CONCURRING OPINION OF
JUDGE A.A. CANÇADO TRINDADE

1. I vote in favour of the adoption, by the Inter-American Court of Human Rights, of the present Judgment, of historical importance, on the merits in the *Barrios Altos* case, as from the recognition of international responsibility expressed by the Peruvian State. As the Court observed (par. 40), such recognition constituted a positive contribution by the respondent State to the evolution of the application of the norms of protection of the American Convention on Human Rights. The oral arguments, both of the Peruvian State and the Inter-American Commission on Human Rights, developed in the memorable public hearing held today, 14 March 2001, in the premises of the Tribunal, opened a new perspective in the experience of the Court in cases of that recognition (*allanamiento*)[1] on the part of the respondent State[2].

2. Given the high relevance of the legal questions dealt with in the present Judgment, I feel obliged to express, under the always merciless pressure of time, my personal thoughts on the matter. The Court, in any circumstances, including in cases of *allanamiento*, as from the recognition on the part of the respondent State of its international responsibility for acts in violation of the protected rights, has the full faculty to determine *motu proprio* the legal consequences of such wrongful acts, such determination no being conditioned by the terms of the *allanamiento*. By acting in that way, the Court is making use of the powers which are *inherent* to its judicial function[3]. As I have always sustained within the Court, in any circumstances *the Court is master of its jurisdiction*[4].

3. In the present case of *Barrios Altos*, by making free and full use, as it is incumbent upon it, of the powers which are inherent to its judicial function, the Court, for the first time in a case of *allanamiento*, besides having determined as admissible the recognition of international responsibility on the part of the respondent State, has also established the juridical consequences of such *allanamiento*, as can be inferred from the categorical paragraphs 41 and 43 of the present Judgment, which provide in an unequivocal way the understanding of the Court in the sense that

> - "(...) The provisions of amnesty, the provisions of prescription y and the establishment of factors excluding responsibility which are meant to obstruct the investigation and sanction of those responsible for grave violations of human rights such as torture, summary, extralegal or arbitrary executions, and forced disappearances, are inadmissible, all of them being prohibited for violating non-derogable rights recognized by the International Law of Human Rights.

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1. Article 52(2) of the Rules of Procedure in force of the Inter-American Court of Human Rights.

2. Cf., earlier on, the cases *Aloeboetoe* (1991), Series C, n. 11; *El Amparo* (1995), Series C, n. 19; *Garrido and Baigorria* (1996), Series C, n. 26; *Benavides Cevallos* (1998), Series C, n. 38; *Caracazo* (1999), Series C, n. 58; and *Trujillo Oroza* (2000), Series C, n. 64.

3. Cf., to this effect, my Dissenting Opinion in the case *Genie Lacayo* (Revision of Sentence, Resolution of 13.09.1997), Series C, n. 45, par. 7.

4. Cf., e.g., my Concurring Opinion in Advisory Opinion n. 15, on the *Reports of the Inter-American Commission on Human Rights* (1997), Series A, n. 15, pars. 5-7, 9 and 37; my Concurring Opinion in the Resolution on Provisional Measures of Protection in the case *James and Others*, of 11.05.1999, pars. 6-8, *in* Inter-American Court of Human Rights, *Compendio de Medidas Provisionales* (July 1996/June 2000), Series E, n. 2, pp. 341-342.

> (...) In the light of the general obligations set forth in Articles 1(1) and 2 of the American Convention, the States Parties have the duty to take measures of all kinds to ensure that no one is deprived of the judicial protection and the exercise of the right to a simple and effective remedy, in the terms of Articles 8 and 25 of the Convention. It is for this reason that the States Parties to the Convention which adopt laws that have such an effect, as do the laws of self-amnesty, incur in a violation of Articles 8 and 25 in connection with Articles 1(1) and 2, all of the Convention. The laws of self-amnesty lead to the defencelessness of the victims and to the perpetuation of the impunity, whereby they are manifestly incompatible with the letter and the spirit of the American Convention. This type of laws obstructs the identification of the individuals responsible for violations of human rights, as obstacles as created to the investigation and the access to justice, impeding the victims and their relatives to know the truth and to receive the corresponding reparation"[5].

