

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 on reparations in the *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, as I did in my previous separate opinion in the judgment on merits in the instant case. My reflections focus on four central issues: a) State crime revisited; b) time and law revisited; c) reparations for State crime; and d) the primacy of law over brute force.

I. State crime revisited

2. In an affidavit of March 9, 2004, submitted to the Court, one of the victims (Benjamín Manuel Jerónimo) declared that the said Plan de Sánchez massacre, which took place on July 18, 1982, was perpetrated by “members of the Army, the Civil Self-Defense Patrols (PAC), and the Judicial Police” (para. 32(a)). In his report given during the public hearing before the Court, on April 23 and 24, 2004, the expert witness, Augusto Willemsen-Díaz, stated that, from 1979 to 1983:

“[T]he Maya were oppressed, persecuted, harassed, attacked and put to death violently; this is reflected in the 200,000 deaths and 626 massacres that can be attributed to the State’s security forces. The indigenous peoples, the collective conscience, and the cultural identity of the survivors and their next of kin, were drastically affected; they were forced to flee their lands, abandon their traditional community structure based on the nuclear and extended family, and live in fear under military control” (para. 38(d)).

3. In my separate opinion in the judgment on merits in this case, I had already underscored the particular gravity of the facts of this case (paras. 2-5). In this judgment on reparations in the same *Case of the Plan de Sánchez Massacre*, the Court established, as one of the proven facts, that:

“[t]he survivors and the next of kin of those murdered in the event were reluctant to seek justice and denounce the clandestine cemeteries in the village, owing to the very real fear of permanent harassment, threat and surveillance by the regional military authorities” (para. 49(5)).

4. Moreover, this judgment has expressly recognized the “extreme gravity of the facts” (para. 93). As I indicated in my separate opinion in the judgment on merits in this case:

“According to the American Convention, it is perfectly possible to determine the *aggravated* international responsibility of the State, with all the juridical consequences in relation to reparations; these include, the State’s compliance with the obligation to determine the individual criminal liability 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 has identified an *aggravated* international responsibility (in the terms of paragraph 51 of the [...] judgment on [merits] in the *Case of the Plan de Sánchez Massacre*). In its previous judgment of November 25, 2003, in *Myrna Mack Chang v. Guatemala*, the Court concluded that, from the proven facts, the ‘aggravated international responsibility’ of the defendant State was evident (para. 25).

5. And, later on in the same opinion, I added my belief that:

"the classic vision of a single, undifferentiated regime of international responsibility no longer corresponds to the actual stage in the evolution of this issue in contemporary international law. The customary search for a normative and conceptual hierarchy in the international legal system (illustrated by the introduction of *jus cogens*) has, I believe, established *aggravated* international responsibility in cases of particularly serious violations of human rights and international crimes, with all its juridical consequences. Because of their particular gravity, international crimes and violations of *jus cogens* affect the basic values of the international community as a whole" (para. 33).

6. This Court's judgment on reparations in the *Case of the Plan de Sánchez Massacre* is conceived and reasoned in the same way as its previous judgment on merits in this case. The different forms of reparation ordered by the Court in this judgment correspond to the *aggravating* circumstances of the human rights violations established by the Court in the corresponding judgment on merits. The State's *aggravated* international responsibility derives from those circumstances (although this is not meant to suggest an inadequate analogy with categories of domestic criminal law.)

7. Indeed, in a case such as this, the facts speak for themselves and eloquently reveal that, contrary to what some international legal doctrine insists on eluding or ignoring, State crimes do exist. The State's *intention* to cause damage when the facts occurred was reliably proved, and established its international responsibility based on negligence or guilt. The human rights violations, victimizing numerous members of a specific ethnic group, were perpetrated in the name of a *State policy*.

8. How can the existence of State crime be denied? How do international jurists who surreptitiously support State sovereignty answer this question, bearing in mind the facts of this case? How long will they continue to close their eyes to the reality of the facts? How long will they shortsightedly obstruct the realization of justice at the international level? How long will they delay the development of the law on the State's international responsibility? How long will they postpone the creation and consolidation of a genuine rule of law and, within that framework, a genuine right to law?

