounts to cruel and inhuman treatment. In *Essono Mika Miha v. Equatorial Guinea*,<sup>93</sup> the ICCPR Committee considered the case of a former civil servant who had been imprisoned, tortured, deprived of food and water, and denied medical attention for well over one month.<sup>94</sup> The Committee stated that the victim “was subjected to torture at the prison of Bata, in violation of article 7,” and that, “the denial of medical attention

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<sup>90</sup> *Ilhan v. Turkey*, Eur. Ct. H.R., App. no. 22277/93 (2000) (Merits and Just Satisfaction).

<sup>91</sup> *Id.* at para. 86.

<sup>92</sup> *Id.* at 87.

<sup>93</sup> *Essono Mika Miha v. Equatorial Guinea*, Communication No. 414/1990, U.N. Doc. CCPR/C/51/D/414/1990 (1994).

<sup>94</sup> *Id.* at paras. 2.4-2.5.

after the ill-treatment in the, or outside the, prison of Bata, amounts to cruel and inhuman treatment within the meaning of article 7.”<sup>95</sup> In a similar fashion, Trinidad violated Article 5 of the American Convention by failing to provide adequate medical treatment to Mr. Caesar for the injuries sustained during his flogging by agents of the State.

Finally, Trinidad’s failure to provide sufficient medical treatment following Mr. Caesar’s flogging contravenes the U.N. Standard Minimum Rules, which state in relevant part, “The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical or mental illness and *the taking of all necessary measures.*”<sup>96</sup> It further contravenes Principle 24 of the UN General Assembly’s Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which provides that “medical care and treatment shall be provided whenever necessary.”<sup>97</sup> The persuasive nature of these international norms, combined with that of the aforementioned judgments of the ECHR and the ICCPR Committee, provide substantial weight to the notion that states have an obligation to provide adequate medical treatment to a detained person who has been injured by State agents. We urge this Court to explicitly recognize this obligation, and in doing so, to find that Trinidad violated Mr. Caesar’s rights under Article 5 of the American Convention by failing to provide him adequate treatment following his flogging.

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<sup>95</sup> *Id.* at 6.4.

<sup>96</sup> Standard Minimum Rules for the Treatment of Prisoners, *supra* note 29, Rule 24 (emphasis added).

<sup>97</sup> UN General Assembly, “Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,” *supra* note 46, Principle 24.

#### **IV. TRINIDAD’S FLOGGING OF MR. CAESAR WITH THE CAT-O-NINE TAILS CONSTITUTES TORTURE AND THEREFORE QUALIFIES FOR EXTRAORDINARY CONDEMNATION UNDER INTERNATIONAL LAW.**

Part III(B)(5) of this brief asserted that the flogging of Mr. Caesar constitutes an independent violation of Article 5 on the basis that the flogging violated Mr. Caesar’s right to humane treatment. This section argues in Part A that state-sanctioned flogging by means of the cat-o-nine tails, standing alone, in fact constitutes “torture,” the most severe form of violation governed by Article 5 of the American Convention. Alternatively, flogging exacerbated by certain other inflicted abuses present in this case constitutes torture. Part B of this section argues that, in either case, the classification of Mr. Caesar’s treatment as torture is important because of the distinctions under international law between torture and other forms of cruel, inhuman or degrading treatment.

##### **A. Trinidad’s Flogging of Mr. Caesar with the Cat-O-Nine Tails Constitutes Torture.**

##### **1. Torture is Differentiated under International Law from Other Forms of Cruel, Inhuman, or Degrading Treatment.**

The UN Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (“Torture Convention”) defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as...punishing him for an act he or a third person has committed.”<sup>98</sup> The essence of torture, as distinct from other forms of cruel, inhuman and degrading treatment, is (1) the *severity* of the ill-treatment, measured by the ‘intensity test’; and (2) the notion that a special stigma

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<sup>98</sup> United Nations, Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, art. 1(1) (entered into force June 26, 1987). Trinidad has not signed the Torture Convention.

should attach to deliberate inhuman treatment.<sup>99</sup> In *Ireland v. United Kingdom*, the ECHR concluded that “it was the intention that the [European] Convention, with its distinction between ‘torture’ and ‘inhuman or degrading treatment,’ should by the first of these attach a special stigma to *deliberate* inhuman treatment *causing very serious and cruel suffering.*”<sup>100</sup> Torture is thus distinguished from other forms of cruel, degrading and inhuman treatment as a matter of degree and kind; it is both intentional and more severe.