4. These considerations of the Inter-American Court constitute a new and great qualitative step forward in its case-law, to the effect of seeking to overcome an obstacle which the international organs of supervision of human rights have not yet succeeded to surpass: the impunity, with the resulting erosion of the confidence of the population in public institutions[6]. Moreover, they meet an expectation which in our days is truly universal. It may be recalled, in this respect, that the main document adopted by the II World Conference of Human Rights (1993) urged the States to "abrogate legislation leading to impunity for those responsible for grave violations of human rights, (...) and prosecute such violations (...)"[7].

5. The so-called self-amnesties are, in sum, an inadmissible offence against the right to truth and the right to justice (starting with the very access to justice)[8]. They are manifestly incompatible with the general - indissociable - obligations of the States Parties to the American Convention to respect and to ensure respect for the human rights protected by it, securing their free and full exercise (in the terms of Article 1(1) of the Convention), as well as to harmonize their domestic law with the international norms of protection (in the terms of Article 2 of the Convention). Moreover, they affect the rights protected by the Convention, in particular the rights to judicial guarantees (Article 8) and to judicial protection (Article 25).

6. It is to be kept in mind, in relation to the laws of self-amnesty, that their *legality at domestic law level*, in leading to impunity and injustice, is in flagrant incompatibility with the norms of protection of the International Law of Human Rights, bringing about violations *de jure* of the rights of the human person. The *corpus juris* of the International Law of Human Rights makes it clear that not everything that is lawful in the domestic legal order is so in the international legal order, and even more

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5. And the Court adds, in the paragraph 44 of the present Judgment: - "As a consequence of the manifest incompatibility between the laws of self-amnesty and the American Convention on Human Rights, the aforementioned laws are devoid of legal effects and cannot keep on representing an obstacle to the investigation of the facts (...) nor to the identification and punishment of those responsible (...)".

6. Cf. the criticisms of the "ignored amnesties" in the past, *in* R.E. Norris, "Leyes de Impunidad y los Derechos Humanos en las Américas: Una Respuesta Legal", 15 *Revista del Instituto Interamericano de Derechos Humanos* (1992) pp. 62-65.

7. United Nations, Declaration and Programme of Action of Vienna (1993), part II, par. 60.

8. Cf. the Joint Separate Opinion of Judges A.A. Cançado Trindade and A. Abreu Burelli, in the case *Loayza Tamayo* (Reparations, Judgment of 27.11.1998), Series C, n. 42, pars. 2-4; and cf. L. Joinet (*rapporteur*), *La Cuestión de la Impunidad de los Autores de Violaciones de los Derechos Humanos (Derechos Civiles y Políticos) - Informe Final*, U.N./Commission on Human Rights, doc. E/CN.4/Sub.2/1997/20, of 26.06.1997, pp. 1-34.

forcefully when superior values (such as truth and justice) are at stake. In reality, what came to be called laws of amnesty, and particularly the perverse modality of the so-called laws of self-amnesty, even if they are considered laws under a given domestic legal order, *are not so* in the ambit of the International Law of Human Rights.

7. This same Court pondered, in an Advisory Opinion of 1986, that the word "laws" in the terms of Article 30 of the American Convention means a legal norm of a *general character*, *tied to the general welfare*, formulated according to the procedure constitutionally established, by legislative organs constitutionally foreseen and democratically elected[9]. Who would dare to suggest that a "law" of self-amnesty satisfies all these requisites? I cannot see how to deny that "laws" of this kind are devoid of a general character, as they are measures of exception. And surely they do not contribute at all to the common good, but on the contrary: they appear as mere subterfuges to cover up grave violations of human rights, to obstruct the knowledge of truth (however painful this latter might be) and to hinder the very access to justice on the part of the victimized ones. In sum, they do not satisfy the requisites of "laws" in the ambit of the International Law of Human Rights.

8. In my Dissenting Opinion in the case of *El Amparo* (Interpretation of Sentence, 1997)[10], I sustained the thesis that a State can have its international responsibility engaged "by the simple approval and promulgation of a law in conflict with its conventional international obligations of protection" (pars. 22-23), - as it happens, in the present case of *Barrios Altos*, with the so-called laws of self-amnesty. While such laws remain in force, there occurs a *continuing situation* of violation of the relevant norms of the human rights treaties which bind the State at issue (in the present case, Articles 8 and 25, in connection with Articles 1(1) and 2 of the Convention).