9. Since State crime is a reality, as the facts of the instant case prove conclusively, the *concomitant* determination of the State's international responsibility and the criminal liability of the perpetrators is essential. Even though the Inter-American Court can only deal with the former, there are complementarities between the responsibility of the State and that of the individual. It is not possible to deal with individual responsibility alone, as contemporary international criminal law does. Convergence must be promoted between the latter and international human rights law, as convergences between international humanitarian law, international refugee law and international human rights law, at the normative and also the hermeneutic and operational levels have been intensified over the last decade – as I have been affirming for years – in order to maximize the protection of human rights.¹

10. The convergences are necessary to foster this protection, particularly when the public power structure is distorted and placed at the service of repression (and

¹. Cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, tomo I, 1a. ed., Porto Alegre, S.A. Fabris Ed., 1997, cap. 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*, Geneva, ICRC, [2001], pp. 1-66.

not in the quest for the common good), or when the State's public power structure is activated in support of private interests (as frequently occurs nowadays). Thus, the international criminal liability of the individual does not absolve the State. The two complement each other, and this recognition is of crucial importance for the eradication of impunity. As I noted in my separate opinion in the judgment on merits in this case:

"The provisions of contemporary international law are addressed directly at the State and its agents; the conduct of both is established and regulated by the latter, and both the State and its agents must be accountable for the consequences of their acts and omissions" (para. 38).

II. Time and Law Revisited

11. More than 22 years have elapsed between the time the *Plan de Sánchez Massacre* occurred on July 18, 1982, and this judgment on reparations that the Inter-American Court has just delivered. More than 22 years have elapsed since this massacre fragmented the Maya-Achí community, damaged its cultural identity, destroyed its family roles, and gave rise to a cultural vacuum. Nevertheless, the surviving victims have stated in their testimonies before this Court that they relive this misfortune "all the time," that they remember everything as if it had happened "yesterday."² They cannot forget.

12. More than 22 years have elapsed since the victims were obliged to live side by side with the perpetrators. More than 22 years have elapsed of humiliation faced with the difficulty of locating the clandestine cemeteries and exhuming the corpses of the massacre. More than 22 years have elapsed of prolonged denial of justice and the consequent impunity. However, the passage of time has not erased what happened from the memory of the surviving victims. They cannot forget.

13. More than 22 years after the Plan de Sánchez massacre, the defendant State has finally acknowledged its international responsibility for the grave human rights violations³ in this case and, following the court's judgment on merits in the instant case, the surviving victims now have a judgment on reparations. During the contentious proceeding before the Court, the State assumed a constructive attitude. But what is the impact of the passage of this extended period (more than 22 years) on the application of law, as regards the reparations that the Court has just ordered? This was precisely the question I asked during the public hearing on reparations before the Court, on April 23 and 24, 2004.

14. My question was motivated by concern about the destruction of the family roles and the fragmentation of the social fabric and cultural identity of the members of the Maya-Achí people who had been victimized, and the consequent "loss of the transmission of oral knowledge" (above all, owing to the massacre of the women and

². Inter-American Court of Human Rights (IACtHR), Transcript of the public hearing on the *Plan de Sánchez Massacre v. Guatemala* held at the seat of the Inter-American Court of Human Rights on April 23 and 24, 2004, p. 121 (in Spanish, for internal circulation only).

³. 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. 50 of this judgment.

elders).⁴ Now that such a long time has passed since the massacre took place, can the damage caused still be repaired?

15. In his answer to my question, the expert witness, Augusto Willemssen-Díaz, focusing on the issue of the oral transmission of the Mayan “millenary culture” considered that, although it was true that the dead were no longer able to communicate fully with the living, and that the principle “spiritual guide” had been “eliminated,” which was an irreparable loss, nevertheless:

“Collectively there is perhaps hope, because there are still some who are bearers and reproducers of the captivating ancient traditions of the Mayas. I hope they are able to react and rebuild a little this extraordinary culture they possessed and maintained for almost 500 years until this terrible event occurred, and I hope they find [...] the strength to recover a large percentage of this magnificent culture they possessed and still possess. [...] I believe it has been significantly harmed [...]. I profoundly hope they are able to recover and readapt and rebuilt this captivating culture.”⁵

16. In this judgment on reparations, the Court has duly taken into account the temporal dimension of this important cultural element (paras. 49(12) and (82)). The Court has duly emphasized the *spirituality* of the members of the Maya Achí community, not only in their relationship with the land, but also in their “close relationship between the living and the dead,” expressed through “the practice of burial rites, as a form of permanent contact and solidarity with their ancestors. The transmission of knowledge and culture is a role assigned to the elders and women” (para. 85).

