SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I vote in favour of the adoption by the Inter-American Court of Human Rights of the present Judgment on the *Bámaca Velásquez* case (Merits) in all resolutory points. Certain transcendental questions raised in the present case lead me, moreover, to leave on the records some thoughts, in the present Separate Opinion, in order to substantiate my conception and position on such questions. From the start, it is truly painful and worrisome to find out that this is not the first time that, in cases submitted to the consideration of the Inter-American Court, the issue is presented, in the framework of the forced disappearance of persons, of the lack of respect for their mortal remains.

2. One may recall, for example, the cases already decided by this Court, *Velásquez Rodríguez* (1988), *Godínez Cruz (*1989), *Caballero Delgado and Santana* (1995), *Garrido and Baigorria* (1996), and *Castillo Páez* (1997), in which the whereabouts of the mortal remains of the disappeared persons continues being ignored to date. The same has taken place in cases of violation of the right to life without the occurrence of forced disappearance of persons, - *Neira Alegría* (1995), *Durand and Ugarte* (2000), - in which one has not succeeded so far to identify the mortal remains of the victims. To these the cases of the *Street Children* (1999) and of *Blake* (1998) may be added, in which the mortal remains of the victims were non-identified or hidden for some time, having subsequently been found.

3. The arguments before the Court, referred to in the present Judgment on the *Bámaca Velásquez* case, introduce a new element for the consideration of this tragedy. In its final written arguments (of 22.10.1999), the Inter-American Commission of Human Rights warned that, in the internal conflicts in countries of Latin America, many individuals were "kidnapped in clandestine centres of detention, were object of tortures", as well as "were burried without dignity nor respect in graves without name", or thrown out "from airplanes into the sea" (par. 123).

4. In the public hearing before the Court on 16 June 1998, the Inter-American Commission, in its final oral oral pleadings, referred to "the anguishes and sufferings" undertaken by the relatives of Mr. Bámaca Velásquez as a consequence of his forced disappearance (par. 145(f)). In its aforementioned final written arguments, the Commission singled out, in this respect, the repercussion, in the maya culture - to which Mr. Bámaca Velásquez belonged, - of not having given a worthy burial to his mortal remains, "for the central relevance which has in his culture the active link which unites the living with the dead", as the "lack of a sacred place where to come to in order to cultivate this link constitutes a deep concern which is diclosed by the testimonies of many maya communities" (par. 145(f)).

5. This new element for the examination of the question, pointed out by the Commission, is not to pass unnoticed in the determination of the violation, correctly established by the Court in the present Judgment (resolutory point n. 2) in the *Bámaca Velásquez* case (Merits), of Article 5(1) and (2) of the American Convention on Human Rights, to the detriment not only of Mr. Efraín Bámaca Velásquez but also of his close relatives. The negligence and lack of respect for the mortal remains of the victims - disappeared or not - of violations of human rights, and the impossibility of recovering them, in various cases before the Court concerning distinct States, appear to me to configure a *malaise* of our times, disclosing the apalling spiritual poverty of the dehumanized world in which we live.

6. The point raises in me some concerns, which I feel obliged to express in this Separate Opinion, since the link between the living and the dead - sustained by so many cultures, including the maya, - does not appear to me to have been sufficiently developed in the domain of legal science. I thus allow myself to focus my thoughts on four interrelated aspectsof the question, from the perspective of human rights, namely: a) the respect for the dead in the persons of the living; b) the unity of the human kind in the links between the living and the dead; c) the ties of solidarity between the dead and the living; and d) the prevalence of the right to truth, in respect for the dead and the living.

I. Death and Law: The Respect for the Dead in the Persons of the Living.

7. In the present *Bámaca Velásquez* case, attention is drawn to the systematic opposition of the public power to the exhumations (par. 121(m)) and the incapacity of the State to to find the burial's place of the mortal remains of the victim, with the consequent impunity of those responsible for the violations of human rights to the detriment of Mr. Bámaca Velásquez as well as of his relatives. In a given moment of her testimony before this Court, Mrs. Jennifer Harbury pointed out that "what she seeks is justice and that the remains of Efraín Bámaca Velásquez", her husband, "are returned to her" (par. 93(b)). In fact, since immemorial times the human being has taken care to give a worthy grave to those related to him who died.

