

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have voted for the adoption, by the Inter-American Court of Human Rights, of this Judgment in the case of *La Cantuta v. Perú*. Considering the relevance of the issues therein addressed by the Court, I am obliged to add this Separate Opinion to the Judgment, with my personal opinions as grounds of my position regarding the matters discussed by the Court. I shall focus my considerations in four basic points, to wit: a) the recurrence of the State crime: the massacre of *La Cantuta* in the context of a State criminal practice (as detached from the application filed before the Inter-American Court, the determination of the facts by the Inter-American Court, and the acknowledgement of aggravated liability by the respondent government itself); b) the contribution of the Inter-American Court to the prevalence of the Law towards the end of self-amnesties; c) the inadmissible aggression to the *Universitas*; and d) the inadmissibility of violations against *jus cogens*.

I. The Recurrence of the State Crime: The Massacre of *La Cantuta* in the Context of a State Criminal Practice.

1. The Application before the Inter-American Court

2. In the application of February 14, 2006 filed by the Inter-American Commission of Human Rights before this Court in the case at issue, the Commission refers, *inter alia*, to a public complaint (dated May 5, 1993) by a General of the Peruvian Army (Mr. Rodolfo Robles Espinoza) in the sense that the National Intelligence Service (SIN) of Peru had organized a "death squad" called *Grupo Colina*, "responsible for the physical elimination of terrorists," which perpetrated the massacre of November 1991 of 14 people in the case of *Barrios Altos* (known to this Court), as well as the extra-legal executions of a professor and 9 students of the University of *La Cantuta* (which took place in July, 1992) (para. 84), also a case which this Court has ruled upon. In fact, the cases are part of a systematic practice planned and executed by State agents, according to the orders given by the highest rank of the State public power.

3. The enumeration of facts included in the above mentioned application filed by the Commission is based, also, in the broad determination of facts by the *Comisión de la Verdad y Reconciliación -CVR-* (Truth and Reconciliation Commission of Peru), included in its Final Report of 2003. In this case of *La Cantuta*, the members of the Peruvian army and the agents of the Grupo Colina broke in the university campus, burst into the homes of professors and students, kidnapped the victims (in the dawn of July 18, 1992), took them with "unknown destination" and executed them. The kidnapped victims of La Cantuta remained missing until July 12, 1993, when mortal remains were located, apparently theirs, in clandestine graves located in the Chavilca gorge, in the city of Cienguilla (paras. 54-58).

4. However, to date, the mortal remains of only two of the executed victims have been identified. Examinations by experts concluded that the victims - the professor and the nine university students kidnapped at *La Cantuta* - had been executed with "shots of firearms in the head" and that their mortal remains had been "burnt in state of putrefaction" (pars 68 and 61). In the dawn of the day, the crime was committed (on July 18, 1992) the State machinery of concealment was set to work.

5. The above mentioned application filed by the Inter-American Commission before this Court mentions that the CVR identified a "whole organized power structure" by means of which it carries out, within the context of an "anti-subversive strategy by the State agents," a "systematic practice" of "arbitrary executions," which reached the highest levels of victimized people in the periods 1983-1984 and 1989-1992 (paras. 73, 70 and 76); also, "the practice of forced disappearance was a mechanism of anti-subversive fight systematically used by the State agents between 1988 and 1993," estimating that the "members of the Armed Forces" where those "charged with the greatest proportion (more than 60%) of the victims of forced disappearance caused by State agents in the period 1980-2000" (para. 77).

6. Then, the Inter-American Commission transcribed, out of the Final Report of the CVR, the "stages" in which this macabre practice was conducted:

"victim selection and detention, deposit in a detention center, eventual transfer to another detention center, interrogation, torture, processing of the information obtained, decision of elimination, physical elimination, disappearance of victim's remains, use of State resources" (para. 78).

7. The Final Report of the CVR, extensively quoted in the application filed by the Inter-American Commission before this Court, refers to a criminal practice by the State, encompassing a "clandestine circuit" of arbitrary detentions followed by extra-legal executions (para. 150). The Grupo Colina was a group of extermination inserted within the SIN structure (led by Vladimiro Montesinos) to face alleged "enemies" of the regime of the then President Alberto Fujimori (paras. 96 and 85). The Grupo Colina operated with State resources (para. 80), and

"fulfilled a State policy which consisted in the identification, control and elimination of those people suspected to belong to insurgent groups, by systematic actions of indiscriminate extra-legal executions, selective murders, forced disappearances and tortures" (para. 89).

2. The Determination of Facts by the Inter-American Court.

8. In this Judgment of the case *La Cantuta*, in chapter VII, regarding the proven facts, the Inter-American Court, taking into account the Final Report of the CVR, set forth that

"Arbitrary executions were a systematic practice carried out in the backdrop of the contra-subversive strategy of State agents, especially during the hardest times of the conflict (1983-1984 and 1989-1992)" (para. 80(1)).

There was a whole organized state power structure, and the extra-legal executions did not constitute isolated or sporadic facts, but a *behavior pattern* by the State in the context of its above mentioned strategy, leading to a truly criminal practice, applying resources and material means of the State itself.

9. The *modus operandi*, as identified by the CVR and recapped by this Court, consisted in the

"selection of the victim, detention, deposit of the victim in a detention center, contingent transfer to other detention center, interrogation, torture, processing of the data obtained, decision to eliminate the victim, physical elimination, concealment of victim's remains and use of State resources." The common denominator in the whole process was "the denial of the detention itself and denial of any information on what had

happened to the arrested person. That is, the victim entered an established circuit of clandestine detention, which only very lucky people could survive." (para. 80(5)).

10. Regarding the "methods applied to destroy evidence" of the crimes committed, the Court remembers that the CVR itself pointed out that these included, among others, "mutilation or incineration" of the mortal remains of the victims (para. 80(7)). In this case of *La Cantuta*, the Court considered proved that the "incinerated bone remains" found in Cieneguilla were part of a "secondary burial," as they "had already remained in other graves" and, after having been removed and burnt ("the bodies were burnt in state of putrefaction"), were "taken and buried in the Chavilca region" (para. 85(34)). That is, the violation of the principle of human dignity took place not only in life, but also after life.

11. It is notorious and public that the illegal detention, followed by extra-legal execution of the victims of cases of both *Barrios Altos* and *La Cantuta*, were perpetrated by the "death squad" called "*Grupo Colina*." This extermination group was directly organized within the hierarchical structure of the Peruvian State armed forces, and

"carried out a State policy consisting in the identification, control and elimination of those persons suspected of belonging to insurgent groups or who opposed to the government of former President Alberto Fujimori. It operated through the implementation of systematic indiscriminate extra-legal executions, selective killings, forced disappearances and tortures." (paras. 80(18)).

12. An account of the history of "*Grupo Colina*" says that former President A. Fujimori and his consultant V. Montesinos made that choice so as to combat terrorism with the "clandestine war" of "State terrorism," performing "kidnapping, forced disappearances and extra-legal executions," and using the "perverse resource of transferring liabilities to lower ranks," thus eluding "their direct liability"; however, the so called "*Grupo Colina*" was authorized to act "from the highest Government instance."¹ The crimes of both *Barrios Altos* and *La Cantuta* constituted an unequivocal and conclusively proven part of a *State policy*.² An analysis of the Final Report of the CVR confirms, fully detailed, the criminal operations of "*Grupo Colina*," with express reference and accounts of the crimes of both *Barrios Altos* and *La Cantuta* as part of a *behavior pattern* of criminal conduct on the part of the State.³

13. Considering the above, it is concluded that we are, in the case of *La Cantuta* and in the context of this sinister State strategy, unequivocally in the presence of a *State crime* which also -as set forth by this Judgment- counted on the State concealment of the facts and the systematic obstruction of the investigations, including the destruction of evidence of the serious crimes committed. In this case of *La Cantuta*, it was conclusively proven that premeditation (*mens rea*), planning and commission of the crime, under aggravated circumstances, and the subsequent

¹ U. Jara, *Ojo por Ojo - La Verdadera Historia del Grupo Colina* (The True Story of the Colina Group), Lima, Edit. Norma, 2003, pp. 59-60; and cf. pp. 75, 78, 88 and 124, for the "learnt lessons" by the murderers at the Escuela de las Américas.

² *Ibid.*, pp. 180-181, and cf. pp. 130-133, 144, 150-151, 160-163 and 177-179.

³ Cf. *Comisión de la Verdad y Reconciliación de Perú* (Truth and Reconciliation Commission of Peru) (CVR), *Informe Final* (Final Report), book VII (Part I: The Process, the Facts, the Victims), Lima, CVR, 2003, pp. 81, 97, 100, 116, 119, 130-158, 233-245 (case of *La Cantuta*), 369, 390, 475-493 (case *Barrios Altos*); and cf. pp. 455-473 on the case of students disappearances of *Universidad Nacional del Centro* (1990-1992).

concealment of the facts, were executed by numerous State agents, with State resources (including those derived from income tax contributors), in a command line which involved both the perpetrators of the atrocities and the highest authorities of the State power. Facts reveal a horrendous investment of the State purposes, and they constitute an unequivocal State crime, with all its legal consequences (cf. *infra*).

3. Acknowledgement of Aggravated Liability by the Respondent Government itself.

14. In this case of *La Cantuta*, the respondent Government itself, in a constructive attitude in the course of the adversarial proceedings, acknowledged international liability both before the Commission and before this Court, although not encompassing all the facts and their legal consequences. Before the Court, it did so both in its response to the application (chapter V) and in its written closing arguments (chapter III). Also, as significantly recorded by the Court in this Judgment (para. 44), in its oral and written closing arguments, the respondent Government itself expressly acknowledged that "international crimes" had been committed. The State expressed, in its own words that

"(...) It reiterates (...) that such acts and omissions constitute international unlawful facts which generate international liability of the State. They constitute crimes according to domestic law and international crimes that the State must punish. (...)" (para. 44).

15. What do those jusinternationalists, who keep on insisting to declare that there can be no State crime, have to say before this manifestation of the State itself, before the overwhelming evidence of the facts and proof in this case of *La Cantuta*? How long will they remain in the shadows of their lack of conscience and sensitivity regarding the fate of the victims of human brutality? When will they awake to the need to contribute to the credibility of the *legal profession*, and stop closing their eyes to the State criminality?

16. In this Judgment of the case *La Cantuta*, the Court determined the scope of the consequences of the State acknowledgement regarding to the legal claims (paras. 52-54). Furthermore, it observed that it was not an isolated or single manifestation by the State, but a significant manifestation to which others have been added, remembered by the Court in this Judgment:

"The facts of this case have been classified by the CVR, the domestic judicial bodies and by the State's representative before this Court, as "international crimes" and "crimes against humanity" (...). The extra-legal execution and forced disappearance of the alleged victims were perpetrated in a context of generalized and systematic attack against sectors of the civil population.

Merely pointing out (...) that the Court considers it acknowledged and proven that the planning and execution of detention and subsequent cruel, inhumane and degrading treatment, extra-legal execution or forced disappearance of alleged victims, carried out in a coordinated and concealed way by members of the military forces and the Colina Group, could not have passed unnoticed to or have occurred without the orders of the highest ranks of the Executive Power and the then military forces and intelligence bodies, especially the chiefs of intelligence and the President of the Republic himself" (paras. 95-96).

17. The Court added that, regarding the violation of the right to life - acknowledged by the respondent Government - of the professor and the nine students kidnapped at the University of La Cantuta, "the case facts were the result of

an operation executed, coordinated and concealed by the *Grupo Colina*, with the knowledge and superior orders of the intelligence services and of the then President of the Republic himself" (para. 114). When referring to the forced disappearance of the victims, the Court accurately remarked that

"the international liability of the State is *aggravated* when the disappearance is part of a systematic pattern or practice applied or tolerated by the State, as it constitutes a crime against humanity which implies a crass abandonment of the essential principles on which the Inter-American system is grounded.

(...) The international liability of the State is configured in an *aggravated manner* due to the context in which the facts were perpetrated, (...) as well as the flaws regarding protection and investigation obligations (...)." ⁴

18. Also, this Court has ruled that the respondent Government itself has acknowledged "the partiality of the judges of the criminal courts in the trial of the La Cantuta events" (para. 144). The Court repeated its understanding in the sense that "in a democratic constitutional state, the jurisdiction of military criminal courts must be restrictive and exceptional" (para. 142). In this case, there was "manipulation of legal and constitutional mechanisms," obstruction of the investigations of the ordinary justice, "irregular deviation of the military jurisdiction investigations," with the aim of "securing impunity for those responsible" (para. 143).

19. It is significant that, regarding that matter, the Peruvian Constitutional Court itself, in its Judgment of November 29, 2005 (*re: S. Martín Rivas*), warned that considering the circumstances of the *cas d'espèce*,

"there is evidence that the purpose of the criminal process filed within the military jurisdiction environment was to prevent the petitioner from being held liable for the acts charged with. Those circumstances are related to the existence of a systematic plan to promote impunity regarding human rights and crimes against humanity, particularly regarding to acts committed by Grupo Colina, to which the petitioner is linked.

In fact, that systematic plan is expressed by: (i) the deliberate prosecution of ordinary crimes by military bodies (...); (ii) the enactment, during that term, of amnesty laws 26,479 and 26,462. (...)." ⁵

20. In the same Judgment, the Peruvian Constitutional Court added that, also in the case of *Barrios Altos*, in its opinion, "there are numerous objective elements which show that the prosecution of the petitioner for crimes against humanity (...) was not really aimed at investigating and punishing him in an effective way." ⁶ That is to say, the Peruvian Constitutional Court itself set forth the manipulations, on the part of the military jurisdiction, to conceal a criminal State practice, and to guarantee the impunity of those who were liable.

21. Said Law denial was not disregarded - it could not be so - by this Court. In this Judgment in the case of *La Cantuta*, this Court, coherently with its Judgments of *Barrios Altos* (2001) and *Almonacid et al.* (2006), pondered, specifically regarding the legal concept of *res judicata*, that the principle of *non bis in idem* is not applied when the process, not independently or impartially instituted, boiled down to exempt

⁴ Paragraphs 115-116 (emphasis added).

⁵ Peru Constitutional Court, Judgment of November 29, 2005 (*re: S. Martín Rivas*), file No. 4587-2004-AA/TC, p. 19, paras. 81-83.

⁶ *Ibid.*, p. 18, para. 78.

the accused from his criminal liability, thus configuring and “apparent” or “fraudulent” *res judicata* (para. 153), which constitutes the Law denial itself.

22. Finally, the extensive and detailed Final Report of Peru’s CVR determines the facts which configured the State criminal practice during the period at issue. The cases of *La Cantuta* (1992),⁷ *Barrios Altos* (1991),⁸ *Huilca Tecse* (1992),⁹ among others, are therein fully described with high degree of detail. When determining the “legal frame of forced disappearance in Peru,” the said Final Report of the CVR repeatedly took into account, when developing its arguments, the jurisprudence of this Inter-American Court.”¹⁰

II. Towards the End of Self-Amnisties: The Contribution of the Inter-American Court to the Prevalence of the Law.

23. In its Judgment in the Case of “The Last Temptation of Christ” (Olmedo Bustos et al.) vs. *Chile*, Judgment of February 5, 2001), this Court stated that the general duty imposed by Article 2 of the American Convention requires that each State Party adopts all the necessary provisions so that what is established by the Convention is effectively fulfilled within the domestic law system, which means that the State must adapt its acting to the protection rules and regulations of the Convention (para. 87). Seven months later, the Court remembered said *obiter dictum* in its historical Judgment in the case of *Barrios Altos*, regarding to Peru (Judgment Construction of September 3, 2001), in relation to the “duty of the State to suppress, from its legal system, those rules in force which imply a violation” of the American Convention (para. 17), and added:

“The enactment of a law expressly contrary to the obligations assumed by the State Party of the Convention constitutes *per se* a violation of the latter and generates international liability of the State. Consequently, the Court considers that, given the nature of the violation of amnesty laws No. 26,479 and 26,492, the ruling of the Judgment on the merits of the case in *Barrios Altos* has general effects (...)” (para. 18).

24. In the case of *El Amparo* (Reparations, Judgment of September 14, 1996), regarding Venezuela, I stated, in my Dissenting Opinion, that the existence of a legal provision of domestic law itself can, *per se*, create a situation which directly affects the rights protected by the American Convention, due to the risk or actual threat that its applicability represents, without the need to expect the occurrence of detriment (paras. 2-3 and 6). In the same case of *El Amparo* (Interpretation of Judgment, Ruling of April 16, 1997), and in my subsequent Dissenting Opinion, I insisted in my understanding in the sense that

“A State may (...) have its international liability compromised, in my opinion, merely by approving and enacting a law in conflict with its conventional obligations of protection, or by the lack of adaptation of its domestic law to guarantee the faithful

⁷ CVR, *Final Report*, *op. cit. supra* No. (3), sections 2(19), pp. 605-632, and 2(22), pp. 233-245.

⁸ CVR, *Final Report*, *op. cit. supra* No. (3), section 2(45), pp. 475-493.

⁹ CVR, *Final Report*, *op. cit. supra* No. (3), section 2(58), pp. 629-647.

¹⁰ CVR, *Final Report*, *op. cit. supra* No. (3), section 1(2)(1), pp. 59, 63, 65, 67-68, 107, 118, 131-132, 143, 151, 178, 191, 212-213, 260, 380, 401, 404-406, 408, 410, 413-414, 417, 421, 436, 439, 467-468, 472-475, 480-481, 484, 498-500, 504, 510, 521 and 529.

fulfillment of said obligations, or by the non adoption of the necessary legislation to fulfill the latter.

(...) The *tempus commisi delicti* would extend in such a way to encompass the whole period during which the national laws remained in conflict with the conventional obligations of protection, thus entailing the additional obligation to remedy the subsequent detriments resulting from such "continued situation" during the whole period under analysis" (paras. 22-23).

25. I reaffirmed the same position in my Concurring Opinion in the above mentioned case of "The Last Temptation of Christ"(paras. 2-40), where I pondered that, considering that the *tempus commisi delicti* is the same as that of the approval and enactment of a law incompatible with a human rights treaty, since then compromising the international liability of the State, the modifications in the domestic legal system of a State Party, necessary to its harmony with the rules and regulations of such a treaty, may constitute, within the context of a specific case, a way of non-monetary compensation under such treaty. The Judgment of the Court in this case was adopted on February 5, 2001.

26. A few days later, in an extraordinary period of sessions of this Court held in its central office in Costa Rica, a new chapter on this matter was opened. Due to a blackout in the main building in which the former deliberations room is located, the Court moved to its Library¹¹ building, where there was power (provided by a generator of their own); where it elaborated and adopted its historical Judgment in the case of *Barrios Altos* (merits), on March 14, 2001. I felt moved at that time, because it was the first time, in contemporary International Law, that an international court (as the Inter-American Court) set forth that amnesty laws (as Peruvian laws No. 26,479 and 26,492) are incompatible with a human rights treaty (as the American Convention) and *have no legal effects* (operative paragraph No. 4).

27. That is, they are flawed with nullity, *ex tunc* nullity and *ab initio* nullity, therefore lacking any and all legal effect. The abovementioned *Barrios Altos* Judgment is, at present, recognized in the specialized legal bibliography in different continents and in the jusinternationalist circles in the whole world, as a landmark in the history of International Human Rights Law. In that Judgment, the Court stated that

- "(...) Amnesty and prescription provisions, and the setting of liability exemptions with the purpose of preventing the investigation and punishment of those responsible for serious violations of human rights such as torture, summary executions, extra-legal or arbitrary executions and forced disappearances are inadmissible, and all of them are prohibited as they contravene rights than cannot be abolished which are recognized by International Human Rights Law.

(...) In the light of the general obligations consecrated in Articles 1(1) and 2 of the American Convention, the States Parties have the duty to take all the measures necessary so that nobody is deprived from legal protection and the exercise of the right to an effective and simple remedy, in the terms of Articles 8 and 25 of the Convention. That is why the State Parties of the Convention which adopt laws having this effect, such as the self-amnesty law, commit a violation of Articles 8 and 25, consistently with Articles 1(1) and 2, all included in the Convention. Self-amnesty laws lead to victims defenselessness and to the perpetuation of impunity, so that is why they are patently incompatible with the content and the spirit of the American Convention. This type of law prevents the identification of individuals responsible for violations of human rights, as the investigation and access to justice are hindered, and the victims and their next of

¹¹ At present, Joint Library with the *Instituto Interamericano de Derechos Humanos* (IIDH), that I was pleased to open.

kin are prevented from knowing the truth and receive the corresponding remedy" (paras. 41 and 43).

28. In my Concurring Opinion in that Judgment on the merits of *Barrios Altos*, I pondered that

"To sum up, the so called self-amnesties are an inadmissible affront to the right to truth and the right to justice (beginning by the access to justice itself). They are openly incompatible with the general obligations –those that cannot be dissociated– of the States Parties of the American Convention to protect and guarantee the human rights the latter protects, assuring their free and full exercise (in the terms of Article 1(1) of the Convention), and also the adaptation of their domestic law to the international rules and regulations of protection (in the terms of Article 2 of the Convention). Furthermore, they affect those rights protected by the Convention, particularly the rights to a fair trial (Article 8) and the legal protection (Article 25).

