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**DEVELOPING A UNIVERSAL JURIDICAL CONSCIENCE: TRINDADE  
OFFERS A VIABLE AGENDA FOR THE 21<sup>ST</sup> CENTURY\***

*Johannes van Aggelen*<sup>†</sup>

The first two volumes of this seminal treatise in Portuguese on the history, conceptional development and in-depth analysis of the jurisprudence of regional, and international tribunals on international human rights law, were published in 1997 and 1999 respectively.<sup>1</sup> This third volume, published in 2003, is the apogee of a successful attempt to bring closer to the reader in his native country the evolution of one of the foremost developments in public international law over the last fifty years. After having been associated with the Inter-American Court of Human Rights for more than a decade, culminating in the Presidency during the last four years, this distinguished Ambassador of public international law gives a unique insight into the workings of institutions intended to humanize public international law through the development of international human rights law. In view of the importance of these volumes, the international legal community would greatly benefit from the publication of an updated English translation in the future.

The third volume of Trindade's trilogy begins with a chapter on the regional protection in the Inter-American hemisphere. This presents an unparalleled analysis of the historical evolution and current stance of this branch of law. The fact that the author during his tenure at the Court appended over thirty-five concurring and dissenting opinions itself constitutes a major achievement towards granting every human being the procedural right of "*locus standing in judicio*," as well as confirming the irrevocable trend towards the universal juridical conscience of humanity. He also leaves a lasting imprint on the development of the Rules of Court, of which the fourth revision bears his signature.<sup>2</sup>

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\* Antônio Augusto Cançado Trindade, 3 *Tratado de Direito Internacional dos Direitos Humanos* (Sergio Antonio Fabris ed., 2003).

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<sup>1</sup> Antônio Augusto Cançado Trindade, 1-2 *Tratado de Direito Internacional dos Direitos Humanos* (Sergio Antonio Fabris ed., 1997,1999), reviewed by Johannes van Aggelen, *Antônio Augusto Cançado Trindade, Tratado de Direito Internacional dos Direitos Humanos Volumes I & II*, 19 *Neth. Q. Hum. Rts.* 215, 215-218 (2001).

<sup>2</sup> Antônio Augusto Cançado Trindade, 3 *Tratado de Direito Internacional dos Direitos Humanos* (Sergio Antonio Fabris ed., 2003), paras. 94-130 and nn.156-161.

He points out that, despite the fact that the Inter-American Court began operation much later than the European equivalent, it has considerably contributed, through a rich jurisprudence, to the evolution of important concepts such as the right of individual petition, interim measures of protection, reparation for grave abuses of human rights,<sup>3</sup> the predominance of international human rights law in the domestic legal system,<sup>4</sup> and the usefulness of the advisory function of a Court of human rights.<sup>5</sup> Particular reference should be made to Advisory Opinion number 16 of October 1, 1999, on the Right to Information on Consular Assistance in the framework of the Guarantees of the Due Process of Law.<sup>6</sup> This opinion came at the right moment in view of the fact that two contentious cases (Breard and La Grand) occupied the International Court of Justice ("ICJ") at the time. Also, in March 2004 the ICJ rendered judgment in another case on the interpretation of Article 36 of the Vienna Convention on Consular Relations.<sup>7</sup>

The author recently underscored his position that the two systems are built on general international law, but at the same time have enriched the law of nations in the protection of the human being.<sup>8</sup> This will also be the gravamen of his argument in his general course at the Hague Academy of International Law, in July/August 2005, entitled: "*International Law for Humankind: Towards a New Ius Gentium.*"

Chapter XVI on the European system of human rights law provides a cursory reading of the procedural innovations leading up to the total overhaul of the system with the entry into force of Protocol 11 on November 1, 1998.<sup>9</sup> The author tends to line up with the idea of one of its former presidents, the late Judge Ryssdal, by believing that the European Court is evolving towards a European Constitutional Court.<sup>10</sup> Trindade contributes to the solution of the doctrinal dilemma in the jurisprudence of the European

<sup>3</sup> *Id.* at paras. 163-164 and nn.62, 69-71.

<sup>4</sup> *Id.* at para. 65, the "Constitutional Law" cases.

<sup>5</sup> *Id.* at n.91.

<sup>6</sup> I/A.Court H.R., *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law*, Advisory Opinion OC-16/99 of October 1, 1999, Series A. No.16.

<sup>7</sup> Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), (Mar. 31) ICJ Reports 2004 ,p.12, available at <http://www.icj-cij.org/icjwww/idocket/imus/imusframe.htm> (holding that the U.S. had breached its obligations to Mr. Avena, as well as to fifty other Mexican nationals and to Mexico under the Vienna Convention on Consular Relations). See also Christopher Le Mon, *Post-Avena Application of the Vienna Convention on Consular Relations by United States Courts*, 18 Leiden J. Int'l L. 2 (forthcoming 2005).

