

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE



Antônio Augusto Cançado Trindade

Judge of the International Court of Justice and Former President of the Interamerican Court of Human Rights;
Balzan Prize of Human Rights.

1. It is necessary and relevant here to consider the present decision of the International Court of Justice (ICJ) within the handling of compliance with the need to secure the proper reparations due to the victims of the horrors inflicted upon them as determined by the Court's Judgment of 19.12.2005. For a long time I have been insisting within the ICJ upon the need to proceed promptly to the determination of reparations for the grave breaches of the International Law of Human Rights and International Humanitarian Law. The delays by the ICJ so far are unacceptable to me.

2. In my own understanding, there is need to move beyond the unsatisfactory interState outlook, if one is to foster the progressive development of international law in the domain of reparations, in particular collective reparations. Prolonged delays are most regrettable, particularly from the perspective of the victims. Already the "founding fathers" of international law went well beyond the strict interState outlook, and were particularly attentive to the duty of prompt reparation for damages.

3. It is in jusnaturalist thinking – as from the XVIth century – that the goal of prompt reparation was properly pursued. Legal positivist thinking – as from the late XIXth century – unduly placed the "will" of States above *recta ratio*. It is in jusnaturalist thinking – revived as it is nowadays – that the notion of *justice* has always occupied a central position, orienting *law* as a whole; *justice*, in sum, is at the beginning of all *law*, being, moreover, its ultimate end.

I. THE RELEVANCE OF DUE COMPLIANCE WITH THE RIGHT TO REPARATIONS

4. In my Declaration presented in the ICJ's Order of 11.04.2016, in the case opposing

D.R. Congo versus Uganda, I expressed my concern with the undue prolongation of time of proceedings (since 2005) as to the due reparations in the *cas d'espèce* (paras. 1-10). I added that

According to a *célèbre* maxim, *justice delayed is justice denied*. This point was object of meditation already in Seneca's *Letters to Lucilius* (circa 62-64 A.D.). In the search for the realization of justice, undue delays are indeed to be avoided. The victims (in armed conflicts) of grave breaches of the International Law of Human Rights and of International Humanitarian Law have a *right to reparations*, – most likely collective reparations, and in their distinct forms, – within a reasonable time.

Ancient Stoic thinking was already conscious of the perennial mystery surrounding human existence, that of the passing of time. Stoicism, in its perennial wisdom, recommended (as in, e.g., Seneca's *De Brevitate Vitae*, circa 40 A.D.) to keep always in mind all times – past, present and future – jointly: time past, by means of remembrance; time present, so as to make the best use of it (in search of justice); and time future, so as to anticipate and prevent all one can, thus seeking to make life longer.

The duty of reparation is firmly-rooted in the history of the law of nations. The acknowledgment of such duty goes back to its origins, to the perennial lessons of the "founding fathers" of international law" (paras. 12 and 14-15).

5. May I add that in this respect, there are relevant passages in the significant references of classic works¹. Such a duty of reparation for injuries was in my view "clearly seen as a response to an *international need*"², in conformity with the *recta ratio*, – "whether the beneficiaries were (emerging) States, peoples, groups or individuals. The *recta ratio* provided

NOTES

1. Of, e.g., Francisco de Vitoria (Second *Relectio – De Indis*, 1538-1539); Hugo Grotius (*De Jure Belli ac Pacis*, 1625, book II, ch. 17); Samuel Pufendorf (*Elementorum Jurisprudentiae Universalis – Libri Duo*, 1672; and *On the Duty of Man and Citizen According to Natural Law*, 1673); Christian Wolff (*Jus Gentium Methodo Scientifica Pertractatum*, 1764; and *Principes du droit de la nature et des gens*, 1758); among others, such as the pertinent considerations also of Alberico Gentili (*De Jure Belli*, 1598); Francisco Suárez (*De Legibus ac Deo Legislatore*, 1612); Cornelius van Bynkershoek (*De Foro Legatorum*, 1721; and *Questiones Juris Publici – Libri Duo*, 1737) (paras. 1617). There is nothing new under the sun. The more we do research on the classics of international law (largely forgotten in our hectic days), the more we find reflections on the victims' right to reparations for injuries, – also present in the writings of, e.g., Juan de la Peña I then (*De Bello contra Insulanos*, 1545); Bartolomé de Las Casas (*De Regia Potestate*, 1571); Juan Roa Dávila (*De Regnorum Justitia*, 1591); Juan Zapata y Sandoval (*De Justitia Distributiva et Acceptione Personarum ei Opposita Disceptatio*, 1609) (paras. 1617).
2. J. Brown Scott, *The Spanish Origin of International Law – Francisco de Vitoria and His Law of Nations*, Oxford/London, Clarendon Press/H. Milford, 1934, pp. 140, 150, 163, 165, 172, 210-211 and 282-283; and cf. also, Association Internationale Vitoria-Suarez, *Vitoria et Suarez: Contribution des théologiens au Droit international moderne*, Paris Pédone, 1939, pp. 73-74, and cf. pp. 169-170; A.A. Cançado Trindade, "Prefacio", in *Escuela Ibérica de la Paz (1511-1694) – La Conciencia Crítica de la Conquista y Colonización de América* (eds. P. Calafate and R.E. Mandado Gutiérrez), Santander, Ed. Universidad de Cantabria, 2014, pp. 40-109.
3. The *right reason* lies at the basis of the law of nations, being the spirit of justice in the line of natural law thinking; this trend of international legal thinking has always much valued the *realization of justice*, pursuant to a "superior value of justice". P. Foriers, *L'organisation de la paix chez Grotius et l'école de droit naturel* [1961], Paris, J. Vrin, 1987, pp. 293, 333, 373 and 375 [reed. of study originally published in: *Recueil de la Société Jean Bodin pour l'histoire comparative des institutions*, vol. 15-part II, Bruxelles, Libr. Encyclopédique, 1961].
4. A. A. Cançado Trindade, *Direito à Reparação – Origem e Evolução no Direito Internacional*, Fortaleza, FB/Univ. Edit., 2019, pp. 5-285.
5. Cf., e.g., 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. 1-104; A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Edit. Ad-Hoc, 2013, pp. 7-185; A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104.
6. 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; A.A. Cançado Trindade, *A Visão Humanista da Missão dos Tribunais Internacionais Contemporâneos*, The Hague/Fortaleza, IBDH/IIDH, 2016, pp. 3-283; A.A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, 3rd. ed., Belo Horizonte, Edit. Del Rey, 2019, pp. 3-514.
7. Cf. S. Zappalà, *La justice pénale internationale*, Paris, Montchrestien, 2007, pp. 15, 19, 23, 29, 31, 34-35, 43, 135, 137 and 145-146.
8. Cf., earlier on, ICJ, case of *Armed Activities on the Territory of the Congo (D.R. Congo versus Uganda, Order of 01.07.2015)*, Declaration of Judge Cançado Trindade, paras. 17; ICJ, case of *Armed Activities on the Territory of the Congo (D.R. Congo versus Uganda, Order of 11.04.2016)*, Declaration of Judge Cançado Trindade, paras. 120.
9. Franciscus de Victoria, *Second Relectio – On the Indians [De Indis]* [1538-1539], Oxford/London, Clarendon Press/H. Milford, 1934 [reed.], p. LV.
10. *Ibid.*, p. LV; and cf. Francisco de Vitoria, "Relección Segunda – De los Indios" [1538-1539], in *Obras de Francisco de Vitoria –*