9. As I saw it fit to insist in my recent Concurring Opinion in the case *"The Last Temptation of Christ" (Olmedo Bustos and Others)* (2001)[11], there is a long and vast international case-law clearly oriented in the sense that "the origin of the international responsibility of the State may rest on any act or omission of any of the powers or agents of the State (whether of the Executive, or of the Legislative, or of the Judiciary)" (par. 16). And I stressed, further on, in conformity with a general principle of the law on the international responsibility,

> - "(...) The independence of the characterization of a given act (or omission) as illicit in international law from the characterization - similar or otherwise - of such act by the domestic law of the State. The fact that a given State conduct is in conformity with the provisions of domestic law, or even that it is required by this latter, does not mean that its internationally illicit character can be denied, whenever it constituted a violation of an international obligation (...)" (par. 21).

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9. Inter-American Court of Human Rights (IACtHR), Advisory Opinion on *The Expression "Laws" in Article 30 of the American Convention on Human Rights* (1986), Series A, n. 6. The Court rightly observed that the word "laws" in the context of a system of human rights protection "cannot be dissociated from the nature and the origin of such system", as "the protection of human rights must necessarily comprise the concept of restriction to the exercise of State power" (par. 21).

10. IACtHR, Resolution of 16.04.1997, Series C, n. 46.

11. IACtHR, Judgment of 05.02.2001, Series C, n. 73.

And both in my aforementioned Concurring Opinion in the case *"The Last Temptation of Christ"* (Merits, 2001, pars. 96-98), and in my previous Dissenting Opinion in the case *Caballero Delgado and Santana* (Reparationos, 1997, pars. 13-14 and 20)[12], I insisted that the modifications in the domestic legal order required, so as to harmonize it with the norms of protection of the American Convention, constitute a form of non-pecuniary reparation under the Convention.

10. There is another point which seems to me even graver in relation to the degenerated figure - an offence against the rule of law (*État de Droit*) itself - of the so-called laws of self-amnesty. As the facts of the present case of *Barrios Altos* disclose - in leading the Court to declare, in the terms of the recognition of international responsibility made by the respondent State, the violations of the rights to life[13] and to personal integrity[14], - such laws do affect non-derogable rights - the *minimum* universally recognized, - which fall in the ambit of *jus cogens*.

11. This being so, the laws of self-amnesty, besides being manifestly incompatible with the American Convention, and devoid, in consequence, of legal effects, *have no legal validity at all* in the light of the norms of the International Law of Human Rights. They are rather the source (*fons et origo*) of an international illicit act: as from their own adoption (*tempus commisi delicti*), and irrespectively of their subsequent application, they engage the international responsibility of the State. Their being in force creates *per se* a situation which affects in a continuing way non-derogable rights, which, as I have already indicated, belong to the domain of *jus cogens*. Once established, by the adoption of such laws, the international responsibility of the State, this is under the duty to put an end to such situation in violation of the fundamental rights of the human person (with the prompt derogation of those laws), as well as, given the circumstances of each case, to provide reparation for the consequences of the wrongful situation created.

12. Last by not least, - in this quite brief couple of hours that I had in order to write my present Concurring Opinion and to inform the Court of it, - may I add one further thought. At this beginning of the XXIst century, I see no sense at all in trying antagonistically to oppose the international responsibility of the State to the individual penal responsibility. The developments, in relation to one and the other, nowadays take place, in my view, *pari passu*. The States (and any other form of politico-social organization) are composed of individuals, citizens and rulers, these latter taking decisions on behalf of the respective State.

13. The international responsibility of the State for violations of internationally recognized human rights, - including violations which have taken place by means of the adoption and application of laws of self-amnesty, - and the individual penal responsibility of agents perpetrators of grave violations of human rights and of International Humanitarian Law, are two faces of the same coin, in the fight against atrocities, impunity, and injustice. It was necessary to wait many years to come to this conclusion, which, if it is possible today, is also due, - may I insist on a point which is

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12. IACtHR, Judgment of 29.01.1997, Series C, n. 31.

