SEPARATE OPINION OF JUDGE A. A. CANÇADO TRINDADE

1. I have voted in favour of the present Judgment on the merits in the case of *Blake versus Guatemala* which the Inter-American Court of Human Rights has just rendered, for considering it to be in keeping with the applicable law, and bearing in mind what was previously decided by the Court in the Judgment on preliminary objections (of 02 July 1996). I feel, however, obliged to express, in this Separate Opinion, the thoughts which follow, concerning the limitation *ratione temporis*, raised in the *cas d'espèce,* as to the competence of the Court, and its legal consequences and impact on the handling of the crime of forced disappearance of person as reflected in the present Judgment. Already in my Separate Opinion in the previous Judgment on preliminary objections in the same *Blake* case I have expressed my concerns in that respect, which I now retake and develop in relation to the merits of the case.

2. As a judicial sentence (*sententia*, etymologically derived from "feeling" [sentimiento]) is something more than a logical operation set in defined legal parameters, I consider it my duty to explain the reason for my concerns as regards the legal solution set forth in the present Judgment of the Court. Such Judgment, despite the considerable efforts required of the Court by the circumstances of the case, while in conformity with the *law stricto sensu,* in my understanding fails to provide the unity proper to any legal solution and to meet fully the imperative of the realization of justice under the American Convention on Human Rights. As I shall indicate further on, only through the *transformation of the existing law* can justice be fully rendered in circumstances such as those presented in the instant *Blake* case of forced disappearance of person.

I. The Limit of the Limitation *Ratione Temporis*.

3. The limitation *ratione temporis* to the competence of the Court, as I pointed out in my Separate Opinion (paragraph 8) in the earlier Judgment on preliminary objections in the present *Blake* case, has never had the wide scope (originally claimed by the respondent State) of conditioning *ratione temporis* the actual submission of the whole case to the jurisdiction

of the Court, but specifically that of excluding from the consideration of the Court only the facts occurred *before* the acceptance by Guatemala of the jurisdiction of the Court in contentious matters. Even so, I allowed myself to add, in my aforementioned Separate Opinion (paragraphs 12-14), that the emphasis of the reasoning of the Court, in my view,

> "should be placed, not on the sword of Damocles of 09 March 1987, the date on which Guatemala accepted the jurisdiction of the Court (which is to be accepted as a limitation *ratione temporis* to the competence of this latter (...)), but rather on the nature of the alleged multiple and interrelated violations of protected human rights, and prolonged in time, with which the present case of disappearance is concerned.
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> When, in relation to Article 62(2) of the American Convention on Human Rights, one is led, by the application of the rigid postulates of the law of treaties, to a situation like the present one, in which the questions of the investigation of the detention and death of a person, and of the punishment of the perpetrators, end up by being turned back to the domestic jurisdiction, grave questions subsist in the air, disclosing a serious challenge for the future. (...)
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> (...) The great challenge which appears in the horizon consists (...) in keeping on advancing resolutely towards the gradual humanization of the law of treaties (a process already initiated with the emergence of the concept of *jus cogens*[1], as this chapter of international law still persists strongly impregnated with State voluntarism and an undue weight attributed to the forms and manifestations of consent."

II. The Time and the Law.

4. The limitation *ratione temporis* to the competence of the Court raises a legal question the grave implications of which transcend the circumstances of the present *Blake* case, thus requiring the greatest attention. In

1. Vienna Convention on the Law of Treaties (of 1969), Articles 53 and 64; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (of 1986), Articles 53 and 64.

fact, the examination of the incidence of the temporal dimension in law in general has not been sufficiently developed in contemporary legal science. This is all the more surprising if we consider that the element of foreseeability is inherent to legal science as such, the time element underlying all of the law. As far as Public International Law is concerned, the examples are clearly identifiable[2]. In the International Law of Human Rights, in the ambit of which the matter begins to be studied more in depth[3], perhaps the most striking illustration is to be found in the jurisprudential construction[4] of the notion of victim (both direct and indirect), comprising the *potential* victim[5].

2. The notion of time is underlying, for example, almost all the basic element of the law of treaties (not only the process of *treaty-making*, but also the terms or conditions themselves established for the application of the treaties, e.g., if by stages, progressively, etc.). Also in the domain of peaceful settlement of international disputes one has devised distinct methods of settlement of disputes which may occur in the future. In the field of regulation of the spaces (e.g., law of the sea, law of outer space) the intertemporal dimension marks presence (taking into account the interests of present and future generations); such dimension is of the very essence, e.g., of international environmental law.

