SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. At last, the heinous "Operation Condor" as been brought to the attention of an international tribunal, the Inter-American Court of Human Rights, to the extent that the instant case of *Goiburú et al. v. Paraguay* falls within its framework, and is a microcosm of it. In this judgment, the Court assessed the State's acquiescence as a "positive contribution to these proceedings" (para. 52), and added that "delivering a judgment in which the truth of the facts and all aspects of the merits of the case and the corresponding consequences are determined, is a way of contributing to preserve the historical memory, to make reparation to the victims' next of kin and to help avoid a repetition of similar acts" (para. 53).

2. Given the historical transcendence of this case, I am obliged to record, in this separate opinion, my reflections on the matter dealt with in the judgment that the Court has just adopted, to justify my position in this respect. In this separate opinion in the *Case of Goiburú et al.*, I will cover the following points: (a) the criminalization of grave human rights violations; (b) the context of State terrorism: '*Operation Condor*'; (c) State crime revisited; (d) international responsibility aggravated by State crime; (e) elements for an approximation to the complementarity between international human rights law and international criminal law; (f) the concealment of State crimes in "Operation Condor"; (g) Condor *redivivus*: history repeats itself; and (h) the expansion of the substantial content of *jus cogens*.

I. The criminalization of grave human rights violations

3. The facts of the *Case of Goiburú et al.* are extremely serious and fall within the framework of "Operation Condor," which characterized an era of the most brutal repression and evil in the entire history of Latin America in general and of the Southern Cone in particular. In this judgment (paras. 40 and 41), the Court recalls that, in its brief answering the application, when acquiescing to "the factual considerations" described therein regarding the merits of the case, the defendant State indicated that it:

> "[…] acknowledged that, in the past, specifically during the regime of Alfredo Stroessner (1954-1989), grave human rights violations were perpetrated that must be investigated, punished and repaired adequately by the State. […] There is no doubt that [the] obligation to ensure rights was not complied with by the State during the 1954-1989 regime, because instead of organizing the Government so that it was capable of legally ensuring the free and full exercise of human rights, it was consolidated under a repressive system which systematically violated human rights.
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> Nevertheless, it is important to mention that Paraguay, contrary to other countries of the Southern Cone, never adopted amnesty laws and recognized the non-applicability of the prescription of grave human rights violations. The State affirms that these are examples of preventive measures designed to preclude the repetition of abuses such as those that occurred during the 1954-1989 dictatorship."

4. The Court in turn, established as proven facts in this case that:

> "The forced disappearances of Agustín Goiburú Giménez, Carlos José Mancuello Bareiro and the brothers Rodolfo and Benjamín Ramírez Villalba have similar characteristics and refer to a single context, in which agents of the Paraguayan State illegally detained, maintained incommunicado, tortured and disappeared persons whose political activities were opposed to the regime of General Stroessner or who were identified as his enemies" (para. 61(14)).

These violations were perpetrated systematically and at the *inter-state* level. Thus, as the Court confirmed, "Dr. Goiburú's disappearance is an example of the coordinated actions taken by the Paraguayan and Argentine security forces under "Operation Condor." His disappearance fits within the *modus operandi* used to disappear Paraguayans in Argentina during the military dictatorship in that country" (para. 61(28).

5. On December 22, 1992, numerous documents were revealed that are kept today in the so-called "Terror Files" in Asunción, which is "one of the most important and irrefutable sources of evidence of the grave abuses committed during the dictatorship of General Stroessner. The documents provide an overview of the Stroessner regime and contain abundant evidence of human rights violations, including arbitrary detention, torture, extrajudicial executions and disappearances, as well as the repressive international cooperation" (para. 61(121)). In reality, the facts of the instant case speak for themselves. When determining the State's international responsibility in the context of this case, the Court stated in its judgment that:

> "This case has unique historic importance: the facts occurred in the context of the systematic practice of arbitrary detention, torture, execution and disappearance perpetrated by the intelligence and security forces of the dictatorship of Alfredo Stroessner, under "Operation Condor," whose characteristics and dynamics have been described in the proven facts […]. In other words, the grave acts took place in the context of the flagrant, massive and systematic repression to which the population was subjected on an inter-State scale, because State security agencies were let loose against the people at the transborder level in a coordinated manner by the dictatorial Governments concerned" (para. 62).[1]

6. Following the embodiment of the grave violations in the four 1949 Geneva Conventions on international humanitarian law (and the two 1977 Additional Protocols), the current historic process in international law of *criminalizing* such *grave* violations of human rights and international humanitarian law was gradually initiated – and has intensified in recent years. The facts concerning "Operation Condor" confirm how appropriate it was to establish a hierarchy of both laws and international illegal acts, in order to determine the legal consequences and avoid the repetition of *grave* human rights violations. Just as *jus cogens* prohibitions (cf. *infra*) have been established on the normative level and, above and beyond this, on the level of substantive law, the establishment of a ranking of violations of law (some being particularly serious, and constituting, in my opinion, true State crimes - *infra*) is being sought, in order to determine their legal consequences.

7. Indeed, recent advances in the *criminalization* of *grave* violations of human rights and international humanitarian law[2] have accompanied *pari passu* the

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[1]. The Court then observes that "during the 1970s, the fact that power in the region was held by a majority of dictatorial regimes, which shared the 'doctrine of national security' as their ideological basis allowed the repression of individuals considered to be 'subversive elements' to acquire a transborder nature through "Operation Condor" This was the code name give to the 'alliance of security forces and intelligence services' of the Southern Cone dictatorships" (para. 64).

[2]. *Cf*. G. Abi-Saab, "The Concept of 'International Crimes' and Its Place in Contemporary International Law", in *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", in *Mélanges offerts à P. Reuter* -

evolution of contemporary international law; the establishment of an international criminal jurisdiction is seen nowadays as an element that strengthens international law, overcoming basic shortcomings of the past in relation to the inability to prosecute and sanction perpetrators of crimes against humanity.[3] These advances in our times are due to the intensification of the clamor of all humanity – to the universal juridical conscience as the ultimate *material* source of all law – against the atrocities that, in recent decades, have made victims of millions of human beings throughout the world – atrocities that cannot be tolerated and that must be combated with determination.

8. We must turn our attention to the superior universal *values* underlying the whole issue of the recent creation of an international criminal jurisdiction with a permanent seat. The materialization of the international criminal responsibility of the individual (alongside the responsibility of the State), and the current process of criminalization of *grave* violations of human rights and humanitarian law constitute elements of crucial importance to combat impunity and for the treatment that should be accorded to past violations, in order to safeguard human rights.

II. The context of State terrorism: '*Operation Condor*'

9. Despite the gravity of the facts of the instant case, all the details of "Operation Condor" (in the framework of which the *Case of Goiburú et al.* is situated) have not been sufficiently clarified to date (cf. *infra*). Under this Operation, the security forces of the States of the Southern Cone coordinated, at the highest level of command, to detain illegally or arbitrarily, abduct, torture, murder or disappear thousands of persons. Although some details of this Operation remain vague even today, as one report on the matter indicates:

> "[...] There is sufficient and irrefutable evidence that State terrorism was practiced on an international scale. The documentation found and the testimonies of several of the agents involved reveal the complicity of the Paraguayan Government and police with the brutal repression exercised by the dictatorships in Argentina and Chile, as well as those of Brazil and Bolivia. It also shows how General Augusto Pinochet protected the practice of State terrorism within and outside his country. There is evidence that both Pinochet and Stroessner paid special attention to strengthening and coordinating their security services and, on several occasions, they met for this purpose."[4]

10. Indeed, the historic *Final Reports* of both the National Commission for Truth and Reconciliation (of Chile, 1991, the so-called *Rettig Report*) and the National Commission on the Disappearance of Persons (of Argentina, 1984) confirm the existence of the coordinated repression carried out by the secret services of the countries of the Southern Cone that became known as "*Operation Condor.*" The first *Final Report*, of the Commission for Truth and Reconciliation of Chile, documents the case of "33 Chilean citizens disappeared following their capture by Argentine,

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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.