13. Article 4 of the American Convention.

14. Article 5 of the American Convention.

very dear to me, - to the *awakening of the universal juridical conscience*, as the *material source par excellence* of International Law itself.

14. As I have warned in this respect in my Concurring Opinion in the Advisory Opinion of the Court on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999)[15],

> - "(...) The very emergence and consolidation of the *corps juris* of the International Law of Human Rights are due to the reaction of the *universal juridical conscience* to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law (*el Derecho*) came to the encounter of the human being, the ultimate addressee of its norms of protection.
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> (...) With the dismystification of the postulates of voluntarist positivism, it became evident that one can only find an answer to the problem of the foundations and the validity of general international law in the *universal juridical conscience*, starting with the assertion of the idea of an objective justice. As a manifestation of this latter, the rights of the human being have been affirmed, emanating directly from international law, and not subjected, thereby, to the vicissitudes of domestic law" (pars. 4 and 14)[16].

15. More recently, in my Separate Opinion in the case of *Bámaca Velásquez*[17], I allowed myself to insist on the point; in reiterating that the advances in the domain of the international protection of the rights of the human person are due to the *universal juridical conscience* (par. 28), I expressed my understanding to the effect that

> - "(...) in the domain of legal science, I cannot see how not to assert the existence of a *universal juridical conscience* (corresponding to the *opinio juris comunis*), which constitutes, in my understanding, the *material* source *par excellence* (beyond the formal sources) of the whole law of nations (*droit des gens*), responsible for the advances of the human kind not only at the juridical level but also at the spiritual one" (par. 16).

16. In my view, both the international case-law, and the practice of States and international organizations, as well as the more lucid juridical doctrine, provide elements wherefrom one may detect *the awakening of a universal juridical conscience*. This allows us to reconstruct, at this beginning of the XXIst century, International Law itself, on the basis of a new paradigm, no longer State-centred, both rather anthropocentric, placing the human being in a central position and bearing in mind the problems which affect humankind as a whole. Thus, as to the *international case-law*, the closest example lies in the case-law of the two international tribunals of human rights which exist today, the European and Inter-American Courts of Human Rights[18]. One may add to it the case-law emerging from the two *ad hoc* International Penal Tribunals, for ex-Yugoslavia and Rwanda. And the case-law itself of the International Court of Justice contains elements developed as from, e.g., elementary considerations of humanity[19].

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15. IACtHR, Advirosy Opinion of 01.10.1999, Series A, n. 16.

16. I have reiterated the same point in my Concurring Opinion in the case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (Provisional Measures of Protection, Resolution of 18.08.2000, par. 12).

17. IACtHR, Judgment on the Merits, of 25.11.2000.

18. The first Protocol (de 1998) to the African Charter on Human and Peoples' Rights provides for the creation, - when the Protocol of Burkina Faso enters into force, - of an African Court of Human and Peoples' Rights, which has not yet been established.

19. Cf., 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", *Droits*

17. As to the *international practice*[20], the idea of a universal juridical conscience has marked presence in many debates of the United Nations (above all of the VI Committee of the General Assembly), in the work of the Conferences of codification of International Law (the so-called "law of Vienna") and the respective *travaux préparatoires* of the International Law Commission of the United Nations; more recently, it has occupied an important space in the cycle of World Conference of the United Nations of the nineties[21].

18. As to the more lucid *doctrine*, it may be recalled that, two decades before the adoption in 1948 of the Universal Declaration of Human Rights, already in 1929, in the memorable debates of the *Institut de Droit International* (New York session), - almost forgotten in our days, - it was pondered, for example, that

> - "(...) Dans la conscience du monde moderne, la souveraineté de tous les États doit être limitée par le but commun de l'humanité. (...) L'État dans le monde n'est qu'un moyen en vue d'une fin, la perfection de l'humanité (...). La protection des droits de l'homme est le *devoir de tout État* envers la communauté internationale. (...)"[22].

At the end of the debates referred to, the *Institut* (22nd. Commission) adopted a resolution containing a "*Déclaration des droits internationaux de l'homme*", the first *considerandum* of which affirmed with emphasis that "la conscience juridique du monde civilisé exige la reconnaissance à l'individu de droits soustraits à toute atteinte de la part de l'État"[23].

