REFLECTIONS ON THE INTERNATIONAL ADJUDICATION OF CASES OF GRAVE VIOLATIONS OF RIGHTS OF THE HUMAN PERSON([1])

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ABSTRACT

The coexistence of contemporary international tribunals has fostered the access to justice for the determination of international responsibility. There are approximations and convergences between the International Law of Human Rights, International Humanitarian Law, the International Law of Refugees, and contemporary International Criminal Law. The central place is of the human person. In addressing grave violations of the rights of the human person, international tribunals have a humanist common mission of rendering justice as a form of reparation. Jusnaturalism prevails over legal positivism, conscience stands above the "will".

Keywords

Human person, rights of; international jurisdiction, international responsibility; international personality; international capacity; crimes of State; massacres; international tribunals; justice, realization of; reparations.

I. INTRODUCTION: VIOLENCE AND THE REACTION OF JUSTICE

Parallel to the advances of international justice in the last decades, the world of our times remains torn by violent conflicts in distinct continents, with large-scale and grave violations of rights of the human person, causing numerous victims. This appears as a permanent feature, which continues to afflict the international community as a whole. The atrocities of the past have left many lessons, which regrettably have not been learned. This should not, however, lead to despair. Attention should be turned to a reassuring phenomenon of our times, namely, the *jurisdictionalization* of international law itself, evidenced by the creation and coexistence of multiple contemporary international tribunals[2].

This development has sought to enlarge and secure the *access to justice* at international level to a growing number of *justiciables*. This phenomenon has asserted the aptitude of international tribunals to resolve disputes in distinct domains of international law[3], at both *inter*-State and *intra*-State levels. The expansion of international jurisdiction has taken place *pari passu* with the corresponding expansions of international responsibility, as well as of international legal personality and capacity (cf. *infra*).

The determination of the international responsibility of States (by international human rights tribunals) and of the international criminal responsibility of individuals (by international criminal tribunals), guided by fundamental principles, and values shared by the international community as a whole, is a reaction of contemporary international law to *grave* violations of human rights and of International Humanitarian Law[4]. Contemporary international tribunals have a humanist common mission[5], and due to their co-existence and labour, the number of *justiciables* has considerably enlarged in distinct continents.

Thanks to the work of all those international tribunals, the international community no longer accepts impunity for international crimes[6], for *grave* violations of the rights of the human person. It is widely reckoned nowadays that perpetrators of grave violations of human

rights and of International Humanitarian Law (States or individuals), have to respond judicially by the atrocities perpetrated, irrespective of their nationality or hierarchical level in the scale of State public power.

The international community counts nowadays on the configuration of a true *droit au Droit*, of the persons victimized in any circumstances, including amidst the most complete adversity[7]. It is highly gratifying to contribute to secure the access of victims to justice. As I pointed out at the Hague Academy of International Law last year in this respect,

> The more than one hundred cases in the adjudication of which I participated within the Inter-American Court of Human Rights [IACtHR], added to some others, along the last decade, within the International Court of Justice [ICJ], in disclosing, in my perception, the most somber that exists in human nature (in grave violations of human rights and international humanitarian law, some of them with extreme cruelty), have reinforced my firm belief in this sense[8].

In effect, contemporary international tribunals have in the last decades been exercising their respective jurisdictions in respect of successive conflicts, entailing large-scale and grave violations of the rights of the human person at *inter*-State level, as well as, mostly, at *intra*-State level. In the current year of 2018, which marks the 70th. anniversary of the Universal Declaration of Human Rights, I have had the occasion to address the experience gathered in the international adjudication of cases of grave violations of human rights on three successive occasions, namely: in my lecture, as guest speaker, in the ceremony of the opening of the judicial year of the Inter-American Court of Human Rights (IACtHR) on 30.01.2018; in my address to a Conference held at the European Court of Human Rights (ECtHR); and in my address to a Joint Seminar of the ECtHR and the IACtHR, held in Strasbourg on 09.11.2018.

May I, in the present article, systematize the elements which I have examined on those three very recent occasions, bringing together points of the utmost relevance to a proper understanding of the matter. My initial reflections which focus on: a) the central place of the human person and limits to State voluntarism; b) the human factor in international adjudication: conscience above the "will"; c) the human ends of the State and their projection into international adjudication; d) the expansion of international jurisdiction, responsibility, personality and capacity, centred on the victims; and e) international adjudication of cases of massacres.

In logical sequence, I shall then dwell upon the following points: a) the existence of crimes of State; b) the determination of the aggravated international responsibility; c) the determination of the condition of victim; d) approximations and convergences between the International Law of Human Rights, International Humanitarian Law, and the International Law of Refugees; e) the legacy of *ad hoc* international criminal tribunals; f) prompt reparations, in distinct forms, for grave violations of the rights of the human person; and g) the realization of justice as a form of reparation, - followed by my final considerations.

II. THE CENTRAL PLACE OF THE HUMAN PERSON AND LIMITS TO STATE VOLUNTARISM

There is a growing awareness nowadays that the exercise of the international judicial function goes beyond the settlement of disputes as presented by the contending parties to the international tribunal at issue: it encompasses furthermore *to say what the Law is* (*juris dictio*), thus contributing to the progressive development of international law[9]. In *saying what the Law is*, international tribunals are to take into account law and justice together, as situations of injustice are not sustainable.

In this connection, I deemed it fit to single this out in the ICJ, e.g., in my extensive Dissenting Opinion (paras. 1-316) in the case of *Jurisdictional Immunities of the State* (Germany *versus* Italy, with Greece intervening, merits, Judgment of 03.02.2012), warning that there cannot be State immunity for international crimes perpetrated in execution of a State policy. I sustained that the victims of oppression and atrocities have the *right to the Law* (*droit au Droit / derecho al Derecho*), the right of access to justice, which cannot be restrained in cases of *delicta imperii*, of crimes of State (cf. *infra*). The central place is that of the human person.

In this respect, a basic feature, and a remarkable contribution of the joint work of international human rights tribunals can be found, in my perception, in the position they have firmly taken of asserting precisely the *central place* of the human person in the present domain of protection, and of setting *limits to State voluntarism*, thus safeguarding the integrity of the respective human rights Conventions and the primacy of considerations of *ordre public* over the "will" of individual States.

Their basic posture has thus been *principiste*, without making undue concessions to State voluntarism. I had the occasion to point this out in my address as guest speaker, being then President of the IACtHR, in the opening of the judicial year of 2004 of the ECtHR, at the *Palais des Droits de l´Homme* in Strasbourg, in the following terms:

> La Cour européenne (CourEDH) et la Cour interaméricaine (CourIADH) ont toutes deux, à juste titre, imposé des limites au volontarisme étatique, protégé l´intégrité de leurs Conventions respectives des droits de l´homme, ainsi que la prépondérance des considérations d´*ordre public* face à la volonté de tel ou tel État, élevé les exigences relatives au comportement de l´État, instauré un certain contrôle sur l´imposition de restrictions excessives par les États, et, de façon rassurante, mis en valeur le statut des individus en tant que sujets du Droit International des Droits de l´Homme en les dotant de la pleine capacité sur le plan procédural[10].

This is illustrated, e.g., by the decisions of the ECtHR in the cases of *Belilos* (1988), of *Loizidou* (preliminary objections, 1995), of *Ilascu, Lesco, Ivantoc and Petrov-Popa* (2001); as well as the decisions of the IACtHR in the cases of the *Constitutional Tribunal* and of *Ivtcher Bronstein* (jurisdiction, 1999), as well as of *Hilaire, Benjamin and Constantine* (preliminary objection, 2001).

Furthermore, both the IACtHR and the ECtHR have pronounced in recent years on cases of *continuing situations* in grave violations of the rights of the human person[11]. Examples are provided by the Judgments of the IACtHR in the cases of *Blake* (1998-1999, reparations), of *Trujillo Oroza* (2002, reparations), of the *Sisters Serrano Cruz* (2004-2005); as well as the Judgments of the ECtHR in the cases of *Varnava et alii* (2009), of *Cyprus versus Turkey* (merits, 2001, and reparations, 2014), of *Ilascu et alii* (2004), of *Xenides-Arestis* (2006), of *Palić* (2011), of *Krstić* (2013), of *Kurić et alii* (2014).

The assertion of an *objective* law, beyond the "will" of individual States, is, in my perception, a revival of jusnaturalist thinking. Judicial settlement of international disputes is needed as a guarantee against unilateral interpretation by a State of conventional obligations. After all, the basic foundations of international law emanate ultimately from the human conscience, from the universal juridical conscience, and not from the "will" of individual States[12]. The assertion of the *unity* of the law is intertwined with the *rule of law* at national and international levels, as access to justice takes place, and ought to be preserved, at both levels[13].

III. THE HUMAN FACTOR IN INTERNATIONAL ADJUDICATION: CONSCIENCE ABOVE THE "WILL"

In its Judgment (of 03.02.2015) in the case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia), the ICJ held that, while the prohibition of genocide has the character of *jus cogens*, and the Genocide Convention contains obligations *erga omnes*, its own jurisdiction is based on consent, on which it depends even when the dispute submitted to it relates to alleged violation of norms having peremptory character. After its own examination of the facts, it decided to reject the Applicant´s claim.

I appended a long Dissenting Opinion to that Judgment of the ICJ, wherein I began by drawing attention to the framework of the settlement of the dispute at issue, ineluctably linked to the imperative of the *realization of justice*, in the light of *fundamental considerations of humanity*. The *principle of humanity*, in my perception, permeates the whole Convention against Genocide, essentially *people-oriented*, as well as the whole *corpus juris* of protection of the rights of the human person, which is essentially *victim-oriented*, encompassing the converging trends of the International Law of Human Rights, International Humanitarian Law and the International Law of Refugees, besides contemporary International Criminal Law (para. 84)[14].

The principle of humanity, - I proceeded, - has a clear incidence in the protection of human beings, in particular in situations of *vulnerability* or *defencelessness* (paras. 58-65). The Genocide Convention is *people-centered* and *victim-oriented* (rather than State-centric) thus showing the need, in the adjudication of the *cas d´espèce*, to go beyond the strict inter-State outlook, focusing attention on the people or population concerned, in pursuance of a humanist outlook, in the light of the principle of humanity[15].

In interpreting and applying the Genocide Convention, - I added, - attention is to be turned to the victims, human groups in situations of vulnerability or defencelessness, rather than to inter-State susceptibilities (paras. 494-496). The imperative of the *realization of justice*, calls here for a people-centered outlook, focused on the victims (pp. 520-522); it acknowledges that conscience (*recta ratio*) stands above the "will" of States (para. 518).

There are other recent examples to the same effect. In its Judgments (of 10.05.2016) in the three recent cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands *versus* United Kingdom, India and Pakistan), e.g., the ICJ decided, by a split-majority, to uphold one of the preliminary objections, grounded on the alleged absence of a dispute between the contending parties. The ICJ then found that it could not proceed to the consideration of the merits of the cases.

In my extensive Dissenting Opinions appended to those three Judgments, I strongly criticized the "formalistic reasoning" of the ICJ for the determination of the existence of a dispute, introducing a higher threshold that went beyond its own *jurisprudence constante* (paras 11-12). As there is no general requirement of prior notice of the applicant State's intention to initiate proceedings before the ICJ (para. 13)[16], - I added - the ICJ has unduly heightened the threshold to establish the existence of a dispute, in laying down the "awareness" requirement, seemingly "undermining its own ability to infer the existence of a dispute from the conflicting courses of conduct of the contending parties" (para. 19).

Moreover, in my three Dissenting Opinions in the present three cases of *Nuclear Desarmament Obligations*, I deemed it necessary to warn that the presence of evil has marked human existence along the centuries. Ever since the eruption of the nuclear age in August 1945, some of the world's great thinkers have been inquiring whether humankind has a future (paras. 93-101), and have been drawing attention to the imperative of respect for life and the relevance of humanist values (paras. 102-114).

