## SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have concurred with my vote to the adoption of the present Judgment of the Inter-American Court of Human Rights on Preliminary Objections in the *Las Palmeras* case concerning Colombia, whereby the Court has dismissed the first, fourth and fifth objections, and has sustained the second and third preliminary objections interposed by the respondent State. I understand that the Court has reached a well-founded decision and in full conformity with the relevant norms of the American Convention on Human Rights. As, moreover, the debates on the case in the public hearing before the Court have transcended the question of the application of such norms and have raised theoretical points of juridical epistemology of great importance, I feel obliged to express, for the records, my personal reflections on the matter, oriented towards the progressive development of the International Law of Human Rights.

2. In the public hearing of 31 May 1999 before the Court on the present *Las Palmeras* case, the Inter-American Commission on Human Rights, in seeking to sustain a *coextensive* interpretation and application of Article 4 of the American Convention on Human rights and of Article 3 common to the four Geneva Conventions on International Humanitarian Law (of 1949), related this point to the question of the existence and observance of the obligations *erga omnes* of protection[1]. This is a theme which is particularly dear to me, as already for some time I have been sustaining, within the Court, the urgent need to promote the doctrinal and jurisprudential development of the legal regime of the obligations *erga omnes* of protection of the rights of the human being aiming at securing

1 Cf. Inter-American Court of Human Rights, *Las Palmeras Case - Transcripción de la Audiencia Pública sobre las Excepciones Preliminares Celebrada el 31 de Mayo de 1999 en la Sede de la Corte*, pp. 19-20 and 35-38 (mimeographed - internal circulation).

their application in practice, what is bound to foster greatly the future evolution of the International Law of Human Rights[2].

3. The pleadings of the Inter-American Commssion in the aforementioned public hearing before the Court of 31.05.1999 in the present *Las Palmeras* case, pertaining to Colombia, correspond, thus, to the concerns which I have already expressed in the Court - mainly in the *Blake versus Guatemala* case (1998-1999) - about the need to devote greater attention to this theme[3]. In that memorable hearing in the present *Las Palmeras* case, there was no discrepancy between the Commission and the respondent State - in a noticeable demonstration, on the part of both, of procedural cooperation and loyalty - as to the possibility to take into account Article 3 common to the four Geneva Conventions on International Humanitarian Law as *element of interpretation* for the application of Article 4 of the American Convention on Human Rights.

2 Thus, for example, in my Separate Opinion in the Court's Judgment (of 24.01.1998) in the *Blake versus Guatemala* case (Merits), I pondered: - "The consolidation of *erga omnes* obligations of protection, as a manifestation of the emergence itself of imperative norms of international law, would represent the overcoming of the pattern erected upon the autonomy of the will of the State. The absolute character of the autonomy of the will can no longer be invoked in view of the existence of norms of *jus cogens*. It is not reasonable that the contemporary law of treaties continues to align itself to a pattern from which it sought gradually to free itself, in giving expression to the concept of *jus cogens* in the two Vienna Conventions on the Law of Treaties. (...)" (paragraph 28). - Subsequently, in my Separate Opinion in the Court's Judgment (of 22.01.1999) in the same *Blake versus Guatemala* case (Reparations), I added: - "Our purpose ought to lie precisely upon the doctrinal and jurisprudencial development of the peremptory norms of International Law *(jus cogens)* and of the corresponding obligations *erga omnes* of protection of the human being. It is by means of the development in this sense that we will achieve to overcome the obstacles of the dogmas of the past, as well as the current inadequacies and ambiguities of the law of treaties, so as to bring us closer to the plenitude of the international protection of the human being" (paragraph 40).

3 Cf. quotations *in* note (2), *supra.*

4. But up to this point took place the concurrence, on the issue, between the Commission and the State at the above-mentioned public hearing. As a matter of fact, it could hardly have been otherwise, as the *interpretative interaction* between distinct international instruments of protection of the rights of the human person is warranted by Article 29(b) of the American Convención (pertaining to norms of interpretation). In fact, such exercise of *interpretation* is perfectly viable, and conducive to the assertion of the right not to be deprived of the life arbitrarily (a non-derogable right, under Article 4(1) of the American Convention) in *any circumstances,* in times of peace as well as of non-international armed conflict (in the terms of Article 3 common to the Geneva Conventions of 1949).

