SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have voted in favour of the present Judgment on reparations in the case *Blake versus Guatemala* which the Inter-American Court of Human Rights has just adopted, for considering it in accordance with the applicable law, and bearing in mind what was previously resolved by the Court in the Judgments on preliminary objections (of 02.07.1996) and on the merits (of 24.01.1998). I understand, nevertheless, that the decision of the Court, in conformity with the *law stricto sensu*, does not keep a direct relationship with the *gravity* of the facts which took place in the present *Blake* case; therefore, just as I have done in my Separate Opinions in the two previous Judgments above-mentioned, I feel obliged to express, in this new Separate Opinion, my concerns and thoughts on the outcome of the *Blake* case, which I develop in this Judgment on reparations fully convinced that only through the *transformation of the existing law* one will achieve the realization of *justice* in circumstances such as those raised in the present *Blake* case of forced disappearance of person.

2. In fact, the present *Blake* case, perhaps more than any other case before the Inter-American Court to date, has revealed the ineluctable tension between the postulates of the law of treaties, in the framework of Public International Law, and those of the International Law of Human Rights. This tension originated itself in the limitation *ratione temporis* of the contentious jurisdiction of the Court, resulting from the temporal intersection - in the consideration of the intertwined facts of the continuing situation of the forced disappearance of Mr. Nicholas Chapman Blake - operated by the incidence of the date of acceptance on the part of Guatemala of the contentious jurisdiction of the Court.

3. The juridical tragedy - as I see it - of the present *Blake* case lies in that, by the application of a classic postulate of the law of treaties, the crime of forced disappearance of persons was unduly disfigured and fragmented, with clear repercussions in the present Judgment of reparations. This occurs despite all the endeavours which resulted in the recent tipification, at international level, of such disappearance as a "continuing or

permanent" crime "as long as the fate or the whereabouts of the victim has not been determined" (Inter-American Convention on the Forced Disappearance of Persons of 1994, Article III), as a complex form of violation of human rights (with related criminal acts) to be understood pursuant to a necessarily *integral* approach (in the light of Articles IV and II, and the Preamble, of that Convention).

4. This occurs precisely at a moment in which contemporary legal doctrine, - as I pointed out in my two previous Separate Opinions in the present case, - strives to achieve the establishment of a true international regime against *grave* violations of human rights (such as torture, forced or involuntary disappearance of persons, and extra-legal, arbitrary and summary executions). Moreover, as I added in my Separate Opinion (paragraph 21) in the Judgment on the merits, there is an element of *intemporality* proper to the International Law of Human Rights which the law of treaties cannot keep on failing to take into due account: this is a legal order of protection destined to be applied in any circumstances and without temporal limitation, that is, all the time.

5. The tension between the precepts of Public International Law and those of the International Law of Human Rights is not of difficult explanation: while the juridical concepts and categories of the former have been formed and crystallized above all at the level of *inter-State* relations (under the dogma that only the States, and later on the international organizations, are subjects of that legal order), the juridical concepts and categories of the latter have been formed and crystallized at the level of *intra-State* relations, that is, in the relations between the States and the human beings under their respective jurisdictions (erected these latter as subjects of that legal order).

6. The tension referred to - of which the present *Blake* case bears eloquent testimony - was, thus, to be expected. The juridical concepts and categories of Public International Law, constructed in the framework of a legal order of coordination in accordance with the principle of the juridical equality of States, have shown themselves not always adequate when transposed into the domain of the International Law of Human Rights. This latter, in its turn, went on to contribute decisively to the historical

rescue of the position of the human being in the law of nations *(droit des gens)*, in accordance, even, with the historical origins of this discipline. In regulating new forms of legal relations, imbued with the imperatives of protection, the International Law of Human Rights came of course to question and challenge certain dogmas of the past.

7. Distinctly from Public International Law, the International Law of Human Rights does not regulate the relations between equals; it operates precisely in defense of those who are ostensibly weaker and more vulnerable (the victims of violations of human rights). In the relations between unequals, it stands in defense of those in greater need of protection. It does not seek to obtain an abstract balance between the parties, but rather to remedy the effects of the lack of equilibrium and of the disparities to the extent that they affect human rights. It does not feed on the concessions of reciprocity, but it rather inspires itself in the considerations of *ordre public* in defense of superior common interests. It is a true *law of protection (droit de protection)*, marked by a logic of its own, and turned to the safeguard of the rights of human beings and not of States.

8. This is the proper sense of the International Law of Human Rights, whose juridical norms are interpreted and applied bearing always in mind the pressing needs of protection of the victims, and requiring, in this way, the humanization of the postulates of classic Public International Law. There is no reason for the already-mentioned tension between the postulates of Public International Law and those of the International Law of Human Rights to last always, but quite on the contrary: the great challenge which faces us is precisely in the sense of the overcoming of that tension.

9. One of the most eloquent manifestations of such tension emanates from the question of reservations to human rights treaties. Inspired in the criterion sustained by the International Court of Justice in its Advisory Opinion of 1951 on the *Reservations to the Convention against Genocide*[1], the

1. In which, - it may be recalled, - the Hague Court endorsed the so-called pan-American practice relating to reservations to treaties, given its 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

present system of reservations set forth in the two Vienna Conventions of the Law of Treaties (Articles 19-23)[2], in joining the formulation of reservations to the acquiescence or the objetions thereto for the determination of their compatibility with the object and purpose of the treaties, is of a markedly voluntarist and contractualist character.

10. Such a system, as I pointed out in my Separate Opinion (paragraphs 16-19) in the Judgment on the merits in the present *Blake* case, leads to a fragmentation (in the bilateral relations) of the conventional obligations of the States Parties to multilateral treaties, appearing entirely inadequate to human rights treaties, which are inspired in superior common values and are applied in conformity with the notion of *collective guarantee*. That system of reservations, unfortunately endorsed by the American Convention on Human Rights itself (Article 75), suffers from notorious insufficiencies when transposed from the law of treaties into the domain of the International Law of Human Rights.

11. To start with, it does not distinguish between human rights treaties and classic treaties, making abstraction of the *jurisprudence constante* of the organs of international supervision of human rights, converging in pointing out that distinction. It allows reservations (not objected) of a wide scope which threaten the very integrity of human rights treaties; it allows reservations (not objected) to provisions of these treaties which incorporate universal minimum standards (undermining, e.g., the basic judicial guarantees of inviolable rights). If certain fundamental rights - starting

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of the reservations with the object and purpose of the treaties. Cf. *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.

