SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have voted in favor of the adoption of this judgment of the Inter-American Court of Human Rights in the *Case of Plan de Sánchez Massacre v.* Guatemala. However, in this separate opinion, I wish to record the personal reflections that this judgment of the Court has prompted, owing to its particular gravity. Indeed, it is the first time in the history of the Inter-American Court that a massacre of this dimension has been submitted to its consideration. In this separate opinion, after making an initial distinction between the jurisdictional and the substantive issue of responsibility, I will focus on the content and scope of the principle of humanity, and then examine aggravated international responsibility, *jus cogens* in its broadest dimension, the existence of State crime, and the co-existence of the international responsibility of the State and the individual. Lastly, I will present my final observations.

I. The Gravity of the Events

2. In the application in the *Case of Plan de Sánchez Massacre*, submitted to the Court on July 31, 2002, by the Inter-American Commission on Human Rights, the latter indicated, *inter alia*, that:

> "The [Plan de Sánchez] massacre was perpetrated in the context of a policy of genocide of the State of Guatemala carried out with the intention of totally or partially destroying the Mayan indigenous people. The violations were on such a scale that they represented massive and multiple violations of the American Convention on Human Rights. (...)
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> The CEH [Historical Clarification Commission] recorded 626 massacres committed by State forces, principally the Army, supported by the paramilitary structure, during the armed conflict (...). 95% were perpetrated between 1978 and 1984 and, during this period, 90% were carried out in areas inhabited predominantly by the Mayan people. (...)
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> Some of the principal characteristics of the massacres during the armed conflict in Guatemala were that they were carried out using acts of excessive cruelty aimed at the elimination of individuals or groups of individuals who had been previously identified as the objective of the military operations, and to incite terror as a mechanism of social control. (...)
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> The massacres and land operations led to the extermination of complete Mayan communities, as well as the destruction of their homes, livestock, crops, and other elements of subsistence, so that, *inter alia*, the right to life of the Mayan people was violated, together with their right to ethnic or cultural identity, and the right to express and disseminate their culture. (...)
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> (...) The Plan de Sánchez massacre occurred within the framework of a State strategy intended to destroy an ethnic group using military operations that led to the massacre of thousands of members of the Mayan indigenous people, the flight of the survivors, the destruction of their subsistence economies and, lastly, the intentional submission of thousands of Mayan indigenous people to living conditions that depended on the military structure." (...).[1]

3. Furthermore, in their brief with comments on the Commission's application, submitted to the Court on September 27, 2002, the petitioners alleged, *inter alia,* that:

> "The crimes committed in implementation of the scorched-earth policy, including the Plan de Sánchez massacre, constitute genocide against the Mayan indigenous people of Guatemala. (...)

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[1] Paragraphs 3, 54-55, 63 and 129 of the application.

> The intention of these acts was to partially or totally destroy the Mayan ethnic group, which includes, as in this case, the Maya-Achí of Rabinal. (...)
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> (...) The result of the State policy has been the murder of thousands of Guatemalan Mayan indigenous people and the complete eradication of almost 440 villages. (...) The CEH recorded 626 massacres that could be attributed to the [State] forces. Victims and survivors of such crimes have been forced to live under a regime of terror and repression, under the authority of those who had carried out the massacres, unable to speak out or demand justice for themselves or their dead. (...) After the massacres, the survivors were forced to live in an environment created and controlled by the Army." (...).[2]

4. During the contentious proceeding before the Inter-American Court, the respondent State acknowledged, with dignity, its international responsibility for the *Plan de Sánchez* massacre, in the words transcribed in paragraphs 34 to 38 of this judgment. The Court assessed this acknowledgment as "a positive contribution to the development of this proceeding and to the exercise of the principles that inspire the American Convention" (para. 50). Despite acknowledging its responsibility for the violation of several provisions of the American Convention (*cf*. para. 36(3) and (4)), the State did not refer to "the issue of genocide," which the Commission and the petitioners had raised in their briefs, "since it was not a matter covered by the American Convention" (para. 36(5)).

5. In its report, *Guatemala - Memoria del Silencio*, the Historical Clarification Commission (CEH) established that "acts of genocide" were perpetrated, particularly, during the period from 1981 to 1983, which saw the highest rates of violence in the armed conflict in Guatemala (during which 81% of the grave human rights violations occurred).[3] In its assessment of the events that occurred in four regions of Guatemala, the CEH concluded that "acts of genocide" were perpetrated against members of the Maya-Ixil, Maya-Achi, Maya-k'iche', Maya-Chuj and Maya-q'anjob'al peoples.[4] In its "final conclusions" in this respect, the CEH repeatedly referred to the concept of acts of genocide.[5] In the opinion of the CEH, the victims were, above all, the "most vulnerable" members of the Mayan communities (especially children and the elderly),[6] and these grave human rights violations involved both the individual responsibility of the "masterminds and perpetrators" of the "acts of genocide" and "State responsibility," because most of these acts were the "result of a policy pre-established by a superior officer for the perpetrators."[7]

II. Jurisdiction and Responsibility

6. It is true that the Inter-American Court lacks jurisdiction to determine violations of the Convention on the Prevention and Punishment of the Crime of

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[2] Paragraphs 354, 357 and 359 of the brief with observations.

