REASONED OPINION OF JUDGE A.A. CANÇADO TRINDADE*

1. I vote in favor of adoption of the instant Judgment of the Inter-American Court of Human Rights on the merits and reparations in the *Myrna Mack Chang versus Guatemala* case, in which the Court ruled that the violation of Myrna Mack Chang's right to life occurred under *aggravating circumstances* (para. 139), because it resulted from "a covert military intelligence operation carried out by the Presidential General Staff and tolerated by various authorities and institutions" (para. 140), set within a "pattern of selective extra-legal executions fostered and tolerated by the State itself" (para. 151), and a "climate of impunity" (paras. 155 and 158). The Court also found that said military intelligence operation by the Presidential General Staff "sought to conceal the facts and sought impunity of those responsible, and to this end, with tolerance by the State, it resorted to all types of means, including harassment, threats and murders of those cooperating with the courts," thus affecting the independence of the Judiciary (para. 216).

2. It is my understanding that this is a case of *aggravated* international responsibility of the State, demonstrated by the aforementioned facts and abusive resort to the so-called "official secret," leading to an obstruction of justice.[1] These *aggravating circumstances* make the instant case a paradigmatic one, and because of them the instant Judgment of the Court is destined to be truly historical. Given the great significance of the juridical issues addressed in it, I feel the obligation to state my personal reflections on the matter, as the basis for my position on the subject of the decision of the Court, especially with respect to the following aspects: a) the difficult paths of international responsibility of the States; b) criminalization of grave human rights violations; c) complementarity between the international responsibility of the States and the international criminal responsibility of individuals; d) types of culpability and crimes of State; e) crimes of State in connection with the fundamental or higher interests of the international community; f) the act of invoking international responsibility of the State by the human being as a subject of international law; g) the nature of the international responsibility of the State, and its relationship with the realization of justice and the struggle against impunity; h) the juridical consequences of crimes of State: *aggravated* international responsibility and the nature and scope of the *reparatio*.

I. The Difficult Paths of International Responsibility of the States.

3. The domain of international responsibility of the State plays a pivotal role in the conceptual universe of International Law. It is the backbone of the international legal order. Actually, the legal system of responsibility is the critical center of any legal system, where the nature and scope of the obligations and the determination of the juridical consequences of their abridgment come together. It therefore constitutes, in brief, the thermometer of operation of the legal system as a whole. Nevertheless, it is truly paradoxical that despite its pivotal role in the international legal order and its crucial importance for the legal system in its entirety, the issue of international

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* This translations is awaiting its final revision by the author.

1. Cf. paras. 174-181 of the instant Judgment. Cf. also, in this regard, CEH, *Guatemala, Memoria del Silencio - Informe de la Comisión para el Esclarecimiento Histórico*, volume VI, Annex I, Guatemala, 1999, pp. 242 and 244.

responsibility of the State has resisted to such an extent the efforts to codify and progressively develop it.

4. Discussion of this topic has followed long and difficult paths.[2] In the course of over seven decades of studies on the subject with the aim of codifying it (from the renowned and failed 1930 Hague Codification Conference to date), controversy has persisted regarding various aspects, including the very moment at which the international responsibility of the State arises,[3] and there continues to be tension between the bilateralist inter-State vision of juridical relations of responsibility and a vision of the same –which I, personally, share- that also takes into account fundamental or higher values of the international community as a whole.

5. For years, from the start of the 20th century, the legal positivism then prevalent sought to transcend fault or blame (from Roman law) as the basis for international responsibility, by grounding the latter on contradiction of the act or omission attributable to the State with the legal provision. With this, legal positivism –always receptive with respect to dogmatism of State sovereignty- reduced the relationship of responsibility to a matter of reparation of damage, at the level of relations between the State committing the infraction and the victim, without even establishing the intention of the State to cause said damage (as an aggravating circumstance). This hermetic approach became stratified over time.

6. It was necessary to wait several years for new developments in legal doctrine[4] to open the path toward a certain "criminalization" of the relationship of responsibility, reducing the space formerly occupied by State voluntarism. Thus –regarding the basis for international responsibility of the State- D. Anzilotti sought to transcend fault or blame;[5] decades later, R. Ago sought to do the same with respect to damage;[6] as rapporteur for the International Law Commission (ILC) of the United Nations on the issue of international responsibility of the State, R. Ago developed, going beyond previous theoretical models, a gradation of violations of State obligations, which led, in 1976, to his renowned proposal of Article 19 of the State Responsibility Project, including the concept of "international crime" and establishing a distinction between it and "international delict."

7. The ILC itself, in its comment on the matter, compared adoption of the language that recognized the distinction between both concepts (international crimes

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2. From the writings of D. Anzilotti to the studies and reports by R. Ago (during which time we also find the influential reflections of H. Kelsen, H. Lauterpacht, C.Th. Eustathiades and F. García Amador, among others), and subsequently –in the framework of the International Law Commission of the United Nations- the reports by W. Riphagen, G. Arangio-Ruiz, and J. Crawford.

3. Cf. A.A. Cançado Trindade, "The Birth of State Responsibility and the Nature of the Local Remedies Rule", 56 *Revue de droit international de sciences diplomatiques et politiques* (1978) pp. 157-188; and, regarding the implications for implementation of the international responsibility of the State, in the various contexts both of international human rights protection and of diplomatic protection, cf. A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, Cambridge University Press, 1983, pp. 6-56 and 290-322.

4. Cf. nota (2), *supra*.

5. Cf. D. Anzilotti, *Teoría Generale della Responsabilità dello Stato nel Diritto Internazionale*, part I, Firenze, F. Lumachi Libr.-Ed., 1902, pp. 25-101.

6. For the reminiscences of R. Ago regarding his predecessor D. Anzilotti, of the brilliant Italian school of international law, cf. R. Ago, "Rencontres avec Anzilotti", 45 *Boletim da Sociedade Brasileira de Direito Internacional* (1992) n. 81/83, pp. 17-25.

and delicts), in codification of the international responsibility of the State, to enshrinement of the *jus cogens* category in the law of treaties.[7] With Article 19 of said ILC Draft, two systems of responsibility would take shape: one for non-compliance with obligations of crucial importance for the international community as a whole, and the other for non-compliance with obligations of a lesser or less general importance. "International crimes" would be the acts of an "especially grave nature" that affect fundamental values of the international community, and the others –without the same degree of gravity- would be "international delicts."[8] A new vision of the law of international responsibility began to arise, taking into account basic values and the needs of the international community as a whole.