<sup>8</sup> Lucius Caflisch & Antônio A. Cançado Trindade, *Les Conventions Américaine et Européenne des Droits de l'Homme et le Droit International Général* [The American and European Conventions of Human Rights and General International Law], 108 *Revue Générale de Droit International Public* 1, 1-62 (2004).

<sup>9</sup> Trindade, *supra* note 2, at paras. 22-51 & pp. 129-147.

<sup>10</sup> *Id.* at nn. 66 & 76.

Court. In other words, he addresses the question of whether the right to an effective remedy, described in Article 13 of the Convention, is a substantial autonomous right or whether it can only be invoked in conjunction with other rights. He concludes that the European Court in the 1996 case of *Aksoy v. Turkey* for the first time pronounced itself on the independent character of Article 13, which can be invoked as a right in itself.<sup>11</sup>

Judge Trindade correctly observes that the procedural innovations of Protocol 11 cannot cope with the ever-growing bulk of applications.<sup>12</sup> However, with the adoption and opening for ratification of Protocol 14 on May 10, 2004, it seems that a successful attempt has been made to curb this trend. Additionally, the author critically peruses the still existing lacunae in the European system. It is correct that there is no provision dealing with the treatment of persons in detention comparable to Article 10 of the International Covenant on Civil and Political Rights (“ICCPR”) and he suggests the elaboration of an additional protocol on this issue.<sup>13</sup> Another important aspect discussed in this chapter is the possibility of the European Union becoming a party to the European Convention – in view of the integration process within the Union. It would indeed be an innovation if the proposal to share the responsibility of the execution of judgments of the European Court became a reality. In July 2000, the Rapporteur of the Committee on Legal and Human Rights Affairs of the Council of Europe raised this idea which would split the duties of the European Court between the European Court, the State parties to the Convention, and the Committee of Ministers of the Council of Europe.<sup>14</sup>

Chapter XVII of Trindade’s third volume discusses the system of human rights protection in Africa. Here the author presents an overview of the ever-increasing importance of the petition system to the African Commission of Human and Peoples’ Rights. In the two 1995 cases against Malawi, he highlights the fact that the Commission correctly considered that a change of government should not affect the responsibility for human rights abuses committed by the previous government.<sup>15</sup>

It is somewhat surprising that the author in this chapter does not ride on one of his many hobby horses, namely the exhaustion of the local remedies rule. Discussion of Article 56(5) of the 1986 African Charter on Human and Peoples’ Rights is absent and this reviewer would like to refer to a number of joint communications against Mauritania reported in the Annual Activity Report of the Commission for the period 1999-2000, where explicit

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<sup>11</sup> *Id.* at para.73, at 161.

<sup>12</sup> *Id.* at paras. 87-89 & nn.144-148.

<sup>13</sup> *Id.* at para. 90, n.172.

<sup>14</sup> *Id.* at paras. 97-99.

<sup>15</sup> *Id.* at para. 27.

reference is made to this issue.<sup>16</sup> Paragraph 80 of this report reads: "The Commission maintains that one of the justifications for this demand is that the accused State should be informed of the human rights violations it is being accused of, to provide it with an opportunity to address them and to save its reputation, which would be inevitably tarnished if it were brought before international jurisdiction." This provision also enables the African Commission on Human and Peoples' Rights to avoid playing the role of a court of first instance – the role that it cannot under any circumstance arrogate to itself.<sup>17</sup> It should be noted that unlike the amended European Convention (Article 35(1) of Protocol 11) and the Inter-American Convention (Article 46(b)), the African Charter does not impose a strict six-month time limit for the submission of communications.

Furthermore, the author also discusses the important exchange of experiences between the various regional courts.<sup>18</sup> In an update of his discussion of the 1998 Protocol, which established an African Court on Human Rights, it should be noted that after the fifteenth ratification in October 2003, the Protocol entered into force on January 25, 2004. His reflection that the effectiveness of international protection would be limited if the language of human rights did not link up with the basis of national societies, or when socioeconomic disparities are the cause of a total negation of human rights, holds particularly true for Africa.<sup>19</sup>

The next chapter in volume III deals with the follow-up of the second World Conference on Human Rights which took place in Vienna in June 1993. In view of constraints of space, reference should be made to volume I of this treatise where the author in detail describes the preparatory process leading up to the conference (Chapter III); recommendations made at the conference (Chapter IV); the actual workings of the conference (Chapter V); and the contribution of governments and other international institutions dealing with human rights (Chapters VI & VII).

Nevertheless, a few additional remarks are warranted. The author correctly addresses the problem of supervision and follow-up with respect to recommendations made by treaty bodies and Special Rapporteurs dealing with extra-conventional mechanisms.<sup>20</sup> Chairpersons of treaty bodies and

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<sup>16</sup> Malawi African Association and Others v. Mauritania, African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97, 196/97, and 210/98 (2000) available at <http://www1.umn.edu/humanrts/africa/comcases/54-91.html>.

<sup>17</sup> For an exhaustive study on the African Charter see Institute for Human Rights and Development in Africa, *Compilation of Decisions on Communications of the African Commission on Human and Peoples' Rights 1994-2001* (2002) (compiling and selecting decisions from the Commission's Activity Reports for the period 1994-2001); Fatsah Ouguerouz, *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003).

<sup>18</sup> Trindade, *supra* note 2, at paras. 48-53.

<sup>19</sup> *Id.* at para. 59.

<sup>20</sup> *Id.* at paras. 19-42.

Special Rapporteurs currently meet jointly once a year. In addition, it should be noted that in 2002 a so-called 'Inter-Committee' meeting was established on a yearly basis, where chairpersons of all existing treaty bodies exchange their experiences. One of the foremost priorities is to create guidelines on an expanded Core document and treaty-specific targeted reports and harmonized guidelines on reporting under the international human rights treaties.<sup>21</sup> It should be added that the seventh treaty body, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, is operational.

Judge Trindade addresses the important problem of reservations to human rights treaties. Since one member of the Sub-Commission on the Promotion and Protection of Human Rights is charged with a study on this topic and because the International Law Commission ("ILC") is addressing the general problem of reservations to treaties, over the last two years an intense exchange of views has taken place between the ILC, the Sub-Commission, and various treaty bodies which have pronounced themselves on the matter.

The last two chapters on the universality of human rights and cultural particularities (Chapter XVIV) and international human rights law at the turn of the century (Chapter XX), cover more than a hundred pages and stand out for their underlying philosophy and in-depth grasp of the wheelings and dealings of society in which ultimately a universal juridical conscience should develop, based on a universally accepted regime for the protection of human rights.

One cannot escape the fundamental underpinning of the human rights movement when, in Chapter XVIV, Judge Trindade cites the famous historian Arnold Toynbee: "Every evolution emerges from the creative spirit of the individual or minority, who first divulge their ideas or discoveries and subsequently attempt to restructure society towards a new *modus vivendi*."<sup>22</sup> The author postulates that through particularities and the diversity of the human species universal values are sought, which subsequently manifest themselves in a universal conscience. He refers to a doctrinal division regarding the treatment of different types of minorities and maintains that some indigenous peoples require a different treatment from other minorities.<sup>23</sup> This may open up a Pandora's box, as during the twenty years of the existence of the Working Group on Indigenous Peoples, which aims at the drafting of a Declaration, none of the indigenous representatives consider

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<sup>21</sup> *Guidelines on an Expanded Core Document and Treaty-Specific Targeted Reports and Harmonized Guidelines on Reporting Under the International Human Rights Treaties*, U.N. Doc. HRI/MC/2004/3 (2004), available at <http://www1.umn.edu/humanrts/hrtreatybodyreporting2004.html> (last visited Mar. 3, 2005).

<sup>22</sup> Trindade, *supra* note 2, at para. 8.

<sup>23</sup> *Id.* at para. 25.

themselves a minority. It also runs counter to the definition of minorities given by Mr. Deschenes, expert of the Sub-Commission in 1985.<sup>24</sup>

Paragraphs 51-54 may be summarized as a cry for social justice and the philosophical underpinning of a *homo sapien* who attempts to guide the *homo economicas*, suffering from economical liberalism and globalization, back on track; this demonstrates the survival of the fittest of those who are left without values and subjected to the violations of social, economic, and cultural rights. Here the author, as a Latin-American, testifies that he grew up with the root of the problem. Subsection VI of this chapter demonstrates that, in the view of the author, cultural disparities can never be traced back to a so-called clash of civilizations as maintained by Samuel Huntington. The author returns to this idea in subsection XI on the universal, legacy of religions.<sup>25</sup>

The author also gives the reader a short summary of developments in the Arabic and Asian regions.<sup>26</sup> The reader should note that the Arab Charter of Human Rights that had been approved in March 1994 by the League of Arab States ("League"), never entered into force because of insufficient ratifications. In March 2003, the League engaged the Arab Human Rights Commission in a revision process and a completely revised Charter was adopted on May 23, 2004 in Tunis. Many controversial provisions which ran counter to international human rights law were deleted from the Charter. In addition, the Asian region finally adopted a Human Rights Charter, "Asian Charter on Human Rights" ("Our Common Humanity – A People's Charter) in Kwangju, South Korea in May 1998 on the occasion of the commemoration of the fiftieth anniversary of the Universal Declaration of Human Rights.<sup>27</sup>

The most intriguing section, however, is the one dealing with 'Death and the Law: the Unity of the Human Species in the Link between the Living and the Dead.' Based on the jurisprudence of the Inter-American Court in several disappearance cases, the author concludes that the legal doctrine bestows human rights on the surviving relatives of the disappeared and on the community to which he had belonged.<sup>28</sup> This is based on the existence of a universal legal conscience that, according to the author, constitutes the material source for the law of nations. The law of nations is in turn responsible for the progress of the human species not only legally, but also spiritually.

The last chapter consolidates past efforts in the field of human rights with a clear vision on the future. The author's correct analysis that interna-

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<sup>24</sup> See E/CN.4/Sub.2/1985/31.

<sup>25</sup> Trindade, *supra* note 2, at paras. 124-148.

<sup>26</sup> *Id.* at paras. 98-102, 103-106.

<sup>27</sup> Asian Human Rights Charter, *declared in Kwangju, South Korea May 17, 1998, available at* <http://www.ahrchk.net/charter/>.

<sup>28</sup> Trindade, *supra* note 2, at paras. 111, 160.

tional humanitarian law, refugee law, and international human rights law currently form a “*trias juridica*” of protection that is placed in jeopardy by the American legal perception of the Afghan and Iraqi crisis; in particular by the treatment of Guantanamo detainees.<sup>29</sup>

The author’s basic philosophy is once more clearly stated in the following words: international human rights law as a *corpus juris* of protection is construed above a new system of superior values as a collective guarantee, while the international mechanisms of protection tend to consolidate *erga omnes* obligations of protection.<sup>30</sup> International human rights law goes hand-in-hand with these underlying values, which are activated by the human conscience as the material source of this new *corpus juris* of protection. In the author’s opinion, the universal legal conscience recognizes and gives concrete expression to inherent rights belonging to every human being.<sup>31</sup>

Today’s problems touching on human rights cannot simply be reduced to the result of political repression or confrontation; one has to add up endemic problems which influence the social level. This phenomenon is aggravated by an increasing socioeconomic gap in addition to problems resulting from corruption, impunity, narco-trafficking, and an increase in criminality. This complex situation requires a real innovation in the ways and means of international protection in order to overcome new challenges to save the rights of the human person. Moreover, despite the communication revolution, human beings appear more isolated than ever and risk losing their values.

The author correctly submits that the “*corpus juris*” of international human rights law has been constructed around superior interests of the human person, independent of national links or political status. This is clear from the decline in invoking diplomatic protection as an instrument to securing protection of human rights over the last fifty years, commensurate with the ascension of the human rights movement.<sup>32</sup> Judge Trindade’s main concern, which is a continuous thread throughout the book, is that every individual should have a *legitimatío ad causam*, to secure his or her *locus standi in iudicio* to petition any violation of human rights.<sup>33</sup>

Trindade’s third volume also contains three Addenda which should be mentioned. Addendum 1 and 2 provide a translation into Portuguese of the Proclamation of Teheran (1968) and the Declaration and Programme of Action adopted in Vienna (1993). This precludes the intention of the author to publish a final volume that would provide the reader with a translation

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<sup>29</sup> *Id.* at para. 4; see also Trindade, *supra* note 1, at ch.8.

<sup>30</sup> *Id.* at para. 6.

<sup>31</sup> *Id.* at para. 17.

<sup>32</sup> *Id.* at paras. 94-96.

<sup>33</sup> *Id.* at paras. 40, 129-135.

into Portuguese of all the basic international and regional human rights instruments. Addendum 3 should particularly attract the attention of Brazilians as it provides a cursory reading of current developments in the field of protection of international human rights in Brazil. The author published a book in 2000 which covered the same topic over a period of fifty years (1948-1997).

Only if one has the courage to go meticulously through the book, in addition to the wealth of footnotes, and the enormous bibliography at the end of each chapter, will a reader be able to grasp the enormous effort the author has made in this third volume. This reviewer was also pleasantly surprised by references to unexpected sources; such as the draft declaration on human rights elaborated by the International Law Institute in 1929 (notes 277-279).

Finally, the author also provides an Agenda for the 21st century. He lists the following priorities: attempt to overcome the contradictions in the world we live in; provide existing human rights instruments and mechanisms with more efficient tools; develop new forms of protection and its preventive dimension; stimulate the adoption of national measures to implement international human rights law and ensure their direct applicability; and strengthen the international legal standing of the human being claiming rights and ensure the independence of jurisdiction of international tribunals dealing with humanitarian rights.<sup>34</sup> In conclusion, the book and the series as a whole provide the international legal community with an invaluable enrichment of its literature.

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<sup>34</sup> *Id.* at para. 47.