[3] The CEH considered it "pertinent to make a distinction between a genocide policy and acts of genocide. A genocide policy exists when the final objective of the actions is the total or partial extermination of a group. Genocidal acts occur when the final objective is not the extermination of the group, but other political, economic, military or any other type of goal, yet the means used to achieve this final objective include the total or partial extermination of the group." Historical Clarification Commission, *Guatemala - Memoria del Silencio*, tome III, Guatemala, CEH, 1999, pp. 316-318.

[4] *Cf*. *ibid*., pp. 358, 375-376, 393 and 416, respectively.

[5] *Cf*. *ibid*., pp. 417-423.

[6] *Cf*., for example., *ibid*., p. 410.

[7] *Ibid*., p. 422.

Genocide (1948). But, two observations are in order. First, Guatemala undertook to protect all the rights embodied in the American Convention as of the date on which it ratified the Convention: May 25, 1978 – prior to the *Plan de Sánchez* massacre. As I stated in my separate opinion in *Case of Blake v. Guatemala* (Merits, Judgment of January 24, 1998):

> "One ought to avoid the confusion between the question of the invocation of the *responsibility* for compliance with the conventional obligations undertaken by the State Party and the question of the *submission* of the latter to the jurisdiction of the Court" (para. 34).

7. The jurisdictional issue is distinct from the substantive issue of international responsibility. Even though the Inter-American Court lacks jurisdiction to rule on alleged acts of genocide (which is beyond is competence *ratione materiae*), this does not exempt the defendant State from its international responsibility – which the State has acknowledged in the instant case – for violation of the rights protected by the American Convention and other humanitarian treaties to which Guatemala is a Party.

8. The State of Guatemala ratified the Convention on the Prevention and Punishment of the Crime of Genocide on January 13, 1950. It also ratified the four 1949 Geneva Conventions on international humanitarian law on May 14, 1952, as well as the two 1977 Additional Protocols to those Conventions on October 19, 1987. The four 1949 Geneva Conventions single out the "grave breaches,"[8] and determine, *inter alia*, the humane treatment of all those affected,[9] and respect for the dead.[10] The two 1977 Additional Protocols establish "fundamental guarantees."[11] The latter include respect for all human beings, including their "religious practices" and their "convictions" (philosophical or of any other nature).[12] Protection is extended to the places of worship, which "constitute the cultural or spiritual heritage of peoples."[13]

III. The Principle of Humanity

9. Humane treatment, under any and every circumstance, encompasses all forms of human behavior and all situations of vulnerable human existence. More than an aspect of those guarantees, humane treatment corresponds to the *principle of humanity* that cuts across the whole *corpus juris* of both treaty-based and customary international humanitarian law. This consideration leads me to my second point: general international law must into account, at the same time as treaty-based international law.

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8 Articles 50/51/130/147.

9 Articles 12/12/13/27.

10 Articles 17/20/120/130.

11 Protocol I, Article 75; Protocol II, Articles 4-6.

12 Protocol II, Article 4; cf. commentaries *in*: Various authors, *Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949* (eds. Y. Sandoz, Chr. Swinarski and B. Zimmermann), Geneva, Nijhoff/ICRC, 1987, pp. 1368-1381 (commentaries by S. Junod); M. Bothe, K.J. Partsch and W.A. Solf, *New Rules for Victims of Armed Conflicts - Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, The Hague, Nijhoff, 1982, pp. 640-643.

13 Article 53(a) of 1977 Protocol I.

10. Herein lies an element that I believe to be of fundamental importance: acts that are considered genocide or grave violations of international humanitarian law under different international treaties and conventions (including the American Convention) were already prohibited by *general* international law, even before the entry into force of those treaties or conventions. The universal recognition of the above-mentioned principle of humanity can be mentioned in this regard.[14]

11. According to the abiding message of a great philosophical jurist, "even if the laws themselves were not in force, at least their content was in force" before the atrocities of the twentieth century were committed in different latitudes: "in other words," continued G. Radbruch:

> "the content of those laws responds to a law which is above the law (...).
> From which we see that, following a century of juridical positivism, the idea of a law which is above the law resuscitates (...). The way towards the solution of these problems is implicit in the name given to the philosophy of law in the ancient universities and which, after many years of disuse, has re-emerged today in the name and concept of *natural law*."[15]

