Book Review: Antônio A. Cançado Trindade, International Law for Humankind: Towards a New *Jus Gentium* (The Hague Academy of International Law Monographs Martinus Nijhoff 2010) price: €180 ISBN 978 9004184282

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Che Guevara once stated that in order to be a successful revolutionary leader, one had to have a large dose of humanity and a strong sense of truth and justice.[1] ICJ Judge Antônio A. Cançado Trindade is leading his own revolution within public international law by building jurisprudence based on precisely these values. This volume is updated from the General Course he gave at the Hague Academy of International Law in 2005. It is divided into the following sections: Part I Prolegomena, discussing the temporal dimension of International Law, Part II Foundations of International Law, Part III Formation of International Law, Part IV Subjects of International Law, Part V Construction of the International Law for Humankind, Part VI Humanization of International Law, Part VII Settlement of Disputes, and Part VIII Perspectives, addressing the legacy of UN World Conferences.

Cançado Trindade declares the purpose of the book to be a call for the establishment of a new *jus gentium* which will respond to the concerns of humankind, *inter alia*, human rights protection, self-determination of peoples, environmental protection, human development, and disarmament. He espouses a strong faith in the potential of law to fulfill the needs and aspirations of humankind, as opposed to discretionary use of force by states.

Cançado Trindade identifies a universal juridical conscience as the "ultimate material source of law", noting the limitations of positivism and the misapplication of the rule of State consent (p.144). He declares that international law has liberated itself form the chains of statism-that there is a primacy of the *raison d'humanité* over the *raison d'État*- "a humanization of International Law –in which human rights constitute the basic foundation of the legal order."(p.28) He bemoans a reductionist view of international law, marked by pragmatism and "technicism" that he believes prevails: "Many international lawyers nowadays seldom dare to go beyond positive law, being on the contrary receptive, if not subservient to relations of power and dominance, and thus paying a disservice to International Law."(p.160)

Cançado Trindade considers customary international law to emanate no so much from state practice (which is ambiguous and contradictory) but rather from *opinio juris*. He opines that general principles of law emanate from human conscience, rescuing international law from the pitfalls of state voluntarism and unilateralism which he considers to be incompatible with the foundations of a true international legal order. In chapter XII, he calls for systematic development of the content, scope and juridical effects or consequences of the *erga omnes* protection obligations. Cançado Trindade declares that no-one would dare deny that the principles of humanity and the dictates of public conscience invoked by the Martens clause belong to the domain of *jus cogens*, directly contradicting Professor Yoram Dinstein who alleges that the principles of humanity are extra-legal considerations.[2] In conformance with

[1] Jon Lee Andersen, Che Guevara: A Revolutionary Life (Avalon Travel Publishing 1998) 637.
[2] Yoram Dinstein, "The Principle of Proportionality" in K. M. Larsen, C. G. Guldahl & G. Nystuen (eds.), *Searching for a "Principle of Humanity" in International Humanitarian Law* (Cambridge: Cambridge University

Professor Larry May, he recognizes the principle of *non-refoulement* as *jus cogens* (p.520) and has confirmed this view within his opinion in the ICJ case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of Congo)* 30 Nov. 2010 .[3]

He identifies a plurality of actors: states, international organizations, NGOs, peoples, and individuals as charged with the duty of ensuring social justice. He opines that ultimately all law exists for the human being; and that the law of nations no exception. Cançado Trindade describes the juridical emancipation of the human being via recognition as a subject of both domestic and international law, endowed in both with full procedural capacity. He characterizes the right of individual petition as the most luminous star in the universe of human rights. He explains the importance of the Inter-American Court of Human Rights' Advisory Opinions in this regard, i.e. *The Right to Information on Consular Assistance* (1999)*,* the *Juridical Condition and Human Rights of the Child* (2002)*, and The Juridical Condition and Rights of Undocumented Migrants* (2003). He is approach is reformatory, as he calls for recognition of conventional obligation vis-à-vis third parties, including individuals. In addition, he laments the lack of use of inter-state complaints within human rights systems.

Cançado Trindade recognizes the importance of cultural diversity, but also the universality of human rights, while discarding distortions of cultural relativism. Yet, it is not made clear how to achieve the balance in practice.

As pertaining the environment, he identifies a growing body of international instruments that recognize the common heritage and common concerns of humankind or mankind (including a temporal dimension that addresses present as well as future generations). He sets forth:

"The conceptions of common heritage and of common concern of mankind embody universal solidarity and social responsibility (rather than competitiveness), emanate from human conscience (rather than from the free "will" of States), reflect basic values of the international community as a whole (rather than State interests), and strengthen the notion of an international *ordre public* (rather than a fragmented contractual vision). They do so in order to face the new global challenges to the international community as a whole, and indeed to all humankind, and to provide adequate and satisfactory responses to them, which the systems of positive law by themselves simply cannot do."(p.349)

He recognizes the principles of precaution, prevention, and sustainable development and criticized the ICJ for not having applied them in a separate opinion in the *Pulp Mills on the River (Argentina* v. *Uruguay* 20 April 2010) case:

"The applicable law in the present case of the *Pulp Mills*, is, in my understanding, not only the 1975 Statute of the River Uruguay, but the Statute *together with* the relevant general principles of law, encompassing the principles of International Environmental Law. These latter are, notably, the principles of prevention, of precaution, and of sustainable development with its temporal dimension, together with the long-term temporal dimension underlying inter-generational equity. The Hague Court, also known as the World Court, is not simply the International Court of Law, it is the International Court of *Justice*, and, as such, it cannot overlook *principles*." (p.220)

Press, forthcoming (2012). Judge Cancado Trindade explains his position on the principle of humanity in the *Barrios Altos* v. *Peru* Case, Inter-American Court of Human Rights, Series C N. 75 (14 March 2001).

