CONCURRING OPINION OF JUDGE A.A. CANÇADO-TRINDADE

1. I have voted in favor of the adoption of the Judgment rendered in the *Case of Almonacid-Arellano et al. v. Chile* by the Inter-American Court of Human Rights. Given the importance of the issues considered in this Judgment by the Court, I feel obliged to append this Opinion, containing my personal reflections, as the basis of my position on the matters addressed by the Court. I shall focus on three main points, as follows: a) the lack of legal validity of self-amnesties; b) self-amnesties and the obstruction and denial of justice: extension of the material scope of *jus cogens* prohibitions; and c) the conceptualization of crimes against humanity at the confluence of International Human Rights Law and International Criminal Law.

I. Lack of legal validity of Self-amnesties

2. This Judgment rendered by the Inter-American Court in the *Case of Almonacid-Arellano et al. v. Chile* follows the line of reasoning first introduced in its historic Judgment (of March 14, 2001) in the C*ase of Barrios Altos v. Peru*, in which the Court stated that:

> "This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extra-legal, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by International Human Rights Law" (para. 41).

The Judgment rendered by the Court in the *Case of Barrios Altos*, -in which there was acquiescence on the part of the Peruvian State-, has become well-known and renowned within international legal circles throughout the world as it was the first time an international court held that a self-amnesty law *had no legal effects*. In its Judgment in the *Case of Barrios Altos*, the Court found, for the first time in history and categorically, that:

> "Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds (…) or the identification and punishment of those responsible (…)" (para. 44).

3. Even though in the *Case of Almonacid-Arellano et al. v. Chile* the State did not acquiesce to the claim, it has adopted a positive and constructive approach to the proceedings before the Court (as evidenced by this Judgment) insofar as it has not disputed that (self-amnesty) Decree Law No. 2.191 of April 18, 1978 violates the American Convention (para. 90) and, moreover, the State itself has admitted that "in principle, amnesty or self-amnesty laws are contrary to the rules of International Human Rights Law" (para. 112). In this Judgment, the Court has rightly characterized Decree Law No. 2.191 as a self-amnesty law, enacted by the "military regime in order to shield its own crimes," perpetrated during the curfew imposed between September 11, 1973 and March 10, 1978, "from the hands of justice" (paras. 119 and 81(10)).

4. It is common knowledge that there are different types of amnesty,[1] "granted" under the pretext of achieving "national reconciliation" through the revelation of the "truth" (under the terms of the amnesty in question) and forgiveness; these pretexts, in practice have been individually or collectively used by some States.[2] However, forgiveness cannot be imposed by a decree law or otherwise; instead, it can only be granted spontaneously by the victims themselves. And, in order to do so, they have sought justice. In this regard, the Court recalls in this Judgment that, when releasing to the public, on March 4, 1993, the final *Report* of the *Comisión Nacional de Verdad y Reconciliación* (National Truth and Reconciliation Commission) (of February 8, 1991), the President of Chile then incumbent, Mr. Patricio Aylwin, apologized to the victims' next of kin, on behalf of the State (and the nation) as follows:

> "When those who caused so much suffering were officials of the State and the relevant government authorities could not or did not know how to prevent or punish them, nor was there the necessary social reaction to avert it, both the State and society as a whole are responsible, whether by act or by omission. It is the Chilean society who is in debt to the victims of human rights violations. (...) Therefore, in my capacity as President of the Republic, I dare to speak for the entire nation and, in its name, apologize to the next of kin of the victims."[3]

5. Over the past years, research has been conducted on the different types of amnesty; however, there is no need to discuss this aspect further here. Notwithstanding, given the circumstances surrounding the *cas d'espèce*, it is relevant to focus on a specific type of amnesty: the so-called "self-amnesty," which seeks to shelter those responsible for gross human rights violation from justice, thus promoting impunity. To start with, it is important to remember that true laws may not be arbitrary; they do not bear the name of those who hold themselves above them. They have some level of abstraction, essential to the operation of law. They embody principles, which form and inform them, and are apprehended by human reason, i.e. the *recta ratio,* and give them a life of their own. They give expression to everlasting values. As pointed out in a famous study of statutory construction,

> "Laws remain identical to themselves, while the ever-changing course of history and life flows beneath them."[4]

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1. *Cf. e.g.* L. Joinet (*rapporteur*), "Study on Amnesty Laws," document No. E/CN.4/Sub.2/1985/16/Rev.1, Geneva, UN Subcommission on the Prevention of Discrimination and Protection of Minorities, 1985, pp. 1-22; J. Gavron, "Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court," 51 *International and Comparative Law Quarterly* (2002) pp. 91-117.