12. We should not forget that in the *Case of J.-P. Akayesu* (Judgment of September 2, 1998), the *ad hoc* International Tribunal for Rwanda considered that the concept of crimes against humanity had "already been recognized a long time before" the Nuremberg trials (1945-1946) (para. 565). The Martens clause contributed to this (*cf*. *infra*). Indeed, expressions similar to the one relating to that crime, invoking humanity as a victim, "appear much earlier in human history (para. 566). The same International Tribunal for Rwanda indicated in the *Case of J. Kambanda* (Judgment of September 4, 1998) that, "in all periods of history, genocide has inflicted massive losses on humanity," and its victims are both those massacred and humanity itself (in both acts of genocide and in crimes against humanity) (paras. 15-16).[16]

13. It is evident that the substance of the condemnation of grave violations of human rights, acts of genocide, crimes against humanity, and other atrocities, was already engraved on the human conscience a long time before they were typified or codified at the international level, either in the 1948 Convention on the Prevention and Punishment of Genocide, or in other human rights or international humanitarian law treaties. Nowadays, international crimes are condemned by both general and treaty-based international law. This development has been fostered by the universal juridical conscience, which, in my opinion, is the ultimate material source of all law.

14. Contemporary international law (treaty-based and general) has been characterized overall by the emergence and evolution of its peremptory norms (*jus cogens*), and an increased awareness, on a virtually universal scale, of the principle

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[14] In this regard, it has already been indicated that: "it is increasingly believed that the role of international law is to ensure a minimum of guarantees and of humanity for all, whether in time of peace or in time of war"; J. Pictet, *The Principles of International Humanitarian Law*, Geneva, ICRC, 1966, pp. 29-30.

[15] G. Radbruch, *Introducción a la Filosofía del Derecho* [*Vorschule der Rechtsphilosophie*], 3a. ed. in Spanish, México, Fondo de Cultura Económica, 1965, p. 180.

[16] The same considerations can be found in the judgments of the same Court in the *Case of J.P. Akayesu* cited above, and also in the *Case of O. Serushago* (Judgment of February 2, 1999, para. 15).

of humanity.[17] Grave human rights violations, acts of genocide and crimes against humanity, amongst other atrocities, violate absolute prohibitions of *jus cogens.*[18] H*umaneness* – which is a feature of a new *jus gentium* of the twenty-first century – cuts across all the *corpus juris* of contemporary international law. In my opinions for this Court – including my concurring opinion in Advisory Opinion No. 16 on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of October 1, 1999) – I have called this development a historic process of the true *humanization* of international law (para. 35).

15. I have already described my own conception of the fundamental role and central position of the general principles of law in any legal system (national or international) extensively and in detail in my concurring opinion in Advisory Opinion No. 18 on *The Juridical Status and Rights of Undocumented Migrants* (2003). Already, in 1951, in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of Genocide,* the International Court of Justice (ICJ) had recognized the principles underlying this Convention as principles that were:

> "obligatory for the States, even in the absence of any treaty-based obligation."[19]

16. In its *constant case law* when interpreting and applying the American Convention, the Inter-American Court has consistently invoked the general principles of law.[20] Among these principles, those endowed with a truly fundamental nature form the *substratum* of the legal system itself, revealing *the right to law* to which all human beings are entitled.[21] In the domain of international human rights law, the *principle of the dignity of the human being* and that of the *inalienability of his inherent rights* belong to this category of fundamental principles. It its Advisory Opinion No. 18 on *The Juridical Status and Rights of Undocumented Migrants (*2003), the Inter-American Court referred expressly to both principles.[22]

17. The primacy of the principle of respect for the dignity of the human being is identified as the purpose of both law and the legal system at the national and the international level. By virtue of this fundamental principle, all individuals must be

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[17] T.O. Elias, "New Trends in Contemporary International Law", *in Contemporary Issues in International Law* (eds. D. Freestone, S. Subedi and S. Davidson), The Hague, Kluwer, 2002, pp. 11-12.

[18] Cf. M.C. Bassiouni, *Crimes against Humanity in International Criminal Law*, 2a. ed. rev., The Hague, Kluwer, 1999, pp. 210-211, with regard to crimes against humanity.

[19] ICJ, *ICJ Reports* (1951) p. 23.

[20] Cf. Inter-American Court of Human Rights (IACtHR), *Five Pensioners vs. Peru* (Judgment of February 28, 2003), para. 156; IACtHR, *Cantos vs. Argentina* (Preliminary Objections, Judgment of September 7, 2001), para. 37; IACtHR, *Baena Ricardo et al. vs. Panama* (Judgment of February 2, 2001), para. 98; IACtHR, *Neira Alegría vs. Peru* (Preliminary Objections, Judgment of December 11, 1991), para. 29; IACtHR, *Velásquez Rodríguez vs. Honduras* (Judgment of July 29, 1988), para. 184; and *cf*. also IACtHR, Advisory Opinion No. 17, on *The Juridical Status and Human Rights of the Child* (of August 28, 2002), paras. 66 and 87; IACtHR, Advisory Opinion No. 16, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of October 1, 1999), paras. 58, 113 and 128; IACtHR, Advisory Opinion No. 14, on *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the American Convention on Human Rights* (of December 9, 1994), para. 35.

[21] A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, tome III, Porto Alegre/Brasil, S.A. Fabris Ed., 2003, pp. 524-525.

[22] Paragraph 157 of the said Advisory Opinion.

respected (both their honor and their beliefs), based on the mere fact of belonging to the human race, irrespective of any other circumstance.[23] The principle of the inalienability of the rights inherent in the human being is, in turn, identified with a basic premise of the development of the whole *corpus juris* of international human rights law.

18. In relation to the principles of international humanitarian law, it has been argued with persuasion that, instead of trying to identify provisions of the 1949 Geneva Conventions or the 1977 Additional Protocols that could be considered to express general principles, it would be preferable to consider these conventions and other humanitarian law treaties as a whole, as constituting the expression – and the development – of those general principles, applicable under any circumstances, so as to better ensure the protection of the victims.[24]

19. In the *Mucic et allii* case (Judgment of February 20, 2001), the International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber) considered that both international humanitarian law and international human rights law are founded on their common concern for safeguarding human dignity, which forms the basis for their minimum standards of humanity (para. 149). Indeed, the principle of humanity may be understood in different ways. First, it can be conceived as an underlying principle of the prohibition of inhuman treatment established in Article 3 common to the four 1949 Geneva Conventions.

20. Second, this principle may be invoked referring to humanity as a whole, in relation to matters of common, general and direct interest to the latter. And, third, the same principle may be used to quality a specific quality of humaneness. In the *Celebici* case (Judgment of November 16, 1998), the said International Criminal Tribunal for the Former Yugoslavia (Trial Chamber), described *inhuman treatment* as an intentional or deliberate act or omission, which caused "serious mental or physical suffering or damage," or constituted a "serious attack on human dignity" (para. 543). And added that:

> "inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed 'grave breaches' in the Conventions fall" (para. 543).

Subsequently, in the *T. Blaskic* case (Judgment of March 3, 2000), the same Tribunal (Trial Chamber) reiterated this position (para. 154).

21. We should not forget the celebrated *Martens clause*, which was originally inserted in the preambles to the 1899 Hague Convention (II) (para. 9) and the 1907 Hague Convention (IV) (para. 8), both relating to the laws and customs of war on land. Its purpose was to juridically extend protection to civilians and combatants in all situations, even those not contemplated in treaty-based provisions. To this end, the Martens clause invoked "the principles of international law, as they result from the usages established," and also the "laws of humanity" and "the dictates of the public conscience." Subsequently, the Martens clause again appeared in the common provisions relating to denunciation of the four 1949 Geneva Conventions on

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[23] B. Maurer, *Le principe de respect de la dignité humaine et la Convention Européenne des Droits de l'Homme*, Paris, CERIC/Univ. d'Aix-Marseille, 1999, p. 18.

[24] R. Abi-Saab, "Les 'principes généraux' du Droit humanitaire selon la Cour Internationale de Justice", 766 *Revue internationale de la Croix-Rouge* (1987) pp. 386 and 389.

international humanitarian law (Articles 63/62/142/158), and in Additional Protocol I (1977) to the Conventions (Article 1(2)) – to cite some of the principal international humanitarian law conventions. For more than a century, this clause has continued to be valid.

22. The Martens clause maintains that the principles of international law, the laws of humanity and the requirements of the public conscience continue to be applicable, irrespective of the emergence of new situations. Accordingly, the said clause (which forms part of general international law) prevents *non liquet*, and plays an important role in the hermeneutics of humanitarian legislation. The "laws of humanity" and the "requirements of the public conscience," which it invokes, fall within the domain of *jus cogens*. In summary, the Martens clause, as a whole, has been conceived and repeatedly affirmed to the benefit of the whole human race, thus ensuring its continuing relevance; it can be considered an expression of the *reason of humanity*, imposing limits on the *reason of State* (*raison d'État*).[25]

23. This judgment of the Inter-American Court in the *Case of Plan de Sánchez Massacre* goes beyond the common denominator of international human rights law and international humanitarian law and contains conceptual elements that belong to international refugee law. For example, this is the case of the specific reference to the criterion of the "justified fear of persecution" (para. 42(29)), inherent in the latter aspect of human rights protection. Indeed, events such as those of the instant case (massacres and "scorched earth" policies) generated fear, and gave rise to forced displacements and the arrival of Guatemalan refugees in Mexico, particularly after 1981-1982).[26] This case brings into evidence the *rapprochement or convergence* between the three aspects of protection, which, as I have been maintaining for several years, are to be found at the normative and hermeneutical level and also at the operational level, in order to maximize the protection of human rights.[27]

