

Concurring opinion
Ramón Cadena Rámila
Judge *ad hoc*

My vote is in favor, fully, of the instant judgment adopted by the Inter-American Court of Human Rights in the Case of the Las Dos Erres Massacre; this is another advance in the construction of the Inter-American Court's jurisprudence. The characteristics of the Las Dos Erres Massacre render it one of the gravest cases that the Inter-American Court has heard in its history, not only because of the cruelty of the facts and the extreme violence carried out by the Guatemalan Army against women and children, but also because of their impunity. The transcendental issues examined by the Court evoke certain thoughts which I feel obligated to assert in this Concurring Opinion.

1. International Humanitarian Law: The gravity of the facts of the Las Dos Erres case is evident. Since International Humanitarian Law is of a compulsory nature, its rules constitute absolute commitments that need to be fulfilled by all States without exceptions. There are no juridical arguments, much less political, that can oppose the Geneva Conventions to justify non-compliance. This branch of international law is no more than a reaffirmation of the oldest customary rules that were developed and completed when the corresponding codification was made.

We must then, in the first place, refer to the international principles and customs that represent the minimum humanity applicable at all times, in all places and circumstances, valid even for the States who are not party to the Conventions, since they express the customs of the towns and behavior that must be observed by the States for internal and international armed conflicts.

It is important to cite the famous clause by Frederic de Martens which can be read in the St Petersburg Declaration: "In the cases not foreseen in the Conventions, civilians and combatants continue to be under the protection and realm of the principles of international law, as they result from the established uses of the principles of humanity and of the demands of public conscience."

This phrase has shown its profound sense since 1899, to the extent that it is reproduced in the Additional Protocols to the Geneva Conventions of 1977. It constitutes a universally accepted formula to solve cases not foreseen in international laws and conventions of a humanitarian type. As in all branches of law, humanitarian law has fundamental principles from which the other notions derive.

In the instant case, the Court accurately cites the Commission for Historical Clarification, since it is useful to base the responsibility of the State of Guatemala as follows: "It is within this context that the Las Dos Erres Massacre took place, within a State policy and a pattern of grave human rights violations." **According to the CEH, "in general, from the human rights violations and the violations of International Humanitarian Law, derives the unavoidable responsibility of the State of Guatemala."** (paragraph 82 of this judgment, emphasis added.)

Subsequently, it indicates that "within the context of an internal armed conflict, the State's obligations regarding children are defined in Article 4(3) of the Additional Protocol II to the Geneva Conventions." This Article establishes that: "children will be provided with the proper care and aid that they require, and, particularly: ... b) timely measures will be taken to facilitate the reunion of families that were

temporarily separated...” According to the International Committee of the Red Cross, this obligation has been defined as that “the parties to the conflict must do everything in their power to reestablish family ties, that is, not only allow the searches undertaken by the members of the families separated, but also facilitate them.” (paragraph 191 of the referred judgment.)

From the context described in the judgment, as well as from the considerations made in other sections, it is clear that during the hostilities of the internal armed conflict and specifically in the case of the Las Dos Erres Massacre, the State of Guatemala did not observe the different universally accepted principles and customs.

According to the **principle of distinction**, “the civil population and civilian persons will enjoy general protection against dangers from military operations.” This general protection enjoyed by the civil population derives from custom and from general principles; however, beginning with common Article 3 of the Geneva Conventions of 1949 and especially from Additional Protocol II to the Geneva Conventions, it is on record in the substantive law text. In other words, while the first (combatants) are, by excellence, the object of the war, the others should not be implicated in the hostilities. This rule of international custom emphatically recognizes that the parties to the conflict will, at all times, make the distinction between civilians and combatants.

On the other hand, according to the **principle of proportionality**, in every internal or international armed conflict, attacks should be strictly limited to the military objectives. Civil property should not be the object of attacks or retaliations. And, lastly, according to the **principle of prohibition on causing superfluous or unnecessary suffering**, any combatant and all parties to a conflict are prohibited from using arms and methods of war that could cause useless losses or unnecessary or excessive suffering. In this sense, indiscriminate attacks are prohibited.

All of these principles constitute humanitarian duties that all of the States must fulfill, since in International Humanitarian Law, the principles represent the minimum humanity applicable at all times, in all places and in all circumstances, even valid for States that are not part of the Conventions or Protocols, since they express the communities’ customs.