17. In the *Case of the Plan de Sánchez Massacre* (reparations), the Court added:

“the victims were unable to bury appropriately their next of kin who had been executed in the massacre or practice funeral rites in accordance with their traditions. And, it is necessary to recall the special significance for the Mayan culture, and particularly the Maya-Achí culture, of the funeral rites, and the magnitude of the damage caused to the victims because these rites were not respected. Moreover, it has been proved that, owing to the conditions of decomposition and calcination in which the remains were found after the exhumations conducted in 1994 and 1996, only a few victims could bury their next of kin and perform the corresponding ceremonies [...]. It has been proved that the death of the women and elders, oral transmitters of the Maya-Achí culture caused a cultural vacuum” (para. 87(a) and (b)).

III. Reparations for State Crime

18. It was essential that, when deciding and ordering a wide range of reparations (pecuniary and non-pecuniary) in its judgment, based on the provisions of Article 63(1) of the American Convention on Human Rights, the Inter-American Court should take into account the aggravating circumstances of the violations in the *Case of the Plan de Sánchez Massacre*. Moreover, the reparations ordered have an individual and a collective or community dimension. Thus, together with the pecuniary damage, when determining the non-pecuniary damage, the Inter-American Court has stressed the “*aggravated impact*” of the facts – their particular *gravity* – for the members of the Maya-Achí people (paras. 81 and 83).

⁴. See note 2, p. 91 (in Spanish, for internal circulation only).

⁵. See note 2, p. 92 (in Spanish, for internal circulation only).

19. The Court recalled, *inter alia*, that the surviving victims were forced to accept the presence of the perpetrators in the same common areas, and were stigmatized, because they were accused of being guilty of the facts, so that they have lived “in a permanent state of silence” (paras. 49(15) and 87(c)) – the torment of silence – in the face of the continuation, up until the present, of impunity, which has caused profound anguish, frustration and impotence (para. 87(e)). Also, the consensus which was prevalent in the Maya-Achí community, and its cultural values of respect for its neighbors and community service, were replaced by force, imposing a militarized structure, with authoritarian practices and the arbitrary use of power, fragmenting the community and causing it to lose its basic points of reference (paras. 49(16) and 87(d)).

20. The damage has continued over time, over more than 22 years of silence and impunity. The *Plan de Sánchez massacre*, perpetrated on July 18, 1982, was conceived, planned and authorized by the State, at the highest level, and brutally executed (by means of summary executions, torture, rape and humiliations) by State agents, as part of a *State policy*. Thereafter, the State took measures to ensure impunity. The *Plan de Sánchez massacre* – I must insist – was carried out within the framework of a clear and confirmed *State policy*, responsible for 626 massacres attributed to the State’s security forces (in the period from 1978 to 1984) and, according to the report of the Historical Clarification Commission of Guatemala (cited in the application in this case), these massacres were addressed at “previously identified” individuals and groups of individuals, in order to “destroy an ethnic group,” and “were intended to exterminate whole Mayan communities.”⁶

21. The *Plan de Sánchez massacre*, almost miraculously (given the brutalized world in which we live), managed to reach an international tribunal such as the Inter-American Court, and must enter the annals of contemporary public international law. Faced with events such as those of the instant case, what have those who write on legal doctrine and who insist on denying the existence of State crime to say? How much longer will they close their eyes to reality? The authority of the argument is more important than the “argument” of the respective “authority,” which is disproved by the facts. State crime exists; this cannot be denied. The facts of the *Plan de Sánchez massacre* prove it authentically.

22. In my opinion, the international responsibility of the State and the international criminal liability of the individuals who perpetrated the crime are absolutely *complementary* and not parallel or self-exclusive. The State cannot exempt itself from its own responsibility for crimes committed by its agents in its name and in implementation of a *State policy*. Contrary to what some contemporary legal doctrine alleges, *societas delinquere potest*. Furthermore, it is not impossible or overwhelmingly difficult to establish the reparations for State crimes, as the Inter-American Court has shown in this judgment.

23. In addition to the reparations for pecuniary and non-pecuniary damage, the Court has ordered other forms of reparation, bearing in mind the aggravating

⁶. Cf. also, in addition to my separate opinion in the judgment on merits in this case (paras. 2-3), the report of the Historical Clarification Commission, *Guatemala - Memoria del Silencio*, tomo III, Guatemala, CEH, 1999, pp. 316-318, 358, 375-376, 393, 410 and 416-423.

circumstances of the violations in the *Case of the Plan de Sánchez Massacre*. Thus, the Court's judgment has ordered a series of other types of reparation (paras. 93-111) to rehabilitate the surviving victims, to combat impunity, to ensure the public acknowledgement of State responsibility so as to make reparation to the victims, to preserve the memory of the victims executed in the massacre, to preserve the collective memory of the Maya Achí community, to promote and disseminate the Maya Achí language, and to implement a widespread development program for the members of the communities affected by the facts of this case (including health, education, housing, production and infrastructure).