8. This is one of the oldest concerns of the human being[1], rendered immortal, e.g., more than four centuries before Christ, by the well-known tragedy of *Antigone* of Sofocles, which pertained precisely to the firm determination of Antigone, a courageous woman, to confront the tyranny of Creon and to give a worthy grave to one of her two dead brothers (like the other brother who had been buried). The search for an understanding of death is indeed present in all cultures and philosophical traditions of the world[2]. This is a truly universal theme, besides being a perennial one, cultivated by the cultures of all peoples in all times[3].

9. In the lucid remark by Pictet, the conflict between Creon and Antigone about the respect due to the mortal remains of the beloved person, corresponds to the eternal antagonism between the positive law (to maintain public order) and the unwritten law (to follow the individual

1. As exemplified, e.g., by the *Book of the Dead of the Ancient Egyptians* (of 2350-2180 b.C.), also known as the *Texts of the Pyramids.*

2. Cf., e.g., J.P. Carse, *Muerte y Existencia - Una Historia Conceptual de la Mortalidad Humana*, México, Fondo de Cultura Económica, 1987, pp. 17-497.

3. A. Desjardins, *Pour une mort sans peur*, Paris, Table Ronde, 1983, p. 61.

conscience): that is, necessity *versus* humanity[4]. Why, - it may be asked, - in spite of the attention always devoted to the theme in the cultures and in all the forms of expression of the human feelings (such as literature and the arts), the whole rich contemporary thinking about the rights inherent to the human being has been concentrated almost exclusively on the persons of the living, and does not seem to have retained with sufficient clarity the links between these latter and their dead[5], including for the determination of their juridical consequences?

10. In the long run, the fundamental challenge of the existence of each human being is summed up in the search for the meaning of such existence; one is thus bound, amidst the occupations of daily life, to reflect on the destiny of each one[6], and on death as part of life. As so lucidly pondered A.D. Sertillanges, in a monograph published more than half a century ago (and almost forgotten in our days), "it is believed that death is an absence, when it is a secret presence. (...) Earlier, only that which was visible ocuppied home; nowadays, a mystery inhabits it; it has been instituted in it an intimate cult (...). The dead survive, whilst they can inspire us noble actions. (...) Fortunately there are faithful hearts. For them, those who have disappeared remain on earth in order to continue doing goodness (...)"[7].

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4. Jean Pictet, *Development and Principles of International Humanitarian Law,* Dordrecht/Geneva, Nijhoff/ H. Dunant Inst., 1985, pp. 61-62.

5. The link between the living and those who depart from this world ensues from several works of universal literature, such as, e.g., the beautiful *Tibetan Book of the Dead,* the contents of which are thought to have been orally transmitted since the XIVth century, having been published in the so-called "Western world" for the first time in 1927; cf. *Bardo-Thödol, El Libro Tibetano de los Muertos,* Madrid, EDAF, 1997, pp. 9-223.

6. In spite of all that has already been written, in universal literature and in philosophy throughout the centuries, on the human being and his *destiny,* one has not reached an explanation or conclusive answer on this latter. Destiny continues to be a mysterious enigma which follows each one throughout his whole existence, and which seems to have its roots in the depths of the interiority of each human being.

7. A.D. Sertillanges, *Nuestros Muertos,* Buenos Aires, Impr. Caporaletti, s/f, pp. 13, 36-37 and 49. - A contemporary account of the experience in the asis-

11. In fact, the respect for the dead, always cultivated in the most distinct cultures and religions, soon found expression (though insufficient treatment) also in the domain of Law. Already the ancient Roman law, for example, safeguarded penally such respect for the dead. In the comparative law of our days, it can be found that the penal codes of numerous countries tipify and sanction the crimes against the respect for the dead (such as, e.g., the subtraction and the hiding of the mortal remains of a human being). And at least one trend of the legal doctrine on the matter visualizes as passive subject of the right to respect for the dead the community itself (starting with the relatives) which the dead belonged to.