2. That is, the Vienna Convention on the Law of Treaties of 1969, and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986, - to which one may add, in the same sense, the Vienna Convention on Succession of States in the Matter of Treaties of 1978 (Article 20).

with the right to life - are non-derogable (in the terms of the human rights treaties themselves), thereby not admitting any derogations which, by definition, are of an essentially temporal or transitory character, - with greater reason one should not admit any reservations, perpetuated in time until withdrawn by the State at issue; such reservations are, in my understanding, without any *caveat,* incompatible with the object and purpose of those treaties. In this particular, I go, accordingly, beyond what was expressed in this respect by this Court in its third Advisory Opinion (paragraph 61) on *Restrictions to the Death Penalty* (1983)[3].

12. Although the two Vienna Conventions on the Law of Treaties prohibit the acceptance of reservations incompatible with the object and purpose of the treaty at issue, they leave, however, various questions without answers. The criterion of the compatibility is applied in the relations with the States which effectively objected to the reservations, although such objections are often motivated by factors - including political - other than a sincere and genuine concern on the part of the objecting States with the prevalence of the object and purpose of the treaty at issue. For the same reason, from the silence or acquiescence of the States Parties in relation to certain reservations one cannot infer a belief on their part that the reservations are compatible with the object and purpose of the treaty at issue.

13. Such silence or acquiescence, moreover, appears to undermine the application of the criterion of the compatibility of a reservation with the object and purpose of the treaty. And the two Vienna Conventions

3. In that Advisory Opinion, the Court considers a reservation which enables a State Party to suspend any of the fundamental non-derogable rights as incompatible with the object and purpose of the American Convention and not permitted by it, but curiously adds that "the situation would be different if the reservation sought merely to restrict certain aspects of a non-derogable right without depriving the right as a whole of its basic purpose" (paragraph 61). I see myself in the impossibility of following the reasoning of the Court's Advisory Opinion referred to in this last limitation: in my view, if a fundamental right does not admit any derogation, *a fortiori it* does not admit any restriction imposed by a reservation either.

referred to are not clear either, as to the legal effects of a non-permissible reservation, or of an objection to a reservation considered incompatible with the object and purpose of the treaty at issue. They do not clarify, either, who ultimately ought to determine the permissibility or otherwise of a reservation, or to pronounce on its compatibility or otherwise with the object and purpose of the treaty at issue.

14. The present system of reservations permits even reservations (not objected) which hinder the possibilities of action of the international supervisory organs (created by human rights treaties), rendering difficult the realization of their object and purpose. The above-mentioned Vienna Conventions not only fail to establish a mechanism to determine the compatibility or otherwise of a reservation with the object and purpose of a given treaty[4], but - even more gravely - do not impede either that certain reservations or restrictions formulated (in the acceptance of the jurisdiction of the organs of international protection)[5] come to hinder the operation of the mechanisms of international supervision created by the human rights treaties in the exercise of the collective guarantee. The present *Blake* case will remain as a sad and disconcerting illustration in this respect.

4. As neither the afore-mentioned Vienna Conventions, nor - prior to them - the cited Advisory Opinion of the International Court of Justice on *Reservations to the Convention against Genocide*, define what constitutes the compatibility or otherwise (of a reservation) with the object and purpose of a treaty, the determination is left to the interpretation of this latter, without it having been defined either on whom falls that determination, in what way and when it should be made. At the time of the adoption of that Advisory Opinion (1951), neither the majority of the Hague Court, nor the dissenting Judges on the occasion, foresaw the development of the international supervision of human rights by the conventional organs of protection; hence the insufficiencies of the solution then advanced, and endorsed years later by the two Vienna Conventions on the Law of Treaties referred to.

5. There is a distinction between a reservation *stricto sensu* and a restriction in the instrument of acceptance of the jurisdiction of an international supervisory organ, even though their legal effects are similar.

15. The present system of reservations, reminiscent of the old pan-American practice, rescued by the International Court of Justice and the two Vienna Conventions on the Law of Treaties, for having crystallized itself in the relations between States, not surprisingly appears entirely inadequate to the treaties whose ultimate beneficiaires are the human beings and not the Contracting Parties[6]. Definitively, human rights treaties, turned to the relations between States and human beings under their jurisdiction, do not bear a system of reservations which approaches them as from an essentially contractual and voluntarist perspective, undermining their integrity, allowing their fragmentation, leaving at the discretion of the Parties themselves the final determination of the extent of their conventional obligations.

16. As the two Vienna Conventions of 1969 and 1986 do not provide any indication for an objective application of the criterion of the compatibility or otherwise of a reservation with the object and purpose of a treaty, they leave it, on the contrary, to be applied individually and subjectively by the Contracting Parties themselves, in such a way that, at the end, only the reserving State knows for sure the extent of the implications of its reservation. The results of this indefinition[7] could not be

6. Hence the warning that I saw it fit to formulate, 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 (reproduced *in:* U.N., *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 1986) - Official Records*, vol. I, N.Y., U.N., 1995, pp. 187-188; and also in: 69/71 *Boletim da Sociedade Brasileira de Direito Internacional* (1987-1989) pp. 283-285), for the manifest incompatibility with the concept of jus cogens of the voluntarist conception of international law, which is not even capable to explain the formation of rules of general international law.

7. Despite the efforts in the sense of systematizing the practice of States on the matter (cf., e.g., J.M. Ruda, "Reservations to Treaties", 146 *Recueil des Cours de l'Académie de Droit International de La Haye* (1975) pp. 95-218; D.W. Bowett, "Reservations to Non-Restricted Multilateral Treaties", 48 *British Year Book of International Law* (1976-1977) pp. 67-92; P.-H. Imbert, *Les réserves aux traités multilatéraux*, Paris, Pédone, 1979, pp. 9-464; K. Holloway, *Les réserves dans les traités*

other than the uncertainties and ambiguitities which surround the matter to date. It calls the attention, for example, the extensive list of reservations, numerous and at times long, and often incongruous, of the States Parties to the Covenant on Civil and Political Rights of the United Nations[8]; and the practical problems generated by many of the reservations (also numerous and not always consistent) of the States Parties to the Convention on the Elimination of All Forms of Discrimination against Women are well-known, - to what one can add the reservations to the United Nations Convention against Torture and the Convention on the Elimination of All Forms of Racial Discrimination[9].

