

BOOK REVIEW / RESENHA:

ANTÔNIO AUGUSTO CANÇADO TRINDADE, *THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE*, OXFORD, OXFORD UNIVERSITY PRESS, 2011, PP. 1-236.

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Judge Antônio Augusto Cançado Trindade is widely known as the outstanding and eminent defender of individuals and human rights in contemporary international society. He has published enormously on the topic of human rights and the protection of individuals under both domestic and international law. As a Judge, both in the Inter-American Court of Human Rights during the period 1991-2006, and in the International Court of Justice (since 2007 until the present), he not only disseminated his approach to international law but also introduced his methods of legal thinking into the world of legal practice.

The book presents a characteristic feature of his views and progressive approach to international law sometimes referred to as 'humanization of international law' (p. 49). His concepts such as "universal juridical conscience", "*droit au Droit*", "*jus necessarium*", and "*recta ratio*" form the basis and the foundation on which his vision of international law has been structured. Interestingly, the author speaks impliedly about the role and responsibilities of international lawyers in the contemporary world. International law has evolved, explains Judge Cançado Trindade. Human beings are benefited therefrom, and international law is thus enriched and justified, freeing itself from the chains of statism, and meeting its original vocation, that of a true *jus gentium*. We have been witnessing for almost two decades the evolution of international law to what has been conceived of as the International Law of Human Rights. This law, essentially victim-oriented, discloses the new ethos of our times: that of the emerging primacy of the *raison d'humanité* over the old *raison d'État* (p. 208).

Therefore, the book seems to be a suggestion for all of us that the more human-oriented approach is an overarching and indispensable element for the systematic conception of international law. Thus, the fundamental task of an international lawyer is to cement the right of access to justice for all people in all circumstances against all odds, in every situation, and without regard to any obstacles whatsoever. In the end, a new international law (a new universal *jus gentium*) of our time will be shaped with an individual positioned at its very center.

Access to justice is a basic and fundamental right of individuals. Judge Cançado Trindade places great weight on the access to justice and the right to individual petition both in his scholarly writing and judicial practice. The direct access of the human person to international justice is the topic to which the author has devoted a great many years (p. xxvii). In his view, such access represents the essence of the international protection of human rights. It forms the foundation of legal protection granted to individuals under international treaties. It comprises both due process of law, the right to a fair trial, and the execution of judgments in good faith. In his own words:

"[t]he right of access to justice *lato sensu* comprises not only the formal access to justice (the right to institute legal proceedings), by means of an effective remedy, but also the guarantees of the due process of law (with equality of arms, conforming the *process équitable*), up to the judgment (as the *prestation juridictionnelle*), with its faithful execution, with the provision of the reparation due. The realization of justice is in itself a form of reparation, granting satisfaction

to the victim. In this way, those victimized by oppression have their right to the law (*droit au Droit*) duly vindicated”.

In the same line, Judge Cançado Trindade claims that the Government of a State which incurs grave and systematic violations of human rights ceases to represent the or population victimized. It seems therefore that such a State foregoes its very right of existence, since its primary purpose is to effectively protect its own individuals (both nationals and other human persons under its jurisdiction).

The whole book is filled with valuable reflections which might give rise to a polemic and be contested under various theoretical headings, but their value is that they are in many respects thought-provoking. Additionally, Judge Cançado Trindade formulated his own original conclusions with respect to access to international justice, in the area which - as the reader will see - is one of the most prominent aspects in the protection of human rights.

Judge Cançado Trindade's book aims to provide an encompassing, systematic framework for access to international justice. He admits it himself while stressing that the approach pursued in the book purports to dedicate special attention to the consolidation of the position of the human person before international tribunals, in particular those of human rights (p. xxviii). The book consists of eleven chapters: the historical recovery of the human person as a subject of the law of nations (I), the exercise of the rights of access to international justice: the right of international individual petition (II), access to justice at international level and the right to an effective domestic remedy (III), the interrelation between the access to justice (right to an effective remedy) and the guarantees of the due process of law (IV), access to international justice in relation to the interaction between international law and domestic law (V), access to justice: the safeguard and preservation of the integrity of international jurisdiction (VI), new developments in the notion of 'potential victim': the preventive dimension of protection (VII), the protection of victims in situations of great adversity and defencelessness (VIII and IX), access to justice of victims of massacres and crimes of State (X), the overcoming of obstacles to direct access to justice (XI). The Reader is introduced to the basic problems of the book in the concise and synthetic introduction and the

results of the research are presented in the final conclusions. It is quite visible that, from the perspective of the whole book, the theoretical parts seem to be most important. Of course, it does not mean that other considerations, in particular of practical nature, do not deserve careful attention.