[3]. As was to be expected, the *travaux préparatoires* of the Statute of the permanent International Criminal Court, adopted at the 1998 Rome Conference, in parallel to State responsibility, contributed to the prompt acknowledgement of individual international criminal responsibility within the sphere of the present and future application of the Statute – which represents a major doctrinal advance in the fight against impunity for the most serious international crimes.

[4]. E. Cuya, *op. cit. infra* n. 126, p. 6.

Paraguayan or Brazilian agents, and handed over to DINA, in just 1975 and 1976."[5] The *Rettig Report* refers expressly to "Operation Condor":

> "The origins of DINA's foreign structure seem to date back to April or May of 1974. […] From mid-1974 onward, DINA increasingly developed a "foreign capability" which included having operational forces in various countries. […] In order to engage in the same kind of political repression in other countries, DINA took the first steps toward coordinating intelligence services in the Southern Cone, including, besides Chile, the security services or similar groups in Argentina, Uruguay, Paraguay and Brazil. *The group that emerged, which was apparently coordinated by DINA, came to be called "Condor," although some think that name referred not to the group or community itself but rather to a series of coordinated operations they undertook*. DINA also maintained bilateral relations with various foreign intelligence services, including the CIA."[6]

Likewise, the corrected and updated summary of the *Rettig Report* (2nd ed., 1999) refers expressly to the "operational plan called 'Condor,' which included the elimination of political opponents."[7]

11. In its Report *"Nunca Más"* [Never Again] (the first edition of which is dated November 1984), the Argentine National Commission on the Disappearance of Persons states, in relation to the "repressive coordination" in Latin America:

> "The illegal repressive operations undertaken by the Government and the activities of persecution linked to them were not confined by geographical boundaries. The security organizations of neighboring states collaborated with these activities in reciprocal arrangements whereby people were arrested with no regard for legality, in blatant violation of the international treaties and conventions on political asylum and refuge to which our country subscribes. The agents of foreign repressive regimes operated in our country and arrested Uruguayans, Paraguayans, Bolivians and other nationals. Foreigners were clandestinely abducted with impunity and handed over to the authorities of their respective countries. […]
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> The method used consisted basically of a linking-up of illegal, repressive groups, which acted together as a single force. […]
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> The events which occurred demonstrated the existence of a typically 'multi-national' repressive apparatus. Under its protection, the foreign forces of repression were integrated into the task groups and became involved in kidnapping, interrogation under torture, assassination."[8]

12. How should we assess this immense distortion of the purposes of the State, when considering the acts carried out under "Operation Condor," which are still not completely known in all their macabre details? In the conceptual universe of law, this distortion was consummated and accentuated, in my opinion, to the extent that those responsible for exercising power (and their doctrinaires) and for legislative activities, deviated from the iusnaturalist principles of the legal system. In this regard, M. García-Pelayo pondered correctly that:

> "The rule of law signifies […] that the State's power is limited by law, but not the possibility of legitimizing any criteria by giving it the form of law […]. Even though legality is a component of the concept of the rule of law, it is also true that this is not

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5. *Ibid*., p. 5.

6. *Cit.* in *Informe Rettig*, tome II, Santiago, Chile, Comisión Nacional de Verdad y Reconciliación, February 1991, pp. 455-457 (emphasis added).

7. *Cit.* in: *Nunca Más en Chile - Síntesis Corregida y Actualizada del Informe Rettig*, 2nd. ed., Santiago, Chile, Comisión Chilena de Derechos Humanos/Fundación Ideas, 1999, p. 63.

8. *Cit.* in: *Nunca Más – Informe de la Comision Nacional sobre la Desaparición de Personas*, 20a. ed., Buenos Aires, EUDEBA, 1995, pp. 265-266.

> identified with just any type of legality, but with a legality that does not harm certain values for and on behalf of which the legal system was constituted […] and which are expressed in norms or principles that the law cannot violate. After all, the rule of law emerges from the essence of iusnaturalism […], precisely with a legality designed to safeguard certain values […], certain rights believed to be natural […]. It was only later that the comprehensive development of legal positivism separated from this underlying connection leading to a full and conscious identification of the law with laws, and of the rule of law with the lawful State […]."[9]

13. Hence the emergence of the authoritarian, repressive and fascist regimes. In the historical perspective of human thought, the Hegelian opposition to iusnaturalism[10] made a significant contribution towards this degradation, with fateful consequences: the "glorification" of the State, transformed into an end in itself, the final depositary of human freedoms, "alpha and omega," justifying the excesses of nationalism with an emphasis on "national security" and fascism (as denounced in Ernst Cassirer's acute and penetrating analysis[11] and in the reflections of Alf Ross[12]), in the context of which grave human rights violations and successive atrocities were committed.

14. But the rebirth of iusnaturalism – which, in reality, never ceased to exist – as of the middle of the twentieth century testified to the impossibility of disregarding the human conscience, the universal juridical conscience – ultimate material source of all law – which today rises up against the indifference and the impunity of those responsible (both States and individuals) for those atrocities and crimes against humanity that have made victims of thousands and thousands of persons in the countries of the Southern Cone of Latin America alone – to which can be added so many other crimes against humanity and acts of genocide perpetrated in recent decades on other continents (Europe, Africa and Asia).

15. This judgment of the Court acknowledges that the proven facts constitute a clear *situation of State terrorism*. The Court also acknowledged the frightening inversion of the purposes of the State that this has implied (constituting, once again, in my opinion, *the somber contraposition of the State and the nation*). In the words of the Court:

> "[…] The institutions, mechanisms and powers of a State should function as a guarantee of protection against the criminal activities of its agents. However, it has been verified that the State's power was orchestrated as a means and resource to violate rights that should have been respected and safeguarded, and actions were implemented using the inter-State collaboration described above. In other words, the State became the principal factor in the grave crimes committed, constituting a clear situation of 'State terrorism.'
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> In Paraguay, this situation has been recognized by the convergence of decisions adopted by the three branches of the State; the Executive, by acknowledging the State's international responsibility in this international jurisdiction and, previously, its Legislature and Judiciary" (paras. 66 and 67).

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9. M. García-Pelayo, *Las Transformaciones del Estado Contemporáneo*, 2nd ed. (10th reprint), Madrid, Alianza Edit., 1996, pp. 52-53.

10. G. Radbruch, *Filosofía del Derecho*, 4a. ed. rev., vol. I, Coimbra, A. Amado Ed., 1961, p. 77.

11. E. Cassirer, *El Mito del Estado,* 2a. ed., México/Bogotá, Fondo de Cultura Económica, 1996, pp. 311-319.

12. A. Ross, *Sobre el Derecho y la Justicia*, 2a. ed., Buenos Aires, EUDEBA, 1997, pp. 314-315.

16. In this regard, in addition to the systematization of the "Terror Files" (following the revelation of these documents on December 22, 1992), the State promulgated Act No. 838/96, on September 12, 1996, to compensate the victims of the human rights violations that occurred during the period 1954-1989, and adopted Act No. 2225, on October 6, 2003, creating the Truth and Justice Commission (para. 61(121) to 61(123)). A judgment of the First Criminal Tribunal (*de Liquidación y Sentencia)* of April 17, 2000, recognized the "common practice" at the time in question of "conceal[ing] the disappearances of detainees who were executed, an action that among the prisoners was called the '*ley de fuga'* [the escape law]" (para. 69). And, significantly, a ruling of the Third Criminal Tribunal (*de Liquidación y Sentencia*) of December 7, 2000, stated that:

> "Terrorism organized by the State itself is a form of organized crime that has occurred in numerous countries and, in particular, in Latin America, where the police forces, diplomatic service, Government officials and military officials in Government have coordinated and carried out 'cleansing tasks' and 'special death flights.' This type of criminal organization has even crossed frontiers, with agents in border countries. […]" (para. 70).