Also in international legal doctrine there have been those who have been stressing the needed prevalence of human conscience, the universal juridical conscience (as "the ultimate material source of international law"), over State voluntarism (paras. 115-118). This is the position I have upheld, pondering that

> one cannot face the new challenges confronting the whole international community keeping in mind only State susceptibilities; such is the case with the obligation to render the world free of nuclear weapons, an imperative of *recta ratio* and not a derivative of the "will" of States. In effect, to keep hope alive it is necessary to bear always in mind humankind as a whole (para. 119).

In my next line of considerations, I focused on the attention of the U.N. Charter to peoples (as shown in several of its provisions) and also to the safeguard of values common to humankind, and to respect for life and human dignity. This new vision advanced by the U.N. Charter, and espoused by the Law of the United Nations, has, in my perception,

> an incidence upon judicial settlement of international disputes. Thus, the fact that the ICJ's mechanism for the handling of contentious cases is an interState one, does not mean that its reasoning should also pursue a strictly interState dimension; that will depend on the nature and substance of the cases lodged with it. And there have been several cases lodged with the Court that required a reasoning going well beyond the interState dimension. Such reasoning beyond the interState dimension is faithful to the U.N. Charter, the ICJ being "the principal judicial organ of the United Nations" (para. 125).

The nature of a case before the ICJ, - I proceeded, - may well call for a reasoning going beyond the strictly interState outlook, as the *cas d´espèce* concerning the obligation of nuclear disarmament, - a matter of concern

to humankind as a whole, - which requires attention to be focused on peoples, in pursuance of a humanist outlook. The distinct series of U.N. General Assembly resolutions, - I proceeded, - give expression to an *opinio juris communis* in condemnation of nuclear weapons (paras. 45 and 150).

And as also sustained by general principles of international law and international legal doctrine, - I added, - nuclear weapons are in breach of international law, of International Humanitarian Law and of the International Law of Human Rights, of the U.N. Charter, and of *jus cogens*, for the devastating effects and sufferings they can inflict upon humankind as a whole (paras. 142-143).

I further warned that the survival of humankind cannot be made to depend on the "will" and the insistence on "national security interests" of a handful of privileged States; the "universal juridical conscience stands well above the `will´ of individual States" (paras. 150 and 224). In the path towards nuclear disarmament, - I went on, - the peoples of the world cannot remain hostage of individual State consent, in the light of the current historical process of *humanization* of international law (paras. 190-193).

This process of *humanization* which stands against the positivist outlook unduly overlooks the *opinio juris communis* as to the illegality of all weapons of mass destruction, including nuclear weapons, and the obligation of nuclear disarmament, under contemporary international law (paras. 194-200). Conventional and customary international law go together, - I added, - in the domain of the protection of the human person, as disclosed by the Martens clause, with an incidence on the prohibition of nuclear weapons (paras. 201-209 and 315). After all, the existence of nuclear weapons is the contemporary tragedy of the nuclear age; today, more than ever, human beings need protection from themselves. Nuclear weapons have no ethics, and ethics cannot be separated from law, as taught by jusnaturalist thinking (para. 213).

The initiatives, *inter alia*, of the establishment of nuclearweaponfree zones, and of the Conferences on the Humanitarian Impact of Nuclear Weapons (paras. 246-287), "have gone beyond the interState outlook"; in my perception, there is great need, in the present domain, "to keep on looking beyond States, so as to behold peoples' and humankind's quest for survival in our times" (para. 299). Furthermore, as nuclear weapons, "as from their conception, have been associated with overwhelming destruction" (para. 300), there is great need of keeping attentive to issues of principle and to fundamental values (para. 316).

In my own understanding, - I added, - *opinio juris communis* - to which U.N. General Assembly resolutions have much contributed - has had a much broader dimension than the subjective element of custom, being a key element in the formation of a law of conscience, so as to rid the world of the inhuman threat of nuclear weapons (paras. 296-308). There is nowadays a vast *corpus juris* on matters of concern to the international community as a whole, overcoming the traditional interState paradigm of the international legal order (paras. 309-310).

This can no longer be overlooked in our days: the interState mechanism of the *contentieux* before the ICJ "cannot be invoked in justification for an interState reasoning" (para. 310). As "the principal judicial organ" of the United Nations, - I proceeded, - "the ICJ has to bear in mind not only States, but also `we, the peoples´, on whose behalf the U.N. Charter was adopted" (para. 314). I then concluded that "[a] world with arsenals of nuclear weapons, like ours, is bound to destroy its past, dangerously threatens the present, and has no future at all. Nuclear weapons pave the way into nothingness" (para. 331)[17].

IV. THE HUMAN ENDS OF THE STATE AND THEIR PROJECTION INTO INTERNATIONAL ADJUDICATION

The growing awareness of the human ends of the State has in recent years projected itself into the international adjudication of cases of grave violations of rights of the human person, even if with distinct outcomes. It has recently done so even in the inter-State *contentieux*, not without difficulties. For example, in my extensive Dissenting Opinion in ICJ´s Judgement in the case of the *Application of the U.N. Convention on the Elimination of All Forms of Racial Discrimination* (CERD - Georgia *versus* Russian Federation, of 01.04.2011), I sustained that the ICJ should have rejected the preliminary objections by means of a proper interpretation of the compromisory clause (under Article 22 of the CERD Convention), in the light of the CERD

Convention as a whole, taking into account its legal nature and material content (paras. 64-78), above all to protect the *justiciables* in situation of particular vulnerability (para. 185).

I further sustained that compromissory clauses of the kind are directly linked to the *right of access to justice* of the *justiciables*, under human rights treaties like the CERD Convention (para. 207). I warned that, in declaring itself without jurisdiction to proceed to the examination of the case as to the merits, the ICJ, in my understanding, failed to value, from the correct humanist perspective, the sufferings and needs of protection of the victimized population (*summum jus, summa injuria*) (paras. 145-166). I thus firmly disagreed with the voluntarist and restrictive position taken by the ICJ in the c*as d´espèce* (paras. 1-214), sustaining that the compromissory clause of Article 22 the CERD Convention should have been interpreted taking into account also the object and purpose of that Convention, as a human rights treaty (paras. 64-118), so as to secure the realization of justice.

On other occasions, however, the human ends of the State were duly taken into account by the ICJ[18], including in the exercise of its advisory function. Thus, in my lengthy Separate Opinion appended to the ICJ´s Advisory Opinion on the *Declaration of Independence del Kosovo* (of 22.07.2010), I drew attention precisely to the human ends of the State and the humanist vision of the international legal order. I underlined the special care, in historical sequence, taken by the League of Nations´ minorities and mandates system, the U.N. trusteeship system (and non-self-governing territories), the U.N. contemporary experiments of international administration of territories, in respect of the conditions of living of the population, all of them revealing "a *humanizing* perspective" (para. 231).

Contemporary *jus gentium* (*droit des gens*), - I proceeded, - has advanced a *humanist* vision of the international legal order, making it clear that the State was historically conceived and came to exist for the human person, and international organizations have been faithful to the observance of the principle of humanity *lato sensu*. This is historically evidenced, well beyond the strict inter-State dimension, by the pioneering experiments of the systems of mandates and trusteeship (para. 76), making it clear that human beings, or the "population" or the "people", are "the most precious constitutive element of the condition of State" (*statehood*) (paras. 76-77).

It may be recalled that the causes of the pioneering experiments of mandates and trusteeship (followed by the international administration of territories) are found in the common purpose: in the light of the *fundamental principle of humanity*, to safeguard the "peoples" or "populations" at issue from exploitation, abuses and cruelty, in sum, to safeguard the dignity of the human person (para. 94). And I added, in my aforementioned Separate Opinion appended to the ICJ´s Advisory Opinion on the *Declaration of Independence of Kosovo*, that

> The lessons accumulated, by those who witnessed or survived the successive massacres and atrocities of the last hundred years, and those who study and think seriously about them today, cannot but lead to this humanist acknowledgement: in the roots of those juridical institutions (mandates, trusteeship, international administration of territories) we detect the belated consciousness of the *duty of care for the human kind*. This is, after all, in my own perception, their most invaluable common denominator (para. 96).

Furthermore, I singled out, *inter alia*, the importance of the principles of international law in the framework of the Law of the United Nations, and in relation to the *human ends* of the State (paras. 177-211), further leading to the overcoming of the strictly inter-State paradigm in contemporary international law.

V. THE EXPANSION OF INTERNATIONAL JURISDICTION, RESPONSIBILITY, PERSONALITY AND CAPACITY, CENTRED ON THE VICTIMS

The aforementioned jurisdictionalization of international law, brought about by the current and reassuring coexistence of international human rights tribunals and international criminal tribunals, brings to the fore other related issues deserving of close attention in our days, such as, e.g., the expansion of international jurisdiction, responsibility, personality and capacity. In effect, one witnesses in our times the consolidation of the subjectivity (active as well as passive, respectively) of individuals in contemporary international law.

In my understanding, this issue is related to the right of direct access to justice as the right to the *realization* itself of justice, as an imperative of *jus cogens*. The IACtHR has rightly proceeded to the jurisprudential acknowledgment of the expansion of the material content of *jus cogens*[19], encompassing the absolute prohibition of torture as well as cruel, inhuman or degrading treatment, the principle of equality and non-discrimination, and the right of access to justice *lato sensu* (comprising the formal access, the guarantees of due process of law, and the faithful compliance with its judgments).

There is growing awareness that the aforementioned expansion of international jurisdiction, responsibility, personality and capacity is *victim-oriented*, the central position being that of the *justiciables*, those seeking justice. Although large-scale violations of human rights continue to subsist, the reactions to them are nowadays immediate and far more effective, so as to secure the prevalence of justice. And justice has been achieved in our days even in cases wherein the victims or their close relatives found themselves in the most complete vulnerability or adversity, if not defencelessness. Justice has been achieved even in respect of mass crimes[20].

The advent and labour of international human rights tribunals and international criminal tribunals have enhanced the recognition of human beings as subjects of international law, ultimate addressees of the norms of the law of nations (*droit des gens*)[21]. The multiplicity of contemporary international tribunals has, moreover, come to enlarge the access to justice (*lato sensu*, formal and material) in our days, and to contribute to put an end to impunity, with the attainment of rule of law (État de Droit, Estado de Derecho,) in a democratic society.

International human rights tribunals as well as international criminal tribunals have operated decisively to this effect[22], and their jurisprudential advances in recent years would be unthinkable some decades ago. They have effectively brought justice often to the victimized ones, including in situations of systematic and generalized violence, and in mass atrocities. They have been much contributing to the struggle against impunity, in the present age of accountability, of individuals as well as States. Contemporary international tribunals have thus demonstrated that nobody is above the law, - neither the governors, nor the governed, nor the States themselves. International law applies directly to States, international organizations and individuals.

Justice has been achieved in our days even in cases wherein the victims or their close relatives found themselves in the most complete vulnerability or adversity, if not defencelessness. This would hardly have been anticipated a few years or decades ago, e.g., in the legislative phase of human rights treaties and instruments. The fact that this is nowadays a reality, is revealing of the advances of international justice, despite so many obstacles and difficulties, gradually overcome.

International human rights tribunals - and, to a lesser degree, international criminal tribunals), - have contributed to secure the *centrality* of victims (the most vulnerable ones) in international legal procedure. In thus fulfilling a real need of the international community (of securing such protection to those in need of it), such international tribunals have been fostering the reassuring historic process which we bears witness of, and contributes to, what I have deemed it fit to name, along the years, as the *humanization* of contemporary international law[23].