Regarding the Geneva Conventions, it is important to indicate that they were ratified by the State of Guatemala on May 14, 1952. As part of these agreements, common Article 3 constitutes a system for the protection of the victims of internal armed conflicts and the minimum protection that must be given to human beings at all times and places during armed conflicts that are not of an international nature. As expressed by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in the judgment of February 20, 2001, “the entire world recognizes that the acts mentioned in common Article 3 are criminal and go against the conscience of any civilized group.” In conclusion, the State of Guatemala has the obligation to investigate the facts and determine if there were any violations of common Article 3 of the Geneva Conventions and identify those responsible.

It is worth noting that the consideration of the Inter-American Court of Human Rights in paragraph 131 of this judgment, when referring to an investigation without delay of the multiple crimes perpetrated during the events of the massacre, must be understood as including the investigation of those events considered crimes of war and other prohibitions by International Humanitarian Law, so as to prosecute and punish those responsible for these acts. It would have been desirable, however, for the judgment to concretely indicate that the State of

Guatemala is obligated to investigate the events and identify those responsible, **including a thorough and efficient investigation to determine if there were any violations to International Humanitarian Law, with the purpose of identifying those responsible.**

There are three arguments that support this assertion.

a) **The interpretation and application of the American Convention do not exclude those of general international law; on the contrary they require them.** The preamble to the American Convention expressly refers to the principles reaffirmed and developed in international instruments, “both of a universal and regional nature” (para. 3). It also refers to obligations imposed by international law (Article 27), as well as to “the generally recognized principles of international law” (Article 46(1)(a)).

b) **The fact that the Inter-American Court lacks jurisdiction to determine violations of specific conventions** such as the Geneva Conventions of 1944 or the Convention against Genocide (1948), does not mean that the Court cannot consider acts that these conventions typify as grave violations or genocide, as *aggravating circumstances* (aspect developed by Judge Antonio Cancado Trindade in his concurring opinion in the Case of the Massacre of Plan de Sanchez.) This argument becomes stronger when these conventions relate to the violation of a right established in this Convention, such as when it deals with a violation to the Right to Life established in Article 4 of the American Convention.

In this sense, and, as argued by jurist Cancado Trindade “under the American Convention, the determination of the *aggravated* international responsibility of the State is perfectly possible...It wouldn't be the first time that the Inter-American Court identified an *aggravated* international responsibility (as occurred in the terms of paragraph 51 of the judgment on the case of the *Plan de Sanchez Massacre* or in its previous Judgment, from 25(1)1.2003, on the case *Myrna Mack Chang versus Guatemala*, in which the Court concluded that, of the facts proven, an “aggravated international responsibility by the respondent State” is inferred, para. 139.)” (Concurring opinion of Cancado Trindade Plan de Sanchez Massacre page 9)

c) At the time when the events of the instant case occurred, the prohibition established in common Article 3 to the Geneva Conventions was already part of the customary international law, and even of the *jus cogens* domain. Therefore, the State of Guatemala was already forced to comply with this prohibition.

2. Competence and application of the Convention of Belém do Pará: It is highly important that in this case the Convention of Belem do Para was applied. The reasons exposed in the referred judgment were: a) the State had the obligation to investigate all of the events with due diligence, which was pending at the time of recognition of the Court's contentious jurisdiction (March 9, 1987); b) this obligation was later reaffirmed by the State with the ratification of the Convention of Belém do Pará on April 4, 1995, thus the State had to ensure its compliance as of that moment, even when it had not been adopted by the State at the time the events of the case took place; and c) The Convention of Belém do Pará complements the international *corpus iuris* in terms of the protection of personal integrity.

The case of Las Dos Erres is not only paradigmatic in terms of impunity, but also in terms of the methods of war used by the State of Guatemala while carrying out hostilities in an internal armed conflict. The use of rape has been denounced repeatedly as a method of torture, as well as specific violence against women,

within internal armed conflicts. This is precisely the case in Guatemala, in the case under analysis.

In this context it is important to note an aspect of the Rome Statute created by the International Criminal Court. It recognizes the practices that violate the human rights of women that have historically occurred in situations of armed conflict or disturbances (rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization or other sexual abuses of comparable gravity) as part of the crimes of genocide, crimes against humanity, and of war. And this aspect occurs in the case of Las Dos Erres Massacre.

It is extremely important to apply the Convention of Belém do Pará in the case of Las Dos Erres Massacre, since the former defines violence against women; it recognizes women's rights to life without violence and establishes that violence against them is a violation of human rights, establishing this right both in the public and the private realm.

It may be asserted that the application of the gender perspective enriches the manner of looking at reality and acting on it, hence the need to mention it and apply it in the case of Las Dos Erres. In terms of human rights, it allows, among other things, to visualize the inequities construed artificially, socio-culturally, and to better detect the specificity in the protection needed by those who suffer inequality or discrimination. Thus, it offers large advantages and possibilities for the effective protection of individuals and, concretely, of women.

The preamble of the Convention of Belém do Pará recognizes that "violence against women is an offense to human dignity and a manifestation of the historically unequal power relations between women and men." The case of Las Dos Erres shows that this inequality indeed exists; therefore it is important to apply it. I am convinced that the Jurisprudence of the Inter-American Court of Human Rights should continue to set precedents in this direction. The importance of recognizing the specific violations of women's human rights within the framework of the Inter-American system lies in the development of specific standards to protect women (Declaration and Plan of Action of Vienna 1993 and IV World Conference on Women [Beijing, 1995 and others.])

This consideration should lead us to propose more concrete aspects in relation to reparation measures, and, concretely, of non-repetition, for example: a) the State of Guatemala must intensify and expand the existing actions to train officers, particularly those in the National Civil Police and the Public Prosecutor's Office, on the causes, nature and consequences of gender violence; b) the State of Guatemala must guarantee that the impact and consequences of acts of violence committed against women during the internal armed conflict are adequately contemplated in the National Compensation Plan ("Plan Nacional de Resarcimiento"); c) the State of Guatemala must implement training programs on women's rights and particularly on the right to a life free of violence, geared toward personnel in the public force, the army and public institutions; d) the State of Guatemala must implement all measures of protection and prevention to guarantee women a life free of violence and measures to avoid abuse and rape of women under federal, police, or military custody, as a form of torture.

3. Access to information and the State Secrets in cases of grave human rights violations: the judgment establishes in number 144 that "all authorities are forced to collaborate in the gathering of proof and should therefore provide the judge of the cause all information required and abstain from acts that imply obstruction in the investigation process." In this regard, it is important to refer specifically to the obligation of the Guatemalan Army to deliver documents relating

to military campaign plans or containing strategies for military missions and hostilities in general, and to allow access to military files.

As mentioned by the Inter-American Commission on Human Rights in its initial claim of the case under consideration, on April 1982 “The Military Junta of the Government pronounced the ‘National Plan for Security and Development’ which established national objectives in military, administrative, legal, social, economic and political terms.” In this plan, the main areas of conflict in the various departments of the country were identified. The Military Junta and the High Command also designed and ordered the implementation of a military campaign plan called “Victory 82,” in which they used new strategic definitions within the framework of counterinsurgency and the objectives of the National Plan for Security and Development. The Military’s refusal to deliver these and other documents is promoting more impunity in Guatemala.

In the case of *Mack Chang vs. Guatemala*, Judgment of November 25, 2003, paragraph 180, the Inter-American Court of Human Rights asserted that “in cases of human rights violations, State authorities cannot resort to mechanisms such as State Secrets or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding.” The Inter-American Court of Human Rights has also referred to the “State Secrets” as an obstacle to access information, in particular information that sheds light on human rights violations.

Indeed, in the case of *Myrna Mack Chang vs. Guatemala*, the Court echoed the words of the Inter-American Commission and recognized that “[i]n the framework of a criminal proceeding, especially when it involves the investigation and prosecution of illegal actions attributable to the security forces of the State, there is a possible conflict of interests between the need to protect state secrets, on the one hand, and the obligations of the State to protect individuals from the illegal acts committed by their public agents and to investigate, prosecute, and punish those responsible for said acts, on the other hand.” In this case, the Court was emphatic in asserting that “in cases of human rights violations, the State authorities cannot resort to mechanisms such as State secrets or confidentiality of the information, or reasons of public interest or national security, to avoid providing the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding.”

In conclusion, the State of Guatemala and specifically the Guatemalan Army are obligated to deliver these and other documents that provide the information necessary to shed light not only on cases such as the Las Dos Erres Massacre, but also other cases of the same gravity, which remain in impunity. International Law recognizes the rights of individuals to receive information, especially relating to acts by the public administration. While the right to access of information is not absolute, all restrictions placed must be clearly established in the law and must respond to an exceptional situation.

The State of Guatemala has the duty to fight impunity and, consequently, to remove all obstacles that could unfairly impede or delay the effective investigation and punishment of those responsible for grave human rights violations and crimes under international law and specifically in the case of Las Dos Erres Massacre. Consequently, it cannot invoke “State secrets” to deny information relating to grave human rights violations and crimes under international law.

Likewise, the State of Guatemala cannot use “State secrets” as a justification to avoid judicial proceedings from moving forward against those allegedly responsible

for grave human rights violations. By refusing to deliver the various documents of this nature, the State of Guatemala has compromised its international responsibility and must therefore immediately terminate this practice and deliver the corresponding documents.

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