17. In other words, in the instant case, the defendant State itself has acknowledged – in a commendable spirit of procedural cooperation – its international responsibility for the existence, at the time in question, of a *criminal policy*. And, it has done so, at different times, through statements made by all its powers. Its own Judiciary has expressly characterized State terrorism as a form of organized crime; in other words a *State crime*. The international jurists who continue to deny the existence of State crimes are closing their eyes to historically proven facts, disregarding the terrible suffering of the numerous victims of such crimes and providing a lamentable disservice to the evolution of contemporary international law.

18. State crimes do exist and are much more frequent that could be supposed *prima facie*. In the present *Case of Goiburú et al.*, they were perpetrated on a transborder or inter-State scale. In a previous case heard by this Court, the *Plan de Sánchez Massacre v. Guatemala* (judgment on merits of April 29, 2004), I maintained in my separate opinion that:

> "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" (para. 35).

And, in my separate opinion in *Myrna Mack Chang v. Guatemala* (judgment of November 25, 2003), I indicated that, as subjects of international law, both the State and the individual can be held responsible for the crimes they commit, coexisting the international responsibility of both, with the corresponding legal consequences (para. 26).

19. In the instant case, State crimes have been committed on an inter-State level. The States of the Southern Cone coordinated within the framework of their "counterinsurgency" policy to torture and exterminate certain segments of their populations. What a tragic and historic irony! The State inflicted indescribable suffering – that will take decades to heal – precisely on their most valuable component, their population! As the Court concluded in this regard:

> "[D]uring the 1970s, in absolute contradiction of the principal objects and purposes of the organization of the international community established universally in the Charter of the United Nations, and the regional community in the Charter of the Organization of American States and the American Convention itself, the intelligence services of several countries of the Southern Cone of the Americas established a criminal inter-State organization with a complex assemblage, the scope of which is still being revealed today; in other words, there was a systematic practice of "State terrorism" at an inter-State level" (para. 72).

III. State crime revisited

20. The existence of a true *State crime* – an issue that I have referred to in some of my recent opinions in this Court – is, in my opinion, convincingly proved in the instant case and, furthermore, on an extensive scale by a truly inter-State network (or, to use a current expression, "transnational" or "multinational"). The secret services of the States of the Southern Cone of South America, trained by the United States of America in the grim "School of the Americas" in Panama (Canal Zone),[13] coordinated to exterminate political opponents. The facts concerning "Operation Condor" as it was known – using, in the so-called "struggle against (communist) subversion, a systematic pattern of illegal detentions and abductions, torture and ill-treatment, forced disappearances and murders, planned and executed through a State policy under the lamentable doctrine of "national security" – has gradually become known during the past decade, particularly with the discovery of the so-called "*Terror Files*" in Paraguay (although no equivalent files were kept in the other Southern Cone countries).[14] Nevertheless, not everything that occurred in that subregion during the years of the military dictatorships is known today (cf. *infra*), not even everything that took place within "Operation Condor."

21. It is precisely for this reason (since, as the Court itself has stated, the "scope" of "Operation Condor" "continues to be revealed today" (*supra*)), that it was an error not to convene a public hearing in this case, given the particular gravity and historic transcendence of the context in which the facts occurred. In its new zeal to "produce" judgments in a record time – against which I have constantly and in vain protested within the Court since this new "method" was adopted,"[15] to cater to the "productivity" graphics in its reports, which appear to have been prepared by economists rather than jurists - the Inter-American Court failed to convene (in a hasty decision, as has been its custom recently), the public hearing that was necessary, despite the State's acknowledgement of responsibility, which, in all probability, would have also cooperated procedurally during this hearing.

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[13]. Called by some the "school of assassins," where it is estimated that more than 60,000 Latin American officers were "trained" (over the period 1946-1984) in torture techniques, particularly to extract confessions from political prisoners; M. Almada, "Terrorismo Made in USA en las Américas - Las Estrategias Legales contra la Impunidad en Paraguay" (presentation in Bochum/Germany on October 14, 2005), *in* www.terrorfileonline.org/es, p. 6. and *cf.* A. Boccia Paz, M.H. López, A.V. Pecci and M.G. Giménez, *op. cit. infra* no. (49), pp. 78-79; J. Patrice McSherry, *op. cit. infra* no. (51), pp. 16-17.

[14]. *Cf.,* e.g., E. Cuya, "La 'Operación Cóndor': El Terrorismo de Estado de Alcance Transnacional", 7 *Revista Ko'aga Roñe'eta* (1996) pp. 1-9; K.M. Slack, "Operation Condor and Human Rights: A Report from Paraguay's Archive of Terror", 18 *Human Rights Quarterly* (1996) pp. 492-506.

[15]. Not by consensus, but by the decision of a majority of the judges.

22. I cannot refrain from recording my dissatisfaction on this specific point. As I indicated in my separate opinion in the very recent *Servellón et al. v. Honduras* (judgment of yesterday, September 21, 2006), when this also happened, "the public hearing that did not take place, would certainly have enhanced three aspects of this judgment: (a) it would have enriched the case file and the preparation of the case (particularly, in view of the positive attitude of procedural collaboration assumed by the State); (b) it would have fully applied the adversarial principle as regards the context of this case, and (c) it would have served as satisfaction (as a form of reparation) to the victims' next of kin" (para. 3). The Court deprived itself of additional probative elements that could have enhanced this judgment (particularly its chapter IX on the State's international responsibility in the context of the instant case), and missed a unique opportunity to make new contributions to the clarification of the somber "Operation Condor" in the context of the instant case.

23. Consequently, I consider that chapter IX of this judgment is unsatisfactory because the Court could and should have gathered additional elements with greater care and time. However, it has been proved that the instant case fits within a policy of *State terrorism* that victimized, in the cruelest and most brutal way, thousands of individuals and their next of kin in the countries that established "Operation Condor," which even allowed grave human rights violations to be committed "extraterritorially," in other countries and on other continents. How can the existence of *State crime* be denied in the face of a State policy of extermination?

24. It is solely in the heads of "illuminated" international jurists that State crime does not exist, when they affirm dogmatically that the State cannot commit a crime, period. They continue to ignore episodes such as those of the instant case, which have been historically proved, and other cases of massacres heard and judged by the Inter-American Court (for example, the cases of the massacre of *Barrios Altos*, the *Plan de Sánchez Massacre*, the massacre of the *19 Tradesmen*, the *Mapiripán Massacre*, the massacre of the *Moiwana Community*, the *Pueblo Bello Massacre*, and the *Ituango Massacre*s), and murders planned at the highest levels of State power (for example, the *Barrios Altos*, and *Myrna Mack Chang* cases), where the defendant States have even acknowledged their international responsibility for the facts.

25. Something does not cease to exist merely because someone affirms that it cannot exist. International jurists cannot remain indifferent to the human suffering evident from proven historical facts. While contemporary international legal doctrine insists in denying what has been proved historically – the crimes committed by the State – it will be eluding an extremely serious issue, with its juridical consequences, compromising its own credibility. My dissatisfaction it not restricted to the doctrinal level, as I have indicated above, it also encompasses the procedural level; in other words, the procedure followed by the Court in this case.