VI. INTERNATIONAL ADJUDICATION OF CASES OF MASSACRES

In effect, a few years or decades ago, no one could imagine that *grave* violations of human rights and of International Humanitarian Law were to be adjudicated by international tribunals, as they have been in recent years. No one could imagine, a few years or decades ago, that cases of *massacres*, of true *crimes of State* (cf. *infra*), were to be adjudicated by international tribunals, as they have been in recent years. In the recent adjudication by the IACtHR of the cycle of cases of massacres, in which I had the honour to have actively participated, the IACtHR thereby rendered justice to the relatives of the fatal victims, thus alleviating their sufferings for the irreparable damages they endured, and helping them to recover their faith in human justice.

Ever since the beginning of the XXIst. century, the IACtHR has faced a new cycle of cases, concerning *massacres*, - wherein circumstances have varied from case to case, but the aggravating elements of intentionality,

of premeditation or planification, added to the particular gravity or seriousness of the damages perpetrated, appeared always present. In some of such cases there has been a plurality of identified victims, in others there has been such a considerable number of them that the exact total of victims and their identity were not entirely known.

The monopoly of force misused by States in a pattern of chronic violence - in a most regrettable distortion of the ends of the State (cf. *supra*) - victimized groups of persons under their respective jurisdictions, who often happened to be the most vulnerable persons, in situations of defencelessness. States here incurred into grave violations of human rights that conformed, in some instances, in my understanding, true *crimes of State*[24] (cf. *infra*). This cycle of cases, with aggravating circumstances, in which grave violations of human rights (beginning with the fundamental right to life) were planned and perpetrated in pursuance of State policies of a *systematic* practice of extermination of human beings, started with the landmark Judgment of the IACtHR in the case of the massacre of *Barrios Altos* concerning Peru (of 14.03.2001).

This leading case was followed, in the course of the next half a decade, by the Court´s Judgments in the cases of the massacres of the *Caracazo* concerning Venezuela (reparations, of 29.08.2002), of *Plan de Sánchez* pertaining to Guatemala (of 29.04.2004), of the *19 Tradesmen* against Colombia (of 05.07.2004), of the *Moiwana Community* concerning Suriname (of 15.06.2005), of *Mapiripán* pertaining to Colombia (of 15.09.2005), of *Ituango* also concerning Colombia (of 01.07.2006), of *Montero Aranguren and Others (Detention Centre of Catia)* concerning Venezuela (of 05.07.2006), of *La Cantuta*, concerning Peru (of 29.11.2006), of the *Prison Castro Castro* also pertaining to Peru (Judgment of 25.11.2006)[25].

This period coincided with the substantial changes introduced (in 1999-2004) by the IACtHR in its *interna corporis* (particularly its historical fourth Regulations, which entered into force in 2001)[26], added to its notable jurisprudential construction from 1998 until 2004, which left its mark[27] for the subsequent handling of cases of the kind by the Court. The IACtHR became well-equipped to handle the challenges raised in those cases pertaining to human collectivities and disclosing aggravating circumstances: the new cycle of *cases of massacres*[28].

VII. THE EXISTENCE OF CRIMES OF STATE

This cycle of *cases of massacres* has brought the IACtHR to acknowledge clearly the existence of particularly *aggravating* circumstances, - conforming in my view true crimes of State, whether segments of doctrine wish to admit it or not. There have been instances in which the respondent States themselves have recognized their international responsibility for the atrocities and criminal policies pursued and criminal acts perpetrated, - as examined in my book of memories of the IACtHR[29]. Segments of contemporary legal doctrine still try to circumvent the issue, but, with the awakening of human conscience, and the disclosure nowadays of atrocities which in the past did not reach international justice, it becomes increasingly more difficult for those petrified by State sovereignty to deny the existence and repeated occurrence of crimes of State.

Crimes of State have occurred in a sustained pattern of extermination of human beings, prolonged in time. No one can deny that this was precisely what happened in cases like, for example, those of the *Massacre of Plan de Sánchez* (one among 626 massacres, which occurred mainly between 1978 and 1984, as established by the Guatemalan Truth Commission), and of *Goiburú and Others versus Paraguay* (one among so numerous other atrocities committed by the so-called "Operation Condor" in the Southern Cone of South America over three decades ago). They have victimized numerous defenceless persons, and denied investigation of the facts and access to justice to numerous other human beings. The relatives of the victims have, at last, - after many years, - found justice before an international human rights tribunal, the IACtHR.

In its Interpretation of Judgment (of 02.08.2008) in the case of the *Prison Castro Castro versus Peru*, the Court addressed, *inter alia*, as to reparations, the measures of guarantee of non-repetition of the wrongful and harmful acts (paras. 44-52). In my lengthy Separate Opinion (paras. 1-158) appended thereto, I examined, *inter alia*, that same issue, together with the right of direct access to justice (national and international) as the right to the *realization* itself

of justice, and as an imperative of *jus cogens*[30]. In my understanding, contemporary international legal doctrine will gain much credibility when it ceases to circumvent the issue, and proceeds to determine the juridical consequences of the perpetration of crimes of State.

To that end, it can now count, for example, on the above surveyed case-law of an international human rights tribunal such as the IACtHR, which has been seized of cases disclosing such crimes and has adjudicated on them. It is indeed reassuring that, even victims of massacres and crimes of State and their close relatives, laying in utter defencelessness, have in our days had their causes adjudicated by the IACtHR, wherein they at last achieved the realization of justice at international level.

Other international tribunals have also been seized of cases of crimes of State, although with distinct results. For example, as to the ICJ, I warned, in my Dissenting Opinion in the case of the *Aplication of the Convention against Genocide* (Croatia *versus* Serbia, 2015), that, as conscience (*recta ratio*) stands above the "will", and objective justice stands above State consent, attention should have been turned to the imperative of the *realization of justice*, in the light of *basic considerations of humanity* (para. 518). In the present domain, international law appears more than voluntary, as truly *necessary*, and the rights protected and fundamental human values stand above the State´s "will" or interests (para. 516).

The Convention against Genocide, - I proceeded, - is centred on human groups in situations of great vulnerability, or defencelessness, and requires an outlook focused on the persons in groups, in the victims (paras. 520-522). The ICJ should have taken into account that the *principle of humanity* permeates the whole Convention, as well as the whole *corpus juris* of protection of the rights of the human person (para. 84), in an even more cogent way when human beings are in situations of *vulnerability*, including *defencelessness* (paras. 58-65).

The Convention against Genocide, and human rights treaties, have a hermeneutics of their own, requiring, for their interpretation and application, to turn attention to the victims, and not to inter-State susceptibilities, in pursuance of a humanist outlook (paras. 494-524). General principles of law (*prima principia*) attribute an ineluctable axiological dimension to the international legal order (para. 517). I then concluded that there is here the prevalence of the *raison d´humanité* over the *raison d´État*, in the light of the *principle of humanity* (paras. 504, 517 and 530).

VIII. THE DETERMINATION OF THE AGGRAVATED INTERNATIONAL RESPONSIBILITY

In the domain of the International Law of Human Rights, the right of individual petition has proved to be quite effective also for the adjudication of cases concerning members of human collectivities[31]. The adjudication of cases of massacres by the IACtHR (cf. *supra*) led to the establishment of the *aggravating circumstances* of the violations at issue[32]. Those cases raised the question - acknowledged by the IACtHR - of the *aggravated* international responsibility of the respondent States.

Two particular legal issues may be singled out in those cases of massacres: first, the determination of the *aggravated responsibility* of the States concerned (aggravating circumstances of the wrongs perpetrated); and secondly, the determination of the condition of *victim* in such cases. Such aggravated State responsibility was established, e.g., in the case of the *Massacre of Plan de Sánchez* (2004), by the occurrence of a pattern of massacres.

As demonstrated in the case of the *Massacre of Plan de Sánchez*, the crimes committed in the course of the execution, by military operations, of a State policy of "*tierra arrasada*", including the massacre itself of Plan de Sánchez (perpetrated on 18.07.1982), were intended to destroy wholly or in part the members of indigenous Maya communities. In its Judgment of 29.04.2004, the IACtHR determined that those violations "gravely affected the members of the *maya-achí* people in their identity and values", and, insofar as they occurred within a "pattern of massacres", they had "an aggravated impact" in the establishment of the international responsibility of the State[33].

In the case of the *Massacre of Mapiripán*, occurred on 15-20.07.1997, one hundred members of the paramilitary forces (*Autodefensas Unidas de Colombia*), counting on "the collaboration and acquiescence" of State agents, unlawfully detained, tortured and murdered

at least 49 civilians in the town of Mapiripán, and then destroyed their bodies and threw their mortal remains into the river Guaviare. The case of the *Massacres of Ituango* fits into the same pattern of chronic violence in Colombia[34], involving directly State agents (together with the paramilitary, against the guerrilla) in the murders of the victims.

In such cases of massacres, in my Separate Opinions I insisted on my view that the facts disclosed therein made it impossible to deny the existence of true *crimes of State*, entailing all their juridical consequences: in this context, I upheld the *complementarity* of the international responsibility of the State and the international criminal responsibility of the individuals concerned, - as, e.g., in the case of the *Massacre of Mapiripán versus Colombia* (Judgment of 15.09.2005), and, earlier on, in the case of the *Massacre of Plan de Sánchez versus Guatemala* (Judgments on merits and reparations, of 29.04.2004 and 19.11.2004, respectively).

There are lessons which can be extracted from other cases of the kind (e.g., cases of *Goiburú and Others*, pertaining to the sinister *Operation Condor*[35], 2006; and of *Almonacid Arellano*, 2006) namely: at conceptual level, there continue to coexist the *objective* international responsibility of the State, and its international responsibility *aggravated* by the *intentionality* (*mens rea*). There are other lessons to be extracted.

In the case of the *Massacre of Mapiripán* (Judgment of 2005), members of the paramilitary forces counted on the "collaboration and acquiescence" of State agents for the massacre perpetrated in mid-1997. Likewise, in the same pattern of chronic violence in Colombia[36], in the case of the *Massacres of Ituango* (Judgment of 2006), the perpetration by paramilitary forces of the massacres involved directly State agents in the murders of the victims.

And in the case of the *Moiwana Community* (Judgment of 2005), concerning Suriname, the armed forces murdered many members of the Community by the end of 1986, and the survivors were forcefully displaced from their traditional lands (of the Ndjuka Maroon Community, in the small town of Moiwana), unable to rebuild their communal *modus vivendi*. Such cases of massacres, in my understanding, disclosed the *complementarity* of the international responsibility of the State and the international criminal responsibility of the individuals concerned. State responsibility entailed reparations of distinct kinds (cf. *infra*), including, in certain cases, measures to foster the voluntary return of the displaced persons to their original lands and communities.

There were other cases wherein the IACtHR reiterated its assertion of the *aggravated* international responsibility of the State, such as, e.g., its Judgments in the cases pertaining to the regime Pinochet in Chile (of 27.09.2006, on the case *Almonacid Arellano*) and to the regime Stroessner in Paraguay (of 22.09.2006, on the case *Goiburú and Others*). In both Judgments, in my lengthy Separate Opinions, I developed my personal reflections on the *crimes of State*, bearing in mind above all the horrors of the sinister *Operation Condor*[37]. The lessons which can be extracted from those two historical cases[38] are clear. At conceptual level, there continue to coexist the *objective* international responsibility of the State, and its international responsibility *aggravated* by the *intentionality* (*mens rea*).

Following those two Judgments, in the case of *La Cantuta*, concerning Peru (Judgment of 29.11.2006) under the regime Fujimori, the victims (one professor and a group of students) were kidnapped from the premises of the University of La Cantuta, Lima, by security forces of the respondent State, after midnight, in the wee small hours of 18.07.1992, were "disappeared", and some of them promptly and summarily executed; following that, the facts were not duly investigated[39].

In the case of *Goiburú and Others* (2006), occurred in a context of unlawful and prolonged detentions (in the mid-seventies) of the victims by agents of the State, the victims remained *incommunicado*, were tortured and murdered, and their mortal remains were hidden, - all as a result of their opposition to the dictatorial regime Stroessner in Paraguay. The IACtHR established the grave violations of human rights that took place, in the context of the so-called "Operation Condor", in which security agents of the States of the Southern Cone of South America "cooperated" to exterminate political opponents of the repressive regimes of those days.

