Inter-American Court of Human Rights

Case of the Serrano-Cruz Sisters *v.* El Salvador

Judgment of November 23, 2004
(Preliminary Objections)

In the *Case of the Serrano Cruz Sisters*,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court"), composed of the following judges[*]:

Sergio García Ramírez, President
Alirio Abreu Burelli, Vice President
Oliver Jackman, Judge
Antônio A. Cançado Trindade, Judge
Cecilia Medina Quiroga, Judge
Manuel E. Ventura Robles, Judge, and
Alejandro Montiel Argüello, Judge *ad hoc*;

also present,

Pablo Saavedra Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary;

pursuant to Articles 37, 56 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"),[1] delivers this judgment on the preliminary objections filed by the State of El Salvador (hereinafter "the State" or "El Salvador").

I
INTRODUCTION OF THE CASE

1. On June 14, 2003, in accordance with the provisions of Articles 50 and 61 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed an application against El Salvador before the Court, arising from petition No. 12,132, received by the Secretariat of the Commission on February 16, 1999.

II

[*] Judge Diego García-Sayán excused himself from hearing this case, pursuant to Articles 19(2) of the Court's Statute and 19 of its Rules of Procedure.

[1] This judgment is delivered under the Rules of Procedure adopted by the Inter-American Court of Human Rights at its forty-ninth regular session in an order of November 24, 2000, which entered into force on June 1, 2001, and under the partial reform adopted by the Court at its sixty-first regular session by an order of November 25, 2003, in force since January 1, 2004.

FACTS SET OUT IN THE APPLICATION

2. In the application, the Inter-American Commission stated that the alleged "capture, abduction and forced disappearance of the children, Ernestina and Erlinda Serrano Cruz" (hereinafter "Ernestina and Erlinda Serrano Cruz," "the Serrano Cruz sisters," "the alleged victims" or "the girls") took place on and after June 2, 1982. They were "7 and 3 years of age, respectively[, … when] they were [allegedly] captured […] by soldiers from the Atlacatl Battalion of the Salvadoran Army during a [military] operation" known as "*Operación Limpieza*" [Cleansing Operation] or "*la guinda de mayo,*" carried out in the municipality of San Antonio de la Cruz, Department of Chalatenango among other places, from May 27 to June 9, 1982. "Around fourteen thousand soldiers" allegedly took part in this operation.

According to the Commission, during this operation, the Serrano Cruz left their home in order to safeguard their lives. However, only María Victoria Cruz Franco, mother of Ernestina and Erlinda, and one of her sons were able to cross "the military barrier on the way to the village of Manaquil." Dionisio Serrano, father of Ernestina and Erlinda, and his children Enrique, Suyapa (who was carrying her 6-month old baby), Ernestina and Erlinda Serrano Cruz went with a group of villagers across the mountains, towards the settlement of "Los Alvarenga," which they reached after walking for three days; there they hid for another three days, despite the lack of food and water. Suyapa Serrano Cruz decided to hide with her baby near the place where her father and siblings were, in order not to endanger them because her baby cried. Dionisio Serrano and his son, Enrique, went to fetch water from a nearby river "at the insistence of his daughters." Finding themselves alone, the children Ernestina and Erlinda began to cry and were discovered by "the military patrols." The Commission stated that Suyapa Serrano Cruz was sure that the soldiers took her sisters, because she heard a soldier ask the others if they should take the girls or kill them, to which another soldier replied that they should take them. When she no longer heard any noise, Suyapa began to look for her two sisters; then her father returned and he also searched around the place where he had left them.

The Commission indicated that Ernestina and Erlinda Serrano Cruz "were last seen 21 years ago, when a Salvadoran Armed Forces helicopter took them" from the site of these events to a place known as "La Sierpe" in the city of Chalatenango. The Commission stated that there is no evidence to prove reliably whether the soldiers who captured the girls handed them over to the International Committee of the Red Cross or to the Salvadoran Red Cross. The Commission also indicated that these facts form part of a pattern of forced disappearances in the context of the armed conflict, allegedly "perpetrated or tolerated by the State."

The Commission stated that Mrs. Cruz Franco was in Honduras "as a refugee in a camp," with her daughter, Suyapa. It also indicated that, because "the facts occurred at a time when domestic legal remedies were inoperative," it was only on April 30, 1993, that María Victoria Cruz Franco, mother of the alleged victims, filed a complaint before the Chalatenango Court of First Instance for the alleged disappearance of Ernestina and Erlinda. The girls' mother filed the complaint "a month and a half after the Salvadoran population recovered its faith in its Judiciary," following publication of the report of the United Nations Truth Commission on March 15, 1993. On November 13, 1995, Mrs. Cruz Franco filed a petition for *habeas corpus* before the Constitutional Chamber of the Supreme Court of Justice. The Chamber rejected it, considering that this remedy was not appropriate for investigating the whereabouts of the sisters. In this regard, the Commission indicated that "the

whereabouts of Ernestina and Erlinda Serrano Cruz have not been found, and those responsible have not been identified or punished."

The Commission filed the application in this case for the Court to decide whether the State had violated Articles 4 (Right to Life), 7 (Right to Personal Liberty), 18 (Right to a Name) and 19 (Rights of the Child) of the American Convention, in relation to Article 1(1) (Obligation to Respect Rights) thereof, to the detriment of Ernestina and Erlinda Serrano Cruz. The Commission also requested the Court to decide whether the State had violated Articles 5 (Right to Humane Treatment), 8 (Right to a Fair Trial), 17 (Rights of the Family) and 25 (Judicial Protection) of the Convention, in relation to Article 1(1) (Obligation to Respect Rights) thereof, to the detriment of Ernestina and Erlinda Serrano Cruz and of their next of kin. The Commission requested the Court to rule on the international responsibility of the State of El Salvador, for having incurred in a continuing violation of its international obligations "[the] effects [of which…] continue over time owing to the forced disappearance of the [alleged] victims on June 2, 1982, and, particularly, as of June 6, 1995, the date on which the State recognized the contentious jurisdiction of the Court."

III
PROCEEDING BEFORE THE COMMISSION

3. On February 16, 1999, the *Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos* [Association for the Search for Disappeared Children] (hereinafter "*Asociación Pro-Búsqueda*") and the Center for Justice and International Law (hereinafter "CEJIL") filed a petition before the Inter-American Commission for the alleged violation of Articles 5, 7, 8, 13, 17, 18, 19 and 25 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Ernestina and Erlinda Serrano Cruz and their next of kin, owing to "[the] detention and disappearance on June 2, 1982 [of] the sisters, Ernestina and Erlinda Serrano Cruz, of 7 and 3 years of age, respectively, [when they were allegedly] captured by the El Salvador Armed Forces during an operation carried out by the Atlacatl Battalion against the municipality of San Antonio La Cruz, Department of Chalatenango." The petitioners also indicated, *inter alia*, that "the State had not conducted a genuine investigation into the disappearance of Erlinda and Ernestina Serrano" and that, "despite the support provided by the [mother of the alleged victims to the criminal proceeding,] the case had been filed on March 16, 1998".

4. On April 14, 1999, the Commission identified the petition as No. 12,132, forwarded the relevant parts of the petition to the State, and requested the latter to provide any information it deemed appropriate.

5. On February 25, 2000, the State submitted a communication affirming that this case was inadmissible, because it did not "comply with the requirement of the exhaustion of domestic remedies" and provided information on "Criminal Proceeding No. 112.93, being processed by the Chalatenango court of first instance [… concerning] the crime of the deprivation of liberty of the minors, Ernestina and Erlinda Serrano".

6. On April 5, 2000, the petitioners presented comments on the communication of February 25, 2000 (*supra* para. 5), regarding the alleged failure to exhaust domestic remedies. They stated that "they ha[d] presented concrete proposals for channeling the investigation into other areas and these had duly been forwarded to the prosecutor responsible for the investigation," because "the only measure taken in

the last nine months by [this] prosecutor[, when the case had been re-opened, following the Commission's notification of the petition filed against the State, was] to ask the International Committee of the Red Cross [...] to advise who these minors had been handed over to." The petitioners indicated that the Salvadoran authorities had not taken any steps to guarantee the effectiveness of the investigation, identify those responsible for the facts, punish them, and make reparation to the victims or their next of kin.

7. On February 23, 2001, the Commission adopted Report Nº 31/01, in which it decided "to declare the case admissible, since it referred to alleged violations of rights protected by Articles 4, 5, 7, 8, 17, 18, 19 and 25 of the American Convention." In this Admissibility Report, the Commission decided to apply the exception to the exhaustion of domestic remedies established in Article 46(2)(c) of the Convention in this case, on the basis that "domestic remedies ha[d] not functioned with the effectiveness required in an investigation of a report of forced disappearance."

8. On March 9, 2001, the Inter-American Commission notified the Admissibility Report to the parties and made itself available to them in order to reach a friendly settlement, pursuant to the provisions of Article 48(1)(f) of the Convention.

9. On January 29, 2002, after various efforts had been made by the parties to achieve a friendly settlement, the petitioners requested the Commission to end the attempt to reach this settlement and to continue examining the merits of the case.

10. On June 24, 2002, the petitioners submitted their comments on the merits of the case, indicating that "[a]ll the steps taken before the authorities to clarify the facts, including the criminal complaint and the petition for *habeas corpus* have been unsuccessful" and that "the denial of justice that the Serrano Family ha[d] faced in their search for [the minors]" was therefore evident.

11. On November 13, 2002, the State submitted a communication, in response to the comments presented by the petitioners (*supra* para. 10), in which it indicated, *inter alia*, that "[i]t was unable to assume the responsibility alleged by the petitioners and c[ould] not be accused of the violation of the human rights and freedoms in light of the American Convention," and also that "[t]he procedure it ha[d] followed in the case reveal[ed] that it ha[d] exercised the remedies of the domestic jurisdiction and that [...] the criminal proceeding was almost completed without the evidence received having proved that it really was elements of the Salvadoran Army who had abducted [Ernestina and Erlinda], or whether they had been handed over to the Salvadoran Red Cross or the International Committee of the Red Cross," so that "[s]ince no one has been found responsible, it was again in order to file the criminal case for administrative purposes, although it would not be closed for subsequent investigations."

12. On March 4, 2003, pursuant to Article 50 of the Convention, the Commission adopted Report No. 37/03, in which it concluded that:

> The facts established in the […] report constitute violations of Articles 4, 5, 7, 8, 17, 18, 19 and 25 of the American Convention; and violation of the obligation to respect and guarantee embodied in Article 1(1) of the American Convention to the detriment of the sisters, Ernestina and Erlinda Serrano Cruz. The facts also constitute the violation of Articles 5, 8, 17, 25 and 1(1) to the detriment of the next of kin of Ernestina and Erlinda Serrano Cruz.

In this regard, the Commission recommended that the State:

> 1. Conduct a complete, impartial and effective investigation to establish the whereabouts of Ernestina and Erlinda Serrano Cruz and, should they be found, provide satisfactory reparation for the human rights violations […] established, including re-establishing their right to a name and making all necessary efforts to ensure the family reunion.
>
> 2. Conduct a complete, impartial and effective investigation to establish the responsibility of all the authors of the human rights violations to the detriment of Ernestina and Erlinda Serrano Cruz and their next of kin.
>
> 3. Make adequate reparation to the next of kin of Ernestina and Erlinda Serrano Cruz for the human rights violations [...]established.

13. On March 14, 2003, the Commission forwarded this report to the State, granting it two months from the date of its transmittal, to report on "the measures adopted to comply with the recommendations." The State had not sent its answer when this time expired.

14. On June 4, 2003, "owing to the State's failure to comply with the recommendations," the Commission decided to file the case before the Court.

15. On July 3, 2003, two days after the Court notified the State of the application filed by the Commission (*infra* para. 19), the State sent the latter its answer to Report No. 37/03 (*supra* paras. 12 and 13).

IV
PROCEEDING BEFORE THE COURT

16. On June 14, 2003, the Inter-American Commission filed an application before the Court (*supra* para. 1).

17. The Commission appointed Juan Méndez and Santiago A. Canton as its delegates to the Court, and Mario López-Garelli and Ariel Dulitzky as legal advisors, in accordance with Article 22 of the Rules of Procedure.[2] Also, pursuant to Article 33 of the Rules of Procedure, the Commission provided the names and addresses of the alleged victims and their next of kin and advised that they would be represented by CEJIL and the *Asociación Pro-Búsqueda* (hereinafter "the representatives of the alleged victims and their next of kin" or "the representatives").

18. On June 24, 2004, the Commission forwarded a communication indicating a sole address for the representatives of the alleged victims and their next of kin.

19. On July 2, 2003, after the President of the Court (hereinafter "the President") had made a preliminary review of the application, the Secretariat of the Court (hereinafter "the Secretariat") notified it to the State, together with its appendixes, informing the State of the time limits for answering the application and appointing its representatives for the proceeding. In addition, on the instructions of the President, the Secretariat informed the State that it had the right to appoint a judge *ad hoc* to take part in the consideration of the case.

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[2] The Commission changed its representatives while the case was being processed.

20. On July 2, 2003, under the provisions of Article 35(1) subparagraphs (d) and (e) of the Rules of Procedure, the Secretariat notified the application to the Center for Justice and International Law and the *Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos*, in their capacity as the original petitioners and representatives of the alleged victims and their next of kin, and advised them that they had 30 days to present their brief with requests, arguments and evidence (hereinafter "requests and arguments brief").

21. On July 23, 2003, the State appointed Ricardo Acevedo Peralta as its Agent and Hugo Carrillo Corleto as its deputy Agent, and advised that it had appointed Alejandro Montiel Argüello as judge *ad hoc*.

22. On September 1, 2003, having requested an extension which the President granted, the representatives of the alleged victims and their next of kin submitted their requests and arguments brief. In this brief, they stated that they endorsed what the Commission had requested in the application and asked the Court to order certain reparations.

23. On October 31, 2003, after additional time had been granted, the State submitted a brief filing preliminary objections, answering the application, and with observations on the requests and arguments brief. El Salvador filed the following preliminary objections: 1) "Lack of jurisdiction *Ratione temporis,"* which it divided into: "1(1) "Non-retroactivity of the application of the crime of forced disappearance of persons" and "1(2) Lack of jurisdiction owing to the terms in which the State of El Salvador recognizes the jurisdiction of the Inter-American Court of Human Rights"; 2) "Lack of jurisdiction *rationae materiae";* 3) "Inadmissibility of the application owing to ambiguity or inconsistency between the object and the plea, and the body of the text," which it dived into: "3(1) Inadmissibility of the application owing to ambiguity or inconsistency between the object and the plea, and the body of the text" and "3(2) Inconsistency between the claims of the Inter-American Commission on Human Rights and those of the representatives of the alleged victims"; and 4) "Failure to exhaust domestic remedies"; which it divided into: "4(1) Justified delay in the corresponding decision" and "4(2) Inappropriateness of the remedy of *habeas corpus*."

24. On November 17, 2003, the Secretariat, under Article 36(4) of the Rules of Procedure, granted the Commission and the representatives 30 days to present their written arguments on the preliminary objections filed by the State (*supra* para. 23).

25. On December 9, 2003, the Commission requested an extension for the presentation of the written arguments on the preliminary objections (*supra* paras. 23 and 24). The same day, on the President's instructions, the Secretariat granted the Commission and the representatives the extension requested by the former, until January 16, 2004.

26. On January 16, 2004, the Commission submitted its written arguments on the preliminary objections filed by the State (*supra* paras. 23, 24 and 25). In this brief, the Commission requested the Inter-American Court to "reject the four preliminary objections filed by the State[, …] on the grounds that they lacked either a juridical or a factual basis."

27. On January 16, 2004, the representatives of the alleged victims and their next of kin submitted their written arguments on the preliminary objections filed by

the State (*supra* paras. 23, 24 and 25), with appendixes. In this brief and its appendixes, the representatives requested the Inter-American Court to reject the preliminary objections.

28. On February 20, 2004, the State forwarded a communication in which it declared that "it rejected the arguments on merits submitted by the other parties in the written arguments on preliminary objections." El Salvador also indicated that it considered it important "to hold a hearing on objections, prior to considering the merits; and also that it was necessary to grant an opportunity for rejoinder concerning the arguments on merits submitted by the other parties" and, based on Article 38 of the Rules of Procedure, it requested the Court to grant it the opportunity "to present arguments on the preliminary objections, and the respective rejoinder to the other parties."

29. On April 1, 2004, the representatives submitted a brief in which they advised that María Victoria Cruz Franco, mother of the alleged victims, had died on March 30, 2004. On April 20, 2004, the representatives submitted a copy of Mrs. Cruz Franco's death certificate.

30. On May 4, 2004, on the instructions of the judges of the Court, the Secretariat informed the parties that: (a) it would duly assess the written arguments on the preliminary objections presented by the Inter-American Commission and the representatives and would take into account what the State had indicated as regards these briefs; (b) regarding the procedural opportunity to respond to these briefs on preliminary objections of the Commission and the representatives, the State could do this when presenting its oral arguments during the public hearing that it would convene, and also when presenting its final written arguments; the Court therefore considered it unnecessary to carry out any further actions in the written proceeding; and (c) respecting the principle of procedural economy, the Court holds a single hearing on preliminary objections and the possible stages of merits, reparations and costs, except in extremely rare cases when it is considered absolutely necessary, as indicated in Article 37(5) of the Rules of Procedure of the Court. In this regard, the Secretariat told the parties that the Court had examined the request made by the State (*supra* para. 28) and considered, as it had in almost all cases since the most recent changes in its Rules of Procedure, that it was not necessary to hold a hearing on preliminary objections separately from the hearing on the possible stages of merits, reparations and costs in this case.

31. On August 6, 2004, the President issued an order convening the parties to a public hearing to be held at the seat of the Court as of September 7, 2004, to hear their final oral arguments on preliminary objections and merits, reparation, and costs, and the testimonial statements of Suyapa Serrano Cruz, Elsy Rosibel Dubón Romero and Jon María Cortina, proposed by the Inter-American Commission and endorsed by the representatives of the alleged victims and their next of kin, and also the statements of Jorge Alberto Orellana Osorio, Miguel Uvence Argueta, Ida María Grott de García and María Esperanza Franco Orellana de Miranda, proposed as witnesses by the State. In this order, the President also informed the parties that they had until October 8, 2004, to submit their final written arguments on preliminary objections and merits, reparation, and costs.

32. On August 20, 2004, the International Commission of Jurists remitted an *amicus curiae* brief.

33. On August 26, 2004, the Due Process of Law Foundation (DOPLF) and Noami Roth-Arriaza presented an *amicus curiae* brief.

34. On September 2, 2004, the *Fundación Sur-Argentina* presented an *amicus curiae* brief.

35. On September 3, 2004, the *Asociación Abuelas de Plaza de Mayo* presented an *amicus curiae* brief.

36. On September 3, 2004, the Secretariat forwarded a note to the parties regarding the public hearing to be held on September 7 and 8, 2004, on preliminary objections and merits, reparation, and costs (*supra* para. 31 and *infra* para. 38). It indicated that the Court had decided to divide the said public hearing into two parts: in the first part of the public hearing, the parties would present their final arguments on preliminary objections and, in the second part, the parties would present their final arguments on merits, reparation, and costs.

37. On September 6, 2004, the State submitted a brief, to which it attached documentation, and requested the Court to admit the evidence it had attached.

38. On September 7 and 8, 2004, the Court held the public hearing on preliminary objects and merits, reparation, and costs, in which it heard the oral arguments of the State, the Inter-American Commission and the representatives of the alleged victims and their next of kin on preliminary objections, received the statements of the witnesses proposed by the Inter-American Commission, the representatives and the State, and finally heard the final oral arguments of the parties on merits, reparation, and costs.

There appeared before the Court:

for the State of El Salvador:

Ricardo Acevedo Peralta, Agent
Ambassador Hugo Carrillo Corleto, deputy Agent
Federico Flamenco, adviser
Ana Elizabeth Villalta Vizcarra, adviser
José Roberto Mejía Trabanino, adviser
Humberto Posada, adviser, and
Carlos Alfredo Argueta Alvarado, adviser

For the Inter-American Commission on Human Rights:

Freddy Gutiérrez, delegate
Ariel Dulitzky, adviser
Mario López Garelli, adviser
Lilly Ching, adviser, and
Víctor Madrigal, adviser

For the representatives of the alleged victims and their next of kin:

Alejandra Nuño, representative of CEJIL;
Gisela de León, representative of CEJIL;
Roxanna Altholz, representative of CEJIL;
Soraya Long, representative of CEJIL;

Azucena Mejía, representative of the *Asociación Pro-Búsqueda*
Sandra Lobo, representative of the *Asociación Pro-Búsqueda*, and
Norma Verónica Ardón, representative of the *Asociación Pro-Búsqueda*.

Witnesses proposed by the Inter-American Commission on Human Rights and by the representatives of the alleged victims and their next of kin:

Suyapa Serrano Cruz;
María Elsy Dubón de Santamaría, and
Juan María Raimundo Cortina Garaícorta.