17. With the persistence of the inadequacy and the insufficiencies of the present system of reservations, it is not at all surprising that, firstly

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internationaux, Paris, LGDJ, 1958, pp. 1-358; K. Zemanek, "Some Unresolved Questions Concerning Reservations in the Vienna Convention on the Law of Treaties", *Essays in International Law in Honour of Judge Manfred Lachs* (ed. J. Makarczyk), The Hague, Nijhoff, 1984, pp. 323-336; Ch. Tomuschat, "Admissibility and Legal Effects of Reservations to Multilateral Treaties", 27 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1967) pp. 463-482; F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, Uppsala, Swedish Institute of International Law, 1988, pp. 184-222), it is difficult to escape from the finding that such practice has shown itself to be inconclusive until now, and at times confusing (which becomes even more serious when dealing with reservations to human rights treaties). This being so, the International Law Commission of the United Nations has deemed it fit to adopt, in 1998, a project of a Practical Guide on Reservations to Treaties: cf. U.N., *Report of the International Law Commission on the Work of Its 50th Session (1998), General Assembly Official Records* - Supplement n. 10(A/53/10), pp. 195-214 ("Reservations to Treaties: Guide to Practice").

8. Compiled by the Secretary-General of the United Nations and collected in the document: U.N., CCPR/C/2/Rev.4, of 24.08.1994, pp. 1-139 (English version), and pp. 1-160 (Spanish version).

9. For a study of the problems created by the reservations to these four human rights treaties of the United Nations, cf. L. Lijnzaad, *Reservations to U.N. Human Rights Treaties - Ratify and Ruin?*, Dordrecht, Nijhoff, 1995, pp. 131-424.

the criticisms and manifestations of dissatisfaction in this respect are multiplied in contemporary doctrine[10], and secondly, the human rights international supervisory organs begin to disclose their willingness to assert their competence to apply the criterion of the compatibility (*supra*) and contribute to secure, in this way, the integrity of the respective human rights treaties. At regional level, in its well-known judgment in the *Belilos versus Switzerland* case (1988), *locus classicus* on the issue, the European Court of Human Rights considered the declaration amounting to a reservation (of a general character) of Switzerland to the European Convention on Human Rights incompatible with the object and purpose

10. Cf. D. Shelton, "State Practice on Reservations to Human Rights Treaties", 1 *Canadian Human Rights Yearbook/Annuaire canadien des droits de la personne* (1983) pp. 205-234; C. Redgwell, "Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties", 64 *British Year Book of International Law* (1993) pp. 245-282; L. Lijnzaad, *op. cit. supra* n. (9), pp. 3-424; M. Coccia, "Reservations to Multilateral Treaties on Human Rights", 15 *California Western International Law Journal* (1985) pp. 1-49; G. Cohen-Jonathan, "Conclusions générales - La protection des droits de l'homme et l'évolution du Droit international", *Société Française pour le Droit International, Colloque de Strasbourg - La protection des droits de l'homme et l'évolution du Droit international*, Paris, Pédone, 1998, pp. 322-326; P. van Dijk, "The Law of Human Rights in Europe - Instruments and Procedures for a Uniform Implementation", VI-2 *Collected Courses of the Academy of European Law / Recueil des Cours de l'Académie de Droit Européen* - Firenze (1995) pp. 58-60 and 64; B. Clark, "The Vienna Convention Reservations Regime and the Convention on Discrimination against Women", 85 *American Journal of International Law* (1991) pp. 281-321; W.A. Schabas, "Reservations to the Convention on the Rights of the Child", 18 *Human Rights Quarterly* (1996) pp. 472-491; L. Sucharipa-Behrmann, "The Legal Effects of Reservations to Multilateral Treaties", 1 *Austrian Review of International and European Law* (1996) pp. 67-88; E.F. Sherman Jr., "The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation", 29 *Texas International Law Journal* (1994) pp. 69-93; A. Sanchez Legido, "Algunas Consideraciones sobre la Validez de las Reservas al Convenio Europeo de Derechos Humanos", 20 *Revista Jurídica de Castilla-La Mancha* (1994) pp. 207-230; C. Pilloud, "Reservations to the Geneva Conventions of 1949", *International Review of the Red Cross* (March/April 1976) pp. 3-44.

of this latter (in the light of its Article 64). In its turn, the Inter-American Court of Human Rights, in its second and third Advisory Opinions[11], pointed out the difficulties of a pure and simple transposition from the system of reservations of the Vienna Convention on the Law of Treaties of 1969 into the domain of the international protection of human rights.

18. At global level, in the *I. Gueye et alii versus France* case (1989), e.g., the Human Rights Committee (under the United Nations Covenant on Civil and Political Rights), in spite of a reservation *ratione temporis* of the respondent State[12], understood that the question - pertaining to pension benefits of more than 700 retired Senegalese members of the French army - was justiciable under the Covenant (as the effects of the French legislation on the matter lasted until then), and concluded that there was a violation of Article 26 of the Covenant[13]. The same Committee, in its *general comment* n. 24(52), of November 1994, warned that the provisions of the two Vienna Conventions and the classic rules on reservations (based upon reciprocity) were not appropriate to the human rights treaties; given the special character of the Covenant as a human rights treaty, the question of the compatibility of a reservation with its object and purpose, instead of being left at the discretion of the manifestations of the States Parties *inter se*, should be objectively determined, on the

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11. In its third Advisory Opinion on *Restrictions to the Death Penalty* (1983) the Court warned that the question of reciprocity as related to reservations did not fully apply *vis-à-vis* human rights treaties (paragraphs 62-63 and 65). Earlier, in its second Advisory Opinion on the *Effect of Reservations on the Entry into Force of the American Convention* (1982), the Court dismissed the postponement of the entry into force of the American Convention by application of Article 20(4) of the 1969 Vienna Convention (paragraph 34).

12. To Article 1 of the [first] Optional Protocol to the Covenant on Civil and Political Rights.

13. Communication n. 196/1985, decision of 03.04.1989 (and previous decision of admissibility of 05.11.1987).

basis of juridical principles, by the Human Rights Committee itself (paragraphs 17 and 20)[14].