IX. THE DETERMINATION OF THE CONDITION OF VICTIM

Moving to another key point, in some of the cases of large-scale violations of human rights, the IACtHR has had to face the difficulty of the determination of the condition of victim in the massacres. Bearing in mind that human rights treaties are essentially *victim-oriented*, a new jurisprudential development has taken place as to the determination of the condition of victim (e.g., cases of *Caracazo*, 2002; of *Montero Aranguren and Others [Detention Centre of Catia]*, 2006). The IACtHR considered, in such cases, as alleged victims, besides the persons already *identified* in the petition lodged with it, those who *could be identified subsequently* (cases of the massacres of *Plan de Sánchez*, 2004; of *Mapiripán*, 2005; of *Ituango*, 2006).

To overcome such difficulties, the IACtHR considered as alleged victims some whose names derived from documents other than the petition originally lodged with it, and, furthermore, ordered the respondent States *to individualize and to identify* the victims and their relatives for the purpose of reparations[40]. The IACtHR took these measures bearing in mind that the alleged victims subsequently identified kept relation with the facts described in the (original) petition and the evidence produced before it (cases of *Goiburú and Others*, 2006; of the massacres of *Ituango*, 2006).

In this cycle of *cases of massacres*, there have been instances in which respondent States themselves have recognized their international responsibility for the atrocities and criminal policies pursued and criminal acts perpetrated. Segments of contemporary legal doctrine still try to circumvent the issue, but, with the awakening of human conscience, it becomes increasingly more difficult for those petrified by State sovereignty to deny the existence and repeated occurrence of *crimes of State* (cf. *supra*) and their legal consequences.

In the case of the *Caracazo*, concerning Venezuela, the problem of identification of the victims arose from the very start of the submission of the case - a true massacre, occurred at the beginning of 1989, - to the IACtHR; the complaint lodged with the Court referred to the hiding of evidence (clandestine graves). The Court, on its turn, in its Judgment of 29.08.2002 on reparations, in determining the beneficiaries of these latter, saw it fit to single out distinct "categories of victims"[41]. The complexity of the *Caracazo* case illustrates the difficulties faced by the IACtHR in a case of a massacre with a great number of victims, and a prolonged lapse of time between the occurrence of the facts and the decision of the Court.

In another case of massacre (that of *Montero Aranguren and Others [Detention Centre of Catia] versus Venezuela*, Judgment of 05.07.2006)[42], the IACtHR faced yet an additional difficulty, namely, that of the coexistence of two versions of the facts (para. 60.16-17). Be that as it may, the Court proceeded to the determination of the victims and of their relatives, displaying its concern not to leave outside the scope of its Judgments (for the purpose of reparations) any of the victims of the massacres perpetrated, even after a long lapse of time.

To this end, the IACtHR considered, in such cases, as alleged victims, besides the persons *identified* in the petition lodged with it, *those who could be identified subsequently*, given that the difficulties found in their individualization led to presume that there were still victims pending of determination (Court´s Judgments in the cases of the *Massacres of Plan de Sánchez*, *Mapiripán* and *Ituango*)[43]. To overcome such difficulties, the Court considered as alleged victims some whose names derived from documents[44] other than the petition originally lodged with it[45].

The Court, furthermore, ordered the respondent State *to individualize and to identify* the victims and their relatives for the purpose of reparations[46]. The IACtHR has, thus, taken the initiative of correcting, by means of its own analysis and assessment of the evidence produced by the parties, eventual gaps or defects in the identification of the alleged victims in the petition lodged with it, even when the parties themselves have admitted that some persons "by mistake were not included in the lists of alleged victims"[47], originally presented before the Court. In the exercise of its duty of protection, the IACtHR has deemed it fit to proceed in this way, in cases disclosing a plurality of alleged victims, above all in the recent cycle of cases of massacres (cf. *supra*).

X. APPROXIMATIONS AND CONVERGENCES BETWEEN INTERNATIONAL LAW OF HUMAN RIGHTS, INTERNATIONAL HUMANITARIAN LAW, AND INTERNATIONAL LAW OF REFUGEES

Contemporary international adjudication contains cases encompassing breaches of the *corpus juris* of International Law of Human Rights, International Humanitarian Law, and the International Law of Refugees as related to each other. One may recall, e.g., that, in the case of *Armed Activities in the Territory of Congo* (D.R. Congo *versus* Uganda, merits and reparations, 2005-2018) the ICJ has been concerned with grave violations of human rights and of International Humanitarian Law; and in the case of *Land and Maritime Boundary between Cameroon and Nigeria* (1996) the ICJ was likewise concerned with the victims of armed clashes.

May I add that the ICJ, in face of armed hostilities in the border between Cambodia and Thailand, issued its Order (of 18.07.2011) of provisional measures of protection in the case of the *Temple de Préah Vihéar*, creating a "provisional demilitarized zone" around the Temple near the border, with the immediate withdrawal of military personnel of both countries. Hostilities came to an end.

In my Separate Opinion appended thereto, I pointed out that the protection went beyond the territory at issue, extending itself to the *populations* living there (the fundamental right to life), in the light of the *principle of humanity* (paras. 114-115), giving expression to the new vision of the *humanized* international law of our times[48]. I reiterated this position two years later, in the same case of the *Temple of Préah Vihéar* (ICJ´s Interpretation of its 1962 Judgment, of 11.11.2013), stressing the importance of taking into account the situation of people in territory, as well as human values, thus endorsing the historical process in course of "the *humanization* of international law" (para. 65).

The ICJ itself, despite its anachronistic inter-State mechanism of operation, has been attentive to developments in the domains of the International Law of Human Rights[49] and of International Humanitarian Law[50]. In this respect, in sum, it should not pass unnoticed that distinct trends of protection of the *justiciables* (International Law of Human Rights, International Humanitarian Law, International Law of Refugees, International Criminal Law) *converge*, rather than conflict with each other, at normative, hermeneutic and operative levels[51].

Another lesson can be extracted from the rightful concern with victims of armed conflicts, pointing towards the *unity* of the Law: not seldom, the international adjudication of those cases, - true human tragedies, - has disclosed the approximations and convergences between the International Law of Human Rights and International Humanitarian Law (as in, e.g., the IACtHR´s case of *Bámaca Velásquez versus Guatemala*, Judgments on merits and reparations, of 25.11.2000 and 22.02.2002, within a pattern of massacres), or else the approximations and convergences between the International Law of Human Rights and International Refugee Law (as in, e.g., the IACtHR´s case of the massacre of the *Moiwana Community versus Suriname*, Judgment of 15.06.2005, and Interpretation of Judgment, of 08.02.2006).

In successive Separate and Concurring Opinions that I appended to Judgments of the IACtHR, I have sustained, precisely, the *complementarity* (also including, in given circumstances, the concomitant application) of the relevant norms of the International Law of Human Rights, of International Humanitarian Law, and of the International Law of Refugees. On this particular point, may I refer to my Separate Opinion in the case *Las Palmeras versus Colombia* (Judgment on preliminary objections, of 04.02.2000), my Separate Opinion in the case *Bámaca Velásquez versus Guatemala* (Judgment on the merits, of 25.11.2000), my Concurring Opinion in the case of the *Indigenous People Kankuamo versus Colombia* (Resolution del 05.07.2004), my Concurring Opinion in the case of the *Community of Peace of San José of Apartadó versus Colombia* (Resolution of 15.03.2005), my Separate Opinion in the case of the *Prison Castro Castro versus Peru* (Interpretation of Judgment, of 02.08.2008), among others.

But that is not all; such approximations and convergences are also noticeable today in so far as the International Law of Human Rights and International Criminal Law are concerned, in their relationships. Thus, in another case of massacre, that of the *Prison Castro Castro versus*

Peru (Interpretation of Judgment, of 02.08.2008), I saw it fit to point out, in my Separate Opinion, that recent developments seemed to indicate that they not exclude, but rather complement, each other, as there is a convergence between the search for justice by means of the investigation of the facts and the sanction of those responsible for grave breaches of human rights, and the endeavours towards the rehabilitation of the victims of those breaches (para. 97).

In the same line of reasoning, I have moreover sustained, as already indicated, the need to explore further and promote the *complementarity* between the international responsibility of the State and the international criminal responsibility of the individual[52], so as to clarify further the present-day confluence between the International Law of Human Rights and contemporary International Criminal Law[53]. No one could imagine, a few years or decades ago, that cases of *massacres*, of true *crimes of State* (cf. *supra*), were to be adjudicated by international tribunals, as they have been in recent years.

In the case-law of international human rights tribunals, there are examples of their reliance, mainly and clearly on the part of the IACtHR, on provisions of International Humanitarian Law; references made by the ECtHR are rather indirect[54]. In any case, this is significant, given the absence of a mechanism of international petitions for specific violations of International Humanitarian Law[55]. International human rights tribunals, as well as international criminal tribunal, here fill a procedural gap. As I have been sustaining along the years, successively in two international jurisdictions (IACtHR and ICJ), there are approximations and convergences between International Law of Human Rights and International Humanitarian Law, as well as International Law of Refugees and International Criminal Law[56].

Thus, for its part, the International Criminal Court (ICC), - among other tribunals, - has, e.g., in its handling (2007-2012) of the case of *Th. Lubanga Dyilo* (situation in the D.R. Congo), from the start dispensed attention to the relevant case-law of international human rights tribunals[57], as to evidenciary matters[58]. The ICC (Trial Chamber I), in its Decision of 07.08.2012, coming to the establishment of the principles and procedures to be applied to reparations, in the same case of *Th. Lubanga Dyilo*, again referred to the pertinent case-law of international human rights tribunals (paras. 21, 86-87 and 98).

XI. THE LEGACY OF *AD HOC* INTERNATIONAL CRIMINAL TRIBUNALS

Recently, the *ad hoc* International Criminal Tribunals for the Former Yugoslavia (ICTFY) and for Rwanda (ICTR) have concluded their cycle (as from their creation, in 1993 and 1994, respectively), attentive to leave their own legacies for future developments of international criminal law[59]. The ICTR reached the end of its era at the end of 2015, and the ICTFY at the end of 2017[60]. With this recent conclusion of the era of *ad hoc* international criminal tribunals (ICTR and ICTFY), attention turns now to the preservation of their legacy[61].

The ICTFY has contributed to clarify the constitutive elements of war crimes, crimes against humanity and genocide, as well as to the relation of gender crimes (e.g., rape and sexual violence) with each one of those international crimes[62]. The ICTFY also contributed to the development of international criminal law and of international humanitarian law[63] and further clarified the development of customary international law. The case-law of the ICTFY has much influenced the case-law of "internationalized" or "mixed" international criminal tribunals.

The ICTR, for its part, was the first international tribunal to pronounce, in its Judgment in the *Akayesu* case (1998), on the crime of genocide, sustaining that rape (and other inhuman sexual violations) can amount to the crime of genocide when intending to destroy a particular group. The decision in the *Akayesu* case[64] oriented the case-law of the Special Court for Sierra Leone (SCSL)[65]. In effect, both the ICTFY and the ICTR have much contributed to the improvement of procedural rules, including in probative matters, in relation to international crimes, so as to put an end to impunity.

In addition to the two *ad hoc* international criminal tribunals that have very recently completed their respective works, the same has happened, as to the "hybrid" or "mixed" international tribunals[66], to the SCSL, which became the first of them to have completed likewise its work, in early December 2013. As

to its legacy[67], in its landmark case of *Charles Taylor*, the SCSL convicted and sentenced the former President of Liberia, and assumed the vanguard of the case-law on conscription of child soldiers[68].

