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Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Nicholas Chapman Blake v. Guatemala
Doc. Type:	Judgment (Preliminary Objections)
Decided by:	President: Hector Fix-Zamudio; Vice President: Hernan Salgado-Pesantes; Judges: Alejandro Montiel-Arguello; Oliver Jackman; Antonio A. Cancado Trindade; Alfonso Novales-Aguirre
Dated:	2 July 1996
Citation:	Blake v. Guatemala, Judgment (IACtHR, 2 Jul. 1996)
Represented by:	APPLICANTS: Janelle M. Diller, Margarita Gutierrez, Joanne M. Hoeper, Felipe Gonzalez, Diego Rodríguez, Arturo Gonzalez and A. James Vazquez-Azpiri
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In the Blake Case,

the Inter-American Court of Human Rights, pursuant to Article 31(6) of the Rules of Procedure of the Inter-American Court of Human Rights (hereinafter “the Rules of Procedure”), renders the following judgment on the preliminary objections filed by the Government of Guatemala (hereinafter “the Government” or “Guatemala”).

I.

1. This case was submitted to the Inter-American Court of Human Rights (hereinafter “the Court” or “the Inter-American Court”) by the Inter-American Commission on Human Rights (hereinafter “the Commission” or the “Inter-American Commission”) by petition of August 3, 1995. The case originated in a complaint (No. 11.219) against Guatemala lodged with the Secretariat of the Commission on November 18, 1993.

2. In referring the case to the Court, the Commission invoked Articles 50 and 51 of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) and Articles 26 et seq. of the Rules of Procedure. The Commission submitted this case to the Court for a decision as to whether there had been a violation of the following Articles of the Convention: 7 (Right to Personal Liberty), 4 (Right to Life), 25 (Right to Judicial Protection), 8 (Right to a Fair Trial), 13 (Freedom of Thought and Expression), and 22 (Freedom of Movement and Residence), all these in relation to Article 1(1) of the Convention, with the alleged “violation of the rights to personal liberty, life and freedom of expression as well as for the denial of justice to the detriment of Mr. Nicholas Chapman Blake,” and of Article 51(2) of the Convention for refusal to “implement the recommendations made by the Commission.” In addition, the Commission asked the Court to declare that the Government

must make full reparation to Nicholas Chapman Blake's next of kin for the grave material -and moral- damage suffered as a result of the multiple violations of rights protected by the Convention and the enormous expenses incurred by the victim's relatives to establish his whereabouts and identify those responsible for his disappearance and subsequent concealment.

Lastly, it asked the Court to order the Government to pay the costs “of this case, including the fees of the professionals who served as the victim's representatives before the State authorities and in the processing of the case before the Commission and the Honorable Court.”

3. The Inter-American Commission designated Claudio Grossman and John Donaldson to act as its Delegates, and Edith Márquez-Rodríguez, David J. Padilla and Domingo E. Acevedo to act as its Attorneys. It also named the following persons to act as Assistants authorized to represent the victim: Janelle M. Diller, Margarita Gutiérrez, Joanne M. Hoeper, Felipe González, Diego Rodríguez, Arturo González and A. James Vázquez-Azpíri.

4. By note of August 18, 1995, after a preliminary review of the application by the President of the Court (hereinafter “the President”), the Secretariat of the Court (hereinafter “the Secretariat”) notified the Government of the application and informed it that it had a period of three months in which to answer, two weeks to name an Agent and Alternate Agent, and thirty days to file preliminary objections, all those periods to commence on the date of notification of the application. By communication of the same date the Government was also invited to appoint a Judge ad hoc.

5. On September 1, 1995, the Government gave notice that it had designated Mr. Dennis Alonzo-Mazariegos as Agent and Mr. Vicente Arranz-Sanz as Alternate Agent. On September 22, 1995, the Government informed the Secretariat that it had appointed Mr. Alfonso Novales-Aguirre as Judge ad hoc.

6. On September 16, 1995, in accordance with Article 31 of the Rules of Procedure, the Government submitted a brief containing its preliminary objections (see *infra* para. 22).

7. That same day the Secretariat forwarded the Government's brief to the Commission and on October 16, 1995, the Commission presented its answer contesting the preliminary objections.

8. On November 9, 1995, the Government submitted its reply to the application.

9. By Order of December 9, 1995, the President decided to summon the parties to a public hearing so that their comments on the preliminary objections presented in this case could be heard.

