

***JUS COGENS: THE DETERMINATION AND THE GRADUAL
EXPANSION OF ITS MATERIAL CONTENT IN CONTEMPORARY
INTERNATIONAL CASE-LAW***

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I. Introductory Observations

In my *General Course on Public International Law*, delivered at The Hague Academy of International Law in 2005, I characterized the doctrinal and jurisprudential construction of international *jus cogens* as proper of a new *jus gentium*, the International Law for Humankind. I sustained, moreover, that, in my understanding, and by definition, international *jus cogens* goes beyond the law of treaties, extending itself to the law of the international responsibility of the State, and to the whole *corpus juris* of contemporary International Law, and reaching, ultimately, any juridical act. In encompassing the whole International Law, it projects also over domestic law, invalidating any measure or act incompatible with it. *Jus cogens* has direct incidence on the very foundations of a universal International Law, and is a basic pillar of the new *jus gentium*¹.

On the occasion of this XXXV Course of International Law organized by the OAS Inter-American Juridical Committee here in Rio de Janeiro (August 2008), I purport, at first, to review the origins and content of that concept within the framework of the fundamental values of the international community. I shall then move on to the evolving scope of *jus cogens*. The way will thus be paved for the consideration of the gradual expansion of the material content of *jus cogens* in contemporary international case-law, in particular the one which has most contributed to that expansion, that of the Inter-American Court of Human Rights (IACtHR).

To such gradual expansion I have devoted myself with all conviction, during my 12 years of work as Judge of the IACtHR, added to two further years devoted to interpretations of sentences (1994-2008). During this period, this latter (followed by the *ad hoc* International Criminal Tribunal for the Former Yugoslavia), has been the contemporary international tribunal which has most contributed for the conceptual evolution of *jus cogens*, in the faithful exercise of its functions of protection of the human person, also in situations of the most complete adversity or vulnerability.

I shall understandably concentrate on this aspect of the subject at issue, on the basis of my own experience, within the IACtHR, of the jurisprudential construction of the gradually expanding material content of *jus cogens*, covering the absolute prohibition of torture and of cruel, inhuman or degrading treatment, followed by the assertion of the fundamental character of principle of equality and

¹ A.A. Cançado Trindade, “International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law - Part I”, 316 *Recueil des Cours de l'Académie de Droit International de la Haye* (2005), ch. XII, pp. 336-346.

A. A. CANÇADO TRINDADE

non-discrimination, and of the right of access to justice. I shall then stress the significance of the right of access to justice as an imperative of *jus cogens*.

The way will thus be paved for the presentation of my concluding observations on the subject under study. I shall draw attention, in particular, to its characterization as a pillar of the new *jus gentium*, the International Law for Humankind of our days, and the pressing need for States to move resolutely from *jus dispositivum* to *jus cogens*, so as to fulfill the needs and aspirations of the international community as a whole.

II. The Fundamental Values of the International Community

The fact that the concepts both of the *jus cogens*, and of the obligations (and rights) *erga omnes* ensuing therefrom, already integrate the conceptual universe of contemporary International Law, the new *jus gentium* of our days, discloses the reassuring and necessary opening of this latter, in the last decades, to certain superior and fundamental values. This significant evolution of the recognition and assertion of norms of *jus cogens* and obligations *erga omnes* of protection is to be fostered, seeking to secure its full practical application, to the benefit of all human beings. In this way the universalist vision of the founding fathers of the *droit des gens* is being duly rescued. New conceptions of the kind² impose themselves in our days, and, of their faithful observance, will depend to a large extent the future evolution of contemporary International Law.

This latter does not emanate from the inscrutable “will” of the States, but rather, in my view, from human conscience. General or customary international law emanates not so much from the practice of States (not devoid of ambiguities and contradictions), but rather from the *opinio juris communis* of all the subjects of International Law (States, international organizations, human beings, and humankind as a whole). Above the will stands the conscience. The fact that, despite all the sufferings of past generations, there persist in our days new forms of exploitation of man by man, - illustrated by the increasing disparities among and within nations, amidst chronic and growing poverty, uprootedness, social exclusion and marginalization, - does not mean that “regulation is lacking” or that Law does not exist to remedy or reduce such man-made imbalances. It rather means that Law is being ostensibly and flagrantly violated, from day to day, to the detriment of millions of human beings.

The current process of the necessary *humanization* of International Law stands in reaction to that state of affairs. It bears in mind the universality and unity of the human kind, which inspired, more than four and a half centuries ago,

² Other concepts have also found expression in the emerging International Law for humankind, such as, e.g., those of *common heritage of mankind* and *common concern of mankind*; and others emerge with the new *jus gentium* of this beginning of the XXIst century, such as that of *universal jurisdiction*.

the historical process of formation of the *droit des gens*. In rescuing the universalist vision which marked the origins of the most lucid doctrine of International Law, the aforementioned process of humanization contributes to the construction of the new *jus gentium* of the XXIst century, oriented by the general principles of law. This process is enhanced by its own conceptual achievements, such as, to start with, the acknowledgement and recognition of *jus cogens* and the consequent obligations *erga omnes* of protection, followed by other concepts disclosing likewise a universalist perspective of the law of nations.

III. International *Jus Cogens* (Peremptory Norms of General International Law)

A. Emergence and Content of *Jus Cogens*

The emergence and assertion of *jus cogens* in contemporary International Law fulfill the necessity of a minimum of verticalization in the international legal order, erected upon pillars in which the juridical and the ethical are merged. The evolution of the concept of *jus cogens* transcends nowadays the ambit of both the law of treaties and the law of the international responsibility of the States, so as to reach general International Law and the very foundations of the international legal order³.

Jus cogens was definitively incorporated into the conceptual universe of contemporary International Law as from the inclusion, among the bases of invalidity and termination of treaties, of the peremptory norms of general International Law, in Articles 53 and 64 of the Vienna Convention of 1969 on the Law of Treaties⁴. The Convention set forth the concept of *jus cogens*, without thereby adopting the thesis - defended in the past by A. McNair⁵ - that a treaty could generate a regime of objective character *erga omnes* in derogation of the classic principle *pacta tertiis nec nocent nec prosunt*⁶. The concept seems to have

³ Inter-American Court of Human Rights (IACtHR), Advisory Opinion n. 18, on *The Juridical Condition and the Rights of the Undocumented Migrants* (of 17.09.2003), pars. 98-99, and Concurring Opinion of Judge A.A. Cançado Trindade, pars. 65-67.

⁴ More than three decades earlier, the expression “*jus cogens*” was utilized by Judge Schücking, in his well-known Separate Opinion in the *Oscar Chinn* case (United Kingdom *versus* Belgium); Permanent Court of International Justice (PCIJ), Series A/B, n. 63, 1934, pp. 148-150, esp. p. 149. One year later, in his course at the Hague Academy of International Law, Alfred Verdross also utilized the expression “*jus cogens*”, and referred himself to the aforementioned Separate Opinion of Judge Schücking; cf. A. Verdross, “Les principes généraux du Droit dans la jurisprudence internationale”, *52 Recueil des Cours de l'Académie de Droit International de La Haye [RCADI]* (1935) pp. 206 and 243.

⁵ Cf. A.D. McNair, “Treaties Producing Effects `Erga Omnes’”, in *Scritti di Diritto Internazionale in Onore di T. Perassi*, vol. II, Milano, Giuffrè, 1957, pp. 23-36.

⁶ It may be added that, during the *travaux préparatoires* of the Convention undertaken by the U.N. International Law Commission [ILC], the notion of “community interest” was made present: at first utilized by J.-M. Yepes in 1950, the idea was later to

been recognized by the Vienna Convention of 1969 as a whole; if this latter did not adopt the notion of treaties establishing “legal regimes of objective character”, on the other hand it set forth the concept of *jus cogens*⁷, i.e., of peremptory norms of general International Law⁸. The provisions on *jus cogens* became the object of analysis of a wide specialized bibliography⁹.

The notion of *jus cogens* seems to have been recognized by the Vienna Convention as a whole, thus transcending the old exclusively bilateralist approach in its application. Even before the Vienna Conference on the Law of Treaties of 1968-1969, in the debates of 1963 and 1966 of the VIth Commission of the U.N. General Assembly, it became clear that the majority of the jusinternationalists of

appear in the 1st. report by J.L. Brierly (the first *rapporteur* on the subject), and in the 1st. report by H. Lauterpacht (the second *rapporteur*), then became absent from the reports by G. Fitzmaurice (the third *rapporteur*), and reappeared at last in the 2nd. report by H. Waldock (the fourth and last *rapporteur* on the matter); S. Rosenne, “Bilateralism and Community Interest in the Codified Law of Treaties”, in *Transnational Law in a Changing Society - Essays in Honour of Ph. C. Jessup* (ed. W. Friedmann, L. Henkin, and O. Lissitzyn), N.Y./London, Columbia University Press, 1972, pp. 207, 212-219 and 226-227; and cf. Ph. Cahier, “Le problème des effets des traités à l’égard des États tiers”, 143 *RCADI* (1974) pp. 589-736.