IV. International responsibility aggravated by State crime

26. State crime within the framework of "Operation Condor" has been described well in a recent study in that regard, published in several languages:

> "'Operation Condor' [...] represents the worst and final deviation of the rule of law and civilized society. The most senior authorities of several countries agreed to cooperate in State terrorism; in other words, in addition to failing to protect the human rights of their own citizens, they conspired to violate international protection norms: the right of asylum, the protection of refugees, *habeas corpus,* and the carefully elaborated

> procedures for the extradition of those facing charges for crimes committed in one country and arrested in another.
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> As a secret treaty, Condor elevated crimes against human rights to the highest level of State policy, under the direct control of heads of State and ministers. And, its existence as an official instrument of six nations prevents these regimes from explaining their crimes against human rights as isolated acts of deluded officials or corrupt agents."[16]

27. The list of the numerous victims of the Stroessner regime has been prepared and published by the *Comité de Iglesias para Ayudas de Emergencia* (CIPAE) based on the so-called "Terror Files" and with the symbolic title *Testimonio contra el Olvido*. The introduction to this document presents some important data, including: first, with the emergence of the moral conscience in the history of human thought, there is no way of denying the involvement of society (with the exception of the oppressed and tortured) in the establishment and preservation for so many years of the regime of oppression.[17] Second, the grave human rights violations that occurred during the years of repression (1954-1989) were perpetrated with society's apparent indifference to human suffering.[18]

28. Third, the "permanent repressive State harassment,"[19] of a truly "totalitarian military State,"[20] persisted throughout the extended state of siege (1954-1987), during which "the Executive had discretionary powers to detain, torture, expel, or even disappear persons."[21] And finally, fourth, these grave systematic human rights violations were perpetrated insufflated by the illusion of material "progress" disseminated by the militarism and "understood from the perspective of State totalitarianism."[22] The victims in the case of *Goiburú et al. v. Paraguay* before the Inter-American Court appear in the document *Testimonio contra el Olvido* based on the "Terror Files": it mentions Agustín Goiburú,[23] Carlos José Mancuello,[24] Rodolfo Ramírez Villalba[25] and Benjamín Ramírez Villalba.[26] Numerous other victims had their rights violated by the same repressive regime and this *context of terror*, characteristic of authentic State crime prolonged over time and multiplying defenseless victims, cannot be minimized here.

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16. J. Dinges, *Operación Cóndor - Una Década de Terrorismo Internacional en el Cono Sur*, Santiago, Ed. B Chile, 2004, pp. 39-40; J. Dinges, *Os Anos do Condor - Uma Década de Terrorismo Internacional no Cone Sul*, São Paulo, Cia. das Letras, 2004, pp. 40-41; J. Dinges, *The Condor Years - How Pinochet and His Allies Brought Terrorism to Three Continents*, N.Y./London, The New Press, 2004, pp. 17-18.

17. CIPAE, *Testimonio contra el Olvido - Reseña de la Infamia y el Terror (Paraguay 1954-1989)*, Asunción, Ed. CIPAE, 1999, p. 10.

18. *Ibid*., pp. 12 and 25.

19. *Ibid*., p. 34.

20. *Ibid*., p. 32.

21. *Ibid*., p. 26.

22. *Ibid*., p. 32.

23. *Ibid*., pp. 85 and 340.

24. *Ibid*., p. 392.

25. *Ibid*., pp. 120 and 462.

26. *Ibid*., pp. 120 and 462.

29. In recent years, the Inter-American Court has heard successive cases of massacres and has ruled on them (for example, the cases of the massacre of *Barrios Altos*, the *Plan de Sánchez Massacre*, the massacre of the *19 Tradesmen,* the *Mapiripán Massacre*, the massacre of the *Moiwana Community*, the *Pueblo Bello Massacre*, the *Ituango Massacre*s). It has also decided cases that occurred in the context of systematic human rights violations (for example, the *Barrios Altos* and *Myrna Mack Chang* cases, among others), planned (at the highest hierarchical level) and executed by the State. As I indicated in my opinions in all these cases, they reveal the urgency of promoting a greater approximation or convergence between international human rights law and international criminal law and, in particular, between the work of international human rights courts and international criminal courts.

30. In the abovementioned cases, among others, the Inter-American Court established the *aggravated* international responsibility of the State and its legal consequences in relation to reparations. I have referred to this in detail in my opinions in those cases. In the instant case, we are faced with a situation, in the extremely grave context of "Operation Condor," of State terrorism on an international or, more precisely, an inter-State scale. In my opinion, this constitutes the State's *aggravated* international responsibility for authentic *State crimes*, with all their legal consequences.

31. *Aggravated* international responsibility is also constituted owing to the State's failure to comply with both the obligation to protect and the obligation to investigate the harmful facts, due to its failure to provide effective domestic recourses to prosecute and sanction the perpetrators of the atrocities. It should be recalled that, in its well-formulated application (of June 8, 2005), submitted to the Court in this case, the Commission indicated that:

> "More than 27 years have elapsed without the next of kin of the victims knowing, through final, executed judgments encompassing all the mastermind, perpetrators and accessories after the fact, what occurred to Agustín Goiburú, Carlos José Mancuello, Rodolfo Ramírez Villalba and Benjamín Ramírez Villalba, where there remains are, who was responsible for their forced disappearance, what punishment was imposed, and what reparation corresponds to them from the courts; all this constituting a context of impunity that affects their fundamental rights protected by the Convention." (para. 152).

32. All these aggravating circumstances lead to a greater approximation between the international responsibility of the State and the international criminal responsibility of the individual (perpetrator of the atrocities), as I indicated in my separate opinion (paras. 38-40) in the *Mapiripán Massacre v. Colombia* (judgment of September 17, 2005). The responsibility of the criminal does not exempt the State from its own aggravated responsibility, owing to its criminal policies, because the State, endowed with its own legal status, can be accused, as any other subject of law.[27]

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[27]. *Cf.* A.A. Cançado Trindade, "Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited," in *International Responsibility Today - Essays in Memory of O. Schachter* (ed. M. Ragazzi), Leiden, M. Nijhoff, 2005, pp. 253-269.

33. The current historical process of the *criminalization* of grave violations of human rights and of international humanitarian law, to which I have already referred, came to revitalize the principle of the universal jurisdiction that already has a long record in the sphere of international law and which is to be found in the confluence between international human rights law (the collective guarantee) and international criminal law. Indeed, there are extremely important aspects that have been entirely disregarded by legal doctrine to date and that I have indicated in my opinions in those cases, which, I believe, merit special attention today, and which can promote the approximation or convergence to which I refer. I will refer to them briefly below.

V. Elements for an approximation to the complementarity between international human rights law and international criminal law

34. There are elements that lead to an approximation to the complementarity between international human rights law and international criminal law that have been insufficiently dealt with by legal doctrine to date. In this regard, I wish to identify five elements that I will examine below: (a) the international legal status of the individual; (b) the complementarity between the international responsibility of the State and that of the individual; (c) the conceptualization of crimes against humanity; (d) prevention and guarantee of non-repetition; and (e) reparatory justice in the confluence of international human rights law and international criminal law.

1. The international legal status of the individual

35. The first element for an approximation in the complementarity between international human rights law and international criminal law is, in my opinion, the individual in his legal capacity as both an *active* (international human rights law) and a *passive* (international criminal law) subject of international law; that is, as the possessor of rights and bearer of obligations that arise directly from international law. The condition of the individual as such represents, as I have indicated in numerous writings, the most precious legacy of juridical science as of the middle of the twentieth century.[28]

36. Indeed, the permanent International Criminal Court (ICC) represents an advance in relation to the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and for Rwanda, as regards, in particular, the presence and participation of the victims during the proceedings (Rome Statute, Articles 68 and 75, and Rules of Procedure, rules 16, 89 and 90-93).[29] A Victims and Witnesses Unit has been established within the ICC Registry (Statute, Article 43(6), and Rules of Procedure, rules 16-19).[30] In addition, the creation of a Trust Fund for the benefit of victims was

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[28]. *Cf., inter alia*, A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law", *Recueil des Cours de l'Académie de Droit International de la Haye* (2005) caps. IX-X (to be published); A.A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, 1st ed., Santiago, Editorial Jurídica de Chile, 2001, pp. 317-374 (2nd ed., 2006); A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104; A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, tome III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 447-497.

[29]. ICC, *Selected Basic Documents Related to the International Criminal Court*, The Hague, ICC Secretariat, 2005, pp. 47, 52, 122 and 151-153.