8. However, progress in this area has not been linear but rather –as often happens- pendulous. It does not seem to me that the final Draft Articles of the ILC, adopted in 2001, have done justice enough to the advanced conceptual vision of R. Ago and to the concerns of G. Arangio-Ruiz. The fact that in its Articles on Responsibility of States (2001) the ILC addressed details regarding the "countermeasures," as they are called (reflecting the most primitive aspect of international law, that is, a new version of resort to reprisals),[9] and that it set aside and shelved, rather lightly, the concept of international crime or "State crime," reflects the world in which we live. *Ubi societas, ibi jus*. The relatively succinct treatment of grave violations –and their consequences- of obligations under mandatory norms of general International Law (Articles 40-41)[10] in the ILC's Articles on the Responsibility of the States (2001) reveals the insufficient conceptual development of the matter up to our days, in an international community that is still seeking a greater degree of cohesion and solidarity.

II. Criminalization of Grave Human Rights Violations

9. The process of *criminalization* of *grave* human rights violations and that of International Humanitarian Law[11] has gone *pari passu* with the evolution of contemporary International Law itself: the establishment of an international criminal jurisdiction[12] is viewed in our days as a component that strengthens International Law

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7. United Nations, *Yearbook of the International Law Commission* (1976)-II, part II, para. 73, p. 122.

8. Cf. comments and examples *in ibid*., pp. 95-122.

9. And this new version of reprisals –the so-called "countermeasures"- constitute the chapter on use (albeit legal) of force, and they should not be considered as an inevitable trait of the regime of "legal liability"; Ph. Allott, "State Responsibility and the Unmaking of International Law", 29 *Harvard International Law Journal* (1988) pp. 22-23.

10. Cf. comments *in* J. Crawford, *The International Law Commission's Articles on State Responsibility*, Cambridge, University Press, 2002, pp. 242-253.

11. Cf. G. Abi-Saab, "The Concept of `International Crimes' and Its Place in Contemporary International Law", *International Crimes of State - A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (eds. J.H.H. Weiler, A. Cassese and M. Spinedi), Berlin, W. de Gruyter, 1989, pp. 141-150; B. Graefrath, "International Crimes - A Specific Regime of International Responsibility of States and Its Legal Consequences", *in ibid*., pp. 161-169; P.-M. Dupuy, "Implications of the Institutionalization of International Crimes of States", *in ibid*., pp. 170-185; M. Gounelle, "Quelques remarques sur la notion de `crime international' et sur l'évolution de la responsabilité internationale de l'État", *Mélanges offerts à Paul Reuter - Le droit international: unité et diversité*, Paris, Pédone, 1981, pp. 315-326; L.C. Green, "Crimes under the I.L.C. 1991 Draft Code", 24 *Israel Yearbook on Human Rights* (1994) pp. 19-39.

12. Including both the decisions of the Security Council of the United Nations to establish the *ad hoc* Tribunals for the former Yugoslavia in 1993, and for Rwanda in 1994 (cf., on the former, v.g., K. Lescure, *Le*

itself, overcoming a basic shortcoming and its past insufficiencies regarding lack of capacity to try and to punish those responsible for grave violations of human rights and of International Humanitarian Law.[13] The *travaux préparatoires* of the 1998 Rome Statute on the International Criminal Court (ICC) led to prompt recognition, within its sphere of application,[14] of individual international criminal responsibility, and this constitutes a major step forward, in terms of legal doctrine, in the struggle against impunity of the most serious international crimes.

10. Said initiative has provided new impetus to the struggle of the international community against impunity, as a *per se* violation of human rights,[15] by affirming and crystallizing the international criminal responsibility of the individual for said violations, thus seeking to prevent future crimes.[16] Criminalization of *grave* violations of human rights and of International Humanitarian Law has, in our time, been expressed in the enshrinement of the principle of universal jurisdiction.[17]

11. In the framework of the inter-American human rights system, in the *Paniagua Morales et al. versus Guatemala* case (also known as the "White Van" case), the Inter-American Court of Human Rights issued a clear warning statement regarding the duty of the State to combat impunity.[18] The Court affirmed the duty of the State[19] to

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Tribunal Pénal International pour l'ex-Yougoslavie, Paris, Montchrestien, 1994, pp. 15-133; Antonio Cassese, "The International Criminal Tribunal for the Former Yugoslavia and Human Rights", 2 *European Human Rights Law Review* (1997) pp. 329-352; Kai Ambos, "Defensa Penal ante el Tribunal de la ONU para la Antigua Yugoslavia", 25 *Revista del Instituto Interamericano de Derechos Humanos* (1997) pp. 11-28; and cf., on the latter, v.g., R.S. Lee, "The Rwanda Tribunal", 9 *Leiden Journal of International Law* (1996) pp. 37-61; [Several Authors], "The Rwanda Tribunal: Its Role in the African Context", 37 *International Review of the Red Cross* (1997) n. 321, pp. 665-715 (studies by F. Harhoff, C. Aptel, D. Wembou, C.M. Peter, and G. Erasmus and N. Fourie); O. Dubois, "Rwanda's National Criminal Courts and the International Tribunal", 37 *International Review of the Red Cross* (1997) n. 321, pp. 717-731, and –especially- adoption of the 1998 Rome Statute by the permanent International Criminal Court.

13. And, especially, for acts of genocide, war crimes, and crimes against humanity; Bengt Broms, "The Establishment of an International Criminal Court", 24 *Israel Yearbook on Human Rights* (1994) pp. 145-146.

14. Probably some of the current controversies among internationalist jurists (myself included) and the criminalists will last some time, regarding certain aspects of the Rome Statute. While I do not intend to refer to them here, in the instant Separate Opinion I merely call attention to the superior universal *values* that underlie all the issue of establishment of a permanent international criminal jurisdiction. Let us furthermore recall that the 1998 Rome Statute enshrined *general principles of criminal law* (*nullum crimen sine lege*, *nulla poena sine lege*, non-retroactivity *ratione personae*, individual criminal responsibility, exclusion of persons under 18 from the competence of the Tribunal, irrelevance of official position, responsibility of supervisors and other superiors, non-extinguishment –non-applicability of the statutes of limitations-, the element of intentionality, circumstances exempting from criminal responsibility, factual and legal errors, superior orders and legal provisions), despite the conceptual differences between the Delegations of *droit civil* and *common law* countries.