19. In the face of the uncertainties, ambiguities and lacunae of the present system of reservations to treaties of the two Vienna Conventions of 1969 and 1986, one can already identify in contemporary doctrine[15] some proposals tending at least to reduce the tension between the law of treaties and the International Law of Human Rights in the matter of reservations, namely: *first,* the inclusion of an express indication in human rights treaties of the provisions which do not admit any reservations (such as those pertaining to the fundamental non-derogable rights), as an irreducible minimum to participate in such treaties; *second,* as soon as the States Parties have proceeded to the harmonization of their domestic legal order with the norms of those treaties (as required by these latter), the withdrawal of their reservations to them[16]; *third,* the modification or rectification, by the State Party, of a reservation considered non-permissible or incompatible with the object and purpose of the treaty[17], whereby a reservation would thus be seen no longer as a formal and final element of the manifestation of State consent, but rather as an essentially temporal measure, to be modified or removed as soon as possible; *fourth,* the adoption of a possible "collegial system" for the acceptance of reservations[18], so as to safeguard the normative character of human rights treaties, bearing in mind, in this respect, the rare example of the

14. Text *in* U.N./Human Rights Committee, document CCPR/C/21/Rev.1/Add.6, of 02.11.1994, pp. 6-7.

15. Cf., e.g., references in n. (10), *supra.*

16. Cf., in this line of reasoning, the Vienna Declaration and Programme of Action (1993), main document adopted by the II World Conference on Human Rights, part II, paragraph 5, and cf. part I, paragraph 26.

17. Cf. note (21), *infra.*

18. Possibility that came to be considered at the Vienna Conference which adopted the Convention of 1969.

Convention on the Elimination of All Forms of Racial Discrimination[19]; *fifth,* the elaboration of guidelines (although not binding) on the existing rules (of the two Vienna Conventions of 1969 and 1986) in the matter of reservations, so as to clarify them in practice[20]; and *sixth,* the attribution to the depositaries of human rights treaties of the faculty to request periodic information from the reserving States on the reasons why they have not yet withdrawn the reservations to such treaties.

20. The current work (as from 1993) of the International Law Commission of the United Nations on the topic of the *Law and Practice Concerning Reservations to Treaties* tends to identify the essence of the question in the need to determine the powers of the human rights international supervisory organs in the matter, in the light of the general rules of the law of treaties[21]. This posture makes abstraction of the specificity of the International Law of Human Rights, attaching itself to the existing postulates of the law of treaties. The debates of 1997 of the International Law Commission focused effectively on the question of the applicability of the system of reservations of the Vienna Conventions in relation to human rights treaties. Although the point of view prevailed that the pertinent provisions of those Conventions should not be modified[22], it was acknowledged that that system of reser-

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19. System of the two-thirds of the States Parties, set forth in Article 20(2) of that Convention.

20. Such as drawn up in 1998 by the International Law Commission of the United Nations; cf. note (7), *supra.*

21. Cf. A. Pellet (special *rapporteur* of the U.N. International Law Commission), *Second Report on the Law and Practice Relating to Reservations to Treaties* (1997), paragraphs 164, 204, 206, 209, 227, 229 and 252.

22. U.N., *Report of the International Law Commission on the Work of Its 49th Session* (1997), *General Assembly Official Records* - Supplement n. 10(A/52/10), p. 94, par. 47.

vations should be improved, given its lacunae, above all in relation to non-permissible reservations[23].

21. In the debates of the Commission, it was even admitted that the conventional organs of protection of judicial character (the regional European and Inter-American Courts of Human Rights) pronounce on the permissibility of reservations when necessary to the exercise of their functions[24]; such considerations were reflected in the "Preliminary Conclusions on Reservations to Multilateral Normative Treaties Including Human Rights Treaties", adopted by the Commission in 1997 (paragraphs 4-7)[25]. In my understanding, one has to go further: the important labour of the International Law Commission on the matter can lead to satisfactory solutions to the human rights international supervisory organs to the extent that it starts from the recognition of the special character of human rights treaties and gives precision to the juridical consequences - for the treatment of the question of reservations - which ensue from that recognition.

22. The attribution of the power of determination of the compatibility or otherwise of reservations with the object and purpose of human rights treaties on the part of the international supervisory organs themselves created by such treaties would be much more in conformity with the special nature of these latter and with the objective character of the conventional obligations of protection. There is a whole logic and common sense in attributing such power to those organs, guardians as they are of

23. *Ibid.,* p. 112, par. 107. In this respect, it was warned that States often and consciously formulate reservations incompatible with the object and purpose of human rights treaties for knowing that they will not be challenged, and that the lack of sanctions for such reservations thus leads States to become Parties to such treaties without truly committing themselves; *ibid.,* pp. 117-118, pars. 129-130.

24. *Ibid.,* pp. 106-107, 119 and 121-122, pars. 82, 84, 134, 138 and 143, respectively.

25. Text *in ibid.,* pp. 126-127.

the integrity of human rights treaties, instead of abandoning such determination to the interested States Parties themselves, as if they were, or could be, the final arbiters of the scope of their conventional obligations. Such system of objective determination would foster the process of progressive institutionalization of the international protection of human rights[26], as well as the creation of a true international public order *(ordre public)* based on the full respect to, and observance of, human rights.

23. It ought to be said, with frankness and firmness, and without margin of error, that, from the perspective of a minimally institutionalized international community, the system of reservations to treaties, such as it still prevails in our days, is rudimentary and primitive. There is pressing need to develop a system of objective determination of the compatibility or otherwise of reservations with the object and purpose of human rights treaties, although for that it may be considered necessary an express provision in future human rights treaties, or the adoption to that effect of protocols to the existing instruments[27].

24. Only with such a system of objective determination we will succeed in guarding coherence with the special character of human rights treaties, which set forth obligations of an objective character and are applied by means of the exercise of the collective guarantee. Only thus we will succeed to establish, in the ambit of the law of treaties, standards of behaviour which contribute to the creation of a true international *ordre public* based on the respect and observance of human rights, with the corresponding obligations *erga omnes* of protection. The acts which took place in the present *Blake* case, in my view, demand in an eloquent way the renovation and humanization of the law of treaties as a whole, comprising also the forms of manifestation of State consent.