[30]. *Ibid*., pp. 32 and 122-124.

ordered (Statute, Article 79, and Rules of Procedure, rule 98),[31] and this was established by decision of the Assembly of the States Parties of December 3, 2005.[32]

37. The presence of the victims in the proceedings before the ICC represents, I believe, a significant point of confluence between contemporary international criminal law and international human rights law. This is no longer merely punitive justice, but also reparatory justice (Rome Statute, Article 75), establishing different forms and means of reparation (ICC Rules of Procedure, rule 98),[33] both individual and collective. It is not surprising that, in its first rulings – in the *Th. Lubanga Dyilo* case and the investigation of the *situation in the Democratic Republic of the Congo*[34] - the ICC has referred expressly to the rich case law of the Inter-American Court.[35] International human rights law and contemporary international criminal law can provide mutual reinforcement, to the ultimate benefit of the individual.

38. The consolidation of the legal status of the individual in international criminal law, as an active and passive subject of international law strengthens accountability under international law for abuses perpetrated against the individual. Thus, individuals are also bearers of obligations under international law, which is reflected in the consolidation of their international legal status.[36] Developments in international legal status and international responsibility occur *pari passu*, and this whole evolution testifies to the formation of the *opinio juris communis* to the effect that the gravity of certain fundamental human rights directly affects basic values that are shared by the international community as a whole.[37]

2. The complementarity between the international responsibility of the State and that of the individual

39. An additional element for an approximation to the complementarity between international human rights law and international criminal law resides in the area of responsibility, encompassing, in my opinion, at the same time, the State and the individual (as subjects of international law). As I have been indicating since my separate opinions in the *Myrna Mack Chang* (2003) and *Plan de Sánchez Massacre*

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31. *Ibid*., pp. 53 and 155-156.

32. The decision was adopted by consensus; *cf.* ICC, *4th Assembly of the States Parties of the International Criminal Court* (The Hague, 28.11-03.12.2005), p. 2. For the text on the Trust Fund for Victims, cf. ICC, *Trust Fund for Victims*, resolution ICC-ASP/4/Res.3, pp. 320-333.

33. ICC, *Selected Basic Documents Related to the International Criminal Court*, The Hague, ICC Secretariat, 2005, pp. 52 and 155.

34. *Cf.* International Criminal Court (ICC)/Pre-Trial Chamber I, doc. ICC-01/04, of January 17, 2006, pp. 14-15, 29 and 34; ICC-01/04, of March 31, 2006, p. 12; and ICC-01/04, of July 31, 2006, pp. 8-9.

35. E.g., in cases such as: *Blake v. Guatemala*, 1998; *the Street Children v. Guatemala*, 1999; *El Amparo v. Venezuela*, 1996; *Neira Alegría v. Peru*, 1996; *Paniagua Morales v. Guatemala*, 2001; *Baena Ricardo et al. v. Panama*, 2001.

36. H.-H. Jescheck, "The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute," 2 *Journal of International Criminal Justice* (2004) p. 43.

37. *Cf.,* e.g., A. Cassese, "Y a-t-il un conflit insurmontable entre souveraineté des États et justice pénale internationale?" in *Crimes internationaux et juridictions internationales* (eds. A. Cassese and M. Delmas-Marty), Paris, PUF, 2002, pp. 15-29; and *cf.,* generally [various authors], *La Criminalización de la Barbarie: La Corte Penal Internacional* (ed. J.A. Carrillo Salcedo), Madrid, Consejo General del Poder Judicial, 2000, pp. 17-504.

(2004) cases among others,[38] and in a recent essay,[39] the State's international responsibility and the international criminal responsibility of the individual are effectively complementary.

3. The conceptualization of crimes against humanity

40. A third point of approximation to the intersection between international human rights law and international criminal law resides in the conceptualization of crimes against humanity, which they both include. Such crimes are perpetrated by individuals, but following State policies, with the powerlessness or tolerance or connivance of society, which does nothing to prevent them; explicit or implicit, State policy is present in crimes against humanity, which even rely on the use of State institutions, personnel and resources.[40] Such crimes are not limited to a simple isolated action of deluded individuals. They are coldly calculated, planned and executed.

41. The definition of crimes against humanity is a major contemporary victory, encompassing, in my opinion, not only international human rights law but also international criminal law, by reflecting the universal condemnation of grave and systematic violations of fundamental and non-derogable rights; in other words, violations of *jus cogens*. Consequently the so-called *statutes of limitations* typical of domestic or national legal systems are not applicable.[41] The establishment of crimes against humanity is, I believe, one more manifestation of the *universal juridical conscience*; of its prompt reaction to crimes that affect humanity as a whole.

42. Crimes against humanity are situated at the confluence between international criminal law and international human rights law. They are particularly grave and originated in the crimes against humanity linked to armed conflicts; however, nowadays it is accepted, from a humanist perspective, that they also have implications in the domain of international human rights law (for example, in cases of the systematic torture and humiliation of the victims), which deny humanity in general and seek to dehumanize their victims.[42] Crimes against humanity are of a massive and systematic nature, they are organized and planned as part of a policy of State crime – as conceptualized in their case law by the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda[43] - they are authentic State crimes.[44]

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38. *Cf.* also, for example, my separate opinions in the cases of the *Mapiripán Massacres* (2005) and the *Ituango Massacres* (2006), both in relation to Colombia.

39. A.A. Cançado Trindade, "Complementarity between State Responsibility and Individual Responsibility...", *op. cit. supra* n. (27), pp. 253-269.

40. *Cf.,* in this sense, e.g., M.Ch. Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd. rev. ed., The Hague, Kluwer, 1999, pp. 252, 254-257. This is the understanding that underlies the United Nations Convention against Torture, which criminalizes the conduct of State agents under international law; *ibid*., p. 263, and *cf.* p. 277.

41. M.Ch. Bassiouni, *op. cit. supra* n. (40), pp. 227 and 289.

42. Y. Jurovics, *Réflexions sur la spécificité du crime contre l'humanité*, Paris, LGDJ, 2002, pp. 21-23, 40, 52-53 and 66-67. And *cf.* E. Staub, *The Roots of Evil – The Origins of Genocide and Other Group Violence*, Cambridge, University Press, 2005 [reprint], pp. 119, 121 and 264.

43. Regarding contemporary international case law on crimes against humanity, cf. J.R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 2nd ed., Ardsley/N.Y.,

43. Organized and planned by the States, at their most senior levels, State crimes are executed by many individuals complying with a criminal policy of the State in question, constituting authentic State crimes, which immediately involve the international responsibility of both the State in question (in the sphere of international human rights law) and that of the individuals who executed them.[45] Hence the importance of preventing them, given their particular gravity, as well as the guarantee of non-repetition (cf. *infra*).

4. Prevention and guarantee of non-repetition

44. Both international human rights law and international criminal law seek, each in its own way, the *prevention* and the *guarantee of non-repetition* of the harmful acts. Both combat impunity. In cases of grave violations, the former determines exemplary reparations (or exemplary damages), as a legal consequence of authentic State crimes. The latter determines penalties for those who, in the name of a State policy, have committed acts of genocide, or crimes against humanity, or war crimes.

45. There is no statute of limitations, typical of domestic law; there is no extinguishment or extinctive prescription in cases of grave violations of human rights and international humanitarian law. The Inter-American Court has made its corresponding contribution, as exemplified in its "leading cases" in this regard of *Barrios Altos v. Peru* (2001) and *Bulacio v. Argentina* (2003). The respective international tribunals are not bound by *res judicata* (typical of domestic law) either, because the applicable law is distinct, international human rights law and international criminal law, respectively.

5. Reparatory justice in the confluence of international human rights law and international criminal law

46. Alongside the recognition of the individual's *ownership* of rights, arising directly from international law (*supra*), contemporary legal writings have accepted the existence of obligations also attributed by international law directly to the individual. And – what it significant – grave violations of such rights, for example, by crimes against humanity, involve *international* individual criminal responsibility, *irrespective* of the provisions of *domestic* law on the matter.[46] Contemporary developments in international criminal law have had a direct effect on the emergence of individual international criminal responsibility (the individual as both an active and passive subject of international law, possessor of rights and bearer of obligations arising directly from public international law (*droit des gens*)), and the principle of universal jurisdiction.