Witnesses proposed by the State of El Salvador:

Ida María Gropp de García;
Jorge Alberto Orellana Osorio;
María Esperanza Franco Orellana de Miranda, and
Miguel Uvence Argueta Umaña.

39. On September 9, 2004, in response to the Court's request during the public hearing on preliminary objections and merits, reparation, and costs (*supra* para. 38), the representatives of the alleged victims and their next of kin forwarded a copy of Legislative Decree No. 486, "Law of General Amnesty to Consolidate the Peace," issued on March 20, 1993, and of judgment No. 24-97/21-98, issued by the Constitutional Chamber of the Supreme Court of Justice of El Salvador on September 26, 2000.

40. On September 10, 2004, the Ombudsman of El Salvador submitted a brief, attaching a copy of the "*Informe de la Señora Procuradora para la Defensa de los Derechos Humanos sobre las desapariciones forzadas de las niñas Ernestina y Erlinda Serrano Cruz, su impunidad actual y el patrón de la violencia en que ocurrieron tales desapariciones*" [The Ombudsman's report on the forced disappearance of Ernestina and Erlinda Serrano Cruz, the current impunity and the context of violence in which this disappearance occurred], issued on September 2, 2004. The representatives also presented a copy of this report on September 6, 2004.

41. On September 16, 2004, José Benjamín Cuéllar Martínez, Pedro José Cruz Rodríguez and Roberto Burgos Viale presented an *amici curiae* brief.

42. On September 28, 2004, on the instructions of the President of the Court and in accordance with Article 45(2) of the Court's Rules of Procedure, the Secretariat requested the State to collaborate by forwarding the following documents to the Court, by October 18, 2004, at the latest: (a) copy of folios 424 to 437 of the file of the criminal proceeding before the Chalatenango Court of First Instance, "Case No. 112/93" "for the abduction of the minors: Ernestina Serrano and Herlinda Serrano"; and (b) all the documentation related to the declaration of recognition of the contentious jurisdiction of the Inter-American Court made by El Salvador in 1995, including the documentation on any discussion that might have arisen in this regard in the Legislative Assembly or any other State body responsible for proposing, drafting and adopting this declaration of recognition.

43. On October 7, 2004, the State submitted its final written arguments on preliminary objections and merits, reparation, and costs, with several appendixes. El Salvador also forwarded some of the documents that the President of the Court had

requested as helpful evidence (*supra* para. 42). In this regard, on the instructions of the President, the Secretariat again asked the State to forward the remaining documents: (a) copy of any measure taken in this proceeding after September 6, 2004; and (b) all the documentation related to the declaration recognizing the contentious jurisdiction of the Inter-American Court of Human Rights made by El Salvador in 1995, including documentation on any discussion that might have arisen in this regard in the Legislative Assembly or any other State body responsible for proposing, drafting and adopting this declaration of recognition.

44. On October 8, 2004, the Inter-American Commission remitted its final written arguments on preliminary objections and merits, reparation, and costs.

45. On October 8, 2004, the representatives remitted their final written arguments on preliminary objections and merits, reparation, and costs.

46. On October 15, 2004, the State remitted a brief with documentation related to the declaration of recognition of the contentious jurisdiction of the Inter-American Court made by the State in 1995, which had been requested as helpful evidence (*supra* paras. 42 and 43).

47. On October 18, 2004, the State submitted a brief with which it remitted a copy of "Executive Decree No. 45, signed by the President of the Republic and the Minister of the Interior, creating the 'Inter-Institutional Commission to seek the children who disappeared as a result of the armed conflict in El Salvador'".

V
JURISDICTION

48. Under the terms of Article 62(3) of the Convention, the Court is competent to hear the preliminary objections raised by the State in this case, since El Salvador has been a State Party to the American Convention since June 23, 1978, and recognized the contentious jurisdiction of the Court on June 6, 1995.

VI
PRELIMINARY OBJECTIONS

49. In the brief answering the application and with observations on the requests and arguments brief (*supra* para. 23), the State filed the following preliminary objections:

1. "Lack of jurisdiction *rationae temporis"*

   1(1) "Non-retroactivity of the application of the crime of forced disappearance of persons"; and

   1(2) Lack of jurisdiction owing to the terms in which the State of El Salvador recognizes the jurisdiction of the Inter-American Court of Human Rights."

2. "Lack of jurisdiction *rationae materiae"*

3. "Inadmissibility of the application owing to ambiguity or inconsistency between the object and the plea, and the body of the text"

3(1) "Inadmissibility of the application owing to ambiguity or inconsistency between the object and the plea, and the body of the text"; and

3(2) "Inconsistency between the claims of the Inter-American Commission on Human Rights and those of the representatives of the alleged victims."

4. "Failure to exhaust domestic remedies"

4(1) "Justified delay in the corresponding decision"; and

4(2) "Inappropriateness of the remedy of *habeas corpus*."

50. When presenting its final oral arguments on preliminary objections during the public hearing on September 7, 2004 (*supra* para. 38), the State indicated that "it withdr[ew]" the preliminary objection "on the inconsistency between the claims of the Inter-American Commission on Human Rights and those of the representatives of the alleged victims [and their next of kin]." Consequently, the State withdrew the second part of the third preliminary objection (*supra* para. 49).

51. The Court will now proceed to examine the remaining objections filed by El Salvador.

FIRST PRELIMINARY OBJECTION
"LACK OF JURISDICTION *RATIONAE TEMPORIS"*

52. In the brief filing preliminary objections, answering the application and with observations on the requests and arguments brief, the State divided the first preliminary objection into:

1(1) "Non-retroactivity of the application of the crime of forced disappearance of persons"; and

1(2) Lack of jurisdiction owing to the terms in which the State of El Salvador recognizes the jurisdiction of the Inter-American Court of Human Rights".

53. The Court will now summarize the argument of the State, the Inter-American Commission, and the representatives of the alleged victims and their next of kin concerning this preliminary objection, starting with objection 1(2) entitled "Lack of jurisdiction owing to the terms in which the State of El Salvador recognized the jurisdiction of the Inter-American Court of Human Rights."

"Lack of jurisdiction owing to the terms in which the State of El Salvador recognizes the jurisdiction of the Inter-American Court of Human Rights"

Arguments of the State

54. The State argued that:

a) The "instrument ratifying recognition of the jurisdiction of the Court," deposited by El Salvador with the OAS General Secretariat on June 6, 1995, accepts the Court's jurisdiction "for an indefinite term, in conditions of reciprocity and with the express reservation that, in the cases in which it recognizes the Court's jurisdiction, this is only and exclusively for subsequent juridical facts and acts, or juridical facts and acts which commenced after the date on which the declaration of recognition [of this jurisdiction] was deposited." This "reservation" excludes from the Court's jurisdiction the juridical facts and acts that preceded the date when this declaration was deposited or which commenced before that date. The facts of the instant case took place before the date on which the declaration was deposited and, even if it is considered that they constitute a continuing violation, the commencement of this violation also occurred before the declaration was deposited. In other words, "the reservation made to the jurisdiction of the Inter-American Court excludes from the Court's jurisdiction not only the juridical facts and acts that are not subsequent to the date on which the declaration of recognition was deposited, but also continuing violations that commenced before the Court's jurisdiction was recognized;

b) If the Court applied the principles it used in the Blake case, it would have jurisdiction to hear effects and acts subsequent to "El Salvador's recognition of the jurisdiction of the Court in June 1995." However, the Court is not able to consider them [in this case], because the commencement of these effects and acts is not subsequent to June 1995;

c) Should the Court consider that the facts in this case refer to a continuing and permanent violation, it bears in mind that, "internationally, there has been no developments in this regard. To the contrary, as can be observed from the Rome Statute of the International Criminal Court, the jurisdiction of that Court has been limited […]. The development in *contrario sensu* establishes clear respect for abiding by the law of treaties, as well as non-recognition of retroactive jurisdictions and considering subsequent facts only";

d) "Should forced disappearance have occurred, the alleged capture of the Serrano Cruz sisters took place on June 2, 1982. This means that it is clearly an event that occurred before the date on which El Salvador deposited the declaration recognizing the Court's jurisdiction, [so] it cannot be considered or decided by the Inter-American Court." The alleged continuing violation "does not fall within the Court's jurisdiction either […,] because the alleged violation commenced in 1982, and not subsequent to the date on which El Salvador deposited its declaration recognizing the Court's jurisdiction – on June 6, 1995; consequently, the Inter-American Court of Human Rights does not have jurisdiction to consider and rule on alleged continuing violations concerning facts which commenced prior to that date";

e) "Nor can the Court consider the alleged failure to investigate that is attributed to the jurisdictional bodies, since this falls under the concept of the alleged forced disappearance and forms part of the continuing violations, the onset of which was not subsequent to the date on which El Salvador deposited its declaration recognizing the Court's jurisdiction";

f) Since, contrary to the presentation in the introduction and body of the application, in the object and plea of the application the facts are "rationalized" and not presented as a continuing event, the State alleges the objection of lack of jurisdiction *ratione temporis* as follows:

> i) Regarding the "alleged capture and subsequent disappearance of Ernestina and Erlinda Serrano Cruz […,] the commencement of this fact did not occur after June 6, 1995";
> ii) "The alleged separation of [Ernestina and Erlinda Serrano Cruz] from their parents and next of kin, and also the alleged denial of identity, were not facts whose commencement occurred after June 6, 1995; consequently, the Court also lacks jurisdiction";
> iii) Regarding the "alleged suffering of the next of kin of the Serrano Cruz sisters resulting from the capture and subsequent disappearance of the Serrano Cruz sisters, [...] these alleged violations also relate to past facts, because from the moment it is affirmed that they refer to violations of the right to humane treatment, protection of the family, and the obligation to respect rights embodied in the Convention, reference is being made to a fact which, as the plea states so well, occurred in the past"; and
> iv) Regarding the "alleged failure to respect the right of the next of kin of the victims to know the truth, which would imply the violation of the right to judicial guarantees, judicial protection and the obligation to respect rights embodied in the American Convention [… ,] it should be recalled that the criminal proceeding that began clarifying this fact began in 1993, so that it is also affected by the exclusion mentioned in the reservation made by El Salvador in June 1995, when recognizing the Court's jurisdiction, because the commencement of this fact did not occur as of that year, but previously";

g) "The 1995 reservation made by the State of El Salvador was made in accordance with and based on the 1978 reservation [...] when El Salvador ratified the American Convention on Human Rights. Article 20 of the Vienna Convention on the Law of Treaties is applicable to the said instrument recognizing the Court's jurisdiction, so that it should be considered that a reservation has been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation. In this regard, "there is no record that a member State of the system has raised an objection to the content of the 1995 reservation by the State of El Salvador or that it has been challenged; therefore, to question its validity almost ten years later would not only create a situation of legal uncertainty among the States but, above all, in legal doctrine on the law of treaties. […] In this regard, regarding the 1995 reservation, it could be said that the State of El Salvador has acquired a right owing to the passage of time, because lack of legal certainty cannot exist forever among States";

h) "Both the 1978 and the 1995 reservations are in keeping with [the Constitution], since the 1978 reservation put on record that the Convention was ratified with the proviso that this ratification was understood to be notwithstanding those provisions of the Convention that might enter into conflict with specific principles of the Constitution; and the 1995 reservation noted that the Government of El Salvador recogniz[ed] the jurisdiction of the

Court, provided that this recognition [was] compatible with the provisions of the Constitution of the Republic of El Salvador";

i) When answering a question raised by the Court during the public hearing, it indicated that the terms of recognition of the Court's jurisdiction were technically equivalent to a reservation in the terms of the reservations regime of the Vienna Convention on the Law of Treaties and also equivalent to a limitation or restriction of recognition of the Court's jurisdiction;

j) When answering a question raised by the Court during the public hearing, it indicated that, according to Article 62(2) of the Convention, the limitation of the declaration recognizing the Court's jurisdiction made by El Salvador fell within the category of "specific cases," in the understanding that "specific cases" are those that occurred before the recognition or whose onset took place before this recognition; and

k) "Under the Vienna Convention on the Law of Treaties [it is possible to formulate a reservation] subsequent to the ratification of a treaty." El Salvador ratified the American Convention in 1978 with a reservation in which it indicated that it would accept the Court's jurisdiction in terms to be determined subsequently. Based on this reservation and in accordance with Article 62 of the Convention, the State made the "reservation" in its declaration recognizing the Court's jurisdiction. No State raised an objection to the "reservation" made by El Salvador. A State is able to recognize the jurisdiction of an international tribunal in its own terms, regardless of what is expressly established in the optional clause on the Court's compulsory jurisdiction.

Arguments of the Commission

55. The Inter-American Commission requested the Court to reject this preliminary objection on the grounds that:

a) The State wishes the Court to apply "the 1995 reservation" relating to the recognition of its contentious jurisdiction. However, the "situation of violations set out in the application was confirmed and renewed as of June 1995, when the judicial authorities of El Salvador had the treaty obligation to do justice" by implementing all possible investigatory measures to determine the whereabouts of the Serrano Cruz sisters, identify those responsible for the violations committed, and make reparation to the next of kin;

b) The continuing situation of human rights violations "includes facts and effects subsequent to the date on which the Court's jurisdiction was recognized." "The condition made by El Salvador when recognizing the jurisdiction of the Court does not prevent the latter from making a ruling in this case and ending the denial of justice to the detriment of the Serrano Cruz sisters and their next of kin";

c) "Depending on the moment when an act that violates the Convention (in force for El Salvador since 1978) occurred, or its 'commencement' occurred, the Commission considers that the limitation formulated by the State would have the effect of creating three different situations for the protection of human rights in the inter-American sphere." The first situation includes violations that took place from 1978 to 1995, over which the Court

would not have jurisdiction, "even if their effects continue over time and exceed the critical date of June 6, 1995." The second situation includes violations subsequent to June 6, 1995, or whose commencement is subsequent to this critical date; these would be "subject to the full protection of all the organs of the inter-American system for the protection of human rights." Lastly, the limitation to the recognition of jurisdiction required by the State creates a third situation, which includes the continuing or constant violations, executed before and after the imposed time limit "whose assessment and classification is only significant if the fact is considered and dealt with integrally";

d) "The facts of this case call for consideration of the legal theory of continuing unlawful acts established by the Court as of the Blake case." Ernestina and Erlinda Serrano Cruz have been disappeared since June 2, 1982, when they were "taken into custody by State agents. To divide their existence, owing to the limit established by the critical date, would have the effect of completing their disappearance," when "there is no evidence of their existence," due to acts that can be attributed to the State;

e) The State interprets that the reservation made in its recognition of the Court's jurisdiction has the effect of excluding the alleged victims from the Court's protection, "even when disappearances are continually self-renewing and self-perfecting acts." This exclusion "would have the effect of constituting [… a] crime against humanity." If this interpretation were adopted, the Court would be acting *contra homine";*

f) The scope that the Court grants to declarations recognizing its jurisdiction must allow them to have an *effet util*;

g) "Regardless of any consideration about the limitation established by the State, the Salvadoran judicial authorities have always had the treaty-based obligation to provide justice by conducting all the investigatory measures necessary to determine the whereabouts of the Serrano Cruz sisters, identify those responsible for the violations committed against them, and make reparation to their next of kin. Moreover, as of June 1995, the inaction of these authorities constantly violated an obligation, which, they consider, only makes sense if it is considered integrally." Moreover, "more than nine years after the recognition of the Court's contentious jurisdiction, there is no evidence that any measure is being taken to end the situation of forced disappearance";

h) The declaration made by El Salvador cannot exclude the Court from considering acts that occurred after the "critical date" of recognition of the Court's jurisdiction, nor those that continue to occur. When answering a question posed by the Court during the public hearing, the Commission indicated that "there are acts and effects that have occurred subsequent to the recognition of the Court's jurisdiction, which remain and are repeated, and which commenced and were executed after 1995. There are completely independent judicial decisions, new decisions to file the case, to close judicial proceedings, decisions to re-open, to hear judicial actions as mere formalities; the State has demonstrated a permanent attitude of declining to re-establish the identity of the girls; for example, the State has systematically refused to implement any kind of legislative, executive or judicial initiative to

re-establish their identity." Furthermore, harassment of witnesses and the next of kin of the alleged victims has occurred subsequent to 1995; and

i) "This case presents the Court with an issue of *first impression*, not only as regards considering a formula of double exclusion, but also owing to the special characteristics of the way in which the phenomenon of forced disappearance is manifested in the in this case […]. In the instant case, the recognition of the rights and obligations embodied in the Convention, and the reciprocal obligation of respect and guarantee of the States, was perfected on June 23, 1978. As of that date, the rights of Ernestina Serrano were recognized, and then those of her sister, Erlinda, who was born later."

Arguments of the representatives of the alleged victims and their next of kin

56. The representatives of the alleged victims and their next of kin requested the Court to reject this objection and presented the following arguments:

a) Human rights treaties establish obligations of an objective nature that must be guaranteed by the contracting States pursuant to their essential purpose: the protection and primacy of the dignity of the human being. When acceding to these treaties, States assumes various obligations, not only in relation to other States, but also towards the persons subject to their jurisdiction;

b) In their arguments on the preliminary objections, the representatives indicated that:

i) "When recognizing the Court's contentious jurisdiction, [the State] was authorized to formulate the reservation of temporality with regard to facts that occurred subsequent to the date of" this recognition. However, not all reservations can be considered valid, because reservations that are incompatible with the object and purpose of the treaty cannot be formulated, pursuant to the provisions of Article 19(c) of the Vienna Convention on the Law of Treaties. "The reservation […] cannot invalidate the protection of human rights, which is the object and purpose of the American Convention. Additionally, a reservation that allows a State to continue violating human rights "without any type of supervision or condemnation" is not valid;

ii) The crime of forced disappearance violates non-derogable fundamental rights, so that "it constitutes an affront to humanity […T]his type of fact [falls within] the international sphere of *ius cogens."* Consequently, a reservation intended to restrict the temporal jurisdiction of the Court in such serious cases is contrary to the object and purpose of the Convention, because it prevents international protection;

iii) The commencement of several of the alleged violations occurred after recognition of the Court's jurisdiction, "for example, the obstruction of justice that has characterized the case and that materialized with the denial of the remedy of *habeas corpus* in 1996, and also the anguish caused to the girls' mother when she realized

that there was no possibility of obtaining prompt and due justice. Added to this, the amnesty laws, even though they entered into force in 1995, continue to be a constant threat to obtaining justice in this case"; and

iv) "After considering the validity of the Salvadoran State's declaration on jurisdiction, [they requested the Court] to determine that, in such serious cases as this one, the fact that the Salvadoran State imposed a temporal limitation on the Court's jurisdiction was an affront to the object and purpose of the American Convention".

c) In their final arguments on preliminary objections, the representatives stated that:

i) According to the provisions of the Vienna Convention on the Law of Treaties, it is not possible to introduce reservations to a treaty after it has been signed, ratified, accepted or adopted. Also, the Convention establishes the terms under which the optional clause of recognition of the Court's jurisdiction can be accepted. In other words, contrary to what El Salvador stated in its final oral arguments, it is not the role of the States to choose the terms under which they recognize the Court's jurisdiction, as in the case of the formulation of reservations to a treaty, notwithstanding the latter cannot be contrary to the object and purpose of the treaty. There is a difference between the concepts of a reservation to and a limitation of the recognition of the Court's jurisdiction;

ii) The limitation to the recognition of the Court's jurisdiction introduced by the State "is invalid, because it does not comply with any of the conditions established in the American Convention". Article 62(2) thereof specifically establishes the conditions that may be introduced into this recognition;

iii) El Salvador alleged that its recognition of the Court's jurisdiction is in accordance with Article 62(2) of the Convention. However, the State "contradicted itself when it specified which of the conditions it fell within." Initially it indicated that the limitation applied to "specific cases" and, subsequently, it only indicated that "the reservation" was made on the condition of reciprocity and indefinitely. It is clear that the limitation of the recognition of jurisdiction whose validity is being discussed does not refer to the condition of reciprocity or the time period. It should also be emphasized that "[t]he introduction of the condition of 'specific cases' in Article 62(2) was intended to enable the States to recognize the Court's jurisdiction for explicit cases; namely, cases in which, both the subjects and the object of the dispute were known. In contrast, the limitation to the recognition of jurisdiction introduced by El Salvador refers to a "type" of violations; specifically, those arising from acts which commenced before June 6, 1995, even though they continue being committed after that date." The State "does not specify the identity of the wronged subject in these cases, nor the rights that are allegedly violated, so that it cannot be considered that it refers to specific cases";

iv) The limitation introduced by the State gives rise to "two different levels of protection for victims of human rights violations," because "contrary to violations occurring after recognition of the Court's jurisdiction, it allows certain continuing violations to be excluded from the jurisdictional scope of the Court, thus creating two levels of supervision for these acts." The first level is applicable to all human rights violations that commenced after June 6, 1995, when the alleged victims are totally protected by the Court's jurisdiction. The second level, is applicable to human rights violations that commenced before June 6, 1995, and which continue after this date, in which case the alleged victims of this type of violations are totally unprotected "due merely to a decision of the State";

v) "If the State's arguments are accepted, this would imply that the acts of State agents intended to destroy evidence that might help determine the whereabouts of the girls or acts of obstruction of justice could be excluded from the Court's jurisdiction, if, as the State claims, it is considered that these acts commenced with the [alleged] abduction of the girls; namely, on June 2, 1982";

vi) The condition for the recognition of the Court's jurisdiction invoked by El Salvador "cannot be applied to this case, which deals with continuing violations. Moreover, it is contrary to the object and purpose of the Convention, because it creates categories of [alleged] victims";

vii) The condition for the recognition of the Court's jurisdiction invoked by El Salvador "has the effect of reducing the effectiveness of the protection mechanisms established by the American Convention, because it excludes from the Court's jurisdiction those persons who are victims of continuing human rights violations, even after recognition of the Court's jurisdiction, if these violations commenced before June 6, 1995"; and

viii) Some of the reported acts occurred after June 6, 1995. These included: the filing of the petition for *habeas corpus* on November 7, 1995; the delivery of the judgment by the Constitutional Chamber of El Salvador on March 14, 1996; and measures taken in criminal proceeding 112/93, "which had the effect of obstructing and delaying the proceeding, including the closure of the investigation on two occasions: March 16 and May 27, 1998." Also, the Army assumed an obstructive attitude to the investigation because, on four occasions, the special prosecutor requested permission to inspect the logbook and, to date, his request has not been followed-up on. There are evident avenues of investigation that have not been followed, such as conducting interviews in children's homes where the girls could have been. These omissions imply State complicity to hide the facts and the whereabouts of the alleged victims.