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26. For the conception of human rights as an "autonomous juridical imperative", cf. D. Evrigenis, "Institutionnalisation des droits de l'homme et droit universel", *in Internationales Colloquium über Menschenrechte* (Berlin, Oktober 1966), Berlin, Deutsche Gesellschaft für die Vereinten Nationen, 1966, p. 32.

27. As suggested in the afore-mentioned "Preliminary Conclusions" of 1997 (paragraph 7) of the International Law Commission; cf. U.N., *Report of the International Law Commission...* (1997), *op. cit. supra* n. (22), pp. 126-127.

25. I do not see how not to take into account the experience of international supervision accumulated by the conventional organs of protection of human rights in the last decades. Any serious evaluation of the present system of reservations to treaties cannot fail to take into account the practice, on the matter, of such organs of protection. It cannot pass unnoticed that the International Court of Justice, in its already mentioned Advisory Opinion of 1951, effectively recognized, in a pioneering way, the special character of the Convention for the Prevention and Punishment of the Crime of Genocide of 1948, but without having extracted from its acknowledgement all the juridical consequences for the regime of reservations to treaties.

26. Almost half a century having lapsed, this is the task which is incumbent upon us, all of us who have the responsibility and the privilege to act in the domain of the international protection of human rights. The words pronounced by the Hague Court in 1951 remain topical nowadays, in pointing out that, in a Convention such as that of 1948, adopted for a "purely humanitaran" purpose,

> "(...) the Contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the Convention. Consequently, in a Convention of this type one cannot speak of individual advantages and disadvantages to States, of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the Parties, the foundation and measure of all its provisions"[28].

28. International Court of Justice, Advisory Opinion of 28.05.1951, *ICJ Reports* (1951) p. 23; and, for a study on the matter, cf. A.A. Cançado Trindade, "La jurisprudence de la Cour Internationale de Justice sur les droits intangibles / The Case-Law of the International Court of Justice on Non-Derogable Rights", *Droits intangibles et états d'exception / Non-Derogable Rights and States of Emergency* (ed. D. Prémont), Brussels, Bruylant, 1996, pp. 53-89.

27. I see no sense in trying to escape from the reality of the specificity of the International Law of Human Rights as a whole, the recognition of which, in my understanding, in no way threatens the unity of Public International Law; quite on the contrary, it contributes to develop the aptitude of this latter to secure, in the present domain, compliance with the conventional obligations of protection of the States *vis-à-vis* all human beings under their jurisdictions. With the evolution of the International Law of Human Rights, it is Public International Law itself which is justified and legitimized, in affirming juridical principles, concepts and categories proper to the present domain of protection, based on premises fundamentally distinct from those which have guided the application of its postulates at the level of purely inter-State relations.

28. I am not, therefore, here proposing that the development of the Internacional Law of Human Rights be brought about to the detriment of the law of treaties: my understanding, entirely distinct, is in the sense that the norms of the law of treaties (such as those set forth in the two above-mentioned Vienna Conventions, anyway of a residual character) can greatly enrich with the impact of the International Law of Human Rights, and develop their aptitude to regulate adequately the legal relations at inter-State as well as intra-State levels, under the respective treaties of protection. In sustaining the development of a system of objective determination - which seems to me wholly necessary - of the compatibility or otherwise of reservations with the object and purpose of human rights treaties in particular, in which the organs of international protection created by such treaties would exert an important role, I do not see in that any threat to the "unity" of the law of treaties.

29. Quite on the contrary, there could hardly be something more fragmenting and underdeveloped than the present system of reservations of the two Vienna Conventions, for which reason it would be entirely illusory to assume that, to continue applying it as until now, one would thereby be fostering the "unity" of the law of treaties. The true unity of the law of treaties, in the framework of Public International Law, would be better served by the search for improvement in this area, overcoming the ambiguities, uncertainties and lacunae of the present system of reservations,

through the development of a system of objective determination *(supra)*, in conformity with the special nature of human rights treaties and the objective character of the conventional obligations of protection. The unity of Public International Law itself is measured rather by its aptitude to regulate legal relations in distinct contexts with equal adequacy and effectiveness.

30. Despite of what happened in the present *Blake* case, in which the terms of acceptance by the respondent State of the contentious jurisdiction of the Court brought about the decomposition of the crime of forced disappearance of person (with direct consequences for the reparations to the injured party), there is no reason for desperation, for not existing juridical impossibility of achieving the humanization of the law of treaties. Thus, to quote one example in this sense, in providing for the conditions in which a breach of a treaty can result in its termination or the suspension of its application, the two Vienna Conventions on the Law of Treaties expressly and specifically exclude "the provisions relating to the protection of the human person contained in treaties of a humanitarian character" (Article 60(5)).

31. This provision resulted from a proposal submitted by Switzerland, in the second session of the Vienna Conference (1969) which adopted the first Vienna Convention on the Law of Treaties. Its purpose was that of pointing out that the treaties of a humanitarian character have a special nature, do not exist for the sole benefit of the States, and transcend the reciprocity between the Parties in incorporating obligations of protection of an absolute character[29]. Such provision (Article 60(5)), together with those concerning *jus cogens* (Articles 53 and 64), represent what exists of

29. I.M. Sinclair, *The Vienna Convention on the Law of Treaties,* Manchester, University Press/Oceana, 1973, pp. 104-105; and cf. G.E. do Nascimento e Silva, *Conferência de Viena sobre o Direito dos Tratados*, Rio de Janeiro, M.R.E., 1971, pp. 80-81; E. de la Guardia y M. Delpech, *El Derecho de los Tratados y la Convención de Viena*, Buenos Aires, La Ley, 1970, pp. 458 and 454; F. Capotorti, "Il Diritto dei Trattati Secondo la Convenzione di Vienna", *Convenzione di Vienna sul Diritto dei Trattati,* Padova, Cedam, 1984, p. 61.

most progressive in the Vienna Convention, fostering, ultimately, the very moralization of the law of treaties[30].

32. Besides constituting a true clause of safeguard in defense of the human being, the provision of Article 60(5) of the two above-mentioned Vienna Conventions pierces the stronghold (previously exclusive) of inter-State relations in the framework of the law of treaties, and recognizes the special nature of the treaties of a humanitarian character with all its juridical consequences. Such recognition is strengthened by the assertion, in the preamble of the two Vienna Conventions, of the principle of universal respect and observance of human rights (sixth paragraph of the Preamble), to be taken into account in the interpretation of the Vienna Conventions of 1969[31] and 1986 themselves. There is no reason for this evolution to be circumscribed to the specific issue of the termination or the suspension of the application of a treaty *(supra)*, and not extending itself likewise, e.g., to the forms of manifestation of the consent of the State (i.e., signature, approval, and ratification of a treaty, or accession to it, and acceptance of an optional clause of recognition of the jurisdiction of an international supervisory organ). In contracting conventional obligations of protection, it is not reasonable, on the part of the State, to assume a discretion so unduly broad and conditioning of the extent itself of such obligations, which would militate against the integrity of the treaty.

33. The principles and methods of interpretation of human rights treaties, developed in the case-law of conventional organs of protection, can much assist and foster this necessary evolution. Thus, in so far as human rights treaties are concerned, one is to bear always in mind the objective character of the obligations enshrined therein, the autonomous

30. P. Reuter, *La Convention de Vienne sur le Droit des Traités,* Paris, Libr. A. Colin, 1970, pp. 21-23.

31. E. Schwelb, "The Law of Treaties and Human Rights", *in Toward World Order and Human Dignity - Essays in Honor of M.S. McDougal* (eds. W.M. Reisman and B.H. Weston), N.Y./London, Free Press/Collier Macmillan, 1976, pp. 263 and 265.

meaning (in relation to the domestic law of the States) of the terms of such treaties, the collective guarantee underlying them, the wide scope of the obligations of protection and the restrictive interpretation of permissible restrictions. These elements converge in sustaining the integrity of human rights treaties, in seeking the fulfillment of their object and purpose, and, accordingly, in establishing limits to State voluntarism. From all this one can detect a new vision of the relations between public power and the human being, which is summed up, ultimately, in the recognition that the State exists for the human being, and not vice-versa.

34. The juridical concepts and categories, inasmuch as they enshrine values, are a product of their time, and, as such, are in constant evolution. The protection of the human being in any circumstances, against all the manifestations of arbitrary power, corresponds to the new *ethos* of our times, which is to be reflected in the postulates of Public International Law. There is - may I insist - no juridical imposibility to reconsider such postulates in the light of the needs of protection of the human being. Such needs ought to prevail over limitations *ratione temporis,* or of other kind, of the conventional organs of protection. Otherwise, we will always be revolving in vicious circles generated by the already mentioned tension between the postulates of the law of treaties, in the framework of Public International Law, and those of the International Law of Human Rights.

35. A pertinent illustration, in the contentious proceedings of the present *Blake* case, is found in the difficulties experienced both by the Inter-American Commission of Human Rights and by the representative of the relatives of the disappeared person (Ms. Joanne Hoeper), as well as by the respondent State, in presenting, in the public hearing before the Court of 10.06.1998, distinct arguments as to the claims for reparations and indemnities, and costs, in relation to the violations of Articles 5 and 8(1), in combination with Article 1(1), of the American Convention, established by the Court in the Judgment on the merits of 24.01.1998, in a form "separated" from the detention, disappearance and death of Mr. Nicholas Chapman Blake.

36. I do not see how to "separate" the intense suffering of the relatives of the disappeared person (Article 5), also victims in the present case (cf.

infra), and the lack of the due process of law and of the investigation of the facts (Article 8(1)), in combination with the general duty to respect the protected rights and to secure their free and full exercise (Article 1(1)), from the context of the forced disappearance of Mr. Nicholas Chapman Blake. The debates of the public hearing before the Court of 10.06.1998, in which all those who intervened - the Inter-American Commission on Human Rights, the representative of the relatives of the victim, and the respondent State, - submitted as it was possible to them their points of view in conformity with their criteria and the premises from which they started[32], disclose, nevertheless, the *artificiality* of the fragmentation or decomposition of the crime of forced disappearance of person.

37. This artificiality has marked the consideration of the present case in all its phases, - preliminary objections, merits and reparations. The inescapable truth is that the violations of Articles 5 and 8(1), in combination with Article 1(1), of the American Convention, were established as such by reason of the continuing and complex crime of the disappearance of Mr. Nicholas Chapman Blake, with implications for the determination of the reparations. The artificiality referred to, resulting from the application of a classic postulate of the law of treaties, has conditioned the very decisions of the Court in all the phases of the case, - preliminary objections, merits, and, now, reparations. It has, furthermore, generated a gap between the *responsibility* of the State Party to the American Convention of Human Rights for violations of the protected rights and the *jurisdiction* - limited *ratione temporis* - of the judicial organ of protection, what, in its turn, brings about the undesirable situation of the lack of a jurisdictional basis for the determination of the engagement of the responsibility of the State for the totality of the acts that took place, and for the establishment of their juridical consequences.

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32. Cf. the oral arguments reproduced in: Inter-American Court of Human Rights, *Transcripción de la Audiencia Pública Celebrada en la Sede de la Corte el 10 de Junio de 1998 sobre las Reparaciones en el Caso Blake*, pp. 3-4, 6, 11-17, 19-20 and 22-24 (mimeographed, internal circulation).

38. It does not seem to me at all reasonable that, in the context of a concrete case such as *Blake versus Guatemala*, a whole significant doctrinal evolution of struggle against *grave* violations of human rights is simply vanished by the imposition of a temporal limitation, *in conformity* with a classic postulate of the law of treaties but *to the detriment* of the development of the International Law of Human Rights. This paradox is even more worrisome in the face of the violation of fundamental *non-derogable* rights (starting with the right to life), protected by the treaties and conventions of human rights as well as of International Humanitarian Law[33]; moreover, the Statute of the International Penal Tribunal, adopted by the recent Diplomatic Conference of the United Nations in Rome, on 17 July 1998, in determining the crimes under the jurisdiction of the Tribunal, includes the "crimes against humanity" (Article 5), which, in turn, comprise, *inter alia,* torture and the forced disappearance of persons (Article 7(1)(f) and (i)), when generalizedly and systematically perpetrated[34].

39. The outcome of the *Blake* case, pointing in a direction opposite to a whole doctrinal evolution reflected in the international tipification of the forced disappearance of person and tending to the consolidation of a true international regime against *grave* violations of human rights, is thus endowed with an anti-historical sense, which is to me a matter of great concern. The present *Blake* case is in a way a stone on the path of the evolution of the more lucid doctrine and case-law to guide the struggle against *grave* violations of human rights. This stone on the path, however, will not make us lose sight of the line of the horizon, in which the development emerges of the peremptory norms of international law *(jus cogens)* and of the obligations *erga omnes* of protection of the human being. As I allowed myself to ponder in my Separate Opinion (paragraph 28) in the Judgment of the Court on the merits (of 24.01.1998) in the present *Blake* case,

33. As exemplified by the provisions on fundamental guarantees of the two Additional Protocols of 1977 to the Geneva Conventions on International Humanitarian Law of 1949 (Protocol I, Article 75, and Protocol II, Article 4).

34. These two "crimes against humanity" are defined in Article 7(2)(e) and (i) of the Statute referred to.

> "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 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".

40. 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[35] that we will achieve to overcome the obstacles of the dogmas of the past, as

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35. On the formation and development of the concept of *jus cogens* in contemporary International Law, cf., e.g.: J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties - A Critical Appraisal*, Wien/N.Y., Springer-Verlag, 1974, pp. 1-194; C.L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties,* Amsterdam, North-Holland Publ. Co., 1976, pp. 1-194; A. Gómez Robledo, *El Jus Cogens Internacional (Estudio Histórico Critico)*, Mexico, UNAM, 1982, pp. 7-227; T.O. Elias, *The Modern Law of Treaties,* Leiden/Dobbs Ferry N.Y., Sijthoff/Oceana, 1974, ch. XII, pp. 177-187; G. Gaja, "Jus Cogens beyond the Vienna Convention", 172 *Recueil des Cours de l'Académie de Droit International de La Haye* (1981) pp. 279-313; L. Alexidze, "Legal Nature of Jus Cogens in Contemporary International Law", *in ibid.*, pp. 227-268; R. Ago, "Droit des traités à la lumière de la Convention de Vienne - Introduction", 134 *Recueil des Cours de l'Académie de Droit International de La Haye* (1971) pp. 320-324. E. Suy, "The Concept of Jus Cogens in Public International Law", *Papers and Proceedings of the Conference on International Law* (Lagonissi/Greece, 03-08.04.1966), Geneva, C.E.I.P., 1967, pp.

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.

41. Within the legal situation created in the *Blake versus Guatemala* case before the Inter-American Court, this latter has, however, succeeded, in the present Judgment on reparations as well as in the previous Judgment on the merits of the case, to contribute - in relation to a specific aspect - to the jurisprudential treatment of the crime of forced disappearance of person, to the extent that it gives precision to, and consolidates, the position of the relatives of the disappeared person also as victims and *titulaires* of the rights protected by the American Convention on Human Rights. All those who were withdrawn from the protection of the law - the disappeared person as well as his relatives - form, thus, the "injured party", in the sense of Article 63(1) of the American Convention, as recognized in the present Judgment on reparations of the Court.

42. This position finds full support in contemporary doctrine and case-law. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (United Nations, 1985)[36] affirms that "the term `victim' also includes, where appropriate, the immediate family or the dependents of the direct victim and the people injured by interceding to give assistance to the suffering victims or to prevent the victimization"

17-77; Ch. de Visscher, "Positivisme et jus cogens", 75 *Revue générale de Droit international public* (1971) pp. 5-11; A. Verdross, "Jus Dispositivum and Jus Cogens in International Law", 60 *American Journal of International Law* (1966) pp. 55-63; U. Scheuner, "Conflict of Treaty Provisions with a Peremptory Norm of International Law", 27 and 29 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1967 and 1969) pp. 520-532 and 28-38, respectively; H. Mosler, "Ius Cogens im Völkerrecht", 25 *Schweizerisches Jahrbuch für internationales Recht* (1968) pp. 1-40; K. Marek, "Contribution à l'étude du jus cogens en Droit international", *Recueil d'études de Droit international en hommage à P. Guggenheim,* Geneva, IUHEI, 1968, pp. 426-459.

36. Adopted by resolution 40/34 of the General Assembly of the United Nations, of 29.11.1985.

(paragraph 2 *in fine*). In the African continent, in the *K. Achuthan (on behalf of A. Banda) versus Malawi* case (1994), the African Commission on Human and Peoples' Rights accepted that the petitioner acted on behalf of his father-in-law, and established a violation of Articles 4, 5, 6, 7(1)(a)(c) and (d), and 26, of the African Charter on Human and Peoples' Rights[37].

43. In the European continent, already in 1970 the old European Commission of Human Rights sustained, in the *X versus Federal Republic of Germany* case, that the term "victim" meant "not only the direct victim or victims of the alleged violation but *also any person who would indirectly suffer prejudice* as a result of such violation or who would have a valid personal interest in securing the cessation of such violation"[38]. This understanding was also advanced by the Commission in other cases[39]. The basis was set for the jurisprudential development of the notion of *indirect victim* under the European Convention on Human Rights[40]. Shortly afterwards, in the *Amekrane versus United Kingdom* case (1973-1974), the European Commission admitted that the widow and the sons of Mohamed Amekrane, - a Moroccan military who sought political asylum in Gibraltar and was extradited therefrom by the British authorities to Morocco, where he was condemned to death and executed, - could claim

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37. Communication n. 64/92, *in* ACHPR, *Decisions of the African Commission on Human and Peoples' Rights, 1986-1997,* Series A, vol. I, Banjul, 1997, pp. 63 and 68.

38. Application n. 4185/69, decision of 13.07.1970, *in: Collection of Decisions of the European Commission of Human Rights*, vol. 35, pp. 140-142; la applicant - wife of a person detained in an asylum for the mentally ill - considered herself an "indirect victim" of the detention of her husband pursuant to decisions of the German tribunals.

39. Cf., e.g., *Koolen versus Belgium* case, application n. 1478/62, *in Collection of Decisions of the European Commission of Human Rights,* vol. 13, p. 89; *X. versus Federal Republic of Germany* case, application n. 282/57, *in Yearbook of the European Convention on Human Rights,* vol. I, p. 166.