47. It is worth adding that the decisions of the United Nations Security Council to create the *ad hoc* International Criminal Tribunals for the Former Yugoslavia (1993) and for Rwanda (1994), added to the establishment of the permanent International Criminal Court by the 1998 Rome Conference to prosecute those responsible for

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Transnational Publs., 2000, pp. 103-120 and 490-494; L.J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Leiden, Nijhoff, 2005, pp. 151-198.

[44]. *Ibid*., pp. 93, 183, 192, 199, 228, 278-279, 310, 329-331, 335, 360 and 375.

[45]. *Cf. ibid*., pp. 375-377, 403, 405-407, 441 and 447-448.

[46]. M.Ch. Bassiouni, *Crimes against Humanity*..., *op. cit. supra* n. (40), pp. 106 and 118.

grave violations of human rights and international humanitarian law (for acts of genocide, crimes against humanity and war crimes), gave new impetus to the international community's struggle against impunity – as a violation *per se* of human rights – in addition to reaffirming the principle of the international criminal responsibility of the individual[47] for such violations; thus seeking to avoid or prevent future crimes.

48. More than 50 years ago, the renowned Nuremberg Tribunal created a new paradigm by stating that individuals can be punished for violating international law, because crimes against international law are committed by individuals and "not by abstract entitles," and only by punishing these perpetrators can the provisions of international law be implemented.[48] This famous *obiter dictum* has effectively paved the way towards the development of international criminal law, which has filled a gap in classic international law, by seeking to end impunity.

49. However, this *obiter dictum* has never satisfied me completely, because it reflects only one aspect of the reality, by ignoring the State's role in the perpetration of these crimes. Hence, the *parallel* development of international criminal law and international human rights law, whereas I consider that their convergence and complementarity should be fostered. Even though States appear to be "abstract entities" when providing basic services, such as free access to education and public health care, to employment and housing (often failing to comply with their obligations in these areas and alienating large segments of the population), they are *very concrete realities* when they punish, sanction, exclude, imprison, torture and murder "undesirables" – as revealed in this specific case as well as many others.

VI. The concealment of State crimes in "Operation Condor"

50. Reparatory justice gains importance in the face of one of the most shocking aspects of "Operation Condor": the concealment of the State crimes perpetrated in the context of this Operation, from the planning to the execution of its criminal policies. A study published in Asunción in 2002, indicates that:

> "Rarely in the recent history of Latin America has the truth about massive plans and actions of repression taken so long to come to light as in the case of Operation Condor. Only recently, a quarter of a century later, is it possible to know a significant part of the documented history of those acts. It is still far from being the complete and final version. This has been because the criminal acts committed involved the repressive forces of several countries and because the secret pact signed in the 1970s continued afterwards, through networks of concealment and impunity. […]
>
> Operation Condor, which only now is beginning to be reconstructed based on the documentary evidence that has begun to emerge, is a paradigmatic example of the effects of State terrorism. […] Even though its winding-up was meticulously planned, Condor has ended up losing the fight against remembrance."[49]

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[47]. *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.

[48]. *Cf.,* e.g., *inter alia*, Ph. Sands (ed.), *From Nuremberg to The Hague - The Future of International Criminal Justice*, Cambridge, University Press, 2003, pp. 32-33.

[49]. A. Boccia Paz, M.H. López, A.V. Pecci and M.G. Giménez, *En los Sótanos de los Generales - Los Documentos Ocultos del Operativo Cóndor*, Asunción, Expobook/Servibook, 2002, pp. 295-296. The statistical information is still not final, but it is calculated that more than 30,000 Latin Americans were assassinated within the framework of "Operation Condor"; *ibid*., p. 83. and *cf.* also, for example, N.C. Mariano, *op. cit. infra* n. (52) pp. 18-19.

51. Indeed, "Operation Condor" (formally created in November 1975, but with some previous activities in 1973-1974, and which, in 1976, achieved its highest level of repression, and in 1980 entered into decline), was planned by the "intelligence services" of the countries of the Southern Cone,[50] to implement a *State extermination policy*, characterized by the *concealment* of transborder "counterinsurgency" operations by death squadrons (illegal and arbitrary detentions, abductions, torture, murders or extrajudicial executions, and the forced disappearance of persons). The participating States endowed it with a *para-State structure* – to further a State criminal policy – which enabled those who held power to hide the atrocities and avoid the application of international law and human rights guarantees, with total irresponsibility and impunity.[51]

52. The reports and testimony of survivors – only recently published – of the atrocities committed in the countries of "Operation Condor" are terrifying; in addition to the above-mentioned crimes, the most macabre forms of torture were perpetrated, together with collective executions, the kidnapping of babies and young children and alteration of their identities, confinement in clandestine prisons (and clandestine cemeteries), the use of fierce dogs against detainees in infrahuman conditions, and micro-fractures caused by the wheels of vehicles passing over the hands and feet of detainees[52] - forming a Dantesque picture of horrifying torments. The concern to conceal the crimes was permanent:

> "During the war to exterminate those who were opposed to the dictatorship, the military tried to hide the corpses, the evidence of their crimes. Almost two thousand political prisoners were thrown into the sea alive, from cargo aircraft. Thousands of others were buried in clandestine cemeteries."[53]

53. The macabre "death flights" were carried out on a weekly basis, taking 15 to 20 prisoners each time, who were told that they were being transferred to "ordinary prisons," and who, "believing that they would be released from the torment of torture, boarded the [Argentine Navy] cargo aircraft with relief"; because:

> "the executioners had the problem of where to hide the thousands of dead, since the clandestine cemeteries were full. The solution was to throw the condemned men into the sea so that they would be eaten by sharks."[54]

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[50]. Also, the involvement of the United States "intelligence service" in this Operation has today been proved, with the declassification of some (although not all) of the United States' documents on Condor in June 1999; Condor as a component of a broader United States "counterinsurgency" strategy to prevent social movements in favor of political, economic and social change in the region; J. Patrice McSherry, *Predatory States*..., *op. cit. infra* n. (51), pp. XVIII-XIX, 241, 249-250 and 252-253; and *cf*. J. Dinges, *Operación Cóndor*..., *op. cit. supra* n. (16), p. 22. The FBI was well aware of everything that was happening in the mid-1970s in the countries of the Southern Cone, as indicated in paragraph 61(8) of this judgment of the Inter-American Court.

[51]. J. Patrice McSherry, *Predatory States - "Operation Condor" and Covert War in Latin America*, Lanham, Rowman & Littlefield Publs., 2005, pp. 4-5, 7-11, 21-23 and 242-243.

[52]. N.C. Mariano, *Operación Cóndor - Terrorismo de Estado en el Cono Sur*, Buenos Aires, Ed. Lohlé Lumen, 1998, pp. 73, 87, 62 and 95.

[53]. N.C. Mariano, *op. cit. supra* n. (52), p. 45.

[54]. *Ibid*., pp. 30-31.

The atrocities of "Operation Condor" reveal that human evil has no limits. In the context of this Operation, the case of Dr. Agustín Goiburú is today considered "paradigmatic of the cooperation of the [Paraguayan and Argentine] intelligence services.[55] Since the participating States concealed their criminal policy, it is not surprising that, following the discovery, of the "Terror Files" (the main documentary source in Latin America of the evil "Operation Condor"), in Paraguay in December 1992, "hundreds of *habeas data* were filed by former political prisoners or their next of kin."[56]

VII. Condor *Redivivus*: History repeats itself

54. The repressive acts of "Operation Condor," on a widespread inter-State scale, that occurred – as has been historically proved – in the 1970s, can happen again. If they have occurred once or more, they can happen again; atrocities have repeated themselves over time. I fear that, today, such acts may be being repeated. And, just as many years elapsed before we learned about the acts committed under the criminal policies of the States in "Operation Condor" (and we still do not know everything today), perhaps it will take a long time before we learn about what is happening today – also with State concealment.