[3] Larry May, *Global Justice and Due Process* (Cambridge 2011) 172-180.

One of Cançado Trindade's most powerful arguments addresses the complementarity of state responsibility under international law and the international criminal responsibility of individuals. (Chapter XV) He explains the approach pursued by the Inter-American Court of Human Rights in cases involving massacres*: Myrna Mack Chang* 2003, *Massacre of Plan de Sanchez* 2004, *19 Tradesmen* 2004, *Massacre of Mapiripán* 2005, and *Moiwana Community v. Suriname* 2005. In these cases, the Inter-American Court held that aggravated responsibility corresponded to the crime of a state- as the state's intention (fault or *culpa*) to cause damage or its negligence to avoid harm could be demonstrated. He states:

"The evolution of the law on international responsibility should not yield to the rigid compartmentalization between civil and criminal responsibility found in the national legal systems. Nothing seems to impede that it contains elements of one and the other, both conforming the international responsibility. This latter is endowed with a specificity of its own. A State can be internationally responsible for a crime, imputable both to its agents who committed it, and to the State itself as juridical person of International Law. To deny this would be to create an obstacle to the development of International Law in the present domain of the international responsibility."(p.372)

Furthermore, he advocates recognition of the complementarity of international human rights tribunals with international criminal tribunals to address impunity and provide reparations in order to secure a realization of justice. It is significant that Cançado Trindade called for non-recognition of immunity for *delicta imperii* in his dissenting opinion in *Germany v. Italy* (3 February 2012). Consider this passage which addresses the problem of evil within humanity but also may be read as an implied expression of frustration with the positivistic attitudes held by his colleagues at the ICJ :

"Grave breaches of human rights and of international humanitarian law amount to breaches of *jus cogens*, entailing State responsibility with aggravating circumstances, and the right to reparation to the victims. This is in line with the idea of *rectitude* (in conformity with the *recta ratio* of natural law) underlying the conception of Law as a whole . . . When will they stop dehumanizing their fellow human beings? As they have not stopped to date, perhaps they never will. . . . Yet, even in this grim horizon, endeavors towards the primacy of the *recta ratio* also seem never to vanish, as if suggesting that there is always hope, in the perennial quest for justice, never reaching an end, like in the myth of Sisyphus". (paras. 227-229)

The book is timely in addressing dilemmas within current affairs, for example in Chapter IV he discusses his opposition to humanitarian intervention and support for humanitarian assistance. He also denounces the application of "preventive" armed attacks and indefinite countermeasures as being contrary to international law:

"Force only generates force, and one cannot pretend to create a new "international order" on the basis of unilateralism and unwarranted use of force, over the corpses of thousands of innocent victims (victimizes by all kinds of terrorism, perpetrated by non-State entities as well as sponsored by States themselves), destined amidst indifference, to oblivion. The projection in time of the cardinal principle of the prohibition of the threat or use of force cannot be overlooked. In fact, nothing in International Law authorizes a State or group of States to proclaim themselves defenders of 'civilization', and those which pretend to take such a course of action, making recourse to the indiscriminate use of force, outside the

framework of the U. N. Charter, do so in the opposite sense to the purpose professed."(p. 105)

Cançado Trindade concludes that the failure to construct a right to peace is in part based on the lack of examination of the basis for peace within each state and the role of non-state entities. He suggests that there is a need to achieve social justice within and between nations, and underscores an "urgent need to put an end to the tendency to separate economic development from social development, macro-economic policies from the social objectives of development". (p.360)

He opposes those who characterize the growth of international tribunals as a problem, stating that the growth and consolidation of international jurisdictions of these courts are reassuring reflections of an evolving international legal order. Similarly, he expresses great appreciation for the contribution of U.N. World Conferences and Word Forums to address the "issues of satisfaction of basic human needs, people's empowerment, sustainable development, and search for more effective protection of economic, social and cultural rights. . . the conditions of life and special needs of protection in particular of vulnerable groups and the poorer segments of the population. . ." (p. 621) He concludes that "Human rights do in fact permeate all areas of human activity , and the recognition of this phenomenon corresponds to a new *ethos* of our times. The final documents of those Conferences should be duly taken into account by all international lawyers, taking our discipline no longer as an instrumental at the service of power, but rather as a new *jus gentium* of emancipation of human beings, as the International Law for humankind."(p. 622)

This volume is a fascinating, thorough exposition of the Judge's vision which has largely been influenced by his prior experience as President of the Inter-American Court of Human Rights and professor of International Law. He is strongly committed to the view that international judges have a particular role in defending the international rule of law and ensuring protection of vulnerable interests, including children, women, migrants, indigenous people, and the environment. In this respect he shares the emancipative perspective articulated by Boaventura de Sousa Santos.[4] This is truly inspiring book which may be considered a new classic within international law. It contains an encyclopedic wealth of references to literature, case law, and conventions. It is highly recommended for scholars, practitioners, and students whom he characterizes as "the new generations of international lawyers" dedicated to universalisation and humanisation.(p.5)

[4] Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (Butterworths 2002)