

CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE*

1. I have voted in favor of this judgment that the Inter-American Court of Human Rights has just adopted in *Maritza Urrutia v. Guatemala* and, in this Separate Opinion, I would like to add some brief personal observations in firm support of the Court's characterization of the absolute prohibition of torture, in all its forms (including psychological) as belonging to the sphere of international *jus cogens*. This characterization is rooted in the evolution of the most lucid contemporary juridical thought, which – among the progress made in recent years towards combating particularly serious human right violations – has even led to the emergence of a real international juridical regime against torture.

2. This juridical regime is composed of the different international instruments and procedures for the prohibition of torture. To the United Nations Conventions (of 1984 and its Optional Protocol of 2002) and the Inter-American Convention (1985) on this issue, must be added the European Convention for the Prevention of Torture and Cruel, Inhuman or Degrading Treatment (1987), the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment (since 1985) of the United Nations Commission on Human Rights, and the Working Group on Arbitrary Detention (since 1991) of the same Commission on Human Rights (attentive to the prevention of torture). The three co-existing conventions to combat torture – that of the United Nations of 1984, the Inter-American of 1985, and the European of 1987 – more than simply being compatible, are complementary.

3. The first two (that of the United Nations and the Inter-American) include a definition of torture, while the third (the European) abstains from defining it. In this judgment in *Maritza Urrutia v. Guatemala*, the Court refers to the elements that constitute the definition of torture in both Conventions – that of the United Nations and the Inter-American (para. 90-91) – when establishing, in this case, the occurrence of psychological torture against the victim, in violation of Article 5(1) and (2) of the American Convention. The Court has stated clearly that:

“(...) The prohibition of torture is absolute and non-derogable, even in the most difficult circumstances, such as war, the threat of war, the fight against terrorism, and any other crime, martial law or state of emergency, civil war or commotion, suspension of constitutional guarantees, internal political instability, or any other public disaster or emergency” (para. 89).

4. The Inter-American Court's observation is opportune, because, even for States that have not ratified the American Convention or any of the three conventions against torture (*supra*), it would be inadmissible to try and elude or relativize the peremptory or absolute nature of the prohibition of torture (even in the so-called “fight against terrorism,” or any other crime). In *Soering v. United Kingdom* (Judgment of July 7, 1989), the European Court of Human Rights affirmed categorically that the absolute prohibition – even in time of war and other national emergencies – of torture and of inhuman or degrading treatment or punishment or treatment, in the terms of article 3 of the European Convention on Human Rights, revealed that this provision incorporated one of the “fundamental values of democratic societies,”¹

* This translations is awaiting its final revision by the author.

¹ This value is also embodied in similar terms in other international instruments, such as the

5. In *Cantoral Benavides v. Peru* (Judgment of August 18, 2000), when establishing a violation of Article 5 of the American Convention, the Inter-American Court considered that certain acts that, in the past, were classified as “inhuman or degrading treatment,” could, subsequently, with the passage of time, come to be considered torture, since the growing demand for protection must be accompanied by a prompt and more vigorous response in dealing with infractions of the basic values of democratic societies (para. 99). The ineluctable fight against torture – “a form of hell that has accompanied our civilization” – and other grave human rights violations represents, in the final analysis, the daily fight to “ensure that the principles of humanity prevail.”²

6. The categorical and absolute prohibition of torture under any circumstance, which falls within the sphere of international *jus cogens*³, is a definitive conquest of civilization. Indeed, the way in which the public authorities treat those who are detained is an infallible criterion for measuring the degree of civilization attained by any country (whether or not it is a party to the human rights treaties). This is what F.M. Dostoevsky had already observed in the nineteenth century, in *Notes from the House of the Dead* (1862)⁴; he considered that the degree of civilization attained by any society could be assessed by visiting its prisons.

7. In actual fact, the definition of the crime of torture, which today is found in two of the three co-existing conventions against torture (article 1 of the 1984 United Nations Convention, and article 2 of the 1985 Inter-American Convention) owes its content to international human rights case law, and not to the classification of the crime of torture in domestic law. The elements that constitute torture in the definition found in the two conventions mentioned above – severe physical or mental suffering, inflicted intentionally, to obtain information or a confession, with the consent or acquiescence of the authorities or other persons acting in an official capacity – is a result of the case law of the former European Commission on Human Rights in the *Greek case* (1967-1970), elaborated subsequently by the European Commission and Court in *Ireland v. United Kingdom* (1971-1978)⁵.

8. In this respect, international case law preceded and influenced international legislation in the sphere of the protection of human rights. Manifesting itself formally in the sphere of international human rights law through either case law or legislation,

International Covenant on Civil and Political Rights of the United Nations and the American Convention on Human Rights, and is “generally recognized as an internationally accepted standard”; European Court of Human Rights, *Soering v. United Kingdom*, judgment of July 7, 1989, p. 26, para. 88.

² A. Cassese, *Inhuman States - Imprisonment, Detention and Torture in Europe Today*, Cambridge, Polity Press, 1996, pp. 59-61.

³ Cf. M. Nowak and W. Suntinger, “International Mechanisms for the Prevention of Torture”, in A. Bloed *et alii* (eds.), *Monitoring Human Rights in Europe - Comparing International Procedures and Mechanisms*, Dordrecht, Nijhoff, 1993, pp. 145-168.

⁴ Cf. F. Dostoevsky, *Souvenirs de la maison des morts*, Paris, Gallimard, 1997 (re-edition), pp. 35-416.

⁵ A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, tomo II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 37-38.

the absolute prohibition of torture arises from the supreme *material* source of law, the *universal juridical conscience*. The recognition and expansion of the sphere of international *jus cogens* also derives from the latter.

9. In this respect, in my Separate Opinion on the Inter-American Court' Advisory Opinion No. 18 on *The Juridical Status and Rights of Undocumented Migrants* (of September 17, 2003), I indicated that:

"(...) In the *A. Furundzija* case (Judgment of December 10, 1998) the International Criminal Tribunal for the former Yugoslavia (*Trial Chamber*) stated that the absolute prohibition of torture, decreed by international law – both treaty law (under various human rights treaties) and common law – had the character of a *jus cogens* norm (...). This was so owing to the importance of the values protected (...). This absolute prohibition of torture, the Tribunal added, imposed obligations *erga omnes* on States (...); the *jus cogens* character of this prohibition 'makes it one of the most fundamental standards of the international community', incorporating 'an absolute value from which no one shall deviate' (...).

Indeed, the concept of *jus cogens* is not limited to treaty law; it belongs also to the law on the international responsibility of States. (...) In my opinion, it is in this pivotal chapter of international law, on international responsibility (perhaps more than in the chapter on treaty law), that *jus cogens* reveals its real, broad and profound dimension, covering all juridical acts (even unilateral ones) and (even beyond the sphere of State responsibility) influencing the very *foundations* of a truly universal international law" (paras. 69-70)

10. Today, there is a movement towards establishing a continuous monitoring mechanism of a preventive nature within the framework of the international juridical regime against torture.⁶ Under the 1987 European Convention, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment carries out preventive inspections in detention establishments in the States Parties (article 2).⁷ In the same way, the recent Optional Protocol (2002) of the United Nations Convention against Torture authorizes the Sub-Committee on the Prevention of Torture (created by this Convention) to conduct preventive visits to detention establishments in the States Parties and make recommendations to them (articles 4 and 11).

11. These developments have ended one of the last remaining strongholds of State sovereignty, by allowing scrutiny of the *sancta sanctorum* of the State – including its prisons and detention establishments, police stations, military prisons, detention centers for foreigners, and psychiatric institutions – and of its administrative practices

⁶ Cf., see, in general, N.S. Rodley, *The Treatment of Prisoners under International Law*, Oxford, Clarendon Press, 1987, pp. 1-374; and cf. J. Donnelly, "The Emerging International Regime against Torture", 33 *Netherlands International Law Review* (1986) pp. 1-23.

⁷ Cf. Council of Europe, *Explanatory Report of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, Strasbourg, C.E., 1989, pp. 5-23, esp. pp. 10-11 and 21; D. Rouget, "La Convention Européenne pour la Prévention de la Torture et des Peines ou Traitements Inhumains ou Dégadants - Un outil essentiel de promotion de la dignité des personnes privées de liberté", 2 *Cahiers de l'Institut des Droits de l'Homme - De la prévention des traitements inhumains et dégradants en France* - Lyon (1996) pp. 17-31; Comité Européen pour la Prévention de la Torture et des Peines ou Traitements Inhumains ou Dégadants, *Contexte historique et principales caractéristiques de la Convention*, Strasbourg, Conseil de l'Europe, [1991], pp. 1-4.

and legislative measures, in order to determine their compatibility with international human rights standards.⁸ This has been achieved in the name of superior common values, embodied in the prevalence of the fundamental rights inherent in the human being.

12. This judgment of the Inter-American Court is framed in this noteworthy juridical and civilizing evolution. Even before *Maritza Urrutia v. Guatemala*, the Court had ruled on the violation of the right to psychological integrity (in *Loayza Tamayo v. Peru*, Judgment of September 17, 1997, paras. 57-58) and on “psychological torture” (in *Cantoral Benavides v. Peru*, Judgment of August 18, 2000, para. 102). In the instant case, the Court once again rules on the latter, amidst its categorical affirmation of the absolute prohibition of torture in all its forms. In the apt words of the Court:

“An international juridical regime of absolute prohibition of all forms of torture, both physical and psychological, has been developed and, with regard to the latter, it has been recognized that the threat or real danger of subjecting a person to physical harm produces, under determined circumstances, such a degree of moral anguish that it may be considered ‘psychological torture.’ The absolute prohibition of torture, in all its forms, is today part of international *jus cogens*” (para. 92).

There is no alternative to this juridical development motivated by the human conscience; if this were not so, we would return to barbarism.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

⁸ A. Cassese, *op. cit. supra* n. (2), pp. 1 and 131-133.