2. A. O'Shea, *Amnesty for Crime in International Law and Practice*, The Hague, Kluwer, 2004, p. 23, and *cf*. pp. 25-33.

3. *Cit. in* para. 81(26) of this Judgment. P. Aylwin-Azocar, "La Comisión de la Verdad y Reconciliación de Chile" (National Truth and Reconciliation Commission of Chile), in *Estudios Básicos de Derechos Humanos - II* (eds. A.A. Cançado-Trindade and L. González-Volio), San José de Costa Rica, IIDH, 1995, pp. 105-119.

4. S. Soler, *La Interpretación de la Ley*, Barcelona, Publ. Ariel, 1962, p. 108, and *cf*. pp. 15, 115, 117, and 143.

6. The Court, in its Advisory Opinion No. 6 (of May 9, 1986), held that:

> "the word *laws* in Article 30 of the [American] Convention means a general legal norm tied to the general welfare, passed by democratically elected legislative bodies established by the Constitution, and formulated according to the procedures set forth by the Constitutions of the States Parties for that purpose." (para. 38)

7. Self-amnesties are far from satisfying all these requirements. They are not true laws insofar as they are devoid of their intrinsic *generic* nature,[5] of the *idea of Law* that inspires them (essential even to legal certainty),[6] and of the search for the common good. They do not even seek the organization or regulation of social relations in furtherance of the common good. They are only designed to keep certain facts from justice, cover gross rights violations and ensure impunity for some individuals. They do not satisfy the minimum requirements of laws; on the contrary, they are illegal aberrations.

8. In my opinion, the person who most eloquently wrote about the purposes of law and the injustices committed based on so-called "laws" is Gustav Radbruch. In his famous *Fünf Minuten Rechtsphilosophie*, first published as a circular addressed to the students of the University of Heidelberg in 1945, shortly after -and certainly under the impact- of the atrocities of World War II, the great legal philosopher asserted that "the three values that Law must serve" are justice, the common good, and legal certainty. However, there are "laws" that have shown to be so detrimental to the common good and so unfair, that they appear to be devoid of "legality."

9. In his fierce criticism of positivism, G. Radbruch added that "There are also fundamental principles of law that are above any and all positive precepts, so that any law that violates such principles cannot but be set aside."[7] Furthermore, the great legal philosopher asserted that positivism

> "was what left people and jurists defenseless against the most arbitrary, cruel, and criminal laws. In the final analysis, it equates law and force, leading to believe that where the latter is present, the former will be as well."[8]

10. In evoking G. Radbruch's philosophy toward the end of his life, I shall allow myself to add that self-amnesties are, in my view, the very negation of Law. They overtly violate general principles of law, such as the right of access to justice (which, in my opinion, falls within the scope of *jus cogens*), the principle of equality before the law, and the right to be tried by a competent court (*juez natural*), among others. In some cases, they have even covered up crimes against humanity and genocide.[9]

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[5]. G. Radbruch, *Introdução à Ciência do Direito* [original title: *Einführung in die Rechtswissenschaft*], São Paulo, Publ. Livr. Martins Fontes, 1999, p. 8.

[6]. G. Radbruch, *Filosofia do Direito*, volume I, Coimbra, Publ. A. Amado, 1961, pp. 185-186.

[7]. G. Radbruch, *Filosofia do Direito*, volume I, Coimbra, Publ. A. Amado, 1961, pp. 213-214.

[8]. *Ibid*., pp. 211-214.

[9]. For example, the Treaty of Sèvres (1920) provided for the incrimination of the Turks responsible for the massacre of Armenians, but it was superseded by the Treaty of Lausanne (1923), which "granted" amnesty to the perpetrators of what came to be known as the first genocide of the 20th century; *cit*. in A. O'Shea, *op. cit. supra* n. (2), p. 15; and *cf*. B. Bruneteau, *Le siècle des génocides - Violences, massacres et processus génocidaires de l'Arménie au Rwanda*, Paris, A. Colin, 2004, pp. 48-72.