55. In the 1970s, it was the "war [*sic*] against subversion," today it is the "war [*sic*] against terrorism." In both cases, for the perpetrators of grave human rights violations, the ends justify the means, and anything is allowed, outside the law. As an advocate of the current "war [*sic*] on terrorism," stated recently, "those who are not with us are against us," exactly as the members of the Army, all Heads of State, engaged in "Operation Condor" affirmed in the 1970s in order to sow terror and try to justify State crimes.

56. State crimes really exist, they have existed and continue existing, as recent reports indicate (for example, a report for the Parliamentary Assembly of the Council of Europe) on systematic practices of torture in prisons (even secret prisons), on other continents – authentic concentration camps – in the so-called "war [*sic*] on terrorism").[57] Today, also, information is emerging on the practice of torture (under the euphemism of "intensive interrogation"), illegal and arbitrary detentions, abductions, clandestine flights, and forced disappearances of persons, of possible extrajudicial executions, also on an inter-State scale.[58]

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[55]. A. Boccia Paz, M.H. López, A.V. Pecci and M.G. Giménez, *op. cit. supra* n. (56), p. 205; and cf. J. Dinges, *Operación Cóndor*..., *op. cit. infra* n. (16), p. 305.

[56]. A. Boccia Paz, M.A. González and R. Palau Aguilar, *Es Mi Informe - Los Archivos Secretos de la Policía de Stroessner*, 4a. ed., Asunción, CDE, 1994, p. 30.

[57]. *Cf.* D. Marty *(rapporteur),* "Alleged Secret Detentions in Council of Europe Member States", Strasbourg, Council of Europe Parliamentary Assembly/Committee on Legal Affairs and Human Rights, doc. AS/Jur(2006)03.rev., of January 22, 2006, pp. 1-25; D. Marty (rapporteur), "Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States", Strasbourg, Council of Europe Parliamentary Assembly/Committee on Legal Affairs and Human Rights, doc. AS/Jur(2006)16-II, of June 7, 2006, pp. 1-71 (limited circulation).

[58]. *Cf.* J. Patrice McSherry, *Predatory States*..., *op. cit. supra* n. (51), pp. XXI, 247-249 and 254; and *cf.* J. Dinges, *Operación Cóndor*..., *op. cit. supra* n. (16), p. 22.

57. Very recently, on July 6, 2006, the European Parliament adopted a resolution on "the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners."[59] In its extensive resolution, the European Parliament began by affirming that:

> "The fight against terrorism cannot be won by sacrificing the very principles that terrorism seeks to destroy, notably that the protection of fundamental rights must never be compromised; [...] terrorism must be fought by legal means and it must be defeated while respecting international and national law."[60]

It then states that the practices of "secret detention" and the abduction of suspects in the territory of the States members involve the State's international responsibility (paras. 2 and 8). It expresses its profound concern owing to the use of European airspace and airports for suspects to "be transferred illegally to the custody of the CIA or the US military or to other countries" (para. 13).

58. The said Resolution "condemns the practice of extraordinary renditions, which is aimed at ensuring that suspects are not brought before a court but are transferred to third countries to be interrogated, where they could be tortured, and detained in facilities controlled by the USA or local authorities." The Resolution also "considers unacceptable the practices of certain governments consisting in limiting their responsibilities by asking for diplomatic assurances from countries in respect of which there is strong reason to believe they practice torture" (para. 10). And, in continuation the same Resolution:

> "Stresses that the prohibition of torture or cruel, inhuman and degrading treatment as defined in Article 1 of the U.N. Convention against Torture, is absolute and allows no exceptions whether in times of war or threat of war, domestic political instability or any other emergency; recalls that cases of *incommunicado* detention, abduction or extraordinary rendition constitute violations of fundamental rights in International Law, in particular Articles 3 and 5 of the European Convention on Human Rights, especially since these acts are synonymous with torture or inhuman and degrading treatment" (para. 29)[61].

59. Condor *redivivus*! Its atrocious and inhuman methods and practices continue to be applied, in a different context, today! When will humanity learn from the lessons of the past, from the terrible suffering of previous generations? If it has not learned yet, perhaps it will never learn. When will human beings cease to dehumanize their fellow human beings? If they have not ceased to do so today, perhaps they will never cease to do so. And they will continue to co-exist with evil, and submit to it. This is why the struggle for the primacy of the *recta ratio*[62] has not ended, as in the myth of Sisyphus.

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[59]. European Parliament, doc. A6-0213/2006, pp. 1-6.

[60]. Preamble, *considerandum* C.

[61]. In addition to this Resolution of the European Parliament, the Secretary General of the Council of Europe presented recommendations – in light of article 52 of the European Convention on Human Rights – in his recent Reports to the Government of the European States, on news that suggested that "individuals, notably persons suspected of involvement in acts of terrorism, may have been arrested and detained, or transported while deprived of their liberty, by or at the instigation of foreign agencies, with the active or passive co-operation of States Parties to the Convention or by States Parties themselves at their own initiative, without such deprivation of liberty having been acknowledged"; cf. Council of Europe, doc. SG/Inf(2006)5, of February 28, 2006, pp. 1-15; Council of Europe, doc. SG/Inf(2006)13, of June 14, 2006, pp. 1-8.

[62]. *Cf.,* in this regard A.A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brazil, Edit. Del Rey, 2006, pp. 3-106 and 385-409.

60. It is not surprising then that the problem of evil has been and continues to be a major concern throughout the history of human thought. Over the centuries, philosophers, theologians and scholars have examined the problem, without finding a conclusive or completely satisfactory answer. As R.P. Sertillanges stated in an authoritative work on the issue:

> "L'angoisse du mal s'impose à toutes les âmes, à tous les groupes et à toutes civilisations. [...] Le problème du mal met en cause la destinée de chacun, l'avenir du genre humain."[63]

61. In brief, terror cannot be fought by terror, but rather by law. As I stated also in my separate opinion in the *Ituango Massacres v. Colombia* (Judgment of July 1, 2006), lamentably and tragically, State crimes:

> "are continually repeated in different latitudes, amidst the manipulation or fabrication of so-called 'public (or published) opinion. The 'post-modern' human being seems to have lost his memory and, consequently, State crimes continue to be repeated. Thus, the *invasion and occupation* of Iraq in 2003, perpetrated by the so-called "coalition" of States, contrary to the Charter of the United Nations and in one of the most flagrant violations of international law of recent decades, has been followed by the killing of innocent people, arbitrary detentions (even in secret prisons), the systematic practice of torture and cruel, inhuman and degrading treatment, and severe and systematic violations of human rights and international humanitarian law, notorious and public and reliably proved,[64] in implementation – evidently wrongful – of a State policy (the so-called "war [*sic*][65] on terror"). Since its judgments in *Cantoral Benavides v. Peru* (of August 18, 2000, paras. 95-96) and *Maritza Urrutia v. Guatemala* (of November 27, 2003, para. 89), the Inter-American Court has consistently maintained the absolute prohibition of torture and ill-treatment, under any circumstances, including war, threat of war, counter-terrorism activities, internal conflicts, or internal states of emergency or instability" (para. 38).

VIII. The expansion of the substantial content of *jus cogens*

62. Despite what I have described above with regard to "Operation Condor," I would like to conclude this separate opinion on a positive note. In this case of *Goiburú et al. v. Paraguay*, the Court has reaffirmed its *consistent case law* in the sense that the crimes of torture and forced disappearance of persons are violations of *jus cogens*, entailing the obligation to investigate them and punish those responsible (paras. 84, 93 and 128), in order to end impunity. In the instant case, the States of the Southern Cone established a repressive plan to commit these violations systematically and conceal their acts, which are aggravating circumstances (aggravated international responsibility).

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63. R.P. Sertillanges, *Le problème du mal - l'histoire*, Paris, Aubier, 1948, p. 5.