IV. Aggravated International Responsibility

24. The fact that the Inter-American Court lacks jurisdiction to determine violations of the Convention on the Prevention and Punishment of Genocide (1948) does not mean that the Court cannot take into account acts that this Convention classifies as genocide, as *aggravating circumstances* of violations of the rights protected by the American Convention on Human Rights (with a direct effect on the determination of reparations). To this end, it is not necessary for these acts to be classified as genocide, which could give rise to difficulties in applying the provisions

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[25] A.A. Cançado Trindade, "Reflexiones sobre el Desarraigo como Problema de Derechos Humanos Frente a la Conciencia Jurídica Universal", *in La Nueva Dimensión de las Necesidades de Protección del Ser Humano en el Inicio del Siglo XXI* (A.A. Cançado Trindade and J. Ruiz de Santiago), 1a. ed., San José, Costa Rica, UNHCR, 2001, pp. 19-78, esp. pp. 58-78.

[26] UNHCR, *Memoria-Presencia de los Refugiados Guatemaltecos en México*, México, UNHCR/Comisión Mexicana de Ayuda a Refugiados, 1999, pp. 41, 45, 167, 235 and 314; A. Rouquié, *Guerras y Paz en América Central*, México, Fondo de Cultura Económica, 1994, pp. 152-153 and 325.

[27] Cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, tome I, 1a. ed., Porto Alegre, S.A. Fabris Ed., 1997, chap. VIII, pp. 269-352; A.A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Santiago de Chile, Editorial Jurídica de Chile, 2001, chap. V, pp. 183-265; A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario - Aproximaciones y Convergencias*, Ginebra, ICRC, [2001], pp. 1-66.

of the American Convention, whose purpose is to determine the international responsibility of the State and not of the individual.

25. Nevertheless, I do not consider these difficulties to be insurmountable. Under the American Convention it is perfectly possible to determine the *aggravated* international responsibility of the State, with all the juridical consequences for reparations. These include compliance with the State's obligation to determine the individual criminal responsibility of the perpetrators of the violations of the protected rights, and their corresponding punishment. This is not the first time that the Inter-American Court identifies *aggravated* international responsibility (in the terms of paragraph 51 of this judgment in the *Case of Plan de Sánchez Massacre*). In its preceding judgment of November 25, 2003, in *Case of Myrna Mack Chang v. Guatemala*, the Court concluded that, from the proven facts, an "aggravated international responsibility of the respondent State" was evident (para. 139).

26. Norms embodied in treaties and conventions may perfectly well be evidence of customary international law.[28] Further still, they may subsist as norms of both treaty-based and customary international law.[29] The 1948 Convention on Genocide *codified* the matter in question. Even if it is considered – a view I do not share – that it was only after the adoption of that Convention that the prohibition of genocide gradually came to incorporate contemporary international law (following its embodiment in international treaty-based law), it cannot be denied that, when the facts of the instant case occurred, the prohibition of genocide was already part of international customary law and, even, of *jus cogens.*[30]

27. Here we are truly entering the domain of *jus cogens* and of *aggravated* international responsibility. I have already described in detail the juridical consequences of the latter in my above-mentioned separate opinion (paras. 41 to 55) to the *Case of Myrna Mack Chang* (2003), which I refer to here. In my opinion, the interpretation and application of the American Convention does not exclude the interpretation and application of general international law; to the contrary, it requires this.

28. The preamble to the American Convention refers expressly to the principles reaffirmed and developed in international instruments, that are "worldwide as well as regional in scope" (para. 3). It also refers to the obligations imposed by international

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[28] R.R. Baxter, "Treaties and Custom", 129 *Recueil des Cours de l'Académie de Droit International de La Haye* (1970) pp. 31, 43, 57 and 102-103.

[29] Remember, for example, the principle of *pacta sunt servanda* – to which the two Vienna Conventions on the Law of Treaties refer (Article 26 and preamble), - which emerged as a general rule for the interpretation of treaties and of international customary law. Thus, this principle is deeply rooted in the *corpus juris* of international law as a whole; M. Lachs, "Pacta Sunt Servanda", *in Encyclopedia of Public International Law* (ed. R. Bernhardt), vol. 7, Amsterdam, North-Holland/Max Planck Institute, 1984, pp. 364-371. The basic issue of the validity of the norms of international law transcends the sphere of the law of treaties. Perhaps, in the last analysis, the basis of an international obligation is of a meta-juridical nature; J.L. Brierly, *The Basis of Obligation in International Law*, Oxford, Clarendon Press, 1958, p. 65; J.L. Brierly, *The Law of Nations*, 6a. ed., Oxford, Clarendon Press, 1963, p. 54.