⁷ For a historical account of the concept, going back to the old Roman law, but reappearing mainly as from the XIXth century, cf. J. Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties - A Critical Appraisal*, Vienna, Springer-Verlag, 1974, pp. 6-11 and 97-108.

⁸ The term, as such, appeared for the first time in the 3rd. report by G. Fitzmaurice, and was again to appear in the 2nd. report by H. Waldock; J. Sztucki, *op. cit. supra* n. (7), pp. 104-105 and 108. - On the criteria for the determination of the rules of International Law which could constitute *jus cogens*, cf. I.M. Sinclair, “Vienna Conference on the Law of Treaties”, 19 *International and Comparative Law Quarterly* (1970) pp. 66-69; I.M. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester, University Press/Oceana, 1973, pp. 124-129, and cf. pp. 129-131.

⁹ Cf., e.g., Ch.L. Rozakis, *The Concept of Jus Cogens in the Law of Treaties*, Amsterdam, North Holland Publ. Co., 1976, pp. 1-194; Ch. de Visscher “Positivisme et *jus cogens*”, 75 *Revue générale de Droit international public* (1971) pp. 5-11; M. Virally, “Réflexions sur le *jus cogens*”, 12 *Annuaire français de Droit international* (1966) pp. 5-29; A. Verdross, “*Jus dispositivum* and *Jus Cogens* in International Law”, 60 *American Journal of International Law [AJIL]* (1966) pp. 55-63; J.A. Barberis, “La liberté de traiter des États et le *jus cogens*”, 30 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht [Z.f.a.o.R.u.V.]* (1970) pp. 19-45; U. Scheuner, “Conflict of Treaty Provisions with a Peremptory Norm of International Law”, 27 and 29 *Z.f.a.o.R.u.V.* (1967 and 1969) pp. 520-532 and 28-38, respectively; H. Mosler, “*Ius cogens* im Völkerrecht”, 25 *Schweizerisches Jahrbuch für internationales Recht* (1968) pp. 1-40; K. Marek, “Contribution à l’étude du *jus cogens* en Droit international”, in *Recueil d’études de Droit International en hommage à P. Guggenheim*, Geneva, I.U.H.E.I., 1968, pp. 426-459; M. Schweitzer, “*Ius cogens* im Völkerrecht”, 15 *Archiv des Völkerrechts* (1971) pp. 197-223; G. Gaja, “*Jus Cogens* beyond the Vienna Convention”, 172 *RCADI* (1981) pp. 279-313; L. Alexidze, “Legal Nature of *Jus Cogens* in Contemporary International Law”, in *ibid.*, pp. 227-268; among other sources (*infra*).

the developing countries and of the countries of Eastern Europe attributed great importance to the concept of *jus cogens*, the same occurring during the Conference, in which there almost was not total opposition to the concept, although the Delegations mainly of the Western countries cautiously insisted on the need of some criteria for the determination of the rules of International Law which constituted *jus cogens*¹⁰.

As to the evolving question of the discernible contents of *jus cogens*, it may be recalled that a comment of the U.N. International Law Commission [ILC], in its *travaux préparatoires* on the law of treaties, suggested, as being incompatible with the rules of *jus cogens*, treaties which contemplated the illicit use of force (contrary to the principles of the U.N. Charter), or any other criminal act under International Law (slave trade, piracy, genocide)¹¹. And already in an Advisory Opinion of 1951, on the *Reservations to the Convention against Genocide*, the ICJ pointed out that the humanitarian principles underlying that Convention were recognizedly “binding on States, even without any conventional obligation”¹².

One and a half decades later, the concept of *jus cogens* was again set forth in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986); in my intervention in the United Nations Conference which adopted it (debates of 12.03.1986 in Vienna), I saw it fit to warn as to the manifest incompatibility with the concept of *jus cogens* of the voluntarist conception of International Law¹³, which appeared incapable to explain even the formation of rules of general international law and the incidence in the process of formation and evolution of contemporary International Law of elements independent of the “free will” of the States¹⁴. With the assertion of *jus cogens* in the two Vienna Conventions on the Law of Treaties (1969 and 1986), the next step consisted in determining in incidence beyond the law of treaties.

¹⁰ I.M. Sinclair, “Vienna Conference...”, *op. cit. supra* n. (8), pp. 66-69; I.M. Sinclair, *The Vienna Convention...*, *op. cit. supra* n. (8), pp. 124-129.

¹¹ *Cit. in* I.M. Sinclair, *The Vienna Convention...*, *op. cit. supra* n. (8), pp. 121-122, and cf. pp. 130-131; cf. also accounts in S.P.A. Ferrer, “Los conceptos de *ius cogens* y *ius dispositivum* y la labor de la Comisión de Derecho Internacional”, 21 *Revista Española de Derecho Internacional* (1968) pp. 763-780; E. Schwelb, “Some Aspects of International *Ius Cogens* as Formulated by the International Law Commission”, 61 *AJIL* (1967) pp. 946-975.

¹² ICJ, Advisory Opinion of 28 May 1951, *ICJ Reports* (1951) p. 23.

¹³ Cf. U.N., *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 1986) - Official Records*, vol. I, N.Y., U.N., 1995, pp. 187-188 (intervention by the Deputy Head of the Delegation of Brazil, A.A. Cançado Trindade).

¹⁴ A.A. Cançado Trindade, “The Voluntarist Conception of International Law: A Re-Assessment”, 59 *Revue de droit international de sciences diplomatiques et politiques* - Geneva (1981) pp. 201-240.

B. The Evolving Scope of *Jus Cogens*

On my part, I have always sustained that it is an ineluctable consequence of the affirmation and the very existence of *peremptory* norms of International Law their not being limited to the conventional norms, to the law of treaties, and their being extended to every and any juridical act¹⁵. Recent developments point out in the same sense, that is, that the domain of the *jus cogens*, beyond the law of treaties, encompasses likewise general International Law¹⁶. In my Concurring Opinion in the Advisory Opinion n. 18 (of 17.09.2003) of the Inter-American Court of Human Rights [IACtHR], on *The Juridical Condition and the Rights of Undocumented Migrants*, I sustained my understanding that the *jus cogens* is not a closed juridical category, but rather one in evolution and expansion (pars. 65-73). In sum,

“(...) the domain of the *jus cogens*, beyond the law of treaties, encompasses likewise general international law. Moreover, the *jus cogens*, in my understanding, is an open category, which expands itself to the extent that the universal juridical conscience (material source of all Law) awakens for the necessity to protect the rights inherent to each human being in every and any situation.

(...) The absolute prohibition of the practices of torture, of forced disappearance of persons, and of summary and extra-legal executions, leads us decidedly into the *terra nova* of the international *jus cogens*. (...)” (pars. 68-69).

And I concluded, in this respect, in the same aforementioned Concurring Opinion, that

“The concept of *jus cogens* in fact is not limited to the law of treaties, and is likewise proper to the law of the international responsibility of the States. The Articles on the Responsibility of the States, adopted by the International Law Commission of the United Nations in 2001, bear witness of this fact. (...) In my understanding, it is in this central chapter of International Law, that of the international responsibility (perhaps more than in the chapter on the law of treaties), that the *jus cogens* reveals its real, wide and profound dimension, encompassing all juridical acts (including the unilateral ones), and having an incidence (including beyond the domain of State

¹⁵ Cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 415-416; IACtHR, Advisory Opinion n. 18, on *The Juridical Condition and the Rights of the Undocumented Migrants* (of 17.09.2003), Concurring Opinion of Judge A.A. Cançado Trindade, pars. 68-73.

¹⁶ For the extension of *jus cogens* to all possible juridical acts, cf., e.g., E. Suy, “The Concept of *Jus Cogens* in Public International Law”, in *Papers and Proceedings of the Conference on International Law* (Langonissi, Greece, 03-08.04.1966), Geneva, C.E.I.P., 1967, pp. 17-77.

JUS COGENS IN CONTEMPORARY INTERNATIONAL CASE-LAW

responsibility) on the very *foundations* of an international law truly universal” (par. 70).

