DISSENTING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I regret that I am unable to share the majority decision of the judges of the Inter-American Court of Human Rights in the third and fourth operative paragraphs, and the principle it adopted on these points in the considering paragraphs 125 and 130 to 132, respectively, of the judgment on merits and reparations in *The Serrano Cruz Sisters v. El Salvador*, because the Court based the judgment on its previous decision (judgment on preliminary objections of November 23, 2004) concerning the first preliminary objection *ratione temporis* (and, in reality, *ratione materiae* also) filed by the respondent State.

2. I consider that this objection, accepted by the Court with my dissenting opinion, prevented it, unduly, from considering facts and acts that began to be executed prior to the date on which the State accepted the Court's compulsory jurisdiction (June 6, 1995) and which continued after the date of that acceptance and up until the present – a decision which I opposed for the reasons described in my previous dissenting opinion (judgment on preliminary objections of November 23, 2004).

3. That decision has conditioned the Court's judgment on merits and reparations, leading it, in the instant case, to limit its powers of protection under the Convention – a limitation that I consider unacceptable. Consequently, in this dissenting opinion to the judgment on merits and reparations in the *Serrano Cruz Sisters* case, I am obliged to record my personal observations justifying my position.

4. My observations relate to seven specific points, which are: (a) the need to overcome excesses of State voluntarism; (b) the development and relevance of the right to identity; (c) the key importance of the rights of the child in this case; (d) the broad scope of the right to life; (e) subsistence of State responsibility even though the Court limited its own jurisdiction in this case; (f) the need for the compulsory international jurisdiction of the Inter-American Court to be automatic; and (g) the perennial challenge of the issue of the relationship between time and law.

I. Towards overcoming excesses of State voluntarism

5. In my above-mentioned dissenting opinion in the judgment on preliminary objections in this case, I stated that:

> "By protecting fundamental values shared by the international community as a whole, contemporary international law has overcome the anachronic voluntarist conception belonging to a distant past. Contrary to what some rare, nostalgic survivors of the apogee of positivism-voluntarism presume, the methodology of interpreting human rights treaties developed on the basis of rules of interpretation embodied in international law (such as those stipulated in Articles 31 to 33 of the 1969 and 1986 Vienna Conventions on the Law of Treaties) applies to both the substantive provisions (on the protected rights) and the clauses that regulate international protection mechanisms – based on the principle *ut res magis valeat quam pereat*, which corresponds to the so-called *effet utile* (sometimes called the principle of effectiveness), amply supported by international case law." (para. 7)

6. Indeed, it would be inadmissible to subordinate the operation of the treaty-based protection mechanism to conditions that were not expressly authorized by Article 62 of the American Convention, because this would not only affect immediately the

effectiveness of the operation of this mechanism, but also fatally impede its possibilities for future development. Also, as I added in this dissenting opinion, from the Court's experience, it is clear that:

> "The primacy of considerations of *ordre public* over the will of individual States; [both the European and the Inter-American Court …] have set very high standards of State conduct and a certain degree of control over the imposing of undue restrictions by States; and it is encouraging to see that they have strengthened the position of the individual as a subject of international human rights law, with full procedural capacity." (para. 47)

7. Some years ago, before this case of the *Serrano Cruz sisters*, in *Blake v. Guatemala*, a preliminary objection of lack of jurisdiction *ratione temporis* filed by the respondent State and partially accepted by this Court led to an undue fragmentation of the continued crime of forced disappearance of persons, and I adopted a position against this in the separate opinions that I presented at all stages of the processing of the case (1996 to 1999) before the Court. When it ruled on the case, the forced disappearance of the victim had ended with the identification of his whereabouts (i.e. his remains).

8. The situation in *The Serrano Cruz Sisters v. El Salvador* is of even greater concern. The first preliminary objection filed by the respondent State and wholly admitted by the Court in its judgment of November 23, 2004 (first and second operative paragraphs) results not in fragmentation, but in the Court's total failure to consider the continued crime of forced disappearance of persons, and all the results of that disappearance, which persist up until the present. In addition, the limitation, allegedly *ratione temporis,* filed by the respondent State (in the said preliminary objection) as regards facts or acts that "began to be executed" before the date on which the State accepted the Court's jurisdiction and which continue *after* that date until the present, does not fall within any of the conditions for accepting the Court's jurisdiction (under Article 62 of the American Convention), nor is it merely of a *ratione temporis* nature.

9. As I recalled in my dissenting opinion in the judgment on preliminary objections in this case, the respondent State itself made it plain, by its arguments, that its purpose was very clearly to exclude consideration of each and every human rights violation that had originated in the internal armed conflict which plagued the country and its people for more than a decade (1980-1991) from the jurisdiction of the Inter-American Court. In my opinion, the terms of the acceptance of the Court's jurisdiction by the State of El Salvador exceeded the conditions stipulated in Article 62 of the American Convention, by unduly excluding from its possible consideration facts and acts *subsequent* to this acceptance, that "began to be executed" prior to it.

10. The respondent State's objection was thus of a *ratione temporis* and *ratione materiae* nature, forming an *imbroglio* of indeterminate time and broad, general and undefined scope; this objection was accepted by the Court for reasons that I fail to understand, when the Court should have declared them inadmissible and invalid. As I stated in my above-mentioned dissenting opinion:

> "By proceeding in this way, accepting the terms of this preliminary objection, the majority of the members of the Court accepted State voluntarism, leaving unprotected those who consider themselves the victims of the continuing human rights violations of a particular gravity that occurred during the Salvadoran armed conflict, as a result of the documented practice of the forced disappearance of children and the elimination of their identity and

name during this armed conflict."[1] (para. 16)

11. By accepting State voluntarism, the Court limited itself unduly and regressively,[2] and unfortunately it did so in an important human rights case that represents a microcosm of one of the greatest tragedies suffered by the countries of Latin America in recent decades: the tragedy of the children who disappeared in the Salvadoran armed conflict. As I stated in my previous dissenting opinion in this case (judgment on preliminary objections),

> "(...) ironically, in the second operative paragraph of this judgment in the *Serrano Cruz Sisters v. El Salvador*, what has been transformed into a "continuing situation" by a decision of the majority of the members of the Court, is not the *situation* allegedly violating human rights that was submitted to the Court's consideration and decision, but rather the continuing situation imposed by the State on the Court that prevents it from exercising its jurisdiction; namely, to examine and rule on the matter – which, in my opinion, is almost a juridical absurdity. It is well known that the history of juridical thought, and even human thought in general, does not make linear progress, but I sincerely hope that, in a temporal dimension, the second operative paragraph of this judgment of the Court is only a stumbling block that has to be overcome, a mishap on the long road that has to be traveled.
>
> In keeping with the Court's recent case law, its judgment in the *Trujillo Oroza* case (*supra*), its abovementioned judgments on competence in the *Constitutional Court* and *Ivcher Bronstein* cases, and on preliminary objections in the *Hilaire*, *Benjamin* and *Constantine* cases, are also notable international advances in international case law in general and its legal grounds. The last two cases are today part of the history of human rights in Latin America, with widespread positive repercussions on other continents; moreover, they have created expectations of continued progress in the Court's case law in the same direction."[3] (paras. 22 and 23).