XII. PROMPT REPARATIONS, IN DISTINCT FORMS, FOR GRAVE VIOLATIONS OF THE RIGHTS OF THE HUMAN PERSON

Recently, in the handling by the ICJ of the case of *Armed Activities on the Territory of the Congo* (reparations), I have deemed it fit to append a Declaration to the Court´s Order of 11.04.2016, wherein I pointed out that contemporary international tribunals have for some time been constructing their case-law on reparation for damages ensuing from grave violations of rights of the human person on a large scale in armed conflicts[69] (paras. 7-8), thus paving the way for collective reparations (paras. 11-12).

Shortly afterwards, the ICJ issued another Order (of 06.12.2016) in the same case of *Activities on the Territory of the Congo*, to which I appended a Separate Opinion, wherein I began by warning against the undue prolongation of time in the international adjudication of cases of grave violations of international law (paras. 3-9). Breach and the fundamental duty of prompt reparation, - I proceeded, - conform an indissoluble whole (paras. 10-23), and reparations in their distinct forms are to be considered (paras. 24-32).

In pursuance of the victim-oriented outlook (cf. *supra*), reassuring advances that have been achieved in recent years, in the determination of the *distinct forms* of reparation due to the victims, mainly in the rich case-law of the IACtHR in this particular, are reassuring. In the case of the *Prison Castro Castro* (Interpretation of Judgment, of 2008), for example, the reparations determined by the IACtHR encompassed measures of guarantee of non-repetition of the wrongful and harmful acts.

In its Judgments in both cases of the *Massacre of Mapiripán* (15.09.2005) and of the massacre of the *Moiwana Community* (15.06.2005), the IACtHR ordered a series of measures of reparations (comprising indemnities as well as non-pecuniary reparations of distinct kinds), including measures to foster the voluntary return of the displaced persons to their original lands and communities, in Colombia and Suriname, respectively.

As to the *rehabilitation of the victims*, the ICC has referred to the Judgments of the IACtHR in the cycle of cases of massacres, such as, e.g., the IACtHR Judgments of 15.09.2005 in the cases of the *Massacre of Mapiripán* (2005); and of *Massacre of Plan de Sánchez* (2004). And as to other modalities of reparations, the ICC has evoked the IACtHR´s Judgments, e.g., in the same case of the *Massacre of Plan de Sánchez*, as well as in the cases of *J.H. Sánchez* (2003), and of *Tibi* (2004).

The matter of rehabilitation of the victims has been brought to the attention also of the ICJ, e.g., in the case of *Questions Relating to the Obligation to Process or Extradite* (Belgium *versus* Senegal) (decided in 2012), related to the Hisséne Habrè regime in Chade in the period of (1982-1990)[70], wherein the ICJ became the first international tribunal to apply the principle of universal jurisdiction. Initially, in its Order (of 28.05.2009) in the case, the ICJ failed to take into due account the nature of the compromissory clause (under Article 30) of the U.N. Convention against Torture (CAT Convention), in not ordering the requested provisional measures of protection.

In my Dissenting Opinion appended to that Order, I sustained that such measures should have been ordered by the ICJ, so as to secure from the start the application of the principle of universal jurisdiction (*aut dedere aut judicare*), on the basis of the CAT Convention, and in respect above all of the absolute prohibition of torture, in the realm of *jus cogens* (paras. 60-63, 68-69, 71, 95 and 100-101)[71]. There was need, - I added, - of a prompt realization of justice, without further delays, as the impunity prevailing so far in the *cas d´espèce* constituted "a *continuing situation* of irreparable damage" to the rights of the human person at issue, beyond the purely inter-State dimension (paras. 60-62 and 72).

Subsequently, however, in its Judgment (merits, of 20.07.2012) in the same case, the ICJ stressed the need to take prompt measures for compliance with the duty to process under the CAT Convention, - besides having correctly pointed out that the absolute prohibition of torture is one of *jus cogens* (para. 99). On the occasion, I presented my Separate Opinion wherein I at first recalled the longstanding

endeavours of the victims in seeking the realization of justice in the *cas d´espèce* (paras. 52-61), in relation to grave violations of human rights and International Humanitarian Law during the regime Hisséne Habrè (1982-1990) in Chade (paras. 44-51 and 82-103).

I firmly endorsed the ICJ´s reassuring assertion of the absolute prohibition of torture (under the CAT Convention) as being one of *jus cogens* (para. 99 and 183-184), and I deemed it fit to go beyond what the ICJ said, in stressing the pressing need to extract therefrom the legal consequences, which the ICJ did not proceed to do. In effect, to the original *grave* violations of human rights, an additional violation followed, namely, the *continuing situation* of the lack of access to on the part of the victims (paras. 145-153), with the impunity of the perpetrators of torture in breach of the CAT Convention and customary international law; time is to operate *pro persona humana*, *pro victima* (paras. 154-168 and 176).

The principle of universal jurisdiction, as laid down in the CAT Convention (Articles 5(2) and 7(1)), seems inspired by the ideal of a universal justice, without limit in time (past or future) nor in space (being trans-frontie). The ICJ applied, in the present case of *Questions Relating to the Obligation to Process or Extradite*, the principle of universal jurisdiction, a pioneering decision of an international tribunal to that effect. In my perception, the principle of universal jurisdiction, transcends the inter-State dimension: in paving the way for reparations for grave violations of rights of the human person, it seeks also to safeguard fundamental human values shared by the international community as a whole.

Parallel to the aforementioned ICJ endeavours, both the IACtHR and the ECtHR - followed more recently by the AfCtHPR - have been construing a remarkable case-law on the *condition of victim* for purposes of reparation. The IACtHR, in particular, has much contributed to that, with its creative jurisprudential construction on the distinct forms of reparation[72]. In securing reparation, in distinct forms, to victims under great adversity, is has enhanced their access to justice *lato sensu*.

The IACtHR´s experience to this effect has thus far provided justice to numerous victims in situations of great vulnerability or defencelessness, namely: a) abandoned or "street children"; b) persons under infra-human conditions of detention; c) forcefully and internally displaced persons; d) members of peace communities in situations of internal armed conflict: e) members of marginalized or abandoned indigenous communities: f) uprooted and undocumented migrants: victims of torture and of inhuman and degrading treatment; g) relatives of victims of massacres. Despite so much adversity, they have notwithstanding had access to international justice[73].

XIII. THE REALIZATION OF JUSTICE AS A FORM OF REPARATION

This brings me to address now the key issue of the realization of justice as a form of reparation for those grave violations of rights of the human person. In its Judgment (merits, on 03.02.2012) in the case of *Jurisdictional Immunities of the State* (Germany *versus Italy*, with intervention of Greece), the ICJ decided to uphold State immunities even in respect of an unlawful continuing situation originated in crimes perpetrated by the Third *Reich* during the II world war (in 1943-1945).

I appended an extensive Dissenting Opinion to that ICJ Judgment, wherein I sustained that grave violations of human rights and International Humanitarian Law amount to violations of *jus cogens*, generating State responsibility and the duty of reparation to the victims, in conformity with *rectitude* (the *recta ratio* of natural law), underlying the conception of Law (in distinct legal systems - *Recht* / *Diritto* / *Droit* / *Direito* / *Derecho* / *Right*) as a whole[74] (para. 313). The imperative of the *realization of justice* by providing reparations is grounded on *basic considerations of humanity*, in the light of *fundamental human values* (paras. 32-54).

I stressed the need to transcend the outdated strictly inter-State outlook, and to recognize the presence of the human person in the *droit des gens*[75]. This finds support in the aforementioned approximations and convergences, in the last decades, of the International Law of Human Rights, of International Humanitarian Law, and of the International Law of Refugees[76] (cf. *supra*). I then warned that there are no immunities for crimes against humanity, for grave violations of absolute prohibitions of *jus cogens*, which stands above the prerogative or privilege of State immunity, with all the legal consequences ensuing therefrom (paras. 117-120). There

is here a primacy of *jus cogens*, thus avoiding denial of justice and impunity[77].

In cases of international crimes, of *delicta imperii*, - I added, - what cannot be waived is the individual´s right of access to justice, encompassing the right to reparation for the grave violations of the rights inherent to him as a human being. Without that right, there is no credible legal system at all, at national or international levels (paras. 151-155). One is here in the domain of *jus cogens*.

Accordingly, there are no State immunities for *delicta imperii*, such as massacres of civilians in situations of defencelessness in the *cas d´espèce* (e.g., the massacre of Distomo, in Greece, in 1944, and the massacre of Civitella, in Italy, also in 1944), or deportation and subjection to forced labour in war industry (e.g., in 1943-1945) (paras. 184-191). In my understanding, the finding of particularly grave violations of human rights and of International Humanitarian Law provides a valuable test for the removal of any bar to jurisdiction, in pursuance of the necessary realization of justice (paras. 166 and 221-226).

It is immaterial whether the harmful act in grave breach of human rights was a governmental one, or a private one with the acquiescence of the State, or whether it was committed entirely in the *forum* State or not (deportation to forced labour is a trans-frontier crime) (paras. 192-198). State immunity does not stand in the domain of redress for grave violations of the fundamental rights of the human person (paras. 129 and 184). There is here the obligation of the responsible State to provide reparation to the victims of those grave violations (para. 245), a duty under customary international law and in accordance with a fundamental general principle of law (para. 257).

The *realization of justice*, as reaction of the Law to those grave violations (bringing one into the realm of *jus cogens*), is in itself a form of reparation (satisfaction) to the victims. In my conception, through *reparatio* (from the Latin term *reparare*, "to dispose again"), the Law intervenes to cease the effects of its violations. The *reparatio*, - I proceeded, - does not put an end to the grave human rights violations already perpetrated, but, in ceasing its effects, it at least avoids the aggravation of the harm already done[78] (paras. 288-299). The *reparatio* is endowed, in my understanding, with a double meaning: it provides satisfaction (as a form of reparation) to the victims, and at the same time it re-establishes the legal order broken by such violations, - a legal order erected on the basis of the full respect for the rights inherent to the human person. The legal order, thus re-established, requires the guarantee of non-repetition of the harmful acts (paras. 283-287).

XIV. FINAL CONSIDERATIONS

In proceeding now to my final considerations, may I observe at first that, on the basis of my own experience, it is clear to me that it is not possible to assess and decide cases of grave violations of rights of the human person without a careful attention to *fundamental human values*. Contrary to what legal positivism assumes, with its professed self-sufficiency, in my understanding law and ethics are ineluctably interrelated, and this is to be taken into account for a faithful realization of justice. This vision has historically marked presence since the very origins of the law of nations (*droit des gens*)[79], and has never been minimized by the more lucid international legal doctrine, untouched by the misleading distortions of legal positivism.

The fundamental principle of humanity upholding human dignity, of utmost importance, has been asserted in the jurisprudential construction of contemporary international tribunals (such as the IACtHR, the ICTFY, the ICTR)[80]. To recall here just one more of many examples (cf. *supra*) to this effect, the ICTR, in the case *J. Kambanda* (Judgment of 04.09.1998), pointed out that, in all periods of human history, genocide has inflicted great losses to humankind, the victims being not only the persons slaughtered but humanity itself (in acts of genocide as well as in crimes against humanity) (paras. 15-16)[81].

The threshold of gravity of breaches of the fundamental rights of the human person has received attention at *normative*[82] as well as *jurisprudential* levels, but it has been insufficiently developed in international legal doctrine to date. It is time for this latter to devote greater attention to the matter. For their part, contemporary international tribunals are aware of the importance of fostering dialogue and co-ordination among them, so as to secure further harmonious jurisprudential developments.