15. W.A. Schabas, "Sentencing by International Tribunals: A Human Rights Approach", 7 *Duke Journal of Comparative and International Law* (1997) pp. 461-517.

16. Cf., in this regard, e.g., D. Thiam, "Responsabilité internationale de l'individu en matière criminelle", *in International Law on the Eve of the Twenty-First Century - Views from the International Law Commission / Le droit international à l'aube du XXe siècle - Réflexions de codificateurs*, N.Y., U.N., 1997, pp. 329-337.

17. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, volume III, 1st. ed., Porto Alegre/Brasil, S.A. Fabris Ed., 2003, p. 413; and cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, volume II, 1st. ed., Porto Alegre/Brasil, S.A. Fabris Ed., 1999, pp. 385-400 and 404-412.

18. In its Judgment of 08.03.1998 on the merits in that case, the Court conceived of *impunity* as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to

"organize the public authorities to guarantee persons subject to its jurisdiction the free and full exercise of human rights," a duty that –as the Court significantly added- "applies whether those responsible for the violations of those rights are members of the public authorities, private individuals, or groups" (para. 174).

12. These considerations of the Court were reiterated in its new *obiter dicta* in the Judgments on reparations in thefollowing cases: *Loayza Tamayo* (1998, para. 170), *Castillo Páez* (1998, para. 107), *Blake* (1999, para. 64), *Villagrán Morales et al.* (2001, para. 100), *Cesti Hurtado* (2001, para. 63), *Cantoral Benavides* (2001, para. 69), *Bámaca Velásquez* (2002, para. 64), *Trujillo Oroza* (2002, para. 97), and likewise in other *obiter dicta* in recent Judgments in the *Juan Humberto Sánchez* (2003, para. 143) and *Bulacio* (2003, para. 120) cases. Recognition of the duty of the State to combat impunity is, thus, expressed in the *case law* of the Inter-American Court.

13. All those of us who have had the experience and the responsibility of acting with dedication in the international adjudication of human rights know that crimes of State do, in fact exist, and we know what this means. In my view, the international criminal responsibility of the individual does not involve an exemption of the responsibility of the State. We are still in the early stages of a long process of evolution in this area, in which the recent establishment of the ICC constitutes one of the most significant moments in the struggle against impunity, but not the culmination as regards the international responsibility of the States. The latter is outside its scope; its determination is, rather, under the jurisdiction of the international human rights courts, which in turn cannot establish the international criminal responsibility of individuals. This segmented way of conceiving international responsibility –that of States and that of individuals- entails, in both cases, that eradication of impunity is only partial. For it to be total, comprehensive, it is necessary to affirm and determine, concomitantly, the responsibility both of the State and of the individual (the agent of the State), which are complementary.

III. Complementarity between the International Responsibility of States and the International Criminal Responsibility of Individuals.

14. In my view, international responsibility of the State and the international criminal responsibility of the individual are not mutually exclusive, but rather complementary. This is so because a public agent acts on behalf of a State, and both the State and its agent must answer for the acts or omissions attributable to both. International human rights courts focus on the international responsibility of the State, and *ad hoc* international criminal courts (for former Yugoslavia and for Rwanda) - and in the future the ICC – focus on that of the individuals involved. Neither the former nor the latter encompass the whole matter at the current stage of evolution.

15. Consideration of international responsibility must not restrict itself to the rigid segmentation of civil and criminal responsibility found in the national legal systems.

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use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives" (Series C, n. 37, para. 173).

[19]. Under Article 1(1) of the American Convention on Human Rights.

Nothing would seem to hinder it from containing aspects of both, together constituting international responsibility. The latter has its own specificity. A State may be internationally responsible for a crime, attributable both to its agents, who committed it, and to the State itself as a legal person under international law. To deny this would be to obstruct the development of international law in the current domain of international responsibility.

16. Even those who argue that criminal responsibility applies only to the individuals who commit the crimes and not to the collective persons (the States), because *societas delinquere non potest*, nevertheless recognize the existence and evolution, today, of forms of criminal responsibility of legal persons under domestic law in various countries.[20] Holding legal persons criminally responsible (e.g. for environmental protection) derives from the very capacity to act and the need to protect higher social and shared values. The State, a legal person (though an abstract one) and a subject of international law, has rights and duties regulated by the latter; its conduct is directly and effectively envisaged in the law of nations.[21] The State, as well as its agents, must therefore answer for the consequences of their acts or omissions.

17. In its final written pleadings on the instant case, *Myrna Mack Chang versus Guatemala*, on June 24, 2003, the Inter-American Commission on Human Rights established a distinction between the responsibility of the State *per se* and the individual criminal responsibility of the agents of the State –although they are interlinked- when it argued that, in the context of the *cas d'espèce*,

> "there is a possible conflict of interests between the need to protect official secret, on the one hand, and the obligations of the State to protect individual persons from the illegal acts committed by their public agents and to investigate, try, and punish those responsible for said acts, on the other hand. [...] To solve this tension, it is necessary to take into account the higher interests of justice and therefore the right to the truth.
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> [...P]ublic authorities cannot shield themselves behind the protective cloak of official secret to avoid or obstruct the investigation of illegal acts ascribed to the members of its own bodies. In cases of human rights violations [...] resorting to official secret with respect to submission of the information required by the judiciary may be considered an attempt to privilege the "clandestinity of the Executive branch" and to perpetuate impunity "(p. 11).

18. In a situation such as the one described above, determination of the international criminal responsibility of the individual is not, therefore, sufficient, because the State itself, in whose name its agents committed a crime, contributed –as a legal person under international law, to the perpetration of said crime or to its happening. In the instant case, *Myrna Mack Chang versus Guatemala*, there is a crime of State due both to the execution (planned by the highest echelons of public authority) of anthropologist Myrna Mack Chang, and to the subsequent cover-up of the facts, obstruction of justice, and impunity of those responsible, thus generating an *aggravated* responsibility.

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[20]. Cf. J. Barboza, "International Criminal Law", 278 *Recueil des Cours de l'Académie de Droit International de La Haye* (1999) pp. 82 and 96.

[21]. Cf., e.g., G. Arangio-Ruiz, *Diritto Internazionale e Personalità Giuridica*, Bologna, Coop. Libr. Univ., 1972, pp. 9-19; J.A. Barberis, *Los Sujetos del Derecho Internacional Actual*, Madrid, Tecnos, 1984, pp. 26-35.