19. In the synthesis of his philosophical thinking on the limits of State power, written in the period of 1939-1945 (during the full agony of what was believed to be "civilization"), Jacques Maritain took as the starting-point the existence of the human person, having roots in the spirit, and sustained that there only is a true progress of humanity when marching towards human emancipation[24]. In affirming that "the human person trascends the State", for having "a destiny superior to time", Maritain added that

> - "(...) The State has no authority to oblige me to reform the judgment of my conscience, as nor has it the power to impose to the spirits its criterion on good and evil (...).

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intangibles et états d'exception / Non-Derogable Rights and States of Emergency (eds. D. Prémont, C. Stenersen and I. Oseredczuk), Bruxelles, Bruylant, 1996, pp. 73-89.

[20]. This latter meaning no longer the simple "practice of States", inspired by their so-called "vital interests", as in the systematizations of the past, but rather the practice of States and international organisms in search of the realization of common and superior ends.

[21]. A.A. Cançado Trindade, "Reflexiones sobre el Desarraigo como Problema de Derechos Humanos frente a la Conciencia Jurídica Universal", *in* A.A. Cançado Trindade y J. Ruiz de Santiago, *La Nueva Dimensión de las Necesidades de Protección del Ser Humano en el Inicio del Siglo XXI*, San José of Costa Rica, UNHCR, 2001, pp. 66-67.

[22]. *Ibid*., pp. 112 and 117.

[23]. *Cit. in ibid*., p. 298.

[24]. J. Maritain, *Los Derechos del Hombre y la Ley Natural*, Buenos Aires, Ed. Leviatán, 1982 (reimpr.), pp. 12, 18, 38, 43, 50, 94-96 and 105-108.

> Therefore, whenever it goes beyond its natural limits in order to penetrate, in the name of totalitarian claims, into the sanctuary of the conscience, it endeavours to violate this latter by monstrous means of psychological poisoning, of organized lies and of terror.(...)"[25].

20. More than four decades later, at the end of the eighties, Giuseppe Sperduti did not hesitate to affirm, in an emphatic criticism to legal positivism, that

> - "(...) la doctrine positiviste n'a pas été en mesure d'élaborer une conception du droit international aboutissant à l'existence d'un véritable ordre juridique (...). Il faut voir dans la conscience commune des peuples, ou conscience universelle, la source des normes suprêmes du droit international"[26].

21. References of the kind, nowadays surely susceptible of a larger and deeper conceptual development, are not limited to the doctrinal level; they also appear in *international treaties*. The Convention against Genocide of 1948, e.g., refers, in its preamble, to the "spirit" of the United Nations. Half a century later, the preamble of the Statute of Rome of 1998 of the International Criminal Court bears witness of the fact that, throughout the XXth century,

> - "(...) millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity" (second *considerandum*).

And, at regional level, the preamble of the Inter-American Convention on Forced Disappearance of Persons of 1994, to quote another example, refers to the "conscience of the hemisphere" (third *considerandum*).

22. A clause of major importance deserves to be singled out: the so-called *Martens clause*, which has more than a century of historical trajectory. Originally presented by the Delegate of Russia, Friedrich von Martens, to the I Peace Conference of The Hague (1899), it was inserted into the preambles of the II Hague Convention of 1899 (par. 9) and the IV Hague Convention of 1907 (par. 8), both pertaining to the laws and customs of land warfare. Its purpose - according to the wise premonition of the Russian jurist and diplomat - was to extend juridically the protection to civilians and to combatants in all situations, even though not contemplated by the conventional norms; with that aim, the Martens clause invoked "the principles of the law of nations (*droit des gens*)" derived from "the usages established", as well as "the laws of humanity" and "the dictates (*exigences*) of public conscience".

23. Subsequently, the Martens clause was to appear again in the provision, concerning denunciation, common to the four Geneva Conventions of International Humanitarian Law of 1949 (Article 63/62/142/158), as well as in the Additional Protocol I (of 1977) to those Conventions (Article 1(2)), - to quote some of the main Conventions on International Humanitarian Law. The Martens clause is thus endowed, for more than a century, of continuing validity, since, however advanced the codification of the humanitarian norms might be, such codification can hardly be considered as truly complete.