In addressing, in the present article, the international adjudication of cases of *grave*

violations of rights of the human person, the aforementioned threshold of *gravity* of those breaches brings to my mind the profound thinking of Simone Weil, shortly before her death in 1943, expressed in her book *La pesanteur et la grâce* / *Gravity and Grace* (containing some of her writings up to May 1942), published posthumously (in French in 1947 and in English in 1952), wherein she pointed out, with much insight:

> L´innocent qui souffre sait la vérité sur son bourreau, le bourreau ne la sait pas. Le mal que l´innocent sent en lui-même est dans son bourreau, mais il n´y est pas sensible. L´innocent ne peut connaître le mal que comme souffrance. Ce qui dans le criminel n´est pas sensible, c´est le crime. Ce qui dans l´innocent n´est pas sensible, c´est l´innocence. / The innocent victim who suffers knows the truth about his executioner, the executioner does not know it. The evil which the innocent victim feels in himself is in his executioner, but he is not sensible of the fact. The innocent victim can only know the evil in the shape of suffering. That which is not felt by the criminal is his own crime. That which is not felt by the innocent victim is his own innocence[83].

In cases of grave violations of the rights of the human persons, international tribunals can and ought to, in my perception, foster the approximations and convergences between the International Law of Human Rights, International Humanitarian Law, the International Law of Refugees, and contemporary International Criminal Law. Such approximations and convergences enhance the realization of justice, leaving no space here for so-called *lex specialis*. Provisions of the *corpus juris* of those trends of protection of the rights of the human person can be applied concomitantly.

In the perpetration of grave breaches of human rights and of International Humanitarian Law, the criminality of individual executioners acting in the name of States is ineluctably linked to the criminality of the responsible States themselves. Their crimes are perpetrated in a planified and organized way, disclosing brutality and a collective criminality with impunity[84]. They count on resources of the State, they are true crimes of State. There is thus need to take into account, jointly, the international responsibility of the *State* and the international criminal responsibility of the *individual*, complementary to each other as they are[85].

The consolidation of the international legal personality (active as well as passive) of individuals, as subjects of international law, enhances accountability at international level for grave violations of the rights of the human person. Individuals are also bearers of duties under international law, and this further reflects the consolidation of their international legal personality. Developments in international legal personality and international accountability go hand in hand, giving expression to the formation of the *opinio juris communis* to the effect that the gravity of violations of fundamental rights of the human person affects directly basic values of the international community as a whole.

Hence the need to keep on securing the evolution of the realization of justice at international level, and the importance of preserving the access of the human person to justice at international level. To this effect, individuals count on international human rights tribunals (ECtHR, IACtHR, and the AfCtHPR). Individuals are no longer at the mercy of some *Staatsrecht*; they are able nowadays to resort to international procedures for the vindication of rights inherent to them, before the ECtHR, IACtHR and AfCtHPR. By being brought to the cognizance of those international tribunals, atrocities are no longer covered-up by the State and its power-holders.

It is a phenomenon of our times that victims in distress, who had lost all hope in justice at national level, have been able duly to vindicate their rights at international level. The human person has at last recovered the central place, reserved to her, in the contemporary international legal order. No one would have anticipated, some years ago, that the defenceless victims of massacres or their relatives would succeed to reach an international human rights tribunal, such as the IACtHR, e.g., in cases of massacres (cf. *supra*).

The suffering of vulnerable or defenceless individuals no longer falls into oblivion; they count nowadays on international jurisdiction, which has expanded to grant them relief. The centrality of the victims in the contemporary expansion of international jurisdiction has its *raison d´être*. The whole *corpus juris* of

the International Law of Human Rights bears witnesses of that centrality, which nowadays has gained ground also in the other trends of International Humanitarian Law and the International Law of Refugees, as well as in contemporary International Criminal Law.

Last but not least, I feel gratified to leave on the records in this *Journal*, still in 2018, my present reflections, transmitted, as mentioned, on three significant ceremonies in the course of 2018, the year which marks the 70th. anniversary of the Universal Declaration of Human Rights. After all, in the world now torn by violent conflicts in distinct continents, there is great need today to preserve and cultivate the legacy of the Universal Declaration, and to study and learn from the jurisprudential construction, to keep on evolving, on responsibility for grave violations of the rights of the human person.

NOTES

1. O presente estudo, originalmente publicado no *Journal of International Humanitarian Legal Studies* (vol. 9, 2018, pp. 98-136), foi apresentado pelo Autor em duas palestras recentes: a primeira foi por ele ministrada, em francês, como conferência magna, na Faculdade de Direito da Université Aix-Marseille, em Aix-en-Provence, França, em 30.10.2018; a segunda palestra foi por ele proferida, em inglês, no Palácio da Paz, sede da Corte Internacional de Justiça, na Haia, Holanda, em 17.01.2019.

2. Cf., e.g., Société Française pour le Droit International (SFDI), *La juridictionnalisation du droit international* (Colloque de Lille de 2002), Paris, Pédone, 2003, pp. 3-545; A.A. Cançado Trindade, "The Merits of Coordination of International Courts on Human Rights", 2 *Journal of International Criminal Justice* - Oxford (2004) pp. 309-312.

3. A.A. Cançado Trindade, "Reflexiones sobre los Tribunales Internacionales Contemporáneos y la Búsqueda de la Realización del Ideal de la Justicia Internacional", *in Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz / Vitoria-Gasteizko Nazioarteko Zuzenbidearen eta Nazioarteko Harremanen Ikastaroak* - Universidad del País Vasco (2010) pp. 17-95; A.A. Cançado Trindade, "O Papel dos Tribunais Internacionais na Evolução do Direito Internacional Contemporâneo", XLI *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano de la OEA* (2014) pp. 37-88.

4. E. Möse, "Main Achievements of the ICTR", 3 *Journal of International Criminal Justice* (2005) pp. 932-933; E. Möse, "The International Criminal Tribunal for Rwanda", *in International Criminal Justice - Law and Practice from the Rome Statute to Its Review* (ed. R. Bellelli), Farnham/U.K., Ashgate, 2010, p. 90; A. Cassese, "The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice", 25 *Leiden Journal of International Law* (2012) p. 497.

5. Cf. A.A. Cançado Trindade, *A Visão Humanista da Missão dos Tribunais Internacionais Contemporâneos*, The Hague/Fortaleza, IBDH/IIDH, 2016, pp. 3-283.

6. Cf. S. Zappalà, *La justice penale internationale*, Paris, Montchrestien, 2007, pp. 15, 19, 23, 29, 31, 34-35, 43, 135, 137 and 145-146.

7. A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, pp. 196-198, and cf. pp. 132-191.

8. A.A. Cançado Trindade, "Les tribunaux internationaux et leur mission commune de réalisation de la justice: développements, état actuel et perspectives", 391 *Recueil des Cours de l´Académie de Droit International de La Haye* (2017) p. 50.

9. Cf., in this sense, e.g., A.A. Cançado Trindade, "A Century of International Justice and Prospects for the Future", *in*: *A Century of International Justice and Prospects for the Future / Rétrospective d´un siècle de justice internationale et perspectives d´avenir* (eds. A.A. Cançado Trindade and D. Spielmann), Oisterwijk, Wolf Publs., 2013, pp. 16-17; A.A. Cançado Trindade, "Quelques réflexions sur les systèmes régionaux dans le cadre de l´universalité des droits de l´homme", *in*: *Select Proceedings of the European Society of International Law* (vol. IV: 2012 Valencia Colloquy), Oxford/Portland, Hart Publ., 2015, pp. 345-347; [Various Authors,] *International Judicial Lawmaking* (eds. A. von Bogandy and I. Venzke), Heidelberg, Springer, 2012, pp. 9-15 and 35-36; A. von Bogandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication*, Oxford, Oxford University Press, 2016 [reed.], pp. 49 and 62.

10. *In*: "Discours de A.A. Cançado Trindade, Président de la Cour Interaméricaine des Droits de l´Homme", Cour Européenne des Droits de l´Homme, *Rapport annuel 2003*, Strasbourg, CourEDH, 2004, pp. 41-50; also reproduced *in*: A.A. Cançado Trindade, *El Desarrollo del Derecho Internacional de los Derechos Humanos mediante el Funcionamiento y la Jurisprudencia de la Corte Europea y la Corte Interamericana de Derechos Humanos*, San José of C.R./Strasbourg, CtIADH, 2007, pp. 41-42, para. 13.

11. Cf. A.A. Cançado Trindade, "Le développement du Droit international des droits de l´homme à travers l´activité et la jurisprudence des Cours européenne et interaméricaine des droits de l´homme", 16 *Revue universelle des droits de l´homme* (2004) pp. 177-180.

12. A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, 2nd. rev. ed., Leiden/The Hague, Nijhoff/The Hague Academy of International Law, 2013, ch. VI, pp. 139-161; A.A. Cançado Trindade, "La *Recta Ratio* dans les Fondements du *Jus Gentium* comme Droit International de l'Humanité", 10 *Revista do Instituto Brasileiro de Direitos Humanos* (2010) pp. 11-26; M.M.T.A. Brus, *Third Party Dispute Settlement in an Interdependent World*, Dordrecht, Nijhoff, 1995, pp. 142 and 182-183.

13. A.A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, 2nd. rev. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2017, pp. 53-56.

14. Cf. A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario - Aproximaciones y Convergencias*, Geneva, ICRC, [2000], pp. 1-66. - The rights protected thereunder, in any circumstances, are not reduced to those "granted" by the State: they are *inherent to the human person*, and ought thus to be respected by the State. The protected rights are *superior and anterior to the State*, and must thus be respected by this latter, by all States.

15. For a recent study, cf. A.A. Cançado Trindade, "Reflexiones sobre la Presencia de la Persona Humana en el Contencioso Interestatal ante la Corte Internacional de Justicia: Desarrollos Recientes", 17 *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián* - Universidad del País Vasco (2017) pp. 223-271.

16. Nor of prior "exhaustion" of diplomatic negotiations (para. 14), I added.

17. For a case-study, cf. A.A. Cançado Trindade, *The Universal Obligation of Nuclear Disarmament*, Brasília, FUNAG, 2017, pp. 41-224.

18. For example, as to the ICJ´s Judgment of 16.04.2013 in the case of the *Frontier Dispute between Burkina Faso and Niger*, concerning the determination of a frontier line, I appended my Separate Opinion thereto, wherein I focused mainly on the "human factor" (paras. 11-105), i.e., the local nomadic and semi-nomadic populations; I stressed the importance of bringing together people and territory, in the light of the *principle of humanity*, keeping in mind the human ends of the State, so as to advance towards the common good (paras. 90, 99 and 104-105).

19. Cf. A.A. Cançado Trindade, "The Expansion of the Material Content of *Jus Cogens*: The Contribution of the Inter-American Court of Human Rights", *in La Convention Européenne des Droits de l´Homme, un instrument vivant - Mélanges en l´honneur de Chr.L. Rozakis* (eds. D. Spielmann *et alii*), Bruxelles, Bruylant, 2011, pp. 27-46; A.A. Cançado Trindade, "Some Reflections on the Reassuring Expansion of the Material Content of *Jus Cogens*", *in Diritti Individuali e Giustizia Internazionale - Liber F. Pocar*, Milano, Giuffrè Ed., 2009, pp. 65-79; A.A. Cançado Trindade, "*Jus Cogens*: The Determination and the Gradual Expansion of Its Material Content in Contemporary International Case-Law", *in XXXV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - 2008*, Washington D.C., OAS General Secretariat, 2009, pp. 3-29; A.A. Cançado Trindade, "La Ampliación del Contenido Material del *Jus Cogens*", *in XXXIV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - 2007*, Washington D.C., OAS General Secretariat, 2008, pp. 1-15.

20. Cf., e.g., [Various Authors,] *La justice pénale internationale face aux crimes de masse - Approches critiques* (eds. R. Nollez-Goldbach and J. Saada), Paris, Pédone, 2014, pp. 15-241; [Various Authors,] *Punir les crimes de masse: entreprise criminelle commune ou co-action?* (ed. O. de Frouville), Bruxelles, Nemesis/Anthemis, 2012, pp. 13-232.

21. Cf. *Conversación con Antônio Augusto Cançado Trindade - Reflexiones sobre la Justicia Internacional* (book-interview with Emilia Bea), Valencia, Ed. Tirant lo Blanch, 2013, pp. 90, 96 and 111.