Besides this horizontal expansion, *jus cogens* is also expanding in a vertical dimension, of the interaction between the international and national legal orders in the present domain of protection. The effect of *jus cogens*, in this second (vertical) level, has been in the sense of invalidating every and any legislative, administrative or judicial measure that, at the level of the domestic law of the States, attempts to authorize or tolerate torture¹⁷. *Jus cogens* has further been invoked to secure the absolute prohibition of violation of fundamental rights of the human person¹⁸.

Jus cogens was thus expressly referred to - in connection with superior values shared by the international community - in the *travaux préparatoires* of the 1985 Inter-American Convention to Prevent and Punish Torture¹⁹. The absolute prohibition of forced disappearance of persons was insisted upon in the preparatory work of the 1994 Inter-American Convention on Forced Disappearance of Persons²⁰. This reassuring development has led to the emergence of a true international legal regime against torture, forced disappearances of persons, extra-legal and arbitrary and summary executions, and illegal and arbitrary detentions²¹.

As far as international case-law is concerned, two international tribunals which, in recent years, have considerably contributed to the development of the material content of the international *jus cogens* have been the IACtHR and the *ad hoc* International Criminal Tribunal for the Former Yugoslavia [ICTFY]. In conformity with the Judgments of the IACtHR in the cases *Cantoral Benavides versus Peru* (August 18, 2000), *Maritza Urrutia versus Guatemala* (November 27, 2003), *Hermanos Gómez Paquiyauri versus Peru* (08.07.2004), and *Tibi versus Ecuador* (September 7, 2004), the understanding is sustained that torture, inhuman treatment and extra-judicial executions are in breach of the *jus cogens*; furthermore, in accordance with the extensive reasoning of the IACtHR in its historical Advisory Opinion n. 18 on the *Juridical Condition and Rights of*

¹⁷ Cf. E. de Wet, “The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law”, 15 *European Journal of International Law* (2004) pp. 98-99.

¹⁸ A.A. Cançado Trindade, *Tratado de Direito Internacional...*, *op. cit. supra* n. (15), p. 415.

¹⁹ Cf. OAS/G.A., *Asamblea General de la OEA - XV Período Ordinario de Sesiones (Cartagena, Colombia), Actas y Documentos*, vol. II, part II, Washington D.C., OAS General Secretariat, 1985, p. 113.

²⁰ Cf. OAS/PC, *Informe del Presidente del Grupo de Trabajo Encargado de Analizar el Proyecto de Convención Interamericana sobre Desaparición Forzada de Personas*, OAS doc. OEA/Ser.G/CP/CAJP-925/93/rev.1, of 25.01.1994, pp. 3-23.

²¹ A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, *op. cit. supra* n. (15), pp. 345-358.

Undocumented Migrants (September 17, 2003), the understanding is advanced that the fundamental principle of equality and non-discrimination has entered into the domain of the *jus cogens*²².

And pursuant to the decisions of the ICTFY (Trial Chambers), e.g., in the cases *Furundzija* (December 10, 1998), *Jeliscic* (December 14, 1999), *Kupreskic and Others* (January 14, 2000), *Kunarac* (February 22, 2001), and *Krstic* (August 2, 2001), the understanding is maintained that genocide, torture and attacks against civilians in armed conflicts are in breach of the *jus cogens*²³; the ICTFY (Trial Chamber II) reiterated its position, as to the prohibition - of conventional and customary law - of torture as being of *jus cogens*, in the *Simic* case (Judgment of October 17, 2002, par. 34). In the *Furundzija* case, the ICTFY (Trial Chamber) sustained that the absolute prohibition of torture, under conventional and customary International Law, - having the character of a *jus cogens*, and generating obligations *erga omnes*²⁴, - was so absolute that it had incidence not only on actual, but also potential, violations²⁵.

This jurisprudential assertion of prohibitions of *jus cogens* has taken place in pursuance of the superior and fundamental values to be protected, shared by the international community as a whole, from which no derogation or diversion is allowed. The significant jurisprudential contributions, in recent years, particularly of the IACtHR and the ICTFY on the matter at issue, are oriented in the correct direction, but there still remains of course a long way to go in the gradual determination of the material content of the *jus cogens*.

The concept of *jus cogens* is in fact not limited to the law of treaties, and is likewise proper to the law of the international responsibility of the States. The Articles on the Responsibility of the States, adopted by the ILC of the United Nations in 2001, bear witness of this fact. Among the passages of such Articles and their comments which refer expressly to *jus cogens*, there is one in which it is

²² Paragraphs 97-101; and cf., for a recent general study, e.g., A.A. Cançado Trindade, "The Case-Law of the Inter-American Court of Human Rights: An Overview", in *Studi di Diritto Internazionale in Onore di Gaetano Arangio-Ruiz*, vol. III, Napoli, Ed. Scientifica, 2004, pp. 1873-1898.

²³ Cf., e.g., F. Harhoff, "La consécration de la notion de *jus cogens* dans la jurisprudence des tribunaux pénaux internationaux", in *Actualité de la jurisprudence pénale internationale à l'heure de la mise en place de la Cour Pénale Internationale* (eds. P. Tavernier and C. Renaut), Bruxelles, Bruylant, 2004, pp. 65-80.

²⁴ Paragraphs 137-139, 144 and 160, and cf. pars. 151 and 153-154.

²⁵ On this last point, cf. the Judgment of the European Court of Human Rights [ECtHR] in the *Soering versus United Kingdom* case (1989, pars. 144 and 148). - And, on the practice under the U.N. Covenant on Civil and Political Rights, cf. F. Pocar, "Patto Internazionale sui Diritti Civili e Politici ed Estradizione", in *Diritti dell'Uomo, Estradizione ed Espulsione - Atti del Convegno di Ferrara (1999) per Salutare G. Battaglini* (ed. F. Salerno), Padova, Cedam, 2003, pp. 89-90.

JUS COGENS IN CONTEMPORARY INTERNATIONAL CASE-LAW

affirmed that “various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties”²⁶.

To the international *objective* responsibility of the States corresponds necessarily the notion of *objective illegality*²⁷ (one of the elements underlying the concept of *jus cogens*). In our days, no one would dare to deny the objective illegality of acts of genocide, of systematic practices of torture, of summary and extra-legal executions, and of forced disappearance of persons, - practices which represent crimes against humanity, - condemned by the universal juridical conscience²⁸, parallel to the application of treaties.

In its Judgment of July 11, 1996, in the case concerning the *Application of the Convention against Genocide (Bosnia-Herzegovina versus Yugoslavia)*, the ICJ affirmed that the rights and obligations set forth in that Convention were “rights and duties *erga omnes*”²⁹. And, already in its Advisory Opinion of 1951 on the *Reservations to the Convention against Genocide*, the ICJ pointed out that the humanitarian principles underlying that Convention were recognizedly “binding on States, even without any conventional obligation”³⁰.

Just as, in the ambit of the International Law of Refugees, the basic principle of *non-refoulement* was recognized as being of *jus cogens*³¹, in the domain of the International Law of Human Rights the character of *jus cogens* of the fundamental principle of equality and non-discrimination was likewise recognized. The objective illegality is not limited to the aforementioned acts and practices. As *jus cogens* is not a closed category (*supra*), I understand that no one either would dare to deny that, e.g., slave work, and the persistent denial of the most elementary guarantees of the due process of law would likewise affront the universal juridical conscience, and effectively collide with the peremptory norms of the *jus cogens*. All this doctrinal evolution points to the direction of the crystallization of the obligations *erga omnes* of protection; without the consolidation of such obligations one will advance very little in the struggle against the violations of human rights.

Manifestations of international *jus cogens* mark presence in the very manner whereby human rights treaties have been interpreted and applied: the restrictions,

²⁶ J. Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, Cambridge, University Press, 2002, p. 188, and cf. pp. 246 and 127-128.

²⁷ In its Advisory Opinion of 21.06.1971 on *Namibia*, the ICJ in fact referred itself to a situation which it characterized as “illegal *erga omnes*”; *ICJ Reports* (1971) p. 56, par. 126.

²⁸ IACtHR, case *Blake versus Guatemala* (Merits), Judgment of 24.01.1998, Separate Opinion of Judge A.A. Cançado Trindade, par. 25, and cf. pars. 23-24.

²⁹ *ICJ Reports* (1996) p. 616, par. 31.

³⁰ ICJ, Advisory Opinion of 28 May 1951, *ICJ Reports* (1951) p. 23.