In the *Loayza Tamayo* case, this Court adopted the “intensity test,” first established in the *Ireland* case, to distinguish between “torture” and “cruel, inhuman and degrading treatment”:

The violation of the right to physical and psychological integrity of persons is a category of violations that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman and degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors.<sup>101</sup>

The *Loayza Tamayo* case further demonstrates that this Court focuses on both the physical and psychological integrity of the victim in deciding whether a particular instance of cruel and inhuman treatment rises to the level of torture.<sup>102</sup> Simply and unanimously stated by the U.N. General Assembly, such treatment amounts to torture if it is “an aggravated and deliberate form

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<sup>99</sup> See, e.g., *Ireland v. United Kingdom*, Eur. Ct. H.R., App. No. 00005310/71 at para. 167 (1978) (Judgment) (Merits).

<sup>100</sup> *Id.* (emphasis added), citing UN General Assembly Resolution 3452 of 9 December 1975, adopted unanimously. *Ireland* has become the standard and is reiterated in cases of torture and cruel, inhuman, and degrading treatment. See, e.g., *Aktas v. Turkey*, Eur. Ct. H. R. App. No. 24351/94 (2003) at para. 313 (“In determining whether a particular form of ill-treatment should be qualified as torture, consideration must be given to the distinction... In addition to the severity of the treatment, there is a purposive element, as recognized in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which came into force on 26 June 1987, which defines torture in terms of the *intentional* infliction of *severe* pain or suffering with the aim, *inter alia*, of obtaining information, inflicting punishment or intimidating”) (emphasis added)).

<sup>101</sup> *Loayza Tamayo*, Inter-Am. Ct. H.R. (Ser. C) No. 33 at para. 57, citing *Ireland* at para. 167.

<sup>102</sup> See *id.*

of cruel, inhuman and degrading treatment or punishment.”<sup>103</sup> Here again, the test for torture is based on two factors: severity and intent.

**2. Trinidad’s Flogging of Mr. Caesar, Standing Alone, Meets the Test for Torture Under International Law.**

Beyond holding that flogging is a violation of Article 5, this Court should explicitly hold that such flogging amounts to torture under international law. Flogging a prisoner with the cat-o-nine tails is a paradigmatic instance of torture, a repugnant remnant of colonial practices that serves three principal purposes: (1) the pure infliction of physical pain; (2) the degradation and dehumanization of the recipient; and (3) the display of state power to its citizens. Flogging with the cat-o-nine tails is a vicious and deliberate form of punishment that should be labeled “torture” by this Court.

**a. Flogging with the Cat-O-Nine Tails is a Particularly Severe form of Cruel and Degrading Punishment as it is Designed to Inflict Maximum Physical Pain and Dehumanize the Victim.**

Flogging with the cat-o-nine tails both inflicts severe pain and injury and humiliates and dehumanizes the victim. The principal function of the cat-o-nine tails is to inflict physical pain. In the present case, Mr. Caesar was strapped naked with his legs spread to a metal contraption called the “Merry Sandy.” Once his hands and legs were tightly bound, he was flogged 15 times with the cat-o-nine tails. The cat-o-nine tails—a device consisting of nine knotted cords attached to a handle—is specifically designed to lacerate and bruise the flesh of its victim. Tellingly, Mr. Caesar was flogged in the presence of the prison doctor, Dr. Chen. By providing physician’s oversight of the flogging of prisoners, the prison authorities demonstrated their anticipation that

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<sup>103</sup> U.N. General Assembly, 30<sup>th</sup> Session, “Declaration on the Protection of All Persons from Being Subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,” adopted by resolution 3452 (XXX) of 9 December 9 1975, art. 1(2).

flogging would inflict a level of pain so severe and threatening to the health of the victim that a physician's presence was necessary.

Beyond the acute physical pain that it inflicts, flogging with the cat-o-nine tails is a dehumanizing and humiliating evocation of slavery in the English-speaking Caribbean. The following passage from "Modernizing Slavery: Investigating the Legal Dimension," recalls that, even at the beginning of the 19<sup>th</sup> century, flogging and whipping were recognized as a brutal and dehumanizing symbol of the master-slave relationship:

The 1824 Order changed the legal terms for slave labor extraction. It made the use of the whip to coerce labor in the field illegal. The whip—a focus of slave protests and anti-slavery propaganda—symbolized the physical brutality, the barely restricted personal power owners exercised at the workplace, and the archaic nature of the chattel slave system. To limit its use was a first step to introducing modern labor extraction methods and it was recognized as such... The whip embodied the brutality of the system.<sup>104</sup>