22. For the growing importance dedicated to the theme, cf., e.g., Y. Beigbeder, *International Justice against Impunity - Progress and New Challenges*, Leiden, Nijhoff, 2005, pp. 1-235.

23. A.A. Cançado Trindade, "A Emancipação do Ser Humano como Sujeito do Direito Internacional e os Limites da Razão de Estado", 6/7 *Revista da Faculdade de Direito da Universidade do Estado do Rio de Janeiro* (1998-1999) pp. 425-434; A.A. Cançado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", *in* 40 *Revista da Faculdade de Direito da UFMG* (2001) pp. 11-23; A.A. Cançado Trindade, "La Emancipación de la Persona Humana en la Reconstrucción del *Jus Gentium*", 47 *Revista da Faculdade de Direito da UFMG* (2005) pp. 55-74; A.A. Cançado Trindade, "As Manifestações da Humanização do Direito Internacional", 23 *Revista da Academia Brasileira de Letras Jurídicas* - Rio de Janeiro (2007) n. 31, pp. 159-170; A.A. Cançado Trindade, "Hacia el Nuevo Derecho Internacional para la Persona Humana: Manifestaciones de la Humanización del Derecho Internacional", 4 *Ius Inter Gentes - Revista de Derecho Internacional* - Catholic University (PUC) of Peru (2007) pp. 12-21; A.A. Cançado Trindade, *A Humanização do Direito Internacional*, 2nd. rev. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2015, pp. 3-789.

24. Cf., on this point, 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; and cf. also ICJ, case concerning *Jurisdictional Immunities of the State* (Germany *versus* Italy, counter-claim, Order of 06.07.2010), Dissenting Opinion of Judge A.A. Cançado Trindade, paras. 142-145 and 151-153.

25. To these, one can add the cases of assassinations planned at the highest level of the State power

and executed by order of this latter, such as that of *Myrna Mack Chang* (Judgment of 25.11.2003).

26. Article 23 of the Rules of Court, providing for direct access to international justice (paragraph 1) and participation of the alleged victims in the whole procedure before the Court, provided with foresight, in its paragraph 2, that

    When there are several alleged victims, next-of-kin or duly accredited representatives, they shall designate a common intervenor who shall be the only person authorized to present pleadings, motions and evidence during the proceedings, including the public hearings.

    This provision - together with paragraph 1 of Article 23 - proved to be of timely importance for the Court´s handling of the aforementioned cases concerning human collectivities, enabling it to conduct the proceedings in a reasonable – and feasible - manner.

27. Cf. A.A. Cançado Trindade, "Une ère d´avancées jurisprudentielles et institutionnelles: souvenirs de la Cour interaméricaine des droits de l´homme", *in Le particularisme interaméricain des droits de l´homme* (eds. L. Hennebel and H. Tigroudja), Paris, Pédone, 2009, pp. 7-73.

28. Cf. A.A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice*, Utrecht, Universiteit Utrecht, 2011, pp. 171; A.A. Cançado Trindade, *La Responsabilidad del Estado en Casos de Masacres Dificultades y Avances Contemporáneos en la Justicia Internacional*, Mexico, Edit. Porrúa/Escuela Libre de Derecho, 2018, pp. 1104.

29. A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, 5th. rev. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2018, pp. 21-27 and 59-74.

30. For recent studies on these points, cf. A.A. Cançado Trindade, *El Derecho de Acceso a la Justicia en Su Amplia Dimensión*, 2nd. rev. ed., Santiago de Chile, CECOH/Librotecnia, 2012, pp. 79-559; A.A. Cançado Trindade, Évolution du Droit international au droit des gens - L´accès des particuliers à la justice internationale: le regard d´un juge, Paris, Pédone, 2008, pp. 1-188.

31. Cf. A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, University of Deusto, 2001, pp. 9-104; A.A. Cançado Trindade, "El Nuevo Reglamento de la Corte Interamericana de Derechos Humanos (2000) y Su Proyección Hacia el Futuro: La Emancipación del Ser Humano como Sujeto del Derecho Internacional", *in XXVIII Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* - OAS (2001) pp. 33-92.

32. Cf., e.g., the cases of the *Massacres of Barrios Altos* (of 2001), of *Plan de Sánchez* (of 29.04.2004), of the *19 Tradesmen* (of 05.07.2004), of *Mapiripán* (of 17.09.2005), of the *Moiwana Community* (of 15.06.2005), of *Ituango* (of 01.07.2006), of *Montero Aranguren and Others* (of 05.07.2006), and of the *Prison of Castro Castro* (of 25.11.2006), among others.

33. Paragraph 51 of the Judgment. The Court ordered reparations in its subsequent Judgment on the case, of 19.11.2004. In turn, earlier on, the Guatemalan Commission for the Historical Clarification, in its report *Guatemala - Memoria del Silencio*, had established the occurrence of 626 massacres committed by the forces of the State during the armed conflict, mainly the Army, supported by paramilitary structures; 95% of them had been perpetrated between 1978 and 1984 (with violence intensified in 1981-1983), and in this period 90% had been executed in areas inhabited predominantly by the Maya people. The acts of extreme violence, in the assessment of that Commission, disclosed the characteristics of "acts of genocide", - specifically against members of the peoples *maya-ixil*, *maya-achi*, *maya-k´iche´*, *maya-chuj* and *maya-q´anjob´al*, in four regions of the country; Comisión para el Esclarecimiento Histórico, *Guatemala - Memoria del Silencio*, vol. III, Guatemala, CEH, 1999, pp. 316-318, 358, 375-376, 393, 416 and 417-423. - In the view of the Guatemalan Truth Commission, the grave and massive human rights violations engaged both the individual responsibility of the "intellectual or material authors" of the "acts of genocide" as well as the "responsibility of the State", as most of those acts were the product of a State "policy pre-established by a superior command to its material authors"; *ibid*., p. 422.

34. In the case of the *Massacres of Ituango*, the facts occurred in June 1996 and as from October 1997: the raids in the town of Ituango (Department of Antioquia) were undertaken by paramilitary groups of "*Autodefensas Unidas de Colombia*", which, counting on the "omission, acquiescence and collaboration" on the part of the security forces of the State, murdered defenceless persons, deprived them of their goods, and generated terror and forced displacement.

35. In the context of the so-called "Operation Condor", security agents of the States of the Southern Cone of South America "cooperated" to exterminate political opponents of the repressive regimes of those days.

36. In the case of the *Massacres of Ituango*, the facts occurred in June 1996 and as from October 1997: the raids in the town of Ituango (Department of Antioquia) were undertaken by paramilitary groups of "*Autodefensas Unidas de Colombia*", which, counting on the "omission, acquiescence and collaboration" on the part of the security forces of

the State, murdered defenceless persons, deprived them of their goods, and generated terror and forced displacement.

37. Cf. A.A. Cançado Trindade, Évolution du Droit international au droit des gens - L´accès des particuliers à la justice internationale..., *op. cit. supra* n. (29), pp. 121-184.

38. Which victimized more than 30 thousand Latin Americans, in their great majority, young innocent people who were kidnapped, tortured and "disappeared", many having been thrown alive from airplanes into the sea, for "there no longer being place" for their mortal remains in clandestine cemeteries.

39. In the earlier case of *Barrios Altos* (Judgment of 14.03.2001), the victims had been members of trade unions.

40. IACtHR, Judgments on the cases of the *Massacre of Mapiripán* (2005); of the "*Street Children*" (*Villagrán Morales and Others*, reparations, 2001).

41. The Court added that the relatives of the 44 victims were also beneficiaries of reparations for violation of Articles 8 and 25 of the American Convention on Human Rights (judicial protection and guarantees); they were regarded also as "direct victims" in their own right.

42. The case pertained to the killing of approximately 63 detainees by the guards of the Detention Centre of Catia, on 27-29.11.1992, in addition to 28 disappeared persons and 52 injured persons.

43. IACtHR, Judgments in the cases of the *Massacre of Plan de Sánchez* (2004), para. 48; of the *Massacre of Mapiripán* (2005), paras. 183 and 305; of the *Massacres of Ituango* (2006), para. 92.

44. Incorporated into the *dossiers* of the cases.

45. IACtHR, Judgment on the case of the *Massacres of Ituango* (2006), para. 94. - The Court has, on more than one occasion, requested the Inter-American Commission of Human Rights (IAComHR) to correct such defects by providing lists of alleged victims *identified subsequently* to the presentation of the petition; cf. IACtHR, Judgments on cases of *Aloeboetoe and Others* (reparations, 1991), paras. 39, 64, 66 and 69; of *El Amparo* (reparations, 1996), paras. 39 and 42; of *Caballero Delgado and Santana* (reparations, 1997), paras. 13 and 38; of the "*Institute of Rehabilitation of Minors*" (2004), paras. 107 and 111.

46. IACtHR, Judgment on the case of the *Massacre of Mapiripán* (2005), paras. 305-306; and cf. Judgment on the case of the "*Street Children*" (*Villagrán Morales and Others*, reparations, 2001), para. 17. - The IACtHR took these measures, in the light of the applicable law (the American Convention and its Regulations), bearing in mind the complexities of each case, making sure that the right of defence of the parties had been respected (at the corresponding procedural moment), and that the alleged victims subsequently identified kept relation with the facts described in the (original) petition and the evidence produced before it (Court's Judgments in the cases of *Goiburú and Others*, and of the *Massacres of Ituango*); IACtHR, Judgments on the cases of *Goiburú and Others* ("Operation Condor", 2006), para. 33; and of the *Massacres of Ituango* (2006), para. 95.

47. IACtHR, Judgment in the case of *Acevedo Jaramillo and Others* (2006), para. 227; and cf. Judgment in the case of *Aloeboetoe and Others* (reparations, 1991), para. 66.

48. And cf. A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, The Hague, Nijhoff/The Hague Academy of International Law, 2010, pp. 1-726; A.A. Cançado Trindade, *Le Droit international pour la personne humaine*, Paris, Pédone, 2012, pp. 45-368.

49. Cf., *inter alia*, e.g., A.A. Cançado Trindade, "La jurisprudence de la Cour Internationale de Justice sur les droits intangibles / The Case-Law of the International Court of Justice on Non-Derogable Rights", *in Droits intangibles et états d´exception / Non-Derogable Rights and States of Emergency* (eds. D. Prémont, C. Stenersen and I. Oseredczuk), Bruxelles, Bruylant, 1996, pp. 53-71 e 73-89.

50. Cf., *inter alia*, e.g., G. Zyberi, *The Humanitarian Face of the International Court of Justice*, Utrecht, Intersentia, 2008, pp. 26-60 and 259-341.

51. Cf. A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario - Aproximaciones y Convergencias*, Geneva, ICRC, [2000], pp. 1-66; A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 7-185; A.A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, 2nd. rev. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2017, pp. 3-462.

52. In this sense I have pronounced myself, e.g., in my Separate Opinions in the IACtHR´s Judgments in the cases of *Myrna Mack Chang* (of 18.09.2003), of the *Massacre of Plan de Sánchez* (of 20.04.2004), of *Goiburú and Others* (of 22.09.2006), of *Almonacid Arellano* (of 26.09.2006), among others. For a recent study, cf. A.A. Cançado Trindade, "Atos de Genocídio e Crimes contra a Humanidade: Reflexões sobre a Complementaridade da Responsabilidade Internacional do Indivíduo e do Estado", 67 *Revista del Instituto Interamericano de Derechos Humanos* (2018) pp. 13-49.

53. E.g., by means of the presence and participation of the victims in the corresponding international procedures.

54. D. Thürer, "International Humanitarian Law: Theory, Practice, Context", 338 *Recueil des Cours de l´Académie de Droit International de La Haye* (2008) pp. 133-134, and cf. pp. 35-36 and 339.

55. *Ibid*., p. 133.