24. I consider that measures of reparations designed to preserve the collective memory are particularly significant. As I indicated in my previous separate opinion in the judgment on merits in this same *Case of the Plan de Sánchez Massacre*:

"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" (para. 43).

In summary, as I have stated in so many opinions in different cases decided by the Inter-American Court, I consider that the human conscience is the material source of all law.

25. Whether the reparations ordered in this judgment of the Court are called punitive damages – which should evidently cause those who deny the existence of State crime to shudder – or “exemplary reparations,” or any other expression of this type, their basic purpose remains the same: they recognize the extreme gravity of the facts, punish the State responsible for the grave violations committed, acknowledge the extreme sacrifice of the victims who died and alleviate the sacrifice of the surviving victims, and establish a guarantee of non-repetition of the harmful acts. Whatever they are called, their basic purpose is always the same, they are for the benefit of the victims (direct and indirect) and the population of the defendant State as a whole, because their purpose is to rebuild the damaged social fabric.

26. The Westphalian international jurists of our days need to awaken from their mental lethargy: the *Plan de Sánchez massacre* was *but one* of the 626 State massacres that comprised an explicit pattern of extermination, executed over a brief period of time, and, up until today, it is the only one that has been filed before an international tribunal, the Inter-American Court of Human Rights. How many more massacres have been perpetrated over recent years, and are still being perpetrated in different latitudes, without us knowing anything about them, in the face of the criminal indifference of the State,⁷ which was historically conceived and created to achieve the common good (not for political repression or the satisfaction of private financial interests)! How is it possible to deny the existence of State crime?

IV. Epilogue: The Primacy of Law of Brute Force

⁷. And the media.

27. State crime exists and to continue denying this – as in the case of some international legal doctrine – is to close one's eyes, partially accept impunity, and do a disservice to the development of international public law. As I have already mentioned in this separate opinion (para. 13, *supra*), the defendant State took a positive step in the contentious proceeding before the Court by acknowledging its international responsibility for the grave human rights violations in the instant case; it has also demonstrated a constructive attitude during the contentious proceeding. This, added to the Court's judgments on merits and reparations in this *Case of the Plan de Sánchez Massacre*, signifies a general acknowledgement of the necessary primacy of law over brute force.

28. This is extremely significant, given the times in which we live, when there is a regrettable increase in the use of force in so many contemporary national and international armed conflicts. Demonstrating a truly irresponsible attitude, the apologists of the use of force seem to forget the suffering of previous generations and the lessons of the not so very distant past. For them the ends justify the means.

29. It should be recalled that the ancient Greeks had already realized the devastating effects of the use of brute force and war on both the vanquished and the victors, revealing the immorality of substituting the ends for the means; from the time of Homer's *Iliad* to the present, all "belligerents" have become "means", things, in a senseless power struggle, incapable of "subjecting their actions to their thoughts." As Simone Weil observed with such insight, the terms "oppressors and oppressed" almost lose their significance in the face of the impotence of all men before the machine of repression and war, converted in a machine for the destruction of the spirit and the fabrication of insensitivity.⁸

30. As in Homer's *Iliad*, there are no victors or vanquished, all are taken by force, possessed by the war, degraded by the devastation caused by the brutality and the massacres.⁹ The brutality and the massacres that took place in past decades and those taking place in different parts of the world in these ominous times in which we live in 2004, have a profoundly de-civilizing effect. The dangerous escalation of violation at this start of the twenty-first century suggests that human beings appear to have learned little or nothing from the sufferings of past generations, which can only be limited by faithful adherence to law and its basic principles. Law is more important than force, just as conscience is more important than will¹⁰ (the ultimate material source of all law). This judgment of the Inter-American Court provides eloquent testimony of the necessary primacy of law over brute force.

⁸. S. Weil, *Reflexiones sobre las Causas de la Libertad y de la Opresión Social*, Barcelona, Ed. Paidós/ Universidad Autónoma de Barcelona, 1995, pp. 81-82, 84 and 130-131.

⁹. S. Weil, "L'*Iliade* ou le Poème de la Guerre (1940-1941)" in *Oeuvres*, Paris, Quarto Gallimard, 1999, pp. 527-552.

¹⁰. A.A. Cançado Trindade, "El Primado del Derecho sobre la Fuerza como Imperativo del *Jus Cogens*", in *Doctrina Latinoamericana del Derecho Internacional*, vol. II (eds. A.A. Cançado Trindade and F. Vidal Ramírez), San José, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 62-63.

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