19. At the conceptual level, I ultimately do not see how not to admit in general international law that crimes of State occur, especially insofar as there is intent (fault or blame), or tolerance, acquiescence, negligence, or omission, by the State in connection with grave violations of human rights and of International Humanitarian Law committed by its agents, even on behalf of a State policy. Under said circumstances, *societas delinquere potest*.

20. In Law, every person constitutes a center or unit of imputation. In the case of physical persons, it is the concrete and living unit of each human being, while the legal person, a creation or construction of the Law, is also a center or unit of imputation for the conduct of individuals acting on its behalf, and for the consequences for which the legal person, as well as its agents, must answer. In brief, the legal personality of a collective entity (such as the State) is a construction of the Law, and it constitutes a unit of imputation for its conduct, carried out by the individuals who compose said collective entity and who act in its behalf; thus, both the legal person and said individuals must answer for the consequences of their acts or omissions,[22] especially when they bring about grave violations of human rights and of International Humanitarian Law. In my view, international responsibility of the State and the international criminal responsibility of the individual are not mutually exclusive but rather complementary and inexorably intertwined.

IV. Types of Culpability and Crimes of State

21. This leads me to some brief reflections on the typology of culpability and, in this framework, the definition of crimes of State. In his masterly monograph, *The question of guilt,* the upright juridical philosopher Karl Jaspers established a distinction among four types of culpability: a) *criminal* culpability, resulting from acts that objectively abridge unequivocal laws, and that are provable before a court of law; b) *political* culpability, resulting from actions of rulers, of the State, for which those governed are responsible, because "every person is co- responsible for how he is governed;" c) *moral* culpability, resulting from the actions of each individual, with his own conscience as the jurisdiction; and d) *metaphysical* culpability, which K. Jaspers commented on as follows:

> "There is a *solidarity* among men as such that makes each one responsible for all wrongdoing and all injustice in the world, especially of crimes that happen in their presence or with their knowledge. If I do not do what I can to impede them, I am also guilty." [23]

22. By expressly invoking natural law in his study,[24] K. Jaspers considered that "where power does not set limits on itself, violence and terror dominate, and ultimately the annihilation of existence and of the soul."[25] The great thinker admitted the existence of collective guilt (as the political responsibility of the citizens), "but not, by this, in the same form as moral and metaphysical guilt and not as criminal guilt."[26] For

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[22]. In this regard, Luis Recaséns Siches, *Tratado General de Filosofía del Derecho*, 16ªth. ed., Mexico, Ed. Porrúa, 2002, p. 272.

[23]. Karl Jaspers, *El Problema de la Culpa*, Barcelona, Ed. Paidós/Universidad Autónoma de Barcelona, 1965 [repr. in Spanish, 1998], pp. 53-54.

[24]. Cf. K. Jaspers, *op. cit. supra* n. (17), pp. 58 and 75.

[25]. *Ibid*., pp. 55-56.

him, metaphysical guilt, in turn, is "the lack of absolute solidarity with the human being as such; [...] ultimately, true collectivity is the solidarity of all men before God."[27]

23. K. Jaspers did not excuse himself from discussing the different consequences of the various types of guilt: *criminal* guilt entails punishment; *political* guilt entails responsibility; *moral* guilt entails repent and renewal; and *metaphysical* guilt entails "a transformation of human self-awareness before God."[28] In addition, this admirable author concluded, firmly and persuasively,

> "There are crimes of State, which are always and at the same time crimes of certain individuals. [...] Whoever [...] orders or commits a crime is –that is the idea- always tried as a person by the community of States of the world. Under such a threat, the world's peace would be ensured. Humanity would join in an *ethos* comprehensible to all. Never more would we repeat what we have suffered: that men, whose dignity had been stolen by their own State, whose human rights had been abridged, who were marginalized or murdered, did not find protection in the higher community of States."[29]

24. Along this same line of thought, another juridical philosopher, Paul Ricoeur, in his essay *La mémoire, l'histoire, l'oubli*, invoking Karl Jaspers' thinking, also referred to culpability for State policies involving criminal responsibility, and expressly used the term "crime of State."[30] Said political culpability,

> "résulte de l'appartenance de fait des citoyens au corps politique au nom duquel les crimes ont été commis. [...] Cette sorte de culpabilité engage les membres de la communauté politique indépendamment de leurs actes individuels ou de leurs actes individuels ou de leur degré d'acquiescement à la politique de l'État. Qui a bénéficié des bienfaits de l'ordre public doit d'une certaine façon répondre des maux créés par l'État dont il fait partie. [...] Des institutions n'ont pas de conscience morale et [...] ce sont leurs représentants qui, parlant en leur nom, leur confèrent quelque chose comme un nom propre et avec celui-ci une culpabilité historique."[31]

25. The most enlightened doctrine of international law also contains elements leading to the definition of crimes of State. Thus, already in 1937, Hersch Lauterpacht warned that traditional respect for State sovereignty held back the development of the law of international responsibility, especially where it was most clearly present, that is, regarding the consequences of responsibility. Thus, traditional theory limited responsibility merely to reparation of damages (pecuniary and moral), without the States, due to their sovereignty, being punished. Nevertheless, by removing the State from the consequences of its own violations of the Law, this vision showed itself as a completely arbitrary one, restricting the international action of justice.[32] This being so, argued that author vehemently, opposing the prevalent doctrine of the time,

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26. *Ibid*., p. 80.

27. *Ibid*., pp. 88 and 90.

28. *Ibid*., p. 57.

29. *Ibid*., p. 131.

30. P. Ricoeur, *La mémoire, l'histoire, l'oubli*, Paris, Éd. du Seuil, 2000, pp. 423, 434 and 609.

31. *Ibid*., pp. 615 and 620.