12. Even though the juridical subjectivity of an individual ceases with his death (thus no longer being, when having died, a subject of Law or *titulaire* of rights and duties), his mortal remains - containing a corporeal parcel of humanity, - continue to be juridically protected (*supra*). The respect to the mortal remains preserves the memory of the dead as well as the sentiments of the living (in particular his relatives or persons close to him) tied to him by links of of affection, - this being the value juridically protected[8]. In safeguarding the respect for the dead, also penal law gives concrete expression to a universal feeling of the human conscience. The respect for the dead is thus due - at the levels of both internal and international legal orders, - in the persons of the living.

13. In fact, the respect for the dead is not an element entirely alien to the international judicial practice. It may be recalled that, in the Advisory Opinion of the International Court of Justice of 16 October 1975 on the *Western Sahara*, the Hague Court took into account the *modus vivendi,* the cultural practices of the nomad populations of the *Western Sahara*, in

stance to persons closed to the end of their lives lead the author to single out the deepend relations of the agonizing person with the others, and to call for "una società che, invece di negare la morte, impari a integrarla nella vita" M. de Hennezel, *La Morte Amica,* 4th. ed., Milano, Bibl. Univ. Rizzoli, 2000, pp. 39 and 16.

8. Bruno Py, *La mort et le droit,* Paris, PUF, 1997, pp. 31, 70-71, 79-80 and 123.

affirming the right of these latter to self-determination[9]. One of the elements, pointed out by the Tribunal, proper to the culture of the nomad tribes of the *Western Sahara*, was precisely the cult of the memory of the dead[10]. In sum, the respect for the dead is due in the persons of the living, *titulaires* of rights and duties.

II. The Unity of the Human Kind in the Links between the Living and the Dead.

14. The International Law of Human Rights discloses an even wider horizon for the consideration of the question. In my understanding, what we conceive as the *human kind* comprises not only the living beings - *titulaires* of human rights, - but also the dead with their spiritual legacy. We all live *in the time*; likewise, legal norms are created, interpreted and applied *in the time* (and not independently of it, as the positivists mistakenly assumed).

9. The aforementioned Advisory Opinion was delivered by the International Court of Justice (ICJ), in answer to a request formulated by the General Assembly of the United Nations. The question concerned the territory of Western Sahara, over which Morocco and Mauritania claimed rights at the moment in which Spain intended to put an end to its administration of such territory. The ICJ pondered that, as the Western Sahara, still at the time of its colonization, was inhabited by populations socially and politically organized in nomad tribes, it could not, therefore, be considered as *terra nullius*. In spite of the claims of Morocco and Mauritania, the ICJ affirmed the right of the populations - even though nomad - of the Western Sahara to self-determination; this latter should be exercised "through the free and genuine expression of the will of the peoples of the Territory". *ICJ Reports* (1975) pp. 68 and 36, pars. 162 and 70.

10. Significantly, in affirming the right of those nomad tribes to self-determination, the ICJ, - perhaps *malgré elle-même*, - took into account their *modus vivendi*, their cultural practices, such as the cultivation of certain lands (including with the concession of rights), the controlled access to the sources of water, and even the cemeteries in which numerous tribes met (*ibid.*, p. 41, par. 87). This, in the aforementioned Advisory Opinion of the ICJ of 1975, the cult of the memory of the dead was taken into account as one of the elements integrating the culture of the nomad populations of the Western Sahara, *titulaires* of the right to self-determination of the peoples.

15. In my view, the time - or rather, the *passing* of the time, - does not represent an element of separation, but rather of approximation and union, between the living and the dead, in the common journey of all towards the unknown. The knowledge and the preservation of the spiritual legacy of our predecessors constitute a means whereby the dead can communicate with the living[11]. Just as the living experience of a human comunidad develops with the continuous flux of thought and action of the individuals who compose it, there is likewise a spiritual dimension which is transmitted from an individual to another, from a generation to another, which precedes each human being and survives him, *in the time*.

16. There is effectively a spiritual legacy from the dead to the living, apprehended by the human conscience. Likewise, in the domain of legal science, I cannot see how not to assert the existence of a *universal juridical conscience* (corresponding to the *opinio juris comunis*), which constitutes, in my understanding, the material source *par excellence* (beyond the formal sources) of the whole law of nations (*droit des gens*), responsible for the advances of the human kind not only at the juridical level but also at the spiritual one. What survives us is only the creation of our spirit, to the effect of elevating the human condition. This is how I conceive the legacy of the dead, from a perspective of human rights.

17. This spiritual dimension - of the universal juridical conscience - has found expression in distinct international instruments of protection of the rights of the human person: pertinent illustrations are found, e.g., in the preambles of the American Declaration on the Rights and Duties of Man (1948), of the Convention against Genocide (1948), of the Inter-American Convention on Forced Disappearance of Persons (1994), of the Rome Statute of the International Criminal Court (1998), - besides the well-known *Martens clause* (with its evocation to the "laws of humani-

11. Is is what I allowed myself to point out, - recalling in this sense a remark by Simone Weil in her book *L'Enracinement* (1949), - in my Concurring Opinion (par. 5) in the case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (Provisional Measures of the Inter-American Court of Human Rights, of 18.08.2000).

ty" and to the "dictates of the public conscience"), set forth repeatedly in successive instruments of International Humanitarian Law[12].

18. It is significant that the Inter-American Convention on Forced Disappearance of Persons (1994) warns in its preamble that "the systematic practice of the forced disappearance of persons constitutes a *crime against humanity*"[13]. This expression has a juridical content of its own and a strong semantic weight, seeming to conceptualize humanity itself as subject of law. The doctrinal conceptualization of the so-called crimes against humanity, - victimizing in massive scale human beings, in their spirit and in their body, - has its origins, well before the Convention against Genocide of 1948, in customary international law itself, on the basis of fundamental notions of humanity and of the dictates of the public conscience[14].

III. The Links of Solidarity between the Dead and the Living.

19. The respect to the memory of the dead in the persons of the living constitutes one of the aspects of human solidarity that links the living to those who have already died. The respect to the mortal remains is also due to the spirit which animated in life the dead person, in connection moreover with the beliefs of the survivors as to the destiny *post mortem* of the person who died[15]. It cannot be denied that the death of an individual affects directly the life, as well as the juridical situation, of other individuals, especially his relatives (as illustrated, in the frameword of civil law (*droit civil*), by the norms of family law and the law of successions).

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12. E.g., Hague Conventions of 1899 and 1907 (preambles), Geneva Conventions of 1949 on International Humanitarian Law (preambles), Additional Protocol I of 1977 (Article 1) to the Geneva Conventions of 1949, Aditional Protocol II (in simplified form, in the preamble, *considerandum* 4).

13. Paragraph 6 (emphasis added).

14. For an account, cf., e.g., S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law*, Oxford, Clarendon Press, 1997, pp. 45-77.

15. B. Py, *op. cit. supra* n. (8), pp. 94 and 77, and cf. pp. 7, 38, 47, 77 and 123.

20. In the face of the anguish generated by the death of a beloved person, the burial rites, with the mortal remains, purport to bring a minimum of consolation to the survivors. Hence the importance of the respect for the mortal remains: their hiding deprives the relatives also of the burial ritual, which fulfils the needs of the unconscious itself and nourishes the hope in the prolongation or permanence of being[16] (even though only in the live memory and in the links of affection of the survivors). The hiding and lack of respect for the mortal remains of the beloved person affect, thus, his close relatives in the innermost part of their being.

21. The spiritual legacy of the dead, in its turn, constitutes, in my understanding, an expression of the solidarity of those who have already died with those who are still alive, in order to help these latter to confront the injustices of this world, and to live with its queries and misteries (such as those of the passing of time and of the destiny of each one). But the expression of solidarity seems to me to operate also in the other, reciprocal, sense, of the living towards their dead, by virtue of the sufferings that these latter had to undergo before their crossing towards eternity[17].