12. The consequences of the Court's decision in the previous judgment on preliminary objections in this case, extend to this judgment on merits and reparations. Constricted by the hermeneutic hermetism of its previous judgment on preliminary

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[1] For a report that reveals that human cruelty has no limits, or borders (since this practice occurred in internal armed conflicts in other countries also) cf. Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos, *El Día Más Esperado - Buscando a los Niños Desaparecidos de El Salvador*, San Salvador, UCA Editores, 2001, pp. 11-324; Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos, *La Problemática de Niñas y Niños Desaparecidos como Consecuencia del Conflicto Armado Interno en El Salvador*, San Salvador, APBNND, 1999, pp. 4-80; Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos, *La Paz en Construcción - Un Estudio sobre la Problemática de la Niñez Desaparecida por el Conflicto Armado en El Salvador*, San Salvador, APBNND, [2002], pp. 3-75; Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos, "*En Búsqueda: Identidad - Justicia - Memoria*", 4 *Época* - San Salvador (2003), pp. 3-15; and cf. Amnesty International, *El Salvador - Dónde Están las Niñas y los Niños Desaparecidos?* London/San Salvador, A.I., 2003, pp. 1-10. Cf. also: Office of the Ombudsman, *Caso Ernestina and Erlinda Serrano Cruz* (Informe de la Sra. Procuradora para la Defensa de los Derechos Humanos sobre las Desapariciones Forzadas de las Niñas, Ernestina and Erlinda Serrano Cruz, Su Impunidad Actual y el Patrón de la Violencia en que Ocurrieron Tales Desapariciones), San Salvador, PDDH, 2004, pp. 1-169 (internal circulation).

[2] Previously, for example, in *Trujillo Oroza v. Bolivia* (judgment on merits of February 27, 2002), the Court considered the continued crime integrally, as a whole, as it should be – which meant, as I stated in my separate opinion in this case (paras. 2-19), that it is possible to overcome the contingencies of the classic principles of the law of treaties when there is awareness of this need; *boni judicis est ampliare jurisdictionem*. Thus the Court gave expression to the superior values that underlie the norms for the protection of human rights, shared by the whole international community (paras. 20-22). In addition, in its judgments on preliminary objections in the *Hilaire* case (and in the *Benjamin* and *Constantine* cases (2001), with regard to Trinidad and Tobago), the Inter-American Court considered rightly that, if it accepted the limitations filed by the States in their own terms in the instruments accepting its compulsory jurisdiction, this would deprive it of its powers and make the rights protected by the American Convention illusory (para. 93, and cf. para. 88).

[3] Cf., e.g. A. Salado Osuna, *Los Casos Peruanos ante la Corte Interamericana de Derechos Humanos*, Lima, Edit. Normas Legales, 2004, pp. 94-131.

objections in this case, the Court eluded the necessary development of case law to be consequent with its advanced evolutionary interpretation of the American Convention. This evolutionary interpretation is applicable, I believe, in relation to the provisions of the American Convention of both a substantive and procedural nature.[4]

II. A lost opportunity to develop case law

1. The relevance of the right to identity

a) The meaning and scope of the right to identity

13. Given the circumstances of this case, I do not see how it is possible to avoid the question of the *right to identity* of the two sisters who are still disappeared, Ernestina and Erlinda Serrano Cruz. It is an issue on which the Court should have *developed case law*, because, in my opinion, there is no way in which the right to identity can be disassociated from the legal personality of the individual as a subject of domestic and international law. Therefore, the Court should have examined jointly the alleged violations in this case to the right to a name (Article 18 of the American Convention) and the rights of the family (Article 17 of the Convention). Respect for the right to identity enables the individual to defend his rights and, consequently, also has an impact on his legal and procedural capacity in both domestic and international law.

14. The right to identity presumes the right to know personal and family information, and to have access to this, to satisfy an existential need and safeguard individual rights. This right also has an important cultural (in addition to social, family, psychological and spiritual) content, and is essential for relationships between each individual and the rest of society, and even for his understanding of the outside world, and his place in it.

15. Without a specific identify, one is not a *person*. The individual is constituted as a being that includes his supreme purpose within himself, and realizes this throughout his life, under his own responsibility. In this optic, safeguarding his right to an identity becomes essential. The legal personality is expressed as a legal category in the sphere of law, as the unitary expression of the aptitude of a human being to be a holder of rights and obligations at the level of regulated human relations and behavior.[5]

16. The right to identity expands the protection of the human being; it exceeds the category of subjective rights rooted in the sphere of law; it also supports the legal personality as a category in itself in the conceptual sphere of law. The identity expresses what is most personal in each human being, extending to his relationships with his fellow human being and with the outside world. The concept of the right to

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[4] Cf. A.A. Cançado Trindade, "The Interpretation of the International Law of Human Rights by the Two Regional Human Rights Courts, *in Contemporary International Law Issues: Conflicts and Convergence* (Proceedings of the III Joint Conference ASIL/Asser Instituut, The Hague, July 1995), The Hague, Asser Instituut, 1996, pp. 157-162 and 166-167; A.A. Cançado Trindade, "Le développement du Droit international des droits de l'homme à travers l'activité et la jurisprudence des Cours Européenne et Interaméricaine des Droits de l'Homme" (Discours du Président de la Cour Interaméricaine des Droits de l'Homme), *in* CourEDH, *Cour Européenne des Droits de l'Homme - Rapport annuel 2003*, Strasbourg, CourEDH, 2004, pp. 41-50; A.A. Cançado Trindade, "La Interpretación de Tratados en el Derecho Internacional y la Especificidad de los Tratados de Derechos Humanos, *in Estudios de Derecho Internacional en Homenaje al Prof. E.J. Rey Caro* (ed. Z. Drnas de Clément), vol. I, Córdoba/Argentina, Ed. Drnas/Lerner, 2003, pp. 747-776.

[5] Cf., in this regard, e.g., L. Recaséns Siches, *Introducción al Estudio del Derecho*, 12a. ed., Mexico, Ed. Porrúa, 1997, pp. 150-151, 153, 156 and 159.

identity began to be developed more thoroughly in the 1980s and 1990s.

17. The concept of individual *subjective rights* has a longer history, originating in particular in the jusnaturalism school of thought in the seventeenth and eighteenth centuries, and systematized in legal doctrine throughout the nineteenth century. However, in the nineteenth century and at the beginning of the twentieth century, this concept continued to be framed in domestic public law, emanating from the public authorities, and influenced by legal positivism.[6] Subjective rights were conceived as the prerogative of the individual as defined by the legal system in question (objective law).[7] It is not surprising that the right to identity transcends subjective rights.

18. However, as I stated in my concurring opinion in the Court's Advisory Opinion No. 17 on the *Juridical Status and Human Rights of the Child* (2002), it cannot be denied that:

> "The crystallization of the concept of individual subjective right, and its systematization, achieved at least an advance towards a better understanding of the individual as a *titulaire* of rights. And they rendered possible, with the emergence of human rights at international level, the gradual overcoming of positive law. In the mid-XXth century, the impossibility became clear of the evolution of Law itself without the individual subjective right, expression of a true "human right."[8]
>
> The emergence of universal human rights, as from the proclamation of the Universal Declaration of 1948, came to expand considerably the horizon of contemporary legal doctrine, disclosing the insufficiencies of the traditional conceptualization of the subjective right. The pressing needs of protection of the human being have much fostered this development. Universal human rights, superior to, and preceding, the State and any form of politico-social organization, and inherent to the human being, affirmed themselves as opposable to the public power itself.
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> The international juridical personality of the human being crystallized itself as a limit to the discretion of State power. Human rights freed the conception of the subjective right from the chains of legal positivism. If, on the one hand, the legal category of the international juridical personality of the human being contributed to instrumentalize the vindication of the rights of the human person, emanated from International Law, - on the other hand the *corpus juris* of the universal human rights conferred upon the juridical personality of the individual a much wider dimension, no longer conditioned by the law emanated from the public power of the State " (paras. 47 and 49-50).