Considerations of the Court

57. The State filed the second part of the preliminary objection on the lack of jurisdiction *ratione temporis* of the Inter-American Court so that, in this case, based on the terms in which it recognized the Court's jurisdiction, the Court should not consider facts prior to the date on which it recognized the Court's compulsory jurisdiction or those that commenced before the declaration of recognition was deposited.

58. The preliminary objection filed by the State is based on paragraph II of the declaration of recognition of the contentious jurisdiction of the Court deposited with the OAS Secretary General on June 6, 1995; for the instant case, the relevant part reads as follows:

> I. The Government of El Salvador accepts as binding *ipso facto* and not requiring special agreement, the jurisdiction of the Inter-American Court of Human Rights, in accordance with the provisions of Article 62 of the American Convention on Human Rights, or "Pact of San José".
>
> II. The Government of El Salvador, when recognizing this jurisdiction, places on record that its recognition is for an indefinite period, on the condition of reciprocity, and with the reservation that the cases in which it accepts the jurisdiction include only and exclusively subsequent juridical facts and acts or juridical facts and acts which commence subsequent to the date of the deposit of this Declaration of Recognition […].
>
> […]

59. The recognition of the Court's contention jurisdiction is regulated by Article 62 of the American Convention, which establishes that:

> 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
>
> 2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court.
>
> 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

60. In this regard, it is necessary to refer to what the Court has stated on recognition of its jurisdiction:

> It is clear from the text of the Convention that a State may be a party to it and recognize or not the binding jurisdiction of the Court. Article 62 of the Convention uses the verb "may" to signify that recognition of the jurisdiction is optional […][3].

61. Here, it should be reiterated that the Court has made a distinction between the possibility of the State making "reservations to the [American] Convention," according to Article 75 thereof, and the act of "recognition of the jurisdiction" of the Court, in accordance with Article 62 thereof (*supra* para. 59). Regarding this difference, the Court has stated that:

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[3] *Cf. Alfonso Martín del Campo Dodd case. Preliminary objections.* Judgment of September 3, 2004. Series C No. 113, para. 68; and *Cantos case. Preliminary objections.* Judgment of September 7, 2001. Series C No. 85, para. 34.

> "Recognition of the jurisdiction" of the Court […] is a unilateral act of each State, qualified by the terms of the American Convention as a whole and, therefore, not subject to reservations. Although some legal doctrine speaks of "reservations" to the recognition of an international court's jurisdiction, in fact this refers to limitations to the recognition of that jurisdiction and not technically to reservations to a multilateral treaty.[4]

62. The American Convention expressly establishes the authority of the States Parties to establish limitations to the Court's jurisdiction when declaring that they recognize as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court, pursuant to the provisions of Article 62 thereof. Thus, the instrument in which El Salvador recognizes the Court's jurisdiction includes a temporal condition to this jurisdiction, which is not technically a reservation to the American Convention. In other words, El Salvador used the authority stipulated in Article 62 of the Convention and established a temporal limitation with regard to cases that might be submitted to the consideration of the Court.

63. The Court must examine the limitations invoked by El Salvador when recognizing the Court's contentious jurisdiction and determine its competence to consider the different facts of this case. The fact that the OAS member State did not raise any objection to the limitation invoked by El Salvador, as the latter has argued, does not mean that the Court cannot examine this limitation in light of the American Convention.[5] To the contrary, the Court, as all organs with jurisdictional functions, has the authority inherent in its attributes to determine the scope of its own competence (*compétence de la compétence/Kompetenz-Kompetenz*). The instruments recognizing the optional clause of the compulsory jurisdiction (Article 62(1) of the Convention) presume that the State depositing them accept the Court's right to resolve any dispute relating to its jurisdiction.[6]

64. Since, according to Article 62(1) of the Convention, the date on which the Court's jurisdiction is recognized depends on the moment at which the State declares that it recognizes as binding *ipso facto* and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of the American Convention, the Court must recall the provisions of Article 28 of the 1969 Vienna Convention on the Law of Treaties[7], when deciding whether or not it has jurisdiction to hear a case. This article states:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with regard to that party.

65. The above principle of non-retroactivity applies to the effective exercise of the juridical effects of the recognition of the Court's jurisdiction to hear a contentious

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[4] *Cf. Alfonso Martín del Campo Dodd case. Preliminary objections, supra* note 3, para. 68; and *Cantos case. Preliminary objections, supra* note 3, para. 34.

[5] *Cf. Case of Belilos v. Switzerland*, judgment of 29 April 1988, Series A No. 132, § 47.

[6] *Cf. Alfonso Martín del Campo Dodd case*. *Preliminary objections*, *supra* note 3, para. 69; *Baena Ricardo et al. case*. *Competence.* Judgment of November 28, 2003. Series C No. 104, para. 68; and *Hilaire, Constantine y Benjamin et al. case*. Judgment of June 21, 2002. Series C No. 94, paras. 16 and 17.

[7] *Cf. Alfonso Martín del Campo Dodd case. Preliminary objections, supra* note 3, para. 68; and *Cantos case. Preliminary objections, supra* note 3, paras. 35 and 37.

case. Therefore, according to the provisions of the said Article 28 of the 1969 Vienna Convention on the Law of Treaties, the Court may consider acts and facts that have taken place after the date of recognition of the Court's jurisdiction and situations which, at that date, had not ceased to exist. In other words, the Court has jurisdiction to consider continuing violations that persist after this recognition, based on the provisions of the said Article 28 and, consequently, the principle of non-retroactivity is not violated.

66. The Court cannot exercise its contentious jurisdiction to apply the Convention and declare that its provisions have been violated when the alleged facts or the conduct of the defendant State which might involve international responsibility precede recognition of the Court's jurisdiction.

67. However, in case of a continuing or permanent violation, whose commencement occurred before the defendant State had recognized the Court's contentious jurisdiction and which persists even after this recognition, the Court is competent to consider the conducts that occurred after the recognition of its jurisdiction and the effects of the violations.[8]

68. When interpreting the Convention pursuant to its object and purpose, the Court must act so as to preserve the integrity of the mechanism established in Article 62(1) of the Convention. It would be inadmissible to subordinate this mechanism to restrictions that render inoperative the system for the protection of human rights established in the Convention and, consequently, the jurisdictional function of the Court.[9]

69. As in other cases, the Court also reiterates that the clause on recognition of the Court's jurisdiction is essential to the effectiveness of the international protection mechanism and must be interpreted and applied so that the guarantee it establishes is truly practical and effective, bearing in mind the special nature of human rights treaties and their collective implementation. Moreover, regarding the principle of *effet utile,* it has said that:

> The States Parties to the Convention must guarantee compliance with its provisions and its effects *(effet utile)* within their own domestic laws. This principle applies not only to the substantive provisions of human rights treaties (in other words, the clauses on the protected rights), but also to the procedural provisions, such as the one concerning recognition of the Court's contentious jurisdiction.[10]

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[8] *Cf. Alfonso Martín del Campo Dodd case. Preliminary objections, supra* note 3, para. 79; and *Blake case. Preliminary objections*. Judgment of July 2, 1996. Series C No. 27, paras. 39 and 40.

[9] *Cf. Baena Ricardo et al. case*. *Competence, supra* note 6, para. 128; *Hilaire, Constantine y Benjamin et al. case*, *supra* note 6, para. 19; *Constantine et al. case. Preliminary objections.* Judgment of September 1, 2001. Series C No. 82, para. 69; *Benjamin et al. case. Preliminary objections.* Judgment of September 1, 2001. Series C No. 81, para. 73; and *Hilaire case. Preliminary objections.* Judgment of September 1, 2001. Series C No. 80, para. 82.

[10] *Cf. Baena Ricardo et al. case. Competence, supra* note 6, para. 66; *Constantine et al. case. Preliminary objections, supra* note 9, para. 74; *Benjamin et al. case. Preliminary objections, supra* note 9, para. 74; *Hilaire case. Preliminary objections, supra* note 9, para. 83; *the Constitutional Court case. Competence.* Judgment of September 24, 1999. Series C No. 55, para. 36; and *Ivcher Bronstein case. Competence.* Judgment of September 24, 1999. Series C No. 54, para. 37. Also, *Cf., inter alia, Case of the "Juvenile Reeducation Institute"*. Judgment of September 2, 2004. Series C No. 112, para. 205; Case of the Gómez Paquiyauri Brothers. Judgment of July 8, 2004. Series C No. 110, paras. 150 and 151; and *Bulacio case*. Judgment of September 18, 2003. Series C No. 100, para. 142. Likewise, *Cf. Klass and others v. Germany, (Merits) Judgment of 6 September 1978, ECHR, Series A no. 28*, *para. 34; and*

70. Furthermore, when determining its jurisdiction in a case when the defendant State has established some limitation with regard to it, the Court must preserve a fair balance between the protection of human rights, which is the ultimate purpose of the system, and the legal certainty and procedural equity that will ensure the stability and reliability of international protection.[11]

71. Taking into account the above principles and parameters, the Court must determine whether it can consider the facts on which the alleged violations of the Convention are based; consequently, it will now examine its jurisdiction *ratione temporis* in light of the provisions of Article 62 of the Convention and of the limitation to the recognition of the Court's jurisdiction invoked by El Salvador.

72. Since the defendant State established a temporal limitation when it recognized this jurisdiction, which was intended to exclude from the Court's jurisdiction facts or acts that occurred prior to the date on which the declaration recognizing the Court's jurisdiction was deposited and also facts and effects relating to a continuing or permanent violation commencing before this recognition; and since it alleged this as a preliminary objection, the Court will now consider whether this limitation is compatible with the American Convention and take a decision on its jurisdiction.

73. In the instant case, the temporal limitation to recognition of the Court's jurisdiction established by El Salvador is based on the authority granted by Article 62 of the Convention to States Parties deciding to recognize the contentious jurisdiction of the Court, to establish a temporal limitation to this jurisdiction. Therefore, this limitation is valid, because it is compatible with the said provision.

74. In every case, the Court must determine whether the facts submitted to its consideration are excluded by the said limitation, because, pursuant to the principle of *compétence de la compétence (supra* para. 63*),* the Court cannot leave it to the States to determine what facts are excluded from its jurisdiction. This determination is one of the Court's obligation in the exercise of its jurisdictional functions.

75. In other cases,[12] the Court has declared that a specific limitation introduced by the State when recognizing its contentious jurisdiction ran counter to the object and purpose of the Convention. The Court observes that, contrary to this case, the aforesaid limitation had "a general scope that had the effect of totally subordinating the application of the Convention to domestic law […] and as decided by the domestic courts." In this case, the application of the limitation established by El Salvador is not subordinated to the State's interpretation of each case, but it is for the Court to determine whether the facts submitted to its consideration are excluded by the limitation.

Permanent Court of Arbitration, *Dutch-Portuguese Boundaries on the Island of Timor, Arbitral Award of June* 25, 1914.

[11] *Cf. Alfonso Martín del Campo Dodd case. Preliminary objections, supra* note 3*,* para. 84*; Baena Ricardo et al. case. Preliminary objections.* Judgment of November 18, 1999. Series C No. 61, para. 42; and *Caballero Delgado and Santana case. Preliminary objections*. Judgment of January 21, 1994. Series C No. 17, para. 44.

[12] *Cf. Constantine et al. case. Preliminary objections, supra* note 9, para. 79; *Benjamin et al. case. Preliminary objections, supra* note 9, para. 79; and *Hilaire case. Preliminary objections*, *supra* note 9, para. 88.

76. In this regard, the United Nations Human Rights Committee has declared inadmissible, *ratione temporis*,[13] several communications where a complaint was filed against a State that had established a limitation to the Committee's jurisdiction similar to the limitation examined in this case.

77. Based on the above, the Court decides that the facts that the Commission alleges in relation to the alleged violation of Articles 4 (Right to Life), 5 (Right to Personal Integrity) and 7 (Right to Personal Liberty) of the Convention, in relation to Article 1(1) (Obligation to Respect Rights) thereof, to the detriment of Ernestina and Erlinda Serrano Cruz, are excluded owing to the limitation to the recognition of the Court's jurisdiction established by El Salvador, because they relate to violations which commenced in June 1982, with the alleged "capture" or "taking into custody" of the girls by soldiers of the Atlacatl Battalion and their subsequent disappearance, 13 years before El Salvador recognized the contentious jurisdiction of the Inter-American Court.

78. In view of these considerations and pursuant to the provisions of Article 28 of the 1969 Vienna Convention on the Law of Treaties, the Court admits the preliminary objection *ratione temporis* filed by the State, disallowing the Court from hearing acts or facts that occurred before June 6, 1995, the date on which the State deposited the instrument recognizing the Court's jurisdiction with the OAS General Secretariat.

79. Since the temporal limitation established by the State is compatible with Article 62 of the Convention (*supra* para. 73), the Court admits the preliminary objection *ratione temporis* filed by El Salvador so that the Court may not consider those facts or acts that commenced prior to June 6, 1995, and that persist after that date when its jurisdiction was recognized. Accordingly, the Court will not rule on the alleged forced disappearance of Ernestina and Erlinda Serrano Cruz and, thus, on any of the allegations concerning violations related to the disappearance.

80. However, the Commission has submitted to the Court's consideration several facts related to an alleged violation of Articles 8 (Right to a Fair Trial) and 25 (Judicial Protection) of the Convention, in relation to Article 1(1) (Obligation to Respect Rights) thereof, which allegedly took place after recognition of the Court's jurisdiction and which occurred in the context of the domestic criminal investigations to determine what happened to Ernestina and Erlinda Serrano Cruz. The Commission expressly stated that there are "facts and effects subsequent to the date on which the Court's jurisdiction was recognized by the Salvadoran State" that "remain," "are repeated" and "commenced" and "were executed" after the said date of the State's recognition of the Court's jurisdiction. According to the Commission, "[t]here are completely independent judicial decision, new decision to file the case, to close judicial proceedings, decisions to re-open, to hear judicial actions as mere formalities, [...] harassment of witnesses and next of kin of the victims" and a "permanent attitude by the State not to allow the re-establishment of the identity of the girls." The Commission added that the "measures taken by the Salvadoran State to provide justice in this case were directed at sowing doubt about the very existence of the [girls]; at incriminating the family for their alleged collaboration with the FMLN guerrilla, and even modifying the testimony provided to the domestic courts by María Esperanza Franco de Orellana."

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[13] *Cf.* U.N., Human Rights Committee, *Acuña Inostroza and others vs. Chile* (*717/1996*), communication of 28 July 1999, para. 6.4; U.N., Human Rights Committee, *Menanteau Aceituno and Carrasco Vásquez vs. Chile (746/1997),* communication of 26 July 1999, para. 6.4; and U.N., Human Rights Committee, *Pérez Vargas vs. Chile (718/1996)*, communication of 26 July 1999, para. 6.4.

81. The facts described by the Commission that allegedly relate to the violation of Articles 8 and 25 of the Convention, include the following: on November 13, 1995, the mother of the Serrano Cruz sisters filed a petition for *habeas corpus* before the Constitutional Chamber of the Supreme Court of Justice of El Salvador, which was decided in a ruling of March 14, 1996; the decision issued on April 19, 1996, by the Chalatenango Court of First Instance; on May 27, 1998, the Chalatenango Court of First Instance ordered the filing of the criminal case; and on May 17, 1999, the criminal proceeding was re-opened.

82. In this regard, when alleging the violation of Articles 8 and 25 of the Convention, the representatives also indicated that some of the reported facts occurred after June 6, 1995. They included: the filing of the petition for *habeas corpus* on November 7, 1995; the delivery of the judgment of the Constitutional Chamber of El Salvador on March 14, 1996; and the measures taken in criminal proceeding 112/93 "which were intended to obstruct and delay the proceeding, including the closing of the investigation on two occasions: March 16 and May 27, 1998."

83. In this regard, the State argued that "moreover, the Court cannot consider the alleged failure to investigate attributed to the jurisdictional bodies, because, since it relates to the alleged forced disappearance, it forms part of the continuing violations that commenced before the date on which El Salvador deposited its declaration recognizing jurisdiction."

84. The Court considers that all the facts that occurred following El Salvador's recognition of the Court's jurisdiction and which refer to the alleged violations of Articles 8 and 25 of the Convention, in relation to Article 1(1) thereof, are not excluded by the limitation established by the State, because they refer to judicial proceedings that constitute independent facts. They commenced after El Salvador had recognized the Court's jurisdiction and can constitute specific and autonomous violations concerning denial of justice occurring after the recognition of the Court's jurisdiction.

85. Based on the above, the Court rejects the preliminary objection *ratione temporis* filed by the State so that the Court would not consider facts or acts that occurred after June 6, 1995, relating to the alleged violations to the right to a fair trial and to judicial protection embodied, respectively, in Articles 8 and 25 of the Convention, in relation to Article 1(1) thereof.

86. The Court emphasizes that, in its application, in its brief with observations on the preliminary objections filed by the State, and in its final oral and written arguments, the Commission had indicated that the Court should determine the international responsibility of the State for the facts "subsequent to the date of recognition of the Court's jurisdiction." In this regard, the Commission indicated that the State was responsible for "not having conducted an exhaustive investigation to discover the whereabouts of the [alleged] victims; [not] having identified, prosecuted and punished those responsible; [...not] having guaranteed to their next of kin the right to the truth and to satisfactory reparation; violating the rights to personal integrity, the rights of the family and to a name; denying [... to the alleged] victims their condition as children; [and for] having separated them from their parents and next of kin, and denying them their identity."

87. In this regard, the Court has noted that both the Commission and the representatives have submitted various facts to the Court's consideration related to alleged violations of Articles 4, 5, 17, 18 and 19 of the American Convention, in relation to Article 1(1) thereof, which had allegedly occurred after recognition of the Court's jurisdiction and in the context of the alleged lack of an investigation at the domestic level to determine what happened to Ernestina and Erlinda Serrano Cruz. In other words, the Commission and the representatives established a close connection between some of the alleged violations of Articles 4, 5, 17, 18 and 19 of the American Convention, and the alleged violation of Articles 8 and 25 of the Convention, in relation to Article 1(1) thereof.

88. Regarding the violation of Article 4 of the Convention, the Commission indicated that there had been "a total absence of adequate measures of investigation"; and that, "[i]n some cases when the respective State has not investigated allegations of arbitrary deprivation of life, the international courts have determined their responsibility for violating this fundamental right."

89. In the case of the alleged violation of Article 5 of the Convention, the Commission indicated in its final oral and written arguments that, owing to "the failure to comply with its obligation to investigate what happened," the State had violated the mental and moral integrity of the Serrano Cruz sisters, because "they continue to be deprived of their identity and contact with their biological family." The Commission also indicated that the next of kin of Ernestina and Erlinda are allegedly direct victims of the violation of Article 5 of the American Convention "because they do not know the whereabouts of [the girls], which causes them great anguish." The representatives added that the next of kin of Ernestina and Erlinda have suffered frustration and impotence owing to the failure of the public authorities to investigate the facts, "punish [those] responsible," and due to the "denial of justice."