22. The human kind, that is, the *unity* of the human kind, ought, thus, in my understanding, to be better appreciated in its essentially *temporal* (and not static) dimension, comprising in the same way also future generations (who begin to attract the attention of the contemporary doctrine of international law)[18]. No one would dare to deny the duty that we have,

16. L.-V. Thomas, *La mort*, 4th. corr. ed., Paris, PUF, 1998, pp. 91-93, 107, 113 and 115.

17. This latter expression of solidarity has been expressed, in the XIXth century, not without pessimism but with compassion, by Arthur Schopenhauer, in recommending that we ought to wish that our dead have "learned their lesson" and that they "have benefited from it"; A. Schopenhauer, *Meditaciones sobre el Dolor del Mundo, el Suicidio y la Voluntad de Vivir*, Madrid, Tecnos, 1999, p. 88.

18. Cf., e.g., E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, Tokyo/Dobbs Ferry N.Y., United Nations University/Transnational Publs., 1989, pp. 1-351; E. Agius and S. Busuttil *et alii* (eds.), *Future Generations and International Law*, London, Earthscan, 1998, pp. 3-197.

the living beings, to contribute to construct a world in which future generations find themselves free from the violations of human rights which victimized their predecesors (the guarantee of non-repetition of past violations).

23. Human solidarity manifests itself not only in a *spacial* dimension - that is, in the space shared by all the peoples of the world, - but also in a *temporal* dimension - that is, among the generations who succeed each other *in the time*[19], taking the past, present and future altogether. It is the notion of human solidarity, understood in this wide dimension, and never that of State sovereignty[20], which lies on the basis of the whole contemporary thinking on the rights inherent to the human being.

24. Hence the importance of the cultures, - as a link between each human being and the comunity en which he lives (the external world), - in their unanimous attention to the respect due to the dead. In social *milieux* strongly permeated by a community outlook, - such as the African ones, for example, - there prevails a feeling of harmony between the living and the dead, between the natural environment and the spirits who animate it[21]. The cultural manifestations ought to find expression in the universe of Law[22]. This does not at all amount to a "cultural relativism", but rather to the recognition of the relevance of the cultural identity and diversity for the effectiveness of the juridical norms.

19. Cf. A.-Ch. Kiss, "La notion de patrimoine commun de l'humanité". 175 *Recueil des Cours de l'Académie de Droit International de La Haye* (1982) pp. 113, 123, 224, 231 and 240; R.-J. Dupuy, *La Communauté internationale entre le mythe et l'histoire*, Paris, UNESCO/Economica, 1986, pp. 160, 169 and 173, and cf. p. 135 for the "anteriority of conscience over history".

20. Which is not even the sovereignty of the peoples, and which appears far too limited in space and pathetically restricted in historical time.

21. J. Matringe, *Tradition et modernité dans la Charte Africaine des Droits de l'Homme et des Peuples*, Bruxelles, Bruylant, 1996, pp. 69-70.

22. It may be recalled that the Inter-American Court of Human Rights had the occasion to take into account the *modus vivendi* and the cultural practices of the maroons in Suriname (the saramaca [cf.] custom), in its Judgment on reparations in the *Aloeboetoe and Others* case (of 10.09.1993).

25. The adepts of the so-called "cultural relativism" seem to forget some unquestionable basic elements, namely: first, cultures are not static, they manifest themselves dynamically *in the time*, and have shown themselves open to the advances in the domain of human rights in the last decades[23]; second, many human rights treaties have been ratified by States with the most diverse cultures; third, there are more recent treaties, - such as the Convention on the Rights of the Child (1989), - which, in their *travaux préparatoires*[24], have taken in due account cultural diversity, and today enjoy a virtually universal acceptance[25]; fourth, cultural diversity has never been an obstacle to the formation of a universal nucleus of non-derogable fundamental rights, set forth in many human rights treaties; fifth, the Geneva Conventions on International Humanitarian Law also count on a virtually universal acceptance.

26. As if these elements were not sufficient, in our days cultural diversity has not refrained the contemporary tendency of criminalization of *grave* violations of human rights, nor the advances in the international criminal law, nor the provision for universal jurisdiction in some human rights treaties (such as the United Nations Convention against Torture (1984), among others), nor the universal struggle to put an end to the crimes against humanity. In fact, cultural diversity has not impeded, either, the creation, in our days, of a true international regime against torture, forced disappearances of persons, and summary, extra-legal and arbitrary executions[26].