³¹ Cf. J. Allain, “The *Jus Cogens* Nature of *Non-Refoulement*”, 13 *International Journal of Refugee Law* (2002) pp. 538-558.

foreseen in them, to the human rights they set forth, are restrictively interpreted, safeguarding the rule of law, and demonstrating that human rights do not belong to the domain of *jus dispositivum*, and cannot be considered as simply “negotiable”³²; on the contrary, they permeate the international legal order itself. In sum and conclusion on the point under examination, the emergence and assertion of *jus cogens* evoke the notions of international public order and of a hierarchy of legal norms, as well as the prevalence of the *jus necessarium* over the *jus voluntarium*; *jus cogens* presents itself as the juridical expression of the very international community as a whole, which, at last, takes conscience of itself, and of the fundamental principles and values which guide it³³.

IV. The Gradual Expansion of the Material Content of *Jus Cogens*

I shall now move on to the gradual expansion, in recent years, of the material content of *jus cogens*, as acknowledged by contemporary international case-law on the matter, in particular that of the IACtHR. Such expansion has covered, as we shall see next, the absolute prohibition of torture and of cruel, inhuman or degrading treatment; the basic principle of equality and non-discrimination; and the fundamental character of the right of access to justice. Attention will be drawn onto the importance of the right of access to justice as an imperative of *jus cogens*.

A. The Absolute Prohibition of Torture and of Cruel, Inhuman or Degrading Treatment

The first stage of the remarkable jurisprudential evolution of the IACtHR on the matter consisted of the assertion of the absolute prohibition, of *jus cogens*, of torture, in every and any circumstance, followed by the same prohibition of cruel, inhuman or degrading treatment. Thus, in its Judgment of August 18, 2000, in the case of *Cantoral Benavides versus Peru*, the IACtHR significantly sustained that

“(…) Certain acts which were qualified in the past as inhuman or degrading treatment, not as torture, could be qualified in the future in a different way, that is, as torture, since to the growing demands of protection of human rights and fundamental freedoms ought to correspond a greater firmness to face the infringements to the basic values of democratic societies (…)” (par. 99).

³² J.A. Pastor Ridruejo, “La Convención Europea de los Derechos del Hombre y el ‘Jus Cogens’ Internacional”, in *Estudios de Derecho Internacional - Homenaje al Profesor Mijaja de la Muela*, vol. I, Madrid, Ed. Tecnos, 1979, pp. 581-590.

³³ A. Gómez Robledo, *El Jus Cogens Internacional (Estudio Histórico Crítico)*, Mexico, UNAM, 1982, pp. 20-21, 222-223 and 226, and cf. p. 140; and cf. also R.St.J. Macdonald, “Fundamental Norms in Contemporary International Law”, 25 *Annuaire canadien de Droit international* (1987) pp. 133-134, 140-142 and 148.

JUS COGENS IN CONTEMPORARY INTERNATIONAL CASE-LAW

In the same sense, in the Judgment of July 8, 2004, in the case of the *Brothers Gómez Paquiyauri versus Peru*, the IACtHR pointed out that

“torture is strictly prohibited by the International Law of Human Rights. The prohibition of torture is absolute and non-derogable, even in the most difficult circumstances, such as war, threat of war, ‘fight against terrorism’ and any other delicts, state of siege or of emergency, commotion or internal conflict, suspension of constitutional guarantees, internal political instability or other emergencies or public calamities”.

And the IACtHR clearly found that “it has been conformed an international juridical regime of absolute prohibition of all forms of torture, both physical and psychological, a regime which belongs today to the domain of the international *jus cogens*” (pars. 111-112).

Years before these significant *obiter dicta* of the IACtHR, I had warned, within the Court, as to the need of the jurisprudential development of the prohibitions of *jus cogens*, in my Separate Opinions in the case of *Blake versus Guatemala* (preliminary objections, Judgment of July 2, 1996,³⁴ merits, Judgment of January 24, 1998,³⁵ and reparations, Judgment of January 22, 1999³⁶). In the same line of thinking, subsequently to the case of *Cantoral Benavides*, I reiterated my position on the matter in my Concurring Opinion in the Judgment (of March 14, 2001) in the case of *Barrios Altos versus Peru*³⁷, as well as in my Separate Opinion in the Judgment (of September 1, 2001) in the case of *Hilaire versus Trinidad and Tobago*³⁸; in my Concurring Opinion in the Judgment (of November 27, 2003) in the case of *Maritza Urrutia versus Guatemala*³⁹; in my Separate Opinion in the Judgment (of July 8, 2004) in the case of the *Brothers Gómez Paquiyauri versus Peru* (of July 8, 2004)⁴⁰; and in my Dissenting Opinion in the cases of the *Sisters Serrano Cruz versus El Salvador* (Judgment on preliminary objections of November 23, 2004)⁴¹.

And in its Judgment of September 7, 2004, in the case of *Tibi versus Ecuador*, the IACtHR again asserted that

“There exists an international juridical regime of absolute prohibition of all forms of torture, both physical and psychological, a regime which belongs today to the domain of *jus cogens*. The

³⁴ Pars. 11 and 14 of the Opinion.
³⁵ Pars. 15, 17, 23, 25 and 28 of the Opinion.
³⁶ Pars. 31, 40 and 45 of the Opinion.
³⁷ Pars. 10-11 and 25 of the Opinion.
³⁸ Par. 38 of the Opinion.
³⁹ Pars. 6, 8-9 and 12 of the Opinion.
⁴⁰ Pars. 1, 37, 39, 42 and 44 of the Opinion.
⁴¹ Pars. 2, 32, and 39-41 of the Opinion.

A. A. CANÇADO TRINDADE

prohibition of torture is complete and non-derogable, even in the most difficult circumstances (...)” (par. 143)⁴².

The IACtHR reiterated this *obiter dictum* in its Judgment of April 6, 2006, in the case of *Baldeón García versus Peru* (par. 121). One year earlier, the Judgment of the IACtHR (of March 11, 2005) in the case of *Caesar versus Trinidad and Tobago*, in the same line of reasoning of its jurisprudential construction of the *jus cogens*, rightly took another step forward, in sustaining the absolute prohibition, proper of the domain of *jus cogens*, of torture *as well as other cruel, inhuman and degrading treatment*. The absolute prohibition of torture, as well as of such treatment, in all and any circumstances, as a prohibition of *jus cogens*, forms today *jurisprudence constante* of the IACtHR.

B. The Basic Principle of Equality and Non-Discrimination

But the IACtHR did not limit itself to such prohibition. It went further, in expanding the material content of *jus cogens* in its historical Advisory Opinion n. 18 (of September 17, 2003), on the *Juridical Condition and Rights of Undocumented Migrants*, so as to encompass the basic principle of equality and non-discrimination (pars. 97-101 and 110-111). The IACtHR sustained that States have the duty to respect and to secure respect for human rights in the light of the general and basic principle of equality and non-discrimination, and that any discriminatory treatment in relation to the protection and exercise of such rights (including labour rights) generates the international responsibility of the States. In the understanding of the Court, the fundamental principle referred to entered into the domain of *jus cogens*, States not being allowed to discriminate, or tolerate discriminatory situations, to the detriment of migrants, and being under the duty to guarantee the due process of law to any person, irrespective of her migratory status. States cannot subordinate or condition the observance of the principle of

⁴² In my Separate Opinion in this same case *Tibi*, I singled out the importance of the absolute character of such prohibition, and examined the evolution of this latter in contemporary international case-law (pars. 26 and 30-32 of the Opinion). - The international regime against torture is today conformed by the U.N. Convention (of 1984, and its Protocol of 2002) and the Inter-American (1985) and European (1987) Conventions on the matter, in addition to the Special *Rapporteur* on Torture (since 1985) of the old U.N. Commission on Human Right (CHR), and the Working Group on Arbitrary Detention (since 1991) of the same CHR (attentive to the prevention of torture). The three aforementioned coexisting Conventions of struggle against torture are basically complementary. On its turn, the European Court of Human Rights affirmed, in the case *Soering versus United Kingdom* (Judgment of 07.07.1989), that the absolute prohibition of torture (also in times of war and other national emergencies) gives expression to one of the contemporary fundamental values of democratic societies (par. 88). And the *ad hoc* International Criminal Tribunal for the Former Yugoslavia categorically sustained, in the case *A. Furundzija* (Judgment of 10.12.1998), that the absolute prohibition of torture has the character of a norm of *jus cogens* (pars. 137-139, 144 and 160).

equality before the law and of non-discrimination to the objectives of their migratory policies, among others.

