The Impact of Cançado Trindade at the Inter-American Court of Human Rights: A Jus Gentium for the People

By:

Salvador Herencia-Carrasco

December 8, 2022

Introduction

There has never been a judge like Cançado Trindade at the Inter-American Court of Human Rights (IACtHR) and probably, there will never be someone like him again. Don't get me wrong, the IACtHR has a long history of exemplary judges that have made the American Convention on Human Rights (ACHR) and other Inter-American instruments as the cornerstone of human rights protection in the region.

For example, Héctor Fix Zamudio, Sergio García Ramírez, Cecilia Medina and Diego García-Sayán are some of the former judges that have contributed to make the IACtHR what it is today. But what set Cançado Trindade apart from

his peers is that he understood his role as a judge and that he used international law to solidify (and shield) the relevance of the ACHR.

As it has been written in this symposium, he wrote for future generations of human rights practitioners. But I also believe that he knew that as a judge (between 1995 and 2006) and as President of the IACtHR (between 1999-2003), he needed to set the foundations of the IACtHR for the next 20-30 years.

In this post, I would like to discuss three individual opinions that he wrote as President of the IACtHR. The first case is Barrios Altos vs. Peru. The second case is Awas Tingni vs. Nicaragua, and the final case is the case of Street Children vs. Guatemala. These three cases deal with some of the major contributions of the IACtHR to International Human Rights Law: limitations to amnesties, the rights of Indigenous Peoples and enforceability of social rights. In all of these, the role of judge Cançado Trindade was seminal.

Barrios Altos: Absolute amnesties equal absolute impunity

The case of Barrios Altos vs. Peru focuses on the killing of 15 civilians (including an 8-year-old child) by the paramilitary group Colina in the city of Lima in 1991. This death squad was under the control of the Fujimori regime. Due to the allegations of torture, forced disappearances and extrajudicial executions in the country, in 1995 the government enacted amnesty laws prohibiting any investigation over these alleged human rights violations.

When the 2001 ruling was published, Fujimori had resigned to the presidency and there was a transitional civilian government in place. The focus of the decision was the validity of amnesties. The position of the IACtHR, was the following:

- 41. This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.

In his concurring opinion to the Barrios Altos decision, President Cançado Trindade states that the prosecution of international crimes and access to justice to victims is embedded in the notion of universal juridical conscience, calling it "(…)the material source par excellence of International Law itself" (para. 13). What the is saying, in practice, is that international law cannot stay neutral to decisions that abhorrently fosters impunity. He concludes his opinion with the following:

- "It ought to be stated and restated firmly, whenever necessary: in the domain of the International Law of Human Rights, the so-called "laws" of self-amnesty are not truly laws: they are nothing but an aberration, an inadmissible affront to the juridical conscience of humanity". (para. 26)

It is impossible not to make a parallel between this conclusion with Radbruch's formula of the unjust. But 21 years after Barrios Altos, what is stated here is widely accepted as the standard practice, at least at the Inter-American level. But to write this before the entry into force of the Rome Statute in July 2002, was to understand that human rights are build not only in the principle/right of human dignity but also in the right of access to justice (Art. 25 of the ACHR).

It can never be stressed the relevance of the Barrios Altos decision for the prosecution of gross human rights violations in Latin America. Courts in Argentina, Chile, Colombia, among others, have used this decision to open investigations that were statutorily barred. In Peru, the Barrios Altos decision, along with the 2006 La Cantuta case were used by the Supreme Court to convict former President Fujimori to 25-years in prison.

The right to collective property of Indigenous rights

The 2001 decision of the case Awas Tingni vs. Nicaragua recognizes the right to collective property of Indigenous Peoples. This ruling started a wide array of cases that developed standards on the right to Indigenous consultation, consent, territory, culture and the environment, particularly in the context of extractive industries operating in their territory. In Awas Tingni, the IACtHR expands the notion of Art. 21 of the ACHR (which was drafted to protect individual property and limit the risk of expropriation without compensation) to include a notion of property where Indigenous views can feel represented.

In a separate opinion, written with other judges, President Cançado Trindade states the following:

- 8. We consider it necessary to enlarge this conceptual element with an emphasis on the intertemporal dimension of what seems to us to characterize the relationship of the indigenous persons of the Community with their lands. Without the effective use and enjoyment of these latter, they would be deprived of practicing, conserving and revitalizing their cultural habits, which give a meaning to their own existence, both individual and communitarian. The feeling which can be inferred is in the sense that, just as the land they occupy belongs to them, they in turn belong to their land. They thus have the right to preserve their past and current cultural manifestations, and the power to develop them in the future.
- 9. Hence the importance of the strengthening of the spiritual and material relationship of the members of the Community with the lands they have occupied, not only to preserve the legacy of past generations, but also to undertake the responsibilities that they have assumed in respect of future generations. Hence, moreover, the necessary prevalence that they attribute to the element of conservation over the simple exploitation of natural resources. Their communal form of property, much wider than the civilist (private law) conception, ought to, in our view, be appreciated from this angle, also under Article 21 of the American Convention on Human Rights, in the light of the facts of the cas d'espèce. (paras. 8 and 9)

When the case was decided in 2001, there were no leading cases using ILO Convention 169 and there was no UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Yet, in these two paragraphs there are ideas that question hegemonic views of law (and human rights). There is no one notion of property and international law must take into account the peculiarities and context of the victims to do them right. Even though judge Cançado Trindade was not a TWAIL scholar, this is as TWAIL as it gets.

In addition, the “spiritual relationship with the land” is not just legal poetry. It’s the recognition of the respect and sustainability of the territory where you eat, exist, and live your culture and religion. 21 years after *Awas Tiigni*, the IACtHR is the leading judicial body in the world on the rights of Indigenous Peoples.

Without the IACtHR, ILO Convention 169 and UNDRIP would not have the recognition and relevance these instruments have today. And I believe judge Cançado had a small but significant role to make the ACHR as a treaty where Indigenous Peoples can feel represented, respected and seen.

Street Children and quality of life: The indivisibility of human rights

The final case I would like to explore is the case of Street Children vs. Guatemala, decided in 1999. As the title suggests, the case focuses on the kidnap, torture, and death of five children living in situation of poverty by Guatemalan security forces in 1990. Even though the case focused on the violation of the rights to life, dignity and due process, judge Cançado Trindade had a concurring opinion, with judge Abreu Burelli, focusing on the particular obligations of the state to protect vulnerable groups. In his opinion, he wrote:

- 4. The duty of the State to take positive measures is stressed precisely in relation to the protection of life of vulnerable and defenseless persons, in situation of risk, such as the children in the streets. The arbitrary deprivation of life is not limited, thus, to the illicit act of homicide; it extends itself likewise to the deprivation of the right to live with dignity. This outlook conceptualizes the right to life as belonging, at the same time, to the domain of civil and political rights, as well as economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights.

The ACHR was adopted in 1969 and entered into force in 1978. As a product of its time, the Convention states in its Art. 26 that economic, social and cultural rights are not judicially enforceable as its progressive development rely on the economic capabilities of the state. But in a continent with so many social and economic inequalities, this division puts people's lives at risk. He understood that, as well as the judges of the IACtHR, insisting in a vida digna approach.

His opinion is just three-pages long, but I think it represents Latin American humanism at its best. It is impossible not to make a parallel with Paulo Freire's pedagogy of the oppressed. If social rights are not judicially enforceable, then all the discourse that human rights are interrelated, and indivisible is just that: a simple discourse. And once again, this stand puts people's lives at risk.

The great change on this matter at the IACtHR only took place in 2017 with the adoption of Lagos del Campo vs. Peru case. In this decision, the IACtHR, by majority, decided that economic, social and cultural rights are judicially enforceable under the ACHR. In practice, it overturns the text of Art. 26 of the ACHR. Since then, the IACtHR has added environmental rights as judicially protected. This shift took place long after judge Cançado left the IACtHR. But I believe that his stand to protect the most vulnerable of the vulnerable contributed to this jurisprudential shift.

Conclusion

I would like to conclude with an invitation. Judge Cançado Trindade is one of the most prominent legal scholars from Latin America and the Global South. Yet, his work, either publications or judicial decisions, is not fully explored.

For example, prof. B.S. Chimni wrote a seminal piece on TWAIL and customary international law. His paper is insightful and questions how the Global North creates customary norms for the rest of the world to follow. And he finds the individual opinions of judge Cançado at the International Court of Justice, including notions like universal juridical conscience and the humanization of International Law, as a positive shift in a Global North narrative.

However, to anyone that has read a decision of the IACtHR or his publications, these concepts are not new. He has been exploring these ideas since he finished his Ph.D. more than 40 years ago. This is just an example, and invitation to all of us, to engage with the work of Global South scholars. We always say that “we need to think outside the box”. This also means to expand the geography of our knowledge and legal sources. This would be the best way to honor the legacy and work of judge Cançado Trindade.

Don Antonio, gracias por todo y descanse en paz.

Salvador Herencia-Carrasco

Director of the Human Rights Clinic of the Human Rights Research and Education Centre and part-time professor at the Section de Droit Civil, University of Ottawa. Twitter: @Sherencia77

View online: The Impact of Cançado Trindade at the Inter-American Court of Human Rights: A Jus Gentium for the People

Provided by Afronomicslaw