19. The right to identity reinforces the protection of human rights, protecting each individual against the denigration or violation of his "personal truth."[9] The right to identity, which encompasses the attributes and characteristics that individualize each human being, seeks to ensure that the individual is faithfully represented in his projection towards his social environment and the outside world.[10] Hence, its relevance which has a direct impact on the legal personality and capacity of the individual in both

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6 L. Ferrajoli, *Derecho y Razón - Teoría del Garantismo Penal*, 5a. ed., Madrid, Ed. Trotta, 2001, pp. 912-913.

7 Ch. Eisenmann, "Une nouvelle conception du droit subjectif: la théorie de M. Jean Dabin", 60 *Revue du droit public et de la science politique en France et à l'étranger* (1954) pp. 753-774, esp. pp. 754-755 and 771.

8 J. Dabin, *El Derecho Subjetivo*, Madrid, Ed. Rev. de Derecho Privado, 1955, p. 64.

9 C. Fernández Sessarego, *Derecho a la Identidad Personal*, Buenos Aires, Edit. Astrea, 1992, pp. 99-100 and 126.

10 Cf. *ibid*., pp. 113 and 115.

domestic and international law.

b) Components of the right to identity

20. Even thought the right to identity is not expressly established in the American Convention, its material content is implied, *in the circumstances of the specific case*, particularly from Articles 18 (Right to a Name) and 17 (Rights of the Family) of the American Convention, in relation to Article 1(1) thereof. The violation of these and other rights expressly established in the American Convention results in the obligation of the respondent State to make reparation.

21. The right to identity, like the right to the truth, is inferred by specific rights embodied in the American Convention; it is more a necessary development of case law that, in turn, leads to the progressive development of the *corpus juris* of international human rights law. Thus, other international human rights instruments – subsequent to the American Convention on Human Rights, such as the 1989 United Nations Convention on the Rights of the Child[11] and the 1990 United Nations Convention on the Protection of the Rights of All Migrant Workers and their Families, effectively recognize the right to identity as such.[12]

22. The right to identity, in *the Serrano Cruz Sisters* case heard under the American Convention, is inferred particularly from the right to a name and the rights of the family (Articles 18 and 17 of the Convention, respectively). But, in other circumstances, in another case, it could equally be inferred from other rights embodied in the Convention (such as the right to juridical personality (Article 3); the right to personal liberty (Article 7); the right to freedom of conscience and religion (Article 12); the right to freedom of thought and expression (Article 13), and the right to nationality (Article 20)).

23. The right to a name, established in the American Convention (Article 18), is also expressly recognized in the Convention on the Rights of the Child (Article 7(1)) and in the African Charter on Human and Peoples' Rights (Article 6(1)). And, although the European Convention on Human Rights does not establish it expressly, the European Court of Human Rights has stated that this right is inferred by Article 8 (Right to Private and Family Life) of the Convention.

24. The European Court understands that, "the name of an individual concerns his private and family life, because it is a means of personal identification and a connection with the family."[13] What is involved is not the name *per se*, but rather the name as an "asset of personal identity," designating the individual, who is identified with it,[14] and by which he exercises and defends his individual rights. The right to identity, made up of the material content of the right to a name and the rights of the family, not only expands the list of individual rights, but also contributes to strengthening the protection

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[11] In particular Articles 7 and 8.

[12] Also, in a world marked, nowadays, by so many internal armed conflicts, which victimize women and children particularly, it is not surprising that the United Nations General Assembly has urged and called on all the States Members to respect the right of children to preserve their identity (including respect for the rights to a name and family relationships (resolution 58/57 of 22 December 2003).

[13] Cf. ECourtHR, *Stjerna v. Finlandia*, Judgment of November 25, 1994, Series A, no. 299-A, p. 60, para. 37; ECourtHR, *Burghartz v. Suiza*, Judgment of February 22, 1994, Series A, no. 280-B, p. 28, para. 24.

[14] C. Fernández Sessarego, *op. cit. supra* no. (9), pp. 25 and 75.

of human rights.

25. Its other component in this case, the rights of the family, is expressly established in both the American Convention (Article 17) and in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador, Article 15), among other international treaties.[15] In its Advisory Opinion No. 17 on the *Juridical Status and Human Rights of the Child*, the Court stated that recognition of the family as a natural and fundamental component of society, with the right to protection by society and the State was a fundamental principle of international human rights law;[16] in the words of the Court,

> "In principle, the family should provide the best protection of children against abuse, abandonment and exploitation. And the State is under the obligation not only to decide and directly implement measures to protect children, but also to favor, in the broadest manner, development and strengthening of the family nucleus. In this regard, "[r]ecognition of the family as a natural and fundamental component of society," with the right to "protection by society and the State," is a fundamental principle of International Human Rights Law, enshrined in Articles 16(3) of the Universal Declaration, VI of the American Declaration, 23(1) of the International Covenant on Civil and Political Rights and 17(1) of the American Convention [on Human Rights]" (para. 66).

The Court added that the right to protection of the family acquires even greater relevance when a child is separated from its family.[17] In this case, the rights of the family require the State to take positive measures.

c) The key importance of the rights of the child

26. In the public hearing before the Court in this case on September 7 and 8, 2004, the Director of the *Asociación Pro-Búsqueda* (J.M.R. Cortina Garaícorta) gave testimony[18] and, among other probative elements considered by the Court, described the context of the instant case:

> "(...) During the armed conflict in El Salvador, there was a systematic pattern of child disappearance during military operations. The case of Erlinda and Ernestina fits perfectly into the general pattern of child disappearance during the conflict. The Armed Forces and the humanitarian institutions that kept the children did nothing to find their families; they were taken to orphanages and to military barracks or they were 'sold in adoption.' It was sufficient for a judge to declare that a child had been materially and morally abandoned for its adoption to be authorized. These adoptions were based on the lie of abandonment and that the children were orphans. 126 children have been found abroad, in 11 countries of America and Europe. All of them have been naturalized as citizens of the country in which they live and almost all of them do not speak their mother tongue. (...)

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15 Also in the United Nations Covenant on Civil and Political Rights (Article 23), the United Nations Covenant on Economic, Social and Cultural Rights(Article 10(1)), the United Nations Convention on the Rights of the Child (Article 8), The European Convention on Human Rights (Article 8). and cf., also, on family reunification, Protocol II to the 1949 Geneva Conventions on international humanitarian law (Article 4(3)(b)).

16 On the importance of the principles of international human rights law in international public law and in all legal systems, cf. ICourtHR, Advisory Opinion on the *Juridical Status and Rights of Undocumented Migrants* (OC-18/03, of September 17, 2003, Series A, no. 18), concurring opinion of Judge A.A. Cançado Trindade, pp. 213-267, paras. 1-89.

17 Cf. I/ACourtHR, *Juridical Status and Human Rights of the Child* Advisory Opinion OC-17/02, of August 28, 2002, Series A, no. 17, pp. 105-106, para. 71.

18 Its transcription is summarized in paragraph 36(a)(3) of this judgment, where the quotation reproduced below is to be found.

> (...) The *Asociación Pro-Búsqueda* was established in August 1994. Up until September 2004, it had resolved 246 requests to trace children and still had 475 cases to resolve. It knows of more than 40 cases of children who disappeared during the armed conflict who are in the homes of Army officers; it was *vox populi* that children were given away in the military barracks. (...)
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> (...) The March 1993 report of the Truth Commission did not mention the case of the disappeared children, probably because it did not have time to investigate the facts of the disappearance of children. The Truth Commission included the disappearance of children in the global situation of disappearances, and described 30 cases of major massacres and some cases of disappearances as examples. (...)"