On this new and highly significant jurisprudential advance I presented an extensive Concurring Opinion (pars. 1-89), in which I supported the position of the Court, acknowledging that such basic principle permeates the whole juridical order, and drawing attention to its importance, and that of all general principles of law, wherefrom the norms and rules emanate, and without which, ultimately, there is no “juridical order” (pars. 44-46 and 65). In sum, such principles conform, in my understanding, the *substratum* of the legal order itself (pars. 52-58). The points which I dwelt upon, - also for the evolution of *jus cogens* and obligations *erga omnes* of protection, - I did so in the ambit of the conception of the *civitas maxima gentium* and of the universality of the human kind. In a passage of my aforementioned Concurring Opinion, I saw it fit to ponder that

“Every legal system has fundamental principles, which inspire, inform and conform their norms. It is the principles (derived ethmologically from the Latin *principium*) that, evoking the first causes, sources or origins of the norms and rules, confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole. It is the general principles of law (*prima principia*) which confer to the legal order (both national and international) its ineluctable axiological dimension; it is they that reveal the values which inspire the whole legal order and which, ultimately, provide its foundations themselves. This is how I conceive the presence and the position of the principles in any legal order, and their role in the conceptual universe of Law. (...)

From the *prima principia* the norms and rules emanate, which in them find their meaning. The principles are thus present in the origins of Law itself. The principles show us the legitimate ends to seek: the common good (of all human beings, and not of an abstract collectivity), the realization of justice (at both national and international levels), the necessary primacy of law over force, the preservation of peace. Contrary to those who attempt - in my view in vain - to minimize them, I understand that, if there are no principles, nor is there truly a legal system. Without the principles, the ‘legal order’ simply is not accomplished, and ceases to exist as such. (...)

Just as, in the ambit of the International Law of Refugees, the basic principle of *non-refoulement* was recognized as being of *jus cogens*, in the domain of the International Law of Human Rights the character of *jus cogens* of the fundamental principle of equality and non-discrimination was likewise recognized (...). The objective illegality is not limited to the aforementioned acts and practices. As *jus cogens* is not a closed category (...), I understand that no one either would dare to deny that slave work, and the persistent denial of the most elementary guarantees of the due process of law, would likewise affront the universal juridical conscience, and effectively collide with the peremptory norms of *jus cogens*. This is particularly significant for the safeguard of the rights of undocumented migrant workers. All this

A. A. CANÇADO TRINDADE

doctrinal evolution points to the direction of the crystallization of the obligations *erga omnes* of protection (...). Without the consolidation of such obligations one will advance very little in the struggle against the violations of human rights” (pars. 44, 46 and 72).

Advisory Opinion n. 18 of the IACtHR has had a considerable impact on the American continent, and its influence is bound to extend itself to other latitudes, for its content and given the topicality and the relevance of the matter. Both the Advisory Opinion n. 18 (*supra*), and the Advisory Opinion n. 16 on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of October 1, 1999)⁴³, call for and advance the same dynamic or evolutive interpretation of the International Law of Human Rights. In the Advisory Opinion n. 16, pioneering and a source of inspiration of the international case-law *in statu nascendi* on the matter, the IACtHR interpreted the protecting norms of the American Convention on Human Rights in such a way as to extend them into new situations, such as that pertaining to the observance of the right to information on consular assistance.

The same outlook was adopted by the Court in its subsequent and forward-looking Advisory Opinion n. 18, on the rights of undocumented migrants, erected on the evolving concepts of *jus cogens* and of obligations *erga omnes* of protection. The historical transcendence of both Advisory Opinions of the IACtHR has been acknowledged in the juridical circles of the whole continent, and elsewhere. They effectively pave the way for the construction of a new *jus gentium* in this first decade of the XXIst century: an International Law which is no longer State-centric, but appears rather attentive to the fulfillment of the needs and aspirations of humankind as a whole.

C. The Fundamental Character of the Right of Access to Justice

Since the IACtHR endorsed the understanding that also the fundamental principle of equality and non-discrimination has entered into the domain of *jus cogens* (*supra*), in successive contentious cases I have insisted on the need to enlarge further the material content of *jus cogens*, so as to encompass likewise the right of access to justice⁴⁴, and thus fulfill the pressing needs of protection of the

⁴³ On the impact and influence of this latter, cf. A.A. Cançado Trindade, “The Humanization of Consular Law: The Impact of Advisory Opinion n. 16 (1999) of the Inter-American of Human Rights on International Case-Law and Practice”, 4 *Chinese Journal of International Law* (2007) pp. 1-16.

⁴⁴ Cf., in this sense, my Separate Opinions in the IACtHR's Judgments in the cases of the *Massacre of Plan de Sánchez versus Guatemala* (merits, of 29.04.2004), pars. 22, 29-33 and 35 of the Opinion; and (reparations, of 19.11.2004), pars. 4-7 and 20-27 of the Opinion; of the *Brothers Gómez Paquiyauri versus Peru* (of 08.07.2004), pars. 37-44 of the Opinion; of *Tibi versus Ecuador* (of 07.09.2004), pars. 30-32 of the Opinion; of *Caesar versus Trinidad and Tobago* (of 11.03.2005), pars. 85-92 of the Opinion; of *Yatama versus Nicaragua* (of 23.06.2005), pars. 6-9 of the Opinion; of *Acosta Calderón versus Ecuador* (of

human person. I have done so, *inter alia*, in my Separate Opinion (devoted to the right of access to justice *lato sensu*) in the Judgment of the Court (of January 31, 2006) in the case of the *Masacre of Pueblo Bello versus Colombia*, drawing attention to the fundamental importance precisely of the right of access to justice, and pondering that

“The interrelatedness which I sustain between Articles 25 and 8 of the American Convention (...) leads to characterize as belonging to the domain of *jus cogens* the access to justice understood as the *full realization* of this latter, that is, as belonging to the domain of *jus cogens* the intangibility of all judicial guarantees in the sense of Articles 25 and 8 taken *jointly*. There can be no doubt that fundamental guarantees, common to the International Law of Human Rights and to International Humanitarian Law⁴⁵, have a universal vocation in being applicable in all and any circumstances, conforming an imperative law (belonging to *jus cogens*), and bringing about obligations *erga omnes* of protection” (par. 64).

Shortly afterwards, in my Separate Opinion in the case of *López Álvarez versus Honduras* (2006), I saw it fit to insist on my understanding in the sense that the *right to the Law* (the access to justice *lato sensu*) is an imperative of *jus cogens* (pars. 52-55). Likewise, in my Separate Opinion in the Judgment of the IACtHR in the case *Baldeón García versus Peru* (merits and reparations, of April 4, 2006), in recalling the precedents of the jurisprudential construction of the prohibitions of *jus cogens* (cf. *supra*), I disagreed with the reasoning of the majority of the Court which considered that the State obligations of prevention, investigation and sanction of those responsible (for human rights violations) would be simple obligations “of means, not of results”. Distinctly from the majority of the Court, I pondered in that Separate Opinion that

“In my understanding, the *access to justice* also integrates the domain of the international *jus cogens*. (...) We are before an imperative law, and, accordingly, the State obligations of prevention, investigation and sanction of those responsible, the are not simple obligations “of means, not of results”, as the Court affirms in paragraph 93 of the present Judgment. I allow myself to disagree with this reasoning of the majority of the Court.

As I pointed out in my Separate Opinion (par. 23) in the recent Judgment of the Court, adopted on March 29, 2006, in the city of Brasilia, in the case of the *Indigenous Community Sawhoyamaya versus Paraguay*:

14.06.2005), pars. 4 and 7 of Opinion; of the *Massacres of Ituango versus Colombia* (of 01.07.2006), par. 47 of the Opinion; of *Baldeón García versus Peru* (of 06.04.2006), pars. 9-10 of the Opinion; of *López Álvarez versus Honduras* (of 01.02.2006), pars. 53-55 of the Opinion; of *Ximenes Lopes versus Brazil* (of 04.07.2006), pars. 38-47 of the Opinion.

⁴⁵ E.g., Article 75 of Protocol I (of 1977) of the Geneva Conventions (of 1949) on International Humanitarian Law.

A. A. CANÇADO TRINDADE

(...) The obligations of the State are of diligence and result, not only of conduct (as the adoption of insufficient and unsatisfactory legislative measures). In effect, the examination of the distinction between obligations of conduct and of result⁴⁶ has tended to take place at a purely theoretical level, assuming variations in the conduct of the State, and also a succession of acts on the part of this latter⁴⁷, - and without taking sufficiently and duly into account a situation in which an irreparable harm to the human person suddenly occurs e.g., the deprivation of the right to life by the lack of due diligence of the State).

We are here before, definitively, *obligations of result and not of behaviour*, as, otherwise, we would not be before an imperative law, and this would moreover lead to impunity” (pars. 5-7 and 9-12).