[30] Cf., in this respect, for example, W.A. Schabas, *Genocide in International Law*, Cambridge, University Press, 2002 [reprint], pp. 445 and 500-501, and cf. pp. 434-435; and, regarding the prohibition of genocide as being established by general or customary international law, cf. *ibid*., pp. 99, 142, 362, 365 and 548; and cf. also *ibid*., pp. 168 and 209, on the events in Guatemala.

law (Article 27),[31] and to the "generally recognized principles of international law" (Article 46(1)(a)).[32] Indeed, the general principles of law[33] orient each and every juridical system and guide both general and treaty-based law. The latter are applied concomitantly,[34] and the fact that a general principle of law has found expression in multilateral conventions does not deprive it of continued application as a principle of customary international law; general international law continues to apply *pari passu* with treaty-based international law.[35]

V. *Jus Cogens* in its Broadest Dimension

29. In my opinion, the concept of *jus cogens* transcends the sphere of the law of treaties[36] and that of the law on State international responsibility,[37] and extends to general international law and the very foundations of the international legal order. The Inter-American Court referred to this evolution in its recent Advisory Opinion No. 18 on *The Juridical Status and Rights of Undocumented Migrants* (paras. 98 to 99). In my concurring opinion to that Advisory Opinion, I reflected that this evolution obeyed the necessity of "a minimum of verticalization in the international legal order, erected upon pillars in which the juridical and the ethical are merged (para. 66), and I added:

> "On my part, I have always sustained that it is an ineluctable consequence of the affirmation and the very existence of *peremptory* norms of international law their not being limited to the conventional norms, to the law of treaties, and their being extended to every and any juridical act[38]. Recent developments point out in the same sense, that is, that the domain of the *jus cogens*, beyond the law of treaties, encompasses likewise general international law[39]. Moreover, the *jus cogens*, in my understanding, is an open category, which expands itself to the extent that the universal

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31 On suspension of guarantees.

32 On the rule of exhaustion of remedies of domestic law.

33 Encompassing those of national legal systems and of international law.

34 *Cf*., in general, for example, G. Barile, "La structure de l'ordre juridique international - Règles générales et règles conventionnelles", 161 *Recueil des Cours de l'Académie de Droit International de La Haye* (1978) pp. 48-64. Regarding genocide, it has been suggested that "the most promising route for the future evolution of international law on genocide would be through clearer expansion of customary international law"; S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law*, 2a. ed., Oxford, University Press, 2001, p. 45.

35 ICJ, *Nicaragua vs. the United States* (Merits), ICJ *Reports* (1986) pp. 93-97, paras. 174-181. Regarding the understanding that specific norms of treaty-based international humanitarian law also form part of general international law, *cf*. G. Abi-Saab, "The 1977 Additional Protocols and General International Law: Some Preliminary Reflexions", *in Humanitarian Law of Armed Conflict: Challenges Ahead – Essays in Honour of F. Kalshoven* (eds. A.J.M. Delissen and G.J. Tanja), Dordrecht, Nijhoff, 1991, p. 126.

36 Established in the two Vienna Conventions on the Law of Treaties (1969 and 1986), Articles 53 and 64.

37 For example, its recognition in the articles on State Responsibility adopted by the United Nations International Law Commission in 2001.

38 *Cf*. A.A. Cançado Trindade, *Tratado de Direito Internacional*..., *op. cit. supra* n. (97), vol. II, pp. 415-416.

39 For the extension of *jus cogens* to all possible juridical acts, *cf*., e.g., E. Suy, «The Concept of *Jus Cogens* in Public International Law», *in Papers and Proceedings of the Conference on International Law* (Langonissi, Greece, April 3 to 8, 1966), Geneva, C.E.I.P., 1967, pp. 17-77.

> juridical conscience (material source of all law) awakens for the necessity to protect the rights inherent to each human being in every and any situation" (para. 68).

30. Thus, nowadays, prohibition of the practices of torture and inhuman treatment, forced disappearance of persons, summary and extrajudicial executions, and failure to respect personal honor and beliefs (including those related to the relations between the living and the dead), is absolute and universal, because it belongs to the domain of international *jus cogens*. This prohibition is affirmed in these terms today, owing to the awakening of the universal juridical conscience, which, I repeat, constitutes the material source of all law. The violation of this general prohibition gives rise to the aggravated international responsibility of the State and the international criminal responsibility of those responsible for the violations (both masterminds and perpetrators).

31. As I also indicated in my abovementioned concurring opinion in this Court's Advisory Opinion No 18 on *The Juridical Status and Rights of Undocumented Migrants* (2003):

> "To the international *objective* responsibility of the States corresponds necessarily the notion of *objective illegality* (one of the elements underlying the concept of *jus cogens*). In our days, no one would dare to deny the objective illegality of acts of genocide, of systematic practices of torture, of summary and extra-legal executions, and of forced disappearance of persons (...), condemned by the universal juridical conscience, parallel to the application of treaties.
>
> (...) The emergence and assertion of *jus cogens* evoke the notions of international public order and of a hierarchy of legal norms, as well as the prevalence of the *jus necessarium* over the *jus voluntarium*; *jus cogens* presents itself as the juridical expression of the very international community as a whole, which, at last, takes conscience of itself, and of the fundamental principles and values which guide it" (paras. 71 and 73).