3. The *Compilation of International Instruments* of human rights, prepared by the Centre for Human Rights of the United Nations, for example, lists in fact not less than 13 international instruments turned to the *prevention* of discrimination of distinct types (cf. U.N. doc. ST/HR/1/Rev.3, of 1988, pp. 52-142). The prevention is of the essence of the three Conventions against Torture (the Inter-American of 1985, Articles 1 and 6; the European of 1987, Article 1; that of the United Nations of 1984, Articles 2(1) and 16), as well as of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 (Article 8). And, in relation to the struggle against extra-legal, arbitrary and summary executions, cf. United Nations, *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*, N.Y., U.N., 1991, pp. 1-71.

4. Above all under the European Convention of Human Rights.

5. Cases *Kjeldsen versus Denmark* (1972), *Donnelly and Others versus United Kingdom* (1973), *H. Becker versus Denmark* (1975), *G. Klass and Others versus Germany* (1978), *Marckx versus Belgium* (1979), *Dudgeon versus United Kingdom* (1981), *J. Soering versus United Kingdom* (1989). The jurisprudential evolution on the matter is examined in my course at the Academy of International Law of The Hague, volume 202 of its *Recueil des Cours*, of 1987, chapter XI, pp. 271-283.

5. As to the relation between the passing of time and the law, in one of the most lucid pleadings that I know of before an international tribunal, that of Paul Reuter as one of legal counsel to Cambodia in the case of the *Temple of Preah Vihear* (Cambodia *versus* Thailand, International Court of Justice, 1962), that jurist had this to say, with a certain literary flair:

> "Le temps exerce en effet une influence puissante sur l'établissement et la consolidation des situations juridiques (...). D'abord la longueur du temps dépend des *matières*. (...) Un deuxième élément doit être pris en considération, nous serions tentés de l'appeler `la densité' du temps. Le temps des hommes n'est pas le temps des astres. Ce qui fait le temps des hommes, c'est la densité des événements réels ou des événements éventuels qui auraient pu y trouver place. Et ce qui fait la densité du temps humain aprécié sur le plan juridique, c'est la densité, la multitude des actes juridiques qui y ont trouvé ou qui y auraient pu trouver place"[6].

6. The time of human beings certainly is not the time of the stars, in more that one sense.[7] The time of the stars, - I would venture to add, - besides being an unfathomable mystery which has always accompanied human existence from the beginning until its end, is indifferent to legal solutions devised by the human mind; and the time of human beings,

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6. International Court of Justice, *Temple of Preah Vihear* case (Cambodia versus Thailand), *ICJ Reports* (1962), *Pleadings, Oral Arguments, Documents*, vol. II, pp. 203 and 205. [Translation: "Time exerts in fact a powerful influence in the establishment and the consolidation of juridical situations (...). First of all, the duration of the time depends on the *matters*. (...) A second element ought to be taken into account, we would be prepared to call it `the density' of time. The time of men is not the time of the stars. What makes the time of men, is the density of the real events or of the eventual events which may have occurred. And what makes the density of the human time as regarded at the juridical level, is the density, the multitude of the juridical acts that have occurred or that could have occurred".]

7. Not only to establish the aquiescence of the State and its legal effects, as Reuter intended in that case.

applied to their legal solutions as an element which integrates them, not seldom leads to situations which defy their own legal logic, - as illustrated by the present *Blake* case. One specific aspect, however, appears to suggest a sole point of contact, or common denominator, between them: the time of the stars is inexorable; the time of human beings, albeit only conventional, is, like that of the stars, implacable, - as also demonstrated by the present *Blake* case.

III. Forced Disappearance as a Continuing or Permanent Crime.

7. On the one hand, we are here before a proven case of forced disappearance of person, typified even in the Guatemalan Criminal Code in force (Article 201 *ter* as amended) as a *continuing* crime. In the same sense, the international norms of protection typify it as a "continuing or permanent" crime "while the fate or whereabouts of the victim is not established" (Inter-American Convention on Forced Disappearance of Persons of 1994, Article III); moreover, they warn that it is a specific and autonomous crime[8], which constitutes a complex form of violation of human rights (with related criminal acts), and which thereby requires that it be understood and addressed pursuant to a necessarily *integral* approach (as it can be inferred from the preamble and Articles IV and II of that Convention).

8. On the other hand, inasmuch as Guatemala, as a State Party to the American Convention on Human Rights (since 25 May 1978), only accepted the jurisdiction of the Court in contentious matters on 09 March 1987, we are led, by the application of a rigid postulate of the law of treaties, to introduce an artificial fragmentation in the consideration of that crime of forced disappearance, taking into account - in an atomized and not integral way - only some of its components, subsequent to this last date, - with direct consequences for the phase of reparations.

8. As expressly pointed out in the *travaux préparatoires* of the Inter-American Convention on Forced Disappearance of Persons; cf. CIDH, *Informe Anual de la Comisión Interamericana de Derechos Humanos 1987-1988*, p. 365.

9. Such situation is, in my understanding, unsatisfactory and worrisome, since forced disappearance of person is, first of all, a *complex* form of violation of human rights; secondly, a particularly *grave* violation; and thirdly, a *continuing or permanent violation* (until the fate or whereabouts of the victim is established). In fact, the continuing situation (cf. *infra*) is manifest in the crime of forced disappearance of persons. As pointed out in this respect, in the *travaux préparatoires* of the Inter-American Convention on Forced Disappearance of Persons,

> "This crime is permanent in so far as it is committed not in an instantaneous way but permanently, and is prolonged as long as the person remains disappeared"[9].

Such consideration was duly reflected in Article III of the Convention (*supra*).

10. The same conception can be found in the United Nations Declaration on the Protection of All Persons against Forced Disappearances of 1992, which, after pointing out the gravity of the crime of forced disappearance of person (Article 1(1)), likewise warns that this latter ought to be "considered a permanent crime while its authors continue concealing the fate or whereabouts of the disappeared person and while the facts have not been clarified" (Article 17(1)).

11. Long before the typification of the forced disappearance of person in the International Law of Human Rights, the notion of *"continuing situation"* found support in the international case-law in the domain of human rights. Thus, already in the *De Becker versus Belgium* case (1960), the European Commission of Human Rights, for example, recognized the existence of a "continuing situation" *(situation continue/situación continuada)*[10]. Ever since, the notion of "continuing situation" has marked pres-

9. OEA/CP-CAJP, *Informe del Presidente del Grupo de Trabajo Encargado de Analizar el Proyecto de Convención Interamericana sobre Desaparición Forzada de Personas*, doc. OEA/Ser.G/CP/CAJP-925/93 rev.1, of 25.01.1994, p. 10.

10. Cf. Cour Européenne des Droits de l'Homme, *Affaire De Becker* (Série B: Mémoires, Plaidoiries et Documents), Strasbourg, C.E., 1962, pp. 48-49 (Rapport de la Commission, 08.01.1960).

ence in the case-law of the European Commission, on numerous occasions[11]. The *continuity* of each situation appears - as the European Commission has expressly warned in the *Cyprus versus Turkey* case (1983) - as an *aggravating* circumstance of the violation of human rights proven in the *cas d'espèce* [12].

IV. The Undue Fragmentation of the Crime of Forced Disappearance.

12. All this jurisprudential construction is, nevertheless, left without effect in the circumstances of the present *Blake* case, by reason of the limitation *ratione temporis* to the competence of the Court. The changing reality of the facts, definitively, always requires from legal rules a dynamic renewal, in order to ensure their constant adequacy to the new needs of protection and, hence, their efficacy. This naturally applies to the capacity of response and struggle against new forms of violation of human rights.

13. In the *cas d'espèce*, the limitation *ratione temporis* to the competence of the Inter-American Court, in restricting the extent of the judicial settlement, leads to the almost decharacterization of the crime of forced disappearance in the *Blake* case. Such limitation breaks down that complex crime, retaining for consideration, as to the rights protected by the Convention, the elements pertaining only to the judicial guarantees (Article 8(1) of the American Convention) and to the right to psychic and

11. Cf., e.g., the decisions of the European Comission concerning the petitions ns. 7202/75, 7379/76, 8007/77, 7742/76, 6852/74, 8560/79 y 8613/79, 8701/79, 8317/78, 8206/78, 9348/81, 9360/81, 9816/82, 10448/83, 9991/82, 9833/82, 9310/81, 10537/83, 10454/83, 11381/85, 9303/81, 11192/84, 11844/85, 12015/86, and 11600/85, among others.