More recently, I have insisted on this same point in my extensive Dissenting Opinion (pars. 1-60) in the case of the *Dismissed Workers of the Congress versus Peru* (Interpretation of Judgment, of November 30, 2007). But it was in the case of *Goiburú and Others versus Paraguay* (Judgment of September 22, 2006), pertaining to the sinister “Operation Condor” of the so-called “intelligence services” of the countries of the Southern Cone of South America (in the epoch of the dictatorships of three decades ago), that the IACtHR at last endorsed the thesis which I had been sustaining therein already for more than two years⁴⁸, in effectively enlarging even further the material content of *jus cogens*, so as to comprise the right of access to justice at national and international levels⁴⁹.

In its aforementioned Judgment of September 22, 2006 in the case of *Goiburú and Others*, the Court, in establishing violations of *jus cogens* in the *cas d'espèce*, asserted that

(...) The access to justice constitutes an imperative norm of International Law, and, as such, it generates obligations *erga omnes* for the States to adopt the measures which are necessary not to leave in impunity those violations (...)” (par. 131).

⁴⁶ In the light mainly of the work of the U.N. International Law Commission (ILC) on the International Responsibility of States.

⁴⁷ Cf. A. Marchesi, *Obblighi di Condotta e Obblighi di Risultato - Contributo allo Studio degli Obblighi Internazionali*, Milano, Giuffrè, 2003, pp. 50-55 and 128-135.

⁴⁸ Cf. the text of my Separate Opinion in this case, reproduced in: A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006)*, Mexico, Edit. Porrúa/Universidad Iberoamericana, 2007, pp. 779-804.

⁴⁹ Cf. also, in this respect, A.A. Cançado Trindade, “La Ampliación del Contenido Material del *Jus Cogens*”, in *XXXIV Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - 2007*, Washington D.C., General Secretariat of the OAS, 2008, pp. 1-15.

JUS COGENS IN CONTEMPORARY INTERNATIONAL CASE-LAW

Shortly afterwards, in its Judgment of November 29, 2006 in the case of *La Cantuta versus Peru*, the Court made again this same assertion (par. 160). The gradual expansion of the material content of *jus cogens*, encompassing lately the right of access to justice, has occurred *pari passu* with the recent judicial condemnation of grave violations of human rights and of massacres, which conform, in my understanding, true crimes of State⁵⁰. In my Separate Opinions in the case of *Goiburú and Others*⁵¹, as well as in the subsequent cases of *Almonacid Arellano versus Chile* (Judgment of September 26, 2006, pars. 58-60 of the Opinion), and of *La Cantuta versus Peru* (Judgment of 29.11.2006, pars. 49-62 of the Opinion), I stressed the considerable importance of this expansion of the material content of *jus cogens*.

On such expansion, I sustained, in my Separate Opinion in the case of *La Cantuta versus Peru* (Judgment of November 29, 2006), that

“In cases like the present one, in which the apparatus of the State power was unduly utilized to commit crimes of State in a shocking distortion of the ends of the State), constituting inadmissible violations of *jus cogens*, and then to cover-up such crimes and maintain its agents, perpetrators of them, in impunity, and the relatives of the victims (also victimized) in the most complete desolation and desperation, - in cases such as those of *La Cantuta* and of *Barrios Altos*, in which the crimes against human rights were perpetrated in the framework of a proven criminal practice of the State, - the patient reconstitution and determination of the facts by this Court constitute, themselves, one of the forms of providing satisfaction - as a form of reparation - due to the surviving relatives of the victims (who are also victims), and of honouring the memory of the fatal victims.

Jus cogens resists crimes of State, and imposes sanctions on them, as a result of the prompt engagement of the *aggravated* international responsibility of the State. As a consequence of such crimes, the reparations due assume the form of distinct obligations of doing, including the investigation, trial and sanction of those responsible for the crimes of State that they perpetrated (by action or omission). Law does not cease to exist by the violation of its norms, as the “realists” degraded by their ineluctable and pathetic idolatry of the established power pretend to insinuate. Quite on the contrary, imperative law (*jus cogens*) promptly reacts to such violations, and imposes sanctions.

During years I have insisted, within this Court, on the necessity of the recognition and the identification of *jus cogens*, and have elaborated, in numerous Individual Opinions (in the exercise of the functions, both

⁵⁰ Cf., in this respect, A.A. Cançado Trindade, “Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited”, in *International Responsibility Today - Essays in Memory of O. Schachter* (ed. M. Ragazzi), Leiden, M. Nijhoff, 2005, pp. 253-269.

⁵¹ Pars. 62-68 of the Opinion, text in *ibid.*, pp. 801-804.

A. A. CANÇADO TRINDADE

contentious and advisory, of the Tribunal), the doctrinal construction of the expansion of the material content of *jus cogens* and of the corresponding obligations *erga omnes* of protection, in their dimensions both horizontal (*vis-à-vis* the international community as a whole) as well as vertical (encompassing the relations of the individual with the public power as well as with non-State entities and other individuals). In this way, the very notion of “victim” under the American Convention has evolved and expanded; there has been an enlargement of both the parameters of the protection due to those justiciable, as well as the circle of protected persons” (pars. 58-60).

The gradual expansion of the material content of *jus cogens* has occurred *pari passu* with the recent judicial condemnation of grave violations of human rights and of massacres, which conform, in my understanding, true crimes of States⁵². In my Separate Opinion in the case of *Almonacid and Others versus Chile*⁵³ I sought to demonstrate the lack of juridical validity of the so-called self-amnesties⁵⁴, incompatible with the American Convention on Human Rights, in generating the obstruction and denial of justice, and the consequent impunity of those responsible for the atrocities. I insisted on the necessity of the enlargement of the material content of the prohibitions of *jus cogens* (so as to secure the access to justice at both national and international levels), and I situated, at last, the conceptualization of the crimes against humanity at the confluence between the International Law of Human Rights and International Criminal Law.

The meaning of this new expansion of the material content of *jus cogens*, by the IACtHR in its Judgment of September 22, 2006, in the case of *Goiburú and Others*, so as to comprise the right of access to justice, and the importance and the implications of this remarkable jurisprudential advance, are emphasized in my Separate Opinion (parrs. 62-68) in that case, in which, moreover, I dwelt upon the criminalization of the grave violations of human rights; the crime of State in the context of State terrorism (the aforementioned “Operation Condor”, and the cover-up by the State of the perpetrated atrocities); the international responsibility of the State aggravated by the crime of State⁵⁵; and new elements of the necessary complementarity between the International Law of Human Rights and contemporary International Criminal Law.

⁵² Cf., in this respect, A.A. Cançado Trindade, “Complementarity between State Responsibility and Individual Responsibility...”, *op. cit. supra* n. (18), pp. 253-269.

⁵³ The public hearings of which took place in the external session of the IACtHR of Brasília, on 29.03.2006.

⁵⁴ As exemplified by the criticized Decree-Law n. 2191, of 18.04.1978, of the Pinochet regime.

⁵⁵ Cf., on this point, A.A. Cançado Trindade, “Complementarity between State Responsibility and Individual Responsibility...”, *op. cit. supra* n. (18), pp. 253-269.

D. The Importance of the Right of Access to Justice as an Imperative of *Jus Cogens*

In the public hearings before the IACtHR, - above all in the hearings pertaining to reparations, - a point which has particularly attracted my attention has been the observation, increasingly more frequent, on the part of the victims or their relatives or legal representatives, to the effect that, had it not been for their access to the international instance, justice would never have been done in their concrete cases. It is by the free and full exercise of the right of individual petition that the rights set forth in human rights treaties have become *effective*. The right of individual petition shelters, indeed, the last hope of those who had not found justice at national level.

The historical Advisory Opinion n. 16 of the IACtHR, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law* (of October 1, 1999), in recognizing the crystallization of a true subjective right to information on consular assistance (of which is *titulaire* every human being deprived of his freedom in another country) discarded the traditional purely inter-State view of the matter, bringing relief to numerous poor foreigners and migrant workers. This new outlook was repeatedly expressed by the IACtHR in its equally pioneering Advisory Opinion n. 18 (of September 17, 2003), on *The Juridical Condition and Rights of Undocumented Migrants*, of transcendental importance in the world of today, which expanded the material content of *jus cogens* in sustaining that this latter encompasses the fundamental principle of equality and non-discrimination.

The relevance of the *locus standi in judicio* in the procedure before the Court, with the full participation of the individuals, has been essential, as the last hope of the forgotten of the world, - as eloquently demonstrated, e.g., by the contentious case of the murders of the “*Street Children*” (case *Villagrán Morales and Others*). In this paradigmatic case, the mothers of the murdered youngsters (and the grandmother of one of them), as poor and abandoned as their sons (and grandson), had access to the international jurisdiction, appeared before the Court⁵⁶, and, due to the judgments of the Inter-American Court⁵⁷, which granted them relief, could at least recover faith in human Justice⁵⁸.