32. H. Lauterpacht, "Règles générales du droit de la paix", 62 *Recueil des Cours de l'Académie de Droit*

> "la violation du droit international peut être telle qu'elle nécessite, dans l'intérêt de la justice, une expression de désapprobation dépassant la réparation matérielle. Limiter la responsabilité à l'intérieur de l'État à la *restitutio in integrum* serait abolir le droit criminel et une partie importante de la loi en matière de *tort*. Abolir ces aspects de la responsabilité entre les États serait adopter, du fait de leur souveraineté, un principe que répugne à la justice et qui porte en lui-même un encouragement à l'illegalité. Ce serait permettre aux individus, associés sous la forme d'État, d'acquérir, quant aux actes criminels commis (...), un degré d'immunité qu'ils ne possèdent pas agissant isolément; c'est une immunité couvrant des actes qui, parce qu'ils sont collectifs et aidés par la puissance presque infinie de l'État moderne, jouissent d'un pouvoir de destruction virtuellement illimité.
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> C'est la personnification courante de l'État, impliquant une distinction artificielle entre l'association et les membres qui la composent, qui a contribué a suggérer ce principe anarchique d'irresponsabilité morale et juridique. (...) Il ne peut guère y avoir d'espoir pour le droit international et la morale si l'individu, agissant comme l'organe de l'État peut, en violant le droit international, s'abriter effectivement derrière l'État impersonnel et métaphysique; et si l'État, en cette capacité, peut éviter le châtiment en invoquant l'injustice de la punition collective."[33]

26. As C.Th. Eustathiades appropriately underlined in his substantial and pioneering study half a century ago, States and individuals are subjects of international law, and it cannot be claimed that the international criminal responsibility of the individual replaces or "eliminates" that of the State; the latter's responsibility can also be defined by an international delict, entailing punishment that under international law has a "repressive function."[34] Individual and State responsibility can perfectly well be cumulative.[35]

V. Crimes of State with Respect to the Fundamental or Higher Interests of the International Community.

27. There is another aspect that should be highlighted in connection with the definition of crimes of State, linked to protection of the fundamental or higher interests of the international community itself, as a whole.[36] Thus, a crime of State is defined as a grave violation of peremptory international law (the *jus cogens*), which directly affects its principles and foundations, and which is a matter that concerns the international community as a whole, and should not be dealt with by analogy with categories of domestic criminal law. In any case, the concept of crimes of State must be studied in depth, and not avoided.

International de La Haye (1937) pp. 339 and 349-350.

[33]. *Ibid*., pp. 350-352.

[34]. C.Th. Eustathiades, "Les sujets du droit international et la responsabilité internationale - nouvelles tendances", 84 *Recueil des Cours de l'Académie de Droit International de La Haye* (1953) pp. 415, 417, 448, 604 and 607-608.

[35]. *Ibid*., p. 603.

[36]. Cf., e.g., J. Barboza, "International Criminal Law", op. cit. supra n. (26), p. 97; J. Quigley, "The International Law Commission's Crime-Delict Distinction: A Toothless Tiger?", 66 *Revue de droit international de sciences diplimatiques et politiques* - Genève (1988) pp. 119-120.

28. Crimes of State take shape, in brief, as especially grave violations of international law entailing an aggravated responsibility (with aggravating circumstances, thus evoking a category of criminal law); the gravity of the violation directly affects the fundamental values of the international community as a whole.[37] Critics of the concept of crimes of State, instead of bearing said values in mind, linked that concept to a mistaken analogy with criminal law in the sense that it has under domestic law.

29. As Georges Abi-Saab rightly recalls, this is not what Roberto Ago had in mind when, in 1976, he proposed the concept of international crimes or crimes of State in the renowned Article 19 of the Draft Articles on State Responsibility of the ILC. The distorted analogy with domestic criminal law ignores the specificity of crimes of State in international law, and regrettably minimizes recognition of the fundamental or higher interests of the international community, emergence of *jus cogens* in the domain of international responsibility of the States, and the need to established an *aggravated* regime of the international responsibility of the State.[38] In addition, the main purpose of this regime is precisely,

> "to defend the normative integrity of the legal system itself against patterns of behaviour which go against its most fundamental principles and thus undermine its regular functioning and credibility. (...)
>
> It can legitimately be feared that setting aside the dual regime of responsibility would be widely perceived as a reversal of the evolution of general international law from a community-oriented system back to a purely intersubjective one."[39]

30. Reaction to grave and systematic violations of human rights and of International Humanitarian Law became, in our days, a legitimate concern of the international community as a whole.[40] This is called for with even greater strength when the victims are vulnerable and defenseless, and when the structure of public authority is deformed and it is utilized to abridge the inherent rights of the human person. Now when the international community professes certain fundamental and higher values, it is necessary to accept the consequence of establishment of a special regime of *aggravated* responsibility (associated with crimes of State) insofar as there are abridgments of said values or of the rules that protect them.[41]

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[37]. A. Pellet, "Can a State Commit a Crime? Definitely, Yes!", 10 *European Journal of International Law* (1999) pp. 426-427; C. Tomuschat, "International Crimes by States: An Endangered Species?", *in International Law: Theory and Practice - Essays in Honour of Eric Suy* (ed. K. Wellens), The Hague, M. Nijhoff, 1998, pp. 253 and 265.

[38]. Establishment of said regime is precisely the aim of the aforementioned Article 19 of the ILC's Draft Articles on State Responsibility; G. Abi-Saab, "The Uses of Article 19", 10 *European Journal of International Law* (1999) pp. 339-351.

[39]. *Ibid*., pp. 350-351.

[40]. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, volume I, 2d. ed., Porto Alegre/Brasil, S.A. Fabris Ed., 2003, p. 244; A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, volume III, 1st. ed., Porto Alegre/Brasil, S.A. Fabris Ed., 2003, p. 415.

[41]. G. Abi-Saab, "The Concept of 'International Crimes' and Its Place in Contemporary International Law", *in International Crimes of State* (eds. J.H.H. Weiler, A. Cassese and M. Spinedi), Berlin, W. de Gruyter, 1989, pp. 144-145.

31. It is, then, appropriate to rescue the approach to this matter that bears in mind the fundamental or higher interests of the international community, which has led to the definition of crimes of State, with their own specificity in international law. Moreover, we must always bear in mind the fundamental principles of the law, without which the juridical order simply is not realized and it ceases to exist as such. As I stated in my Concurring Opinion in the recent Advisory Opinion No. 18 of the Inter-American Court of Human Rights, on the *Juridical Status and Rights of Migrants without Documents* (of 17.09.2003):

> - "Every legal system has fundamental principles that inspire, permeate and shape their provisions. These are the principles (...) that, evoking the first causes, sources or origins of provisions and rules, give cohesion, coherence, and legitimacy to the legal provisions and to the legal system as a whole. They are the general principles of law (*prima principia*) that give the legal order (...) its inevitable axiological dimension; they reveal the values that inspire the whole legal order and that, ultimately, provide its very foundations. This is how I conceive the presence and position of principles in any legal order, and their role in the conceptual universe of the Law. (...) Provisions and rules issue from the *prima principia* and find their meaning in them. The principles are thus present in the origins of the Law itself" (paras. 44 and 46).