32. The above-mentioned *jus cogens* prohibitions are categorical nowadays, at the current stage of the evolution of contemporary international law. In addition, they reveal the gradual emergence of a universal international law. The purpose of *jus cogens* is precisely to ensure the most fundamental interests and values of the international community as a whole.[40] The said prohibitions (of grave human rights violations) indicate, according to M. Lachs, how:

> "mankind, or the international community, on its journey through history, found it necessary to outlaw once and for all certain actions (...). On this, the deniers and doubters have to agree, if they accept the basic premises of law and the imperative of its progress."[41]

33. There are international obligations relating to the safeguard of fundamental values of the international community that differ from other international obligations; this has given rise to the emergence in contemporary international law of concepts such as those of obligations *erga omnes*, pertinent to *jus cogens*.[42] Consequently, the classic vision of a single, undifferentiated regime of international responsibility no

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[40] B. Simma, "From Bilateralism to Community Interest in International Law," 250 *Recueil des Cours de l'Académie de Droit International de La Haye* (1994) p. 289.

[41] M. Lachs, "The Development and General Trends of International Law in Our Time," 169 *Recueil des Cours de l'Académie de Droit International de La Haye* (1976) pp. 272-273.

[42] V. Starace, "La responsabilité résultant de la violation des obligations à l'égard de la communauté internationale", 153 *Recueil des Cours de l'Académie de Droit International de La Haye* (1980) p. 205.

longer corresponds to the actual stage of evolution of the issue in contemporary international law.[43] In my opinion, the current search for a normative and conceptual hierarchy in the international legal order (illustrated by the establishment of *jus cogens*) has established *aggravated* international responsibility in cases of particularly grave human rights violations and international crime with all its legal consequences. Owing to their particular gravity, international crime and violations of *jus cogens* affect the basic values of the international community as a whole.[44]

VI. Existence of State Crime

34. *Aggravated* responsibility is precisely the responsibility that corresponds to a *State crime*, even though this is not an attempt to suggest an inadequate analogy with categories of domestic criminal law. The facts of this *Case of Plan de Sánchez Massacre* speak for themselves, eloquently, revealing that State crime does exist, even though part of international juridical doctrine, clinging to the dogmas of the past, seeks to deny or elude this. State crime, entailing aggravated international responsibility directly affects the fundamental values of the international community as a whole.

35. From this perspective, State crime is a grave violation of peremptory international law (*jus cogens*). State crime becomes even more evident to the extent that it is established by the State's intention (act or omission) or tolerance, acquiescence, negligence or omission in relation to grave violations of human rights and international humanitarian law perpetrated by its agents, even in the name of a State policy.

36. Here, the principle of the objective and absolute responsibility of the State gives way to responsibility based on act or omission, provided that the State's *intention* to cause damage or its negligence in avoiding such damage can be shown – as in the instant *Case of Plan de Sánchez Massacre*. As in the *Case of Myrna Mack Chang*, here, the act or omission becomes the essential conceptual basis for the State's responsibility, *aggravated* by this circumstance. As I mentioned in my separate opinion in the *Case of Myrna Mack Chang*:

> "Crimes of State are much more than a possibility; as the facts of the *cas d'espèce* show, they are a reality. As long as attempts to evade the issue continue, contemporary international juridical doctrine will continue to succumb to the specter of State sovereignty, and it will continue to hold back the evolution of the law of nations in our days. As long as its existence continues to be denied, the human person, the ultimate one entitled to its inherent rights, and prior and superior to the State, will be denied protection and exercise of said rights, first of all the right to justice; the human person will also be denied reparations for abridgments of those rights.
>
> As long as its existence continues to be denied, the State – hostage to a deformed structure of repression and impunity - will be deprived of its principal aim, the realization of the common weal. As long as its existence continues to be denied, in the midst of an empty semantic *imbroglio* (which distracts attention from the central issue, which is the need to ensure that justice prevails), the Law itself will be deprived of its ultimate aim, which is precisely the realization of justice. As long as attempts to avoid the issue continue, treatment of the central chapter of the law of international responsibility of the State will continue to be unconvincing, in addition to being conceptually incomplete and juridically inconsistent. With this, the construction and consolidation of the true Rule of Law will regrettably be postponed, and in the

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[43] *Ibid*, pp. 274-275, and cf. pp. 289, 297 and 308.

[44] 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) p. 224, and cf. p. 307.

framework of the latter, that of the true *right to the Law,* that is, the right to a legal order that effectively safeguards the fundamental rights of the human person" (paras. 54 and 55).