27. In his testimony before the Court, the Director of the *Asociación Pro-Búsqueda* also stated that:

> "It was a phenomenon that occurred in El Salvador; usually, when these children were brought to the shelters, a judge's decision [...] declaring that the children had been materially and morally abandoned was sufficient for the judge to order their adoption. [...] The costs of the adoptions depended on where they were carried out; they ranged from five to eight thousand dollars, up to twenty thousand. We have one case in which we were told of a "fattening-up" home, in file 36-A-12-83; it states that the cost of these children, who had been abducted [...] was from 15 to 20 thousand dollars; money which, afterwards, these people shared among themselves and with others [...]. [...] this home, [...] I would call it a child trafficking home [...]. I believe that these adoptions, even if they may have been legal, because they were authorized by a judge, were unlawful, because they were based on the lie [...] that the children had been orphaned or materially and morally abandoned."[19]

28. Given the circumstances of this case, the Court should have also considered the alleged violations of the rights of the child, bearing in mind the provision of Article 19 of the American Convention which establishes that "every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State." This provision occupies a central position in the consideration of this case which occurred in the context of the tragedy of the children who disappeared during the Salvadoran armed conflict from 1980-1991. In my opinion, the Court should have established that, pursuant to Article 19 of the Convention, the rights of the child had been violated in the instant case to the detriment of the sisters, Ernestina and Erlinda Serrano Cruz.

29. The two sisters, who continue disappeared to this day, were children when the original facts under investigation by the Chalatenango Trial Court occurred and, today, they would be 29 years old and probably 27 years old, respectively. The case occurred in the context of a true human tragedy (during the 1980-1991 Salvadoran armed conflict), about which the *Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos* has gathered information that speaks for itself,[20] and cannot be avoided. The victims were the disappeared children and also their immediate families, according to the expanded *notion of victim*[21] supported by the *consistent case law* of the Court since *Blake v.*

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[19] ICourtHR, Transcription of the public hearing on preliminary objections and possible merits, reparations and costs in the case of the Serrano Cruz Sisters v. El Salvador, held on September 7 and 8, 2004, at the seat of the Court, San José, Costa Rica, Inter-American Court of Human Rights, 2005, p. 15 of this testimony. (for internal circulation) [in Spanish only]

[20] Cf., e.g., Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos, *La Problemática de Niñas y Niños Desaparecidos como Consecuencia del Conflicto Armado Interno en El Salvador*, El Salvador, San Salvador, 1999, pp. 29-35; Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos/Save the Children, *Un Estudio sobre la Problemática de la Niñez Desaparecida por el Conflicto Armado en El Salvador*, El Salvador, San Salvador, 2002, pp. 24-26.

[21] A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of

Guatemala (judgment on merits of January 24, 1998).

30. However, in a case such as *The Serrano Cruz Sisters v. El Salvador*, which occurred in the context of a true human tragedy that resulted in hundreds of victims, the human rights violations, in addition to affecting the direct victims and the indirect victims (their next of kin), had an impact on the whole social tissue. In this regard, I stated in my separate opinion in the "Street Children" case (Villagrán Morales et al. *v. Guatemala*, judgment on reparations, of May 26, 2001), that:

> "(..) although those responsible for the established order do not realize it, the suffering of those who are excluded is inexorably projected on the whole social body. [...] Human suffering has both an individual and a social dimension. Thus, the damage caused to each human being, however humble, affects the whole community. As this case reveals, the victims proliferate among the immediate surviving next of kin who are also forced to live with the torment of the silence, indifference and oblivion of those around them" (para. 22).

31. In this case, the most recent inventory drawn up by the *Asociación Pro-Búsqueda*, which forms part of the case file, lists 698 children who disappeared during the Salvadoran armed conflict, aged at the time from less than one year to 18 years old.[22] Faithful compliance with Article 19 of the American Convention, in circumstances such as those of the instant case, which occurred in the context of this human tragedy, require the immediate search for, tracing, finding, family reunion,[23] and psychological treatment of the disappeared children who are found. Most efforts in this regard have been undertaken by civil society entities (such as, above all, the *Asociación Pro-Búsqueda*[24]), moved by human solidarity, and not by the public authorities,[25] who have the duty to protect all those subject to their jurisdiction.

d) The fundamental right to a decent life

Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987), chapter XI ("The Evolution of the Notion of Victim or of the Condition of the Complainant in the International Protection of Human Rights"), pp. 243-299.

[22] Some of the children identified were found alive in different situations, in orphanages or with families in El Salvador and abroad, in the Americas and in Europe (through *de facto* "adoptions" or undue appropriation by civilians and members of the Army). The *Asociación Pro-Búsqueda* is investigating 126 cases of international adoptions, and also cases of alleged victims of the illicit trafficking of children (with the possible alteration of first and last names).

[23] As required also by the United Nations Convention on the Rights of the Child, Article 39.

[24] As expressly stated by the United Nations Committee on the Rights of the Child under the Convention on the Rights of the Child (UN, doc. CRC/C/15/Add.232, of 30 June 2004, para. 31), which attributed the tracing and identification of almost 250 children principally to the *Asociación Pro-Búsqueda*, and has expressed its "concern" because the State had not "played a larger role in the investigation into the disappearance of 700 other children" during the Salvadoran armed conflict from 1980-1991 (*Ibíd*., p. 7, para. 31).

[25] The respondent State even questioned the very existence of the sisters, Erlinda and Ernestina Serrano Cruz, in this case before the Inter-American Court, and did not adopt all necessary measures to determine their whereabouts and safeguard their right to identity (which includes the right to a name and the right to the protection of the family), a situation which persists until today. The Serrano Cruz sisters, who continue disappeared, were sought by their mother before she died, and continue to be sought by their living siblings. Moreover, the United Nations Human Rights Committee, under the Covenant on Civil and Political Rights, has urged the State of El Salvador to present "detailed information on the number of children found alive and those who perished during the 1980-1991 armed conflict; UN, document CCPR/CO/78/SLV, of 22 August 2003, p. 5, para. 19.

32. I do not see how to avoid considering the right to life, as the Inter-American Court has in this case, to my regret. In my opinion, the hypothesis and the constant references in considering paragraphs 130 to 132 of this judgment are entirely unsatisfactory. In its acclaimed judgment on merits in the *"Street Children" case (Villagrán Morales et al. v. Guatemala*, of November 29, 1999, paragraph 144), which already belongs to the history of the international protection of human rights in Latin America, this same Court stated that:

> "The right to life is a fundamental human right, and the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning. Owing to the fundamental nature of the right to life, restrictive approaches to it are inadmissible. In essence, the fundamental right to life includes not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this basic right do not occur and, in particular, the duty to prevent its agents from violating it"

33. The State has not complied with this obligation in the instant case. The right to life, in the sense defended by the Court five years ago, was violated in this case, to the detriment of the sisters, Ernestina and Erlinda Serrano Cruz, who are still disappeared. I consider that this is what the Court should have established in this judgment. I cannot see how it can be maintained that two children who disappeared in an armed conflict have had their right to a decent life preserved. Nor do I see how it is possible to fail to rule in this regard, as the Court failed to do in this judgment. Moreover, I do not see how the two children who are still disappeared have been able to develop an authentic life project. The two disappeared sisters are innocent and silent, but not forgotten, victims of the age-old violence of man against man.