5. There is, nevertheless, a distance between the exercise of interpretation referred to, - including here the interpretative interaction, - and the *application* of the international norms of protection of the rights of the human person, the Court remaining entitled to interpret and *apply* the American Convention on Human Rights (Statute of the Court, Article 1[4]). In characterizing the second and third objections interposed by the respondent State in the present case as *preliminary* objections properly (as to competence and not as to admissibility), rather than as defenses as to the merits, the Court proceeded to decide them, in my understanding correctly, *in limine litis*[5], - by an imperative of juridical stability as well as of "prudence and economy of the judicial function"[6].

4 Cf. also the Statute of the Commission, Article 1(2).

5 Cf., on the need to decide preliminary objections *in limine litis,* my Separate Opinions in the *Gangaram Panday versus Suriname* case (Judgment of 04.12.1991), paragraph 3; and in the *Castillo Páez versus Peru* case (Judgment of 30.01.1996), paragraph 4; and in the *Loayza Tamayo versus Peru* case (Judgment of 31.01.1996), paragraph 4.

6 G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour Internationale,* Paris, Pédone, 1967, pp. 182-183; cf. also, on the matter, S. Rosenne, *The Law and Practice of the International Court,* 2nd. rev. ed., Dordrecht, Nijhoff, 1985, p. 464.

6. At the sustantive level, the considerations developed on the protection of the fundamental right to life lead us to enter, unequivocally, into the domain of *jus cogens*[7], with the corresponding obligations *erga omnes* of protection[8], to which reference was made in the public hearing. In this respect, in spite of sharing the concern expressed by the Inter-American Commission at the aforementioned public hearing of 31.05.1999 before this Court, my line of reasoning on the matter is distinct.

7. In sustaining, as I have been doing, for years, the convergences between the *corpus juris* of human rights and that of International Humanitarian Law (at normative, interpretative and operational levels)[9], I think, however, that the concrete and specific purpose of development of the obligations *erga omnes* of protection (the necessity of which I have been likewise sustaining for some time) can be better served, by the identification of, and compliance with, the *general obligation of guarantee* of the exercise of the rights of the human person, *common to the American Convention and the Geneva Conventions (infra),* rather than by a correlation between sustantive norms - pertaining to the protected rights, such as the right to life - of the American Convention and the Geneva Conventions.

7 Inter-American Court of Human Rights, *Villagrán Morales and Others versus Guatemala* case *(case of the "Street Children")*, Judgment of 19.11.1999, Joint Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu Burelli, paragraph 2: - ""There can no longer be any doubt that the fundamental right to life belongs to the domain of *jus cogens*".

8 On the relationship between *jus cogens* and *erga omnes* obligations, cf., *inter alia*: M. Byers, "Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules", 66 *Nordic Journal of International Law* (1997) pp. 211-239; A.J.J. de Hoogh, "The Relationship between *Jus Cogens*, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective", 42 *Austrian Journal of Public and International Law* (1991) pp. 183-214.

9 Such as I have developed, *inter alia,* in my essay "Aproximaciones o Convergencias entre el Derecho Internacional Humanitario y la Protección Internacional de los Derechos Humanos", *in Seminario Interamericano sobre la Protección de la Persona en Situaciones de Emergencia - Memoria* (Santa Cruz de la Sierra, Bolivia, junio de 1995), San José, CICR/ACNUR/Gob. Suiza, 1996, pp. 33-88.

8. That general obligation is set forth in Article 1.1 of the American Convention as well as in Article 1 of the Geneva Conventions and in Article 1 of the Additional Protocol I (of 1977) to the Geneva Conventions. Their contents are the same: they enshrine the duty *to respect*, and *to ensure respect* for, the norms of protection, in all circumstances. This is, in my view, the common denominator (which curiously seems to have passed unnoticed in the pleadings of the Commission) between the American Convention and the Geneva Conventions, capable of leading us to the consolidation of the obligations *erga omnes* of protection of the fundamental right to life, in any circumstances, in times both of peace and of internal armed conflict. It is surprising that neither doctrinea, nor case-law, have developed this point sufficiently and satisfactorily up to now; until when shall we have to wait for them to awake from an apparent and prolonged mental inertia or lethargy?

9. It is about time, in this year 2000, to develop with determination the early jurisprudential formulations on the matter, advanced by the International Court of Justice precisely three decades ago, particularly in the *cas célèbre* of the *Barcelona Traction* (Belgium *versus* Spain, 1970)[10]. It is about time, on this eve of the XXIst century, to develop systematically the contents, the scope and the juridical effects or consequences of the obligations *erga omnes* of protection in the ambit of the International Law of Human Rights, bearing in mind the great potential of application of the notion of *collective guarantee*, underlying all human rights treaties, and responsible for some advances already achieved in this domain.

10 It may be recalled that, in that case, the International Court of Justice for the first time distinguished, on the one hand, the inter-State obligations (proper to the *contentieux diplomatique*), and, on the other hand, the obligations of a State *vis-à-vis* the international community as a whole (*erga omnes* obligations). These latter - added the Court - derive, e.g., in contemporary international law, *inter alia,* from the "principles and rules concerning the basic rights of the human person", - it so occurring that certain rights of protection "have entered into the body of general international law", and others "are conferred by international instruments of a universal or quasi-universal character"; *Barcelona Traction* case (Belgium *versus* Spain, 2nd. phase), *ICJ Reports* (1970) p. 32, par. 34, and cf. also par. 33.

10. The concept of obligations *erga omnes* has already marked presence in the international case-law[11], as illustrated, in so far as the International Court of Justice is concerned, by its Judgments in the cases of the *Barcelona Traction* (1970), of the *Nuclear Tests* (1974), of *Nicaragua versus United States* (1986), of *East Timor* (1995), and of *Bosnia-Herzegovina versus Yugoslavia* (1996), and by the arguments of the parties in the cases of the *Northern Cameroons* (1963) and of *South West Africa* (1966), as well as by its Advisory Opinion on *Namibia* (1971) and the (written and oral) arguments pertaining to the two Advisory Opinions on *Nuclear Weapons* (1994-1995)[12]. Nevertheless, in spite of the distinct references to the obligations *erga omnes* in the case-law of the International Court of Justice, this latter has not yet extracted the consequences of the affirmation of the existence of such obligations, nor of their violations, and has not defined either their legal regime[13].

11. But if, on the one hand, we have not yet succeeded to reach the opposability of an obligation of protection to the international community as a whole, on the other hand the International Law of Human Rights nowadays provides us with the elements for the consolidation of the opposability of obligations of protection to all the States Parties to human rights treaties (obligations *erga omnes partes*[14] - cf. *infra*). Thus, sev-

11 Including with a reference to them in the tenth Advisory Opinion (of 1989) of the Inter-American Court of Human Rights, on the *Interpretation of the American Declaration on the Rights and Duties of Man* (paragraph 38).

12 Cf. M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford, Clarendon Press, 1997, pp. 12-13; C. Annacker, "The Legal Regime of *Erga Omnes* Obligations in International Law", 46 *Austrian Journal of Public and International Law* (1994) pp. 132-133, and cf. 131-166.

13 The Hague Court had a unique occasion to do it in the *East Timor* case (1995), having regrettably wasted such opportunity, in relating the *erga omnes* obligations to something antithetical to them: the State consent as basis of the exercise of its jurisdiction in contentious matters. Nothing could be more incompatible with the very existence of the *erga omnes* obligations than the positivist-voluntarist conception of International Law and the emphasis on the State consent as basis of the exercise of international jurisdiction.

14 On the meaning of the obligations *erga omnes partes*, opposable to all States Parties in certaing treaties or to a given community of States, cf. C. Annacker, *op. cit. supra* n. (12), p. 135; and cf. M. Ragazzi, *op. cit. supra* n. (12), pp. 201-202.

eral treaties, of human rights[15] as well as of International Humanitarian Law[16], provide for the general obligation of the States Parties to *guarantee* the exercise of the rights set forth therein and their observance.

12. As correctly pointed out by the *Institut de Droit International,* in a resolution adopted at the session of Santiago of Compostela of 1989, such obligation is applicable *erga omnes*, as each State has a legal interest in the safeguard of human rights (Article 1)[17]. Thus, parallel to the obligation of all the States Parties to the American Convention to protect the rights enshrined therein and to guarantee their free and full exercise to all the individuals under their respective jurisdictions, there exists the obligation of the States Parties *inter se* to secure the integrity and effectiveness of the Convention: this general duty of protection (the collective guarantee) is of direct interest of each State Party, and of all of them jointly (obligation *erga omnes partes*). And this is valid in times of peace[18] as well as of armed conflict[19].