To the extent that they obstruct the administration of justice for such heinous crimes, self-amnesties are contrary to *jus cogens* (*cf. infra*).

11. In this Judgment in the *Case of Almonacid-Arellano et al.*, the Inter-American Court, following the precedent introduced in the *Case of Barrios Altos,* pointed out that self-amnesties such as Decree Law No. 2.191 of 1978

> "leave victims defenseless and perpetuate impunity for crimes against humanity. Therefore, they are overtly incompatible with the wording and the spirit of the American Convention, and undoubtedly affect rights embodied in such Convention. This constitutes in and of itself a violation of the Convention and generates international liability for the State. Consequently, given its nature, Decree Law No. 2.191 does not have any legal effects and cannot remain as an obstacle for the investigation of the facts inherent to the instant case or for the identification and punishment of those responsible therefor. Neither can it have a like or similar impact regarding other cases of violations of rights protected by the American Convention which have occurred in Chile" (para. 119).

12. It is hardly surprising that Decree Law No. 2191 has been the target of severe criticism in specialized legal publications.[10] After all, it was precisely during the period covered by the aforesaid self-amnesty that most State crimes were perpetrated by the Pinochet regime. The Inter-American Court has established in this Judgment that, precisely during the period between September 11, 1973 and March 10, 1978, the "military dictatorship" in Chile,

> "by developing a state policy intended to create fear, attacked massively and systematically sectors of the civilian population that were considered as opponents to the regime. This was achieved by a series of serious violations of human rights and of international law, among which there are at least 3,197 victims of summary executions and forced disappearances, and 33,221 detainees, of whom the great majority were tortured." (para. 103)

Mr. Almonacid-Arellano, extra-legally executed by State officials within a "systematic and generalized pattern" of crimes against the civilian population (para. 103), was among these many victims.

13. Stories and testimonies published in recent years agree that the dictatorship which seized power in Chile on September 11, 1973 opted for the "immediate elimination" through "collective executions." Out of at least 3,197 dead and disappeared "1,823 were killed or disappeared during the first four months of the coup d'état."[11] Thus, on September 11, 1973, the "war [sic] against terrorism" began, just like on September 11, 2001: on each occasion the choice was to violate human rights and International Law by erroneously combating terrorism through State terrorism.

14. During the "total war" which began on September 11, 1973, suspects and political prisoners

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[10]. *Cf.*, *inter alia*, B. Chigara, *Amnesty in International Law - The Legality under International Law of National Amnesty Laws*, Harlow/London, Longman, 2002, pp. 11 and 114; A. O'Shea, *Amnesty for Crime in International Law..., op.* cit. *supra* n. (2), pp. 68, 285-286 and 313.

[11]. N.C. Mariano, *Operación Cóndor - Terrorismo de Estado en el Cono Sur* (Operation Condor, State Terrorism in the Southern Cone), Buenos Aires, Publ. Lohlé-Lumen, 1998, p. 87; and *cf*. A. Boccia Paz, M.H. López, A.V. Pecci, and G. Giménez Guanes, *En los Sótanos de los Generales - Los Documentos Ocultos del Operativo Cóndor* (In the Generals' basements- The Hidden Documents of Operation Condor), Asunción, Expolibro/Servilibro, 2002, p. 187.

"were crammed into improvised concentration camps, such as the *Estadio Nacional de Santiago* (National Stadium of Santiago). Over 1,000 people were summarily executed (…). The Chilean military introduced a new tactic for Latin America: they would bury the prisoners' bodies in secret mass graves or "common pits," and would tell prisoners' families that their relatives had never been kept in their custody.

(…) Since the enemy had international reach, Pinochet masterminded an international scheme to defeat it. To this end, he forged a secret alliance with the military governments of Uruguay, Paraguay, Brazil, and Argentina. (…) The initiative was named "Operation Condor" (...). Almost invariably, the victims of Operation Condor disappeared."[12]

15. Seeking to grant amnesty to those responsible for the aforesaid State crimes is an affront to the Rule of Law in a democratic society. As I stated in my Concurring Opinion in the *Case of Barrios Altos*,

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

There is another point which seems to me even graver in relation to the distorted figure -an offense against the Rule of Law itself- of the so-called laws of self-amnesty. As the facts of this *Case of Barrios Altos* disclose -in leading the Court to declare, in accordance with the recognition of international liability made by the respondent State, the violations of the rights to life[13] and to personal integrity,[14]- such laws do affect non-derogable rights -the *minimum* universally recognized- which fall within the scope of *jus cogens."* (paras. 5 and 10).

16. And I concluded my Concurring Opinion by stating that:

"No State can be considered to rest above the Law, whose norms have as ultimate addressees the human beings. (…) It should be stated and restated firmly, whenever necessary that in the domain of the International Law of Human Rights, the so-called 'laws' of self-amnesty are not truly laws: they are nothing but an aberration, an inadmissible affront to the juridical conscience of humanity." (para. 26)

II. Self-amnesties and the Obstruction and Denial of Justice: Extension of the Material Scope of *Jus Cogens* Prohibitions

17. Self-amnesties, although based on "legal" instruments such as statutes, decree laws and similar, are the very negation of Law and a truly legal aberration. The adoption and enactment of self-amnesties constitute, in my opinion, an *additional* violation of the American Convention on Human Rights. The *tempus commisi delicti* is that of the enactment of the self-amnesty in question, an *additional*

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12. J. Dinges, *Operación Cóndor - Una Década de Terrorismo Internacional en el Cono Sur* (Operation Condor - A Decade of International Terrorism in the Southern Cone), Santiago, Publ. B Chile, 2004, pp. 22-23.

13. Article 4 of the American Convention.

14. Article 5 of the American Convention.

violation of the Convention that adds to the original violations thereof in this case. Self-amnesty, in and of itself, violates, by its very existence, Articles 1(1) and 2 of the American Convention, hinders access to justice by the victims or their next of kin (Articles 25 and 8 of the Convention), obstructs the investigation of the facts (required by Article 1(1) of the Convention), prevents the administration of justice and the granting of appropriate reparations. They entail, in sum, the most flagrant obstruction and denial of justice, leaving the victims and their next of kin utterly and completely defenseless.

18. Such denial of justice is accompanied by aggravating circumstances, with their ensuing legal consequences, insofar as it implies a deliberate cover-up of violations of fundamental rights through a systematic pattern of illegal or arbitrary detention, kidnapping, torture, and forced disappearance of persons, which are absolutely prohibited under *jus cogens.*[15] Consequently, the aforesaid self-amnesties bring upon the State *aggravated* international liability.

19. Said aggravated international liability is the result of violating *jus cogens,* -giving rise to an objective illegality,[16]- which entails other consequences in relation to reparations. No State may resort to contrivances in order to violate *jus cogens* norms;[17] its prohibitions are not dependent on the State's acquiescence.[18] In its most recent Judgment rendered four days ago, in the *Case of Goiburú et al. v. Paraguay* (on September 22, 2006), the Inter-American Court extended the material scope of *jus cogens* to include the right of access to justice at the domestic and international level, in the sense I have been advocating in this Court for a long time now, as I pointed out in my Separate Opinion (paras. 62-68) in the aforesaid case.

20. Furthermore, said denial of justice constitutes a gross violation of Articles 1(1), 2, 25 and 8 of the American Convention. The State that commits such a violation by way of a "self-amnesty" fails to "respect" and "ensure respect for" the rights enshrined in the American Convention (in accordance with the general obligation contained in Article 1(1) thereof); fails to harmonize its domestic law with the American Convention (in accordance with the general obligation contained in Article 2 thereof), and hinders access to justice, not only formally but also materially[19] (Articles 25 and 8 of the Convention). That is to say, access to justice and due process of law as a whole are affected, denied by "self-amnesty." The inextricable interrelationship between the provisions of Articles 25 and 8 of the American Convention, violated in this case, is emphatically recognized by the most

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[15]. A. O'Shea, *op. cit. supra* n. (2), p. 186, and *cf.* pp. 198-199, 219 and 222-223.

[16]. *Cf.* A. Orakhelashvili, "Peremptory Norms and Reparation for Internationally Wrongful Acts," 3 *Baltic Yearbook of International Law* (2003) p. 26.

[17]. *Cf*. B. Chigara, *op. cit. supra* n. (9), pp. 151 and 164, and *cf.* pp. 26, 35-36, 60 and 91.

[18]. Precisely to avoid that the State resorts to subterfuge in order to cover up crimes, in recent years, the erosion of the traditional connection between territoriality and nationality has been promoted for the purpose of "denationalizing" the administration of criminal justice in certain circumstances and protecting the legitimate interests of the international community in this area; *cf.* L. Reydams, *Universal Jurisdiction - International and Municipal Legal Perspectives*, Oxford, University Press, 2004, pp. 27 and 220-221. And *cf*. also Beigbeder, *Judging Criminal Leaders - The Slow Erosion of Impunity*, The Hague, Nijhoff, 2002, pp. 14 and 207-214.

[19]. *Cf*. A. O'Shea, *op. cit. supra* n. (2), pp. 270-272, and *cf.* p. 273.

lucid contemporary legal authors, even in relation to "self-amnesties," as noted as follows:

> "The right of access to justice is expressed in human rights treaties in the *interrelated provisions* for the right to a hearing and the right to an effective remedy."[20]

21. Ultimately, self-amnesties violate the right to know the truth and the right to justice. They callously disregard the terrible suffering of the victims and hinder the right to appropriate reparations. Their vicious effects, in my view, permeate the whole social body, with the ensuing loss of faith in human justice and true values and a perverse distortion of the purpose of the State. Originally created to serve the common good, the State becomes an entity that exterminates members of certain sectors of the population (the most precious constituent element of the State itself, its human *substratum*) with total impunity. From an entity designed to serve the common good, it becomes an entity responsible for truly criminal practices, undeniable *State crimes*.

22. It is clear from this Judgment rendered by the Court (para. 152) in the *Case of Almonacid-Arellano* that *jus cogens* transcends the law of treaties to include general International Law. And it could not be otherwise because of its conceptualization as peremptory law. The Inter-American Court significantly finds, in the *cas d'espèce*, that

> "The State may not invoke any domestic law or provision to exonerate itself from the Court's order to have a criminal court investigate and punish those responsible for Mr. Almonacid-Arellano's death. The Chilean State may not apply Decree Law No. 2.191 again, on account of all the considerations presented in this Judgment, insofar as the State is under an obligation to set aside said Decree Law (*supra* para. 144). Additionally, the State may not invoke the statute of limitations, the non-retroactivity of criminal law or the principle of *ne bis in idem* to decline its duty to investigate and punish those responsible" (para. 151).

23. Hence operative paragraph No. 3 of this Judgment, which states that "insofar as it was intended to grant amnesty to those responsible for crimes against humanity, Decree Law No. 2191 is incompatible with the American Convention and, therefore, it has no legal effects." Inasmuch as the aforesaid Decree Law has no legal effects in the light of the American Convention, and in order to put an end to the violation of Articles 1(1) and 2, as well as of Articles 25 and 8 as established by the Court (operative paragraph No. 2), the respondent State may not formally maintain said decree law in force as part of its domestic law.

24. As a member of this Court, I have always emphasized the interrelation, at the ontological and hermeneutical level, between Articles 25 and 8 of the American Convention (as in, *inter alia*, my Separate Opinion -paras. 28 to 65- in the *Case of the Pueblo Bello Massacre v. Colombia*, Judgment of January 31, 2006) in the conceptual construction of the right of access to justice (right to effective jurisdictional protection, the *right to Law*) as a *jus cogens* imperative. In addition, since my early years in this Court, I have consistently emphasized the interrelation of the general obligations contained in Articles 1(1) and 2 of the American Convention, for example, in my Dissenting Opinion (paras. 2-11) in the *Case of El Amparo v. Venezuela*, Judgment on Reparations of September 14, 1996. In another

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[20]. i.e. the rights enshrined in Articles 8 and 25 of the American Convention; *cf*. *ibid.*, p. 282 (emphasis added), and *cf*. pp. 284 and 288-289.

Dissenting Opinion in the same C*ase of El Amparo* (Order of April 16, 1997 on Interpretation of the Judgment), I also asserted the objective or "strict" liability of the State for failure to comply with its legislative obligations under the American Convention in order to harmonize its domestic law with the obligations undertaken under said treaty (paras. 12-14 and 21-26).

25. Moreover, in my Dissenting Opinion in the *Case of Caballero-Delgado and Santana v. Colombia* (Judgment on Reparations of January 29, 1997), regarding the interrelation between the general duties to respect and to ensure respect for the protected rights and to harmonize the domestic legal order with the international norms of protection of the American Convention (para. 6), I stated that:

> "In fact, those two general obligations, -which are added to the other specific conventional obligations concerning each of the protected rights,- are incumbent upon the States Parties by the application of International Law itself, of a general principle (*pacta sunt servanda*) whose source is metajuridical, in seeking to be based, beyond the individual consent of each State, on considerations concerning the binding character of the duties derived from international treaties. In the present domain of protection, the States Parties have the general obligation, arising from a general principle of International Law, to take all measures of domestic law *to guarantee* the effective protection (*effet utile*) of the recognized rights.
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> The two general obligations enshrined in the American Convention -that of respecting and guaranteeing the protected rights (Article 1(1)) and that of harmonizing domestic law with the international norms of protection (Article 2)- appear to me to be ineluctably intertwined. (…) As those conventional norms bind the States Parties -and not only their governments,- in addition to the Executive, the Legislative and the Judicial Powers are also under the obligation to take the necessary measures to give effectiveness to the American Convention at domestic law level. Non-compliance with the conventional obligations, as known, engages the international responsibility of the State, for acts or omissions, either of the Executive Power, or of Legislative, or of the Judiciary. In sum, the international obligations of protection, which in their wide scope are incumbent upon all the powers of the State (…)" (paras. 8 and 10).

III. The Conceptualization of Crimes against Humanity at the Confluence of International Human Rights Law and International Criminal Law

26. In my recent Separate Opinion four days ago (always under relentless time pressure, further intensified by the current fast working "methods" of the Inter-American Court, which I do not share), in the Judgment in the *Case of Goiburú et al. v. Paraguay*, I placed the conceptualization of crimes against humanity at the confluence of International Human Rights Law and International Criminal Law. In the aforesaid Separate Opinion, I pointed out that crimes against humanity

> "are perpetrated by individuals who, however, follow State policies, with the institutions, human and other resources of the State at their disposal, and who are favored by the impotence or tolerance or connivance or indifference of the social body that does nothing to stop them. Either explicitly or implicitly, the State policy is present in crimes against humanity.[21] They are not limited to mere isolated acts by deranged individuals. They are carefully calculated, planned and executed.

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[21]. *Cf.*, in this regard, e.g., M.Ch. Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd. rev. ed., The Hague, Kluwer, 1999, pp. 252, 254-257. This is the concept underlying the United Nations Convention against Torture, which criminalizes, under International Law, the acts of public officials; *ibid.*, p. 263 and *cf*. p. 277.

The classification of crimes against humanity is a great contemporary victory, which encompasses, in my view, not only International Human Rights Law, but also International Criminal Law insofar as it reflects the universal condemnation of gross and systematic violations of fundamental and irrevocable rights, i.e. *jus cogens* violations; hence the non-applicability, in the event of their occurrence, of the so-called statutes of limitations in national or domestic legal systems.[22] The category of crimes against humanity, in my opinion, is yet another expression of the *universal juridical conscience*, of its immediate reaction against crimes that affect humanity as a whole.

Crimes against humanity stand at the confluence of International Criminal Law and International Human Rights Law. Crimes against humanity of exceptional gravity were, in their origins, connected with armed conflicts, but nowadays, from a humanistic perspective, it is recognized that crimes against humanity have an impact on International Human Rights Law (e.g. in cases of systematic torture and humiliation of victims) insofar as, in seeking to dehumanize their victims, they negate humanity in general.[23] Crimes against humanity are massive and systematic in nature; they are organized and planned as a matter of State criminal policy, -as conceptualized in their precedents by the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda,[24]- they are clearly State crimes.[25]

Organized and orchestrated by the State, in the upper echelons of government, State crime is carried out by several individuals in furtherance of the criminal policy of a given State, thus constituting actual crimes of the State, resulting in international liability of such State (under International Human Rights Law) and of the individuals that perpetrated the crimes.[26] Hence, the importance of prevention, given the severity of these crimes, as well as the guarantee of non-repetition" (paras. 40-43).

27. The Inter-American Court addressed this issue as part of its reasoning in the Judgment rendered in this *Case of Almonacid-Arellano et al. v. Chile.* As an indication of jurisprudential cross-fertilization, the Court evokes the case law of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY, Trial Chamber) in the sense that a single act in gross violation of human rights by a perpetrator may constitute a crime against humanity, taken within the context of a *systematic practice*, if it is the product of "a political system based on terror and persecution" (*Case of Tadic,* May 7, 1997, para. 649). What is at stake is the conduct of the State, the existence of a "policy element" (*Case of Kupres[ki]*, January 14, 2000, paras. 550-551). Isolated acts by a perpetrator, if planned by the State, as part of a "systematic" practice in furtherance of a "State policy," constitute crimes against humanity (*Case of Kordic*, February 26, 2001, paras. 176-179).

28. In my recent General Course on Public International Law delivered at The Hague Academy of International Law (2005), I pointed out that, in fact, at the dawn of International Law, basic principles of humanity were applied to govern the conduct of the States. What in time became known as "crimes against humanity" derived,

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22. M.Ch. Bassiouni, *op. cit. supra* n. (21), pp. 227 and 289.

23. Y. Jurovics, *Réflexions sur la spécificité du crime contre l'humanité*, Paris, LGDJ, 2002, pp. 21-23, 40, 52-53 and 66-67 and *cf.* E. Staub, *The Roots of Evil – The Origins of Genocide and Other Group Violence*, Cambridge, University Press, 2005 [reprint], pp. 119, 121 and 264.

24. On contemporary international case law regarding crimes against humanity, *cf.* J.R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 2nd. ed., Ardsley/N.Y., Transnational Publs., 2000, pp. 103-120 and 490-494; L.J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Leiden, Nijhoff, 2005, pp. 151-198.

25. *Ibid*., pp. 93, 183, 192, 199, 228, 278-279, 310, 329-331, 335, 360 and 375.

26. *Cf*. *ibid*., pp. 375-377, 403, 405-407, 441 and 447-448.

originally, from Customary International Law,[27] and was later conceptually developed under International Humanitarian Law,[28] and, more recently, under International Criminal Law.[29] Here, we are in the realm of *jus cogens*, of peremptory law. When human beings fall victim to such crimes, humanity as a whole is likewise victimized. This has been expressly recognized by the ICTY (in the *Case of Tadic*, 1997); such crimes affect the human conscience (ICTY, *Case of Erdemovic*, 1996),[30] -the universal juridical conscience,- and the aggrieved persons as well as humanity itself fall victim to them.[31] This line of analysis developed by International Humanitarian Law and contemporary International Criminal Law must, in my view, be incorporated into the conceptual universe of International Human Rights Law. This Judgment of the Inter-American Court in the *Case of Almonacid-Arellano et al.* constitutes a first step in this direction.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary

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[27]. S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law*, Oxford, Clarendon Press, 1997, pp. 45-48.

[28]. *Cf*. J. Pictet, Développement et principes du Droit international humanitaire, Genève/Paris, Inst. H.-Dunant/Pédone, 1983, pp. 107 and 77; C. Swinarski, *Principales Nociones e Institutos del Derecho Internacional Humanitario como Sistema Internacional de Protección de la Persona Humana* (Basic Concepts and Principles of International Humanitarian Law as an International System for the Protection of Human Rights), San José de Costa Rica, IIDH, 1990, p. 20.

[29]. *Cf*. D. Robinson, "Defining 'Crimes against Humanity' at the Rome Conference," 93 *American Journal of International Law* (1999) pp. 43-57; and, on the historical background, *cf.*, e.g. H. Fujita, "Le crime contre l'humanité dans les procès de Nuremberg et de Tokyo," 34 *Kobe University Law Review* (2000) pp. 1-15. - Crimes against humanity are currently defined in The Rome Statute of the International Criminal Court (Article 7).

[30]. J.R.W.D. Jones, *The Practice of the International Criminal Tribunals*..., *op. cit*. *supra* n. (24), pp. 111-112.

[31]. A.A. Cançado-Trindade, "International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law," *Recueil des Cours de l'Académie de Droit International de la Haye* (2005) Chapter XI (in print).