VII. Coexistence of the International Responsibility of the State and the Individual

37. I do not consider that there is any legal impediment to the *concomitant* determination of the international responsibility of the State and the criminal responsibility of the individual in the terms indicated above (para. 25, *supra*) in relation to the American Convention, which reveals the interaction between the national and international legal orders in this domain of the protection of human rights. In this regard, it has been considered that, since the facts determined by the Historical Clarification Committee (CEH) coincided with crimes classified in both domestic and international laws, and since the respective conducts were classified as "the most serious on the social scale," meriting "the most severe social penalties," a mere "ethical reproach" was necessary but insufficient; consequently, for such conduct, "the imposition of a penalty" was envisaged. And it was added that:

> "If the reproach is only moral the whole system for the prevention of crime and the protection of the legal rights established by criminal law is distorted. If a criminal penalty is not applied in the case of such serious acts, society may consider that acts that were prohibited were permitted or, at the very least, consider that they were justified."[45]

The struggle against impunity is based on the foregoing. However, at the strictly international level the matter has still not been developed sufficiently, and this reflects the persisting attitude of dealing with the international responsibility of the State and the criminal responsibility of the individual separately and in a compartmentalized manner.

38. At the actual stage of insufficient development of the issue, the international human rights tribunals (the European and Inter-American Courts and, in future, the African Court) focus on the former (State international responsibility), while the *ad hoc* international criminal tribunals (for the Former Yugoslavia and for Rwanda) and the International Criminal Court (ICC) deal with the latter (the international criminal responsibility of the individual). But the international responsibility of the State and the individual are complementary. However, when focusing on the international responsibility of the State for violations of the rights it protects, the American Convention on Human Rights does not fail to indicate – in its often overlooked Article 32(1)[46] – that "every person has responsibilities to his family, his community, and mankind."

39. The reaction to grave and systematic violations of human rights and international humanitarian law are today a legitimate concern of the international community as a whole. This reaction is even more necessary when the victims are vulnerable and defenseless (as in this *Case of Plan de Sánchez Massacre*), and the structure of public power is deformed and put at the service of repression rather

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[45] C. Paz and Paz Bailey, *La Tipificación de Violaciones en Contra de Derechos Fundamentales y los Hechos de Violencia Vinculados al Enfrentamiento Armado*, Guatemala, CECI/Instituto de Estudios Comparados en Ciencias Penales de Guatemala, 1998, p. 2.

[46] Regarding the correlation between obligations and rights.

than in the search of the common good. I consider that the international criminal responsibility of the individual does not excuse that of the State; the two co-exist, and recognition of this is of crucial importance for the eradication of impunity. The norms of contemporary international law are addressed directly at both the State and its agents; the conduct of both is established and regulated by those norms, and both the State and its agents must respond for the consequences of their acts and omissions.

VIII. Epilogue

40. I could not conclude this separate opinion without referring, very briefly, to an aspect of the *Case of Plan de Sánchez Massacre* that, in my opinion, cannot be ignored. Even though the facts occurred 22 years ago, they are certainly still alive in the memory of the survivors. The years of silence and humiliation, faced with the difficulties of locating the clandestine cemeteries and exhuming the corpses of those murdered in the massacre, and the prolonged denial of justice, could not erase what happened in Plan de Sánchez on July 18, 1982, from the memory of the survivors. As a Latin America writer has indicated, "forgetting is full of memories";[47] in other words, there is no forgetting.

41. Memory is enduring, it resists the erosion of time, it surges up from the depths and darkness of human suffering; since the routes of the past were traced and duly trod, they are already known, and remain unforgettable. In this respect, a great thinker of the twentieth century said that we should never ignore "respect for the eternal human rights, appreciation for what is old, and the continuity of the culture and history of the spirit."[48]

42. Two decades after the *Plan de Sánchez* massacre, the defendant State has acknowledged its international responsibility for the grave human rights violations[49] in the *cas d'espèce*, and the victims of *Plan de Sánchez* have had the merits of their case heard and decided by an international human rights court. The survivors of the *Plan de Sánchez* massacre can now fully reconstruct or reconstitute their relations with their dead, vindicated by this judgment of the Inter-American Court.

43. In summary, the human conscience is the material source of all law. The collective conscience of the members of the Mayan people has given eloquent testimony of its spiritual, individual and collective existence, which identifies, connects and distinguishes them. The fate of each one of them is inescapably linked to that of the other members of their communities. As C.G. Jung so lucidly reflected in his autobiography, the human soul has an *objective* nature and behavior.[50] The spiritual, individual and collective existence is an *objective reality*. The facts of this case prove this fully.

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47 M. Benedetti, *El Olvido Está Lleno de Memoria*, Bogotá, Edit. Planeta, 2001, pp. 13-19.

48 C.G. Jung, *op. cit. infra* n. (48), p. 278.

49 Embodied in Articles 1(1), 5(1) and (2), 8(1), 11, 12(2) and (3), 13(2)(a) and (5), 16(1), 21(1) and (2), 24 and 25 of the American Convention; *cf*. para. 46 of this judgment.

50 C.G. Jung, *Recuerdos, Sueños, Pensamientos*, Barcelona, Ed. Seix Barral, 2002, pp. 126 and 135.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra Alessandri
Secretary