40. Cf. two other decisions *in ibid.*, p. 275.

to be "victims" of violations of Articles 3, 5 and 8 of the European Convention, to the detriment of their deceased husband and father[41]. More recently, in its decision on the admissibility of the *Andronicou and Constantinou versus Cyprus* case (1995), the European Commission relied upon its own *jurisprudence constante* to the effect that the parents of a person whose death engages the responsibility of the respondent State can claim to be victims of a violation of the European Convention, the same occurring with the brothers and sisters of the deceased person in case that person was unmarried[42].

44. At global level (United Nations), several decisions of the Human Rights Committee (under the Covenant on Civil and Political Rights of the United Nations) have oriented themselves in the same sense. It may be recalled, for example, the position adopted in the matter by the Committee in two cases pertaining to Uruguay, namely: in the *García Lanza de Netto* case (1980), the Committee accepted that the initial author of the petition, by virtue of "close family connection", acted on behalf of the alleged victims, her uncle and aunt (who had been detained and were unable to act on their own behalf)[43]; and in the *Valentini de Bazzano* case

41. European Commission of Human Rights, application n. 5961/72, decision of admissibility of 11.10.1973, pp. 1-14, pars. 1-30, cf. especially par.26 (mimeographed, internal circulation); and cf., for the friendly settlement of the case, European Commission of Human Rights, *Amekrane versus United Kingdom* case, *Report of the Commission* (of 19.07.1974), pp. 1-5.

42. Application n. 25052/94, *Andronicou and Constantinou versus Cyprus* case, decision of admissibility of 05.07.1995, *in:* Commission Européenne des Droits de l'Homme, *Décisions et Rapports,* vol. 82-B, Strasbourg, C.E., 1995, p. 112; and the Commission added that the conditions governing applications under Article 25 of the European Convention do not necessarily coincide with the national criteria concerning *locus standi,* as the legal norms of domestic law on the matter can serve ends different from those of Article 25 of the Convention (*autonomy* of the notion of victim).

43. Communication n. 8/1977, in: International Covenant on Civil and Political Rights, *Human Rights Committee - Selected Decisions under the Optional Protocol,* [vol. I], N.Y., U.N., 1985, pp. 45-46.

(1979) the Committed understood in the same way that the author of the petition "was justified by reason of close family connection in acting on behalf of the other alleged victims"[44]. Thus, the present *Blake versus Guatemala* case, in the inter-American system of protection of human rights, makes no exception to this significant doctrinal and jurisprudential evolution as to the notion of victim under human rights treaties.

45. Which are, at last, the lessons that we can extract from the present Blake case before the Inter-American Court? Essentially ten, in my understanding, which I allow myself to summarize in conclusion:

- *First,* in accepting optional clauses of recognition of the contentious jurisdiction of conventional organs of protection, States Parties to human rights treaties ought to bear always in mind the objective character of the obligations of protection enshrined in such treaties, as well as the element of *intemporality* inherent in the protection of human rights;

- *Second,* one cannot decharacterize the crime of forced disappearance of persons as a continuing and complex crime; the fragmentation of its constitutive elements, even if pursuant to the application of law *stricto sensu,* as in the present case (by virtue of the limitation *ratione temporis* of the jurisdiction of the Court in the circumstances of the *cas d'espèce*), discloses the notorious artificiality of such decomposition, which marked the consideration by the Court of the present case in all its phases (preliminary objections, merits and reparations);

- *Third,* the undue fragmentation of the continuing and complex crime of forced disappearance of persons, besides leading to unsatisfactory legal results, is endowed with an anti-historical character, in the sense that it points to the direction opposite to the contemporary doctrinal and jurisprudential development tending towards the consolidation of a true international legal regime against *grave* violations of human rights;

44. Communication n. 5/1977, *in ibid.*, pp. 41 and 43; moreover, communication n. 63/1979, concerning Uruguay, decided by the Committee in 1981, was submitted by Violeta Setelich, on behalf of her husband Raúl Sendic Antonaccio (*in ibid.*, pp. 102 and 104).

- *Fourth,* there is pressing need, in this *fin de siècle*, of a reconsideration of the law of treaties itself in its entirety, and in particular of that pertaining to all forms of manifestation of State consent, starting from the necessary recognition of the special nature of human rights treaties and of the objective character of the conventional obligations of protection, with all legal consequences ensuing therefrom;

- *Fifth,* the present system of reservations to treaties (set forth in the two Vienna Conventions on the Law of Treaties, of 1969 and 1986), surrounded by uncertainties, ambiguities and lacunae, is of a contractual and voluntarist character, and of a fragmenting effect; bearing in mind the special character of human rights treaties, there is pressing need to develop a system of objective determination of the compatibility or otherwise of the reservations with the object and purpose of such treaties, so as to preserve the integrity of these latter;

- *Sixth,* such system of objective determination concerning reservations to human rights treaties in no way affects the unity of the law of treaties in the framework of Public International Law; on the contrary, it contributes to develop the aptitude of this latter to secure compliance with the conventional obligations of protection of the States *vis-à-vis* all human beings under their jurisdictions;

- *Seventh,* the limitation - e.g., *ratione temporis* - of the jurisdiction of a conventional organ of protection in no way affects the responsibility itself of the State Party for violations of the rights protected by the human rights treaty at issue; the States Parties remain bound by such treaty as from the moment in which they ratified it or adhered to it, and the terms of acceptance of the jurisdiction of the organ of protection condition only that jurisdiction, but not the responsibility of the State Party;

- *Eighth,* the fundamental human rights which admit no derogations *a fortiori* admit no reservations either, and integrate the domain of *jus cogens*; as an imperative of the universal juridical conscience, one ought to keep on fostering the development of the peremptory norms of international law *(jus cogens)* and of the corresponding obligations *erga omnes* of protection of the human being in any circumstances;

- *Ninth,* all the persons who were withdrawn from the protection of the law - such as, in the present case, the disappeared person and also his relatives - are victims and *titulaires* of the protected rights, forming the *"injured party"* (in the sense of Article 63(1) of the American Convention on Human Rights) for the effects of reparations; and

- *Tenth,* the victims, thus understood, who form the injured party in the international *contentieux* of human rights, are, in conclusion, subjects of the International Law of Human Rights, endowed with international legal personality as well as full international legal capacity.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary