CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I vote in favour of the adoption of the present Advisory Opinion of the Inter-American Court of Human Rights, which, in my understanding, represents an important contribution of the International Law of Human Rights to the evolution of a specific aspect of contemporary international law, namely, that pertaining to the right of foreigners under detention to information on consular assistance in the framework of the guarantees of the due process of law. The present Advisory Opinion faithfully reflects the impact of the International Law of Human Rights on the precept of Article 36(1)(b) of the Vienna Convention on Consular Relations of 1963. In fact, at this end of the century, one can no longer pretend to dissociate the above-mentioned right to information on consular assistance from the *corpus juris* of human rights. Given the transcendental importance of this matter, I feel obliged to present, as the juridical foundation of my position on the issue, the thoughts which I purport to develop in this Concurring Opinion, particularly in relation to the resolutory points ns. 1 and 2 of the present Advisory Opinion.

I. Time and Law Revisited: The Evolution of Law in Face of New Needs of Protection.

2. The central issue of the present Advisory Opinion leads to the consideration of a question which appears truly challenging to me, namely, that of the relation between time and law. The time factor is, in fact, inherent to the legal science itself, besides being a key element in the birth and exercise of rights (as exemplified by the individual right to information on consular assistance, as raised in the present advisory proceeding). Already in my Individual Opinion in the *Blake versus Guatemala* case (merits, judgment of 24.01.1998) before this Court, in tackling precisely this question, I allowed myself to indicate the incidence of the temporal dimension in Law in general, as well as in various chapters of Public International Law in particular (paragraph 4, and note 2), in addition to the International Law of Human Rights (*ibid.*, note 5). The theme reassumes capital importance in the present Advisory Opinion, in the framework of which I proceed, therefore, to retake its examination.

3. All the international case-law pertaining to human rights has developed, in a converging way, throughout the last decades, a dynamic or evolutive interpretation of the treaties of protection of the rights of the human being[1]. This would not have been possible if contemporary legal science had not liberated itself from the constraints of legal positivism. This latter, in its hermetical outlook, revealed itself indifferent to other areas of human knowledge, and, in a certain way, also to the existencial time, of human beings: to legal positivism, imprisonned in its own formalisms and indifferent to the search for the realization of the Law (*Derecho*), time reduced itself to an external factor (the dead-lines (*plazos*), with their juridical consequences) in the framework of which one had to apply the law (*la ley*), positive law.

4. The positivist-voluntarist trend, with its obsession with the autonomy of the will of the States, in seeking to crystallize the norms emanating therefrom in a given historical moment, came to the extreme of conceiving (positive) law *independently of time*: hence its manifest incapacity to accompany the constant changes of the social structures (at domestic as well as international levels), for not having foreseen the new factual assumptions, being thereby unable to respond to them; hence its incapacity to explain the historical formation of customary rules of international law[2]. The very

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1 Such evolutive interpretation does not conflict in any way with the generally accepted methods of interpretation of treaties; cf., on this point, e.g., Max Sorensen, *Do the Rights Set Forth in the European Convention on Human Rights in 1950 Have the Same Significance in 1975?*, Strasbourg, Council of Europe (doc. H/Coll.(75)2), 1975, p. 4 (mimeographed, internal circulation).

2 A. Verdross, *Derecho Internacional Público*, 5th. ed. (transl. from the 4th. German ed. of *Völkerrecht*), Madrid, Aguilar, 1969 (1st. reprint), p. 58; M. Chemillier-Gendreau, "Le rôle du temps dans la formation du droit international", *Droit international - III* (ed. P. Weil), Paris, Pédone, 1987, pp. 25-28; E. Jiménez de Aréchaga, *El Derecho Internacional Contemporáneo*, Madrid, Tecnos, 1980, pp. 15-16 and 37; A.A. Cançado Trindade, "The Voluntarist Conception of International Law: A Re-assessment", 59 *Revue de droit international de sciences diplomatiques et politiques* - Genève (1981) p. 225. And, for the criticism that the evolution of legal science itself, contrary to what legal positivism sustained, cannot be explained by means of an idea adopted in a "purely aprioristic" manner, cf. Roberto Ago, *Scienza Giuridica e Diritto Internazionale*, Milano, Giuffrè, 1950, pp. 29-30.

emergence and consolidation of the *corpus juris* of the International Law of Human Rights are due to the reaction of the *universal juridical conscience* to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law (*el Derecho*) came to the encounter of the human being, the ultimate addressee of its norms of protection.

5. In the framework of this new *corpus juris*, we cannot remain indifferent to the contribution of other areas of human knowledge, and nor to the existential time; the juridical solutions cannot fail to take into account the time of human beings[3]. The endeavours undertaken in this examination seem to recommend, in face of this fundamental element conditioning of human existence, a posture entirely distinct from the indifference and self-sufficiency, if not arrogance, of legal positivism. The right to information on consular assistance, to refer to one example, cannot nowadays be appreciated in the framework of exclusively inter-State relations. In fact, contemporary legal science came to admit, as it could not have been otherwise, that the contents and effectiveness of juridical norms accompany the evolution of time, not being independent of this latter.

6. At the level of domestic law, one even spoke, already in the middle of this century, of a true *revolt of Law against the codes*[4] (positive law): - "À

3 Time has been examined in different areas of knowledge (the sciences, philosophy, sociology and social sciences in general, besides law); cf. F. Greenaway (ed.), *Time and the Sciences*, Paris, UNESCO, 1979, 1-173; S.W. Hawking, *A Brief History of Time*, London, Bantam Press, 1988, pp. 1-182; H. Aguessy *et alii, Time and the Philosophies*, Paris, UNESCO, 1977, pp. 13-256; P. Ricoeur *et alii, Las Culturas y el Tiempo*, Salamanca/Paris, Ed. Sígueme/UNESCO, 1979, pp. 11-281.

4 In a lucid monograph published in 1945, Gaston Morin utilized this expression in relation to the French Civil Code, arguing that this latter could no longer keep on being applied mechanically, with an apparent mental laziness, ignoring the dynamics of social transformations, and in particular the emergence and assertion of the rights of the human person. G. Morin, *La Révolte du Droit contre le Code - La révision nécessaire des concepts juridiques*, Paris, Libr. Rec. Sirey, 1945, pp. 109-115; in sustaining the need for a constant revision of the legal concepts themselves (in the matter, e.g., of contracts, responsibility, and propriety), he added that there was no way to make abstraction of value judgments (*ibid.*, p. 7).

l'insurrection des faits contre le Code, au défaut d'harmonie entre le droit positif et les besoins économiques et sociaux, a succédé la révolte du Droit contre le Code, c'est-à-dire l'antinomie entre le droit actuel et l'esprit du Code civil. (...) Des concepts que l'on considère comme des formules hiératiques sont un grand obstacle à la liberté de l'esprit et finissent par devenir des sortes de prismes au travers desquels l'on ne voit plus qu'une réalité déformée"[5]. In fact, the impact of the dimension of human rights was felt in institutions of private law.

7. This is illustrated, e.g., by the well-known decision of the European Court of Human Rights in the *Marckx versus Belgium* case (1979), in which, in determining the incompatibility of the Belgian legislation pertaining to natural children with Article 8 of the European Convention on Human Rights, it pondered that, even if at the time of the drafting of the Convention the distinction between "natural" family and "legitimate" family was considered lawful and normal in many European countries, the Convention should, nevertheless, be interpreted in the light of present-day conditions, taking into account the evolution in the last decades of the domestic law of the great majority of the member States of the Council of Europe, towards the equality between "natural" and "legitimate" children[6].

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5 *Ibid.*, pp. 2 and 6. [Translation: "To the insurrection of the facts against the Code, to the lack of harmony beween positive law and economic and social needs, the revolt of Law against the Code has succeeded, that is, the antinomy between current law and the spirit of the Civil Code. (...) The concepts that one considers as hieratic formulas are a great obstacle to the freedom of the spirit and end up by becoming a sort of prisms through which one does not see more than a deformed reality".]

6 Other illustrations are found, for example, in the judgments of the European Court in the cases of *Airey versus Ireland* (1979) and *Dudgeon versus United Kingdom* (1981). The *Airey* case is always recalled for the projection of classic individual rights into the ambit of economic and social rights; the Court pondered that, in spite of the Convention having originally contemplated esentially civil and political rights, one could no longer fail to admit that some of those rights had projections into the economic and social domain. And, in the *Dudgeon* case, in determining the incompatibility of national legislation on

8. At the level of procedural law the same phenomenon occurred, as acknowledged by this Court in the present Advisory Opinion, in pointing out the evolution in time of the concept itself of due process of law (paragraph 117). The contribution of the International Law of Human Rights is here undeniable, as disclosed by the rich case-law of the European Court and Commission of Human Rights under Article 6(1) of the European Convention of Human Rights[7].

9. At the level of international law - in which the distinct aspects of *intertemporal* law came to be studied[8] - likewise, the relationship between

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homosexuality with Article 8 of the European Convention, the Court pondered that, with the evolution of the times, in the great majority of the member States of the Council of Europe one no longer believed that certain homosexual practices (between consenting adults) required *per se* penal repression. Cf. F. Ost, "Les directives d'interprétation adoptées par la Cour Européenne des Droits de l'Homme - L'esprit plutôt que la lettre?", *in* F. Ost and M. van de Kerchove, *Entre la lettre et l'esprit - Les directives d'interprétation en Droit*, Bruxelles, Bruylant, 1989, pp. 295-300; V. Berger, *Jurisprudence de la Cour européenne des droits de l'homme*, 2nd. ed., Paris, Sirey, 1989, pp. 105, 110 and 145.

7 Cf., e.g., *Les nouveaux développements du procès équitable au sens de la Convention Européenne des Droits de l'Homme* (Actes du Colloque de 1996 en la Grande Chambre de la Cour de Cassation), Bruxelles, Bruylant, 1996, pp. 5-197.

8 To evoke the classic formulation of arbiter Max Huber in the *Palmas Island* case (United States *versus* The Netherlands, 1928), *in:* U.N., *Reports of International Arbitral Awards*, vol. 2, p. 845: "A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time such a dispute in regard to it arises or falls to be settled". For a study of the matter, cf.: Institut de Droit International, "[Résolution I:] Le problème intertemporel en Droit international public", 56 *Annuaire de l'Institut de Droit International* (Session de Wiesbaden, 1975) pp. 536-541. And cf., *inter alia*, P. Tavernier, *Recherches sur l'application dans le temps des actes et des règles en Droit international public*, Paris, LGDJ, 1970, pp. 9-311; S. Rosenne, *The Time Factor in the Jurisdiction of the International Court of Justice*, Leyden, Sijthoff, 1960, pp. 11-75; G.E. do Nascimento e Silva, "Le facteur temps et les traités", 154 *Recueil des Cours de l'Académie de Droit International de La Haye* (1977) pp. 221-297; M. Sorensen, "Le problème inter-temporel dans l'application de la Convention Européenne des Droits de l'Homme", *in Mélanges offerts à Polys Modinos*, Paris, Pédone, 1968, pp. 304-319.

the contents and the effectiveness of its norms and the social transformations which took place in the new times became evident[9]. A *locus classicus* in this respect lies in the well-known *obiter dictum* of the International Court of Justice, in its *Advisory Opinion on Namibia* of 1971, in which it affirmed that the system of mandates (territories under mandate), and in particular the concepts incorporated in Article 22 of the Covenant of the League of Nations, "were not static, but were by definition evolutionary". And it added that its interpretation of the matter could not fail to take into account the transformations occurred along the following fifty years, and the considerable evolution of the *corpus juris gentium* in time: "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"[10].

10. In the same sense the case-law of the two international tribunals of human rights in operation to date has oriented itself, as it could not have been otherwise, since human rights treaties are, in fact, living instruments, which accompany the evolution of times and of the social milieu in which the protected rights are exercised. In its tenth Advisory Opinion (of 1989) on the *Interpretation of the American Declaration of the Rights and Duties of Man*, the Inter-American Court pointed out, however briefly, that the value and meaning of that American Declaration should be examined not in the light of what one used to think in 1948, when it was adopted, but rather nowadays, in face of what is today the inter-American system of protection, bearing in mind "the evolution it has undergone since the adoption of the Declaration"[11]. The same evolu-

9 For example, the whole historical process of decolonization, brought about by the emergence and consolidation of the right of self-determination of peoples, was decisively fostered by the evolution itself to this effect of contemporary international law.

10 International Court of Justice, *Advisory Opinion on Namibia, ICJ Reports* (1971) pp. 31-32, par. 53.

11 Inter-American Court of Human Rights, Advisory Opinion OC-10/89, *Interpretation of the American Declaration of the Rights and Duties of Man*, of 14.07.1989, Series A, n. 10, p. 45, par. 37.

tive interpretation is pursued, in a more elaborate way, in the present Advisory Opinion of the Court, taking into consideration la crystallization of the right to information on consular assistance in time, and its link with human rights.

11. The European Court of Human Rights, in its turn, in the *Tyrer versus United Kingdom* case (1978), in determining the unlawfulness of corporal punishments applied to adolescents in the Isle of Man, affirmed that the European Convention on Human Rights "is a living instrument" to be "interpreted in the light of present-day conditions" of living. In the concrete case, "the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field"[12]. More recently, the European Court has made it clear that its evolutive interpretation is not limited to the substantive norms of the Convention, but is extended likewise to operative provisions[13]: in the *Loizidou versus Turkey* case (1995), it again pointed out that "the Convention is a living instrument which must be interpreted in the light of present-day conditions", and that none of its clauses can be interpreted solely in the light of what could have been the intentions of its draftsmen "more than forty years ago", it being necessary to bear in mind the evolution of the application of the Convention along the years[14].

12. The profound transformations undergone by international law, in the last five decades, under the impact of the recognition of universal human rights, are widely known and acknowledged. The old monopoly of the State of the condition of being subject of rights is no longer sus-

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12 European Court of Human Rights, *Tyrer versus United Kingdom* case, Judgment of 25.04.1978, Series A, n. 26, pp. 15-16, par. 31.

13 Such as the optional clauses of Articles 25 and 46 of the Convention, prior to the entry into force, on 01.11.1998, of Protocol XI to the European Convention.

14 European Court of Human Rights, *Case of Loizidou versus Turkey* (Preliminary Objections), Strasbourg, C.E., Judgment of 23.03.1995, p. 23, par. 71.

tainable, nor are the excesses of a degenerated legal positivism, which excluded from the international legal order the final addressee of juridical norms: the human being. The need is acknowledged nowadays to restore to this latter the central position - as *subject of domestic as well as international law* - from where he was unduly displaced, with disastrous consequences, evidenced in the successive atrocities committed against him in the last decades. All this occurred with the indulgence of legal positivism, in its typical subservience to State authoritarianism.

13. The dynamics of contemporary international life has cared to disauthorize the traditional understanding that the international relations are governed by rules derived entirely from the free will of the States themselves. As this Court well indicates, Article 36 of the Vienna Convention on Consular Relations, as interpreted in the present Advisory Opinion, constitutes "a notable advance in respect of the traditional conceptions of International Law on the matter" (par. 82). In fact, the contemporary practice itself of States and international organizations has for years withdrawn support to the idea, proper of an already distant past, that the formation of the norms of international law would emanate only from the free will of each State[15].

14. With the dismystification of the postulates of voluntarist positivism, it became evident that one can only find an answer to the problem of the foundations and the validity of general international law in the *universal juridical conscience*, starting with the assertion of the idea of an objetive justice. As a manifestation of this latter, the rights of the human being have been affirmed, emanating directly from international law, and not subjected, thereby, to the vicissitudes of domestic law.

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15 Cf., e.g., C. Tomuschat, "Obligations Arising for States Without or Against Their Will", 241 *Recueil des Cours de l'Académie de Droit International de La Haye* (1993) pp. 209-369; S. Rosenne, *Practice and Methods of International Law*, London/N.Y., Oceana Publs., 1984, pp. 19-20; H. Mosler, "The International Society as a Legal Community", 140 *Recueil des Cours de l'Académie de Droit International de La Haye* (1974) pp. 35-36.

15. It is in the context of the evolution of the Law in time, in function of new needs of protection of the human being, that, in my understanding, ought to be appreciated the insertion of the right to information on consular notification (under Article 36(1)(b) of the above-mentioned 1963 Vienna Convention) into the conceptual universe of human rights. Such provision, despite having preceeded in time the general treaties of protection - as the two Covenants on Human Rights of the United Nations (of 1966) and the American Convention on Human Rights (of 1969), - nowadays can no longer be dissociated from the international norms on human rights concerning the guarantees of the due process of law. The evolution of the international norms of protection has been, in its turn, fostered by new and constant valuations which emerge and flourish from the basis of human society, and which are naturally reflected in the process of the evolutive interpretation of human rights treaties.

II. *Venire Contra Factum Proprium Non Valet.*

16. In spite of the fact that the Vienna Convention on Consular Relations of 1963 was celebrated three years before the adoption of the two Covenants on Human Rights (Civil and Political Rights, and Economic, Social and Cultural Rights) of the United Nations, its *travaux préparatoires*, as this Court recalls in the present Advisory Opinion, disclose the attention dispensed to the central position occupied by the individual in the exercise of his free discretion, in the elaboration and adoption of its Article 36 (pars. 90-91). In the present advisory proceeding, all the intervening States, with one sole exception (the United States), sustained effectively the relationship between the right to information on consular assistance and human rights.

17. In this sense, the Delegations of the seven Latin-American States which intervened in the memorable public hearing before the Inter-American Court on 12 and 13 June 1998 were in fact unanimous in relating the provision of the 1963 Vienna Convention on Consular Relations (Article 36(1)(b)) on consular notification directly to human rights, in particular to the judicial guarantees (arguments of Mexico, Costa Rica, El

Salvador, Guatemala, Honduras, Paraguay)[16] and including to the right to life itself (arguments of Mexico, Paraguay, Dominican Republic)[17]. The only Delegation in disagreement, that of the United States, emphasized the inter-State character of the above-mentioned Vienna Convention, arguing that this latter did not provide for human rights, and that consular notification, in its view, was not an individual human right and was not related to the due process of law[18].

18. In arguing in this way, the United States assumed, however, a position with an orientation manifestly distinct from that which they sustained themselves in the case - filed against Iran - of the *Hostages (United States Diplomatic and Consular Staff) in Tehran* (1979-1980) before the International Court of Justice (ICJ). In fact, in their oral arguments before the Hague Court in that case, the United States invoked, at a given moment, the provision of the 1963 Vienna Convention on Consular Relations which requires of the receiving State the permission for the consular authorities of the sending State "to communicate with and have access to their nationals"[19].

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16 Cf. Inter-American Court of Human Rights (IACtHR), *Transcripción de la Audiencia Pública Celebrada en la Sede de la Corte el 12 y 13 de Junio de 1998 sobre la Solicitud de Opinión Consultiva OC-16* (mimeographed), pp. 19-21 and 23 (Mexico); 34, 36 and 41 (Costa Rica); 44 and 46-47 (El Salvador); 51-53 and 57 (Guatemala); 58-59 (Honduras); and 62-63 and 65 (Paraguay).

17 IACtHR, *Transcripción de la Audiencia Pública..., op. cit. supra* n. (16), pp. 15 (Mexico); 63 and 65 (Paraguay); and 68 (Dominican Republic).

18 IACtHR, *Transcripción de la Audiencia Pública..., op. cit. supra* n. (16), pp. 72-73, 75-77 and 81-82 (United States).

19 International Court of Justice (ICJ), *Hostages (U.S. Diplomatic and Consular Staff) in Tehran* case, *ICJ Reports* (1979); Pleadings, Oral Arguments, Documents; Argument of Mr. Civiletti (counsel for the United States), p. 23. Further on, the United States argued, significantly, that the treatment dispensed by the Iranian government to the North-American civil servants captured and kept as hostages in Tehran fell "far below the minimum standard of treatment which is due to *all* aliens, particularly as viewed in the light of fundamental standards of human rights. (...) The right to be free from arbitrary arrest and detention and

19. In the written phase of the proceedings, the United States, in their *memorial/mémoire*, after pointing out that, in the circumstances of the *cas d'espèce*, the North-American nationals had been held *incommunicado* "in the grossest violation of consular norms *and accepted standards of human rights*", added, with all emphasis, that Article 36 of the 1963 Vienna Convention on Consular Relations "establishes rights not only for the consular officer but, perhaps even more importantly, *for the nationals of the sending State* who are assured access to consular officers and through them to others"[20].

20. This line of argument of the United States before the ICJ could not be clearer, adding itself to that of the Latin-American States intervening in the present advisory proceeding before the Inter-American Court (*supra*), contributing all of them, jointly, to insert Article 36 of the above-mentioned 1963 Vienna Convention ineluctably into the conceptual universe of human rights. Having sustained this thesis before the ICJ, in my understanding the United States cannot pretend to prevail themselves, in the present advisory proceeding before the Inter-American Court, of a position oriented in the opposite sense on the same point (as warned by the international case-law[21]): *allegans contraria non audiendus est.*

21. This basic principle of procedural law is valid both for the countries of *droit civil*, like the Latin-American (by virtue of the doctrine, of

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interrogation, and the right to be treated in a humane and dignified fashion, are surely rights guaranteed to these individuals by fundamental concepts of international law. Indeed, nothing less is required by the Universal Declaration of Human Rights"; *cit. in ibid.*, Argument of Mr. Owen (agent for the United States), pp. 302-303. - In the written phase of the proceedings the United States, in their *memorial/mémoire*, pointed out that "the right of consular officers in peacetime to communicate freely with co-nationals has been described as implicit in the consular office, even in the absence of treaties. (...) Such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations". Memorial/*Mémoire* of the Government of the U.S.A., *cit. in ibid.*, p. 174.

20 *Ibid.*, p. 174 (emphasis added).

21 Cf., e.g., Ch. de Visscher, *De l'équité dans le règlement arbitral ou judiciaire des litiges de Droit international public*, Paris, Pédone, 1972, pp. 49-52.

classic Roman law, *venire contra factum proprium non valet*, developed on the basis of considerations of equity, *aequitas*) as well as for the countries of *common law*, like the United States (by reason of the institution of *estoppel*, of Anglo-Saxon juridical tradition). And, in any way, it could not be otherwise, so as to preserve the confidence and the principle of good faith which ought always to have primacy in the international process.

22. In order to safeguard the credibility of the work in the domain of the international protection of human rights one ought to guard oneself against the double standards: the real commitment of a country to human rights is measured, not so much by its capacity to prepare unilaterally, *sponte sua* and apart from the international instruments of protection, governmental reports on the situation of human rights in other countries, but rather by its initiative and determination to become a Party to the human rights treaties, thus assuming the conventional obligations of protection enshrined therein. In the present domain of protection, the same criteria, principles and norms ought to be valid for all States, irrespective of their federal or unitary structure, or any other considerations, as well as to operate to the benefit of all human beings, irrespective of their nationality or any other circumstances.

III. The Crystallization of the Subjective Individual Right to Information on Consular Assistance.

23. The action of protection, in the ambit of the International Law of Human Rights, does not seek to govern the relations between equals, but rather to protect those ostensibly weaker and more vulnerable. Such action of protection assumes growing importance in in a world torn by distinctions betweens nationals and foreigners (including *de jure* discriminations, notably *vis-à-vis* migrants), in a "globalized" world in which the frontiers open themselves to capitals, inversions and services but not necessarily to the human beings. Foreigners under detention, in a social and juridical *milieu* and in an idiom different from their own and that they do not know sufficiently, experiment often a condition of particular vulnerability, which the right to information on consular assistance, inserted into the conceptual universe of human rights, seeks to remedy.

24. The Latin-American countries, with their recognized contribution to the theory and practice of international law, and nowadays all States Parties to the American Convention on Human Rights, have acted in support of the prevalence of this understanding, as exemplified by the arguments in this sense of the intervening States in the present advisory proceeding (cf. *supra*). The United States have also given their contribution to the linking of aspects of diplomatic and consular relations with human rights, as exemplified by their arguments in the international *contentieux* of the *Hostages in Tehran* (*supra*). Those arguments, added to the zeal and determination revealed whenever is the case of defending the interests of their own nationals abroad[22], suggest that the arguments presented by the United States in the present advisory proceeding constitute an isolated fact, without further consequences.

25. It may be recalled that, in the already mentioned case of the *Hostages (United States Diplomatic and Consular Staff) in Tehran* (United States *versus* Iran), in the provisional measures of protection ordered on 15.12.1979 the ICJ pondered that the conduction without obstacles of consular relations, established since ancient times "*between peoples*", is no less important in the context of contemporary international law, "in promoting the development of friendly relations *among nations*, and *ensuring protection and assistance for aliens resident in the territories of other States*" (par. 40)[23]. This being so, the Court added, no State can fail to recognize "the imperative obligations" codified in the Vienna Conventions on Diplomatic Relations (of 1961) and on Consular Relations (of 1963) (par. 41)[24].

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22 Cf. [Department of State/Office of American Citizens Services,] *Assistance to U.S. Citizens Arrested Abroad* (Summary of Services Provided to U.S. Citizens Arrested Abroad), pp. 1-3.

23 *ICJ Reports* (1979) pp. 19-20 (emphasis added).

24 *Ibid.*, p. 20. - The language utilized by the Hague Court was quite clear, in no way suggesting a vision of the above-mentioned Vienna Conventions of 1961 and 1963 under a contractualist outlook at the level of exclusively inter-State relations; on the contrary, it warned that the norms of the two Conventions have incidence on the relations between peoples and nations, as

26. Five months later, in its judgment of 24.05.1980 in the same case of the *Hostages in Tehran* (merits), the ICJ, in referring again to the provisions of the Vienna Conventions on Diplomatic Relations (of 1961) and on Consular Relations (of 1963), pointed out: first, their universal character (par. 45); second, their obligations, not merely contractual, but rather imposed by general international law itself (par. 62); and third, their imperative character (par. 88) and their capital importance in the "interdependent world" of today (pars. 91-92)[25]. The Court came even to invoke expressly, in relation to such provisions, the contents of the Universal Declaration of Human Rights of 1948 (par. 91)[26].

27. The insertion of the matter under examination into the domain of the international protection of human rights thus counts on judicial recognition, there being no longer any ground at all for any doubts to subsist as to an *opinio juris* to this effect. This latter is so clear and forceful that there would be no way even to try to resort to the nebulous figure of the so-called "persistent objector". More than a decade ago I referred to that unconvincing formulation, which has never found the support that it sought in vain in the international case-law, as a new manifestation of the old voluntarist conception of international law, entirely unacceptable in the present stage of evolution of the international community; the international case-law, above all as from the judgment of the International Court of Justice in the *North Sea Continental Shelf* cases (1969), has come to confirm in an unequivocal way that the subjective element of international custom is the *communis opinio juris* (of

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well as on the protection and assistance to foreigners in the territory of other States. By then already (end of the seventies), there was no way not to relate those norms to human rights.

25 *ICJ Reports* (1980) pp. 24, 31 and 41-43.

26 *Ibid.*, p. 42. - In his Separate Opinion, Judge M. Lachs referred to the provisions of the above-mentioned Vienna Conventions of 1961 and 1963 as "the common property of the international community", having been "confirmed in the interest of all" (*ibid.*, p. 48).

at least the general majority of the States), and in no way the voluntas of each State individually[27].

28. In the interdependent world of our days, the relationship between the right to information on consular consular assistance and human rights imposes itself by application of the principle of non-discrimination, of great potential (not sufficiently developed to date) and of capital importance in the protection of human rights, extensive to this aspect of consular relations. Such right, lying at the confluence between such relations and human rights, contributes to extend the protecting shield of Law to those who find themselves in a disadvantaged situation - the foreigners under detention - and who, thereby, stand in greater need of such protection, above all in social circles constantly threatened or frightened by police violence.

29. In issuing today the sixteenth Advisory Opinion of its history, the Inter-American Court, in the exercise of its advisory function endowed with a wide jurisdictional basis, has corresponded to the high responsibilities which the American Convention confers upon it[28]. From this

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27 A.A. Cançado Trindade, "Contemporary International Law-Making: Customary International Law and the Systematization of the Practice of States", *Thesaurus Acroasium - Sources of International Law* (XVI Session, 1988), Thessaloniki (Greece), Institute of Public International Law and International Relations, 1992, pp. 77-79.

28 The Inter-American Court, as an international tribunal of human rights, finds itself particularly entitled to pronounce upon the consultation formulated to it, of distinct contents from the two contentious cases recently submitted to the ICJ on aspects of the application of the 1963 Vienna Convention on Consular Relations. It may be observed, in this respect, that, in the recent *LaGrand* case (Germany *versus* United States), in the provisional measures of protection ordered by the International Court of Justice on 03.03.1999, one of the Judges, in his Declaration, saw it fit to recall that, in its contentious function as the main judicial organ of the United Nations, the International Court of Justice limits itself to settling international disputes pertaining to the *rights and duties of States* (also in so far as provisional measures of protection are concerned) - (cf. Declaration of Judge S. Oda, *LaGrand* case (Germany *versus* United States), *ICJ Reports* (1999) pp. 18-20, pars. 2-3 and 5-6; and cf., to the same effect, Declaration of Judge S. Oda, *Breard* case (Paraguay *versus* United States), *ICJ Reports* (1998) pp. 260-262, pars. 2-3 and 5-7).

Advisory Opinion - and in particular from its resolutory points ns. 1 and 2 - it clearly results that it is no longer possible to consider the right to information on consular assistance (under Article 36(1)(b) of the 1963 Vienna Convention on Consular Relations) without directly linking it to the *corpus juris* of the International Law of Human Rights.

30. In the framework of this latter, the international juridical personality of the human being, emancipated from the domination of the State, - as foreseen by the so-called founding fathers of international law (the *droit des gens*), - is in our days a reality. The Westphalian model of the international order appears exhausted and overcome. The access of the individual to justice at international level represents a true juridical revolution, perhaps the most important legacy which we will be taking into the next century. Hence the capital importance, in this historical conquest, of the right of individual petition combined with the optional clause of the compulsory jurisdiction of the Inter-American and European Courts[29] of Human Rights, which, in my Concurring Opinion in the case of *Castillo Petruzzi versus Peru* (preliminary objections, judgment of 04.09.1998) before this Court, I allowed myself to name as true *fundamental clauses (cláusulas pétreas)* of the international protection of human rights (paragraph 36).

31. The "normative" Conventions, of codification of international law, such as the 1963 Vienna Convention on Consular Relations, acquire a life of their own which certainly independs from the individual will of each one of the Parties States. Such Conventions represent much more than the sum of the individual wills of the States Parties, rendering also possible the progressive development of international law. The adoption of such Conventions came to demonstrate that their functions much transcend those associated with the juridical conception of "contracts", which exerted influence in the origin and historical development of treaties (above all the bilateral ones). A great challenge to contemporary legal science lies precisely in liberating itself from a past influenced by analogies with private law (and in particular with the

29 As to this latter, prior to Protocol XI to the European Convention on Human Rights, which entered into force on 01.11.1998.

law of contracts)[30], as nothing is more antithetical to the role reserved to the Conventions of codification in contemporary international law than the traditional contractualist vision of treaties[31].

32. The Conventions of codification of international law, such as the above-mentioned Vienna Convention of 1963, once adopted, instead of "freezing" general international law, in reality stimulate its greater development; in other words, general international law not only survives such Conventions, but is revitalized by them[32]. Here, once again, the time factor makes its presence, as an instrumental for the formation and crystallization of juridical norms - both conventional and customary - dictated by the social needs[33], and in particular those of protection of the human being.

33. The progressive development of international law is likewise accomplished by means of the application of human rights treaties: as I have pointed out in my already mentioned Concurring Opinion in the *Castillo Petruzzi* case (1998 - *supra*), the fact that the International Law of Human Rights, overcoming dogmas of the past (particularly those of legal positivism of sad memory), goes well beyond Public International Law in the matter of protection, in comprising the treatment dispensed

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30 Shabtai Rosenne, *Developments in the Law of Treaties 1945-1986*, Cambridge, Cambridge University Press, 1989, p. 187.

31 In the first decades of this century, recourse to analogies with private law was related to the insufficient or imperfect development of international law (Hersch Lauterpacht, *Private Law Sources and Analogies of International Law*, London, Longmans/Archon, 1927 (reprint 1970), pp. 156 and 299). The evolution of international law in the last decades recommends, nowadays, a less indulgent posture on the matter.

32 H.W.A. Thirlway, *International Customary Law and Codification*, Leiden, Sijthoff, 1972, p. 146; E. McWhinney, *Les Nations Unies et la Formation du Droit*, Paris, Pédone/UNESCO, 1986, p. 53; A. Cassese and J.H.H. Weiler (eds.), *Change and Stability in International Law-Making*, Berlin, W. de Gruyter, 1988, pp. 3-4 (intervention by E. Jiménez de Aréchaga).

33 Cf. ICJ, Dissenting Opinion of Judge K. Tanaka, *North Sea Continental Shelf* cases, Judgment of 20.02.1969, *ICJ Reports* (1969) pp. 178-179.

by the States to all human beings under their respective jurisdictions, in no way affects nor threatens the unity of Public International Law; quite on the contrary, it contributes to assert and develop the aptitude of this latter to secure compliance with the conventional obligations of protection contracted by the States *vis-à-vis* all human beings - irrespective of their nationality or of any other condition - under their jurisdictions.

34. We are, thus, before a phenomenon much deeper than the sole recourse *per se* to rules and methods of interpretation of treaties. The intermingling between Public International Law and the International Law of Human Rights gives testimony of the recognition of the centrality, in this new *corpus juris,* of the universal human rights, what corresponds to a new *ethos* of our times. In the *civitas maxima gentium* of our days, it has become indispensable to protect, against discriminatory treatment, foreigners under detention, thus linking the right to information on consular assistance with the guarantees of the due process of law set forth in the instruments of international protection of human rights.

35. At this end of century, we have the privilege to witness the process of *humanization* of international law, which today encompasses also this aspect of consular relations. In the confluence of these latter with human rights, the subjective individual right[34] to information on consular assistance, of which are *titulaires* all human beings who are in the need to exercise it, has crystallized: such individual right, inserted into the conceptual universe of human rights, is nowadays supported by conventional international law as well as by customary international law.

Antônio A. Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

34 Already by the middle of the century one warned as to the impossibility of evolution of Law without the subjective individual right, expression of a true "human right". J. Dabin, *El Derecho Subjetivo*, Madrid, Ed. Rev. de Derecho Privado, 1955, p. 64.