While some provisions of the Corporal Punishment (Offenders Over Sixteen) Act of 1953 gave Trinidad the right to flog convicts, Trinidad did not exercise this right for decades. The government began practicing corporal punishment in 1993 as part of a trend within English-speaking Caribbean countries—a trend to which human rights groups reacted with vehement opposition.<sup>105</sup> By reinstating not just corporal punishment but the practice of flogging with cat-o-nine tails in particular, Trinidad evoked a singularly dehumanizing remnant of its own past. The State now exercises the same absolute power over the prisoner—and the same disregard for

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<sup>104</sup> M. Turner, "Modernizing Slavery: Investigating the Legal Dimension," *New West Indian Guide*, Vol. 73, No.3/4 (1999) (the 1824 Order pertained equally to flogging with the 'cat-o-nine'). See also, S. Emling, "Caribbean Islands Try Flogging To Deter Crime: Rights Groups Object, US Takes No Stand," Cox News Service (17 Feb. 1997), available at <http://www.corpun.com/ttju9702.htm>.

<sup>105</sup> See, e.g., *Trinidad and Tobago: Corporal Punishment*, Amnesty International AI Index: AMR 49/007/2000 (22 June 2000) ("Amnesty International opposes the use of corporal punishment as a violation of the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment guaranteed by Article 5 of the Universal Declaration of Human Rights.")

his humanity—that the master once did over the slave. The resulting assault on the victim’s psychological integrity is perhaps just as vicious as the attack on his physical integrity.

In sum, flogging with the cat-o-nine tails satisfies the first part of the test for torture because it is a particularly severe form of physical and psychological punishment, distinguished from cruel, inhuman and degrading treatment by virtue of its intensity.

**b. Trinidad’s Practice of Flogging with the Cat-O-Nine Tails is Deliberate.**

There can be no doubt that Mr. Caesar’s flogging was an intentional, premeditated act carried out by agents of the Trinidadian State. Mr. Caesar was sentenced to 15 strokes of the cat-o-nine tails under the Trinidad and Tobago Corporal Punishment (Offenders Over Sixteen) Act of 1953, which provides in its Article 6, “Any male offender, above the age of sixteen years, on being convicted before the High Court of any of the offences mentioned in the Schedule, may be ordered by the Court to be flogged in addition to any other punishment to which he is liable.”<sup>106</sup> On February 5, 1998, prison officials administered Mr. Caesar’s sentence by flogging him 15 times with the cat-o-nine tails. The flogging was a deliberate act, prescribed by the laws of Trinidad and carried out by State agents, and therefore satisfies the second element of the test for torture under international law.

**3. Trinidad’s Flogging Of Mr. Caesar, Exacerbated By Other Abuses, Constitutes Torture.**

The flogging of Mr. Caesar was exacerbated by other abuses committed by Trinidad. These additional abuses, many of which constitute independent violations of Article 5 of the American Convention as set forth earlier in this brief, include: exposure to the suffering of prisoners subject to flogging; deliberate delay of the flogging; humiliating administration of

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<sup>106</sup> Corporal Punishment (Offenders Over Sixteen) Act of 1953 of Trinidad and Tobago, *supra* note 4, art. 6.

flogging; and failure to provide medical treatment. This Court should find that, at the very least, the flogging of Mr. Caesar as aggravated by these circumstances amounts to torture.

In an oft-cited passage, Judge Zekia of the ECHR discussed the elements that the European Court should consider in determining whether the severity of an instance of ill treatment has been aggravated by other factors that might lead the Court to conclude that the treatment is severe enough to satisfy the first part of the test for torture:

Admittedly the word "torture" included in Article 3 of the Convention is not capable of an exact and comprehensive definition. It is undoubtedly an aggravated form of inhuman treatment causing intense physical and/or mental suffering. Although the degree of intensity and the length of such suffering constitute the basic elements of torture, a lot of other relevant factors had to be taken into account. Such as: the nature of ill-treatment inflicted, the means and methods employed, the repetition and duration of such treatment, the age, sex and health condition of the person exposed to it, the likelihood that such treatment might injure the physical, mental and psychological condition of the person exposed and whether the injuries inflicted caused serious consequences for short or long duration are all relevant matters to be considered together and arrive at a conclusion whether torture has been committed.<sup>107</sup>