32. In that same Separate Opinion, I added that the abuse and atrocities suffered by so many human beings everywhere "have ultimately awakened the *universal juridical conscience* to the urgent need to reconceptualize the very foundations of the international juridical order" (para. 25), and progress of this order is in accordance with the rise of human awareness of the need for realization of the common weal and of justice (para. 26). In this same vision, the definition both of crimes of State, based on establishment of an especially grave violation of international law, and of the respective forms of reparation, as compensations and punishments at the same time (cf. *infra*), are inescapably linked to the evolution of an international community with greater integration and solidarity, aware of the basic principles and the higher values that it must preserve and that must guide it.[42]

VI. The act of invoking the international responsibility of the State by the Human Being as a Subject of International Law.

33. In the instant Judgment in the *Myrna Mack Chang versus Guatemala* case, the Inter-American Court, when it found a violation of the rights to fair trial and to judicial protection to the detriment of the immediate next of kin of Myrna Mack Chang, ruled that the "military intelligence operation of the Presidential General Staff," which generated her murder, also "sought to conceal the facts and sought impunity of those responsible, and to this end, with tolerance by the State, it resorted to all types of means, including harassment, threats and murders of those cooperating with the courts. All this has affected the production of evidence and independence of the judiciary, has delayed the criminal proceeding, and has a negative impact on the development of this proceeding" (para. 216). In the instant Judgment of the Court, both Myrna Mack Chang and her immediate next of kin have been deemed the victims of the aforementioned violations of rights.

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42. R. Besné Mañero, *El Crimen Internacional - Nuevos Aspectos de la Responsabilidad Internacional de los Estados*, Bilbao, Universidad de Deusto, 1999, pp. 140 and 185-186.

34. This is not the first time that the Court has affirmed the expansion of the concept of victim[43] under the American Convention, to encompass both the direct victim and the indirect victims (his or her next of kin). I believe that expansion of the juridical-procedural capacity and personality of the human being is in accordance with the true needs of the contemporary international community. In my Separate Opinion in the *Villagrán Morales et al. versus Guatemala* case (the "Street Children" case, Judgment on reparations of 26.05.2001), I reflected that the indirect victims (the immediate next of kin) also:

> "have suffered an irreparable loss, as their lives will never more be the same. The loss, at a given moment of their lives, of the beloved one, has thrown them into a "*selva oscura*", wherefrom they will have to endeavour to get out, through suffering (and only suffering), in order not only to honour the memory of their dead, but also to transcend the darkness of human existence, and to attempt to get closer to the light and to know the true reality, during the time which is left to them of the brief journey of each one in this world (the very brief *cammin di nostra vita*, which does not allow us to *know* all that we need). The realization of justice contributes at least to structure their psychic life, to reawake their faith and hope, and to set in order their human relations with their fellowmen. Every true jurist has, thus, the ineluctable duty to give his contribution to the realization of justice, from the perspective of the integrality of the personality of the victims" (para. 40).

35. In that same Separate Opinion, I added:

> "For a long time I have been insisting that the great juridical revolution of the XXth century has been the one consolidated by the International Law of Human Rights, in erecting the human being as subject of International Law, endowed, as a true *complaining party* against the State, with full juridico-procedural capacity at international level[44]. The present case of the "*Street Children*", in which the forgotten ones of this world succeed to resort to an international tribunal in order to vindicate their rights as human beings, gives an eloquent testimony of this. In the ambit of application of this new *corpus juris*, it is undoubtedly the victim who appropriately assumes the central position. (...) This development appears in conformity with the very aims of Law, the addressees of whose norms are, ultimately, the human beings" (para. 16).

The true revolution of contemporary juridical thinking lies, in my view, not so much in criminal international law (as it is currently in vogue to believe), but rather in International Human Rights Law, as the latter deems that individuals, whatever the extremely adverse circumstances they may find themselves in) can invoke and put into practice (as active subjects of International Law) the international responsibility of the State for violations of the rights that are inherent to them as human beings.

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[43]. On evolution of the concept of the victim in International Human Rights Law, cf. A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987) 243-299.

[44]. Cf., e.g., A.A. Cançado Trindade, "Las Cláusulas Pétreas de la Protección Internacional del Ser Humano: El Acceso Directo de los Individuos a la Justicia a Nivel Internacional y la Intangibilidad de la Jurisdicción Obligatoria de los Tribunales Internacionales de Derechos Humanos", *in El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI - Memoria del Seminario* (November 1999), volume I, San Jose, Costa Rica, Inter-American Court of Human Rights, 2001, pp. 3-68.

VII. Nature of the international responsibility of the State, and its Relationship with the Realization of Justice and the Struggle against Impunity.

36. As long as an international human rights court cannot determine the international criminal responsibility of the individual, and an international criminal court cannot determine the responsibility of the State, impunity will probably persist, being only partly punished by the former and the latter. International responsibility of the State is neither exclusively civil (as suggested by the duty to provide reparation for damage), nor exclusively criminal (as suggested by legitimization of a punishment). It is a collective responsibility of the State, alongside the international criminal responsibility of the individual. International responsibility of the State contains both civil and criminal aspects, in the current stage of evolution of international law.

37. The viewpoint, espoused by the Inter-American Court of Human Rights in the past, according to which compensations "with exemplarizing or dissuasive purposes" have no place in international law,[45] has been completely surpassed. It is in accordance with a reactionary vision, shaped by the precepts of juridical positivism, that until recently (whether consciously or not) held back development regarding this matter, and which no longer reflects, as stated above, the current stage of evolution of international law in this regard. Furthermore, in my view, realization of the exemplarizing or dissuasive purposes can –and must- be sought not only through compensations, but also through other (non-pecuniary) forms of reparation.