15 Cf., e.g., American Convention on Human Rights, Article 1(1); United Nations Covenant on Civil and Political Righs, Article 2(1); United Nations Convention on the Rights of the Child, Article 2(1).

16 Article 1 common to the four Geneva Conventions on International Humanitarian Law of 1949, and Article 1 of the Additional Protocol I of 1977 to the Geneva Conventions of 1949.

17 Cf. I.D.I., 63 *Annuaire de l'Institut de Droit International* (1989)-II, pp. 286 and 288-289.

18 As to the general duty of guarantee of the exercise of the protected human rights, cf. the arguments of Ireland before the European Court of Human Rights (ECtHR), in the *Ireland versus United Kingdom* case, *in:* ECtHR, *Ireland versus United Kingdom* case (1976-1978), *Pleadings, Oral Arguments and Documents,* Strasbourg, 1981, vol. 23-II, pp. 21-23 and 27, and vol. 23-III, pp. 17-19 and 21-26.

19 Thus, a State Party to the Geneva Conventions of 1949 and its Additional Protocol I of 1977, even if it is not involved in a given armed conflict, is entitled to demand from the other States Parties - which are so involved - compliance with the conventional obligations of a humanitarian character; L. Condorelli and

13. Some human rights treaties establish a mechanism of petitions or communications which comprises, parallel to the individual petitions, also the inter-State petitions; these latter constitute a mechanism *par excellence* of action of collective guarantee. The fact that they have not been used frequently[20] (on no occasion in the inter-American system of protection, until now) suggests that the States Parties have not yet disclosed their determination to construct a the international *ordre public* based upon the respect for human rights. But they could - and should - do so in the future, with their growing awareness of the need to achieve greater cohesion and institutionalization in the international legal order, above all in the present domain of protection.

14. In any case, there could hardly be better examples of mechanism for application of the obligations *erga omnes* of protection (at least in the relations of the States Parties *inter se*) than the methods of supervision foreseen *in the human rights treaties themselves*, for the exercise of the collective guarantee of the protected rights[21]. In other words, the mechanisms for application of the obligations *erga omnes partes* of protection already exist, and what is urgently need is to develop their legal regime, with special attention to the *positive obligations* and the *juridical consequences* of the violations of such obligations.

15. At last, the absolute prohibition of grave violations of fundamental human rights - starting with the fundamental right to life - extends itself,

L. Boisson de Chazournes, "Quelques remarques à propos de l'obligation des États de `respecter et faire respecter' le droit international humanitaire `en toutes circonstances'", *in Études et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet* (ed. C. Swinarski), Genève/La Haye, CICR/Nijhoff, 1984, pp. 29 and 32-33.

20 For a study of this point in particular, cf. S. Leckie, "The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?", 10 *Human Rights Quarterly* (1988) pp. 249-301.

21 Y. Dinstein, "The *Erga Omnes* Applicability of Human Rights", 30 *Archiv des Völkerrechts* (1992) pp. 16 and 22, and cf. 16-37; and cf. M. Byers, *op. cit. supra* n. (8), pp. 234-235; M. Ragazzi, *op. cit. supra* n. (12), pp. 135 and 213.

in fact, in my view, well beyond the law of treaties, incorporated, as it is, likewise, in contemporary customary international law. Such prohibition gives prominence to the obligations *erga omnes*, owed to the international community as a whole. These latter clearly transcend the individual consent of the States[22], definitively burying the positivist-voluntarist conception of International Law, and heralding the advent of a new international legal order committed with the prevalence of superior common values, and with moral and juridical imperatives, such as that of the protection of the human being in any circumstances, in times of peace as well as of armed conflict.

A.A. Cançado Trindade

Antônio Augusto Cançado Trindade
Judge

M. Ventura R.

Manuel E. Ventura-Robles
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22 C. Tomuschat, "Obligations Arising for States Without or Against Their Will", 241 *Recueil des Cours de l'Académie de Droit International de La Haye* (1993) p. 365.