Applying Judge Zekia's formulation to the case before this Court, it is plain that the severity of Mr. Caesar's flogging was aggravated by its surrounding circumstances, resulting in "inhuman treatment causing intense physical and mental suffering." On four separate occasions prior to his own punishment, Mr. Caesar was deliberately exposed to the immediate effects of flogging on others. On each occasion he was led to believe that his own torture was impending, and forced to witness the anguish of other prisoners after they were subjected to the same

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<sup>107</sup> *Ireland v. United Kingdom*, Eur. Ct. H.R., App. No. 00005310/71 at para. A of the separate opinion of Judge Zekia. See also *Selmouni v. France*, Eur. Ct. H.R., App. No. 25803/94 at para. 100 (2000) ("[S]everity'...depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.").

torment he was anticipating with dread. In each instance he was returned to his cell with no explanation, only to continue awaiting his own flogging; this practice exacerbated the psychological impact of Mr. Caesar's detention and of the flogging itself. Among the observers of the flogging was the prison doctor, who was fully aware of Mr. Caesar's medical history and his health condition at the time. Mr. Caesar pleaded with him to take his feeble state into account. But the doctor, like the other prison officers present, ignored these pleas and authorized the flogging.<sup>108</sup> After the flogging, the prison authorities neglected to provide Mr. Caesar with any medical treatment except painkillers, thus contributing to the long-term physical and mental suffering of Mr. Caesar.

In light of these reprehensible additional circumstances this Court should find that the flogging of Mr. Caesar, as exacerbated by surrounding abuses, was sufficiently severe to satisfy the first element of the test for torture under international law. As the flogging was also

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<sup>108</sup> The presence of a doctor is in and of itself an egregious violation of medical ethics; it also serves as a painful reminder of the practice of state-sponsored torture that prevailed in Latin America in the recent past. Doctors' involvement in torture, of whatever form and degree, is always contrary to medical ethics. In addition, doctors' involvement in torture is contrary to the Inter-American Convention to Prevent and Punish Torture (Organization of American States, 1985); the Universal Declaration of Human Rights (United Nations, 1948); the Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment (United Nations, 1988); The Declaration of Geneva (World Medical Association, 1948); the International Code of Medical Ethics (World Medical Association, 1949); and the Resolution on Human Rights (World Medical Association, 1990). According to the "UN Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment":

Principle 1: It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment... Principle 4: It is a contravention of medical ethics for health personnel, particularly physicians... b) *To certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments.*

*See also*, Amnesty International, "Doctors and Torture" (2002), available at <http://web.amnesty.org/library/Index/ENGACT750012002?open&of=ENG-313>.

unquestionably intentional, this Court should find that, in light of its aggravating circumstances, the flogging of Mr. Caesar constituted torture.

**B. It is Important That This Court Expressly Hold that the Flogging of Mr. Caesar by Means of the Cat-O-Nine Tails Constituted Torture.**

*Amici curiae* urge this Court to find that the practice of flogging constitutes “torture,” not mere “cruel, inhuman, or degrading treatment,” because more severe legal consequences attach to the prohibition of torture.

**1. Classifying Mr. Caesar’s Flogging as Torture Would Make His Treatment a *Jus Cogens* Violation.**

One important reason to classify Mr. Caesar’s flogging as torture is that his treatment would then constitute a *jus cogens* violation. Article 53 of The Vienna Convention of the Law of Treaties defines *jus cogens* or a peremptory norm in international law as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.”<sup>109</sup> The prohibition of torture has achieved the status of *jus cogens* and as such is absolute. The American Convention, like the entire body of the international law of torture, prohibits torture in absolute terms and makes no provisions for exceptions or derogations therefrom. In its judgment in *Prosecutor v. Furundzija*, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) explicitly recognized the prohibition on torture as *jus cogens*:

[T]he prohibition of torture laid down in human rights treaties enshrines an absolute right, which can never be derogated from, not even in time of emergency ... This is linked to the fact... that the prohibition on torture is a peremptory norm or *jus cogens*...

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<sup>109</sup> Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (1969), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, art. 53 (entered into force Jan. 27, 1980). *See also* *Nicaragua v. United States*, ICJ Reports 1986 at 100 (affirming *jus cogens* as an accepted doctrine of international law); and JHH Weiler, A. Cassese, M. Spinedi (eds), *International Crimes of States: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (1989) (discussing recent developments in applying *jus cogens* beyond the law of treaties to the law of state responsibility).

The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.<sup>110</sup>

The ICTY described, in the strongest possible terms, the widespread international condemnation of torture, stating that, “There exists today universal revulsion against torture... This revulsion, as well as the importance States attach to the eradication of torture, has led to a cluster of treaty and customary rules on torture acquiring a particularly high status in the international, normative system.”<sup>111</sup>

Because the prohibition of torture is *jus cogens*, the prohibition against flogging will become absolute in the event that this Court holds that such flogging in fact constitutes torture. The significance of *jus cogens* norms has been summarized as follows:

[T]he implications of *jus cogens* are those of a duty and not of optional rights... [*Jus cogens*] obligations are non-derogable, in times of war as well as peace. Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite, the nonapplicability of statutes of limitation for such crimes, and universality of jurisdiction over such crimes irrespective of where they were committed, by whom (including Heads of State), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* [obligation ‘flowing to all’] not to grant impunity to the violators of such crimes.<sup>112</sup>

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<sup>110</sup> *Prosecutor v. Furundzija*, ICTY, Case No. IT-95-17/I-T, Judgment, at paras 144, 153 (10 December 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm>. See also *Prosecutor v. Delalic*, ICTY, *Mucic et. al.*, Case No. IT-96-21-T, Judgment, at para. 454 (16 November 1998); and *Prosecutor v. Kunarac et. al.*, ICTY, Case. No. IT-96-23-T, Judgment, at para. 466 (22 February 2001)(holding that the prohibition of torture constitutes *jus cogens*). See also *Ireland v. United Kingdom*, Eur. Ct. H.R., App. No. 00005310/71 at para. 163; and *Aktas v. Turkey*, Eur. Ct. H.R., App. No. 24351/94 at para. 310 (2003) (holding that the prohibition of torture is absolute and non-derogable).

<sup>111</sup> *Prosecutor v. Furundzija*, ICTY, Case No. IT-95-17/I-T at para. 147.

<sup>112</sup> M. Cherif Bassiouni, *Accountability for International Law Crimes and Serious Violations of Fundamental Human Rights: International Crimes: Jus Cogens and Obligation Erga Omnes*, 59 LAW & CONTEMP. PROB. 63, 65-66 (1996).

If this Court classifies flogging as torture, Trinidad and other states that practice such flogging will thus be barred from invoking state privileges and immunities to uphold the practice. These states will be compelled under international law to take effective measures to stamp out the practice and to punish those administering it, and those individuals responsible for flogging will be prosecutable outside the country where the flogging took place. Moreover, Trinidad's denunciation of the American Convention—currently in effect—will in the future be no defense to its continued practice of flogging.

In sum, the prohibition of torture—as *jus cogens*—supercedes state sovereignty as an absolute and non-derogable international norm. For this reason, if the Court finds that flogging with the cat-o-nine tails (either standing alone or in combination with the other abuses suffered) constitutes torture, this finding will override any state attempt to invoke principles of state sovereignty to justify its practice of sentencing convicts to flogging.

**2. Under the Torture Convention, the Classification of Mr. Caesar's Flogging as Torture Has Other Significant Legal Ramifications.**

Under the terms of the Torture Convention, states parties to that convention make important commitments with regard to the extradition, expulsion, and *nonrefoulement* of persons who may be subjected to torture. Article 3(1) of the Torture Convention states that, “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>113</sup> This provision is a reflection of the international community's unconditional condemnation of torture, and an expression of its desire to protect all persons who are threatened with the practice. States parties commit themselves not to transfer persons, for any reason, to a country where they

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<sup>113</sup> Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, *supra* note 99, art. 3(1).

may be subject to torture. By classifying flogging as torture, this Court would provide legal protection under the Torture Convention to anyone who is scheduled to be returned, expelled, or extradited to a country where he or she faces a sentence of flogging. In the future, persons facing such a sentence could use this Court's ruling that flogging constitutes torture to argue that they should not be returned to a country where the sentence would be carried out.

## V. CONCLUSION

This Court has jurisdiction over the case at bar regarding violations of Article 5 of the American Convention. Neither Trinidad's denunciation of the American Convention nor its attempt to impose limits on its instrument of acceptance preclude jurisdiction.

We urge the Court to find that Trinidad committed seven individual and discrete abuses amounting to "cruel, inhuman, or degrading punishment or treatment" in violation of Article 5 of the American Convention, and that cumulatively, these abuses unquestionably constituted a violation of Article 5.

We further urge the Court to find that Trinidad's flogging of Mr. Caesar with a cat-o-nine tails, either standing alone or combined with the other abuses suffered, constituted torture.

Respectfully Submitted,

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