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[25]. *Ibid.*, pp. 81-82.

[26]. G. Sperduti, "La souveraineté, le droit international et la sauvegarde des droits de la personne", *in International Law at a Time of Perplexity - Essays in Honour of Shabtai Rosenne* (ed. Y. Dinstein), Dordrecht, Nijhoff, 1989, p. 884, and cf. p. 880.

24. The Martens clause thus continues to serve as a warning against the assumption that whatever is not expressly prohibited by the Conventions on International Humanitarian Law could be permitted; quite on the contrary, the Martens clause sustains the continuing applicability of the principles of the law of nations (*droit des gens*), the laws of humanity and the dictates (*exigences*) of public conscience, irrespective of the emergence of new situations and the development of technology[27]. The Martens clause, thus, does not allow for *non liquet*, and it exerts an important role in the interpretation of humanitarian norms.

25. The fact that the draftsmen of the Conventions of 1899, 1907 and 1949, and of Protocol I of 1977, have reiteratedly asserted the elements of the Martens clause, places this latter at the level of the *material sources* themselves of International Humanitarian Law[28]. Thus, it exerts a continuing influence in the spontaneous formation of the content of new rules of International Humanitarian Law[29]. Contemporary juridical doctrine has also characterized the Martens clause as a source of general international law itself[30]; and no one would dare today to deny that the "laws of humanity" and the "dictates of public conscience" invoked by the Martens clause belong to the domain of *jus cogens*[31]. The clause referred to, as a whole, has been conceived and repeatedly affirmed, ultimately, to the benefit of all human kind, thus remaining quite up-to-date. It may be considered as an expression of the *reason of humanity* imposing limits to the *reason of the State* (*raison d'État*).

26. It is never to be forgotten that the State was originally conceived for the realization of the common good. The State exists for the human being, and not *vice versa*. No State can be considered to rest above the Law, whose norms have as ultimate addressees the human beings. The contemporary *pari passu* developments of the law of the international responsability of the State and of the international penal law point effectively towards the prominence of Law, both in the relations between the States and the human beings under their respective jurisdictions, as well as in the interindividual relations (*Drittwirkung*). It ought to be stated and restated firmly, whenever necessary: in the domain of the International Law of Human Rights, the so-called "laws" of self-amnesty are not truly laws: they are nothing but an aberration, an inadmissible affront to the juridical conscience of humanity.

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27. B. Zimmermann, "Protocol I - Article 1", *Commentary on the Additional Protocols of 1977 to the Geneva Conventions of 1949* (eds. Y. Sandoz, Ch. Swinarski and B. Zimmermann), Geneva, ICRC/Nijhoff, 1987, p. 39.

28. H. Meyrowitz, "Réflexions sur le fondement du droit de la guerre", *Études et essais sur le Droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet* (ed. Christophe Swinarski), Genève/La Haye, CICR/Nijhoff, 1984, pp. 423-424; and cf. H. Strebel, "Martens' Clause", *Encyclopedia of Public International Law* (ed. R. Bernhardt), vol. 3, Amsterdam, North-Holland Publ. Co., 1982, pp. 252-253.

29. F. Münch, "Le rôle du droit spontané", *in Pensamiento Jurídico y Sociedad International - Libro-Homenaje al Profesor Dr. Antonio Truyol Serra*, vol. II, Madrid, Universidad Complutense, 1986, p. 836; H. Meyrowitz, *op. cit. supra* n. (128), p. 420. It has already been pointed out that, in *ultima ratio legis*, International Humanitarian Law protects humanity itself, facing the dangers of armed conflicts; Christophe Swinarski, *Principales Nociones e Institutos del Derecho Internacional Humanitario como Sistema Internacional de Protección de la Persona Humana*, San José of Costa Rica, IIDH, 1990, p. 20.

30. F. Münch, *op. cit. supra* n. (28), p. 836.

31. S. Miyazaki, "The Martens Clause and International Humanitarian Law", *Études et essais... en l'honneur de J. Pictet*, *op. cit. supra* n. (27), pp. 438 and 440.

Antônio A. Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary