

OBITUARY

INTERNATIONAL COURT OF JUSTICE: TRIBUTES TO JUDGE
ANTÔNIO AUGUSTO CANÇADO TRINDADE

The legacy of Antônio Augusto Cançado Trindade to contemporary international law

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1. Introduction

Cançado Trindade was a firm believer in and defender of his postulate that the individual should be at the heart of international law in all its facets, from human rights and humanitarian law to the mechanisms for settling traditional inter-state disputes. He was very sensitive to what he and many others regarded as the greatest development in international law since the end of the Second World War: the growth of a specific corpus of law to protect the fundamental human rights of the individual. He was forthright, passionate, and tenacious in his beliefs, although always open to hearing another point of view.

As is well known, he was a prodigious worker and was prolific in writing opinions, separate or dissenting, in almost every case in which he participated, each of which was purposeful and a valuable contribution to the Court's work. These opinions revealed the emphasis that he placed on respect for the inherent dignity of the individual.

In this tribute, we highlight some of his original ideas and judicial decisions, especially in relation to the development of international human rights law and the impact of international law at the most granular level: the individual. First, we revisit his academic legacy, focusing on his work on the 'founding fathers' of international law, general principles of law, and the concept of international law for humankind. Then, we explore his legacy at the Inter-American System, highlighting his decisions in *Plan de Sánchez Massacre v. Guatemala*, *Maritza Urrutia v. Guatemala*, and *Ximenes Lopez v. Brazil*. Finally, we celebrate two of his most influential opinions at the International Court of Justice (ICJ), those in *Diallo* and *Jurisdictional Immunities*.

2. The legacy of the Scholar

A professor of international law since 1979, Cançado Trindade was active as a scholar even after his appointments to the Inter-American Court of Human Rights and the International Court of Justice. His works, which are an excellent example of 'teachings of the most highly qualified publicists of the various nations', spanned virtually all areas of international law, and consistently showcased his distinctively Latin American, decolonial approach to the field. This section focuses on three of his great contributions to international legal thought: general principles of law, reclaiming 'founding fathers' in the field, and his well-known theory of international law for humankind.

*The views presented do not necessarily reflect those of the Court.

Professor Cançado Trindade's research shows that the often-criticized source, 'general principles of law recognized by civilized nations', in Article 38 of the ICJ Statute, was problematic from its conception. He concluded that, even in 1920 – when the provision was first included in the Statute of the Permanent Court of International Justice (PCIJ) – it was 'impossible to determine which are the "civilized nations". [One] can only identify the ones which behave in a "civilized" way for some time, and to the extent that they so behave. No country is to consider itself as essentially "civilized"'.¹ Despite its fallacious foundation, the idea that certain nations and peoples are superior to others from a civilizational standpoint provided the political and philosophical basis for atrocities such as transatlantic chattel slavery and genocide; the fact that the odious phrase is still part of the Charter of the principal judicial organ of the United Nations, and part of the Article generally seen as comprising the sources of international law, points to the long journey ahead in making international law truly international. Professor Cançado Trindade's teachings have been invaluable in this quest.

When addressing myths in international law, one may also refer to Cançado Trindade's work on the 'founding fathers'² of the discipline, a topic on which he recorded two lectures for the United Nations Audiovisual Library of International Law. In revisiting the foundations of international law, Professor Cançado Trindade importantly concluded that early scholars like Francisco Suárez, Francisco de Vitoria, Domingo de Soto, Hugo Grotius, Samuel Pufendorf, and Christian Wolff were not as state-centric in their approach as one might have thought; in fact, they understood 'the ultimate material source of the law of nations' to be *recta ratio* – human conscience.³ Cançado Trindade also uses these scholars as the foundation for his conclusion that the 'human person, and especially those that become victims of breaches' have a central position in the legal order of the law of nations – as has been recognized by several tribunals in contemporary times.⁴ For Professor Cançado Trindade, the essence of their legacy is that international law has at its core an intrinsic connection with ethical considerations, and thus should not be limited by the will of states.⁵

This reading of those classic texts reflects Cançado Trindade's own views as a scholar and as a person, he having been a self-described humanist. Humanism, he argued, allowed for a universalist view of the law of nations, an outcome that would not be possible on the basis of a strictly positivist approach to international law.⁶ Regardless of one's particular views about what international law is, one would find it difficult to refute the conclusion that 'basic considerations of humanity permeate nowadays the whole *corpus juris gentium* of the law of nations (*droit des gens*), disclosing the current historical processes of its *humanization* and *universalization*'.⁷ Examples abound in the practice of international tribunals, especially those focusing on international human rights law and international criminal law.

That is the basis upon which Professor Cançado Trindade developed his ideas on the International Law for Humankind, a ground-breaking theory that he first presented at the prestigious Hague Academy's General Course on Public International Law (which he delivered in

¹A. A. Cançado Trindade, 'Preface', in D. B. Garrido Alves et al. (eds.), *Local Challenges, Global Responsibilities: Individuals as the Foundation of Sustainable Solutions* (2016), at 12, citing A. A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça* (2015), 135–6.

²The expression is used in inverted commas so as to acknowledge the voices that were often silenced or not heard throughout the history of international law, markedly those of women, persons of colour, and individuals from the Global South.

³A. A. Cançado Trindade, 'The Founding Fathers of International Law, 6 June 2015', United Nations Audiovisual Library of International Law, available at legal.un.org/avl/ls/Cancado-Trindade_IL_video_4.html.

⁴*Ibid.*

⁵A. A. Cançado Trindade, 'La Perennidad Del Legado de Los "Padres Fundadores" Del Derecho Internacional, 27 October 2017', United Nations Audiovisual Library of International Law, available at legal.un.org/avl/ls/Cancado-Trindade_IL_video_5.html.

⁶*Ibid.*

⁷See Cançado Trindade, *supra* note 1, at 16.

2005), and that later became a celebrated, often-reprinted book. His argument is ambitious: individuals are ‘true subjects (and not only “actors”) of International Law’, and we as international lawyers should ‘move towards the construction of a new *jus gentium*’ which takes into account ‘the social needs and aspirations of the international community (*civitas maxima gentium*), of humankind as a whole, so as to provide responses to attempt to fulfil them’.⁸ As such, one cannot limit international law to what states agree in their international relations, nor what they say *jus gentium* is. Professor Cançado Trindade’s legal theory, derived from the ‘founding fathers’ of international law, is brilliant in that it does not brand itself as revolutionary; rather, for him, such an understanding of international law has always existed, and the fact that early international law developed into a state-centric enterprise does not alter that conclusion. The overriding message of his academic work is that international law can be a source of hope for people – hope against discrimination, hope against apartheid, hope against genocide, hope in the face of climate change.⁹ Like all great Professors, Cançado Trindade’s definitive theory inspires us to be better as international lawyers and as human beings.

3. The legacy of the Judge

3.1 Inter-American Court of Human Rights

Cançado Trindade, the Judge, was as influential as Cançado Trindade, the Scholar. He began his almost three-decade career in the international judiciary at the Inter-American Court of Human Rights (IACtHR), in 1994¹⁰ – a Court which, to this day, some describe as the ‘Cançado Trindade Court’, so impactful was the legacy of his 14 years as a Member. His robust decisions and 72 opinions had one common feature: the centrality he gave to victims in the international legal order and, particularly, in international human rights proceedings. Here, one must also note the contributions of Judge Cançado Trindade’s opinions to the protection of indigenous communities in the Inter-American Human Rights system, such as in *Plan de Sánchez Massacre v. Guatemala*, a case of a massacre of over 200 Mayan indigenous persons by the Guatemalan army, and which he often cited as the most shocking he encountered at the IACtHR.

In his Separate Opinion, Judge Cançado elucidated one of the cornerstones of his understanding of international human rights law – the principle of humanity, which demands humane treatment of all persons in every circumstance, and which cuts across the entirety of international law.¹¹ He reasoned that the conduct of Guatemala entailed its international responsibility in an aggravated form – in the sense that acts that would amount to genocide under the Convention on the Prevention and Punishment of the Crime of Genocide should be understood as aggravating the violations of rights contained in the American Convention on Human Rights.¹² Besides their relevance for the development and consolidation of international human rights law, this Separate Opinion and the IACtHR’s decision had great symbolic importance for the protection of indigenous and traditional communities in the Americas, which historically have been discriminated against and subjected to grave violations of human rights.

Another contribution worth highlighting is his work on the prohibition of torture. In his Concurring Opinion in *Maritza Urrutia v. Guatemala*, Judge Cançado Trindade was categorical in supporting the IACtHR’s finding that the prohibition of torture was absolute, encompassing torture ‘in all its forms (including psychological)’, and that this absolute prohibition was grounded

⁸A. A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (2020), at 3.

⁹*Ibid.*

¹⁰In fact, he first acted as a Judge of the IACtHR in 1991, as an *ad hoc* Judge in the case *Gangaram Panday v. Suriname*.

¹¹*Case of the Plan de Sánchez Massacre v. Guatemala*, Merits, I/A Court H.R. Series C No. 105, Judgment of 29 April 2004, Separate Opinion of Judge Cançado Trindade, at 32, para. 9.

¹²*Ibid.*, at 36, para. 24.

in *jus cogens*.¹³ The Opinion also featured one of his famous references to literature – in this instance, to Dostoevsky’s 1862 *Notes from the House of the Dead*, which he used to illustrate that the treatment of detainees by public authorities was an infallible indicator of a society’s values and degree of human development.¹⁴ Moreover, he cited other international and regional human rights instruments, as well as precedents from other international tribunals (for example, the International Criminal Tribunal for the former Yugoslavia).¹⁵ This served to corroborate his view that international law is an integral body of law, and that more dialogue should be promoted between different courts adjudicating related issues of law.

While one could dedicate an entire volume to Judge Cançado Trindade’s legacy in the Inter-American System, the limitations of this tribute only permit mention of one final contribution: the importance international law and lawyers should accord to the suffering of victims of human rights violations. In his Separate Opinion in *Ximenes-Lopes v. Brazil*, Judge Cançado dedicates an entire section to this point: he quoted and amplified the voice of Irene, sister of Damião Ximenes-Lopes, a man with mental illness who died after being subjected to inhuman and degrading treatment in Brazil’s public health system. Irene was ‘terrified’ and had ‘so many nightmares’ after seeing her brother’s corpse with ‘several signs of torture’; she struggled with depression for three years thereafter, and spent six years in her pursuit of justice.¹⁶ Judge Cançado Trindade gave prominence to those who endured the consequences of human rights violations. Damião Ximenes-Lopes was a human being who suffered the unimaginable; Irene Ximenes-Lopes underwent great emotional pain because of Brazil’s failure to deliver justice in a timely manner. He was, and she is, more than the name of a case. This, in its most simple form, shows how the great ideas of Cançado Trindade are to be put into practice: in the end, what truly matters are people, and it is they who are the ultimate purpose of international law.

3.2 International Court of Justice

Even after his election to the International Court of Justice (ICJ) with the highest number of votes ever in the General Assembly, Judge Cançado Trindade remained true to the view of international law that characterized his academic work and his judicial service at the IACtHR. His many opinions and declarations at the ICJ were as much doctrinal pieces as elucidations of his alternate reasonings (or critiques) to the Court’s decisions, and he played a central role in prodding the Court to be even more attentive to the impact of its decisions on the individual – this was perhaps his main contribution to the jurisprudence of the Court. In this regard, this tribute highlights Judge Cançado Trindade’s landmark opinions in two cases, namely *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* and *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*.

In *Jurisdictional Immunities*, which related to reparations for crimes that occurred during the Nazi regime, Judge Cançado Trindade wrote two powerful Dissenting Opinions, both of which include the following *dictum*:

One cannot build (and try to maintain) an international legal order over the suffering of human beings, over the silence of the innocent destined to oblivion. At the time of mass deportation of civilians, sent to forced labour during the two World Wars (in 1916–1918 and in 1943–1945) of the twentieth century (and not only the Second World War), everyone

¹³*Case of Maritza Urrutia v. Guatemala*, Merits, Reparations and Costs, I/A Court H.R. Series C No. 103, Judgment of 27 November 2003, Concurring Opinion of Judge Cançado Trindade, at 1, para. 1.

¹⁴*Ibid.*, at 2, para. 6.

¹⁵*Ibid.*, at 3, paras. 9–10.

¹⁶I/A Court H.R., *Transcript of Public Hearing of November 30, 2005 and December 1, 2005 in the case of Ximenes-Lopes v. Brazil* (2005), at 23, 27–8.

already knew that that was a wrongful act, an atrocity, a serious violation of human rights and of international humanitarian law, which came to be reckoned as amounting also to a war crime and a crime against humanity. Above the will stands conscience, which is, after all, what moves the law ahead, as its ultimate material source, removing manifest injustice.¹⁷

This passage is relevant because the Court found that Italy had violated its obligation to respect the immunities of Germany under international law by, *inter alia*, allowing civil claims to be brought against Germany for the egregious violations of international humanitarian law committed by the Nazi regime. On several issues in this case, Judge Cançado Trindade was the sole dissenter; his view was that the law of immunities could not be used as a bar for holding entities, which committed mass atrocities and violations of *jus cogens* norms, accountable for their wrongdoing.¹⁸ Fidelity to his fundamental commitment to place the human person at the heart of international law could not be more clearly evidenced than it was in this dissent, and his bravery in standing his ground and in openly challenging his colleagues is nothing short of commendable. The law will fall into disrepute and become risible if it disallows claims for grave violations of peremptory norms of international law on the basis of sovereign immunity. One must agree with Judge Cançado Trindade that the atrocities committed by Germany during the First and Second World Wars were already known to be wrongful. His powerful and moving intonation, ‘above the will stands conscience’, speaks to the existence throughout history of general principles of law, derived from the principle of humanity, which have drawn the line between what is lawful and what is unlawful.

In *Diallo*, a case of diplomatic protection of a Guinean citizen who had his human rights violated as a result of the circumstances related to his detention, arrest and expulsion by and from the Democratic Republic of the Congo, Judge Cançado Trindade also wrote two Separate Opinions (at the merits and compensation stages). In them, he celebrated the Court’s novelty in establishing simultaneous violations of two human rights treaties (using an approach that was, in fact, reminiscent of his Separate Opinion in *Plan de Sánchez Massacre v. Guatemala*). He also criticized the Court for not observing, *inter alia*, the principle of humanity in its reasoning in a case that fundamentally concerned an individual.¹⁹ Judge Cançado Trindade argued that the application of the principle of humanity was not limited to the well-known circumstances of armed conflict, but rather was also applicable in times of peace, in the relations between states and the individuals subject to their jurisdiction, and especially in relation to those who are ‘in a situation of vulnerability, or even *defencelessness*’.²⁰ To support his conclusion, he reviewed several instruments relating to international human rights law to assess the scope of a general principle of law. Judge Cançado Trindade’s principle of humanity echoes throughout time to reflect the protective principles of the 1899 and 1907 Martens Clause, and since it applies in times of peace as in war, it also reflects the preambular provision of the 1815 Vienna Declaration on the Abolition of Slave Trade that, ‘the commerce, known by the name of “the Slave Trade”, has been considered, by just and enlightened men of all ages, as repugnant to the principles of humanity and universal morality’.²¹ In this case, as in many others, Judge Cançado Trindade’s opinions will be read and referenced for generations to come.

¹⁷*Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, [2012] ICJ Rep. 99, at 179, para. 72 (Judge Cançado Trindade, Dissenting Opinion); *Jurisdictional Immunities of the State (Germany v. Italy)*, Counter-Claim, Order of 6 July 2010, [2010] ICJ Rep. 310, para. 179 (Judge Cançado Trindade, Dissenting Opinion).

¹⁸*Ibid.*

¹⁹*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment of 30 November 2010, [2010] ICJ Rep. 639, at 730 (Judge Cançado Trindade, Separate Opinion).

²⁰*Ibid.*, para. 94.

²¹This passage bears a strong resemblance to the famous *dictum* by Justice Story in relation to transatlantic chattel slavery: ‘the slave trade was founded in violation of some of the first principles which ought to govern nations’, among which were ‘the

4. Conclusion

In this short tribute, our goal is not only to celebrate Cançado Trindade's main contributions to international law as a scholar and as a judge, but also to offer glimpses into the man he was as evidenced by his work.

I encountered Antônio for the first time when he was a Judge of the Inter-American Court of Human Rights. In my role as a Member of the Inter-American Commission on Human Rights, I presented a case to the Court in which he sat as a Judge. His background in international human rights at a regional level, and at a time when many Latin American states were transitioning from military rule to democratic governance, was to be influential throughout his tenure at the International Court of Justice. That background shaped how he approached cases before the Court and, as mentioned, his own view on their outcomes.

I was honoured when Antônio asked me to join him in writing a Joint Declaration in the *Chagos* case, in light of our shared understanding of the importance of the normative content of certain United Nations General Assembly resolutions relating to the right to self-determination. In our Declaration, we argued that the Court:

should have devoted more of its reasoning to highlight the importance of General Assembly resolutions in the consolidation of the right of peoples to self-determination, and, given the relevance of *jus cogens* to the issues raised in the proceedings, the Court should have pronounced on the *jus cogens* character of the right of peoples to self-determination.²²

Both in the drafting of this Declaration and in our regular exchanges at the Court, working with Antônio was pleasurable and beneficial.

One trait of his that cannot be overstated was his generosity, especially to students. As many *in memoriam* accounts recollected, Antônio would regularly invite students to visit The Hague, engage in intellectual exchanges with them, comment on their ongoing academic projects, and help them enter the field of international law in any way he could. He extended this same generosity to the Judicial Fellow who is co-author of this tribute, from the early stages of his international legal studies over a decade ago until recently. His dedication and openness to students, even after becoming a judge, further highlights the legacy of kindness and humility that Antônio, the human being, has left to those who had the privilege to meet him.

On the basis of his contributions to international legal thought and to future generations of international lawyers, Latin America and the Caribbean have every reason to be proud of this giant of a scholar and jurist they produced. Antônio Augusto Cançado Trindade's contribution to international law, in relation to which this tribute only scratches the surface, is immeasurable. He is thoroughly missed by his colleagues, but our solace is knowing that his legacy lives on.

obligations of good faith and morality and the internal maxims of social justice'. *United States v. the Schooner "La Jeune Eugenie"*, (1822) 2 *Mason's Reports*, at 109.

²²*Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, [2019] ICJ Rep. 95, at 260, para. 8 (Judges Cançado Trindade and Robinson, Joint Declaration).