Their direct access to the international jurisdiction enabled them to vindicate their rights against the manifestations of arbitrary power, and conferred an ethical content upon the norms of both domestic and international law. In my Separate Opinion (par. 22) in the Judgment on reparations (of May 26, 2001), in the case of

⁵⁶ Public hearings of 28-29.01.1999 and 12.03.2001.

⁵⁷ As to the merits, of 19.11.1999, and as to reparations, of 26.05.2001.

⁵⁸ In my lengthy Separate Opinion (pars. 1-43) in that case (Judgment on reparations, of 26.05.2001), I pointed out precisely this point, besides another one virtually unexplored in international doctrine and case-law to date, namely, the triad of the victimization, of human suffering and of the rehabilitation of the victims.

the “*Street Children*”, I saw it fit to warn that the suffering of the most humble and vulnerable persons is projected into the social community or *milieu* as a whole, and their close relatives are forced - if there is no justice - to live amidst the silence, indifference and oblivion of the others, - their suffering permeating the whole community (par. 22).

Four years later, the case of the *Institute of Rehabilitation of Minors versus Paraguay* came again to demonstrate, as I pointed out in my Separate Opinion (pars. 3-4), that the human being, even in the most adverse conditions, emerges as subject of the International Law of Human Rights, endowed with full international juridico-procedural capacity. The Court's Judgment in this latter case duly recognized the high relevance of the historical reforms introduced by the Court in its present Regulations⁵⁹, in force as from 2001, in favour of the *titularity*, of the individuals, of the protected rights, granting them *locus standi in judicio* in all the stages of the contentious procedure before the Court⁶⁰.

The aforementioned cases of the “*Street Children*” and of the *Institute of Rehabilitation of Minors* are eloquent testimonies of this titularity, affirmed and exercised before the IACtHR, even in situations of the most extreme adversity⁶¹. To these, numerous other victims can be added, - e.g., those in infra-human conditions of detention, in forced displacement from their homes, in condition of undocumented migrants, in situation of complete defenselessness and also victims of massacres and their relatives⁶², - who, despite so much adversity, have nevertheless had access to international justice. Recently, once again, the abandoned and forgotten of the world again reached an international human rights

⁵⁹ Pars. 107, 120-121 and 126 of the aforementioned Judgment.

⁶⁰ Cf., in this respect, A.A. Cançado Trindade, “El Nuevo Reglamento de la Corte Interamericana de Derechos Humanos (2000) y Su Proyección Hacia el Futuro: La Emancipación del Ser Humano como Sujeto del Derecho Internacional”, in *XXVIII Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - OEA* (2001) pp. 33-92; A.A. Cançado Trindade, “Le nouveau Règlement de la Cour Interaméricaine des Droits de l'Homme: quelques réflexions sur la condition de l'individu comme sujet du Droit international”, in *Libertés, justice, tolérance - Mélanges en hommage au Doyen G. Cohen-Jonathan*, vol. I, Bruxelles, Bruylant, 2004, pp. 351-365.

⁶¹ In its turn, the Advisory Opinion n. 17 of the Inter-American Court (of 28.08.2002), on the *Juridical Condition and Human Rights of the Child*, e.g., placing itself in the same line of assertion of the juridical emancipation of the human being, emphasized the consolidation of the juridical personality of the child, as true subject of rights and not as simple object of protection; this was the *Leitmotiv* which permeated the whole Advisory Opinion referred to, affirmed in an eloquent way in its paragraphs 41 and 28.

⁶² Cf., e.g., the Judgments of the IACtHR in the cases of the *Massacres of Barrios Altos versus Peru* (of 14.03.2001), of *Plan de Sánchez versus Guatemala* (of 29.04.2004), of the *19 Traders versus Colombia* (of 05.07.2004), of *Mapiripán versus Colombia* (of 17.09.2005), of the *Moiwana Community versus Suriname* (of 15.06.2005), of *Pueblo Bello versus Colombia* (of 31.01.2006), of *Ituango versus Colombia* (of 01.07.2006), of *Montero Aranguren and Others (Retén de Catia) versus Venezuela* (of 05.07.2006), of the *Prison of Castro Castro versus Peru* (of 25.11.2006), of *La Cantuta versus Peru* (of 29.11.2006).

tribunal in search of justice, in the cases of the members of the *Communities Yakye Axa* (Judgment of June 16, 2005) and *Sawhoyamaxa* (Judgment of March 28, 2006), concerning Paraguay. In those two recent cases, those forcefully displaced from their homes and ancestral lands, and socially marginalized and excluded, effectively reached an international jurisdiction, before which they at last found justice.

As the more lucid international legal doctrine points out, international *jus cogens* enlarges the ambit of operation of a true international *ordre public*, fulfils the higher interests of the international community as a whole, and stresses the necessity of *judicial control* of the observance of the peremptory norms of International Law⁶³. In this line of thinking, I saw it fit to ponder, in my Separate Opinion (par. 154) in the recent case of the *Prison of Castro Castro versus Peru* decided by the IACtHR (Interpretation of Judgment, of August 2, 2008), that

“It is not surprising that it has been precisely in the domain of the protection of the fundamental rights of the human person that the material content of *jus cogens* is being defined⁶⁴. No one would question today, e.g., that the prohibitions of *grave* violations of International Humanitarian Law are effectively prohibitions of international *jus cogens*⁶⁵, which project themselves also into the domestic legal order of the States⁶⁶. The international and domestic legal orders appear here in interaction, in the struggle against violations of *jus cogens*”.

As I added in that same Separate Opinion, we are before “a humanized (or even a truly humanist) *ordre public* in which the public or general interest fully coincides with the prevalence of human rights, - what implies the recognition that *human rights constitute the basic foundation, themselves, of the legal order*⁶⁷, at

⁶³ Cf., *inter alia*, K. Zemanek, “How to Identify Peremptory Norms of International Law”, in *Völkerrecht als Wertordnung - Festschrift für C. Tomuschat* (eds. P.-M. Dupuy *et alii*), Kehl, N.P. Engel Verlag, 2006, pp. 1108, 1114 and 1117; and cf., for a discussion, R. Kolb, *Théorie du Jus Cogens International*, Paris, PUF, 2001, pp. 68-83 and 172-181; cf. also, e.g., E.P. Nicoloudis, *La nullité de jus cogens et le développement contemporain du Droit international public*, Athens, Éd. Papazissi, 1974, pp. 41-45 and 227-228.

⁶⁴ G. Cohen-Jonathan, “Du caractère objectif des obligations internationales relatives aux droits de l'homme - Quelques observations”, in *Les droits de l'homme et la Constitution - Études en l'honneur du Prof. G. Malinverni* (eds. A. Auer *et alii*), Genève/Zurich/Bâle, Schulthess, 2007, pp. 130-133.

⁶⁵ Cf. L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law - Historical Development, Criteria, Present Status*, Helsinki, Lakimiesliiton Kustannus/Finnish Lawyers' Publ. Co., 1988, pp. 605-606 and 621, and cf. pp. 602-604 and 607-608.

⁶⁶ Cf. E. de Wet, “The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law”, 15 *European Journal of International Law* (2004) pp. 98, 100, 105, 112 and 120-121.

⁶⁷ A.A. Cançado Trindade, *O Esgotamento de Recursos Internos no Direito Internacional*, 2nd. ed., Brasília, Edit. University of Brasília, 1997, pp. 265-266.

international and national levels. Underlying the concept of *jus cogens* is the jusnaturalist thinking, which leads to peremptory norms as from the assertion and acknowledgment of ethical values which seek to benefit humankind as a whole⁶⁸ (par. 155).

This is thus the present state of the matter in the jurisprudential construction, on the part of the IACtHR during the period I have served it as Judge, of the material content of *jus cogens*. From the acknowledgment of the absolute prohibition of prohibition of torture and of cruel, inhuman or degrading treatment, the IACtHR moved on to the recognition of the fundamental character of principle of equality and non-discrimination, belonging to the domain of *jus cogens*. And lately, the IACtHR further stressed the significance of the right of access to justice *lato sensu*, - properly understood as the right to realization of *material justice*, - as an imperative of *jus cogens*.

The fact that the right of access to justice (judicial protection and judicial guarantees) is not formally ranked by certain human rights treaties among non-derogable rights cannot, in my view, be invoked against the jurisprudential construction situating it as belonging to the domain of *jus cogens*. Firstly, any restrictions to the exercise of the protected rights are to be restrictively interpreted, in the light of the object and purpose of the human rights treaties at issue; secondly, States are here bound by obligations of *result*⁶⁹, and cannot at all invoke derogations to evade the obligation to secure the right of access to justice; and thirdly, States can only avail themselves of permissible and temporary derogations to the extent that they are not incompatible with their other obligations under International Law and do not involve any form of discrimination⁷⁰.