10. The public hearing was held at the seat of the Court on January 28, 1996, at which there appeared:

for the Government of Guatemala:

Dennis Alonzo-Mazariegos, Agent
Fredy Gudiel-Samayoa, Advisor;

for the Inter-American Commission on Human Rights:

Claudio Grossman, Delegate
John Donaldson, Delegate
Domingo Acevedo, Attorney
Felipe González, Assistant

II.

11. The following paragraphs summarize the events, circumstances and processing of this case before the Commission as they were set forth in the application and its attachments submitted to the Court.

12. According to the application, on March 26, 1985, Mr. Nicholas Chapman Blake, a United States citizen and journalist residing in Antigua, Guatemala, set off with Mr. Griffith Davis, a United States citizen and photographer, to the small village of El LLano in the Department of Huehuetenango, arriving there on March 28, 1985. The purpose of the trip was to collect information for an article on one of the Guatemalan guerrilla bands. That same day, the El Llano Civil Patrol, under the command of Mario Cano, questioned Mr. Blake and Mr. Davis “on the purpose of their trip.” Years later, it was established that after seeking instructions from officers of the Las Majadas military garrison, Mario Cano ordered three members of his patrol -identified as Epólito Ramos-García, Candelario Cano-Herrera and Vicente Cifuentes- to arrest Blake and Davis and take them to a place known as Los Campamentos on the border with the El Quiché Department, telling them, “You can kill them if you wish.” On arrival there, “Epólito Ramos-García fired on one of them, killing him instantly” and “Vicente Cifuentes ... shot the second man, killing him also,” whereupon the “three civil patrolmen threw the bodies into very dense undergrowth at the side of the path” and covered them with tree trunks “to make them disappear.”

13. The Commission in its application set forth the many measures Mr. Nicholas Chapman Blake's relatives took, to no avail, until Mr. Justo Martínez told them, in 1988, how Mr. Blake and Mr. Davis had been killed by the El Llano Civil Patrol. Mr. Martínez also claimed that the previous year (1987) the remains of the two victims had been burned to prevent discovery. The remains -first Mr. Davis's and later Mr. Blake's- were eventually discovered in 1992. Once Mr. Nicholas Chapman Blake's remains had been identified by a forensic expert, his death certificate was drawn up and the date of his death established as March 29, 1985.

14. The complaint was received by the Inter-American Commission on November 18, 1993, and on December 6, 1993, it was transmitted to the Government, which was asked to submit information on the case within 90 days. By note of March 7, 1994, the Government requested an extension of the deadline and on March 10, 1994, the Commission granted an extension of 30 days. The Government submitted its comments on the case on April 14, 1994.

15. The Commission convened a hearing attended by both parties at its headquarters on September 16, 1994, in order to reach a friendly settlement. At that hearing, the Government submitted a brief in which it formally raised the objection of non-exhaustion of domestic remedies and asked the Commission to consider its participation in the friendly settlement to be at an end.

16. At the plaintiff's request, a hearing was held on February 14, 1995, at which the Government's representative rejected the proposal of a friendly settlement of the case and "once more raised the objection of non-exhaustion of remedies under domestic law."

17. On February 15, 1995, the Commission approved Report 5/95, and decided in its resolatory part:

TO RECOMMEND

1. That the State of Guatemala accept its objective responsibility for the murder of Mr. Nicholas Blake, his disappearance and the cover-up of his murder, and make the appropriate reparations to his successors.

2. That the State of Guatemala, on the basis of evidence already in existence and evidence obtainable under its legislation, identify, prosecute, detain and punish those responsible for the death of Mr. Nicholas Blake.

3. That the State of Guatemala, on the basis of evidence already in existence and evidence obtainable under its legislation, identify, prosecute, detain and punish those responsible for the cover-up and obstruction of the judicial proceeding concerning the disappearance and death of Mr. Nicholas Blake.

4. That the State of Guatemala take such measures as are necessary to avoid a recurrence of such types of violation, including abuses by the Civil Patrols, cover-up by the civilian and military authorities, and the lack of effective judicial proceedings.

5. That this report drawn up in accordance with Article 50 be transmitted to the Government, which shall not be at liberty to publish it, and

6. That if within a period of sixty days from the transmittal of this Report, the Government has not implemented the above recommendations, the instant case be submitted to the Inter-American Court of Human Rights pursuant to Article 51 of the American Convention.

18. On May 4, 1995, the Commission transmitted Report 5/95 to the Government of Guatemala, informing it that if it failed to implement the recommendations contained therein, the Commission would submit the case for the consideration of the Inter-American Court as provided in Article 51 of the Convention.

19. On July 5, 1995, the Government transmitted its reply to the Commission, declaring that:

[t]he proceedings on the merits are currently at the investigation stage, the last procedural steps being the statements by witnesses in the instant case before the District Prosecutor of the Ministry of the Interior ["Ministerio Público"] of Huehuetenango ... As indicated by the statements made by the aforementioned persons, it is evident that the case is progressing.

20. On August 3, 1995, having not reached an agreement with the Government, the Commission submitted the case for the consideration and decision of the Court.

III.

21. The Court is competent to hear the instant case. Guatemala has been a State Party to the American Convention since May 25, 1978, and accepted the contentious jurisdiction of the Court on March 9, 1987.

IV.

22. The Government filed three preliminary objections, summarized as follows:

First. Incompetence of the Inter-American Court of Human Rights to try this case, inasmuch as recognition of the compulsory competence of the Court applies exclusively to cases that occurred after the date on which the declaration was deposited with the Secretariat of the Organization of American States.

Second. Incompetence of the Court to deal with this application by reason of its subject.

Third. Violation by the Commission of the American Convention by virtue of the restriction regarding interpretation contained in Article 29(d).

V.

23. The first objection is that of “[i]ncompetence of the Court to hear this case” which the Government based on the fact that Guatemala accepted the jurisdiction of the Court on March 9, 1987, “with the reservation that cases in which the Court's competence is accepted relate exclusively to events that occurred after the date on which the declaration is presented to the Secretariat of the Organization of American States” and that the acts to which the application refers occurred in March 1985, prior to Guatemala's acceptance, so that the Court lacked competence to try the case. The Government maintains that despite the fact that the Commission “[a]ccuses it ... of arbitrary and unlawful abduction of Mr. Nicholas Chapman Blake, of causing his forced disappearance and taking his life,” those events clearly occurred in March 1985.

24. The Inter-American Commission requested that this objection be dismissed because the application in the instant case “refers to events that took place after that date.” In support of its request, the Commission contends that lack of competence *ratione temporis* “does not apply to continuous crimes,” stating that from the time of Mr. Blake's arrest by the El Llano Civil Self-Defense Patrol on March 28, 1985, he had been disappeared until June 14, 1992, the date on which his remains were discovered. Accordingly, Mr. Blake's disappearance had been in effect “for a period of time that exceeded by more than five years the acceptance of the compulsory jurisdiction of the Court March 9, 1987- by the State of Guatemala.” According to the Commission, the continuous effect of the disappearance is illustrated in the instant case by “the concealment of Mr. Blake's remains, the cover-up of the perpetrators and accomplices, the authorities' total indifference and lack of information about the events, and the lasting consequences that this tragic situation has had on Mr. Blake's family.”

VI.

25. The second objection is that of “[i]ncompetence of the Inter-American Court of Human Rights by reason of the subject,” claimed by the Government “on the grounds that the events on which the application is based do not violate any of the human rights and freedoms recognized by the American Convention,” inasmuch as they constitute an unlawful common criminal act for which the State cannot be held responsible on the grounds that members of the Civil Self-Defense Patrols are agents of the State. With regard to the links between the Civil Patrols and the Army, the Government contends that “[i]t is natural for the Civil Patrols to have close ties to the National Army as far as the anti-subversion struggle is concerned... but one may not blithely conclude from this that their members belong to, or have the same duties as, the Armed Forces and that they are Agents of the Guatemalan State.” Consequently, if some of the members of those Patrols commit crimes, “their responsibility is direct and individual” since their membership of a Civil Patrol “grants them neither immunities nor privileges, nor exemptions of any kind.”

26. The Commission asserts that the Government, in its second objection, raises a matter relating to the merits of the case before the Court; that establishing whether the alleged events constitute a violation of the Convention will depend on the evidence supplied by the parties and that, therefore, “it will be based on different objectives and criteria to those the Court should apply to determine its competence at this introductory or preliminary stage.” The Commission reiterates that the Court is competent to try the instant case because the acts imputed to the State affect rights protected by the Convention, inasmuch as, under International Law, a State incurs responsibility when acts that constitute a violation are attributable to it; in other words, when “[s]uch acts are committed by agents of the State or persons or groups of persons connected with it, or with its acquiescence.” Likewise, the State is responsible “if it does not investigate or repress acts that may constitute a violation of internationally protected rights.” The Commission contends that Guatemala has not met its obligation to control paramilitary groups operating within its national territory, that the Statute of the Civil Self-Defense Patrols places them under the Ministry of Defense, and that they are armed, trained and supervised by the Army, so that “they act as agents of the Guatemalan State.”

VII.

27. Concerning the third preliminary objection, the Government maintains that the Inter-American Commission violates Article 29(d) of the Convention in its attempt to exclude or limit the effect of the American Declaration of the Rights and Duties of Man. It alleges a “distorted interpretation” of the human rights recognized in the Convention, one totally lacking in logic or even minimum legal grounds and without precedent in the international and regional protective systems.

28. According to the Commission, this alleged violation “is not valid as a preliminary objection inasmuch as it concerns [the] Government's assessment of the legal arguments the Commission uses in the application,” which the Court will have the opportunity to address when it examines the merits of the point raised by the Commission.

VIII.

29. The following is the Court's consideration of the preliminary objections presented by Guatemala. The first objection concerns the lack of competence of this Court, on the grounds that the deprivation of liberty to which Mr. Nicholas Chapman Blake was subjected (on March 28, 1985) and his death (on March 29, 1985, according to the death certificate) occurred prior to Guatemala's acceptance of the jurisdiction of this Court (March 9, 1987), with the explicit clarification that such acceptance applied exclusively to events that "occurred after the date on which the instrument of acceptance was deposited with the Secretariat of the Organization of American States."

30. There is no disagreement between the Government and the Commission on the fact that Mr. Blake's detention and death occurred during March 1985 or that those events took place before Guatemala had deposited the instrument of acceptance of the jurisdiction of this Court on March 9, 1987.

31. The disagreement between the parties concerns the effects of those events. The Government maintains that they ended in March 1985, while the Commission contends that the effects are continuous, since the deprivation of Mr. Blake's liberty and his death were discovered many years later and its consequences are still being felt, inasmuch as:

they derive from Mr. Blake's kidnapping and subsequent forced disappearance by agents of the Guatemalan State and comprise, in addition to that crime, a series of violations including the cover-up of the disappearance by high-level Government officials and the Guatemalan Armed Forces, as well as the delay and consequent denial of justice by the Guatemalan State.

32. At the public hearing on January 28, 1996, both parties further explained their arguments in response to questions from Judges Novales-Aguirre, Cançado Trindade, Jackman and Montiel-Argüello. The Government strongly urged its view that the events had all ended in March 1985, that is, prior to its acceptance of the jurisdiction of this Court. The Commission, for its part, reiterated that, in its view, there was continuity in Guatemala's violation of rights enshrined in the American Convention and that Mr. Blake's death should be considered to be a continuous crime since it was only discovered on June 14, 1992.

33. The Court is of the view that the acts of deprivation of Mr. Blake's liberty and his murder were indeed completed in March, 1985 -the murder on March 29 according to the death certificate, as Guatemala maintains- and that those events cannot be considered per se to be continuous. The Court therefore lacks competence to rule on the Government's liability. This is the only aspect of the preliminary objection which the Court considers to be well founded.

34. Conversely, since the question is one of forced disappearance, the consequences of those acts extended to June 14, 1992. As the Commission states in its application, government authorities or agents committed subsequent acts, and this, in the Commission's view, implies complicity in, and concealment of, Mr. Blake's arrest and murder. Although the victim's death was known to the authorities or agents, his relatives were not informed despite their unstinting efforts to discover his whereabouts, and because attempts had been made to dispose of the

remains. The Commission also claims that there were further violations of the American Convention connected with these events.

35. In the first cases of disappearance of persons submitted to it this Court maintained that:

[t]he forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee... The practice of disappearance, in addition to directly violating many provisions of the Convention, such as those noted above, constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention. The existence of this practice, moreover, evinces a disregard of the duty to organize the State in such a manner as to guarantee the rights recognized in the Convention (Velásquez Rodríguez Case, Judgment of July 29, 1988. Series C No. 4, paras. 155 and 158, and Godínez Cruz Case, Judgment of January 20, 1989. Series C No. 5, paras. 163 and 166).

36. There is no treaty in force containing a legal definition of forced disappearance of persons which is applicable to the States Parties to the Convention. However, note should be taken of the texts of two instruments, the United Nations Declaration on the Protection of All Persons from Enforced Disappearance, of December 18, 1992, and the Inter-American Convention on Forced Disappearance of Persons, of June 9, 1994. Although the latter has not yet entered into force for Guatemala, these instruments embody several principles of international law on the subject and they may be invoked pursuant to Article 29(d) of the American Convention. In the terms of that article, no provision of this Convention shall be interpreted as “excluding or limiting the effects that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.”

37. Article 17(1) of the United Nations Declaration states that:

Acts constituting enforced disappearance shall be considered a continuing offense as long as its perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and as long as these facts remain unclarified.

Article III of the aforementioned Inter-American Convention provides that:

The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined.

38. In addition, in Guatemala's domestic legislation, Article 201 TER of the Penal Code - amending decree No. 33 96 of the Congress of the Republic approved on May 22, 1996 stipulates in the pertinent part that the crime of forced disappearance “shall be deemed to be continuing until such time as the victim is freed.”

39. The foregoing means that, in accordance with the aforementioned principles of international law which are also embodied in Guatemalan legislation, 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.

40. In the light of the above, as Mr. Blake's fate or whereabouts were not known to his family until June 14, 1992, that is, after the date on which Guatemala accepted the contentious jurisdiction of this Court, the preliminary objection raised by the Government must be deemed to be without merit insofar as it relates to effects and actions subsequent to its acceptance. The Court is therefore competent to examine the possible violations which the Commission imputes to the Government in connection with those effects and actions.

IX.

41. The second preliminary objection is based on a claim of this Court's incompetence owing to the subject, inasmuch as Guatemala considers that the events on which the application is based do not constitute a violation of any of the human rights and freedoms recognized in the American Convention and that they are ordinary unlawful criminal acts which cannot be imputed to the State, since Civil Self-Defense Patrols cannot be presumed to be agents of the State. Accordingly, if the members of those patrols commit criminal acts, their liability is direct and individual.

42. The Commission, for its part, asserts that the objection refers to the merits of the case, inasmuch as establishing whether the alleged facts constitute violations of the Convention will depend on the evidence supplied by the parties.

43. The Court is of the view that this second objection is not preliminary; that it is, rather, essentially linked to the merits of the dispute. In order to establish whether the Civil Self-Defense Patrols ought or ought not to be deemed agents of the State and, therefore, whether the events indicated by the Inter-American Commission are attributable to the State or, on the contrary, are ordinary crimes, it will be necessary to examine the merits of the dispute and consider the evidence supplied by the parties. Consequently, this objection must be rejected on the grounds of inadmissibility.

X.

44. The third objection concerns the alleged violation by the Commission of Article 29(d) of the Convention, which the Government attributes to a "distorted interpretation" of the human rights recognized in the Convention. The Commission maintains that this objection also concerns the merits, because only at that stage will the Court be able to establish whether or not the Commission has correctly interpreted the precepts of the Convention which the Government claims it has infringed.

45. This Court maintains that the Government's arguments are unclear, since the precept it invokes (*supra*, para. 36) has a different meaning to that attributed to it; moreover, the matter was not clarified at the public hearing held on January 28, 1996. The Government is apparently contending that the Commission's interpretation of the provisions of the Convention in which the human rights violated are enshrined is inaccurate. The objection evidently relates to the merits of the case; therefore this Court may consider whether the Commission's arguments regarding Guatemala's possible violation of those provisions of the Convention are well founded. Consequently, this objection should also be dismissed on the grounds of inadmissibility and the fact that it is not a preliminary objection.

46. As the first preliminary objection is only partially founded and the other two are inadmissible, the hearing of the case should proceed. Whereas the victim's detention and murder do not fall within the competence of the Court, it maintains its jurisdiction over the effects and actions subsequent to the date on which Guatemala accepted the competence of the Court.

XI.

Now, therefore,

THE COURT,

DECIDES:

unanimously

1. That the first objection is partially founded and to declare itself incompetent to decide on Guatemala's alleged responsibility for the detention and death of Mr. Nicholas Chapman Blake.
2. To continue to hear the case with regard to the effects and acts that occurred after the date on which Guatemala accepted the competence of the Court.
3. To dismiss the second and third objections on the grounds of inadmissibility.

Judge Cançado Trindade informed the Court of his Separate Opinion, and Judge Novales-Aguirre of his individual concurring opinion, both of which are attached hereto.

Done in Spanish and English, the Spanish text being authentic. Read at a public session at the seat of the Court in San José, Costa Rica, this second day of July, 1996.

Héctor Fix-Zamudio
President

Hernán Salgado-Pesantes
Alejandro Montiel-Argüello
Oliver Jackman
Antônio A. Cançado Trindade

Alfonso Novales-Aguirre

Judge ad hoc

Manuel E. Ventura-Robles
Secretary

So ordered,

Héctor Fix-Zamudio
President

Manuel E. Ventura-Robles
Secretary

SEPARATE OPINION OF JUDGE A. A. CANÇADO TRINDADE

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

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

3. Inasmuch as cases of enforced disappearance have been characterized by the denial of responsibility on the part of the public authorities and the resulting impossibility of obtaining justice and reparation, leading to a situation of impunity and to the defenselessness of the victims, both direct (the "disappeared") and indirect (their relatives), neither can forced disappearance be dissociated from violations of other rights, also protected in treaties such as the

American Convention, namely, e.g., the right to simple and prompt recourse to a competent national court or tribunal (Article 25) and the right to a fair trial by an independent and impartial tribunal (Article 8). In reality, only after discovery of the whereabouts of a disappeared person has it been possible to determine whether those and other rights have been violated. This we know from the experience on the matter of the international organs of protection of human rights, starting with the need to consider a case of disappearance in an integral manner, comprising its multiple aspects.

4. Since it has been established, at this phase of preliminary objections, in the instant Blake case, that neither party disputes the facts of the detention and death of Mr. Nicholas Chapman Blake, occurred between 28 and 29 March 1985, -the death having been found or confirmed more that seven years later, in June 1992,- the Court has before it a case of disappearance, and must determine, at the next stage of the proceedings, whether or not that disappearance was forced. In any event, the characterization of the present case as one of disappearance, requires that this latter be understood in an integral manner, comprising its multiple aspects.

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

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

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

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

7. The aforementioned brief of preliminary objection adds that

As the Commission accuses the State of Guatemala of the arbitrary and unlawful abduction of Mr. Nicholas Chapman Blake, of perpetrating his forced disappearance and taking his life, affirming that all those events occurred on 28 March 1985 in the place known as Los Campamentos in the Department of Huehuetenango, and that, consequently, on this day Mr. Blake's human rights recognized by the Convention in its Articles 7, 4, 8, 25, 13, 22 and 1(1)

were violated, by the same token, the Court's incompetence to hear the case is evident, inasmuch as the acceptance of the compulsory jurisdiction of the Court applies exclusively to cases concerning events that occurred after the date on which the acceptance was deposited at the Secretariat General of the OAS, that is, after 9 March 1987, so that the preliminary objection interposed is entirely founded.

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

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

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

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

11. As a final thought, may I point out that cases of disappearance, such as the present one, encompass, among related rights, non-derogable fundamental rights, and this, in my understanding, places the interdiction of that crime in the domain of *jus cogens*, of the peremptory norms of general international law. It is not surprising that the 1994 Inter-American

Convention on Forced Disappearance of Persons prohibits (Article X) the invocation of any justification for that crime, even in exceptional circumstances (e.g., state or threat of war, or any public emergencies).

12. I say this because, in my view, the emphasis of this Judgment of the Court on preliminary objections should have been placed, not on the sword of Damocles of 9 March 1987, date on which Guatemala accepted the jurisdiction of the Court (which must be accepted as a limitation *ratione temporis* of its jurisdiction, given the present stage of insufficient evolution of the precepts of the law of treaties to fulfill the basic purpose of effective protection of human rights), but rather on the nature of the alleged multiple and interrelated violations of protected human rights, prolonged in time, with which the present case of disappearance is concerned.

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

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

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

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

INDIVIDUAL CONCURRING OPINION OF JUDGE ALFONSO NOVALES-AGUIRRE

I have concurred in the Judgment in which the Inter-American Court of Human Rights only partially accepted the objection of incompetence *ratione temporis* interposed by the Government of the Republic of Guatemala, considering as I do that no other decision would have been appropriate in strict compliance with the law. Nonetheless, since the Court has partially accepted the objections, it will not now, in its judgment on the merits, be able to pronounce on Mr. Nicholas Chapman Blake's arrest and murder, since these occurred prior to Guatemala's acceptance of the jurisdiction of the Court.

The unlawful death of any person is intolerable and for that reason alone should not go unpunished. Through this concurring opinion I utter a battle cry against impunity in connection with those events on which the Court has declared itself incompetent, and urge the Government of the Republic of Guatemala to pursue the exhaustive investigations warranted by this case and, consequently, to capture, try and sentence the intellectual or material authors of the crimes committed.

Alfonso Novales-Aguirre
Judge ad hoc

Manuel E. Ventura-Robles
Secretary