38. Irrespective of the civil or criminal elements of the international responsibility of the State, I believe it is undeniable that reparations can adopt a punitive or repressive nature,[46] to ensure the realization of justice and to put an end to impunity (cf. *infra*). It is also necessary to bear in mind that, while reparations (both pecuniary and moral) benefit the injured party directly, punishment (or repressive action against the State found in violation), in turn, benefits the human community itself as a whole; not to admit this would be to allow the State found in violation to remove itself from the Law.[47]

39. As C.Th. Eustathiades (*supra*) had done, Hans Kelsen also maintained that States and individuals are subjects of international law, as the latter places obligations on both; hence the coexistence of international responsibility both of individuals (physical persons) and of States (legal persons). In the case of the States, their responsibility is collective, and H. Kelsen recognized that a State, when it commits a grave violation of international law, commits a delict or a crime.[48] Noting that the individual responsible for said violation acted on behalf of the State, H. Kelsen also

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45. Inter-American Court of Human Rights (I-ACtHR), *Velásquez Rodríguez versus Honduras* case (Compensatory Indemnification), Judgment of 21.07.1989, Series C, n. 7, p. 24, paras. 38-39; I-ACtHR), *Godínez Cruz versus Honduras* case (Compensatory Indemnification), Judgment of 21.07.1989, Series C, n. 8, p. 21, paras. 36-37.

46. M. Gounelle, "Quelques remarques sur la notion de `crime international' et sur l'évolution de la responsabilité internationale de l'État", *in Mélanges offerts à Paul Reuter - Le droit international: unité et diversité*, Paris, Pédone, 1981, pp. 317-318.

47. H. Lauterpacht, *op. cit. supra* n. (34), pp. 355-357.

48. Cf. H. Kelsen, *Principles of International Law*, N.Y., Rinehart & Co. Inc., 1952, pp. 9, 11-13, 97-100, 104-105, 107 and 114-117.

admitted that the responsibility of the State can be both objective and absolute, and under certain circumstances can also be based on fault or blame.[49]

40. In point of fact, even admitting the principle of objective or absolute responsibility of the State (as the Inter-American Court has rightly done in the case of *"The Last Temptation of Christ" versus Chile,* 2001), this does not mean that responsibility based on fault or blame is totally dismissed under any and all hypotheses or circumstances. There are cases –as in the instant *Myrna Mack Chang versus Guatemala* case- in which the *intention* of the State to cause harm or its negligence in avoiding it can be proven; fault or blame then becomes, here, the indispensable basis for responsibility of the State,[50] *aggravated* by that circumstance.

VIII. The Juridical Consequences of Crimes of State: *Aggravated* International Responsibility and the Nature and Scope of the *Reparatio*.

41. *Aggravated* responsibility is, precisely, that which is consistent with a crime of State. The renowned Article 19 of the State Responsibility Project (1976) of the ILC (*supra*), in its provision regarding "international crimes," precisely had in mind the determination of an *aggravated* degree of responsibility for certain violations of international law.[51] It did not in any way intend to suggest an analogy with categories of domestic criminal law. Once aggravated responsibility has been accepted, its juridical consequences must be established.

42. Already in 1939, long before becoming the rapporteur of the ILC on International Responsibility of the States, Robert Ago reflected that the same material fact may be apprehended by different rules within the same juridical order, ascribing juridical circumstances to it that are also different, generating the obligation to provide reparation or legitimizing application of a punishment.[52] It may thus require either the obligation to provide reparation, or application of a punishment, or both simultaneously; for R. Ago, "punishment and reparation may thus exist side by side, as effects of the same crime."[53]

43. The same juridical fact can, thus, give rise to different consequences, such as reparation and punishment. For an especially grave illegal act (e.g. a grave violation of human rights or of International Humanitarian Law), compensatory reparation (for the victim or the victim's next of kin) may not be sufficient, in which case a punitive reparation (e.g., investigation of the facts and punishment of those responsible) may be required. Both may be necessary for the realization of justice.

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49. *Ibid*., pp. 122-123.

50. Cf., in this regard, H. Lauterpacht, *op. cit. supra* n. (34), pp. 359-361 and 364.

51. I. Sinclair, "State Responsibility: *Lex Ferenda* and Crimes of State", *in International Crimes of State* (eds. J.H.H. Weiler, A. Cassese and M. Spinedi), Berlin, W. de Gruyter, 1989, p. 242.

52. Roberto Ago, "Le délit international", 68 *Recueil des Cours de l'Académie de Droit International de La Haye* (1939) pp. 424 and 426.

53. *Ibid*., pp. 428-429.

44. In 1958, Cuban jurist F.V. García Amador, who at the time was the ILC rapporteur on Responsibility of the States, noted that certain forms of reparation have a clear and distinctly punitive purpose (*punitive damages/dommages-intérêts punitifs*) and involve imputing criminal responsibility to the State for violation of certain international obligations –especially, grave violations of fundamental human rights, analogous to crimes against humanity.[54] Thus, the very "duty of providing reparation" (with an initial civil law connotation) varies according to "the nature and function of the reparation in specific cases;" reparation, thus, does not always have the same form or the same purpose, and in the case of punitive damages (cf. *infra*) it contains a criminal element of responsibility.[55]

45. The whole chapter on reparations for human rights violations requires greater conceptual and case-law development, based on recognition of the close relationship between the right to reparations and the right to justice. Said development is especially necessary in face of grave and systematic human rights violations, which in turn require a firm reproval of the illicit conduct of the State, and dissuasive reparations, to ensure non-recidivism of the injurious acts, taking into account both the expectations of the next of kin of the victim and the higher interests or needs of the society.

46. In effect, one cannot deny the close link between reparations and combating impunity, as well as ensuring non-recidivism of the injurious acts, always and necessarily from the perspective of the victims. True *reparatio*, linked to realization of justice, requires overcoming obstructions of the duty to investigate and to punish those responsible, and putting an end to impunity. In other words, contrary to what the Inter-American Court maintained in the past,[56] it is my view that reparations can perfectly well be both compensatory and punitive, with the aim of putting an end to impunity and ensuring realization of justice –which is perfectly in accordance with the current stage of development of international law.

47. The provisions of Article 63(1) of the American Convention on Human Rights[57] do in fact open a very broad horizon for the Inter-American Court of Human Rights in the matter of reparations. Exemplarizing or dissuasive reparations, consistent with an *aggravated* responsibility, may contribute to ensure non-recidivism of the injurious acts and to the struggle against impunity. In my several years of experience as a Judge at the Inter-American Court, I have been able to corroborate how the States have less difficulty complying with pecuniary reparations than with reparations pertaining to the duty to investigate and punish those responsible for human rights violations, in other words, ultimately, the realization of justice.

48. As stated in a Joint Separate Opinion in the *Loayza Tamayo versus Peru* case (Reparations, Judgment of 27.11.1998), treatment given to measures of reparation in

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54. F.V. García Amador, "State Responsibility - Some New Problems", 94 *Recueil des Cours de l'Académie de Droit International de La Haye* (1958) pp. 396-398.

55. *Ibid*., p. 409.

56. In the judgments on "compensatory indemnification" (of 1989) in the *Velásquez Rodríguez* and *Godínez Cruz* cases, *cit. supra* n. (47).

57. Article 63(1) de la American Convention provides that: "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

International Human Rights Law has been unsatisfactory, because it "starts out from analogies with solutions of private law and, especially, of civil law, within the framework of domestic legal systems," strongly influenced by merely patrimonial content and interest. This criterion is inadequate and insufficient in International Human Rights Law, in which "the determination of reparations must take into account the personality of the victim as a whole," and the impact of the violation committed on the victim or the next of kin of the victim: the starting point must be a perspective that is not merely patrimonial, but rather focused on dignity of the human person. Non-pecuniary reparations are much more important than one might assume *prima facie*, even to make the violations *cease* and remove their consequences,[58] pursuant to the terms of Article 63(1) of the American Convention.

49. While the concept of "punitive damages" is not foreign to comparative domestic case law, nor to the case law of international arbitration,[59] it is not my intention to invoke it here in the sense in which it has been used –in other contexts- as exemplary reparation that is necessarily pecuniary (involving considerable amounts[60]). Far from it. In the current context of protection, which has its own specificity, other, non-pecuniary forms of reparation have commonly been identified as "obligations to do," once again suggesting a reductionist analogy with civil law solutions.

50. These forms of reparation (such as those contained in operative paragraphs 7, 8, 9, 10, 11 and 12 of the instant Judgment in the *Myrna Mack Chang versus Guatemala* case) can well be deemed both compensatory and punitive in nature (containing both civil and criminal aspects). They have exemplary or dissuasive purposes, in the sense of preserving remembrance of the violations occurred, of providing satisfaction (a feeling of realization of justice) to the next of kin of the victim, and of contributing to ensure non-recidivism of said violations (even through human rights training and education).

51. "Punitive damages" may also be conceived in this sense, akin to the "obligations to do" that are both compensatory and punitive (thus overcoming the dichotomy between civil and criminal aspects, typical of the regime of responsibility under domestic law). I would like to mention certain significant examples from the rich case law of the Inter-American Court regarding reparations. In the *Aloeboetoe versus Suriname* case (Judgment of 10.09.1993), the Court ordered a school reopened and the creation of a foundation to assist the beneficiaries. In the *Villagrán Morales et al. versus Guatemala* case (the *"Street Children"* case, Judgment of 26.05.2001), the Court ordered that an educational center be named after the victims in the case; in a similar manner, in the *Trujillo Oroza versus Bolivia* case (Judgment of 27.02.2002), the Court ordered that an educational center be given the victim's name.

52. Other examples may be added. In the *Cantoral Benavides versus Peru* case (Judgment of 03.12.2001), the Court ordered the State to provide a university-level educational scholarship to the victim. In the *Barrios Altos* case with respect to Peru

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58. Joint Separate Opinion of Judges A.A. Cançado Trindade and A. Abreu Burelli, paras. 6-8, 10-11, 14 and 17.

59. Cf., e.g., *inter alia*, R.W. Hodgin and E. Veitch, "Punitive Damages Reassessed", 21 *International and Comparative Law Quarterly* (1972) pp. 119-132; J.Y. Gotanda, "Awarding Punitive Damages in International Commercial Arbitrations [...]", 38 *Harvard International Law Journal* (1997) pp. 59-105, respectively; and also cf. examples of the practice (both domestic and international) *in* D. Shelton, *Remedies in International Human Rights Law*, Oxford, University Press, 2000, pp. 74-75 and 288-289.

60. And entailing the risk of a "commercialization" of justice.

(Judgment of 30.11.2001), the Court ordered reparations in terms of educational benefits and payment of health service expenses; in the *Durand and Ugarte versus Peru* case (Judgment of 03.12.2001), the Court once again ordered payment of health services or expenses and psychological support. Said reparations for damages are in fact both compensatory and punitive; "punitive damages," thus understood, actually have already been applied, for a long time, in the domain of international human rights protection –which makes us recall the phrase by Molière's famous character, Monsieur Jourdain, *qui parlait la prose sans le savoir...*[61] In evolving contemporary international law, "punitive damages" *lato sensu*[62] (beyond the merely pecuniary meaning inappropriately given to them) can be an appropriate response or reaction of the juridical order against a crime of State.[63]

53. In conclusion, the facts in the instant case, *Myrna Mack Chang versus Guatemala,* demonstrate that crimes of State do exist. The facts in the instant case indicate that most contemporary international juridical doctrine is mistaken in seeking to avoid the issue. While the expression "crime of State" may seem objectionable to many international jurists (especially those petrified by the specter of State sovereignty) because it suggests an inadequate analogy with juridical categories of domestic criminal law, this does not mean that crimes of State do not exist. The facts in the instant case are eloquent evidence that they do exist. Even if another name is sought for them,[64] the existence of crimes of State does not cease for that reason.

54. 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.

55. 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

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61. M. Jourdain: - "(...) Il y a plus de quarante ans que je dis de la prose, sans que j'en susse rien, et je vous suis le plus obligé du monde de m'avoir appris cela". Molière, *Oeuvres Complètes* (*Le bourgeois gentilhomme*, 1670, act II, scene V), Paris, Éd. Seuil, 1962, p. 515.

62. It should not go unnoticed that, e.g., the Declaration adopted by the United Nations World Conference against Racism, Racial Discrimination, Xenofobia and Related Forms of Intolerance (Durban, 2001), when it foresaw measures or reparation, compensation, indemnification and others for human suffering and the "tragedies of the past" (paras. 98-106), and the respective Program of Action, in its provisions on reparations and indemnification (paras. 165-166), used a language that reveals affinities with the concept of "punitive damages" *lato sensu*.

63. N.H.B. Jorgensen, *The Responsibility of States for International Crimes*, Oxford, University Press, 2003, pp. 231 and 280.

64. Which would not avoid the skeptical exclamation of the legendary prince of Denmark:
"-(...) What do you read, my lord?
- Words, words, words".
(W. Shakespeare, *Hamlet, Prince of Denmark*, 1600, act II, scene 2).

conceptually incomplete and juridically inconsistent. With this, the construction and consolidation of the true Rule of Law will regrettably be postponed, and in the 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.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura Robles
Secretary