34. What is the reason for armed conflicts? There is no reason. They lead to nothing; they are a desperate race towards nothing. All combatants become pathetic objects of the conflict. They no longer think; they just kill, abduct children (ending their innocence and identity), and become engines of destruction. They are unable to think, because they have entered the vacuum of nothingness. They have brutalized themselves, because killing and destroying is their profession; for nothing. Absolutely nothing. Already in the eighth century A.D., Homer, in the *Iliad*, affirmed with insuperable force and strength of expression, with penetrating words that should be read attentively by the numerous unscrupulous and irresponsible apologists of the use of force nowadays:

> "War - I know it well, and the butchery of men.
> Well I know, shift to the left, shift to the right
> my tough tanned shield. That's what the real drill,
> defensive fighting means to me. I know it all,
> (...) I know how to stand and fight to the finish,
> twist and lunge in the War-god's deadly dance.
> (...) Ah for a young man
> all looks fine and noble if he goes down in war,
> hacked to pieces under a slashing bronze blade -
> he lies there dead... but whatever death lays bare,
> all wounds are marks of glory. When an old man's killed
> and the dogs go at the gray head and the gray beard
> (...) - that is the cruelest sight
> in all our wretched lives!"[26]

[26] Homer, *The Iliad*, N.Y./London, Penguin Books, 1991 [re-ed.], pp. 222 and 543-544, verses 275-278, 280-281 and 83-89, respectively.

35. Given the increasing vulnerability of the individual in our violent world, which has not learned the lessons of the past, the right to life calls for greater protection of the individual, as advocated by this Court in the "*Street Children*" case (*supra*). Another example, along the same lines, is to be found in the recent case law of the European Court of Human Rights: in *Cyprus v. Turkey* (judgment of May 10, 2001), for example, the European Court established that the right to life (Article 2 of the European Convention on Human Rights) had been violated, owing to the failure of the respondent State to comply with the procedural obligation to investigate the whereabouts of the disappeared persons.[27]

36. In its judgments in three other recent cases against Turkey – *Kaya* (February 19, 1998),[28] *Ogur* (May 20, 1999)[29] and *Irfan Bilgin* (July 17, 2001)[30] – the European Court also maintained that Article 2 of the European Convention (right to life) had been violated owing to the failure of the respondent State to conduct an "effective investigation" into the circumstances of the death of the respective victims. In *Kiliç v. Turkey* (judgment of March 28, 2000), the European Court established that this right had been violated owing to the failure of the public authorities to take "reasonable measures available to them to prevent a real and immediate risk to the life of Kemal Kiliç";[31] the Court took identical decisions in the *Mahmut Kaya* (Judgment of March 28, 2000)[32] and *Akkoç* (Judgment of October 10, 2000)[33] cases, both relating to Turkey.

37. In *Velikova v. Bulgaria* (Judgment of October 4, 2000), the European Court again declared that Article 2 of the Convention (right to life) had been violated owing to the lack of an "effective investigation" into the death of the victim;[34] that Court considered that:

> "(...) the right to life ranks as one of the most fundamental provisions in the Convention. In the light of the importance of the protection afforded by Article 2, the Court must subject to the most careful scrutiny complaints about deprivation of life."[35]

38. In *Nachova and others v. Bulgaria* (Judgment of February 26, 2004), when deciding that Article 2 of the European Convention (together with Article 14) had been violated, the European Court reaffirmed the fundamental nature of the non-derogable right to life (under Article 2 of the Convention), and added that:

> "The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Article 2 be interpreted so as to make its safeguards

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27 ECourtHR, petition No. 25781/94, *Cyprus v. Turkey*, paras. 132-136.

28 ECourtHR, petition No. 158/1996/777/978, *Kaya v. Turkey*, para. 92.

29 ECourtHR, petition No. 21594/93, *Ogur v. Turkey*, para. 93.

30 ECourtHR, petition No. 25659/94, *Irfan Bilgin v. Turkey*, para. 145.

31 ECourtHR, petition No. 22492/93, *Kiliç v. Turkey*, para. 77.

32 ECourtHR, petition No. 22535/93, *Mahmut Kaya v. Turkey*, para. 101.

33 ECourtHR, petitions Nos. 22947/93 and 22948/93, *Akkoç v. Turkey*, para. 94.

34 ECourtHR, petition No. 41488/98, *Velikoca v. Bulgaria*, para. 84.

35 *Ibid*., para. 68.

practical and effective."[36]

39. The two international human rights courts (the Inter-American and the European Courts) have thus proceeded to develop case law on the right to life, based on the reiterated affirmation of its fundamental nature, either by recognizing its comprehensive normative or material content, or by surrounding this right with all the measures – regarding both prevention and investigation – that tend to maximize its protection. We must continue resolutely in this direction.

e) Conclusion

40. In my concurring opinion in *Five Pensioners v. Peru* (Judgment on merits and reparations of February 29, 2003) I recalled that:

> "(...) The [Inter-American] Court has consciously moved in the correct direction, in the exercise of one of its inherent powers, and taking both the American Convention and its *interna corporis* as living instruments, that require an *evolutionary* interpretation (as stated in its *consistent case law),*[37] to attend to the changing needs of the protection of the individual" (para. 16).

41. The Inter-American Court, in keeping with its evolutionary interpretation of the American Convention,[38] could not avoid, as it did in this judgment, proceeding to develop the necessary case law to which I referred above. In summary, I do not see how the Court could fail to conclude that the respondent State has violated the right to identity (with its components embodied in Articles 18 and 17 of the American Convention, *supra*, on the rights to a name and to the protection of the family) in relation to Article 1(1) of the Convention, to the detriment of Ernestina and Erlinda Serrano Cruz, because it has not determined the whereabouts of the two sisters, who are still disappeared, re-establishing their names and family ties.

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[36] ECourtHR, petitions Nos. 43577/98 and 43579/98, *Nachova and Others v. Bulgaria*, para. 92, and cf. para. 175.

[37] Cf., in this regard, the *obiter dicta in*: Inter-American Court of Human Rights (ICourtHR), Advisory Opinion OC-10/89, on the *Interpretation of the American Declaration on the Rights and Duties of Man in the Framework of Article 64 of the American Convention on Human Rights*, of July 14, 1989, paras. 37-38; ICourtHR, Advisory Opinion OC-16/99, on the *Right to Information on Consular Assistance within the Framework of Due Process of Law*, of October 1, 1999, paras. 114-115, and concurring opinion of Judge A.A. Cançado Trindade, paras. 9-11; ICourtHR, the *"Street Children" case (Villagrán Morales et al. v. Guatemala*), judgment on merits of November 19, 1999, paras. 193-194; ICourtHR, *Cantoral Benavides v. Peru*, judgment on merits of August 18, 2000, paras. 99 and 102-103; ICourtHR, *Bámaca Velásquez v. Guatemala*, judgment on merits of November 25, 2000, Separate opinion of Judge A.A. Cançado Trindade, paras. 34-38; ICourtHR, the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, judgment on merits and reparations of August 31, 2001, paras. 148-149; ICourtHR, *Bámaca Velásquez v. Guatemala*, judgment on reparations of February 22, 2002, separate opinion of Judge A.A. Cançado Trindade, para. 3.

[38] Illustrated, with such emphasis, in its three historic and pioneering Advisory Opinions Nos. 16, 17 and 18, regarding, respectively, *The Right to Information on Consular Assistance in the Framework of Due Process of Law* (OC-16/99, of October 1, 1999, Series A, no. 16, paras. 32, 34, 36 and 42); *Juridical Status and Human Rights of the Child* (OC-17/02, of August 28, 2002, Series A, no. 17, paras. 20-22); and *Juridical Status and Human Rights of Undocumented Migrants* (OC-18/03, of September 17, 2003, Series A, no. 18, paras. 54 and 120). and also in its judgments in the *"Street Children" case (Villagrán Morales et al. v. Guatemala)*, judgment of November 19, 1999, Series C, no. 63, paras. 192, 193 and 194; *Cantoral Benavides v. Peru* judgment of August 18, 2000, Series C, no. 69, paras. 98, 100 and 101; *Bámaca Velásquez v. Guatemala*, judgment of November 25, 2000, paras. 126, 157 and 209; *the Gómez Paquiyauri Brothers v. Peru*, judgment of July 8, 2004, Series C, no. 110, paras. 165 and 166; the *"Children's Rehabilitation Institute" v. Paraguay*, judgment of September 2, 2004, Series C, no. 112, para. 148; and *Tibi v. Ecuador*, judgment of September 7, 2004, Series C, no. 114, para. 144, among others.