64. *Cf.,* very recently, e.g.: United Nations/Committee against Torture, *Consideration of Reports Submitted by States Parties under Article 19 of the Convention - United States of America: Conclusions and Recommendations of the Committee against Torture*, document CAT/C/USA/CO/2, of 18 May 2006, pp. 1-11; Council of Europe/Parliamentary Assembly - Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions in Council of Europe Member States - Memorandum* (rapporteur D. Marty), document AS/JUR/2006/03.rev, of January 22, 2006, pp. 1-25; Council of Europe/Parliamentary Assembly - Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States - Report* (rapporteur D. Marty), document AS/JUR/2006/16/Part II, of June 7, 2006, pp. 1-71.

65. A term inadequately used with ominous consequences.

63. In these circumstances, ensuring that justice is done, so as to end impunity, is an important form of reparation. In this regard, in my separate opinion in *Bulacio v. Argentina* (Judgment of September 18, 2003), I stated that law reacts in the face of the extreme violence with which human beings treat each other, since this is unacceptable. I reflected that:

> "It is here that the Law intervenes, to halt the cruelty with which human beings treat their fellow men or women […] to affirm its own prevalence over brute force, to attempt to organize human relations on the basis of *recta ratio* (natural law), to mitigate human suffering, and thus make life less unbearable, or perhaps bearable – understanding that life with suffering, and solidarity, is preferable to non-existence […]
>
> This explains the importance of the realization of justice. The juridical order (both domestic and international) sets itself up to oppose violent acts that breach human rights, to ensure that justice prevails and, thus, to provide satisfaction to the direct and indirect victims. In his work on *L'Ordinamento Giuridico*, originally published in 1918, the Italian philosopher of the Law, Santi Romano, argued that punishment is not attached to specific juridical provisions, but rather is inherent to the juridical order as a whole, operating as an "effective safeguard" of all subjective rights protected by said order.[66] […]
>
> The Law, issuing from and moved by human awareness, provides *reparatio* (from the Latin *reparare*, "to dispose once again"); it also intervenes to avoid repetition of the wrong, in other words, to establish, as one of the non-pecuniary forms of reparation of damage resulting from violations of human rights, the *guarantee of non-recidivism of the injurious acts.* […]
>
> *Reparatio* does not end what happened, the violation of human rights. The wrong was already committed;[67] *reparatio* avoids a worsening of its consequences (due to indifference of the social milieu, due to impunity, due to oblivion). From this perspective, *reparatio* takes on a dual meaning: it provides satisfaction (as a form of reparation) to the victims, or to their next of kin, whose rights have been abridged, while also reestablishing the legal order weakened by said violations –a legal order erected on the basis of full respect for the inherent rights of the human person.[68] The legal order, thus reestablished, requires guarantees of non-recidivism of the injurious facts. *Reparatio* disposes once again, reestablishes order in the lives of the surviving victims, but cannot eliminate the pain that is inevitably incorporated into their daily existence. The loss is, from this angle, strictly irreparable. Even so, *reparatio* is an unavoidable duty of those responsible for rendering justice. In a stage of greater development of human awareness, and therefore of the Law itself, undoubtedly the realization of justice overcomes any and every obstacle, even those derived from the abusive exercise of rules or precepts of substantive law […]. *Reparatio* is a reaction, in the field of the Law, to human cruelty, expressed in various ways: violence in dealing with other human beings, impunity of those responsible with respect to the public authorities, indifference and oblivion in the social milieu.
>
> This reaction of the legal order breached (the *substratum* of which is precisely respect for human rights) is ultimately moved by the spirit of human solidarity.[…] Reparation, thus understood - providing satisfaction to the victims (or their next of kin) and guarantees of non-recidivism of the injurious facts, in the framework of the realization of justice - is undeniably important. Rejection of indifference and oblivion, and guarantees of non-recidivism of the violations, are expressions of solidarity between the victims and the potential victims, in the violent world, empty of values, in which we live. It is, ultimately, an eloquent expression of the ties of solidarity that link the living to their deceased ones […]"[69] (paras. 30, 33, 35 and 37-40).

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66. Santi Romano, *L'ordre juridique* (trad. 2nd ed., reed.), Paris, Dalloz, 2002, p. 16.

67. Human capacity both to promote good and for evil has not ceased to attract the attention of human reflection over the centuries; cf. F. Alberoni, *Las Razones del Bien y del Mal*, Mexico, Gedisa Edit., 1988, pp. 9-196; A.-D. Sertillanges, *Le problème du mal*, Paris, Aubier, 1949, pp. 5-412.

68. As I had pointed out in my Separate Concurring Opinion the previous day, with regard to Advisory Opinion No. 18 of the Inter-American Court on the *Juridical Status and Rights of Undocumented Migrants* (on September 17, 2003, para. 89.

69. Regarding these ties of solidarity, see my Separate Opinions in the *Bámaca Velásquez v. Guatemala* case (Judgments of the Inter-American Court on merits of November 25, 20002, and on reparations of February 22, 2002).

64. In this judgment, after underscoring the "continuing or permanent nature" of the crime of forced disappearance of persons (para. 83) and the context of impunity that still prevails in violation of Articles 8(1) and 25 of the American Convention, the Court took a step forward with regard to the *jus cogens* prohibitions, in the direction that I have been advocating for some time. Indeed, in my separate opinion in *Myrna Mack Chang v. Guatemala* (judgment of November 25, 2003), I sustained that, faced with the existence of a State crime, the right to justice is essential; in other words, the right to a legal system that effectively safeguards fundamental human rights (paras. 9-55).

65. I believe that this is an essential requirement of *jus cogens*, particularly when it has been proved that the State itself has planned (at the most senior level), and massively and systematically perpetrated crimes, making victims of individuals subject to their jurisdiction (and even subject to the jurisdiction of other States, such as in "Operation Condor"). In my separate opinion in the recent case of the *Pueblo Bello Massacre v. Colombia* (judgment of January 31, 2006), I observed that:

> "The indivisibility between Articles 25 and 8 of the American Convention [...] leads me to characterize access to justice, understood as the *full realization* of justice, as forming part of the sphere of *jus cogens*; in other words, that the inviolability of all the judicial rights established in Articles 25 and 8 considered *together* belongs to the sphere of *jus cogens.* There can be no doubt that the fundamental guarantees, common to international human rights law and international humanitarian law,[70] have a universal vocation because they are applicable in any circumstance, constitute a peremptory right (belonging to *jus cogens*), and entail obligations *erga omnes* of protection" (para. 64).[71]

66. In the same separate opinion, I argued that, in the same way as the Inter-American Court had expanded the substantial content of *jus cogens* in its historical Advisory Opinion No. 18 on the *Juridical Status and Rights of Undocumented Migrants* (of September 17, 2003), to include the basic principle of equality and non-discrimination, the moment had come to take another qualitative leap forward in the development of its case law, by proceeding to the necessary and "continued expansion of the substantial content of *jus cogens*" by recognizing that this also encompasses the right of access to justice *lato sensu*; in other words, the right to full jurisdictional assistance, even to end impunity.

67. To my great satisfaction, after insisting on this fundamental issue within the Court for three years, during my period as a judge of the Court, it has finally given this new qualitative leap forward that I have been advocating, when it affirms in this judgment, based on the gravity of the facts of the *cas d'espèce*:

> "[..] Access to justice is a peremptory norm of international law and, as such, gives rise to obligations *erga omnes* for the States to adopt all necessary measures not to let such violations remain unpunished, either by exercising their jurisdiction to apply their domestic law and international law to prosecute and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so" (para. 131).

68. By correctly affirming that the *right for justice to be done* is a peremptory norm of *jus cogens*, I consider that the Court has shown that there are reasons to continue hoping: because, in the end, sooner or later, even in the face of the most

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[70]. E.g. Article 75 of Protocol I (1977) to the 1949 Geneva Conventions on international humanitarian law.

[71]. And *cf.* paras. 60-62 of the same separate opinion.

cruel State crimes, the law reacts – as testified by this judgment of the Inter-American Court. Nowadays, the universal juridical conscience has awoken to acknowledge human suffering judicially and to seek its reparation by the guarantee of the primacy of justice in human relations.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary