

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have concurred in my opinion, in the city of Buenos Aires, with the Judgment entered by the Inter-American Court of Human Rights in the case of *Baldeón-García v. Peru*. Given the importance of some of the issues discussed in this Judgment, I believe I should explain my personal analysis thereon to support my position on this matter. Particularly, I am referring to the need to progress on the Court's precedent setting process, in the sense of broadening the material scope of the *jus cogens* (in order to cover also the right to fair trial *lato sensu*), and the acknowledgment of the obligations thereby imposed upon the State to act in a given manner and also to achieve a given result.

2. In this Judgment, the Court considered the arrest and subsequent execution of Mr. Bernabé as proven facts Baldeón-García; events that occurred when the victim was 68 years old. The arrest, made effective on September, 25, 1990, in the locality of Pacchahuallhua, Department of Ayacucho, was part of a "counterinsurgency operation" carried out by military officers who invaded the aforementioned rural community through the use of violence and random shootings (para. 72(14-18)). On that same day,

"The persons arrested were first locked in a room and then transferred to another room to be interrogated and tortured.

[...] During his arrest, Mr. Bernabé Baldeón-García was beaten, tied with metal wires hanged upside down from a beam, and later submerged in a tank filled with cold water.

Mr. Bernabé Baldeón-García died in the early morning of September 26, 1990 (...) while under the custody of military officers.

The dead body of Mr. Bernabé Baldeón-García was buried that same day without the presence of his next of kin" (para. 72(19-22)).

3. The Court found that the arrest and execution of the victim were carried out under a *systematic pattern* of mistreatment and extrajudicial executions in Peru, as acknowledged by the Truth and Reconciliation Commission of Peru, particularly in the periods 1983-1984 and 1989-1993 (para. 72(1-3)). In the Judgment of the case of *Baldeón-García v. Peru* (referred to in the *Final Report* of August 28, 2003 by said Commission), the Inter-American Court duly highlighted the contributions made by the Truth and Reconciliation Commission of Peru (paras. 167 and 196); however, it indicated that justice had not been done and that perpetrators were yet to be punished.

4. I believe, as indicated in my Separate Opinion (paras. 1-43) in the case of *Plan de Sánchez Massacre v. Guatemala* (Judgment of April, 29, 2004),¹ that the aforementioned *systematic pattern* of mistreatment and extrajudicial executions constitutes an aggravating circumstance and thus results in the *aggravated* international responsibility of the respondent government, and all appropriate legal effects. In that context, the Court may –and should– have made progress on the precedent setting process; however, it only repeated what it had already sustained in prior cases.

5. In the Judgment of August 18, 2000, in the case of *Cantoral Benavides v. Peru*, the Court made significant progress when holding that

¹ Cf. also my Separate Opinion on the Judgment (of November 25, 2003) in the case of *Myrna Mack Chang v. Guatemala* (paras. 1-55 of the Opinion).

"(...) certain acts that were classified as inhuman or degrading in the past, but not as torture, could be classified otherwise in the future, that is, as torture, since the response to the increasing demands for protection of human rights and fundamental freedoms, should be a stricter approach and treatment of the violations of the core values of democratic societies (...). Based on the aforementioned, we can conclude that an international legal regime has been developed which establishes the absolute prohibition of any type of acts of torture" (paras. 99 and 103).

Some years before these significant *obiter dicta* of the Court, I referred to the need to develop the Court jurisprudence on *jus cogens* prohibitions, in my Separate Opinions on the case of *Blake v. Guatemala* (preliminary objections, Judgment of July 02, 1996;² on the merits, Judgment of January 24, 1998;³ and reparations, Judgment of January 22, 1999;⁴); I later issued my reaffirming Concurring Opinion on the Judgment (of March 14, 2001) in the case of *Barrios Altos v. Peru*,⁵ and the Separate Opinion on the Judgment (preliminary exceptions, Judgment of September 01, 2001) in the case of *Hilaire v. Trinidad and Tobago*,⁶ in my Concurring Opinion on the Judgment (of November 27, 2003) in the case of *Maritza Urrutia v. Guatemala*;⁷ in my Separate Opinion on the Judgment in the case of *Gómez-Paquiyaury Brothers v. Peru* (of July 08, 2004);⁸ and my Dissenting Opinion in the case of the *Serrano Cruz Sisters v. El Salvador* (Judgment on preliminary exceptions of November 23, 2004).⁹

6. In the Judgment of September 07, 2004, in the case of *Tibi v. Ecuador*, the Court reaffirmed that:

"There is an international legal regime that absolutely prohibits any type of torture, whether physical or psychological; a regime that today is part of the realm of the *jus cogens*. The prohibition against torture is complete and irrevocable, even under the most difficult circumstances, such as war, threat of war, fight against terrorism or any other offenses, state of siege or emergency, domestic unrest or conflict, suspension of constitutional guarantees, domestic political instability or other public disasters or emergencies" (para. 143).¹⁰

The Court restated this *obiter dictum* in this Judgment on the case of *Baldeón-García* (para. 117).

7. The Court broadened the material scope of the *jus cogens* in its landmark Advisory Opinion No.18 (of September 17, 2003), on the *Juridical Condition and Rights of Undocumented Migrants*, to include the basic principle of equality and non-

² Paras. 11 and 14 of the Opinion.

³ Paras. 15, 17, 23, 25 and 28 of the Opinion.

⁴ Paras. 31, 40 and 45 of the Opinion.

⁵ Paras. 10, 11 and 25 of the Opinion.

⁶ Para. 38 of the Opinion.

⁷ Paras. 6, 8- 9 and 12 of the Opinion.

⁸ Paras. 1, 37, 39, 42 and 44 of the Opinion.

⁹ Paras. 2, 32 and 39 -41 of the Opinion.

¹⁰ In my Separate Opinion in the case of *Tibi*, I referred to the importance of the absolute nature of said prohibition and I examined the evolution of contemporary international judgments (paras. 26 and 30-32 of the Opinion).

discrimination (paras. 97-101 and 110-111). I issued an extensive Concurring Opinion on this significant progress made in the Court's case law (paras. 1-89). In the instant case of *Baldeón-García v. Peru*, the Court could –and should– have made progress, but it did not; the Court acknowledged the violations of Articles 4(1) and 5(1) and (2) of the Convention (operative paragraphs No. 2-4 of this Judgment), but at the same time, –and unanimously, as in the recent case of *Pueblo Bello Massacre v. Colombia* (2006)– of Articles 8(1) and 25, *considered as a whole*, all of them relating to Article 1(1) of the Convention.

8. On this last aspect (operating paragraph no. 5), in this Judgment the Court found that:

“(...) Based on the above, the Court considers that no effective remedy was available to guarantee, within a reasonable time, the right, to fair trial to the next of kin of Mr. Baldeón-García in compliance with legal safeguards” (para. 155).

This *obiter dictum* of the Court undoubtedly reflects its unanimous understanding of the close and inevitable relation between Articles 8(1) and 25 of the American Convention.

9. In my opinion, the *right to fair trial* is also part of the realm of the international *jus cogens*. As I explained in my Separate Opinion on the recent case of *Pueblo Bello Massacre v. Colombia* (Judgment of January 31, 2006):

"The impossibility to segregate Article 25 from Article 8, both of the American Convention (...), involves the need to consider the right to fair trial, understood as *full access* to justice, as part of the realm of the *jus cogens*, i.e. the intangibility of all legal safeguards belong to the realm of the *jus cogens* as set forth in Articles 25 and 8, *considered as a whole*. There is no doubt that the fundamental safeguards, common to the International Law of Human Rights and International Humanitarian Law, are universal in nature since they are applicable in any and all circumstances, they embody compulsory laws (as part of the *jus cogens*), and purport *erga omnes* obligations to protect.

After that landmark Advisory Opinion no. 18, on the *Juridical Condition and Rights of Undocumented Migrants* of 2003, the Court could –and should– have made qualitative progress on precedent setting. I dare nurse the hope that the Court will do so as soon as possible if it effectively continues supporting its avant-garde precedents, –instead of attempting to limit them– and will courageously further on the progress made based on the aforementioned Advisory Opinion no. 18 aimed at continuously broadening the material scope of the *jus cogens*" (paras. 64-65).

10. Also in my recent Separate Opinion (paras. 52-55) in the case of *López-Álvarez v. Honduras* (Judgment of February 01, 2006), I restated my idea that the right to justice (the right to fair trial *lato sensu*) is a compulsory element of the *jus cogens*. The Court could –and should– have established so in the instant case; instead, it repeated prior *obiter dicta*. Thus, the Court lost the opportunity to step forward regarding its precedent setting process.

11. I will go even further. In my opinion, as I explained above, we are referring to compulsory laws; therefore, the State's obligations to prevent, investigate and punish perpetrators are not mere obligations "to act in a given manner, but not to achieve a given result," as stated by the Court in paragraph 93 of this Judgment. I dissent in this reasoning from the majority of the Court.

12. As I indicated in my Separate Opinion (para. 23) in the recent Judgment of the Court of March 29, 2006, in the city of Brasilia, in the case of *Sawhoyamaya Indigenous Community v. Paraguay*:

"(...) The State's obligations require it to act diligently and to achieve a given result, not merely to act in a given manner (such as adopting insufficient and ineffective legislative measures). Indeed, the examination of the difference between obligations to act in a given manner and to achieve a given result¹¹ has, in general, been carried out under a theoretical approach, assuming variations in the conduct of the State and even a succession of acts by the latter,¹² -without sufficiently and duly considering a situation that suddenly causes irreparable damage to a human being (v.g., deprivation of life due to the State's lack of diligence)."

In other words, the obligations involved are *to achieve a given result and not merely to act in a given manner*, because, otherwise, they would not refer to compulsory laws and, in addition, they could result in impunity.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary

¹¹ Especially based on the work of the United Nations Human Rights Commission on the International Responsibility of States.

¹² Cf. A. Marchesi, *Obblighi di Condotta e Obblighi di Risultato - Contributo allo Studio degli Obblighi Internazionali*, Milano, Giuffrè, 2003, paras. 50-55 and 128-135.