90. Regarding the violation of Article 17 of the Convention, to the detriment of the Serrano Cruz sisters and their next of kin, the Commission stated that "the lack of diligence in the investigation and determination of the whereabouts [of Ernestina and Erlinda], constitutes a violation of the rights protected by Article 17 of the Convention." Both the Commission and the representatives mentioned that, according to Protocol II additional to the Geneva Conventions of 12 August 1949, the State has the obligation not only to allow the next of kin to carry out a search, but also to facilitate it with "timely measures" such as the identification and registration of children for family reunification. The representatives also indicated that "far from taking any measure of this type, [El Salvador] ensured non-reunification […] by different acts and omissions," such as the creation of obstacles to prevent finding Ernestina and Erlinda, and the way in which the criminal investigation has been carried out "owing to the lack of impartiality and diligence" with which it was conducted. In this regard, the representatives indicated expressly that these arguments refer to events relating to the alleged violation of Articles 8 and 25 of the Convention.

91. Regarding the alleged violation of Article 18 of the American Convention, the Commission indicated that "[t]he State's obligation to clarify the facts and establish the whereabouts of the two disappeared children subsists fully in the instant case, [because] if they are still alive, Ernestina and Erlinda Serrano Cruz have the right to know their origins, which complements the right of the next of kin to know their whereabouts." The representatives argued that "the State has also violated the right to identity of the girls by trying to deny their existence before the Court."

92. Finally, in relation to the alleged violation of Article 19 of the American Convention, the Commission indicated that the State had failed to comply with the obligations arising from this article by "not taking any measure to return them to their family" and "not having determined […] their whereabouts." The Commission indicated that, since June 1995, "the judicial authorities of El Salvador have had the treaty-based obligation to provide justice by conducting comprehensive investigatory measures aimed at determining the whereabouts of the Serrano Cruz sisters, identifying those responsible for the violations committed against them, and making reparation to their next of kin." The condition established by the State when recognizing the jurisdiction of the Court does not prevent the Court from ruling and "ending the denial of justice." In this regard, the representatives indicated that the State has not complied with its obligation to provide special measures of protection, "because it has not taken any steps to return and reunite [Ernestina and Erlinda] with their family."

93. From the allegations transcribed in the preceding paragraphs, the Court notes that it is possible that some of the facts that are the object of this case and may constitute violations of the Convention began to be executed after the date on which El Salvador recognized the Court's jurisdiction. The Court considers that it has jurisdiction to consider these alleged violations.

94. Therefore, the Court decides to reject the preliminary objection *ratione temporis* in relation to the alleged violations of Articles 8 and 25 of the Convention, in relation to Article 1(1) thereof, and to any other violation whose facts or commencement was subsequent to June 6, 1995, the date on which the State deposited with the OAS General Secretariat the instrument recognizing the Court's jurisdiction.

95. The Court also observes that some of the grounds for the alleged violation of Articles 4, 8, 17, 18, 19 and 25 of the American Convention are related to the alleged forced disappearance. Regarding these allegations, the Court decided not to consider them because it has decided that it will not rule on the alleged forced disappearance (*supra* paras. 77, 78 and 79).

96. In summary, the Court accepts the preliminary objection *ratione temporis* filed by the State, in the terms of paragraphs 77, 78 and 79 of this judgment, and rejects the said preliminary objection in the terms of paragraphs 84, 85, 93 and 94 of this judgment.

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* *

"*Non-retroactivity of the application of the crime of forced disappearance of persons*"

Arguments of the State

97. In the brief filing preliminary objections, answering the application and with observations on the requests and arguments brief, the State argued that:

a) "Presuming [the Court might decide] to consider that there had been an alleged permanent and continuing forced disappearance in this case, [it was] in order to file the [objection of] lack of jurisdiction *rationae temporis* of the use of this term." This objection "should not be taken into account if the Inter-American Court decides to declare the application inadmissible [...] or if, based on the plea and its reasoned object, it decides to consider claims other than the alleged permanent and continuing forced disappearance";

b) The 1994 Inter-American Convention on Forced Disappearance of Persons "constituted the first binding legal instrument in any part of the world" concerning forced disappearance. The State has not ratified this Inter-American Convention, "but this does not prevent it from constituting [a] source of international law and being applied by the Court";

c) According to the application brief filed by the Inter-American Commission, the alleged violations constitute a crime of continuing and permanent forced disappearance, which commenced in 1982 and allegedly continues, since the whereabouts of the Serrano Cruz sisters has not been established. If the Court accepts this reasoning, it would be applying the principles established in the 1992 United Nations Declaration on the Protection of All Persons from Enforced Disappearances and the 1994 Inter-American Convention on Forced Disappearance of Persons, and this would violate the principle of non-retroactivity of the law and the principle of legality. The Court could consider the alleged violations described by the Commission in relation to the provisions of the American Convention and the American Declaration of the Rights and Duties of Man that have allegedly been violated, but it cannot classify them as "forced disappearance of persons (continuing and permanent)," because this classification and definition of a crime was legally established 10 and 12 years later. In other words, there can be no retroactive application of a conduct classified as a crime subsequently to the time at which it allegedly occurred;

d) Using juridical logic, it is almost impossible for the forced disappearance of persons to constitute an integral, permanent and continuing whole, unless this has been declared in the respective conventions. Classifying all violations as continuing and permanent, specifically substantive violations, lacks juridical logic and becomes a legal fiction;

e) The amplitude of the concept of forced disappearance, established in Article II of the Inter-American Convention on Forced Disappearance of Persons, can allow almost any other conduct to be classified as forced disappearance, given that this concept does not take into account the perpetrator's intention or the possible special situation of abandon of the subject, and other circumstances that would be required for the existence of a crime or a conduct violating the Convention;

f) It cannot be understood that, among their provisions, the general regional and international human rights treaties contain a specific human right to non-disappearance or to protection against the forced disappearance of persons; and

g) If the Court considers that the definition of forced disappearance of persons "has been established in other sources of international law and prior

> to the date on which the alleged facts [of the instant case] occurred," it should make the corresponding clarification and specify the exact sources that allow this. The Court's case law in the Velásquez Rodríguez, Godínez Cruz and Blake cases is in error when it applies the conducted defined as a crime in the 1994 Convention in cases that preceded that definition.

Arguments of the Commission

98. The Inter-American Commission requested the Court "to reaffirm its jurisdiction" and "to declare [that this objection is] inadmissible." It argued that:

> a) In this case, it is not asking the Court to apply the Inter-American Convention on Forced Disappearance of Persons, but to use this instrument to define the concept of forced disappearance. The definition of forced disappearance was not established by this Convention, but is "a series of grave human rights violations protected by the American Convention," which has been widely developed in international legal doctrine and practice;
>
> b) The continuing nature of forced disappearance does not arise from the Inter-American Convention on Forced Disappearance; it had this characteristic previously. The Convention gave a form to the practice and interpretation of domestic law in the hemisphere and the organs of the inter-American protection system. The Convention merely reflects and gives shape to something that already existed in inter-American legislation in force;
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> c) The concept of forced disappearance is not being applied retroactively, because it had been defined and developed by international law, owing to the regrettable reality of previous decades. Otherwise, the victims of forced disappearance would lack juridical protection under the American Convention. The application of the concept of forced disappearance of persons in cases such as Velásquez Rodríguez "was a critical landmark in the development of international human rights law";
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> d) "The Salvadoran State erroneously attempts to apply a principle of criminal law (*nullum crimen, nulla poena sine praevia lege poenali)* to the proceeding before the Inter-American Court, when the latter has indicated repeatedly the differences between the criminal proceeding and the way in which the protection organs of the inter-American system function";
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> e) Accepting "the argument of the Salvadoran State [would] be equivalent to saying that, prior to 1994, forced disappearance of persons was allowed or, at least, not prohibited by the American Convention and international law"; and
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> f) Forced disappearance existed as a pattern of conduct that violated numerous rights established in the American Convention.

Arguments of the representatives of the alleged victims and their next of kin

99. The representatives of the alleged victims and their next of kin requested the Court to declare that it had jurisdiction to hear the facts of the instant case and argued that:

> a) The Vienna Convention on the Law of Treaties and the Court's recent case law establish the principle of non-retroactivity, which means that "the provisions of a treaty do not bind a State Party in relation to any act or fact which took place before the date of the entry into force of the treaty." However, in some cases or situations this argument may be modified, owing to the so-called "juridical theory of continuing unlawful acts." In other words, jurisdiction *ratione temporis* exists with regard to facts or violations that, even though they occurred before recognition of the Court's jurisdiction, continued over time (continuing unlawful acts) and persisted after this recognition;
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> b) They share the Commission's opinion that "the reported facts […] constitute the crime of forced disappearance [… and] have retained this characteristic since the recognition of the Court's jurisdiction on June 6, 1995." The characteristic of "continuity" implicit in the crime of forced disappearance "authorizes the Court to hear the instant case '*ratione temporis*'";
>
> c) The crime of forced disappearance is characterized by its "finalistic trajectory and a specific *dolus*," since the crime seeks to hide the passive subjects indefinitely, create uncertainty about their fate, cause them the most absolute lack of security, and exclude them from the protection of the judicial organs. The Penal Code of El Salvador includes this crime in the chapter entitled "Crimes against humanity"; hence, the legislator wished to indicate that "the elements that characterize the crime are those that have been recognized by international legal doctrine as crimes against humanity";
>
> d) Article 28 of the Vienna Convention on the Law of Treaties establishes the principle of the non-retroactivity of the application of international treaties. The alleged violations are continuing and, accordingly, do not constitute an exception to the principle of non-retroactivity. The commencement of the disappearance of the two Serrano Cruz sisters took place on June 2, 1982, and this violation persists up until today, and will persist until the whereabouts of the minors is established, because this violation is of a continuing nature; and
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> e) The crime of forced disappearance is a multiple crime, because the legal rights affected include the individual's right to life, liberty, humane treatment, peace, safety and wellbeing. Some of the reported facts occurred after June 6, 1995; they include: the filing of the petition for *habeas corpus*; the delivery of the judgment of the Constitutional Chamber of El Salvador on March 14, 1996; the procedures of the criminal proceeding aimed at obstructing and delaying it, and the closing of the investigation on two occasions. Moreover, the deprivation of liberty of the alleged victims continues today, and also the separation from their family, the suppression of their identity, the denial of justice for the girls and their family and, since these violations are "a consequence of the disappearance, the Court has jurisdiction to rule [on them]." In addition, the State's negligence and

obstruction in the investigations persist and their purpose has been varied in order to demonstrate the inexistence of the alleged victims.

Considerations of the Court

100. Since the State argues that the conduct of forced disappearance should not be invoked retroactively, because it was defined as such after the time at which the facts in this case allegedly occurred, and that "it lacks juridical logic" and is "practically impossible that the forced disappearance of persons constitutes an integral, continuing and permanent whole, unless this has been established in the respective conventions," the Court considers that it must reiterate what it has established in its constant case law on cases of forced disappearance of persons. In this regard, it has stated that it constitutes an unlawful act that gives rise to multiple, continuing violations of several rights protected by the American Convention and places the victim in a state of complete defenselessness, which involves other related crimes; it is a crime against humanity. The State's international responsibility is aggravated when the disappearance is a feature of State practice.[14] Also, forced disappearance presumes disregard of the obligation to organize the State structure so as to guarantee the rights recognized in the Convention. Hence the importance that the State should adopt all necessary measures to avoid such facts, investigate and punish those responsible and, also, inform the next of kin of the whereabouts of the disappeared and compensate them, when applicable.[15]

101. Starting with its first cases in 1988,[16] the Court classified the series of multiple and continuing violations of several rights protected by the Convention as forced disappearance of persons, based on developments in the sphere of international human rights law at that time, which years later led to the adoption of declarations and conventions on this subject.

102. In the judgment on merits in the *Velásquez Rodríguez case,* delivered on July 29, 1988,[17] the Court referred to the evolution of the concept of forced disappearance of persons, particularly in the 1980s, as follows:

> 151. The establishment of a Working Group on Enforced or Involuntary Disappearances of the United Nations Commission on Human Rights, by Resolution 20 (XXXVI) of February 29, 1980, is a clear demonstration of general censure and repudiation of the practice of disappearances, which had already received world attention at the UN General Assembly (Resolution 33/173 of December 20, 1978), the Economic and Social Council (Resolution 1979/38 of May 10, 1979) and the

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[14] *Cf. Case of Molina Theissen. Reparations* (Art 63(1) American Convention on Human Rights). Judgment of July 3, 2004, Series C No. 108, para. 41.

[15] *Cf. the case of the 19 Tradesmen*. Judgment of July 5, 2004. Series C No. 109, para. 142; Case of Bámaca Velásquez. Judgment of November 25, 2000. Series C No. 70, paras. 128 and 129; *Blake case.* Judgment of January 24, 1998. Series C No. 36, paras. 65 and 66; *Castillo Páez case*. Judgment of November 3, 1997. Series C No. 34, para. 72; *Blake case. Preliminary objections*, *supra* note 8, paras. 35 and 39; *Fairén Garbi and Solís Corrales case*. Judgment of March 15, 1989. Series C No. 6, paras. 147 to 152; *Godínez Cruz case*. Judgment of January 20, 1989. Series C No. 5, paras. 163 to 167; and *Velásquez Rodríguez case*. Judgment of July 29, 1988. Series C No. 4, paras. 155 to 158.

[16] *Cf. Velásquez Rodríguez case, supra* note 15, paras. 149 to 153; *Godínez Cruz case, supra* note 15, paras. 157 to 161; and *Fairén Garbi and Solís Corrales case*, *supra* note 15, para. 146.

[17] *Velásquez Rodríguez case*, *supra* note 15, paras. 151 and 152. Likewise *Cf. Godínez Cruz case*, *supra* note 15, paras. 159 and 160; and *Fairén Garbi and Solís Corrales case*, *supra* note 15, para. 146.

> Subcommission for the Prevention of Discrimination and Protection of Minorities (Resolution 5B (XXXII) of September 5, 1979). The reports of the rapporteurs or special envoys of the Commission on Human Rights show concern that the practice of disappearances be stopped, the victims reappear and that those responsible be punished.
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> 152. Within the inter-American system, the General Assembly of the Organization of American States (OAS) and the Commission have repeatedly referred to the practice of disappearances and have urged that disappearances be investigated and that the practice be stopped (AG/RES. 443 (IX-0/79) of October 31, 1979; AG/RES.510 (X-0/80) of November 27, 1980; AG/RES. 618 (XII-0/82) of November 20, 1982; AG/RES. 666 (XIII-0/83) of November 18, 1983; AG/RES. 742 (XIV-0/84) of November 17, 1984 and AG/RES. 890 (XVII-0/87) of November 14, 1987; Inter-American Commission on Human Rights: Annual Report 1978, pp. 24-27; Annual Report, 1980-1981, pp. 113-114; Annual Report, 1982-1983, pp. 46-67; Annual Report, 1985-1986, pp. 37-40; Annual Report, 1986-1987, pp. 277-284 and in many of its Country Reports, such as OEA/Ser. L/V/II.49, doc. 19, 1980 (Argentina); OEA/Ser. L/V/II.66, doc. 17, 1985 (Chile) and OEA/Ser. L/V/II.66, doc. 16, 1985 (Guatemala)).

103. The Court observes that, even though the international community only adopted the first declaration and the first treaty referring to the crime of forced disappearance of persons in 1992 and 1994, respectively, prior to this, legal doctrine and the organs of the universal and regional system had used this classification frequently when referring to that series of facts and violations as a crime against humanity.[18] Thus, for example, within the inter-American system, Resolution AG/RES. 666 (XIII-0/83) of November 18, 1983, is noteworthy. In it, the General Assembly of the Organization of American States (hereinafter "OAS") resolved "To declare that the practice of forced disappearance of persons in the Americas is an affront to the conscience of the hemisphere and constitutes a crime against humanity," and Resolution AG/RES. 742 (XIV-0/84) of November 17, 1984, in which the Assembly referred to forced disappearance as "a cruel and inhuman procedure to evade the law, to the detriment of the norms that guarantee protection against arbitrary detention and the right to personal integrity and safety." Likewise, the following resolutions of the United Nations General Assembly should be cited: Resolution 3450 (XXX) of December 9, 1975, on the question of missing persons in Cyprus as a result of the armed conflict; Resolution 32/128 of December 16, 1977, proposing the establishment of a body responsible for investigating missing persons in Cyprus "impartially, effectively and rapidly"; and Resolution 33/173 of December

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[18] *Cf. Fairén Garbi and Solís Corrales case, supra* note 15, paras. 148 to 152; *Godínez Cruz case*, *supra* note 15, paras. 163 to 167; and *Velásquez Rodríguez case*, *supra* note 15, paras. 155 to 158. Likewise, *Cf.* Inter-American Commission on Human Rights. *Annual Report of the Inter-American Commission on Human Rights 1983-1984.* Chapter IV "Situation of human rights in several States" and Chapter V "Areas in which steps need to be taken towards full observance of the human rights set forth in the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights", paras. 10 and 11, OEA/Ser.L/V/II.63 doc. 10 of September 28, 1984; Inter-American Commission on Human Rights. *Annual Report of the Inter-American Commission on Human Rights 1984-1985*. Chapter IV "Situation of human rights in several States", OEA/Ser.L/V/II.66 Doc. 10 rev. 1 of October 1, 1985; Inter-American Commission on Human Rights. *Annual Report of the Inter-American Commission on Human Rights 1985-1986*. Chapter IV "Situation of human rights in several States", OEA/Ser.L/V/II.68 Doc. 8 rev. 1 of September 26, 1986; Inter-American Commission on Human Rights. *Annual Report of the Inter-American Commission on Human Rights 1986-1987*. Chapter IV "Situation of human rights in several States", OEA/Ser.L/V/II.71 Doc. 9 rev. 1 of September 22, 1987; Inter-American Commission on Human Rights. *Annual Report of the Inter-American Commission on Human Rights 1987-1988*. Chapter IV "Situation of human rights in several States", OEA/Ser.L/V/II.74 Doc. 10 rev. 1 of September 16, 1988; Inter-American Commission on Human Rights. *Annual Report of the Inter-American Commission on Human Rights 1988-1989*. Chapter IV "Situation of human rights in several States", OEA/Ser.L/V/II.76 Doc. 10 of September 18, 1989; and *Annual Report of the Inter-American Commission on Human Rights 1991*. Chapter IV "Situation of human rights in several States", OEA/Ser.L/V/II.81 Doc. 6 Rev. 1 of February 14, 1992.

20, 1978, entitled "Disappeared Persons," in which the General Assembly expressed its concern about "reports from various parts of the world relating to enforced or involuntary disappearances of persons as a result of excesses on the part of law enforcement or security authorities or similar organizations," and also its concern about "reports of difficulties in obtaining reliable information from competent authorities as to the circumstances of such persons," and indicated that there is "a danger to the life, liberty and physical security of such persons, arising from the persistent failure of these authorities or organizations to acknowledge that such persons are held in their custody or otherwise account for them."

104. Added to the above, the Court notes that the phenomenon of forced disappearances during the armed conflict which affected El Salvador from 1980 to 1991 and its consequences were analyzed and discussed by the Truth Commission for El Salvador sponsored by the United Nations, the Inter-American Commission on Human Rights, international organizations, authorities and bodies of the State itself, and other organizations.[19]

105. Based on the above, this Court considers that there is no doubt that the forced disappearance of persons is a continuing crime, which constitutes a complex form of human rights violation, and that, even in the 1970s, it was being considered as such in international human rights law. Forced disappearance signifies a flagrant rejection of the values inherent in human dignity and the most basic principles on

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[19] *Cf.* Report of the United Nations Truth Commission on El Salvador, "*De la locura a la esperanza: la guerra de 12 años en El Salvador"*, San Salvador, New York, 1992-1993, pp. 41, 42, 43 and 105 to 117; Inter-American Commission on Human Rights. *Annual Report of the Inter-American Commission on Human Rights 1983-1984.* Chapter IV "Situation of human rights in several States", El Salvador. OEA/Ser.L/V/II.63 doc 10 of September 28, 1984, paras. 10 and 11; Inter-American Commission on Human Rights. *Annual Report of the Inter-American Commission on Human Rights 1984-1985*. Chapter IV "Situation of human rights in several States", El Salvador. OEA/Ser.L/V/II.66 Doc. 10 rev. 1 of October 1, 1985; Inter-American Commission on Human Rights. *Annual Report of the Inter-American Commission on Human Rights 1985-1986*. Chapter IV "Situation of human rights in several States", El Salvador. OEA/Ser.L/V/II.68 Doc. 8 rev. 1 of September 26, 1986; Inter-American Commission on Human Rights. *Annual Report of the Inter-American Commission on Human Rights 1986-1987*. Chapter IV "Situation of human rights in several States", El Salvador. OEA/Ser.L/V/II.71 Doc. 9 rev. 1 of September 22, 1987; Inter-American Commission on Human Rights. *Annual Report of the Inter-American Commission on Human Rights 1987-1988*. Chapter IV "Situation of human rights in several States", El Salvador. OEA/Ser.L/V/II.74 Doc. 10 rev. 1 of September 16, 1988; Inter-American Commission on Human Rights. *Annual Report of the Inter-American Commission on Human Rights 1988-1989*. Chapter IV "Situation of human rights in several States", El Salvador. OEA/Ser.L/V/II.76 Doc. 10 of September 18, 1989; United Nations Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, *"Question of the human rights of all persons subjected to any form of detention or imprisonment. Question of enforced or involuntary disappearances"*, UN Doc. E/CN.4/1995/36 of 21 December 1994, paras. 155-160; United Nations Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, *"Question of enforced or involuntary disappearances"*, UN Doc. E/CN.4/2003/70 of January 21, 2003, paras. 98 to 102; second decision in file SS-0449-96 issued by the El Salvador Ombudsman on February 10, 2003, on the forced disappearance and subsequent search for hundreds of children violently separated from their families in the context of the armed conflict experienced by El Salvador from 1979 to 1991; *"Informe de la 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 desaparición"*, issued on September 2, 2004, pp. 69 to 108; Amnesty International, Report *"El Salvador: ¿Dónde están las niñas y los niños desaparecidos?"* July 30 2003, Index No. AI: AMR 29/004/2003/s; Asociación Pro-búsqueda de Niñas y Niños Desaparecidos, "*El día más esperado: buscando a los niños desaparecidos de El Salvador*", Asociación Pro-búsqueda, UCA Editores, San Salvador, 2001; Asociación Pro-búsqueda de Niñas y Niños Desaparecidos, "*La Paz en Construcción. Un estudio sobre la problemática de la niñez desaparecida por el conflicto armado en El Salvador"*. Asociación Pro-búsqueda and Save the Children Sweden, San Salvador; and Asociación Pro Búsqueda de Niñas y Niños Desaparecidos, "*La problemática de niñas y niños desaparecidos como consecuencia del conflicto armado interno en El Salvador*", Asociación Pro-búsqueda, San Salvador, April 1999.

which the inter-American system and the American Convention itself are based. It is equally evident that this crime implies a series of violations of different rights embodied in the Convention and that, in order to declare the violation of these rights, the Court does not require the defendant State to have ratified the relevant Inter-American Convention, nor does it require this in order to classify all these violations as forced disappearance.[20]

106. In the context of this case, the Court rejects the preliminary objection *ratione temporis* entitled "Non-retroactivity of the application of the crime of forced disappearance of persons," because the Court has already decided that it will not consider the alleged forced disappearance of Ernestina and Erlinda Serrano Cruz (*supra* paras. 78 and 79).

SECOND PRELIMINARY OBJECTION
"LACK OF JURISDICTION *RATIONAE MATERIAE"*

107. The Court will now summarize the arguments of the State, the Inter-American Commission, and the representatives of the alleged victims and their next of kin regarding this preliminary objection.

Arguments of the State

108. In its brief filing preliminary objections, answering the application and with observations on the requests and arguments brief, and also in its final oral and written arguments, the State requested the Court to declare that it lacked jurisdiction "because the facts [of the instant case] related to international humanitarian law." In this regard, the State argued that:

> a) The facts of the instant case occurred when the State of El Salvador was undergoing "one of the most difficult and critical moments in its history (1979-1992)," when there was a "clear confrontation" between opposition forces and governmental forces. "The situation of internal tension from 1979 to 1992, constituted a non international armed conflict" and was regulated by the provisions of international humanitarian law, specifically by the four 1949 Geneva Conventions and their 1977 Additional Protocols, to which El Salvador is a party. The International Committee of the Red Cross (ICRC) intervened in order to provide protection and assistance to the victims of the conflict and it was recognized that "international humanitarian law was applicable and in force, […] irrespective of how the conflict was described";
>
> b) "The principal regime applied to the situation in El Salvador was [...] international humanitarian law," which "includes provisions on many matters that are outside the scope of international human rights law." International humanitarian law and international human rights law "have been developed independently and appear in different treaties." "International humanitarian law is an exceptional, emergency law, which is involved when the international or national order is interrupted, while human rights law applies in times of peace" and "many of its provisions may be suspended." "El

[20] *Cf. Blake case. Preliminary objections*, *supra* note 8, para. 35; *Fairén Garbi and Solís Corrales case*, *supra* note 15, para.151; *Godínez Cruz case, supra* note 15, para. 166; and *Velásquez Rodríguez case, supra* note 15, para. 158.

Salvador has never undervalued the exercise of human rights in grave situations of conflict";

c) In 1982, the year in which the facts allegedly occurred, the State did not have a practice of disappearing children; on the contrary, it applied international humanitarian law. The alleged facts occurred in a "combat zone," where there were confrontations between two bands in which the civilian population participated and during which many minors were abandoned and found by the opposite side. The Army used to hand the children who were "orphans or separated from their families" to the Salvadoran Red Cross or to the International Committee of the Red Cross for their care and protection. The State's action "responded to what was appropriate and established under the applicable *lex specialis*," which was international humanitarian law. If the Army did intervened and "picked up the two abandoned minors" and handed them to the Salvadoran Red Cross or the ICRC, "the Army's conduct […] can only be examined with reference to the law applicable during non international armed conflicts and not, by inference, in the terms of the American Convention." "The population in the Department of Chalatenango, in the zone known by the guerrilla as the Modesto Ramírez Central Front […], was involved with the guerrilla in 1982, either temporarily ceasing to be civilian population or as combatants. In the case of the Serrano Cruz family […] one of its sons was a member of the Front and the family belonged to the 'masses'";

d) The Court's jurisdiction to interpret human rights treaties "cannot be extended to humanitarian law treaties", so that if "the Court hears the case, it would be interpreting the pertinent articles of the 1977 Protocol additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of non-international armed conflicts";

e) "Unlike the *Las Palmeras* case, in which the Commission persuaded the Court to rule on violations of humanitarian law, the instant case refers to facts that, *per se,* correspond to the area of international humanitarian law." Bearing in mind the Court's ruling in that case, the Court does not have jurisdiction to determine the compatibility of State acts or laws with the 1949 Geneva Conventions; and

f) The facts of this case "should be examined in accordance with the applicable *lex specialis*, which is international humanitarian law, and this is outside the Court's jurisdiction." The Court should declare itself incompetent "to rule on the violations of humanitarian law alleged by the Inter-American Commission or the representatives of the alleged victims."

Arguments of the Commission

109. The Inter-American Commission indicated that the Court is "fully competent to hear and decide on the matter of the instant case," which calls for the application of the American Convention, ratified by El Salvador on June 23, 1978. It argued that:

a) The forced disappearance of the girls was alleged in the context of an internal armed conflict characterized by massive human rights violations and not as a fact "on the margin" of this conflict, as the State affirms;

b) It had not requested the Court to apply international humanitarian law, but to apply the American Convention in order to establish the international responsibility of El Salvador for the forced disappearance of the Serrano Cruz sisters, because the two minors enjoyed its full protection, "particularly, from the moment they were in the power of State agents." This protection included an investigation into their whereabouts and the punishment of those responsible for the facts. "Consequently, the Inter-American Commission will refrain from referring to the arguments of the State on the applicability of international humanitarian law";

c) The Court has examined cases of forced disappearance of persons in the context of an internal armed conflict and has defined the scope of the State's obligation under the American Convention. The State attempts to justify the human rights violations committed by its agents alleging the Serrano Cruz family's active participation in the guerrilla. In other words, instead of investigating the whereabouts of the children, Ernestina and Erlinda, the State tries to blame the family for their disappearance;

d) The State has incurred in numerous contradictions, because, on the one hand, it blames the Serrano Cruz family for the facts and, on the other hand, it speculates that the Serrano Cruz sisters did not exist. Moreover, it does not present any evidence to show that, after they had been captured by members of the Atlacatl Battalion, the Serrano Cruz sisters were handed over to the Salvadoran Red Cross or the International Committee of the Red Cross, as it has affirmed; and

e) "The fact that international human rights law is applicable particularly in times of peace does not mean that it is not applicable in times of conflict." The American Convention has been binding and fully applicable in El Salvador since June 23, 1978, the date of which it ratified this treaty. The protection system established by the American Convention is such that, even in the circumstances indicated in its Article 27, it establishes a firm nucleus of rights that are non-derogable in situations of war, public danger, or other emergency. "Without invalidating the *lex specialis* nature of international humanitarian law and the important protections that it offers in times of conflict, the fact that the American Convention on Human Rights was fully applicable in El Salvador during the internal conflict is not in question. The facts before the Court refer to violations of this instrument."

Arguments of the representatives of the alleged victims and their next of kin

110. The representatives of the alleged victims and their next of kin requested the Court to "reject" this objection, because:

a) The reasoning used by the State ignores the need to apply international law and international humanitarian law harmoniously and to foster the applicability of the latter in times of war, "failing to appreciate that human rights are applicable in grave situations of conflict." Also, the State's

affirmation that human rights apply "only in times of peace" endangers the minimum human rights of those who are at war;

b) According to Article 63 of the American Convention, the Court's jurisdiction is not exclusively to consider facts that take place in times of peace, but includes those that occur during armed conflicts. In accordance with Article 29 of the Convention, this does not preclude the Court from interpreting provisions that grant protection to the individual in light of the Convention or other treaties of the inter-American protection system. The Court has recognized the value of international humanitarian law for the interpretation of the American Convention. To interpret the corresponding provisions of the Convention that were or are violated by the State in the most favorable way, the Court may take into consideration Article 3 common to all the Geneva Conventions and Additional Protocol II, as well as applicable provisions regarding the protection of children and forced displacement.

c) Since June 23, 1978, the date on which it ratified the Convention, the State was bound to respect and guarantee the human rights of all persons subject to its jurisdiction, with no exception. "The ratification made by the Salvadoran State did not include any type of reservation to substantive provisions of the treaty." And, the State has not indicated that it had suspended guarantees at the time the facts occurred; and

d) In its oral arguments, the State "expressly acknowledged […] that international human rights law was in force" in situation of internal armed conflict.

Considerations of the Court

111. The Court considers that since the State has alleged that "[i]nternational humanitarian law is an exceptional, emergency law, which is involved when the international or national order is interrupted[, as happened during the non international armed conflict in El Salvador from 1979 to 1992), while human rights law applies in times of peace" and that the facts of this case "should be examined in accordance with the applicable *lex specialis*, which is international humanitarian law, and this is outside the Court's jurisdiction," it must refer to the complementarity between international human rights law and international humanitarian law and the applicability of the former in times of peace and during armed conflict, and also repeat that this Court is empowered to interpret the norms of the American Convention in light of other international treaties.

112. Regarding the complementarity of international human rights law and international humanitarian law, the Court considers it should emphasize that all persons, during internal or international armed conflict, are protected by the provisions of international human rights law, such as the American Convention, and by the specific provisions of international humanitarian law. Consequently, there is a convergence of international norms protecting those who are in such situations. In this regard, the Court stresses that the specificity of the provisions of international humanitarian law that protect individuals subject to a situation of armed conflict do not prevent the convergence and application of the provisions of international human rights law embodied in the American Convention and other international treaties.

113. The Court has recognized this convergence of the provisions of international human rights law and the provisions of international humanitarian law in other cases,

in which it declared that the defendant States had violated the American Convention owing to actions in the context of a non-international armed conflict.[21] The Court has also protected members of communities by adopting provisional measures "in light of the provisions of the American Convention and international humanitarian law," given that they were in a situation of extreme gravity and urgency in the context of an armed conflict.[22] Hence, international human rights law is fully in force during internal or international armed conflicts.

114. Article 27 (Suspension of Guarantees) of the American Convention clearly establishes that the Convention continues operating in time of war, public danger or other emergency that threatens the independence or security of a State Party.

115. Likewise, in Article 3 common to all the Geneva Conventions of 12 August 1949, international humanitarian law establishes the complementarity of its norms with international human rights law, when it establishes, *inter alia,* the obligation of the State in the case of armed conflict not of an international nature to provide humane treatment, without any adverse distinction to persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by any cause. In particular, international humanitarian law prohibits, at any time or in any place, violence to the life, integrity and dignity with regard to the above-mentioned persons.[23]

116. Moreover, the Additional Protocol to the Geneva Conventions of 12 August 1949, relating to the protection of victims of non international armed conflicts (Protocol II), acknowledges in its preamble the complementarity or convergence of the norms of international humanitarian law and those of international human rights law, when it states that "[…] international instruments relating to human rights offer a basic protection to the human person". And, Article 75 of Protocol I to these Conventions, on the protection of victims of international armed conflicts (when referring to fundamental guarantees for all persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the said Conventions or under that Protocol), and Article 4 of Protocol II(when referring to the fundamental guarantees of all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted), indicate that such persons are entitled to such guarantees, thus embodying the complementarity of international human rights law and international humanitarian law.

117. It should also be stressed that, when referring to the normative it should observe when carrying out its mandate, the Truth Commission for El Salvador indicated that "the concept of grave facts of violence, as used in the Peace

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[21] *Cf. Case of Molina Theissen*. *Reparations*, *supra* note 14, paras. 15 and 41; *Case of Molina Theissen*. Judgment of May 4, 2004. Series C No. 106, para. 40 and third and fourth operative paragraphs; *Case of Bámaca Velásquez. Reparations* (Art 63(1) American Convention on Human Rights). Judgment of February 22, 2002. Series C No. 91, para. 85; and *Case of Bámaca Velásquez, supra* note 15, paras. 143, 174, 207, 213 and 214.

[22] *Cf. Matter of the Pueblo Indigena de Kankuamo.* Provisional measures. Order of the Inter-American Court of Human Rights of July 5, 2004, eleventh considering paragraph; *Matter of the Communities of Jiguamiandó and Curbaradó.* Provisional measures. Order of the Inter-American Court of Human Rights of March 6, 2003, eleventh considering paragraph; and *Matter of the Peace Community of San José de Apartadó*. Provisional measures. Order of the Inter-American Court of Human Rights of June 18, 2002, eleventh considering paragraph.

[23] *Cf. Case of Bámaca Velásquez, supra* note 15, para. 207.

Agreements, has not been established in a normative vacuum[, … so that] when defining the juridical provisions applicable to this task, it should be noted that, during the Salvadoran conflict, both parties had the obligation to respect a series of provisions of international law, including those stipulated in international human rights law or in international humanitarian law, or in both."[24]

118. Based on the above, the Court observes that the State cannot question the full applicability of the human rights embodied in the American Convention, based on the existence of a non international armed conflict. The Court considers that it is necessary to reiterate that the existence of a non international armed conflict does not exempt the State from fulfilling its obligations to respect and guarantee the rights embodied in the American Convention to all persons subject to its jurisdiction,[25] or to suspend their application.

119. In its case law, the Court has established clearly that it has the authority to interpret the provisions of the American Convention in light of other international treaties, so that it has frequently used provisions from other human rights treaties ratified by the defendant State to provide content and scope to the provisions of the Convention. In this regard, in its constant case law,[26] this Court has decided that "for the purpose of interpreting a treaty, it does not only take into account the agreements and instruments formally relating to it (second paragraph of Article 31 of the Vienna Convention), but also the context (third paragraph of Article 31)." In its case law, the Court has indicated that this concept is particularly important for international human rights law, which has made substantial progress by the evolutive interpretation of the international protection instruments. These parameters allow the Court to use the provisions of international humanitarian law, ratified by the defendant State, to give content and scope to the provisions of the American Convention.

120. In the context of this case, the Court rejects the preliminary objection entitled "Lack of jurisdiction *rationae materiae,"* because the respective allegations refer to

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[24] *Cf.* Report of the United Nations Truth Commission on El Salvador, "*De la locura a la esperanza: la guerra de 12 años en El Salvador"*, San Salvador, New York, 1992-1993, p. 10.

[25] *Cf. Case of Bámaca Velásquez, supra* note 15, paras. 143, 174 and 207.

[26] *Cf. Case of Tibi*. Judgment of September 7, 2004. Series C No. 114, para. 144; *Case of the "Juvenile Reeducation Institute"*, *supra* note 10, para. 148; *Case of the Gómez Paquiyauri Brothers*, *supra* note 10, paras. 165 and 166; *Case of Bámaca Velásquez, supra* note 15, paras. 126, 157 and 209; *Case of Cantoral Benavides.* Judgment of August 18, 2000. Series C No. 69, paras. 98, 100 and 101; *Case of the "Street Children" (Villagrán Morales et al.).* Judgment of November 19, 1999. Series C No. 63, paras. 192, 193 and 194; *Case of the "Panel Blanca" (Paniagua Morales et al.)*. Judgment of March 8, 1998. Series C No. 37, para. 133; *Juridical Condition and Rights of the Undocumented Migrants.* Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 18, paras. 54 and 120; *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, paras. 20-22; *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law.* Opinion OC-16/99 of October 1, 1999. Series A No. 16, paras. 32, 34, 36 and 42; *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2 of the American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 21; *Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights*. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10, para. 44; and *"Other Treaties" Subject to the Advisory Jurisdiction of the Court* (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, paras. 19 and 21.

facts or acts on which the Court has decided that it will not rule (*supra* paras. 78 and 79).

THIRD PRELIMINARY OBJECTION

"Inadmissibility of the application owing to ambiguity or inconsistency between the object and the plea, and the body of the text"

121. As indicated above (*supra* para. 49), the State presented this preliminary objection in two parts:

> 3(1) "Inadmissibility of the application owing to ambiguity or inconsistency between the object and the plea, and the body of the text"; and
>
> 3(2) "Inconsistency between the claims of the Inter-American Commission on Human Rights and those of the representatives of the alleged victims and their next of kin".

122. However, when presenting its final oral arguments on the preliminary objections at the public hearing on September 7, 2004 (*supra* paras. 38 and 50), the State indicated that "it withdr[ew]" the preliminary objection "on the inconsistency between the claims of the Inter-American Commission on Human Rights and those of the representatives of the alleged victims [and their next of kin]."

123. Since the State withdrew the second part of the third preliminary objection, the Court will now summarize the arguments of the State, the Inter-American Commission, and the representatives of the alleged victims and their next of kin regarding part 3(1) of this preliminary objection (*supra* para. 121).

Arguments of the State

124. The State indicated that the plea in the application is contrary to the "body" of the application. In this regard, the State alleged that:

> a) It was not clear whether the Commission wanted the Court to consider the alleged capture, abduction and forced disappearance of the alleged victims that took place in 1982 because "it was continuing over time," or whether it wanted the Court to consider and rule on the same facts, but only as of the date on which El Salvador recognized the Court's jurisdiction;
>
> b) It was not clear whether the continuing crime alleged by the Commission included the violation of the rights established in Articles 1(1), 4, 5, 7, 8, 17, 18, 19 and 25 of the American Convention, or whether the violation of some of these rights was due to the alleged failure to investigate the whereabouts of the alleged victims, identify and punish those responsible, and guarantee the right to the truth and adequate reparation to the next of kin, all of which "is contrary to the concept of forced disappearance";
>
> c) The Commission's application is not consistent, because there is no reference to an alleged continuing violation of the rights established in certain articles of the Convention in the object and the plea of the application; to the contrary, it "makes a rationalization of facts that are contrary to the continuity it alleges in other parts of the application." This situation affects the right to defense and the principle of good faith, because it does not allow

the State "to identify whether its answer should be directed at an alleged continuing crime […] or […] at four different facts, about which it is not established whether they are continuing and which, on the contrary, appear to be a rationalization";

d) It may be presumed that the Commission presents "its application in a way that contributes to a judgment against the State at all costs, attempting to sidestep the Court's evident lack of jurisdiction to consider an alleged continuing and permanent violation, rationalizing this surreptitiously in the object and plea of the application." The object and plea duplicate the charges;

e) The Commission and the representatives changed their position when they alleged that some of the facts are subsequent to the date on which the Court's jurisdiction was recognized; this is contrary to the alleged unity, which implies that the continuing and permanent crime of forced disappearance constitutes a single fact. Consequently, the principle of estoppel should be applied;

f) The principle of *iura novit curiae* is not limitless, because "judges and courts cannot […] change the subjective claims of petitioners"; and

g) If the Court does not declare the application inadmissible and considers that "the violation of the State's right to defense can be repaired during the hearing, [… it should] establish […] the alleged facts rationally, as requested by the Inter-American Commission in the object and plea of the application.

Arguments of the Commission

125. In its arguments on preliminary objections, the Commission requested the Court to reject this objection, since "it has no effect" on the application. However, in its final written arguments the Commission requested the Court to "consider [the third objection] withdrawn," because the State had withdrawn it during the public hearing; accordingly, it did not present any other argument. In this regard, the Court has established that, during the public hearing, the State only withdrew the second part of the third preliminary objection, namely, part 3(2) (*supra* paras. 50 and 122). When requesting the Court to reject this preliminary objection in its arguments on preliminary objections, the Commission indicated that:

a) "In no circumstances" did the State's arguments constitute a preliminary objection, since their basic purpose was not to question the Court's jurisdiction. They did not affect the State's right to defense, because there is no ambiguity or inconsistency in the application, which "is factually and juridically clear and presents the claims precisely and specifically";

b) Forced disappearance is a single phenomenon comprising a multiple violation of rights protected by the American Convention. "The forced disappearance is a single fact; but it entails examining and determining each of the rights violated." The continuing violation of the rights began in June 1982 "and is renewed with every day that passes without justice being done" in this regard; and

c) With this preliminary objection, the State is attempting to disregard the concept of continuing crime constituted by forced disappearance.

Arguments of the representatives of the alleged victims and their next of kin

126. In their arguments on preliminary objections, the representatives indicated that they would not refer to this point because "with some exceptions, the State's arguments refer to the Commission's application." In their final written arguments, they indicated that the State had withdrawn the preliminary objected entitled "Inadmissibility of the application owing to ambiguity or inconsistency [of the application]" and made no reference to the first part of the preliminary objection entitled "Inadmissibility of the application owing to ambiguity or inconsistency between the object and the plea, and the body of the text."

Considerations of the Court

127. The Court rejects preliminary objection 3(1) (*supra* para. 121) entitled "Inadmissibility of the application owing to ambiguity or inconsistency between the object and the plea, and the body of the text", because it is not a true preliminary objection.

FOURTH PRELIMINARY OBJECTION
"Failure to exhaust domestic remedies"

("Justified delay in the corresponding decision"
and "Inappropriateness of the remedy of *habeas corpus"*)

128. The Court will now summarize the arguments of the State, the Inter-American Commission, and the representatives of the alleged victims and their next of kin regarding this preliminary objection.

Arguments of the State

129. The State indicated that "it had duly alleged the objection of failure to exhaust domestic remedies [in the proceeding before the Inter-American Commission], on the basis that the judicial proceeding before the pertinent instance had not yet been finalized, so that domestic remedies had not been exhausted," and there had been a "Justified delay in the corresponding decision." The State also alleged the "Inappropriateness of the remedy of *habeas corpus*" to determine the whereabouts of the Serrano Cruz sisters. In this regard, the State argued that:

> a) "It is not true that the decision of the Inter-American Commission on Human Rights concerning this objection is valid, because it never took into account all the inconsistencies" in the statements made by the mother of Ernestina and Erlinda Serrano Cruz;
>
> b) During the criminal investigation, "pertinent procedures were conducted "seeking the truth and it has not been possible to determine or individualize anyone to whom the disappearance of the children could be attributed." This is due to facts that cannot be attributed to the State, but to "external agents" such as: incoherence of the evidence provided by the alleged victims' next of kin, particularly the evidence provided by their mother, who has changed her testimony; essential evidence for clarifying the facts was destroyed in the fires that occurred in Army barracks and on the premises of the Salvadoran Red Cross during the armed conflict; failure to

determine the legal existence of the two minors until three days before the complaint was filed before the Chalatenango Court "for causes attributable to the parents of the girls, because they had never registered their daughters on the pertinent registers." The contradictions in the statements of María Victoria Cruz Franco, mother of the alleged victims, cannot be justified by her fear of being considered a member of the Salvadoran guerrilla;

c) In the domestic jurisdiction, María Victoria Cruz Franco made three statements, Suyapa Serrano one, and Esperanza Franco two, and the facts of the case cannot be determined with any certainty from them. There is no valid evidence that would allow the Inter-American Court to take a decision on the merits of the case, without risking delivering a ruling which does not reflect what may really have happened;

d) "Since the case is pending before the Inter-American Court, it is necessary to wait for its decision in the matter, before continuing with the investigations in the case, and presenting all the evidence provided to the international instance, in order to redirect the whole investigation." It is also necessary to investigate "the Fourth Infantry Brigade further, with regard to possible files that may provide information on what happened, […] and to seek further information on the sisters' dates of birth";

e) "It is essential to establish the whole historical context in relation to 'the masses', the operations of the Armed Forces, the Salvadoran guerrilla camps. […] It should include not only the Atlacatl Battalion [… ,] but also […] the possible participation of other units should be verified." "The other children of the Serrano Cruz family [have not been] summoned to provide testimony, since this would be unlawful as the international proceeding is pending." In the domestic sphere, any decision adopted by the Inter-American Court on the possible inexistence of the minors and with regard to the alleged falsification of one of the baptismal certificates must be taken into account;

f) The international court must determine whether the fact that the girls were picked up by soldiers and handed over to the Salvadoran Red Cross "constitutes a crime in itself," given that "it should be recalled that, if the soldiers picked up the minors, they did not know that their next of kin were nearby";

g) The remedy of *habeas corpus,* whose effectiveness stems from the urgency of the jurisdictional order to find and free a disappeared person, would normally be appropriate for exhausting domestic remedies. However, in this case it was not, because it was filed 13 years after the disappearance of the alleged victims. Moreover, it is not appropriate to determine the whereabouts of the Serrano Cruz sisters, because it has not been alleged that the children were detained by State authorities, and there is valid evidence concerning the participation of a humanitarian organization. The appropriate remedy to exhaust domestic remedies in this case is the filing of a criminal proceeding;

h) "It may be presumed that [the remedy of *habeas corpus*] was used as a formal requirement for access to the Inter-American Commission on Human Rights"; and

i) "In the hearing on merits […] Suyapa Serrano [stated] that her mother gave inconsistent statements. If the Court considers that what Suyapa Serrano said and the confession in this regard are true, it cannot consider that the Supreme Court of Justice has committed any violation of jurisdictional protection and, much less, decide that domestic remedies have been exhausted." "The Supreme Court of El Salvador is being asked to exhaust domestic remedies with facts that are untrue [...]. If the proceeding is flawed, it cannot be expected that the result, whatever it is, would exhaust remedies or violate jurisdictional protection."

Arguments of the Commission

130. The Commission requested the Court to reject the preliminary objection on failure to exhaust domestic remedies, given that the State wishes the Court to review an issue that was decided definitively by the Commission. In this regard, the Commission indicated that:

a) There is an express decision on admissibility in Report No. 31/01, issued on February 23, 2001, which examines compliance with the Convention's requirements for admissibility. The State's arguments are time-barred and without grounds. Decisions adopted by the Commission, in keeping with the powers accorded to it by the Convention, should be considered final and non-appealable. They are not susceptible to fresh arguments by the defendant State, which has not provided elements that would justify a different decision by the Court. Furthermore, the Commission reaffirms its decision on the admissibility of the instant case;

b) Articles 46 and 47 of the American Convention establish that it is for the Commission "to determine the admissibility of a petition." In accordance with the Court's case law, the opportunity to file objections to the exhaustion of domestic remedies is during the first stages of the proceeding before the Commission. Also, it is presumed that the State has tacitly waived any objection based on failure to exhaust domestic remedies, if it has not been filed at that time;

c) In the current evolution of the inter-American protection system, the Court should not examine a question of admissibility that has already been decided by the Commission with all procedural guarantees. Review by the Court of matters of admissibility that have been decided in the proceeding before the Commission, such as the failure to exhaust domestic remedies, creates an imbalance between the parties and deviates from the criteria of reasonableness established by the Court for the exercise of its full jurisdiction. It is unnecessary to extend a repetitive task regarding matters of admissibility, given that it has no effect on the protection of human rights, or on the right of the alleged victims to obtain a prompt ruling from the organs of the inter-American system;

d) "The judicial investigation into the disappearance of the Serrano Cruz sisters has been unsuccessful[. T]he little or no investigatory activity has generally been a mere formality […] intended to question the identity of the alleged victims rather than clarifying the facts and determining their fate and their whereabouts. There has also been a completely unjustified delay: 22

years after the abduction and 11 [years] after the criminal complaint was filed, not a single person has been investigated, […] prosecuted or punished"; and

e) The remedy of *habeas corpus*, indicated by the Court as appropriate in cases of forced disappearance was generally ineffective when the facts occurred, as affirmed by the expert witness, David Morales, and this is supported by the documentary evidence provide by the Commission. This "direct, immediate, very brief [remedy, …] does not signify the exhaustion of any complaint that could be filed" subsequently. It may be filed before "the case on merits has commenced, during the case, or even when judgment has been delivered." In this regard, *habeas corpus* does not exhaust the domestic jurisdiction.

Arguments of the representatives of the alleged victims and their next of kin

131. The representatives of the alleged victims and their next of kin requested the Court to reject the objection filed by the State, because it lacked the "essential requirement" to be filed. In this regard, the representatives alleged that:

a) The objection of failure to exhaust domestic remedies "was not filed in accordance with the parameters of the inter-American system." The State did not indicate opportunely the domestic remedies that should be exhausted, nor did it prove their effectiveness. During the proceeding before the Commission, the State submitted three briefs, in which it merely requested that the case be closed, based on the existence of pending procedures in the criminal proceeding. However, it did not indicate that the criminal proceeding was appropriate to determine the whereabouts of the alleged victims;

b) According to Articles 46 and 47 of the American Convention, the Commission is empowered to determine the admissibility of a petition and to decide on the exhaustion of domestic remedies. When this proceeding has been carried out, and in order to ensure legal certainty and procedural security, the principle of procedural preclusion should take effect. In accordance with the principle of legal certainty, the Court's power to review *in toto* all the Commission has done and decided should be exceptional. The representatives requested the Court to validate the Commission's Report on admissibility No. 31/01. The State is attempting to return to a discussion that had already been decided by the Commission when determining that the petition was admissible; and

c) Criminal action 113/02, open since 1993, has been filed on three occasions, even though there were procedures pending. The judge in charge of the case stated that "she had nothing to examine in the case and that no one was interested in it, because the mother of the children had died, that the case was now in the jurisdiction of the Inter-American Court, that it was the Court that was trying the State, that […] she was activating the case based on the prosecutor's request to carry out procedures designed to defend the State before the Inter-American Court, and would then file it, because there [was] nothing to be done."

Considerations of the Court

132. The American Convention establishes that the Court exercises full jurisdiction over matters relating to a case submitted to its consideration, even relating to the procedural requirements on which the possibility of it exercising its jurisdiction are based.[27]

133. Article 46(1)(a) of the Convention establishes that in order to determine the admissibility of a petition or communication lodged with the Inter-American Commission in accordance with los Articles 44 or 45 of the Convention, remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law.[28]

134. This Court has indicated that when Article 46(1)(a) of the Convention states that domestic remedies must be filed and exhausted according to generally recognized principles of international law, this means that such remedies should not only exist formally, but should also be adequate and effective, as a result of the objections included in Article 46(2) of the Convention.[29]

135. The Court reiterates the criteria for filing the objection of failure to exhaust domestic remedies that must be respected in this case. First, the defendant State can expressly or tacitly waive invoking the failure to exhaust domestic remedies.[30] Second, in order to be opportune, the objection of failure to exhaust domestic remedies must be filed at the admissibility stage of the proceeding before the Commission; that is, before any consideration of merits; if this has not been done, it is presumed that the State tacitly waived the possibility of filing this objection.[31] Third, the Court has indicated that the failure to exhaust domestic resources is merely a matter of admissibility and that the State alleging it must indicate the domestic remedies that should be exhausted, and also prove that such remedies are effective.[32]

136. The Court observes that María Victoria Cruz Franco, mother of Ernestina and Erlinda Serrano Cruz, filed a petition for *habeas corpus* on November 13, 1995, before the Constitutional Chamber of the Supreme Court of Justice of El Salvador; it was resolved by a decision of March 14, 1996, which decided "[t]o dismiss [the petition] because it had not included the procedural grounds for establishing a violation of the Constitution[, …] and to remit [the decision] to the Chalatenango Judge of First Instance, together with case file 112/93, so that the investigation into the reported facts may continue." Consequently, the Chalatenango Court of First

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[27] *Cf. Case of Tibi, supra* note 26, para. 47; *Case of Herrera Ulloa.* Judgment of July 2, 2004. Series C No. 107, para. 79; and *Case of Juan Humberto Sánchez.* Judgment of June 7, 2003. Series C No. 99, para. 65.

[28] *Cf. Case of Tibi, supra* note 26, para. 48; and *Case of Herrera Ulloa, supra* note 27, para. 80.

[29] *Cf. Case of Tibi, supra* note 26, para. 50; *Case of the Mayagna (Sumo) Awas Tingni Community. Preliminary objections*. Judgment of February 1, 2000. Series C No. 66, para. 53; and *Case of Loayza Tamayo. Preliminary objections*. Judgment of January 31, 1996. Series C No. 25, para. 40.

[30] *Cf. Case of Tibi, supra* note 26, para. 49; *Case of Herrera Ulloa*, s*upra* note 27, para. 81; and *Case of the Mayagna (Sumo) Awas Tingni Community. Preliminary objections, supra* note 29, para. 53.

[31] *Cf. Case of Tibi, supra* note 26, para. 49; *Case of Herrera Ulloa, supra* note 27, para. 81; and *Case of the Mayagna (Sumo) Awas Tingni Community. Preliminary objections, supra* note 29, para. 53.

[32] *Cf. Case of Tibi, supra* note 26, para. 49; *Case of Herrera Ulloa, supra* note 27, para. 81; and *Case of the Mayagna (Sumo) Awas Tingni Community. Preliminary objections, supra* note 29, para. 53.

Instance issued a decision on April 19, 1996, in compliance with the decision of the Constitutional Chamber.

137. However, on May 27, 1998, the Chalatenango Court of First Instance issued a decision resolving to file the criminal case file. Among the grounds for this decision, it indicated that "the instant proceeding [had been] totally reviewed and [as it had not been] established who had abducted the minors, it was filed." On February 16, 1999, the *Asociación Pro-búsqueda* and CEJIL, representing the alleged victims and their next of kin, lodged a petition before the Inter-American Commission. On April 14, 1999, the Commission requested the State to provide information on the pertinent part of the petition.

138. At this point, the Court considers that it is necessary to emphasize that when the petitioners submitted the petition to the Commission, the criminal proceeding had been filed. Subsequently, when the petition was being processed before the Commission, the criminal investigation was re-opened. The formal re-opening of the proceeding does not appear in the case file; however, the proceeding was activated with a communication from the prosecutor dated May 17, 1999, requesting a complete certification of the case file on the "instruction of the superior prosecutor, so that a more detailed and thorough examination of [this] case could be carried out." On June 24, 1999, the prosecutor in charge of the investigation was substituted by another.

139. On February 25, 2000, the State submitted a brief to the Commission stating that this case could not be admitted, because "the requirement of exhaustion of domestic remedies had not been complied with" and providing information on "Criminal Proceeding No. 112.93, which is being processed in the Chaletanango court of first instance […] for […] the crime of deprivation of liberty of the minors, Ernestina and Erlinda Serrano." On April 5, 2000, the petitioners submitted their comments on the communication of February 25, 2000, regarding the alleged failure to exhaust domestic remedies. They stated that "the petitioners ha[d] presented specific proposals to guide the investigation towards other areas, which had been duly transferred to the prosecutor responsible for the investigation," because "the only measure taken in [nine months, after the case had been re-opened following the Commission's notification of the petition filed against El Salvador, was] to request the International Committee of the Red Cross […] to advise who these minors had been delivered to."

140. On February 23, 2001, the Commission adopted Report Nº 31/01, deciding to declare the case admissible and applying the exception to the exhaustion of domestic remedies established in Article 46(2)(c) of the Convention, on the basis that "[u]p until the date on which the report was adopted, domestic remedies had not operated with the effectiveness required to investigate a complaint on forced disappearance […. It indicated that] almost eight years ha[d] elapsed since the first complaint was filed before the authorities of El Salvador, and up until the date of the adoption of the […] report, the way the facts had occurred had not been definitively established."

141. Regarding the alleged "Justified delay in the corresponding decision" of the criminal proceeding, the Court finds no reason to re-examine the Commission's reasoning when it decided on the admissibility of the case, because this reasoning is compatible with the relevant provisions of the Convention and, consequently, it rejects the preliminary objection filed by the State.

142. With regard to the alleged failure to exhaust domestic remedies owing to the "Inappropriateness of the remedy of *habeas corpus,*" the Court observes that, in the proceeding before the Commission, the State presented a communication on February 25, 2000, in which it introduced the topic of failure to exhaust domestic remedies and merely provided information on "Criminal Proceeding No. 112.93, which is being processed in the Chalatenango court of first instance […] for […] the crime of deprivation of liberty of the minors, Ernestina and Erlinda Serrano." The Court rejects this argument as being time-barred, because the State filed it in the proceeding before the Court and not at the stage of admissibility before the Commission.

VII
OPERATIVE PARAGRAPHS

143. Therefore,

THE COURT,

DECIDES:

Unanimously,

1. To admit the first preliminary objection *ratione temporis* filed by the State, entitled "Lack of jurisdiction owing to the terms in which the State of El Salvador recognizes the jurisdiction of the Inter-American Court of Human Rights," in accordance with paragraphs 73, 78 and 96 of this judgment, with regard to facts or acts that occurred prior to June 6, 1995, the date on which the State deposited the instrument recognizing the Court's jurisdiction with the OAS General Secretariat.

By six votes to one,

2. To admit the first preliminary objection *ratione temporis* filed by the State, entitled "Lack of jurisdiction owing to the terms in which the State of El Salvador recognizes the jurisdiction of the Inter-American Court of Human Rights," in accordance with paragraphs 73, 79, 95 and 96 of this judgment, with regard to facts or acts that began prior to June 6, 1995, and which continued after that date on which the State accepted the jurisdiction of the Court.

Dissenting Judge Cançado Trindade.

By six votes to one,

3. To reject the first preliminary objection *ratione temporis* filed by the State, entitled "Lack of jurisdiction owing to the terms in which the State of El Salvador recognizes the jurisdiction of the Inter-American Court of Human Rights," in accordance with paragraphs 84, 85, 93, 94 and 96 of this judgment, with regard to the alleged violations of Articles 8 and 25 of the Convention, in relation to Article 1(1) thereof, and to any other violation whose facts or commencement occurred after June 6, 1995, the date on which the State deposited the instrument recognizing the jurisdiction of the Court with the OAS General Secretariat.

Dissenting Judge *ad hoc* Montiel Argüello.

Unanimously,

4. To reject the preliminary objection entitled "Non-retroactivity of the application of the crime of forced disappearance of persons", in accordance with the first and second operative paragraphs and paragraphs 78, 79 and 106 of this judgment.

Unanimously,

5. To reject the second preliminary objection entitled "Lack of jurisdiction *rationae materiae*," in accordance with the first and second operative paragraphs and paragraphs 78, 79 and 120 of this judgment.

Unanimously,

6. To reject the third preliminary objection entitled "Inadmissibility of the application owing to ambiguity or inconsistency between the object and the plea, and the body of the text," because this is not a true preliminary objection, in accordance with paragraph 127 of this judgment.

By six votes to one,

7. To reject the fourth preliminary objection filed by the State regarding "failure to exhaust domestic remedies," in accordance with paragraphs 141 and 142 of this judgment.

Dissenting Judge *ad hoc* Montiel Argüello.

Judge Cançado Trindade informed the Court of his dissenting opinion on the second operative paragraph, and Judge *ad hoc* Montiel Argüello informed the Court of his dissenting opinion on the third and seventh operative paragraphs, both of which accompany this judgment.

Done at San José, Costa Rica, on November 23, 2004, in Spanish and English, the Spanish text being authentic.

Sergio García-Ramírez
President

Alirio Abreu-Burelli

Oliver Jackman

Antônio A. Cançado Trindade

Cecilia Medina-Quiroga

Manuel E. Ventura-Robles

Alejandro Montiel-Argüello
Judge *ad hoc*

Pablo Saavedra-Alessandri
Secretary

So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

DISSENTING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I regret that I am unable to share the decision taken by the majority of the Inter-American Court of Human Rights in the second operative paragraph, and the approach adopted on this point in considering paragraphs 66 to 79 of the judgment on preliminary objections in *the Serrano Cruz Sisters v. El Salvador*, because the Court has admitted the first preliminary objection *ratione temporis* filed by the defendant State, which was intended to exclude the Court from considering facts or acts that commenced prior to the date on which the State recognized the Court's contentious jurisdiction (June 6, 1995), and that continue after the date of recognition. I will now explain the legal grounds for my dissenting position on this issue.

2. In doing so, I will also explain my position on a question of capital importance relating to compulsory international jurisdiction (based on the acceptance of the optional clause on compulsory jurisdiction) of an international human rights tribunal such as the Inter-American Court. The reflections that I will develop in this dissenting opinion will cover the following points: first, an evaluation *lex lata* of compulsory international jurisdiction; second, the juridical effect of the specific formulation of the optional clause in Article 62 of the American Convention on Human Rights (*numerus clausus*); third, my considerations *de lege ferenda* on compulsory international jurisdiction within the framework of the American Convention on Human Rights; fourth, *jus cogens* in the convergence between international humanitarian law and international human rights law; and, fifth, the recurring search for automatic compulsory international jurisdiction as a necessity of our times.

I. Preliminary considerations

3. I do not believe that it is necessary to repeat here what I have stated in my concurring opinions in previous judgments on preliminary objections in the *Hilaire*, *Benjamin* and *Constantine* cases (2001), in relation to Trinidad and Tobago, on the preceding question of the *compétence de la compétence* (*Kompetenz Kompetenz*) of the Inter-American Court in the matter under discussion, because my reflections have long been accepted by the Court and today form part of its consistent case law in this regard. Additionally, I do not consider it necessary to go into the origin and evolution of the establishment of the optional clause on compulsory jurisdiction, and examine international practice in this regard; this has already been explained in detail in my abovementioned concurring opinions in the said *Hilaire*, *Benjamin* and *Constantine* case.

4. On this specific point, I will restrict myself to recalling that the original purpose of the establishment of the optional clause on compulsory jurisdiction (created in 1920) – a clause that has survived in Article 62 of the American Convention – was to attract acceptance of the compulsory jurisdiction of the Permanent Court of International Justice (PCIJ) and subsequently of the International Court of Justice (ICJ), and also of the European Court of Human Rights (prior to Protocol No. 11 to the European Convention on Human Rights), by the greatest possible number of States parties to the respective multilateral treaties. Currently, this question is only posed in relation to the European Court, which today (with Protocol No. 11) is endowed with automatic compulsory jurisdiction – a

situation that is appropriate and that I have been advocating for the Inter-American Court in recent years.[1]

5. As regards the Court in The Hague, however, the optional clause on compulsory jurisdiction, which continues to exist, has been stratified over time and, nowadays, no longer responds to the necessities of international contentious cases, even purely inter-State cases. This is due to a permissive stance taken by the ICJ, reflecting a voluntarist conception of international law, which has allowed and accepted all types of limitations imposed by the States when recognizing the international Court's jurisdiction, on their own terms.

6. It would be unfortunate if Article 62 of the American Convention was, ultimately, as ill-fated as Article 36(2) of the ICJ Statute. Indeed, the invalid and incongruent State practice under Article 36(2) of the ICJ Statute cannot serve as an example or model to follow for the States Parties to treaties for the protection of human rights, such as the American Convention on Human Rights, as regards the scope of the jurisdictional basis for the actions of the Inter-American Court of Human Rights. Here we are confronted with superior values shared by our community of nations that cannot be left to the mercy of the vicissitudes of the individual "will" of each State Party to the American Convention.

II. Compulsory international jurisdiction: new reflections *Lex Lata*.

7. 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.

8. The case law of the Inter-American Court contains clear examples in this regard. Thus, in its judgment on competence in the *Constitutional Court* and *Ivcher Bronstein* cases (1999), with regard to Peru, the Inter-American Court maintained that:

> "Acceptance of the Court's compulsory jurisdiction is an ironclad clause to which there can be no limitations except those expressly provided for in Article 62(1) of the American Convention. Because the clause is so fundamental to the operation of the Convention's system of protection, it cannot be at the mercy of limitations not already stipulated but invoked by States Parties for internal reasons."[2]

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[1]. Cf. A.A. Cançado Trindade, "Las Cláusulas Pétreas de la Protección Internacional del Ser Humano: El Acceso Directo de los Individuos a la Justicia a Nivel 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* (Nov. 1999), vol. I, 2a. ed., San José, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 3-68.

[2]. IACtHR, Case of the Constitutional Court (Competence), Judgment of September 24, 1999, Series C, No. 55, para. 35; IACtHR, *Case of Ivcher Bronstein* (Competence), Judgment of September 24, 1999, Series C, No. 54, para. 36.

9. It would be unacceptable to subordinate the implementation of the treaty-based protection mechanism to restrictions filed by the States Parties in their instruments recognizing the optional clause on compulsory jurisdiction of the Inter-American Court (Article 62 of the American Convention) that were not expressly authorized by the American Convention. This would not only immediately affect the effectiveness of the implementation of the treaty-based protection mechanism, but would also have a fatal effect on its future development possibilities. In both cases, the Inter-American Court had the opportunity of underscoring its obligation to preserve the integrity of the treaty-based regional system for the protection of human rights as a whole.[3]

10. In the acknowledged absence of "implicit" limitations to the exercise of the rights embodied in human rights treaties, the constant limitations to these protection treaties must be interpreted restrictively. The optional clause on compulsory jurisdiction is not an exception to this: it does not allow limitations, other than those *expressly* included in those treaties and, given its capital importance, it cannot be at the mercy of limitations that are not established in them and that are invoked by the States Parties owing to reasons or vicissitudes of a domestic nature.[4]

III. The specific formulation of the optional clause of Article 62 of the American Convention on Human Rights (*Numerus Clausus*): New reflections

11. Paragraphs 1 and 2 of Article 62 of the American Convention on Human Rights establish that:

> "1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as compulsory, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
>
> 2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court."[5]

12. These are the terms and conditions for the recognition of the contentious jurisdiction of the Inter-American Court by a State Party to the Convention. These terms and conditions of recognition are expressly stipulated in Article 62, and their formulation is not merely illustrative, but clearly *specific*. No State is obliged to accept an optional clause, as the name itself indicates; however, if it decides to do

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[3]. Likewise, the European Court of Human Rights, in its judgment on preliminary objections (of March 23, 1995) in *Loizidou versus Turquia*, noted that, in light of the letter and spirit of the European Convention, it is not possible to infer the possibility of restrictions to the optional clause when recognizing the contentious jurisdiction of the European Court (former Article 46 of the European Court, prior to Protocol No. 11); also, contrary to the permissive State practice under Article 36 of the ICJ Statute, under the European Convention, State practice was exactly *a contrario sensu*, accepting the said clause without restrictions.

[4]. Cf. Inter-American Court of Human Rights, *Castillo Petruzzi et al. v. Peru* (Preliminary objections), Judgment of September 4, 1998, Series C, No. 41, Concurring opinion of Judge A.A. Cançado Trindade, paras. 36 and 38.

[5]. Paragraph 3 of Article 62 of the Convention adds that: - "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

so, it must do so in the terms expressly stipulated in that clause. There are four conditions for this recognition according to Article 62(2): a) unconditionally; b) on the condition of reciprocity; c) for a specified period; and d) for specific cases. These are the only terms and conditions of recognition of the contentious jurisdiction of the Inter-American Court established and authorized by Article 62(2) of the Convention, which does not authorize the States Parties to file any other conditions or restrictions (*numerus clausus*).

13. In the instant case of the *Serrano Cruz Sisters v. El Salvador*, the limitation allegedly *ratione temporis* filed by the defendant State, and invoked in is first preliminary objection with regard to facts or acts which commenced before the date on which the State recognized the Court's jurisdiction in contentious matters, and which continued after that date and up until the present (the second operative paragraph), does not, in my opinion, fall within the framework of any of the abovementioned unvarying conditions for accepting the optional clause on compulsory jurisdiction of the Inter-American Court included in Article 62 of the American Convention.

14. It is not a question of unconditional recognition; or recognition on the condition of reciprocity.[6] Contrary to the opinion of the majority of the members of the Court in this judgment, neither is it recognition for a specified time,[7] because the object of the limitation filed by the State is a completely indeterminate period that continues indefinitely in time. Nor is it an issue of specific cases, but rather of any situation that falls within the framework of the broad and indefinite terms of the State's limitation.

15. I am not trying to cast doubts on the clarity and good faith with which the defendant State set out its arguments throughout this contentious proceeding. The purpose of the limitation is extremely clear, as the State indicates with procedural openness and fairness: to exclude consideration of any human rights violation that occurred during the internal armed conflict that afflicted the country for more than a decade from 1980 to 1991 from the Inter-American Court's jurisdiction. I consider that the recognition of the Court's jurisdiction by the State of El Salvador clearly exceeded the limitations established in Article 62 of the American Convention, by unduly excluding from the Court's possible consideration facts and acts subsequent to this recognition, which had commenced before it.

16. For reasons I fail to understand, most members of the Court admitted the part of the first preliminary objected filed by the State in this regard (a nebulous and hybrid type of objection that is both *ratione temporis* and *ratione materiae*), for an indefinite time and with a broad, general and indefinite scope when, in my opinion, they should have declared it inadmissible and invalid. 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

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[6]. This is mentioned in another part of the instrument by which the State recognizes the Court's jurisdiction on contentious matters.

[7]. In another part of its instrument recognizing the Court's jurisdiction on contentious matters, the State even refers to "indefinite period." However, the limitation it imposes is described as for an unspecified time, which seems to me to be a *contradictio in terminis*.

documented practice of the forced disappearance of children and the elimination of their identity and name during this armed conflict.[8]

17. This decision of the Inter-American Court does not conform to its own recent case law in this regard and, in my opinion, is regressive. In the instant case, the will of the State has unfortunately prevailed over the imperatives of human rights protection. The time has come for the States Parties to the American Convention to refrain from formulating limitations of this nature, and to modify or withdraw those that they may have formulated in the past, in order to make them compatible with the precise scope of Article 62 of the Convention.

18. With its well-known and reputable juridical tradition, El Salvador could very well do this, giving a good example to some other countries. It is always worthwhile recalling the writings of the great Salvadoran international jurist Gustavo Guerrero, more than 70 years' ago, who devoted himself particularly to writing on the State's international responsibility and the codification of international law. He upheld the unity and universality of law, and invoked repeatedly the ideal of international justice as the best guarantee of peace.[9]

19. In this regard, in the *Trujillo Oroza* case heard by the Court, Bolivia gave a good example of acknowledging its international responsibility for the facts described in the application of the Inter-American Commission on Human Rights, including those that occurred before the date on which it recognized the Court's contentious jurisdiction (July 27, 1993) or ratified the American Convention on Human Rights (July 19, 1979). This enabled this Court to consider and decide on the continuing crime of the forced disappearance of José Carlos Trujillo Oroza (which commenced in 1971) and its juridical consequence (Judgment of February 27, 2002, para. 72).

20. The Court considered this continuing crime *integrally*, as a whole, as it should be. This means, as I indicated in my separate opinion in that case, that it is possible to overcome the contingencies of the classic postulates of the law of treaties, when there is awareness of this necessity; *boni judicis est ampliare jurisdictionem* (paras. 2 to 9). In *Trujillo Oroza v. Bolivia*, a favorable confluence of factors allowed the Court to take a notable step forward in its case law in its judgment of February 27, 2002.

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[8]. For reports which reveal that human cruelty has no limits, or even borders (since this practice also occurred in internal armed conflicts in other countries), 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* (APBNND), *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* (APBNND), *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: *Procuraduría para la Defensa de los Derechos Humanos, Caso Ernestina y Erlinda Serrano Cruz* [the report of the Ombudsman on the forced disappearance of the children, Ernestina and Erlinda Serrano Cruz, its current impunity and the pattern of violence in which such disappearances occurred], San Salvador, PDDH, 2004, pp. 1 to 169 (internal circulation only).

[9]. G. Guerrero, *La Codification du Droit International*, Paris, Pédone, 1930, pp. 9-10, 13, 24, 27 and 150. And cf. A.A. Cançado Trindade and A. Martínez Moreno, *Doctrina Latinoamericana del Derecho Internacional*, vol. I, San José, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 5-64.

21. As I observed in my said separate opinion in that case, this judgment avoided and overcame an undue fragmentation and distortion of a complex, grave and continuing crime (the forced disappearance of persons), taking into account that, nowadays, the concept of a *continuing situation* has widespread support in international case law (paras. 10 to 19). Hence, the Court emphasized that the superior values that underlie the norms of protection shared by the international community as a whole, have primacy over the sword of Damocles of the dates on which State acceptance is manifested (para. 20, and *cf*. paras. 21 and 22).

22. Conversely and 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.

23. 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.[10]

24. In contrast to these advances, this judgment of the Court on preliminary objections in the *Serrano Cruz Sisters v. El Salvador* is, *data venia*, particularly with regard to the second operative paragraph, and the corresponding considering paragraphs Nos. 66 to 79; a regrettable step backwards. Consequently, I dissent firmly from what I deem to be an unacceptable capitulation to State voluntarism which is no longer sustainable today, and which also militates against the actual process of jurisdictionalization of international law itself, revealed by recent advances in the ancient ideal of the realization of justice at the international level also (*cf. infra*).

25. The terms of the defendant State's recognition of the jurisdiction of the Inter-American Court on contentious matters are also inadmissible and invalid as regards another specific aspect; namely, when the State reserves the faculty to terminate the recognition of this jurisdiction "when it considers this opportune." This *caveat* conflicts with the ruling of the Court in the abovementioned judgments on competence in the *Constitutional Court* and *Ivcher Bronstein* cases.

26. In another line of thought still relating to this case, the only limitation filed by the defendant State referred to in the first operative paragraph of this judgment – regarding which little or nothing could be done, owing to the degree of stagnation of

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

the classic postulates of the law of treaties, which have not accompanied either the normative evolution of international human rights law, or the emergence of fundamental values shared by the international community as a whole – has unfortunately led, once more, to the undue fragmentation of the complex, grave and continuing crime of the alleged forced disappearance of persons of the children, Ernestina and Erlinda Serrano Cruz.

27. It is not my intention to repeat in this dissenting opinion my extended arguments against this fragmentation, expressed in detail in my three separate opinions in the Court's judgments in *Blake v. Guatemala* (preliminary objections, 1996; merits, 1998; and reparations, 1999). However, what I do find unacceptable is the broad scope of the State limitation referred to in the second operative paragraph of this judgment on preliminary objections in the *Serrano Cruz Sisters v. El Salvador*. In this regard, as I mentioned in my abovementioned concurring opinion in the *Hilaire* case (and also in the *Benjamin* and *Constantine* cases), with regard to Trinidad and Tobago:

> "In my understanding, in this matter, it cannot be sustained that what is not prohibited is permitted. This posture would amount to the traditional – and surpassed – attitude of *laisser-faire, laisser-passer*, proper to an international legal order fragmented by the voluntarist State subjectivism, which in the history of law ha ineluctably favored the most powerful ones. *Ubi societas, ibi jus*... At this beginning of the twenty-first century, in an international legal order wherein one seeks to affirm superior common values, among considerations of international *ordre public*, as in the domain of international human right law, it is precisely the opposite logic which should apply: *what is not permitted, is prohibited.*
> (...) It is not the function of the jurist simply to take note of the practice of States, but rather to say what the law is. Since the classic work of H. Grotius in the seventeenth century, there has been a whole trend of international law thinking which conceives international law as a legal order endowed with an intrinsic value of its own (and thereby superior to a merely "voluntary" law), - as well recalled by H. Accioly[11] - as it derives its authority from certain principles of sound reason (*est dictatum rectae rationis*)" (paras. 24 and 26).

28. In its judgment on preliminary objections in the *Hilaire* case – and also in the *Benjamin* and *Constantine* cases (2001) - the Inter-American Court considered correctly that, if it accepted the restrictions imposed by States in the instruments recognizing its contentious jurisdiction in their terms, this would deprive it of its powers and render illusory the rights protected by the American Convention (para. 93, and *cf.* para. 88). This position taken by the State is clearly supported by the specific and very clear formulation of Article 62(2) of the American Convention.

29. As I indicated in my separate opinion in *Blake v. Guatemala* (Reparations, 1999),

> "(...) 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.
> 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, insofar as human rights treaties are concerned, one should always bear in mind the objective character of the obligation enshrined therein, the autonomous 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

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[11]. H. Accioly, *Tratado de Derecho Internacional Público*, tome I, Rio de Janeiro, Imprensa Nacional, 1945, p. 5.

> 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."[12]

IV. Compulsory international jurisdiction: new reflections *de lege ferenda*.

30. Despite the unfortunate decision of the Inter-American Court, in the second operative paragraph of this judgment on preliminary objections in *the Serrano Cruz Sisters v. El Salvador*, it should be recalled that, in its abovementioned judgments on preliminary objections in the *Hilaire*, *Benjamin*, and *Constantine* cases, and also in its previous judgments on competence in the *Constitutional Court* and *Ivcher Bronstein* cases, the Court safeguarded the integrity of the provisions of Article 62 of the American Convention on Human Rights, and thus made a valuable contribution to strengthening the international jurisdiction and achieving the ancient ideal of international justice.

31. On the positive side, it should be noted that, despite all the difficulties, this ideal has been revitalized and has gained ground nowadays, with the encouraging significant expansion of the international judicial function, reflected by the creation of new international tribunals. For some time, I have been insisting that the time has come to finally overcome the regrettable lack of automatism of the international jurisdiction and, in particular, of the inter-American system for the protection of human rights.

32. Owing to the distortions resulting from their practice in this area, the States are now faced with a dilemma that should have been overcome long ago: or they continue adhering to the anachronic voluntarist conception of international law, abandoning the prospect of the primacy of law over political interests, or they return to and achieve determinedly the ideal of constructing a more cohesive and institutionalized international community in light of the primacy of law and the search for justice, moving resolutely from *jus dispositivum* to *jus cogens,*[13] convinced that, ultimately, the international juridical system is a *necessary* rather than a voluntary system.

33. I will now repeat what I stated in my concurring opinion in the judgment on preliminary objections of September 1, 2001, of the Inter-American Court in the *Hilaire* case (and also in the *Benjamin* and *Constantine* cases):

> "The time has come to consider, in particular, in a future protocol of amendments to the procedural part of the American Convention on Human Rights, aiming at strengthening its mechanisms of protection, the possibility of an amendment to Article 62 of the American Convention, in order to render this clause also *mandatory*, in conformity with its character of fundamental clause (*cláusula pétrea*), thus establishing the *automatism* of the

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[12]. IACtHR, *Blake v. Guatemala* (Reparations), Judgment of January 22, 1999, Series C, No. 48, Separate opinion of Judge A.A. Cançado Trindade, paras. 32-34.

[13]. And always bearing mind that the protection of fundamental rights places us firmly in the domain of *jus cogens*. In this regard, when intervening in the discussions of March 12, 1986, of the Vienna Conference on the Law of Treaties between States and International Organizations or between International Organizations, I referred to the evident incompatibility between the concept of *jus cogens* and the voluntarist conception of international law, which is not even able to explain the establishment of rules of general international law; cf. UN, *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 1986) - Official Records*, volume I, N.Y., U.N., 1995, pp. 187-188 (intervention by A.A. Cançado Trindade).

jurisdiction of the Inter-American Court of Human Rights.[14] There is a pressing need for the old ideal of the permanent international compulsory jurisdiction[15] to become reality also on the American continent, in the present domain of protection, with the necessary adjustments in order to face its reality of human rights to fulfill the growing needs of effective protection of the human being" (para. 39).

V. The recurring search for automatic compulsory international jurisdiction as a necessity of our times

34. The recurring search for compulsory international jurisdiction appears to relate to the myth of Sisyphus. Already in 1959, the Institute of International Law (Neufchatel session), of which I am honored to be a member, adopted unanimously a resolution supporting the compulsory jurisdiction of international tribunals, as "an essential complement to the relinquishment of the use of force in international relations."[16] Since then, the idea has had a long and involved history that still continues, above all, in the case of contentious matters solely between States. However, progress has been made in contentious matters opposing States and individuals (as active or passive subjects of international law).

35. I have already referred to the fact that the European Court of Human Rights (with Protocol No. 11) is today endowed with automatic compulsory jurisdiction (*cf. supra*). Other contemporary international courts also have it. This is the case of the International Criminal Court. Even though other mechanisms had been considered during the *travaux préparatoires* of the 1998 Rome Statute (including such truculent procedures as "opting in" and "opting out"), the compulsory jurisdiction prevailed finally, obviating the need for an additional manifestation of consent by the States Parties to the Rome Statute.[17] This was a significant decision that strengthened the international jurisdiction.

36. The Court of Justice of the European Communities provides an example of the supranational compulsory jurisdiction, even though it is limited to community law or to the law on integration (of the European Union). In its own way, the system of the 1982 United Nations Convention on the Law of the Sea goes beyond the traditional regime of the optional clause of the ICJ Statute[18] (which, unfortunately, served as a model for the Inter-American Court): it opens to the States Parties to that Convention the option of going before the International Tribunal for the Law of the Sea, or the ICJ itself, or to arbitration (Article 287). Despite the exclusive nature of

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[14]. With the necessary amendment – by a protocol – in this regard, of Article 62 of the American Convention, ending the restrictions that it establishes and expressly rejecting the possibility of any other restrictions and also ending the reciprocity and optional nature of the recognition of the Court's contentious jurisdiction, which would make it compulsory for all States Parties.

[15]. In a monograph published in 1924, four years after the adoption of the Statute of the former PICJ, Nicolas Politis, when recalling the historic evolution from private justice to public justice, also advocated the evolution, at the international level, from optional justice to compulsory justice; cf. N. Politis, *La justice internationale*, Paris, Libr. Hachette, 1924, pp. 7-255, esp. pp. 193-194 and 249-250.

[16]. *Annuaire de l'Institut de Droit International* (1959), *cit. in* C.W. Jenks, *The Prospects of International Adjudication*, London, Stevens/Oceana, 1964, pp. 113-114.

[17]. H. Corell, *Evaluating the ICC Regime: The Likely Impact on States and International Law*, The Hague, T.M.C. Asser Institute, 2000, p. 8 (internal circulation).

[18]. In reality, the optional clause (of the ICJ Statute) is not the only source of the compulsory jurisdiction of the ICJ; another source is precisely the jurisdictional clauses inserted in treaties attributing jurisdiction to international tribunals to resolve conflicts relating to their interpretation and application.

specific matters, the Montego Bay Convention managed to establish a compulsory procedure with coercive elements; the choice of specific procedures at least ensures the resolution of conflicts in accordance with the law under the said Convention.[19]

37. These examples are sufficient to reveal that compulsory jurisdiction is a reality today – at least in specific circumscribed domains of international law, as I have just indicated. Compulsory international jurisdiction is, ultimately, a real juridical possibility. If it has still not been generally attained at the universal level, this should not be attributed to an absence of juridical viability, but rather to an erroneous perception of it role, or simply to a lack of willingness to expand it scope. Compulsory jurisdiction is a manifestation of the recognition that international law is, more than voluntary, really necessary.

38. In addition to the progress already achieved to this end, reference should be made to similar initiatives and efforts. One example is the proposal for a draft protocol to the American Convention on Human Rights that I prepared as Rapporteur of the Inter-American Court of Human Rights, which, *inter alia,* supports an amendment to Article 62 of the American Convention in order to make the Inter-American Court's jurisdiction on contentious matters automatically compulsory when the American Convention is ratified.[20] I hope that these proposals will prosper when our community of nations attains a greater level of awareness of the need to improve the protection mechanisms of the American Convention.

VI. *Jus Cogens* in the convergence between international humanitarian law and international human rights law.

39. In addition to my previous observations on the second and first operative paragraphs of this judgment on preliminary objections in *the Serrano Cruz Sisters v. El Salvador*, and the other operative paragraphs (the third to the seventh), which I have voted in favor of, I would like to add some brief considerations on the fifth operative paragraph, in which the Court has correctly rejected the second preliminary objection, entitled objection owing to lack of jurisdiction *ratione materiae*. In the considering paragraphs on this preliminary objection (paras. 111 to 119), which it correctly rejects (para. 120), the Court refers pertinently to the convergence and complementarities between international humanitarian law and international human rights law. It also refers to relevant provisions of the norms on both aspects of the protection of human rights. I would reason different, and go further than the Court, to reach the same conclusion as that reached by the Court, rejecting the said objection.

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[19]. L. Caflisch, "Cent ans de règlement pacifique des différends interétatiques", 288 *Recueil des Cours de l'Académie de Droit International de La Haye* (2001) pp. 365-366 and 448-449; J. Allain, "The Future of International Dispute Resolution - The Continued Evolution of International Adjudication", *in Looking Ahead: International Law in the 21st Century / Tournés vers l'avenir: Le droit international au 21ème siècle* (Proceedings of the 29th Annual Conference of the Canadian Council of International Law, Ottawa, October 2000), The Hague, Kluwer, 2002, pp. 61-62; S. Karagiannis, "La multiplication des juridictions internationales: un système anarchique?", *in* Société française pour le Droit international, *in La juridictionnalisation du Droit international* (Colloque de Lille), Paris, Pédone, 2003, p. 34; M. Kamto, "Les interactions des jurisprudences internationales et des jurisprudences nationales", *in ibid*., p. 424.

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

40. The peremptory nature of Article 3 common to the four 1949 Geneva Conventions on international humanitarian law has been judicially recognized.[21] In my opinion, this provision, together with the references to the fundamental guarantees of the 1977 Protocols I (Article 75) and II (Articles 4 to 6) additional to the four 1949 Geneva Conventions on international humanitarian law, and the provisions regarding non-derogable rights in human rights treaties such as the American Convention, belong to the domain of international *jus cogens.* This is, *per se,* sufficient to reject the said objection of "lack of jurisdiction *ratione materiae"* as being manifestly inadmissible.

41. Furthermore, every time that an attempt has been made to disassociate the provisions of these two aspects of the protection of human rights (international human rights law and international humanitarian law), the results have been disastrous – as illustrated, today, by the attempt being made by the State (which is not a party to the American Convention) responsible for those detained in Guantánamo Bay.[22] The convergence between international human rights law, international humanitarian law and international refugee law – which, as I have been maintaining for many years, is expressed at both the normative, and the hermeneutic and operational levels - ensures the maximum protection of the individual in any and every circumstance,[23] and even more since the norms belong to the domain of *jus cogens*.

VII. Epilogue: The expansion of the international jurisdiction

42. Above and beyond the solution of international disputes, the compulsory jurisdiction testifies to the rule of law in the international sphere, leading to a more cohesive and inspired international legal system, guided by the imperative of the realization of justice. Also, the multiplicity of international tribunals nowadays (for example, in addition to the ICJ, the International Tribunal for the Law of the Sea, the International Criminal Court, the international (inter-American and European) human rights courts, the *ad hoc* international criminal tribunals – for Rwanda and for the Former Yugoslavia, and the Court of Justice of the European Communities) constitute an encouraging development of the growing recourse to judicial channels to resolve disputes, and the formation of the embryo of a future international judiciary.

43. This development reveals that the ancient ideal of international justice has been revitalized and is gaining ground nowadays. It has also affirmed and developed the ability of international law to adequately resolve international disputes in different domains of human activity (*cf. supra*). Today, such disputes no longer reveal a strictly inter-State dimension as in the past. International human rights

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[21]. Cf. ICJ, *Nicaragua v. The United States of America*, *ICJ Reports* (1986) pp. 114-115, para. 220.

[22]. For this ominous, fragmenting and erroneous attempt, and also an equally erroneous and reductionist vision of the scope of the third and fourth 1949 Geneva Conventions on International Humanitarian Law, cf. U.S., *Additional Response of the United States to Request for Precautionary Measures of the Inter-American Commission on Human Rights - Detainees in Guantanamo Bay, Cuba*, of July 15, 2002, pp. 1-35. Contrary to that State's allegations, there is no juridical vacuum or limbo, and every individual is protected by law, in any circumstances whatsoever (even those detained and sentenced), applying the provisions of international humanitarian law and international human rights law *concomitantly*.

[23]. A.A. Cançado Trindade, "Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Humanitario Internacional: Aproximaciones y Convergencias", *in 10 Años de la Declaración de Cartagena sobre Refugiados - Memoria del Coloquio Internacional* (San José, Costa Rica, December 1994), San José, IIDH/ACNUR/Gob. Costa Rica, 1995, pp. 77-168.

tribunals, for example (the Inter-American and the European Courts of Human Rights), have expanded access to justice to subjects of international law other than the States.[24] They have done what the ICJ has been unable to do (owing to the anachronic limitations of its Statute). The many contemporary international tribunals are responding to an urgent need of the international community as a whole. And the individual has finally been given access to justice, at the international as well as the national level.

44. Specialized international tribunals, such as the European and Inter-American Courts of Human Rights, and the international criminal tribunals *ad hoc* for the Former Yugoslavia and for Rwanda have affirmed universal principles, and the primacy of humanitarianism over traditional mechanisms of the inter-State contentious sphere.[25] Their work has been complementary to that of the ICJ (which has also referred to elementary considerations of humanity), and has contributed to raising contemporary international contentious matters to a new universalist dimension, over and above the peaceful solution of international disputes on a strictly inter-State basis. In this way, they have enriched contemporary public international law.

45. The multiplicity of international tribunals is, consequently, an encouraging phenomenon, offering additional forums for access to justice, and also providing justice at an international level. Attention should be focused on this healthy substantive development, which is a reflection of the expansion of the application of international law in general and of judicial solutions in particular,[26] instead of trying – as some doctrinaires have attempted – to create an artificial "problem" based on the traditional concern with the delimitation of jurisdictions. The questions posed by the co-existence of the international tribunals can be adequately examined in the dialogue between international judges, and not on the basis of puerile self-assertions of alleged primacy (of one court over the others).

46. As I stated recently, in my address, as guest speaker, on the occasion of the opening of the 2004 judicial year of the European Court of Human Rights (on January 22, 2004) in the *Palais des Droits de l'Homme* in Strasbourg):

> "This is a point which deserves to be stressed on the present occasion, as in some international legal circles attention has been diverted in recent years from this fundamental achievement to the false problem of the so-called `proliferation of international tribunals'. This narrow-minded, inelegant and derogatory expression simply misses the key point of the considerable advances of the old ideal of international justice in the contemporary world. The establishment of new international tribunals is but a reflection of the way contemporary international law has evolved, and of the current search for, and construction of, an international community guided by the rule of law and

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[24]. A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104; and cf. H. Ascensio, "La notion de juridiction internationale en question", *in La juridictionnalisation du Droit international* (Colloque de Lille), Paris, Pédone, 2003, p. 198; J.-P. Cot, "Le monde de la justice internationale", *in ibid*., pp. 517 y 521; M. Bedjaoui, "La multiplication des tribunaux internationaux ou la bonne fortune du droit des gens", *in ibid*., pp. 541-544.

[25]. M. Koskenniemi and P. Leino, "Fragmentation of International Law? Postmodern Anxieties", 15 *Leiden Journal of International Law* (2002) pp. 576-578. – It may be recalled that, in the *M/V Saiga* case (1999), the International Tribunal for the Law of the Sea (ITLS) also evoked basic considerations of humanity; cf. ITLS, *M/V Saiga* case (No. 2) (*Saint Vincent and the Grenadines v.* Guinea), *Reports of Judgments, Advisory Opinions and Orders* (1999), paras. 155-156.

[26]. Cf. J.I. Charney, "Is International Law Threatened by Multiple International Tribunals?", 271 *Recueil des Cours de l'Académie de Droit International de La Haye* (1998) pp. 116, 121, 125, 135, 347, 351 and 373.

> committed to the realization of justice. It is, furthermore, an acknowledgement of the superiority of the judicial means of settlement of disputes, bearing witness of the prevalence of the rule of law in democratic societies, and discarding any surrender to State voluntarism.
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> Since the visionary writings and ideas of Nicolas Politis and Jean Spiropoulos in Greece, Alejandro Álvarez in Chile, André Mandelstam in Russia, Raul Fernandes in Brazil, René Cassin and Georges Scelle in France, Hersch Lauterpacht in the United Kindgom, John Humphrey in Canada, among others, it was necessary to wait for decades for the current developments in the realization of international justice to take place, nowadays enriching rather than threatening international law, strengthening rather than undermining international law. The reassuring growth of international tribunals is a sign of our new times, and we have to live up to it, to make sure that each of them gives its contribution to the continuing evolution of international law in the pursuit of international justice"[27].

47. In the sphere of the protection of fundamental human rights, the growth and consolidation of the international human rights jurisdictions on the American and the European continent testify to the notable progress made by the ancient ideal of international justice today. Both the European and the Inter-American Court have correctly established limits to State voluntarism; they have safeguarded the integrity of their respective human rights conventions, and the primacy of considerations of *ordre public* over the will of individual States; they 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.

48. With regard to the foundation of their contentious jurisdiction, eloquent illustrations of their firm stance in support of the integrity of the protection mechanisms of the two conventions are to be found in recent decisions of the European Court[28] and the Inter-American Court, for example.[29] Both international human rights tribunals, when correctly deciding basic procedural questions posed in recent cases, have appropriately used the mechanisms of public international law to strengthen their respective jurisdictions for the protection of the individual.

49. The Inter-American and the European Courts of Human Rights have thus decisively safeguarded the integrity of the mechanisms of protection of the American and European Conventions on Human Rights, which ensure the juridical emancipation of the individual *vis-à-vis* his own State. This is a significant jurisprudential construct which, in my opinion, does not allow any going back. Therefore, in my opinion, it is necessary to revert, as soon as possible, the unfortunate decision of the majority of the members of the Court in relation to the second operative paragraph of this judgment in *the Serrano Cruz Sisters v. El*

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[27]. A.A. Cançado Trindade, *Speech on the Occasion of the Opening of the Judicial Year of the European Court of Human Rights (Thursday, 22 January 2004) / Discours dans l'audience solennelle à l'occasion de l'ouverture de l'année judiciaire de la Cour Européenne des Droits de l'Homme (le jeudi 22 janvier 2004)*, Strasbourg, Council of Europe/ECtHR doc. No. 926464, of January 22, 2004, p. 11, paras. 10-11. And cf. text also reproduced *in* European Court of Human Rights/Cour européenne des droits de l'homme, *Annual Report 2003/Rapport annuel 2003*, Strasbourg, C.E., 2004, p. 44, paras. 10-11. And cf. likewise, A.A. Cançado Trindade, "The Merits of Coordination of International Courts on Human Rights", 2 *Journal of International Criminal Justice* - Oxford (2004) pp. 309-312.

[28]. In the *Belilos versus Switzerland* case (1988), in the *Loizidou versus Turkey* case (Preliminary Objections, 1995), and in the *I. Ilascu, A. Lesco, A. Ivantoc and T. Petrov-Popa versus Moldovia and the Russian Federation* case (2001).

[29]. In the *Constitutional Tribunal* and *Ivcher Bronstein vs Peru* cases, Competence (1999), and in the *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (Preliminary objections, 2001).

Salvador, and return immediately to the progressive jurisprudential line of the Inter-American Court, to its important case law that emancipates the individual.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary

DISSENTING OPINION OF JUDGE ALEJANDRO MONTIEL ARGÜELLO

1) I have dissented from the third operative paragraph of the preceding judgment because, in my opinion, the Court should have admitted the objection of lack of jurisdiction with regard to all the facts that allegedly gave rise to the State's responsibility; consequently, it should have been decided that this responsibility does not exist and that the case should be dismissed and filed.

2) It is widely recognized that the Republic of El Salvador experienced one of the most difficult and critical moments of its history from 1979 to 1982, when there was an uprising by guerrilla groups who attempted to obtain political power through violence. The conflict was so severe that Protocol II additional to the Geneva Conventions of 12 August 1949 became applicable, and also the intervention of the International Red Cross.

3) As a result of the conflict, many people were displaced, both abroad and to safer places; many families were dispersed and the members did not know each other's whereabouts or that of their previous neighbors; moreover, files of courts, municipalities, and religious and charity organizations were destroyed.

4) This situation evidently created extreme difficulty in clarifying the truth in cases in which one of the groups was accused of violating someone's human rights, even though the Government of El Salvador has made pertinent efforts.

5) This appears to be the reason why El Salvador (which had ratified the American Convention on Human Rights in 1978), only recognized the jurisdiction of the Inter-American Court of Human Rights on June 6, 1995. Furthermore, this recognition was made restrictively, because it contains "the reservation that it recognizes this jurisdiction solely and exclusively in cases involving subsequent juridical facts and acts, or juridical facts and acts which commenced after the declaration of recognition had been deposited ..."

6) I am in complete agreement with those who would like all the 35 member countries of the Organization of American States to ratify the American Convention on Human Rights, since only 24 of them have done so, and all those who ratify it to recognize the jurisdiction of the Inter-American Court of Human Rights, because currently only 21 countries do so. Moreover, the ratifications and the declarations of recognition contain numerous reservations and restrictions, all of which weaken considerably the American system for the protection of human rights. The system of the European Court of Human Rights is much more complete, following Protocol II and the Statute of the International Criminal Court.

7) Despite the above, our desire to attain the ideal should not lead us to disregard existing reservations and restrictions, but rather to apply them strictly; the contrary would not contribute to improving the system, rather it could have the effect of dissuading some States from taking part in it or doing so in a more restrictive way that at present.

8) In this case, the declaration of recognition should be interpreted in good faith, in accordance with the usual meaning of its terms, and taking into accounts its object and purpose, in application of the general rule of interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties.

9) According to that declaration, not only acts prior to the declaration but also subsequent acts, which commenced prior to it, are excluded from the Court's jurisdiction. To determine whether the facts alleged to have resulted in violations of rights and, consequently, State responsibility, fall within these categories, the human rights that are said to have been violated in the applications of the Commission and of the next of kin must be examined.

10) The applications of both the Commission and the next of kin indicate that the rights to life, to humane treatment, to personal liberty, to judicial protection, of the child, of the family, and to a name were violated to the detriment of the alleged victims; and the rights to humane treatment, of the family, to a fair trial and to judicial protection, to the detriment of the next of kin.

11) It can be seen, merely from listing the rights that are said to have been violated, that the alleged violations occurred as a result of the disappearance of the victims or, at least, of facts that commenced on the date of that disappearance (which has been established as June 1982); while, as stated above, the declaration of recognition was made on June 6, 1995; in other words, 13 years later. Not a single fact that resulted in human rights violations commenced after the disappearance. It is true that some facts are subsequent to the declaration, but this is not sufficient since, to fall within the Court's jurisdiction, they would have to have commenced after this.

12) It has been alleged that the crime of forced disappearance is of a continuing nature while the person disappeared does not appear, and the State has argued that it has not ratified the Inter-American Convention on Forced Disappearance of Persons adopted in Belem do Pará on June 9, 1995. The problem posed is to determine whether the said Convention establishes the continuing nature of the crime of forced disappearance or whether it merely confirms this nature, which had been recognized in other international instruments, so that the fact that the Convention has not been ratified would have no significance. However, in this case, that problem would not have any significance either, because, whether the crime is continuing or not, the facts resulting from it would always have commenced prior to the declaration of recognition and, consequently, are not subject to the Court's jurisdiction in the instant case. If the contrary were true, this would signify an undue fragmentation of the complex crime of forced disappearance as happens in other cases, when declarations of recognition that have been drafted in a different way are applicable.

The characteristics of the crime of forced disappearance, which I agree with, do not detract from the reality that the crime generates facts that can be excluded from the Court's jurisdiction if a declaration of recognition establishes this, as in the instant case.

13) The Commission has cited paragraph 39 of the judgment on preliminary objections delivered by the Court on July 2, 1996, in Blake *vs*. Guatemala, which states: "...forced disappearance implies the violation of various human rights recognized in international human rights treaties, including the American Convention, and that the effects of such infringements – even though some may have been completed, as in the instant case – may be prolonged continuously or permanently until such time as the victim's fate or whereabouts are established.

14) I was one of the judges who delivered this judgment and I agree with the contents of the above paragraph, but the Blake case is very different from the instant case, because, as mentioned, continuity does not mean that the pertinent facts did not have a commencement. This had no significance in the Blake case, because Guatemala's declaration of recognition did not exclude facts that commenced before the declaration (as did that of El Salvador), but only preceding facts.

15) In accordance with Guatemala's declaration, the Court decided to rule that the preliminary objection owing to lack of jurisdiction with regard to the detention and death of Mr. Blake was admissible, and to continue hearing the case in relation to effects and acts subsequent to the declaration. Conversely, as El Salvador's declaration excludes facts that commenced prior to the declaration, the objection of lack of jurisdiction is applicable to all the facts invoked by the petitioners and, as I mentioned above, the case should be dismissed and declared closed.

16) In the judgment on merits in the Blake case, delivered on January 24, 1998, in which I also took part, partially dissenting, the Court declared that Guatemala had violated the judicial guarantees set forth in Article 8(1) of the Convention and also the right to humane treatment of the relatives of the victim.

17) The fundamental difference between the Blake case and the instant case is evident. In the former, the violations of the rights of the next of kin were examined because it was considered that those violations occurred subsequent to the date of the declaration while, in the instant case, since the commencement of the facts was prior to the declaration – as they were an undoubted consequence of the disappearance – they are not subject to the Court's jurisdiction. Furthermore, in the Blake case, the violations of the rights of the victim were rejected and, in this case, the Commission invokes them, even though it is even clearer that they are the immediate result of the disappearance.

18) It has also been alleged that the limitation contained in El Salvador's declaration is contrary to the object and purpose of the American Convention on Human Rights. This is not true, because not every alleged violation of that object and purpose falls within the Court's jurisdiction. Nevertheless, according to Article 62 of the Convention, it must be included in the defendant State's declaration of recognition or in a special declaration, thereby following a similar procedure to the International Court of Justice. Paragraph 2 of this article establishes that the declaration may be made unconditionally, for a specified period, or for specific cases. In the instant case, El Salvador's declaration refers to both a specified period and specific cases.

It is true that the expression 'specific cases' is not the most fortunate one, because it could be interpreted as referring to individually identified cases; however, the practice of all the countries who have accepted the Court's jurisdiction and the relevant case law of the Court has been that this refers to cases included within previously indicated categories and this is what El Salvador's declaration does. To adopt another interpretation would invalidate all the limitations contained in the declarations that are in force, since none of them refer to individually identified cases.

19) As I said at the beginning of this opinion, I hope that all the American States accept the Court's jurisdiction without any limitation, but until this happens, we must apply the actual system.

20) I have dissented from the seventh operative paragraph which rejects the objection of non exhaustion of domestic remedies, because, in my opinion, this rejection implies an anticipated ruling on matters that should be decided in the judgment on merits in this case.

Alejandro Montiel-Argüello
Judge *ad hoc*

Pablo Saavedra-Alessandri
Secretary