42. Also, I do not see how the Court could fail to conclude that the respondent State has violated the rights of the child (Article 19 of the Convention), in relation to Article 1(1), to the detriment of Erlinda Serrano Cruz, who was under 18 years old when El Salvador accepted the Court's contentious jurisdiction. And, I do not see how the Court could fail to reaffirm the right to life in its most ample dimension, meaning a decent life, which was not respected by the respondent State to the detriment of the sisters, Ernestina and Erlinda Serrano Cruz, who are still disappeared. I can only hope that this judgment on merits and reparations, and the previous judgment on preliminary objections in the instant case are only a momentary setback and very soon the Inter-American Court will return to its line of evolutionary interpretation and its case law of the past five years, which emancipates the individual and has placed the Court in the vanguard of the international protection of human rights.

III. Subsistence of State responsibility even though the Court limited its own jurisdiction

43. There is a final very important matter to examine in this dissenting opinion. Even though the Inter-American Court, in a decision which I believe to be incorrect, has limited its own jurisdiction, to the point of depriving itself of any consideration of the forced disappearance of the sisters, Ernestina and Erlinda Serrano Cruz, which still persists, the responsibility of the respondent State still subsists for the facts that have been proved in this case. Since the views expressed in my previous opinions for this Court appear to have evaporated with the winds of time, as if I was just talking to myself, I will rescue my reflections of almost a decade ago from apparent *oblivion*.

44. I do so, knowing that it is possible that no one will take them into account, in a post-modern world that cultivates "virtual reality"; in which, people increasingly have many opinions but read very little, talk a great deal but think very little. I do so, even if it is just for myself, because, like Ionesco's rhinoceros, *je ne capitule pas* – even in a world in which the energies of those who practice the law of post-modernity seem to be almost entirely occupied by interminable[39] meetings and seminars and by rushed and frenetic computer screens, and not by the silent, tranquil, supportive and instructive company of books that invite reflection. In brief, I do it moved by a sentiment of duty as a judge of this Court.

45. As I stated in my dissenting opinion (paragraph 24(19)) in *Genie Lacayo v. Nicaragua* (order of the Court on the request for review of judgment of September 13, 1997), and in my separate opinion (paras. 32-36) in *Blake v. Guatemala* (judgment on merits of January 24, 1998), I understand that it is as of the accession to or ratification of the American Convention on Human Rights that a new State Party undertakes to respect all the rights protected by the American Convention and to ensure their free and full exercise (starting with the fundamental right to life). The acceptance by a State of the compulsory jurisdiction of the Court refers only to the legal proceedings before the Court in a specific human rights case.

46. Even though, the Court can only rule on a case after this acceptance of its jurisdiction by the State, in accordance with Article 62 of the Convention, this does not exempt the State from its responsibility for violations of the rights embodied in the Convention from the time it becomes a party to it. Even though the Court is unable to rule on a case before its contentious jurisdiction has been accepted (a question of

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[39] Not to mention insupportable.

jurisdiction), the treaty-based obligations of the State Party, assumed from the moment it accedes to the Convention or ratifies it, subsist (a question of *international responsibility*).

47. Hence, the moment from which El Salvador undertook to protect all the rights embodied in the American Convention, starting with the fundamental rights to a decent life and to humane treatment (Articles 4 and 5), was the moment of its ratification of the Convention on June 23, 1978 – that is, prior to all the events that occurred during the Salvadoran armed conflict (1980-1991). The time following its acceptance of the Court's contentious jurisdiction, on June 6, 1995, would only determine the possibility of having recourse to the Court to decide a specific case under the Convention, in the terms of Article 62 thereof.

48. But, it would never determine this based on a State-imposed restriction that is not established in Article 62 of the Convention, and even less if the intention was to encompass – as it did – facts and acts that "began to be executed" prior to the date of the State's acceptance of the Court's contentious jurisdiction and *that continue following* this date and *until the present.* This possibility simply does not exist under the American Convention, or under treaty law, applied from the perspective of an international human rights tribunal such as the Inter-American Court.

49. The issue of invoking the State party's *responsibility* for complying with its treaty-based obligations should not be confused with the issue of the State's *submission* (moreover, in terms that I consider unacceptable) to the Court's *jurisdiction*. The two become possible at different moments: the former, which is of a substantive or material nature, as of the ratification of the Convention by the State (or as of its accession thereto), and the latter, which is of a jurisdictional nature, as of its acceptance of the Court's contentious jurisdiction. Each and every State Party to the Convention, even if it has not accepted the compulsory jurisdiction of the Court - or has accepted it with limitations *ratione temporis* - remains bound by the provisions of the Convention from the time of its ratification or of accession thereto.

50. Even though most members of the Court have not wished to rule on all the rights violated in this case of the *Serrano Cruz Sisters,* owing to the "hybrid limitation" *ratione temporis* and *ratione materiae* of the Court's jurisdiction, nothing prevented them from stating that the respondent State in the instant case, as well as all the States Parties to the American Convention on Human Rights, are bound by all the protected rights from the date on which they ratify or accede to the Convention.

51. Despite the Court's silence on the rights to life, to a name, and to the protection of the family, and the rights of the child, the observations made by the Inter-American Commission on Human Rights on all these rights in its report No. 37/03 of March 4, 2003, in this case are still valid.[40] Since, together with the Court, the Commission has competence "with respect to matters relating to the fulfillment of the commitments made by the States Parties" (Article 33 of the American Convention), the latter undertake to heed the measures adopted in its reports. Consequently, El Salvador, as a State Party to the Convention, will know that it should comply not only with the operative paragraphs of this judgment of the Court, but also bear in mind *bona fide* the considerations of the other supervisory organ of the American Convention and the

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[40] ICHR, *Report 37/03 - Case 12,132 (El Salvador)*, doc. OEA/Ser.L/V/II.117-Doc.43, of March 4, 2003, p. 33, and cf. pp. 19-34.

Court's associate, and the other treaty-based obligations relating to the rights protected by the American Convention that arise from its ratification of the latter.

IV. The need for the compulsory international jurisdiction of the Inter-American Court to be automatic

52. The Inter-American Court of Human Rights[41] has, on different occasions, been imposing limits to excesses of State voluntarism. To my satisfaction, over the last five years, this Court has safeguarded the integrity of the protection mechanism of the American Convention on Human Rights and also the primacy of considerations of *ordre public* over the "will" of individual States. It has also established higher standards for the conduct of the State and a certain measure of control over undue restrictions by the States, thus strengthening the position of the individual as a subject of international human rights law, endowed with juridical and procedural capacity.

53. With regard to the grounds for its jurisdiction in contentious matters, its judgments on jurisdiction in *the Constitutional Court* and *Ivcher Bronstein v. Peru* cases (1999), and its judgments on preliminary objections in the *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* cases (2001) provide exemplary and eloquent illustrations of its firm position in defense of the integrity of the protection mechanism of the American Convention.[42] I regret, however, that I am unable to say the same with regard to the decision of the Court (on preliminary objections, and merits and reparations) in this case – although I dare hope that the Court will soon return to its cutting-edge case law on the grounds for its jurisdiction in contentious matters, in defense of the individual.

54. In this case, the Court denied itself the possibility of examining the whole of a *continued situation* of forced disappearance of persons, including acts that occurred *after* the acceptance of its jurisdiction in contentious matters by the respondent State, by acceding to an undue restriction imposed by the latter (in its instrument of acceptance), which attempted to remove from the Court's jurisdiction all the acts that constitute the continued situation if they "began to be executed" before the State's said acceptance of the Court's jurisdiction. The Court ceded to the excess of State voluntarism by accepting a "hybrid limitation *ratione temporis* and *ratione materiae*, which is not authorized by Article 62 of the Convention. I regret that I cannot agree with the majority of the members of the Court in this regression in its case law.

55. The notion of *continued situation* was conceived in international human rights law in order to provide protection – for example, in the case of a complex and extremely serious crime such as the forced disappearance of persons[43] - and so as not to deprive an international human rights court of its jurisdiction, as has occurred in this case. The notion of *continued situation*, which constitutes normative progress in international human rights law concerning protection against grave human rights violations, was used here not to expand the protective jurisdiction to the origin of such

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41 In the same way as the European Court of Human Rights.

42 As do the judgments of the European Court in *Belilos v. Suiza* (1988), *Loizidou v. Turkey* (preliminary objections, 1995), and in *I. Ilascu, A. Lesco, A. Ivantoc and T. Petrov-Popa v. Moldovia and the Russian Federation* (2001).

43 Which, owing to its "extreme gravity," is "considered as continued or permanent while the fate or whereabouts of the victim has not been established" – as determined in Article III of the Inter-American Convention on the Forced Disappearance of Persons of 1994.

violations but, the reverse, to remove the respondent State from this jurisdiction until the present, thus depriving the Court – by acceding to this merely formalistic interpretation – of exercising its treaty-based obligation to protect.

56. The notion of *continued situation*, which supports a procedural advance in international human rights law by contributing to the effectiveness of the right of international individual petition, was degraded in this case, because it was used to render this right of petition illusory. Consequently, in this case it was precisely the fundamental clauses (*cláusulas pétreas)* – as I have always called them within this Court [44] – that were removed from the international protection of the American Convention; namely, those relating to the right to individual international petition and to the acceptance of the Court's jurisdiction on contentious matters. In international human rights law, the notion of *continued situation* was conceived to protect individual victims and not the respondent State, as had surrealistically occurred in this case.

57. It was precisely to avoid difficulties such as the one that arose in this case, and that could arise again in future cases that, in the *draft protocol to the American Convention on Human Rights, to strengthen its protection mechanism* (2001) – which I prepared after having been appointed to do so by my colleagues, the judges of the Court – I proposed an amendment to Article 62 of the American Convention in order to make the jurisdiction of the Inter-American Court *automatically compulsory* (for all the States Parties to the Convention and without any interpretative declarations or restrictions), among several other matters.[45] I recalled this proposal in my separate opinions (para. 39) in *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (judgments on preliminary objections of September 1, 2001), and I repeat it with even greater emphasis in this dissenting opinion.

58. My position on this matter is firmly anti-"realist." When I presented this *draft protocol* in my successive reports to the to the General Assembly, Permanent Council, and Committee on Juridical and Political Affairs of the Organization of American States (OAS) in 2001, 2002 and 2003, I remember that no formal objection was made to it; nevertheless, nothing has been done in this regard to date. Perhaps my proposals were also dispersed by the winds of the implacable and cruel passage of time. Fortunately, at the time my reports to the OAS were always very well received by the delegations of the Member States. Nevertheless, at times I detected a look of surprise from a few delegates (as if they had just heard a proposal from a visitor from outer space), although they were always very attentive and polite to me.

59. These few ill-dissimulated looks of surprise caused me a mixture of dismay and sorrow. Indeed, it is difficult to escape the impression that, throughout the history of law, it has been the "realists," in the same way as the positivists, who have least understood the relationship between the time factor and law. Imprisoned in their self-sufficiency, which simplifies everything, they continue cultivating a pitifully *static* vision of the legal system and the social acts that it seeks to regulate.

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[44] A.A. Cançado Trindade, "Las Cláusulas Pétreas de la Protección Internacional del Ser Humano: El Acceso Directo a la Justicia Internacional y la Intangibilidad de la Jurisdicción Obligatoria de los Tribunales Internacionales de Derechos Humanos", *in El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI - Memoria del Seminario* (Noviembre de 1999), vol. I, 2a. ed., San José, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 3-68.

[45] Cf. A.A. Cançado Trindade, *Informe: Bases para un Proyecto de Protocolo a la Convención Americana de Derechos Humanos, para Fortalecer Su Mecanismo de Protección*, tome II, 2a. ed., San José, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 1-64.

60. "Realists" and positivists have shown that they are blind to the world of *values*, submissive to relations of power and domination, and insensible to the need to situate legal solutions in time, to respond to changing human needs. "Realists" and positivists only known how to work with the present; we cannot expect them to understand what they are unable to express. They suffer from an atemporal shortsightedness that leads them to continue trying to make abstractions of the effects of the passage of time in the search for and application of legal solutions. They are slaves to the primacy of their own conceptual hermetism.

61. Nowadays, in the domain of protection, the instruments of international law must be used to strengthen the international jurisdiction of human rights protection, not to weaken it. It is only in this way that we can continue struggling to preserve the integrity of the protection mechanism of the American Convention on Human Rights. While serving as a judge of this Court, I would not like Article 62 of the American Convention on Human Rights to suffer the same fate as Article 36(2) of the Statute of the International Court of Justice (ICJ).[46] I could not be silent in that event.

62. The automatic nature of the jurisdiction of an international court, such as the Inter-American Court of Human Rights, is a *necessity* for the international community in our region. For those of us who believe in the primacy of law over force,[47] it is an urgent necessity. Moreover, it is already a reality for some international tribunals such as the European Court of Human Rights,[48] the International Criminal Court, and the Court of Justice of the European Communities. The permissive and voluntarist practice under Article 36(2) of the ICJ Statute[49] cannot, in any way, serve as a model for the actions and decisions of the Inter-American Court. The law, which is and must be the same for everyone, is above the 'will" of the States.

63. Hence, the categorical imperative for the compulsory jurisdiction of the Inter-American Court to be automatic, in order to end difficulties such as those that arose in this case. There is no reason for an international human rights tribunal such as the Inter-American Court to accede, as the Court in The Hague has in deciding litigations that are essentially among States, to the extreme expressions of State voluntarism, by accepting undue restrictions formulated by the States in their instruments accepting the optional clause on compulsory jurisdiction (Article 36(2) of the ICJ Statute). The Inter-American Court decides on disputes of another nature, between States and the individuals under their respective jurisdictions and if we proceed with the same logic as the inter-State litigation before the ICJ, we will be depriving those individuals of the protection to which they have a right under the American Convention.

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[46] As I explained in detail in my dissenting opinion in the previous judgment of the Court on preliminary objections (2004) in this case of *the Serrano Cruz Sisters v.* El *Salvador*, and also in my separate opinions in this Court's judgments on preliminary objections (2001) in *Hilaire*, *Benjamin* and *Constantine et al.*, in relation to Trinidad and Tobago.

[47] Cf., in this regard, e.g., A.A. Cançado Trindade and A. Martínez Moreno, *Doctrina Latinoamericana del Derecho Internacional*, tome I, San José, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 5-64; A.A. Cançado Trindade and F. Vidal Ramírez, *Doctrina Latinoamericana del Derecho Internacional*, vol. II, San José, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 5-66.

[48] Since Protocol No. 11 to the European Convention on Human Rights came into force.

[49] An attempt has already been made, in vain, to limit the excesses of State voluntarism under that provision; cf. S.A. Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice*, Dordrecht, Nijhoff, 1995, pp. 1-128.

