SEPARATE OPINION OF JUDGE
A. A. CANÇADO TRINDADE

1. I have joined in the decision of the Inter-American Court of Human Rights in the instant *Blake* case, although I would have preferred the Court to have based its conclusions on a different reasoning. Given the importance of this Judgment on Preliminary Objections, this being the first time that the Court has been called upon to decide on the matter in the special circumstances of the *cas d'espèce*, and because of its implications for cases of like kind in the future, I shall explain my understanding of the grounds for this decision. My Separate Opinion dwells upon the Court's decision on the first preliminary objection interposed by the Government of Guatemala, since I am satisfied with the Court's decision on the second and third objections, rejected as unfounded for appearing rather as arguments as to the merits.

2. The Court has before it a case of disappearance of a person, since it has been established that the detention and death of Mr. Nicholas Chapman Blake occurred between 28 and 29 March 1985, and his presumed mortal remains (later identified as such by a forensic expert) were only found in June 1992. Since the Court has developed some considerations on the concept of “forced disappearance of persons” (paragraphs 35-39 of the Judgment), may I add a brief general observation, recalling that the term -which comes to be used increasingly since the mid-sixties, gradually passing into the lexicon of the international law of human rights during the next decade,- has only recently been defined as a crime (Article II) by the 1994 Inter-American Convention on Forced Disappearance of Persons. The international experience on the matter accumulated by human rights supervisory organs in recent years shows that forced disappearance of persons cannot be dissociated from violations of other rights, enshrined in human rights treaties like the American Convention on Human Rights, such as, e.g., the right to personal liberty and security [Article 7(1)], the right not to be subject to arbitrary arrest or imprisonment [Article 7(3)], the right not to subjected to torture or to cruel, inhuman, or degrading treatment (Article 5), the right to recognition as a person before the law (Article 3).

3. Inasmuch as cases of enforced disappearance have been characterized by the denial of responsibility on the part of the public authorities and the resulting impossibility of obtaining justice and reparation, leading to a situation of impunity and to the defenselessness of the victims, both direct (the “disappeared”) and indirect (their relatives), neither can forced disappearance be dissociated from violations of other rights, also protected in treaties such as the American Convention, namely, e.g., the right to simple and prompt recourse to a competent national court or tribunal (Article 25) and the right to a fair trial by an independent and impartial tribunal (Article 8). In reality, only after discovery of the whereabouts of a disappeared person has it been possible to determine whether those and other rights have been violated. This we know from the experience on the matter of the international organs of protection of human rights, starting with the need to consider a case of disappearance in an integral manner, comprising its multiple aspects.

4. Since it has been established, at this phase of preliminary objections, in the instant *Blake* case, that neither party disputes the facts of the detention and death of Mr. Nicholas Chapman Blake, occurred between 28 and 29 March 1985, -the death having been found or confirmed more that seven years later, in June 1992,-

the Court has before it a case of disappearance, and must determine, at the next stage of the proceedings, whether or not that disappearance was forced. In any event, the characterization of the present case as one of disappearance, requires that this latter be understood in an integral manner, comprising its multiple aspects.

5. Indeed, this appears to have been the understanding, at this phase of preliminary objections, with distinct purposes and conflicting arguments, of both the Inter-American Commission on Human Rights in its complaint of 3 August 1995, and the Government of Guatemala in its brief of preliminary objections of 16 September 1995,- as both the Commission and the Government refer to all the complaints as a whole. This is one aspect which cannot pass unnoticed.

6. In presenting its first preliminary objection, Guatemala cites the instrument of its acceptance of the jurisdiction of the Court on 9 March 1987 (that is, the Governmental Agreement n. 123-87, of 20 February 1987), Article 2 of which provides that

> The acceptance of the competence of the Inter-American Court of Human Rights is effected for an indefinite period of time, with a general character, on the condition of reciprocity and with the reservation that cases in which the Court's competence is accepted relate exclusively to events that occurred after the date on which this declaration is presented to the Secretary of the Organization of American States.

It should be clarified that the "reservation" reproduced above is not to be understood in the same sense attributed to the term in the domain of the law of treaties. It is used, rather, in the sense of a condition expressed by the Guatemalan Government in the terms of acceptance of the contentious jurisdiction of the Court for "specific cases", -which Guatemala is entirely at liberty to do by virtue of the provisions of Article 62(2) of the American Convention on Human Rights.

7. The aforementioned brief of preliminary objection adds that

> As the Commission accuses the State of Guatemala of the arbitrary and unlawful abduction of Mr. Nicholas Chapman Blake, of perpetrating his forced disappearance and taking his life, affirming that all those events occurred on 28 March 1985 in the place known as *Los Campamentos* in the Department of Huehuetenango, and that, consequently, on this day Mr. Blake's human rights recognized by the Convention in its Articles 7, 4, 8, 25, 13, 22 and 1(1) were violated, by the same token, the Court's incompetence to hear the case is evident, inasmuch as the acceptance of the compulsory jurisdiction of the Court applies exclusively to cases concerning events that occurred after the date on which the acceptance was deposited at the Secretariat General of the OAS, that is, after 9 March 1987, so that the preliminary objection interposed is entirely founded.

Another clarification is worth making here. It has not been shown, as the respondent Government contends, that the Commission claimed that the death and forced disappearance of Mr. Nicholas Chapman Blake, and the other alleged violations of the cited Articles of the American Convention, "all" occurred and ended on 28 March 1985. To the best of my knowledge the Commission did not make that claim in its complaint, a point duly clarified by the Commission itself at the public hearing before the Court on 28 January 1996.

8. In my understanding, the first preliminary objection of Guatemala is characterized as a preliminary objection of competence *ratione temporis*, interposed not as a condition of admissibility of the complaint, but rather as a condition of the process, of the application of the Court's jurisdictional activity. As such, it does not have the wide scope which the respondent Government purports to attribute to it, so as to restrict *ratione temporis* the very submission of the entire case to the jurisdiction of the Court. It is only meant to exclude from consideration by the Court, owing to restriction of its competence *ratione temporis*, those events which occurred prior to Guatemala's acceptance of the jurisdiction of the Court. There remains, however, the complaint of forced disappearance in respect of related rights, and as to the effects and actions subsequent to the deposit of its instrument of acceptance (on 9 March 1987), over which the Court retains its jurisdiction.

9. The Court recalls (paragraph 35 of the Judgment) its own characterization of the disappearance of persons, in the first cases of this kind submitted to it in the late 1980s, as a "multiple and continued violation of many rights" recognized in the American Convention; and it rightly points out (paragraph 38 of the Judgment) that the Guatemalan Penal Code in force typifies forced disappearance as a *continued* crime (Article 201 *ter* amended). Furthermore, the notion of *continuing situation (situación continuada/situation continue)* is also judicially recognized by the European Court of Human Rights, in decisions on cases of detention dating back to the 1960s.[1]

10. It should also be borne in mind that, in the instant *Blake* case, the Commission is not in fact seeking a decision of the Court on the violation of the right to life in particular or on the violation of the right not to be subject to arbitrary detention in particular. The Commission's complaint comprises the alleged multiple violations of human rights involved in the continuing disappearance of Mr. Nicholas Chapman Blake, taken as a whole. Hence the importance of the understanding of the present case of disappearance, bearing in mind the ineluctable interrelation between certain protected human rights as disclosed by a case of this nature.

11. As a final thought, may I point out that cases of disappearance, such as the present one, encompass, among related rights, *non-derogable* fundamental rights, and this, in my understanding, places the interdiction of that crime in the domain of *jus cogens*, of the peremptory norms of general international law. It is not surprising that the 1994 Inter-American Convention on Forced Disappearance of Persons prohibits (Article X) the invocation of any justification for that crime, even in exceptional circumstances (e.g., state or threat of war, or any public emergencies).

12. I say this because, in my view, the emphasis of this Judgment of the Court on preliminary objections should have been placed, not on the sword of Damocles of 9

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1 Moreover, the practice of the Human Rights Committee, under the United Nations Covenant on Civil and Political Rights and its first Optional Protocol, as from the early eighties, contains examples of the consideration of continuing situations generating events that occurred or persisted after the date of entry into force of the Covenant and Protocol with regard to the State at issue, and which constituted *per se* violations of the rights enshrined in the Covenant.

March 1987, date on which Guatemala accepted the jurisdiction of the Court (which must be accepted as a limitation *ratione temporis* of its jurisdiction, given the present stage of insufficient evolution of the precepts of the law of treaties to fulfill the basic purpose of effective protection of human rights), but rather on the nature of the alleged multiple and interrelated violations of protected human rights, prolonged in time, with which the present case of disappearance is concerned.

13. When, in relation to Article 62(2) of the American Convention on Human Rights, by the application of the rigid postulates of the law of treaties one is led to a situation like the present one, in which issues of the investigation of the detention and death of a person, and of the punishment of the perpetrators, end up by being returned to the domestic jurisdiction, serious questions subsist in the air, revealing a serious challenge for the future. The entire evolution of the international law of human rights, over the past five decades, has been constructed on the understanding or premise that the protection of human rights, as rights inherent in the human being, is not exhausted -cannot be exhausted- in the action of the State.

14. It calls to attention that, in the circumstances of the present case, one has had to resign oneself to the *renvoi* or abandonment to the national jurisdiction of the issues of the investigation of the detention and death of a person, and the punishment of those responsible for them, after resorting to the international jurisdiction precisely in view of the shortcomings or insufficiencies of national jurisdiction to this effect. The great challenge appearing on the horizon consists, in my view, in continuing to advance resolutely towards the gradual humanization of the law of treaties (a process already initiated with the emergence of the concept of *jus cogens*[2]), as this chapter of international law persists still strongly impregnated with State voluntarism and an undue weight attributed to the forms and manifestations of consent.

15. It only remains for me to express the hope that, perhaps with the gradual development of the conceptualization, and a solid jurisprudential construction, of the crime of forced disappearance of persons -only recently defined in the international law of human rights,- in the foreseeable future it will no longer be possible to compartmentalize or introduce artificial separations among its multiple components. The day this degree of evolution of the matter is attained, any preliminary objection that implies separating the examination of the detention and death of a person from the consideration of alleged additional and continued violations of related rights ought to be discarded as unfounded.

Antônio Augusto Cançado Trindade
Judge

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[2] Vienna Convention on the Law of Treaties (1969), Articles 53 and 64; Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), Articles 53 and 64. Another illustration in this sense lies in the safeguard clause in defense of the human being contained in Article 60(5) of the two Vienna Conventions (as to the termination of a treaty or the suspension of its application).

Manuel E. Ventura-Robles
Secretary