23. E.g., women's rights, in various parts of the. - Furthermore, no-one would dare to deny, for example, the right to cultural identity, which thus would have, that right itself, a universal dimension; cf. [Various Authors,] *Law and Cultural Diversity* (eds. Y. Donders et alii), Utrecht, SIM, 1999, pp. 41, 72 and 77.

24. Cf. *The United Nations Convention on the Rights of the Child - A Guide to the Travaux Préparatoires* (ed. S. Detrick), Dordrecht, Nijhoff, 1992, pp. 1-703.

25. With very rare exceptions.

26. Cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brasil, S.A. Fabris Ed., 1999, pp. 338-358. - Thus, the so-called "cultural relativism" in the domain of the International Law of Human Rights is thereby marked by too many fallacies. I feel also unable to accept the so-called "juridical relativismo" in the domain of Public International

27. All this points to the prevalence of the safeguard of the non-derogable rights in any circumstances (in times of peace as well as of armed conflict). The normative and interpretative convergences between the International Law of Human Rights and International Humanitarian Law, acknowledged in the present Judgment in the *Bámaca Velásquez* case (pars. 205-207), contribute to place those non-derogable rights, - starting with the fundamental right to life itself, - definitively in the domain of *jus cogens.*

28. Universal human rights find support in the spirituality of all cultures and religions[27], are rooted in the human spirit itself; as such, they are not the expression of a given culture (Western or any other), but rather of the *universal juridical concience* itself. All the aforementioned advances, due to this universal juridical conscience, have taken place amidst cultural diversity. Contrary to what the spokesmen of the so-called - and distorted - "cultural relativismo" preach, cultural manifestations (at least those which conform themselves with the universally accepted standards of treatment of the human being and of respecto for their dead) do not constitute obstacles to the prevalence of human rights, but quite on the contrary: the cultural *substratum* of the norms of protection of the human being much contributes to secure their effectiveness. Such cultural manifestations - such as that of respect for the dead in the persons of the living, *titulaires* of rights and duties - are like superposed stones with which is erected the great pyramid[28] of the universality of human rights.

Law: such relativism is nothing but a neopositivist outlook of the international legal order, from an anachronistic State-centred perspective, rather than community-centred (the *civitas maxima gentium*). Equally unsustainable appears to me the "realist" trend in contemporary legal and social sciences, with their intellectual cowardice and their capitulation before the raw "reality" of the facts (as if these latter were reduced to product of a simple historical inevitability).

27. Cf. [Various Authors,] *Les droits de l'homme - bien universel ou fruit de la culture occidentale?* (Colloquy of Chantilly/France, March 1997), Avignon, Institut R. Schuman pour l'Europe, 1999, pp. 49 and 24.

28. To evoke an image quite proper to the rich maya culture.

IV. The Prevalence of the Right to Truth, in Respect for the Dead and the Living.

29. Several peoples of Latin America have, in their recent history, known and suffered the scourge and cruelty of torture, inhuman or degrading treatment, summary and arbitrary or extra-legal executions, and forced disappearances of persons[29]. The search for truth - as illustrated by the cases of forced disappearance of persons - constitutes the starting-point for the liberation as well as the protection of the human being; without truth (however unbearable it might come to be) one cannot be freed from the torment of uncertainty, and it is not possible either to exercise the protected rights.

30. In fact, the prevalence of the right to truth appears as a *conditio sine qua non* to render effective the right to judicial guarantees (Article 8 of the American Convention) and the right to judicial protection (Article 25 of the Convention), all reinforcing each other mutually, to the benefit of the close relatives of the disappeared person. The right to truth is thus endowed with an individual as well as a collective dimensions.

31. It has, in my understanding, a wider dimension than that which may *prima facie* be ensued from Article 19 of the Universal Declaration of Human Rights of 1948. Beyond what is formulated in that provision[30], which has inspired other provisions of the kind of distinct human rights treaties, the right to truth applies ultimately also as a sign of respect for the dead and the living. The hiding of the mortal remains of a disappeared person, in a flagrant lack of respect to them, threatens to disrupt the spiritual bond which links the dead to the living, and attempts against

29. To which one may add contemporary atrocities and acts of genocide in other continents, such as the European (e.g., ex-Yugoslavia) and the African (e.g., Rwanda), - besides massive violations of human rights in the Middle-East and the Far East.

30. According to which "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to receive and impart information and ideas through any media and regardless of frontiers".

the solidarity which ought to guide the paths of the human kind in her temporal dimension.

32. As to the jurisprudential construction of the right to truth, an advance can be found between what was in this respect pointed out by the Court in the *Castillo Páez* case (Judgment on the merits, of 03.11.1997[31] , and what was pondered in the present Judgment on the merits in the *Bámaca Velásquez* case (pars. 198-199). The right to truth indeed requires the investigation by the State of the wrongful facts, and its prevalence constitutes, moreover, as already observed, the prerequisite for the effective *access* itself to justice - at national and international levels - on the part of the relatives of the disappeared person (judicial guarantees and protection under Articles 8 and 25 of the American Convention). As the State is under the duty to cease the violations of human rights, the prevalence of the right to truth is essential to the struggle against impunity[32], and is ineluctably linked to the very realization of justice, and to the guarantee of non-repetition of those violations[33].

33. For the affirmation of such right, to the benefit of the relatives of the disappeared person, it does not appear to me necessary to resort to the contemporary European doctrine - in my view not much inspired and still less inspiring - of the so-called *protection par ricochet.* We are before a legitimate exercise of interpretation, in perfect conformity with the general rules of interpretation of treaties[34], whereby one seeks to secure the

31. In which the Court characterized the right to truth as "a concept still in doctrinal and jurisprudential development", linked to the State duty to investigate the facts which produced the violations of the American Convention (pars. 86 and 90).

32. Just like in other cases, in the present Judgment on the *Bámaca Velásquez* case the Inter-American Court has pointed out the need to fight impunity (pars. 211-213), particularly under the general obligation set forth in Article 1(1) of the American Convention.

33. L. Joinet, *Informe Final acerca de la Cuestión de la Impunidad de los Autores de Violaciones de los Derechos Humanos,* U.N./Commission on Human Rights, doc. E/CN.4/Sub.2/1997/20, of 26.06.1997, pp. 5-6 and 19-20.

34. Articles 31-33 of the Vienna Conventions on the Law of Treaties (of 1969 and 1986).

effet utile of the American Convention on Human Rights in the domestic law of the States Parties, maximizing the safeguard of the rights protected by the Convention.

34. The international case-law itself in the matter of human rights has disclosed its understanding of that legitimate exercise of interpretation, extending the protection to new situations as from the pre-existing rights. The Inter-American Court has timely recalled, in its important Advisory Opinion on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, of 01.10.1999, that "human rights treaties are living instruments, the interpretation of which has to follow the evolution of times and the conditions of present-day life" (par. 114).

35. In the same line of such evolutive interpretation, in its recent Judgment on the merits in the *Cantoral Benavides* case (of 18.08.2000), the Inter-American Court pondered[35] that, for example, "certain acts which were qualified in the past as inhuman or degrading treatment", may subsequently, with the passing of time, come to be considered "as torture, since to the growing exigencies of protection" of human rights "ought to correspond a greater firmness in confronting the infringements to the basic values of the democratic societies" (par. 99, and cf. pars. 100-104).

36. In both the *Cantoral Benavides* case (pars. 104 and 106) and in the present *Bámaca Velásquez* case (par. 158), the Court established, *inter alia*, the violation of Article 5(2) of the American Convention, in view of the *tortures* suffered by the *direct* victim (Mr. Cantoral Benavides and Mr. Bámaca Velásquez, respectively). The prohibition of *cruel, inhuman* or *degrading treatment,* in the terms of the same Article 5(2) of the American Convention, retains relevance, as recognized by the Court in the present Judgment, for the sufferings undertaken by the *indirect* victims, the close relatives of Mr. Bámaca Velásquez. The prohibition of torture as well as cruel, inhuman or degrading treatment, under the American Convention and other human rights treaties, is absolute.

35. In an approach also followed by the European Court of Human Rights.

37. In fact, the juridical content itself of the absolute prohibition of cruel, inhuman or degrading treatment, in particular, has had a domain of application widened *ratione materiae*, comprising new situations perhaps not foreseen at the moment of its formulation in human rights treaties[36]. Thus, the prohibition of such treatment has been invoked, under the European Convention of Human Rights, in cases pertaining also to non-extradition (such as the *cas célèbre Soering versus United Kingdom* (1989) and non-deportation[37]. This has taken place by means of an evolutive interpretation of the international instruments of protection of the rights of the human being.

38. The absolute prohibition of cruel, inhuman or degrading treatment has experienced, furthermore, a widening also *ratione personae*, comprising, in given cases (such as those of forced disappearance of person), as to the titularity of rights, also the relatives of the direct victim (in their condition of indirect victims - cf. *supra*). Thus, the Inter-American Court has correctly established that, in circumstances such as those of the present

36. For example, in its Provisional Measures of Protection (of 18.08.2000) in the case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic*, the Inter-American Court of extended such Measures to rights other than the fundamental rights to life and to personal integrity, in such way as, e.g., to impede the deportation or the expulsion of certain individuals, and to allow their return and family reunification (par. 13). And in the Provisional Measures of Protection which the Court has just adopted yesterday (24.11.2000), in the case of the *Community of Peace of San José of Apartadó*, it extended such Measures to internally displaced persons in Colombia (resolutory point n. 6).

37. On such extensive application of the absolute prohibition of inhuman or degrading treatment, cf., e.g., H. Fourteau, *L'application de l'article 3 de la Convention Européenne des Droits de l'Homme dans le droit interne des États membres,* Paris, LGDJ, 1996, pp. 211-265. - Likewise, Article 8 of the European Convention on Human Rights, on the respect to privathe and family life, has had an interpretation and application expanded *ratione materiae* to cases pertaining to, e.g., non-deportation (such as, for example, the important cases *Moustaquim versus Belgium*, 1991, and *Beldjoudi versus France,* 1990); R, Cholewinski, "Strasbourg's `Hidden Agenda'?: The Protection of Second-Generation Migrants from Expulsion under Article 8 of the European Convention on Human Rights", 12 *Netherlands Quarterly of Human Rights* (1994) pp. 287-306.

Bámaca Velásquez case, the victims are the disappeared person as well as his close relatives.

39. Already on previous occasions, such as in the *Blake* case (Judgments on the merits, of 24.01.1998, and reparations, of 22.01.1999), and in the "*Street Children*" case (Judgment on the merits, of 19.11.1999), the Inter-American Court correctly established the juridical foundation of the *widening of the notion of victim*, to comprise, in the specific circumstances of the aforementioned cases (in which the mortal remains of those victimized had been non-identified or hidden for some time), also the close relatives of the direct victims. There persisted, nevertheless, the need to develop, as I have attempted to do in this Separate Opinion, the question of the bonds and links of solidarity between the dead and the living, forming the unity of the human kind, with the respect due to ones and the others, for which there ought to prevail the right to truth.

40. The widening of the notion of victim again occurs in the present case, in relation to the close relatives of Mr. Efraín Bámaca Velásquez. The intense suffering caused by the violent death of a beloved person is further aggravated by his forced disappearance, and discloses one of the great truths of the human condition: that the fate of one is ineluctably linked to the fate of the others. One cannot live in peace in face of the disgrace of a beloved person. And peace should not be a privilege of the dead. The forced disappearance of a person victimizes likewise his close relatives (at times disrupting the family nucleus itself[38]), not only for the intense suffering and the desperation ensuing therefrom, but also from substract all from the protecting shield of Law. This understanding already forms today, on the eve of the XXIst century, *jurisprudence constante* of the Inter-American Court of Human Rights.

Antônio A. Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

38. As clearly stated in testimonies in public hearings pertaining to various contentious cases before the Inter-American Court in the last years.