56. Cf. references *in* n. (50), *supra*.

57. This has been so as from the decision of its Pre-Trial Chamber I (of 29.01.2007, on confirmation of charges), which contained cross-references to pertinent decisions of the IACtHR (case *Ivcher Bronstein*, 2001) and the ECtHR (cases *Soering*, 1989, and *Mamatkulov and Askarov*, 2005). As to the identification of victims for purposes of reparations, the ICC (Pre-Trial Chamber I) further referred, in the same Judgment in the *Lubanga* case, to the Judgments of the IACtHR in the case of *Aloeboetoe et alii* (reparations, of 1993), and in the case of the *Massacre of Plan de Sánchez* (reparations, of 2004). And cf. also the decision of Trial Chamber I of 07.08.2012.

58. On such matters, the ICC referred to the case-law of the ICJ (case of the *Armed Activities of the Territory of the Congo*, merits, 2005), as well as of the *ad hoc* ICTFY (case, *inter alia*, of *Delalic et alii*, 1998-2001).

59. Cf. [Various Authors,] *2007, L´Année des bilans: Leçons et perspectives face à la clôture des premiers tribunaux internationaux*, Paris, I.J.T., 2007, pp. 11-119; ICTY, *ICTY Manual on Developed Practices, as Part of a Project to Preserve the Legacy of the ICTY*, The Hague/Turin, ICTY/UNICRI, 2009, pp. 1-219; [Various Authors,] *Symposium on the Legacy of International Criminal Courts and Tribunals in Africa, with a Focus on the Jurisprudence of the International Criminal Tribunal for Rwanda*, Waltham, Brandeis Univ., 2010, pp. 1-49. And cf., on its legacy, e.g., S. Kendall and S.M.H. Nouwen, "Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda", 110 *American Journal of International Law* (2016) pp. 212-232.

60. Their precious archives, of historic relevance, have passed to the custody of the Mechanism of International Criminal Tribunals (MICT) of the United Nations, as U.N. property, remaining, accordingly, inviolable U.N., *United Nations Mechanism for International Criminal Tribunals* (MICT Archives), 2015, pp. 1 and 3.

61. Cf., e.g., [Various Authors,] *Assessing the Legacy of the ICTY* (ed. R.H. Steinberg), Leiden, Nijhoff, 2011, pp. 3-311; [Various Authors,] *ICTY Global Legacy* (2011 Hague Conference Proceedings), The Hague, ICTY Outreach Programme, 2012, pp. 9-175; [Various Authors,] *Legacy of the ICTY in the Former Yugoslavia* (Sarajevo and Zagreb Conferences Proceedings), The Hague, ICTY Outreach Programme, 2012, pp. 11-216; [Various Authors,] *20 Years of the ICTY - Anniversary Events and Legacy Conference Proceedings*, Sarajevo, U.N./ICTY, 2014, pp. 9-107. And, for a general study, cf., e.g., [Various Authors,] *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (eds. B. Swart, A. Zahar and G. Sluiter), Oxford, Oxford University Press, 2011, pp. 7-536.

62. For a parallel between the case-law of the ICTR and the ICTFY on gender crimes [crimes relating to sexual violence], cf. I. Piccolo (ed.), *The Crime of Rape in International Criminal Law*, The Hague, ICA, 2013, pp. 5-78; [Various Authors,] *Prosecuting Conflict-Related Sexual Violence at the ICTY* (eds. S. Brammertz and M. Jarvis), Oxford, Oxford University Press, 2016, pp. 1-386.

63. The crime of torture, in particular, first emerged in the realm of International Law of Human Rights, and then, later on, also in that of in International Criminal Law.

64. Which served as precedent for judgment in the *M. Muhimana* case (2005).

65. In the sense that, in order to determine rape, it is not necessary to prove the absence of consent of the victim, given the coercitive context in which rape takes place.

66. Cf., e.g., S. Williams, *Hybrid and Internationalised Criminal Tribunals - Selected Jurisdictional Issues*, Oxford, Hart Publ., 2012, pp. 58-133.

67. On the legacy of the SCSL, cf. V.E. Dittrich, "La Cour Spéciale pour la Sierra Leone et la portée de son héritage", 45 *Études internationales - Québec*, 2014, n. 1, pp. 85-103; V.E. Dittrich, "Legacies in the Making: Assessing the Institutionalized Legacy Endeavour of the Special Court for Sierra Leone", *in The Sierra Leone Special Court and Its Legacy - The Impact for Africa and International Criminal Law* (ed. Ch. C. Jalloh), Cambridge, Cambridge University Press, 2014, pp. 663-691; Th. M. Clark, "Assessing the Special Court's Contribution to Achieving Transitional Justice", *in ibid.*, pp. 746-769.

68. As well as on forced marriages as a crime against humanity.

69. Cf. A.A. Cançado Trindade, *The Access of Individuals to International Justice*, *op. cit. supra* n. (6), pp. 151-191; A.A. Cançado Trindade, Évolution du Droit international au droit des gens - L´accès des particuliers à la justice internationale..., *op. cit. supra* n. (29), pp. 132-146 and 151-184; A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias...*, *op. cit. supra* n. (28), pp. 59-74 and 367-394; A.A. Cançado Trindade, *El Derecho de Acceso a la Justicia en Su Amplia Dimensión*, 2nd. rev. ed., Santiago de Chile, Ed. Librotecnia, 2012, pp. 367-396 and 423-559; A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 113-129; A.A.

Cançado Trindade, *State Responsibility in Cases of Massacres...*, *op. cit. supra* n. (27), pp. 1-71. And cf. also: [Various Authors,] *Réparer les violations graves et massives des droits de l´homme: La Cour Interaméricaine, pionnière et modèle?* (eds. E. Lambert Abdelgawad and K. Martin-Chenut), Paris, Éd. Société de Législation Comparée, 2010, pp. 17-334; I. Bottigliero, *Redress for Victims of Crimes under International Law*, Leiden, Nijhoff, 2004, pp. 1-253; [Various Authors,] *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (eds. C. Ferstman, M. Goetz and A. Stephens), Leiden, Nijhoff, 2009, pp. 7-566; L. Moffett, *Justice for Victims before the International Criminal Court*, London/N.Y., Routledge, 2014, pp. 1-289; J.-B. Jeangène Vilmer, *Réparer l´irréparable - Les réparations aux victimes devant la Cour Pénale Internationale*, Paris, PUF, 2009, pp. 1-182.

70. A.A. Cançado Trindade, "Rehabilitation of Victims: Reflections on Some Issues Raised in the Case *Belgium versus Senegal* (2013) Adjudicated by the International Court of Justice", *in* XL *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - 2013,* Washington D.C., OAS General Secretariat, 2014, pp. 85-151.

71. This was not the only occasion when I have sustained the need of the jurisprudential construction of *jus cogens* within the ICJ. Thus, e.g., in my extensive Separate Opinion (paras. 195 and 212-217) in the ICJ´s Advisory Opinion on the Declaration *of Independence of Kosovo* (of 22.07.2010), I underlined the importance of elaborating it with particular attention to the grave violations of International Humanitarian Law at *intra*-State level.

72. Cf., e.g., A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, *op. cit. supra* n. (28), pp. 59-74 and 367-394; A.A. Cançado Trindade, "Genesis and Evolution of the State´s Duty to Provide Reparation for Damages to Rights Inherent to the Human Person", *in L´homme et le droit - En hommage au Professeur J.-F. Flauss* (eds. E. Lambert Abdelgawad *et alii*), Paris, Pédone, 2014, pp. 145-179; A.A. Cançado Trindade, "Reminiscencias de la Corte Interamericana de Derechos Humanos en cuanto a Su Jurisprudencia en Materia de Reparaciones", 21 *Revista de Derecho Vox Juris* - Facultad de Derecho de la Universidad de San Martín de Porres (2011) pp. 53-72.

73. A.A. Cançado Trindade, "The Human Person and International Justice" (W. Friedmann Memorial Award Lecture 2008), 47 *Columbia Journal of Transnational Law* (2008) pp. 21-24.

74. Cf. A.A. Cançado Trindade, "La *Recta Ratio* dans les Fondements du *Jus Gentium* comme Droit International de l´Humanité", 10 *Revista do Instituto Brasileiro de Direitos Humanos* (2010) pp. 11-26.

75. Cf. A.A. Cançado Trindade, Évolution du Droit international au droit des gens - L´accès des particuliers à la justice internationale..., *op. cit. supra* n. (29), pp. 1-187; A.A. Cançado Trindade, *Le Droit international pour la personne humaine*, Paris, Pédone, 2012, pp. 45-368.

76. Cf. A.A. Cançado Trindade, L. Ortiz Ahlf and J. Ruiz de Santiago, *Las Tres Vertientes de la Protección Internacional de los Derechos de la Persona Humana*, 2nd. rev. ed., Mexico, Ed. Porrúa / Escuela Libre de Derecho, 2017, pp. 1-221.

77. Cf. A.A. Cançado Trindade, *La Protección de la Persona Humana frente a los Crímenes Internacionales y la Invocación Indebida de Inmunidades Estatales*, Fortaleza/Brazil, IBDH/IIDH/SLADI, 2013, pp. 19-305.

78. By the indifference of the social *milieu*, by impunity or by oblivion.

79.. Cf. A.A. Cançado Trindade, "La Perennidad del Legado de los 'Padres Fundadores' del Derecho Internacional", 13 *Revista Interdisciplinar de Direito da Faculdade de Direito de Valença* (2016) n. 2, pp. 15-43; A.A. Cançado Trindade, "Prefácio: A Visão Universalista e Humanista do Direito das Gentes: Sentido e Atualidade da Obra de Francisco de Vitoria", *in*: Francisco de Vitoria, *Relectiones - Sobre os Índios e sobre o Poder Civil*, Brasília, Edit. University of Brasília / FUNAG, 2016, pp. 19-51; and cf. also ICJ, case of the *Alleged Violations of the 1955 Treaty of Amity* (Iran *versus* United States, Order of 03.10.2018), Separate Opinion of Judge A.A. Cançado Trindade, para. 66.

80. Cf. A.A. Cançado Trindade, "Some Reflections on the Principle of Humanity in Its Wide Dimension", *in Research Handbook on Human Rights and Humanitarian Law* (eds. R. Kolb and G. Gaggioli), Cheltenham, E. Elgar, 2013, pp. 188-197.

81. An equal reasoning is found in the Judgments of the same ICTR in the cases *J.P. Akayesu*, and of *O. Serushago* (Judgment of 05.02.1999, para. 15).

82. Cf., e.g., E.J. Roucounas, "Les infractions graves au Droit humanitaire", 31 *Revue hellénique de Droit international* (1978) pp. 60-139; C. Swinarski, "Effets pour l´individu des régimes de protection de droit international", 391 *Recueil des Cours de l´Académie de Droit International de La Haye* (2017) pp. 204 and 226-233.

83. S. Weil, *La pesanteur et la grâce* [1947], Paris, Libr. Plon, 1991, pp. 133-134; S. Weil, *Gravity and Grace* [1952], Lincoln, University of Nebraska Press, 1997, p. 122.

84. Cf. A.A. Cançado Trindade, *State Responsibility in Cases of Massacres...*, *op. cit. supra* n. (27), pp. 39-44; R. Maison, *La responsabilité individuelle*

pour crime d´État en Droit international public, Bruxelles, Bruylant/Éds. de l´Université de Bruxelles, 2004, pp. 24, 85, 262-264 and 286-287; M. Osiel, *Mass Atrocity, Collective Memory, and the Law*, New Brunswick/London, Transaction Publs., 1997, pp. 9, 61, 103 and 300.

85. Cf. A.A. Cançado Trindade, "Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited", *op. cit. supra* n. (23), pp. 253-269; R. Maison, *La responsabilité individuelle pour crime d´État*..., *op. cit. supra* n. (83), pp. 294, 298, 409-410, 412, 459 and 511.