The review will focus especially on a cursory overview of the book's content. The monograph starts with some historical background. Eventually, Judge Cançado Trindade concludes with an obvious observation that the individual is a subject of both domestic and international law endowed with basic rights and obligations. All law exists for the human being and the law of nations is no exception to that (p. 13). To confirm that, the book continues with the analysis of the right of international individual petition to which the author refers as the judicial mechanism of the emancipation of the human being vis-à-vis his own State. In this regard, Judge Cançado Trindade argues that only through the individual petitions - an important and most dynamic mechanism of international protection of human rights - the direct access of the individual to justice at the international level is guaranteed. It proves that the process of humanization of international law is an undeniable reality.

The next chapter of the book discusses access to justice at the international level and the right to an effective domestic remedy. The author focuses especially, and rightly so, on the *Castillo Paéz versus Peru* case (1997) and Article 25 of the American Convention. He also discusses the converging case law of both the European Court and the Inter-American Court to conclude that the right to a domestic remedy constitutes one of the basic pillars of the rule of law in a democratic society. Consequently, Judge Cançado Trindade turns his attention to the interrelation between the access to justice and the guarantees of due process (chapter IV). Again, he reviews the case-law of both the European Court and the Inter-American Court. Several important and apt observations have been made here, for example, that the correct administration of justice is one of the essential elements of the *État de Droit* and it includes by necessity the faithful execution of judgments (p. 72). All in all, the State is under a duty to provide full access to justice, by means of effective domestic remedies, in conformity with the guarantees of the due process of law. Only in

such a scenario, the realization of justice is fully secured.

The author also devotes much of his attention to access to international justice in relation to the interaction between international law and domestic law (chapter V). This part seems to be of special relevance to the book as a whole. He rightly points to Article 27 of the VCLT to argue that States cannot invoke the international difficulties or gaps in domestic law in order to justify non-compliance with the obligations provided for by the human rights treaties. He also persuasively suggests that both domestic law and international law cannot be seen in isolation and in a compartmentalized way: both are intertwined and constantly interact.

Therefore, - he proceeds, - one may speak of efficient and genuine human rights only if domestic law and international are taken as the single law devoted to the protection of the human person. To this end, the States must fulfill their general obligation to bring domestic law into conformity with human rights treaties. It will improve the national systems of judicial protection. It should also be noted that the consolidation of domestic law and international law with a view to effectuating human rights is clearly visibly through the evolution of the rule of exhaustion of local remedies (which is not unlimited) and the principle of complementarity prevailing in international criminal law.

The institutional aspect of the international protection of human rights is covered by chapter VI. Access to justice by individuals requires an international structure with full integrity and effectiveness, including the secure execution of judgments and the compliance with the conventional obligations by States. Judge Cançado Trindade traces the development of international human rights tribunals and their converging case law to conclude that it sets certain limits on State voluntarism. He also emphasizes the primacy of consideration of *ordre public* over the will of individual States.

The Judge sees it fit to stress the importance of the new developments in the notion of the "potential victim" as a central element in the international *contentieux* of human rights which experienced a noticeable enlargement in recent years due to the activity of human rights tribunals. Then he moves forward to discuss in two parts the protection of victims in situations of great adversity or defencelessness (in

particular, migrants and civilian in situations of armed conflicts). More importantly, the author elaborates on the access to justice of victims of massacres and crimes of State (chapter X). The human rights tribunals have always experienced certain difficulties in trying the cases and determining international responsibility as well as the condition of a victim.

To ensure effective protection, Judge Cançado Trindade correctly expends the notion of direct victim. He also emphasizes the victims' right to redress. It is his view that the crimes of State do exist despite the work of the International Law Commission and its decision not to include the notion of crimes of State into the draft articles on State responsibility. He opines that crimes of State have been not only State-sponsored but also State-conceived, State-planned, State-financed, and eventually executed by States in their own capacities (p. 191). Moreover, the concept of crimes refers to the most heinous acts that breach basic human rights. Humankind has undergone indescribable sufferings until attaining the degree of human consciousness that sets the *raison d'État* limits. Therefore, the notion of crimes should be applied in order to underline the atrocity of acts of States.

The book concludes with a set of important observations. In chapter XI, Judge Cançado Trindade persuasively explains why the laws of self-amnesty are utterly at variance with human rights treaties. His attention has also been focused on the obligation of States to ensure effective access to justice and the guarantees of due process. He also believes that the material content of *jus cogens* has expanded and at present encompasses the absolute prohibition of all forms of torture, the basic principle of equality and non-discrimination, and the right to access to justice. The human rights values have formed the basic foundation of the international legal order and these values care to ascribe to human rights concrete expression (p. 205). It may be discussed whether his conception of the content of *jus cogens* reflects the prevailing international law as it exists now, as it still seems that there is no consensus as to which human rights are indeed considered *jus cogens*. But for Judge Cançado Trindade the rights of the human person are prior and superior to the rights of States, and, seemingly, therefore the basic human rights form a part of *jus cogens*.

The human rights include the peremptory access to justice which comprises, *inter alia*, the right to initiate proceedings (and, in particular, the international individual petition) before international tribunals and the guarantees of due process of law as well as the right to due protection by means of the faithful compliance with, or execution of, the judicial decisions of those tribunals (p. 210). Ultimately, both the Inter-American and the European Courts have safeguarded access to international justice as they have overcome obstacles to the individual petitioners' direct access to justice. These reassuring evolutions are due to the awakening of the universal juridical conscience, heralding a new *jus gentium*.

It needs to be mentioned that the book clearly reflects prodigious research and erudition. The author has taken into account the decisions of international courts and tribunals as well as the work of the International Law Commission (ILC). He also relies on an impressive number of publications written on the subject which includes authors from various States and legal cultures. Therefore, the book is a result of diligent and arduous work. The reading of the book confirms that the author critically assessed the current state of international law and arrived at many interesting and significant conclusions. The book is accompanied by an extensive list of cases; a table of international treaties, conventions, and instruments; and a 17-page selected bibliography. It is well suited for international human rights courses at the postgraduate university level and could also be an important guide for international human rights practitioners. This observation is reinforced by the fact that the book's content and structure is the outcome of a general course on international human rights law delivered by Judge Cançado Trindade at the Academy of European Law of the European University Institute in Florence in June 2007.

In sum, this book has several strengths. The book tries to persuade the reader that

individual access to international justice is an important step in the evolution of international law. The author's idea should become the law at some point in the near future. Therefore, the book has its original significance for the future: it contributes to the correct evolution of international law by way of academic scholarship. Judge Cançado Trindade must be applauded for taking up again a difficult and complex subject. His considerations are interesting and valuable.

His theoretical discussion on various aspects of access to justice presents an in-depth analysis and compels to the rethinking of the concept of access to justice. The breadth of issues and the richness of arguments certainly proves that the author fully committed himself to the subject matter. It is increasingly understood in the field of the theory of human rights and international law as a whole that the full understanding of international law can only be achieved with a sound grasp of human rights and, in particular, the access of individuals to justice. Therefore, the added value of the book is the discussion on the legal foundation of public international law. Besides, the book remains an excellent stand-alone resource; perhaps not a one-stop-shop, but a point of departure for a more detailed discussion of various aspects of human rights and international law itself.

Of course, it is not possible, in a review of such a book, to comment in detail on every aspect demanding special attention. Nevertheless, it follows from this brief description that the book under review is a well-researched and very erudite piece, giving evidence of the author's sound knowledge of international law. Judge Cançado Trindade does not avoid a discussion of thorny issues and confidently presents and defends his views. I would venture to conclude that anyone with a genuine interest in international law would immediately identify the book as an impressive example of the work on international human rights and the basis of international law.

NOTES

1. A. Kozłowski, *The Normative Dimension of the Conception of the Individual Presented in Opinions of Judge Antônio Augusto Cançado Trindade of the ICJ - Fundamental Elements*, 2015 Wrocław Review of Law, Administration & Economics 5(2), at 3; Robert P. Barnidge, Jr., *The Contribution of Judge Antônio Augusto Cançado Trindade to the Adjudication of International Human Rights at the International Court of Justice*, in: James A. Green, Christopher P.M. Waters (eds), *Adjudicating International Human Rights. Essays in Honour of Sandy Ghandhi* (Martinus Nijhoff Publishers 2014), at 34-49.
2. See, for instance, his Separate Opinion in the case of *Unilateral Declaration of Independence*, Advisory Opinion of 22 July 2010, I.C.J. Reports 2010, 553, 602, paras. 90, 196.
3. His Dissenting Opinion in the case concerning the *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment of 3 February 2012, I.C.J. Reports 2012, 179, at 289, para. 310.
4. See his Separate Opinion in the case of *Unilateral Declaration of Independence*, Advisory Opinion of 22 July 2010, I.C.J. Reports 2010, 553, at 602, para. 180.