12. In its *Report* of 04 October 1983 in the *Cyprus versus Turkey* case (petition n. 8007/77) the European Commission concluded that the *continuing separation of families* (as a result of the refusal of Turkey to allow the return of Greek Cypriots in order to reunite themselves with their next of kin in the North) constituted an "aggravating factor" of a continuing situation in violation of Article 8 of the European Convention of Human Rights. European Commission of Human Rights, *Decisions and Reports*, vol. 72, pp. 6 and 41-42.

moral integrity (Article 5 of the Convention), both in relation to the relatives of the disappeared person.

14. There are other disturbing aspects in the "fragmentation" of the crime of forced disappearance of persons in successive violations of human rights over time: beyond the artificiality of such decharacterization lies the fact that, in the forced disappearance of persons, we are before the violation of rights of a *non-derogable character*, such as the fundamental right to life itself, in the framework of a continuing situation. This is what the preamble of the Inter-American Convention on Forced Disappearance of Persons aptly warns, adding - as does the preamble of the United Nations Declaration on the Protection of All Persons against Forced Disappearances - that the systematic practice of such disappearance constitutes a crime against humanity.

15. We are, definitively, before a particularly *grave* violation of multiple human rights. Among these are *non-derogable* fundamental rights, protected both by human rights treaties as well as by International Humanitarian Law treaties[13]. The more recent doctrinal developments in the present domain of protection disclose a tendency towards the "criminalization" of grave violations of human rights[14], - as the practices of torture, of summary and extra-legal executions, and of forced disappearance of persons. The prohibitions of such practices pave the way for us to enter into the *terra nova* of the international *jus cogens*. The emergence and consolidation of imperative norms of general international law would be seriously

13. Cf., e.g., the provisions on fundamental guarantees of Additional Protocol I (of 1977) to the Geneva Conventions on International Humanitarian Law (of 1949), Article 75, and of the Additional Protocol II (of the same year), Article 4.

14. As exemplified by the recognition of the individual responsibility (cf. the Inter-American Convention to Prevent and Punish Torture, besides the Convention on the Prevention and Punishment of the Crime of Genocide of 1948) parallel to the international responsibility of the State, and the consolidation of the principle of universal jurisdiction (as one of the legal consequences of the typification itself of the crime of forced disappearance of persons); cf. OEA/CP-CAJP, *Informe..., op. cit. supra* n. (9), p. 9.

jeopardized if one were to decharacterize the crimes against humanity which fall under their prohibition.

V. The Specificity and Integrity of Human Rights Treaties.

16. It will not be through the decomposition or fragmentation, pursuant to the application of a classic postulate of the law of treaties, of the constitutive elements of a particularly grave crime such as that of forced disappearance of person, that one will advance in those important doctrinal developments. In the present *Blake* case, the limitation *ratione temporis* to the competence of the Court not only has negative repercussions on its own competence *ratione materiae*, but also discloses a *décalage* between the law of treaties, and the International Law of Human Rights.

17. The solutions of the former, set forth in the two Vienna Conventions on the Law of Treaties (of 1969 and 1986), were erected to a large extent on the premise of the balance of the accord de volontés among the sovereign States themselves, with some significant concessions to the interests of the so-called international comunity (identified above all in the assertion of *jus cogens* in Articles 53 and 64 of both Vienna Conventions). The solutions of the latter are erected on distinct premises, opposing to those States the human beings victimized under their jurisdiction, ultimate subjects of the rights of protection.

18. Hence the ineluctable tension between one and the other, of which the problem raised in the present *Blake* case is but one manifestation. Among others, one may recall the system itself -voluntarist and contractualist - of reservations to treaties, enshrined in the two Vienna Conventions on the Law of Treaties (Articles 19-23)[15] (inspired in the criterion sustained by the International Court of Justice in its Advisory Opinion of 1951 on *Reservations to the Convention against Genocide*[16]), which

15. To which one could add, in the same sense, the Vienna Convention on Succession of States in Respect of Treaties of 1978 (Article 20).

16. In that Advisory Opinion, the International Court of Justice endorsed the so-called pan-American practice relating to reservations to treaties, given its

leads to a fragmentation (in bilateral relations) of the conventional obligations of the States Parties in multilateral treaties. Such system is, in my understanding, entirely inadequate to human rights treaties, which find inspiration in superior common values and are applied in conformity with the notion of *collective guarantee.*

19. The rightful preoccupation in safeguarding above all the *integrity* of human rights treaties nowadays calls for a wide revision of the individualist system of reservations set forth in the two aforementioned Vienna Conventions[17]. Cogent reasons militate in favour of conferring upon the international supervisory organs established by those treaties the determination of the compatibility or not of reservations with the object and purpose of human rights treaties[18], - instead of leaving such determina-

flexibility, and in search of a certain balance between the *integrity* of the text of the treaty and the *universality* of participation in it; hence the criterion of the compatibility of the reservations with the object and purpose of the treaties. Cf. International Court of Justice, Opinion on the *Reservations to the Convention against Genocide, ICJ Reports* (1951) pp. 15-30; and cf., *a contrario sensu*, the Joint Dissenting Opinion of Judges Guerrero, McNair, Read and Hsu Mo (pp. 31-48), as well as the Dissenting Opinion of Judge Álvarez (pp. 49-55), for the difficulties generated by this criterion.

17. The current work (as from 1993) of the International Law Commission of the United Nations on the topic of the Law and Practice Relating to Reservations to Treaties is thus endowed with importance; it remains to be seen whether it will or not fulfil the expectations existing nowadays about the evolution of the matter, particularly in so far as the application of human rights treaties is concerned.

18. The human rights international supervisory organs begin to disclose their preparedness to proceed in this way. In its judgments in the *Belilos* (1988) and *Weber* (1990) cases, for example, the European Court of Human Rights considered invalid the declarations amounting to reservations of Switzerland to the European Convention on Human Rights. In the *Belilos* case, *locus classicus* on the question, the Court considered that reservation, of a general character, incompatible with the object and purpose of the European Convention (in the light of its Article 64). The Inter-American Court of Human Rights, in its third Advisory Opinion (1983), warned that the question of reciprocity pertaining to reservations did not apply fully in relation to human rights treaties (paragraphs

tion to the States Parties themselves, as if they were, or could be, the final arbiters of the scope of their conventional obligations. That system of international control would be much more in keeping with the special character of human rights treaties, endowed with mechanisms of supervision of their own. Here, in effect, two necessarily complementary elements are added: the special character of human rights treaties (a determining factor, which cannot be minimized), and the necessity of determination of the scope of the competences of the supervisory organs created by them[19].

20. The same kind of concern applies to the denunciation of a treaty, permissible only when expressly foreseen in this latter[20], and not to be

62-63 and 65). And the Human Rights Committee, under the United Nations Covenant on Civil and Political Rights, in its general comment n. 24(52), of November 1994, also warned that the provisions of the two Vienna Conventions and the classic rules on reservations (based on reciprocity) are not appropiate to human rights treaties; the system of objections by States to reservations, in particular, did not make much sense, as States often have no interest or necessity to object to reservations, and the consequent absence of protest could not imply that a reservation would be compatible or not with the object and purpose of a given human rights treaty (paragraph 17). The two regional Courts of human rights have pronounced on the matter (*supra*) despite the fact that neither the European Convention on Human Rights (Article 64), nor the American Convention on Human Rights (Article 75 of which limits itself to make a *renvoi* to the pertinent provisions of the Vienna Convention on the Law of Treaties of 1969), confer expressly this function upon them. This is, notwithstanding, a question of common sense, if not of functional necessity.

19. The scope of such competences could, in this respect, be given precision expressly in the instruments of protection themselves to be adopted in the future; meanwhile, it is the case-law of the human rights international supervisory organs that will care to affirm their competence on the matter and to overcome the inadequacy and the insufficiencies of the system of reservations currently set forth in the two Vienna Conventions on the Law of Treaties.

20. The only exceptions to this principle contemplated in the two Vienna Conventions on the Law of Treaties (Article 56) are when it is established that it was the intention of the parties to admit the possibility of denunciation, and when this latter can be inferred from the nature of the treaty.

presumed in the present domain of protection[21]. Here, again, the time factor marks its presence: distinctly from other treaties the validity (*vigencia*) of which may even be expressly limited in time, human rights treaties create obligations of protection of an objective character, without temporal restriction. Thus, even though foreseen the denunciation (through certain requisites), its application, in an extreme case, ought to be subject to controls, as it is not reasonable that a State Party undertakes to respect human rights and to secure their full exercise only for some years, and that, once the treaty was denounced, everything would be permissible...

21. No one would dare to attempt to sustain that position. Moreover, even if the denunciation was made, there would subsist in relation to the denouncing State the obligations set forth in the treaty which correspond also to rules of customary international law, which would deprive the denunciation of any practical effect. In the long run, there is an element of *intemporality* in the *corpus juris* of the International Law of Human Rights, as it is a law of protection (droit de protection) of the human being as such, irrespective of his nationality or of any other condition or circumstance, and thereby constructed to be applied without temporal limitation, that is, all the time. The law of treaties cannot keep on not taking into due account this element of intemporality proper to the International Law of Human Rights.

22. Definitively, also in the law of treaties, - in relation, e.g., to reservations and denunciation (*supra*), as well as to other aspects[22], - the volun-

21. The American Convention on Human Rights contains a clause of denunciation (Article 78), the content of which reveals the concern of the draftsmen in the sense that, even in the extreme case of its application, the requisites established therein were to be rigorously observed. The United Nations Covenant on Civil and Political Rights, in its turn, does not provide for denunciation; in this respect, the Human Rights Committee, operating under the Covenant, in its general comment n. 26(61), of October 1997, sustained that the Covenant at issue, by its own nature, does not admit the possibility of denunciation.

22. To recall one of them, in providing for the conditions in which a violation of a treaty may bring about its termination or the suspension of its operation, the two Vienna Conventions on the Law of Treaties expressly and specifi-

tarism of the States has its limits, without which the object and purpose of human rights treaties would hardly be fulfilled. In any case, if a State Party in fact complied with the general duty to harmonize its domestic law with the international norms of protection[23], it would be very difficult to make the denunciation, by reason to the controls of domestic law itself in a democratic State. No State Party to a human rights treaty would contemplate, in all conscience, the faculty of denunciation (even if foreseen), given the highly negative effect which this latter would have on the objetive regime of protection, inspired in superior common values and applied in conformity with the notion of collective guarantee, which that same State helped to establish and consolidate, when it ratified, or acceded to, the treaty at issue.

VI. The Imperative Norms of International Law (*Jus Cogens*).

23. In an intervention in the debates of 12 March 1986 of the Vienna Conference on the Law of Treaties between States and International Organizations or between International Organizations, I allowed myself to draw attention to the manifest incompatibility with the concept of *jus cogens* of the voluntarist conception of international law, which is not capable even of explaining the formation of the rules of general international law[24]. In fact, such conception also fails to explain the incidence of elements independent of the free will of States in the process of formation of contemporary international law. If it is by their free will that States create and apply the norms of international law - as that conception seeks to sustain, - it is also by their free will that States violate those norms, and the voluntarist conception in this way revolves itself, pathetically, in

cally except therefrom "the provisions relating to the protection of the human person contained in treaties of humanitarian character" (Article 60(5)), - in a true clause of safeguard in defence of the human being.

23. As set forth, e.g., in Article 2 of the American Convention on Human Rights.

24. Cf. U.N., *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 1986) - Official Records*, volume I, N.Y., U.N., 1995, pp. 187-188.

vicious circles and intellectual acrobatics, incapable of providing a reasonable explanation for the formation of customary norms and the evolution itself of general international law.

24. There is pressing need for contemporary doctrine to devote more attention to a curious phenomenon, with important juridical implications: while the law of treaties remains conditioned by the manifestations of the voluntarist conception of international law, customary law appears much less vulnerable to this latter. This being so, it would not be possible, for example, to speak of limitations *ratione temporis* to the competence of an international tribunal (such as the one raised in the present case) in relation to norms of general international law. Nor would it be possible to speak of restrictions or reservations to customary norms. The *opinio juris sive necessitatis* (the subjective element of custom), as manifestation of the international juridical conscience, reveals nowadays much more vigour than the secular postulates of the law of treaties, when one comes to establish new legal regimes of protection of the human being against particularly grave violations of his rights.

25. Although the two aforementioned Vienna Conventions provide for the function of *jus cogens* in the domain proper to the law of treaties, it is an ineluctable consequence of the existence itself of *imperative* norms of international law that these latter are not limited to the violations resulting from treaties, and that they encompass every and any violation, including those resulting from every and any action and any unilateral acts of the States. To the *objetive* international responsibility of the States corresponds necessarily the notion of *objetive illegality* (one of the elements underlying the concept of *jus cogens*). In our days, no one would dare to deny the objective illegality of systematic practices of torture, of summary and extra-legal executions, and of forced disappearance of persons, - practices which constitute crimes against humanity, - condemned by the universal juridical conscience, parallel to the application of treaties.

VII. The Emergence of *Erga Omnes* Obligations of Protection.

26. This entire doctrinal evolution points in the direction of the consolidation of *erga omnes* obligations of protection, that is, obligations per-

taining to the protection of human beings, which are due to the international community as a whole. The time has come to develop the first jurisprudential indications in this respect, already advanced almost three decades ago, in the *cas célèbre* of the *Barcelona Traction* (1970)[25]. The time has come to develop them systematically 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.

27. Half a century passed since the adoption of the American and the Universal Declarations of Human Rights, and after so many years of continuing operation of the existing systems of international protection of human rights, what else is contemporary international case-law waiting for to develop the contents and legal effects of the *erga omnes* obligations in the present domain? Among the elements to be, from the start, taken into account, are the direct applicability of the international norms of protection in the ambit of the domestic law of the States, and the adoption of measures that secure the faithful execution of the judgments of the existing international tribunals of human rights (the Inter-American and European Courts of Human Rights).

28. 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 *jus cogens*. It is not reasonable that the contemporary law of treaties continues to

25. 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, the obligations of a State *vis-à-vis* the international community as a whole (*erga omnes* obligations). These latter - the Court added - derive, e.g., in contemporary international law, *inter alia*, from "the principles and rules concerning the basic rights of the human person", - it so happening that some rights of protection "have entered into the body of general international law", and others are set forth in international instruments of universal or almost universal character; *Barcelona Traction* case (Belgium *versus* Spain, 2nd. phase), *ICJ Reports* (1970) p. 32, paragraphs 33-34.

aligning 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. It is not reasonable that, by the almost mechanical application of postulates of the law of treaties erected upon the autonomy of the will of the State, one would restrain - as in the present case - a reassuring evolution, fostered above all by the *opinio juris as* a manifestation of the universal juridical conscience, to the benefit of all human beings.

29. There is pressing need for the law of treaties to reconsider itself, so as to accompany and to regulate, with the precision which is characteristic of it, this evolution, in such a way as to fulfill the new needs of safeguard - in any circumstances - of the human being, ultimate subject (*titulaire*) of the rights of protection. One ought to demystify the presentation, frequent and undue, of certain postulates as eternal and immutable truths, as they appear rather as a product of their time, that is, juridical solutions found in a given stage of the evolution of law, in accordance with the ideas prevailing in the epoch.

30. It is not reasonable that, despite the efforts of contemporary doctrine, and including of the representatives of the States which participated of the process of elaboration of treaties such as the Inter-American Convention on Forced Disappearance of Persons, one would refrain from promoting such developments, as a result of the fragmenting application - in relation to the forced disappearance of persons, as in the present case - of a rigid postulate of the law of treaties. Human rights are demanding a transformation and revitalization of the law of treaties.

VIII. Conventional Obligations (Responsibility) and Judicial Settlement (Jurisdiction).

31. Just as the recent Advisory Opinion of the Inter-American Court on *Reports of the Inter-American Commission on Human Rights (Article 51 of the American Convention on Human Rights* - OC-15, of 14 November 1997) reached the very bases of its advisory function, the question raised in the present *Blake* case touches likewise the bases of its competence in contentious matters (its delimitation in time, *ratione temporis*). The present

stage of (insufficient) evolution of the law of treaties allows me, at least, to formulate a precision on this question, which fulfills only in part one of my concerns.

32. As I pointed out in my Dissenting Opinion (paragraph 24 n. 19) in the *Genie Lacayo versus Nicaragua* case (Resolution of the Court on the Request for Revision of Judgment, of 13.09.1997), it is my understanding that it is from the moment of the ratification of the American Convention, or accession to it, that the new State Party undertakes to respect all the rights protected by the Convention and to secure their free and full exercise (starting with the fundamental right to life); the acceptance, by that State, of the compulsory jurisdiction of the Court in contentious matters refers only to the judicial means of settlement, by the Court, of a concrete case of human rights. It is certain that the Court can only pronounce on the case on the basis of the terms of acceptance of its competence in contentious matters by such State, but it is equally certain that this in no way affects the responsibility of a State Party for violations of the rights set forth in the Convention.

33. Even if the Court cannot in the circumstances pronounce upon the matter at issue, there subsist nevertheless the conventional obligations of the State Party, undertaken by it as from the moment of its ratification of the Convention, or accession to it. Thus, the moment as from which Guatemala undertook to protect all the rights set forth in the American Convention, including the right to life and the right to personal liberty (Articles 4 and 7), is the moment of its ratification of the Convention, on 25 May 1978. The subsequent moment of its acceptance of the jurisdiction of the Court in contentious matters, on 09 March 1987, conditions only the judicial means of settlement of a concrete case under the Convention.

34. One ought to avoid the confusion between the question of the invocation of the *responsibility* for compliance with the conventional obligations undertaken by the State Party and the question of the *submission* of this latter to the jurisdiction of the Court. One and the other are rendered possible in distinct moments: the former, of substantive or material order, as from the ratification of the Convention (or the accession to it)

by the State, and the latter, of jurisdictional order, as from the acceptance of the jurisdiction of the Court in contentious matters. Every and any State Party to the Convention, even if it has not recognized the compulsory jurisdiction of the Court, or has recognized it with limitations *ratione temporis*, remains bound by the provisions of the Convention since the moment of its ratification of this latter, or of its accession to it.

35. Even though the Court was not able to pronounce on all the rights encompassed in the present *Blake* case as a result of the limitation *ratione temporis* to its competence, nothing impedes it to point out that Guatemala, as well as all the States Parties to the American Convention on Human Rights, are bound by all the protected rights, as from the date of the ratification of the Convention or accession to it. Despite the silence of the Court on, for example, the rights to life and to personal liberty, on them subsist the considerations of the Inter-American Commission on Human Rights in its Report of 15.02.1995 on the case[26].

36. As the Court points out both in the present Judgment (paragraph 108) as well as in the Judgment of 17.09.1997 in the *Loayza Tamayo versus Peru* case (Merits, paragraph 81), given that the Commission is an organ, together with the Court, with competence "with respect to matters relating to the fulfillment of the commitments made by the States Parties" (Article 33 of the American Convention), these latter undertake to abide by what is approved in its Reports. This being so, Guatemala, as a State Party to the Convention, will certainly not only comply with the provisions of the present Judgment of the Court, but also bear in mind *bona fide* the considerations of the other supervisory organ of the American Convention, and the other conventional obligations pertaining to the rights protected by the American Convention, which ensue from its ratification of this latter.

37. Finally, as to the violations of the judicial guarantees and the right to mental and moral integrity (Articles 8(1) and 5, respectively, in relation to Article 1(1), of the American Convention) to the detriment of the next

26. CIDH, *Informe 5/95 - Caso 11.219 (Guatemala)*, doc. OEA/Ser.L/V/II.88-Doc.17, of 15.02.1995, pp. 15-18.

of kin of Nicholas Chapman Blake, as established in the present Judgment of the Court, I allow myself to add one brief and last thought. Herein lies, in my understanding, the contribution of the Judgment that the Inter-American Court has just rendered to the development of the jurisprudential treatment of the crime of forced disappearance of person, to the extent that it gives precision to the position of the next of kin of the disappeared person as subjects *(titulaires)* of the rights protected by the American Convention.

38. In a continuing situation proper to the forced disappearance of person, the victims are the disappeared person (main victim) as well as his next of kin; the indefinition generated by the forced disappearance withdraws all from the protection of the law[27]. The condition of victims cannot be denied also to the next of kin of the disappeared person, who have their day-to-day life transformed into a true calvary, in which the memories of the person dear to them are intermingled with the permanent torment of his forced disappearance. In my understanding, the complex form of violation of multiple human rights which the crime of forced disappearance of person represents has as a consequence the *enlargement of the notion of victim* of violation of the protected rights.

A.A. Cançado Trindade

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

27. Cf., in this sense, Article 1(2) of the United Nations Declaration on the Protection of All Persons against Forced Disappearances.