Here, the imperative character of the right of access to justice renders such incompatibility evident⁷¹. It would indeed be inconceivable to deny to any person the right of access to justice. We can here visualize a true *right to the Law*, that is, the right to a legal order which effectively safeguards the rights inherent to the human person. This is an imperative of *jus cogens*. In effect, without the right of access to justice, there is in reality no true legal system. Without the *right to the Law*, there is no rule of law, there is ultimately no Law at all.

⁶⁸ Cf. M. Ragazzi, "Alexidze on *Jus Cogens* (Selected Considerations)", in *Theory and Practice of Contemporary International Law - Essays in Honour of Prof. L. Alexidze on the 80th Birthday Anniversary*, Tbilisi, Inovatia, 2007, pp. 35 and 38.

⁶⁹ As I have sought recently to demonstrate in my lengthy Dissenting Opinion (pars. 1-60) in the case of the *Dismissed Workers of the Congress versus Peru* (Interpretation of Judgment, of 30.11.2007).

⁷⁰ As clarified, e.g., by paragraphs 2 and 1, respectively, of Article 27 of the American Convention on Human Rights.

⁷¹ As I sustained in my recent Separate Opinion (pars. 156-157) in the case of the *Prison Castro Castro versus Peru* (Interpretation of Judgment, of 02.08.2008).

V. Concluding Observations

The evolution of the aforementioned jurisprudential construction ought to be appreciated in a wider dimension. In reaction to the successive atrocities which, along the XXth century, victimized millions and millions of human beings, in a scale until then unknown in the history of humankind, the *universal juridical conscience*⁷² manifested itself with vigour, - as the ultimate *material source* of all Law, - restituting to the human being his condition of subject of both domestic and international law, and final addressee of all juridical norms, of national as well as international origin. We are before a humanized (or even truly humanist) international *ordre public* in which the public interest or the general interest coincides fully with the prevalence of human rights⁷³, - implying the recognition that *human rights constitute the basic foundation, themselves, of the legal order*.

In the domain of the International Law of Human Rights, moved by considerations of international *ordre public*, we are before common and superior values, underlying it, and which appear as truly fundamental and irreducible. We can here visualize a true *right to the Law*, that is, the right to a legal order which effectively safeguards the rights inherent to the human person. This evolution, with the recognition of the direct access of individuals to international justice, discloses, at this beginning of the XXIst century, the advent of the new primacy of the *raison d'humanité* over the old *raison d'État*, to inspire the historical process of *humanization* of International Law⁷⁴.

Jus cogens, nowadays established well beyond the law of treaties, is a conceptual construction which occupies a central position in the new *jus gentium*, the International Law for humankind. It has met with judicial recognition of

⁷² Mucho más de lo que tal vez se hubiera *prima facie* suponer, la *conciencia jurídica universal* ha, efectiva y reiteradamente, sido invocada tanto en las formulaciones doctrinales como en la práctica internacional (de los Estados y de las organizaciones internacionales); cf. A.A. Cançado Trindade, “Reflexiones sobre el Desarraigo como Problema de Derechos Humanos Frente a la Conciencia Jurídica Universal”, in *La Nueva Dimensión de las Necesidades de Protección del Ser Humano en el Inicio del Siglo XXI* (de A.A. Cançado Trindade y J. Ruiz de Santiago), San José de Costa Rica, ACNUR, 2001, pp. 19-78 (4a. ed., 2006).

⁷³ In this sense, the emergence of a truly *jus commune* of human rights at international level has been suggested; cf. M. de Salvia, “L’élaboration d’un `jus commune’ des droits de l’homme et des libertés fondamentales dans la perspective de l’unité européenne: l’oeuvre accomplie par la Commission et la Cour Européennes des Droits de l’Homme”, in *Protection des droits de l’homme: la dimension européenne - Mélanges en l’honneur de G.J. Wiarda* (eds. F. Matscher and H. Petzold), 2nd. ed., Köln/Berlin, C. Heymanns Verlag, 1990, pp. 555-563; G. Cohen-Jonathan, “Le rôle des principes généraux dans l’interprétation et l’application de la Convention Européenne des Droits de l’Homme”, in *Mélanges en hommage à L.E. Pettiti*, Bruxelles, Bruylant, 1998, pp. 168-169.

⁷⁴ For a general study of this historical process, cf. A.A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brazil, Edit. Del Rey, 2006, pp. 3-409.

contemporary international tribunals, and in greater depth in the case-law of the IACtHR and of the ICTFY (cf. *supra*). *Jus cogens* appears indeed as a pillar of the new *jus gentium*, the International Law for humankind. *Jus cogens*, identified with general principles of law of material order, serves the superior interests of the international community as a whole⁷⁵; such interests, in turn, find expression in the peremptory norms of International Law (*jus cogens*), emanating from the universal juridical conscience in each historical moment, and paving the way for the construction of a new *jus gentium*, the International Law for humankind. *Jus cogens* exists indeed for the benefit of human beings, and ultimately of humankind.

Along the years, this has been acknowledged in different parts of the world and distinct cultural *milieux*, pointing to the construction of a universalist International Law, the new *jus gentium* of our times⁷⁶. It can hardly be denied that general principles of law, proper to any legal system, at either national or international level⁷⁷, do enjoy universal acceptance or recognition. Such principles guide all legal norms, including those endowed with a peremptory character; it is thus not surprising that one trend of juridical thinking has identified them with the domain of *jus cogens*⁷⁸, standing above the will of States and of other subjects of International Law. Emanating, in my view, from human conscience, they rescue International Law from the pitfalls of State voluntarism and unilateralism, incompatible with the foundations of a true international legal order.

Those principles reflect the idea of an objective justice, are consubstantial with the national or international legal system itself, embodying, as they do,

⁷⁵ G.M. Danilenko, “International *Jus Cogens*: Issues of Law-Making”, 2 *European Journal of International Law* (1991) p. 45, and cf. pp. 48-49 and 59-65 on the possibility of the incidence of *jus cogens* in the elaboration itself of drafts of international instruments.

⁷⁶ Thus, to the late Cuban jurist M.A. D'Estéfano Pisani, for example, the concept of *jus cogens*, rooted in natural law, reflects the juridical achievements of humankind; it warns States as to the need to abide by fundamental principles and peremptory norms, depriving of legitimacy any act or situation (ensuing from the law of treaties or customary law) incompatible with them; M.A. D'Estéfano Pisani, *Derecho de Tratados*, 2nd. ed., Havana/Cuba, Edit. Pueblo y Educación, 1986 [reprint], pp. 97 and 165-166. In a similar line of reasoning, the Chinese jurist Li Haopei criticized positivists for having attempted to base International Law on a mere assumption, State consent, which was nothing but a “layer of loose sand”, for, if it were really so, International Law would cease to be effective whenever States withdrew their consent. He further criticized the attitude of positivists of intentionally ignoring or belittling the value of general principles of law, and held that peremptory norms of International Law have emerged to confer an ethical and universal dimension to International Law and to serve the common interests of the international community as a whole and, ultimately, of all mankind; Li Haopei, “*Jus Cogens* and International Law”, in *Selected Articles from Chinese Yearbook of International Law*, Beijing/China, Chinese Society of International Law, 1983, pp. 47-48, 57, 59, 61-64 and 74.

⁷⁷ Such as, e.g., *bona fides* and *pacta sunt servanda*.

⁷⁸ R. Kolb, *Théorie du jus cogens international*, Paris, PUF, 2001, pp. 98-100, 105, 110 and 112.

JUS COGENS IN CONTEMPORARY INTERNATIONAL CASE-LAW

superior values, which can fulfill the aspirations of humankind as a whole. Their continued validity is beyond question, and their relevance becomes evident in the construction, in our days, of a new *jus gentium*, the international law for humankind. The consolidation of *erga omnes* obligations of protection, ensuing from peremptory norms of International Law, overcomes the pattern erected in the past upon the autonomy of the will of the State, which can no longer be invoked in view of the existence of norms of *jus cogens*. States are nowadays faced with a dilemma which should have been overcome a long time ago: either they return to the old voluntarist conception of International Law, abandoning the hope in the primacy of Law over power politics, or they retake and realize the ideal of construction of a more cohesive and institutionalized international community in the light of the imperatives of the rule of law and the realization of justice, moving resolutely from *jus dispositivum* to *jus cogens*⁷⁹.

⁷⁹ And always bearing in mind that the protection of fundamental rights places us precisely in the domain of *jus cogens*.