64. By virtue of the principle *ut res magis valeat quam pereat*, which corresponds to the so-called *effet utile* (sometimes called the effectiveness principle), which has wide support in case law, the States Parties to human rights treaties must ensure that treaty provisions have the appropriate effects within their respective domestic legal systems. I consider that this principle applies not only to the substantive norms of human rights treaties (i.e. those concerning the protected rights), but also to the procedural norms, particularly those referring to the right of individual international petition and the acceptance of the jurisdiction of the international judicial organs of protection on contentious matters – namely, the fundamental clauses (*cláusulas pétreas*) of the international protection of human rights.

65. These treaty-based norms, which are essential to the effectiveness of the international protection system as a whole, must be interpreted and applied so that their safeguards are truly practical and effective, taking into account the special nature of human rights treaties and their implementation through the collective guarantee. We are privileged to be part of the gratifying historical process of the emancipation of the individual *vis-à-vis* the State and we must act in conformity with this exalted mission.

66. We have to go beyond the mere resolution of specific cases and reveal the nature of law and, imbued with this spirit, indicate how the protection system can evolve to respond to the individual's growing and changing needs for protection. A case such as this one would have been a unique opportunity for the Court to do this; since, it has not done so, I will record my personal observations in this dissenting opinion, in the hope that perhaps they will serve for something more than my imagined dialogue with myself.

V. Epilogue: The time factor and law, the eternal challenge

67. I could not conclude this dissenting opinion in the instant case without referring to my final concern. Time, or more precisely the passage of time, is the greatest enigma of human existence. It has occupied human thought throughout history. It is surrounded by mystery, which has prompted the successive intellectuals who have approached it at very different historical moments to search for a meaning with eloquent forms of expression – as exemplified by the penetrating words in this regard of, for example, Plato in his *Dialogues*, Seneca in his *Letters to Lucilius*, Saint Augustine in his *Confessions*, Marcel Proust in his *À la recherche du temps perdu*, and Jorge Luis Borges in his *Historia de la Eternidad* and his *Elogio de la Sombra*. However, I suspect that no one can say with certainty how he has learned to deal with the passage of time.

68. We know, for example, that chronological time is not biological time, that biological time is not psychological time, that digital time is not existential time. We also know that time is different for each age, that the time of children (who live in the moment) is not the time of adults (who live each day), and that the time of adults is not the time of the elderly (who live their life history). We know that time, which gives children their innocence, ends up allowing the elderly the profit from the lessons of their own existence. But, who can say with any certainty that he knows how to come to terms with the passage of time?

69. The passage of time has also challenged legal science, as I have indicated in several of my opinions in this Court, and in my books.[50] The complexity of the

[50] Cf., regarding the time factor and law, A.A. Cançado Trindade, *O Direito Internacional em um Mundo*

relationship between the time factor and law has been illustrated by the difficulties encountered by the Court to decide this case of the Serrano Cruz sisters. I suspect that despite all its efforts over the past century (for example, clarifying the principle of inter-temporal law[51]), legal science has not learned to come to terms with the passage of time either.

70. As I stated in my separate opinion in *Blake v. Guatemala* (merits, 1998),

> "The time of human beings certainly is not the time of the stars, in more that one sense. The time of the stars, [...] 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, 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" (para. 6).

71. Eight years later, the result of this case of the Serrano Cruz sisters has also demonstrated this, perhaps even more eloquently (or even alarmingly), because the judgment on merits delivered by the Court in the case, with which I disagree, challenges even more strongly its own juridical logic. We are still in the first stages of developing the treatment that legal science should accord to the difficult relationship between the time factor and law.

72. The temporal dimension is present also in the part of this judgment concerning non-pecuniary reparations, with which I agree. Operative paragraph 10, for example, illustrates this clearly, when it determines correctly that the respondent State must designate a day dedicated to the children who, for different reasons, disappeared during the Salvadoran armed conflict. There is no oblivion; time imbues the history of each and every one of us with memory. I will repeat what I stated in this regard in my separate opinion in the case of *the Plan de Sánchez Massacre v. Guatemala* (judgment on merits of April 29, 2004):

> "Memory is enduring, it resists the erosion of time, it surges up from the depths and darkness of human suffering; since the routes of the past were traced and duly trod, they are already known, and remain unforgettable. (...)" (para. 41)

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em Transformação, Rio de Janeiro, Ed. Renovar, 2002, pp. 3-6; A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brasil, S.A. Fabris Ed., 1999, pp. 336-338.

[51] A matter that was examined by the *Institut de Droit International* at its sessions in Rome (1973) and Wiesbaden (1975); cf. 55 *Annuaire de l'Institut de Droit International* (1973) pp. 33, 27, 37, 48, 50, 86, 108 and 114-115; 56 *Annuaire de l'Institut de Droit International* (1975) p. 536-541; and cf. M. Sorensen, "Le problème dit du droit intertemporel dans l'ordre international – Rapport provisoire", 55 *Annuaire de l'Institut de Droit International* (1973) pp. 35-36. With regard to the influence of the passage of time in the continuity of the rules of international law, cf. K. Doehring, "Die Wirkung des Zeitablaufs auf den Bestand völkerrechtlicher Regeln", *Jahrbuch 1964 der Max-Planck-Gesellschaft*, Heidelberg, 1964, pp. 70-89. With regard to the time factor and treaties, cf. G.E. do Nascimento e Silva, "Le facteur temps et les traités", 154 *Recueil des Cours de l'Académie de Droit International de La Haye* (1977) p. 221-295. With regard to the time factor and international litigation, cf. S. Rosenne, *The Time Factor in the Jurisdiction of the International Court of Justice,* Leyden, Sijthoff, 1960, pp. 11-75; A.A. Cançado Trindade, "The Time Factor in the Application of the Rule of Exhaustion of Local Remedies in International Law", 61 *Rivista di Diritto Internazionale* (1978) pp. 232-257. and cf., in general, e.g, E. McWhinney, "The Time Dimension in International Law, Historical Relativism and Intertemporal Law", *in Essays in International Law in Honour of Judge M. Lachs* (ed. J. Makarczyk), The Hague, Nijhoff, 1984, pp. 184-199; M. Chemillier-Gendreau, "Le rôle du temps dans la formation du droit international", *in Droit international - III* (ed. P. Weil), Paris, Pédone, 1987, pp. 25-28.

73. Indeed, there is no oblivion there can be no oblivion. The sisters, Ernestina and Erlinda Serrano Cruz, who have remained disappeared since June 2, 1982, are still present in the memory of their loved ones, and their drama is now consigned to the annals of international human rights case law. There is no oblivion. in *À la recherche du temps perdu*, a classic work on the passage of time, Marcel Proust suggests, with subtlety and sophistication, that even though memory is spontaneous, it is a protection against the passage of time, a safeguard against oblivion and indifference; memory, inescapable, even though involuntary, is a means of escape from the fading of events that results from the passage of time.

74. In the end, memory is a means of resisting the transitory nature of human existence. States that seek to forget and impose forgetfulness of the abuses perpetrated in the past, end up causing an added harm to their own people. States that seek to restrict, *ratione temporis* and *ratione materiae*, the scope of the jurisdiction (*juris dictio*) of an international human rights tribunal such as this Court end up by prejudicing their own people and obstructing the progress of international law - human rights law - with regard to jurisdiction. And the international courts that accede to the excesses of State voluntarism end up by ceasing to exercise fully their function and duty to protect.

75. Nevertheless, in this case, the designation of a day dedicated to the memory of the children who disappeared during the Salvadoran armed conflict is an example of the reaction of the law to the effects of the passage of time, because there can be no oblivion. The collective memory will also help to acknowledge the suffering of all the Salvadoran people and, in particular, vindicate the children who lost their innocence and identity prematurely (and some their very life), victims of the millenary ritual of uncontrolled human violence, described with perennial actuality in Homer's *Iliad* – sacrificed in armed conflicts typical of the brutal and desperate race towards nothingness of the combatants.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra Alessandri
Secretary