With respect to self-amnesty laws, we have to bear in mind that *their legality within the scope of domestic law*, as they lead to impunity and injustice, are in flagrant incompatibility with the protection rules and regulations of International Human Rights Law, thus entailing *de jure* violations of human rights. The *corpus juris* of International Human Rights Law emphasizes that not everything that is legal within the domestic legal system is so in the international legal system, especially when higher values are at stake (such as truth and justice). Actually, the so called amnesty laws, particularly the perverse modality of the so called self-amnesty laws, although considered laws under a certain domestic legal system, *are not so* in the scope of International Human Rights Law. (...)

We do not have to ever forget that the State was originally conceived aiming at common welfare. The State exists for the human being, and not vice versa. No State can be considered above the Law, which regulations' final addressees are human beings. (...) We have to firmly say and repeat it, as many times as necessary: in the scope of International Human Rights Law, the so called "laws" of self-amnesty are not actually laws: they are a mere aberration, an inadmissible affront to the legal conscience of humanity" (paras. 5-6 and 26).

29. Subsequent to the Judgment on the merits, the above mentioned Construction of Judgment in the same case of *Barrios Altos*, explained that the ruling by the Court regarding the merits, given that the nature of the violation by amnesty laws No. 26,479 and 26,492, "has general effects" (operative paragraph No. 2). Consequently, said laws of self-amnesty are inapplicable (in any given situation, whether before, during or after their alleged "adoption"), they are simply not "laws." The Court explanation has had, since then, a sensitive impact in the domestic legal system, not only of the Peruvian State, but also of other South-American States. Regarding to the responding Government in the *cas d'espèce*, as it is made clear by the Court in this Judgment of the case *La Cantuta*,

"the Judgment issued in the *case of Barrios Altos* is fully incorporated into the domestic legal system. (...) If that Judgment was conclusive that it had general effects, such declaration makes it *ipso jure* part of Peru's domestic law, which is shown in the fact that such Judgment has been applied and interpreted by state bodies.

The *ab initio* incompatibility of the amnesty laws with the Convention has generally materialized in Peru ever since it was pronounced by the Court in the judgment in the case of *Barrios Altos*; that is, the State has suppressed any effects that such laws could have had." (paras. 186-187)

30. Recently, the Inter-American Court took a new step in the evolution of the subject matter, in the same line of the *Barrios Altos* Judgment, in its Judgment on the case *Almonacid Arellano y Otros vs. Chile* (dated September 26, 2006). The Court declared that "when expecting to grant an amnesty to those responsible for crimes against humanity, decree law No. 2191 is incompatible with the American Convention and, therefore, lacks legal effects under said treaty" (operative

paragraph No. 3). And the Court set forth that the respondent Government must guarantee that the above mentioned amnesty decree-law of the Pinochet regime, does not continue representing an obstacle for the investigation, prosecution and punishment of those who were responsible for violations of human rights in the *cas d'espèce* (operative paragraphs No. 5-6).

31. In my long Separate Opinion of the case *Almonacid Arellano y Otros*, I focused my arguments in three basic points, to wit: a) the lack of legal validity of self-amnesties; b) self-amnesties and the obstruction and denial of justice: the broadening of the material content of *jus cogens* prohibitions; and c) the conceptualization of crimes against humanity in the confluence between International Human Rights Law and International Criminal Law (paras. 1-28). I do not intend to repeat here what I developed in that recent Opinion, but only to refer to them and extract the following warning that I formulated in my Separate Opinion in the case of *Almonacid*:

"(...) Self-amnesties are not true laws, as they lack the *generic characteristic* of the latter, the idea of Law which inspires them (essential even for legal certainty), and their search for common welfare. They do not even look for the organization or regulation of the social relation for achieving common welfare. They just expect to subtract certain facts from justice, conceal serious violations of rights, and guarantee the impunity of some people. They do not satisfy the minimum requirements of laws; very much on the contrary, they are legal aberrations. (...)

(...) Self-amnesties are, in my opinion, the denial itself of the Law. They openly infringe general law principles, as the access to justice (which in my opinion belongs to the scope of *jus cogens*), equality before the law, the right to a natural judge, among others. In some cases, they have even concealed crimes against humanity and genocide acts. Considering that they prevent the concretization of justice for crimes of such seriousness, self-amnesties infringe. As far as they hinder justice from its execution for crimes of such seriousness, self-amnesties infringe *jus cogens*. (...)

Finally, self-amnesties violate the rights to truth and justice, they cruelly disregard the terrible suffering of the victims, hinder the right to proper reparations. Their perverse effects, in my opinion permeate the whole social tissue, with the resulting loss in the faith for human justice and real values, and a perverse distortion of the State purposes. Originally created for the realization of common welfare, the State boils down to an entity which exterminates members from segments of its own population (the most precious element of the State itself, its human *substratum*) before the most absolute impunity. From an entity created for the concretization of common welfare, it turns into an entity responsible for truly criminal practices, for undeniable *State crimes*" (paras. 7, 10 and 21).

32. Judgments of this Court in the cases of *Barrios Altos* (2001), *Almonacid* (2006), and *La Cantuta* (2006), constitute a decisive contribution of this Court towards the end of self-amnesties and the prevalence of the Law. I perfectly remember that, in the public hearing of September 29, 2006 in this case of *La Cantuta*, held in the Court's house in San José de Costa Rica (my last public hearing as Incumbent Judge of this Court), the common concern, expressed by both the Inter-American Commission and by the counsel of the victims and their next of kin, as I understood it, was in the sense to guarantee the due remedies, among which the guarantee of non-repetition of injurious facts, -although their arguments regarding self-amnesty laws have not been converging or coincident.

33. The victims and their next of kin counsel (interventions of Ms. Viviana Krsticevic and Ms. María Clara Galvis, of CEJIL) firmly held that what was set forth by the Court in the Judgment of *Barrios Altos* was already *directly* incorporated in the domestic Peruvian legal system, and was convalidated by the constant practice of the Peruvian Judicial Power since then (excluding the military jurisdiction, the decisions of which lack "jurisdictional" characteristics). Also, the Inter-American

Commission Delegate (Commissioner Paolo Carozza), lucidly and correctly stated that the amnesty laws of the Fujimori regime had to be *abolished* (term used by this Court in the Judgment of *Barrios Altos*) so as to make it clear that they never had validity regarding the American Convention, being contrary to the *jus cogens* (cf. *infra*).

34. Also, an equally lucid and substantial *amicus curiae* submitted by the Institute of Legal Defense -*Instituto de Defensa Legal (IDL)*- with offices in Lima, Peru, urged the Court to declare self-amnesty laws No. 26479 and No. 26492 *inexistent* (pp. 4 and 40), remarking that the international courts jurisprudence, among which that of the Inter-American Convention, has immediate effects, direct application and is binding, thus incorporating "directly in the Peruvian *corpus juris*" (p. 30). The said *amicus curiae* of the IDL added that those self-amnesty laws "are inexistent," as they "exceeded the intangible limit (constitutional guarantee of human rights", and were placed "in an extralegal and extraconstitutional scope" (p. 38). The *amicus curiae* of the IDL concluded that

"there is a repeated, consistent and uniform practice of the Peruvian Attorney General Office and the Peruvian Judicial Power in the sense that such self-amnesty laws lack legal effects and do not constitute an obstacle for starting the investigations, prosecution and punishment of human rights infringers; there is a set of decisions issued by the Constitutional Court understanding that, within the domestic scope and according to the text of the Peruvian Constitution, the procedural obstacles hindering the punishment of human rights violations are inadmissible, and that the jurisprudence of the Inter-American Human Rights Court is of direct application in the domestic legal system (...).

For the same reasons, it is not necessary that the Peruvian State adopts any additional provisions to those already assumed, in the domestic law, to guarantee the lack of legal effects of self-amnesty laws in an effective way. (...) In the particular case of the Peruvian self-amnesty laws, it is worth mentioning that, considering their non-existing condition, they are inefficient from their origin (as they were not part of the domestic legal system they produced no legal effect whatsoever)" (p. 39).

35. The above mentioned participants of the public hearing before this Court, as well as the aforementioned *amicus curiae*, expressed a common concern, and also a common purpose, even though through arguments of different nuances. I understand that the Inter-American Court has paid attention to this common concern and has contributed to this also common purpose, when determining, in a very clear way, that the so called self-amnesty "laws" "*were unable to generate effects, do not keep them at present, nor can they be generated in the future.*"¹² Said "laws" of self-amnesty are not truly laws, but a legal aberration, an affront to the *recta ratio*.

III. The Inadmissible Aggression against the *Universitas*.

36. There is another aspect in this case of *La Cantuta* that deeply moves me, at the time I complete 12 years as Incumbent Judge of this Court and 30 years as university Professor.¹³ I find myself obliged to express my unbreakable faith in the *Universitas*, and my conviction that, in the *cas d'espèce*, apart from the State crime perpetrated in the victims detriment (a Professor and 9 university students) and their next of kin, an inadmissible aggression was committed against an institution of

¹² Para. 189, and operative paragraph No. 7 (emphasis added).

¹³ Permanently settled in Brasilia, but as invited Professor in many of the main Universities in every continent.

universality character: the University, - in this case in particular, the University of La Cantuta.

37. On July 6, 1953, the University of La Cantuta opened its doors; its name derives from the fact that "it was built in an ancient town that had the name of the Incas heraldic flower, which is cultivated along the Mantaro valley, with red and yellow tints."¹⁴ The above mentioned University prepared future teachers for practicing in schools (high school level) of the country, that is, it had a social and teaching function (although it was already taken by military forces since May 21, 1991).¹⁵

38. But apart from the teaching and social function that it represents in each country, the University would hardly be realized without the *supranational* function - beyond the State - that belongs to it by an intrinsic demand.¹⁶ At present, broad ways of communication and understanding are available for the new generations, more than in other times, for exchanging ideas, the refinement of the concentration capacity, discernment and criticism, intergenerational dialogue (between professors and students), to look for the construction of a fairer and better world for future generations. We are summoned to rethink the whole conceptual universe within which we are trained, in our vision of both the international and national system, of the public institutions, starting with the State itself in a democratic society.

39. It is inadmissible that armed forces invade a university campus in the most possible arbitrary way. The campus is the space for free thinking, where the production and circulation of ideas must be preserved and cultivated. Along the centuries, the University was awarded the characteristic of *alma mater* ("madre nutricia," *alma* -soul- from Latin *alere*, which means feeding and growing), as a generator and promoter of ideas and knowledge, so as to engender and transform the human being by means of the knowledge, for him to be able to give answer to the challenges of the world in which he lives. The armed invasion is not the only way of aggression against the University as it was conceived along the centuries¹⁷, but maybe it is the roughest aggression against the production and free circulation of ideas. In this case of *La Cantuta*, as already remarked, the State security agents invaded the university campus and broke in the houses of professors and students to

¹⁴ Efraín Rúa, *El Crimen de La Cantuta - La Desaparición y Muerte de un Profesor y Nueve Estudiantes que Estremeció al País*, 4th. ed., Lima, Universidad La Cantuta, 2005, p. 41.

¹⁵ Asociación Pro Derechos Humanos (APRODEH), *De la Tierra Brotó la Verdad - Crimen e Impunidad en el Caso La Cantuta*, Lima, APRODEH, 1994, p. 9.

¹⁶ As it is known, the Universities appeared in the European continent during the Low Middle Age, cultivating essentially scholastic reasoning and debating methods. By the end of the 14th Century, the concept of University approached this of today; during Renaissance, the term *Universitas* acquires the present meaning. The feeling of universality was encouraged by the use of Latin, by the culture of universal knowledge (to be spread everywhere), and by the gradual search of authors of every culture. As time went by (until the 18th Century), Universities looked for their legal autonomy.

¹⁷ Another form of aggression, which has regrettably become normal in our shadow times, is the so called "privatization" of public Universities as "State policy" (in a dreadful inversion of values). As a defender of public University (thus belonging to an extinguishing species), I consider teaching as a *public asset*, to be conveyed from generation to generation, and not goods to be sold to whoever can pay more. At present, in the neighborhoods of Latin-American cities, there is a "Private University" next to any bakery, willing to "teach", or, rather, to inform on anything, as long as they are well paid (with due respect for the bakeries which provide us, at an affordable price -almost a giveaway price-, our daily bread).

kidnap and execute their victims in the name of the "security of the State." The *Universitas* itself was also attacked by the repression forces. The time for light searching was unduly taken by the State shadows heralds.

40. A departing Judge of the Inter-American Court, -who thanks God never missed one single session and never excused himself from participating in any deliberation of the Court during his 12 years of service rendered as Incumbent Judge- is fully entitled to set forth, in this Separate Opinion, one of his many reminiscences regarding the arguments on this case. Little after the Fujimori regime I visited Peru as President of the Inter-American Court, for a series of events; at that time, when receiving the degree of Emeritus Professor granted by another University which suffered during the dark days of the said regime¹⁸, in my speech of September 13, 2001, at the President's Office of the *Universidad Nacional Mayor de San Marcos*, among other things, I pointed out that

"After the times of shadow, those of light have come. But nobody can guarantee us -and this with relation to any country - that the shadows will not return. Should this happen, the only certain thing is that the light would emerge again, - as in the sequence of night and day, or day and night. In the same way that shadows appear when the light fades, the first rays of light arise from the last remains of darkness. The clear-dark tension, of progress mixed with regression, is inherent to human condition, as the ancient Greek (always so contemporary) remarked centuries ago with total lucidity in one of their greatest legacies to the evolution of human thought.

International human rights instruments have decisively contributed to wake up human conscience for the need to protect individuals in any and all circumstances. Events in Peru during the last months have revealed a true reencounter of Peru with its best tradition and legal thoughts (...). When this happens, we can say that the international human rights system has effectively reached the bases of the national society.

Nothing of what happened during the last months in this Latin-American country, so rich in legal culture and tradition, which today I am honored to visit, would have been possible without the admirable mobilization of the Peruvian civil society, and its impact on the public institutions. This shows the importance of the international instances of protection of human rights: they represent the last hope for those who had lost trust and faith in justice, mainly those defenseless, oppressed and forgotten.

There could hardly be, for a jusinternationalist, such a gratifying experience as the one I am living in these four days of visit to Peru. (...) This ceremony has great symbolic importance to me. I come from the Academy, to which I shall continue belonging. I belong to the University, the *Universitas*, which, by definition, has a universal vocation. As jusinternationalist, I uphold the principles of *mankind reason* above *State reason*." (...).¹⁹

41. Two years later, in a co generic ceremony in another Peruvian University, on November 18, 2003, presided over by the President of the *Pontificia Universidad Católica del Perú* (Dr. S. Lerner Febres), also President of the *Comisión de la Verdad y Reconciliación Nacional* (CVR) of Peru, I outlined, in my speech at that time

¹⁸ V.g., the military occupation of the Universidad Nacional Mayor de San Marcos in May, 1992. And to this, other acts of violence are added, such as, for instance, the case of the disappeared students of the Universidad Nacional del Centro in Huancayo; cf. "Huancayo y Cantuta: Dónde Están los Desaparecidos?", 4 *Idee Magazine* (November, 1992) No. 44, pp. 13-14. Also, the crime of La Cantuta was attributed - as notorious and public - to a reprisal perpetrated by the Grupo Colina of extermination of *senderistas*, by the Tarata street attack; cf. U. Jara, *Ojo por Ojo - La Verdadera Historia del Grupo Colina*, op. cit. supra No. (1), p. 177.

¹⁹ A.A. Cançado Trindade, "Speech by the President of the Inter-American Human Rights Court at the Celebrations during the 450th Anniversary of the Universidad Nacional Mayor de San Marcos (Appointed as Emeritus Professor)," 58 *Revista de Derecho y Ciencia Política de la Universidad Nacional Mayor de San Marcos* - Lima (2001) nrs. 1-2, pp. 729-730 and 733, paras. 21-24 and 33.

"the continued applicability of the people's law, the humanity laws and the demands of public conscience, regardless of the raising of new situations (...)." ²⁰

Once again, the *Universitas* found its true vocation as nucleus of culture and irradiation of culture, of the free circulation of ideas, of the recognition of the necessary prevalence of the Law above the force,²¹ of the intangibility of the rights inherent to the human being. After years of shadows, then the light came. The *Universitas*, as originally conceived, was in effect a center of cultural irradiation, of teaching and of transmission of culture.

42. Along the 19th Century and the beginning of the 20th, together with several attacks suffered in numerous countries, the University tragically lost sight of the original sense of its vocation, as it gradually limited itself to a "specialized" professional research center, thus substituting culture, so important to life. In our times, the University is still attacked and shown as trivial, in many ways. In a renown manifest of 1930, in defense of the recovery of the University and its teaching and transmission of cultural subjects role, J. Ortega y Gasset warned:

"La vida es un caos, una selva salvaje, una confusión. El hombre se pierde en ella. Pero su mente reacciona ante esa sensación de naufragio y perdimiento: trabaja por encontrar en la selva 'vías', 'camino'; es decir: ideas claras y firmes sobre el Universo, convicciones positivas sobre lo que son las cosas y el mundo. El conjunto, el sistema de ellas es la cultura en el sentido verdadero de la palabra; todo lo contrario, pues, que ornamento. Cultura es lo que salva del naufragio vital, lo que permite al hombre vivir sin que su vida sea tragedia sin sentido o radical envilecimiento.

No podemos vivir humanamente sin ideas. De ellas depende lo que hagamos (...). Es forzoso vivir a la altura de los tiempos y muy especialmente a la altura de las ideas del tiempo. Cultura es el sistema vital de las ideas en cada tiempo. (...) La Universidad contemporánea ha (...) [quitado] casi por completo la enseñanza o transmisión de la cultura." ²²

43. Violence and aggression perpetrated against cultivation and the intergenerational transmission of ideas have assumed several forms. As pointed out in a book originally published in Bologna in 1991 (*Il Passato, la Memoria, l'Oblio*),

"(...) La historia de nuestro siglo, como bien sabemos, aunque tratemos de olvidarlo, está llena de censuras, supresiones, ocultamientos, desapariciones, condenas, retractaciones públicas y confesiones de traiciones innominables, declaraciones de culpabilidad y de vergüenza. Obras enteras de historia fueron rescritas borrando los nombres de los héroes de un tiempo, catálogos editoriales fueron mutilados, fueron robadas fichas de los catálogos de las bibliotecas, fueron reeditados libros con conclusiones distintas de las originales, pasajes enteros fueron suprimidos, fueron antologados textos en un orden cómodo que permitiera documentar inexistentes filiaciones ideales e imaginarias ortodoxias políticas.

Primero se quemaron libros. Después se los ha hecho desaparecer de las bibliotecas con el intento de borrarlos de la historia. Primero se eliminaron innumerables seres humanos, después se trató de suprimir esa supresión, de negar los hechos, de

²⁰ A.A. Cançado Trindade, "Hacia el Nuevo *Jus Gentium* del Siglo XXI: El Derecho Universal de la Humanidad", in A.A. Cançado Trindade *Doctor Honoris Causa - Cuadernos del Archivo de la Universidad* (No. 39), Lima, PUC/Peru, 2005, p. 38, and cf. pp. 30-41.

²¹ Cf., Regarding that matter, A.A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brasil, Edit. Del Rey, 2006, pp. 175-193.

²² J. Ortega y Gasset, *Misión de la Universidad* (1930), Madrid, Rev. Occidente/Alianza Ed., 2002 [reed.], pp. 35-36, and cf. pp. 37, 40-41 and 53.

obstaculizar la reconstrucción de los acontecimientos, de prohibir el recuento de víctimas, de impedir el recuerdo. (...).²³

44. A University cannot fulfill its function if the free flow of ideas of each time, which constitutes culture, is inhibited by the State security forces. The armed invasion of a University, apart of being a serious crime in detriment of the victimized university students (kidnapped, tortured, executed and disappeared), is an obscurantist aggression against a supranational institution (the *Universitas*), - an aggression which affects the whole social tissue. During the 20th Century, several Universities in different places around the world were attacked. Numerous Universities, in a certain moment of their existence, were violated and forced by the State security forces.²⁴

45. Some of these aggressions have become renown, and today they appear in the specialized bibliography of Human Rights International Law. It is the case of the University of *La Cantuta*, brought to the knowledge of this Inter-American Court.²⁵ Others, which did not reach the Court, have left a lesson; for instance, to evoke another renown episode, in a more distant past,

"The entering of police horses in the Universidad de Buenos Aires and the violent and ferocious repression of the so called 'noche de los bastones largos' -night of the long sticks- of July 1966, constitutes a fundamental landmark of the repressive political project of the armed forces. All these events contributed, to a great extent, to push young people of the middle class towards the fields of "national and popular" opposition.²⁶

Despite the repression against Universities, the freedom of spirit has reacted against the repressing State forces, which have damaged the ideals of the new generations with the force of their ideas and purpose to build a better world than the one which was given to them. After the shadows, the light came.

46. The *Universitas* is inviolable. The forces of repression, not satisfied with victimizing thinking human beings, along many years also eliminated the most faithful partners of the latter: the books. They destroyed or burnt entire libraries²⁷, but they could not prevent the raising of emancipating human ideals. Along the centuries, the oppressors killed thinking human beings, they burnt their remains (as in this case of *La Cantuta*); burnt the faithful partners of those who thought -the books-, but they could not extirpate the free thinking, the ideals of young people, the right to dissent, the freedom of spirit.

²³ P. Rossi, *El Pasado, la Memoria, el Olvido*, Buenos Aires, Ed. Nueva Visión, 2003 [reed.], p. 33.

²⁴ As it happened, *inter alia*, during the first years of its existence, also with the University where I lecture International Law since three decades ago: the University of Brasília.

²⁵ According to a recent account, "President Fujimori had decided not to leave any free space to his opponents. Thus, he ordered his parliamentary majority to set forth the reorganization of the Universities of San Marcos and La Cantuta, places where the students had claimed his responsibility in crimes against humanity" ; Efraín Rúa, *El Crimen de la Cantuta - La Desaparición y Muerte...*, op. cit. supra No. (14), p. 276.

²⁶ M. Raffin, *La Experiencia del Horror - Subjetividad y Derechos Humanos en las Dictaduras y Posdictaduras del Cono Sur*, Buenos Aires, Edit. del Puerto (Colección Tesis Doctoral, No. 5), 2006, p. 147.

²⁷ Cf., regarding that matter, v.g., F. Báez, *História Universal da Destruição dos Livros*, Rio de Janeiro, Ediouro, 2006, pp. 17-376.

47. As after the shadows the light gradually appears, the *chiaroscuro* of the life of the individuals and the people, of human existence, we must not disregard that, in this Judgment, the Inter-American Court has set forth "that in June of this year the President of the Republic has apologized to the authorities of the University of La Cantuta" (para. 233). Also, the Court has taken the provisions necessary so that the suffering of the Professor and the nine students killed or disappeared remains not only in the memory of their next of kin and beloved human beings but also in the collective memory, as a way to honor the victims and resist the erosion of time.

48. As it did in its recent Judgment in the case of *La Prisión de Castro Castro*, also in this Judgment of the case *La Cantuta*, the Court has equally valued the existence of the monument and public site called "*El Ojo que Lloro*" (the Crying Eye),

"created at the request of civil society and with the cooperation of the State authorities, which constitutes an important public recognition to the victims of violence in Peru. However, the Court considers that the State must guarantee that, in the term of a year, the 10 people declared as executed victims or victims of forced disappearance in this Judgment are represented in the said monument, in case they are not already represented, and if their next of kin wish so. (...)" (para. 236).

IV. The Inadmissibility of Violations against *Jus Cogens*.

49. As a conclusion of this Separate Opinion, my last Opinion as Incumbent Judge of this Court, I allow myself to return to the starting point. State crimes entail serious legal consequences. At the time I finish writing this Separate Opinion, there are twelve requests of extradition of former President A. Fujimori submitted by Peru to Chile²⁸, among which, the one corresponding to the liability for the events in this case of *La Cantuta* is included. Recently, in another case decided by this Court, that of *Goiburú et al. vs. Paraguay* (Judgment of September 22, 2006), the horrors of the so called "Operación Condor" were revealed, in the context of which State crimes were committed in a beyond-the-border or interstate level.²⁹ At present, the reaction of legal conscience is shown in the recognition that the general duty of investigation, to guarantee the respect for the human rights consecrated in the American Convention (Article 1(1)), also applies in an interstate level, in the exercise of the collective guarantee by the States Parties in the American Convention (as it is the case of Chile and Peru).

50. In my Separate Opinion in the recent case of the *Pueblo Bello* Massacre (Judgment of January 31, 2006) I developed (as in several of my former Opinions) my arguments regarding the broad scope of the general duty of guarantee (Article 1(1) of the Convention) and the *erga omnes* obligations of protection of the Convention (paras. 2-13). The Court, in its Judgment in this case of *La Cantuta*, when pointing out that the facts of the *cas d'espèce* have infringed imperative laws of International Law (*jus cogens*), has positively esteemed the efforts of the respondent Government to attend "its duty -derived from its obligation to investigate - to request and impel, through appropriate judicial and diplomatic measures, the extradition of one of the main defendants" (paras. 159-160). An approximation or convergence between International Human Rights Law and International Criminal Law can be developed therefrom.

²⁸ As remembered by this Court's Judgment, para. 80(91).

²⁹ A matter that is analyzed in my Separate Opinion (paras. 1-68) in that case.

51. When underlining the broad scope of Article 1(1) of the American Convention, the Court has immediately after affirmed the obligation of the States Parties to investigate human rights violations and to prosecute and punish the responsible participants (para. 160). The fulfillment of such an obligation gains importance before the *seriousness* of the facts of this case of *La Cantuta*, eloquently emphasized at the very beginning of an account in the case:

"As opposed to what is expected, impunity does not conceal the crime, it increases it. The chain of crimes by the concealers is added to the crime committed by the perpetrators – material and intellectual. Kidnapping, cold-blooded murdering, concealed burial and body incineration are completed by lying, denial and delay in justice administration. Except for honorable cases, prosecutors and judges, non executive members, members of congress, military and civil governors have become part of the large file of the accessory impunity with which it is expected to return the case of the nine students and the professor of the Universidad de la Cantuta to the mass grave, cold-blooded murdered at the dawn of July 18, 1992."³⁰

52. It was a *State crime* which involved, with *animus aggressionis*, a chain of command, composed by several agents of the public power (of the different State powers), from the President of the Republic to the perpetrators of the extra-legal executions and other human rights violations. When analyzing the legal consequences of the said violations, this Court has pointed out, in this Judgment of the case *La Cantuta*, that

"Before the nature and seriousness of the facts, and within a context of systematic violation of human rights, the need to eradicate impunity appears before the international community as a duty of interstate cooperation for such effects. Access to justice constitutes an imperative rule of International Law and, as such, it generates *erga omnes* obligations for the States to adopt the necessary provisions so as not to leave those violations without punishment, whether exercising its jurisdiction to apply its domestic law and International Law to prosecute and, eventually, penalize those responsible for such facts, or cooperating with other States that do so or attempt to do so. The Court remembers that, under the mechanism of collective guarantee set forth in the American Convention, jointly with regional and universal international obligations on the matter, the States Parties of the Convention must cooperate with each other in that sense" (para. 160).³¹

53. Consequently, the broadening of the material content of the *jus cogens* is consolidated in this Judgment, as it encompasses the right of access to justice *lato sensu*, without which there is simply no Constitutional State. I honestly hope that the Court maintains this position in the future, and does not admit any attempt to stop its guaranteeing and emancipating jurisprudence of the human being regarding the matter, as this scope of protection of the human being does not imply nor admits steps back. I sincerely hope that the Court always keeps progressing in its jurisprudential construction regarding the imperative rules of International Law.

54. As a reaction of the *universal legal conscience* (which to me constitutes the ultimate *material* source of the whole Law), in our times a truly universal legal system of *absolute prohibition* of torture, of forced disappearances of people and of summary and extra-legal executions has been constituted. The said prohibition belongs to the scope of *jus cogens*. And said crimes against humanity (located in the

³⁰ APRODEH, *De la Tierra Brotó la Verdad...*, op. cit. supra No. (7), p. 5.

³¹ And also cf. paras. 239-241, regarding the intangibility of imperative rules of International Law (*jus cogens*) and the role of education in human rights.

confluence of International Human Rights Law and International Criminal Law) as pointed out by the Court in its Judgment in the case of *Almonacid* and has just repeated so in this Judgment of the case *La Cantuta*, affect not only those victimized, but also humankind as a whole (para. 225).

55. Thus the State duty of investigating, suing and punishing those who were liable, in order to avoid the repetition of such serious facts as the ones of this case. Furthermore, the Court added that,

"(...) The State shall not allege any law or domestic law provision so as to be exempted from the Court order to investigate and criminally punish those responsible for the events of *La Cantuta*. Particularly, as it has proceeded since the passing of Judgment by this Court in the case of *Barrios Altos versus Perú*, the State shall not apply amnesty laws again, as they generate no effects in the future (...), nor shall it allege prescription, non-retroactivity of criminal law, nor the principle of *non bis in idem* (...), or any other similar responsibility exemption so as to remain free from its duty to investigate and punish those responsible. (...)

(...) Also, by virtue of the effectiveness of the collective guarantee mechanism set forth under the Convention, the States Parties must cooperate with each other so as to eradicate the impunity of the violations committed in this case through the prosecution, and, should it be the case, the punishment of the responsible parties" (paras. 226-227).

56. Legal conscience has finally awaken to reveal at present with transparency the occurrence of true State crimes, which are brought before a human rights international court (as this Inter-American Court), and to promptly react against them, -which would probably be unthinkable, or could not be anticipated, some decades ago. However, this is what happens today, as testified by the Judgments of this Court in the cases of *Barrios Altos vs. Peru* (of March 14, 2001), of *Myrna Mack vs. Guatemala* (of November 25, 2003), of *Masacre de Plan de Sánchez vs. Guatemala* (of April 29, 2004 and November 19, 2004), of *Masacre de Mapiripán vs. Colombia* (of March 7, 2004), of the massacre of *Comunidad Moiwana vs. Surinam* (of June 15, 2005), of *Masacres de Ituango vs. Colombia* (of July 01, 2006), of *Goiburú y Otros vs. Paraguay* (of September 22, 2006), of *Almonacid Arellano y Otros vs. Chile* (of September 26, 2006), and of *Prisión de Castro Castro vs. Peru* (of November 25, 2006), among others.

57. Along this jurisprudencial evolution, I have insisted, in successive Opinions I let the Court know, in the occurrence of true State crimes, with their legal consequences. Not long ago, in my Separate Opinion in the case of the Castro Castro Prison (of November 25, 2006), in this same ordinary term of sessions of the Court, I made a warning regarding the recurrence of the State crime and to remember the forgotten legal thought on the matter (paras. 40-51). And I added that the conception of a State crime

"entails to the "progressive development" itself of International Law. It presupposes the existence of former and above the State rights, the violation of which, to the detriment of human being, is particularly serious and damages the international legal system itself. The latter provides universal values, as it inhibits said serious and damaging violations, and it seeks to guarantee the international *ordre juridique*.

Furthermore, it expresses that the belief that certain behaviors -which constitute or are part of a State policy - are inadmissible and generate the aggravated international liability of the State, with its legal consequences. It signals the path to be followed towards the construction of an organized international community, of the new *jus gentium* of the 21st century, of the International Law for humankind." (...)

The State crime effectively entails legal consequences, -this being inevitable-, with direct incidence in the reparations owed to the victims and their next of kin. One of the consequences consists in the *lato sensu* "punitive damages," these being conceived

beyond the purely monetary sense to them improperly awarded (in certain national jurisdictions), as certain reparation duties that the liable States must assume by criminal acts or practices; said duties may configure an adequate response or reaction of the legal system against the State crime.

They are obligations to perform. And, among these, there is the obligation to identify, trial and punish the perpetrators of State crimes who, by their acts (or omissions), incurred in international criminal liability, apart from compromising the international liability of their State, in the name of which they acted (or omitted), in the execution of a criminal State policy. It is not the case of purely individual acts (or omissions), but a criminality organized by the State itself. Consequently, it becomes necessary to take *jointly* into account, the criminal international liability of the individuals involved as well as the international liability of the State, essentially supplementary; the aggravated international responsibility of the State in question corresponds to the State crime"; (paras. 52-53 and 55-56).

58. In cases such as this one, where the State power apparatus was improperly used to commit State crimes (in a shocking distortion of the State purposes), constituting inadmissible violations of the *jus cogens*, to then conceal said crimes and keep its agents -perpetrators of those crimes- in impunity, and the victims' next of kin (also victimized) in the most complete desolation and desperation, -in cases as those of *La Cantuta* and *Barrios Altos*, in which the crimes against human rights were perpetrated in the context of a proven practice by the State,- the patient reconstitution and determination of the facts by this Court constitute, themselves, one of the ways of providing satisfaction - as a form of reparation - owed to the victims' surviving next of kin (who are also victims), and a way to honor the memory of the deceased victims.

59. The *jus cogens* resists State crimes, and imposes sanctions to them, by virtue of the prompt commitment of the international *aggravated* liability of the State. As a consequence of said crimes, the owed reparations assume the way of different obligations to perform, including the investigation, trial and punishment of those responsible for the perpetration of the State crimes (by action or omission). The Law does not cease to exist by the violation of its rules, as the "realists" expect to insinuate, degenerated by their inevitable and pathetic idolatry for the established power. Very much on the contrary, the imperative law (*jus cogens*) immediately reacts against those violations, and it imposes sanctions.

60. For years, within this Court, I have insisted upon the need to recognize and identify the *jus cogens*, and I have elaborated, in several Opinions (both in adversarial and in consulting functions for the Court), the doctrinal construction of the application of the material content of the *jus cogens* and the corresponding erga omnes obligations of protection, in both their horizontal (*vis-à-vis* the international community as a whole) and vertical (encompassing the relations of the individual with the public power and with non-State entities and other individuals). With this, under the American Convention, the concept of "victim" itself has evolved and expanded, and so have the parameters of protection owed to the justiciable ones and the circle of protected people.

61. I feel grateful because the Court has adopted my reasoning, which today is an *acquis*, a conquest of its *jurisprudence constante* on the matter. Now that my time as Incumbent Judge of this Court expires, a Court which has assumed a vanguard position among the contemporary international courts regarding to this matter in particular, I feel entirely free to point out that this is an advance that admits no stepping back. I insist (considering that very soon, on January 1, 2007, the time to silence in my present office shall come) that this Court cannot let itself stop or

regress its own jurisprudence regarding imperative law (*jus cogens*) within this scope of protection of the human being, *regarding both substantive and procedural law*.

62. With this Judgment of the Court in the case of *La Cantuta*, a historical cycle of rendering of justice by this Court comes to an end, which has revealed that the prevalence of Law is affirmed even in the most adverse conditions for the bearers of human rights - the human being, subject of International Law, even in a status of complete defenselessness, - as it was revealed, for instance, in the cases tried by this Court which took place during the Fujimori regime (*Barrios Altos* and *La Cantuta*, among others), the Pinochet regime (*Almonacid*), and the Stroessner regime (*Goiburú y Otros*) within the context of the sinister "Operación Cóndor." On my part, I close with nostalgia this unforgettable period of services rendered and of being personally fulfilled as Encumbent Judge of this Court, period that could not be more gratifying, in the never ending learning process provided by the search -against all kinds of adversity- of the right to the truth and justice, as well as the never ending search of the sense of life, of human existence.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary