

# REFLECTIONS ON A CENTURY OF INTERNATIONAL JUSTICE: DEVELOPMENTS, CURRENT STATE AND PERSPECTIVES\*

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## ABSTRACT

The realization of the old ideal of justice at international level has considerably advanced in recent years, with the operation of multiple contemporary international tribunals. The expansion of international jurisdiction advances *pari passu* with the expansion of international legal personality and responsibility. Contemporary international tribunals have much contributed to such expansion in all its dimensions. The co-existence of contemporary international tribunals is a phenomenon of our times, in this second decade of the XXIst century. Attention is turned, in a reassuring way, to the much-needed co-ordination and jurisprudential harmony, so as to enhance the access to justice *lato sensu* (that is, the realization of justice itself). This development brings to the fore the relevance of the general principles of law (*prima principia*) and discloses the unity of law: as from the idea of an objective justice, international and national jurisdictions work

## RESÚMEN

*La realización del viejo ideal de justicia en el plano internacional ha avanzado considerablemente en los últimos años, con la operación de los múltiples tribunales internacionales contemporáneos. La expansión de la jurisdicción internacional avanza pari passu con la expansión de la personalidad y responsabilidad jurídicas internacionales. Los tribunales internacionales contemporáneos han contribuido mucho a dicha expansión en todas sus dimensiones. La co-existencia de los tribunales internacionales contemporáneos es un fenómeno de nuestros tiempos, en esta segunda década del siglo XXI. Las atenciones se concentran, de modo alentador, en la co-ordinación y la armonía jurisprudencial, tan necesarias, de modo a fortalecer el acceso a la justicia lato sensu (i.e., la propia realización de la justicia). Este desarrollo destaca la relevancia de los principios generales del derecho (prima principia) y revela la unidad del derecho: a*

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together in the realization of justice, to the ultimate benefit of the human person.

**KEYWORDS:** International tribunals; realization of justice. International jurisdiction, expansion of. Access to justice. General principles of law. Unity of the Law.

*partir de la idea de una justicia objetiva, jurisdicciones internacional y nacional actúan conjuntamente en la realización de la justicia, en beneficio último de la persona humana.*

**PALABRAS CLAVE:** *Tribunales internacionales; realización de la justicia. Jurisdicción internacional, expansión de. Acceso a la justicia. Principios generales del derecho. Unidad del Derecho.*

**SUMMARY:** I. *Prolegomena*. II. The Emergence of International Tribunals. III. A Lesson from the Past. IV. International Justice beyond the Inter-State Dimension. V. The Expansion of International Jurisdiction. VI. The Contribution of Expanded Advisory Jurisdiction. VII. The Move Towards Compulsory Jurisdiction. VIII. The Relevance of General Principles of Law. IX. Interactions between International and Domestic Law: The Unity of the Law. X. Concluding Observations: The Tasks Ahead, and Prospects for the Future. XI. *Post Scriptum*.

## I. PROLEGOMENA.

1. It is an honour and a source of satisfaction to me to deliver this *aula magna* here at the University of Vilnius, on the topic “*Reflections on a Century of International Justice: Developments, Current State and Perspectives*”. This is a subject which has been accompanying me in recent years. Two years ago, I addressed it in the ceremony of commemoration, by the International Court of Justice (ICJ), of the centenary of the Peace Palace at The Hague. And eight years ago I did the same, in the ceremony of commemoration of another centenary, that of the II Hague Peace Conference (of 1907), held in the premises of the Hague Academy of International Law.

2. It is my intention today, 04 September 2015, to share new reflections on the matter with those present in this auditorium. May I at first thank Professor Dainius Žalimas, President of the

Constitutional Court of Lithuania, for his introductory address: I credit his kind words to his generosity. I am very pleased to learn that I am the first Judge of the International Court of Justice to come to Lithuania to address an *aula magna* at the secular and prestigious University of Vilnius: as a scholar of international law, this is a great honour to me.

3. In the course of my presentation, I shall refer, *inter alia*, to developments in the case-law of the Hague Court, - the old Permanent Court of International Justice (PCIJ) as well as the International Court of Justice (ICJ), which I have nowadays the honour to serve. May I take the occasion, preliminarily, to pay tribute, in this auditorium, to the fruitful experience gained by Lithuania already in the era of the PCIJ, in respect of contentious cases (such as those of the *Interpretation of the Statute of the Memel Territory*, Judgment of 11.08.1932, and of the *Panevezys-Saldutiskis Railway*, Judgment of 28.02.1939), as well as of advisory opinions (such as that on the *Railway Traffic between Lithuania and Poland – Railway Sector Landwarów-Kaisiadorys*, Advisory Opinion of 15.10.1931).

## II. THE EMERGENCE OF INTERNATIONAL TRIBUNALS.

4. Turning attention now to the epoch of the emergence of international tribunals, I had the occasion to ponder, in the two aforementioned previous centennial celebrations<sup>1</sup>, that, looking back in time, we find that, by the beginning of last century, there were already calls for the creation of permanent courts or tribunals. This was illustrated by two initiatives, namely: first, to render permanent a Court of Arbitral Justice<sup>2</sup>, as from the model of the Permanent

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1 Cf. A.A. Cançado Trindade, “The Presence and Participation of Latin America at the II Hague Peace Conference of 1907”, in *Actualité de la Conférence de La Haye de 1907, II Conférence de la Paix (Colloque de 2007)* (ed. Y. Daudet), Leiden/La Haye, Académie de Droit International/Nijhoff, 2008, pp. 66-73, and cf. pp. 51-84.

2 Cf. D.J. Bederman, “The Hague Peace Conferences of 1899 and 1907”, in *International Courts for the Twenty-First Century* (ed. M.W. Janis), Dordrecht, Nijhoff, 1992, pp.

Court of Arbitration (PCA) envisaged in the previous I Hague Peace Conference (of 1899), and secondly, to establish an International Prize Court, with access to it granted to individuals.

5. The proposal for a permanent Court of Arbitral Justice as a whole was to project itself on the advent of judicial solution proper, at international level, as it became one of the sources of inspiration for the drafting of the Statute of the PCIJ in 1920<sup>3</sup>. And although the projected International Prize Court set forth in the XII Hague Convention of 1907 never saw the light of day, as the Convention did not enter into force, it presented issues of relevance for the evolution of International Law, namely: first, it foresaw the establishment of a jurisdiction above national jurisdictions to decide on last appeal on maritime prizes; secondly, it provided, for example, in such circumstances, for the access of individuals directly to the international jurisdiction<sup>4</sup>; thirdly, it envisaged a type of international compulsory jurisdiction; and fourthly, it admitted the proposed Court's free authority to decide (the *compétence de la compétence*)<sup>5</sup>.

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- 3 Cf. S. Rosenne, "Introduction", in: PCA, *The Hague Peace Conferences of 1899 and 1907 and International Arbitration - Reports and Documents* (ed. S. Rosenne), The Hague, T.M.C. Asser Press, 2001, p. XXI. And cf. also A. Eyffinger, "A Highly Critical Moment: Role and Record of the 1907 Hague Peace Conference", 54 *Netherlands International Law Review* (2007) n. 2, pp. 217 and 227.
- 4 It was then admitted that the individual is "not without standing in modern international law"; J. Brown Scott, "The Work of the Second Hague Peace Conference", 2 *American Journal of International Law* (1908) p. 22. The view prevailed that it would be in the interests of the States - particularly the small or weaker ones - to avoid giving to this kind of cases the character of inter-State disputes: "les litiges nés des prises garderaient (...) le caractère qu'ils avaient en première instance (...), affaires regardant d'un côté l'État capteur et de l'autre les particuliers"; S. Séfériadès, "Le problème de l'accès des particuliers à des juridictions internationales", 51 *Recueil des Cours de l'Académie de Droit International de La Haye* (1935) pp. 38-40.
- 5 João Cabral, *Evolução do Direito Internacional*, Rio de Janeiro, Typ. Rodrigues & Cia., 1908, pp. 97-98. - On the evolution of this last point (the *compétence de la compétence* of international tribunals), cf., generally, I.F.I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction (Compétence de la Compétence)*, The Hague, Nijhoff, 1965, pp. 1-304.

6. The 1907 debates of the II Hague Peace Conference led to the prevailing view of granting individuals direct appeal before the projected International Prize Court. Yet, it was elsewhere, in Latin America, still in the year of 1907, that the first modern international tribunal - the Central American Court of Justice - came to operate. It did so for ten years, granting access not only to States but also to individuals<sup>6</sup>; in its decade of operation, the Court was seized of ten cases, five lodged with it by individuals and five inter-State cases<sup>7</sup>. It was in this respect truly pioneering<sup>8</sup>, and contributed to the gradual expansion of international legal personality. The very advent of permanent international jurisdiction at the beginning of the XXth. century, before the creation of the PCIJ, was thus *not* marked by a purely inter-State outlook of the international *contentieux*<sup>9</sup>.

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6 A.A. Cançado Trindade, “Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century”, 24 *Netherlands International Law Review / Nederlands Tijdschrift voor internationale Recht* (1977) p. 376.

7 Cf. *ibid.*, pp. 376-377; and cf. F.A. von der Heydte, “L’individu et les tribunaux internationaux”, 107 *Recueil des Cours de l’Académie de Droit International de La Haye* (1962) p. 321.

8 C.J. Gutiérrez, *La Corte de Justicia Centroamericana*, San José de Costa Rica, Edit. Juricentro, 1978, pp. 42, 106 and 150-152.

9 The ideal of an international judicial instance, beyond the inter-State dimension, had already found expression in earlier experiments which granted procedural capacity to individuals, in the era of the League of Nations, such as the systems of minorities (including Upper-Silesia) and of territories under mandates, and the systems of petitions of the Islands Aaland and of the Saar and of Danzig, besides the practice of mixed arbitral tribunals and of mixed claims commissions, of the same epoch; cf. J.-C. Witenberg, “La recevabilité des réclamations devant les juridictions internationales”, 41 *Recueil des Cours de l’Académie de Droit International de La Haye [RCADI]* (1932) pp. 5-135; J. Stone, “The Legal Nature of Minorities Petition”, 12 *British Year Book of International Law* (1931) pp. 76-94; M. Sibert, “Sur la procédure en matière de pétition dans les pays sous mandat et quelques-unes de ses insuffissances”, 40 *Revue générale de droit international public* (1933) pp. 257-272; M. St. Korowicz, *Une expérience en droit international - La protection des minorités de Haute-Silésie*, Paris, Pédone, 1946, pp. 81-174; C.A. Norgaard, *The Position of the Individual in International Law*, Copenhagen, Munksgaard, 1962, pp. 109-128; A.A. Cançado Trindade, “Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century”, 24 *Netherlands International Law Review* (1977) pp. 373-392. Those experiments paved the way, in the era of the United Nations, for the consolidation of the mechanisms of international individual

### III. A LESSON FROM THE PAST.

7. At the time of the drafting and adoption, in 1920, of the Statute of the PCIJ, an option was, however, made for a strictly inter-State dimension for its exercise of the international judicial function in contentious matters. Yet, as I have pointed out in my Separate Opinion (paras. 76-81) in the ICJ's Advisory Opinion (of 2012) on *a Judgment of the ILO Administrative Tribunal upon a Complaint Filed against the IFAD*, the fact that the Advisory Committee of Jurists did not find, in 1920, that the time was ripe to grant access to the PCIJ to subjects of rights other than States (such as individuals), did not mean that a definitive answer had been found to the question at issue. The fact that the same position was maintained at the time of adoption in 1945 of the Statute of the ICJ did not mean a definitive answer to the question at issue either.

8. The question of access of individuals to international justice, with procedural equality, continued to draw the attention of legal doctrine ever since, throughout the decades. Individuals and groups of individuals began to have access to other international instances, reserving the PCIJ, and later on the ICJ, only for disputes between States. The dogmatic position taken originally in 1920, on the occasion of the preparation and adoption of its Statute, did not hinder the PCIJ to occupy itself promptly of cases pertaining to the treatment of minorities and inhabitants of cities or territories with a juridical statute of their own.

9. In considerations developed in the examination of such matters, the PCIJ went well beyond the inter-State dimension, taking into account the position of individuals themselves (as in, e.g., *inter alia*, the Advisory Opinions on *German Settlers in Poland*, 1923; on *the Jurisdiction of the Courts of Danzig*, 1928; on the *Greco-Bulgarian "Communities"*, 1930; on *Access to German Minority Schools in Upper Silesia*, 1931; on *Treatment of Polish Nationals*

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petition; cf. J. Beauté, *Le droit de pétition dans les territoires sous tutelle*, Paris, LGDJ, 1962, pp. 1-256; M.E. Tardu, *Human Rights - The International Petition System*, binders 1-3, Dobbs Ferry N.Y., Oceana, 1979-1985.

*in Danzig*, 1932; on *Minority Schools in Albania*, 1935)<sup>10</sup>. Ever since, the artificiality of that dimension became noticeable and acknowledged, already at an early stage of the case-law of the PCIJ.

10. The option in 1920 (endorsed in 1945) for an inter-State mechanism for judicial settlement of contentious cases, was made, as I have recalled,

(...) not by an intrinsic necessity, nor because it was the sole manner to proceed, but rather and only to give expression to the prevailing viewpoint amongst the members of the Advisory Committee of Jurists in charge of drafting the Statute of the PCIJ. Nevertheless, already at that time, some 90 years ago, International Law was not reduced to a purely inter-State paradigm, and already knew of concrete experiments of access to international instances, in search of justice, on the part of not only States but also of individuals. The fact that the Advisory Committee of Jurists did not consider that the time was ripe for granting access, to the PCIJ, to subjects of law other than the States (e.g., individuals) did not mean a definitive answer to the question (...). (...) Already in the *travaux préparatoires* of the Statute of the PCIJ, the minority position marked presence, of those who favoured the access to the old Hague Court not only of States, but also of other subjects of law, including individuals. This was not the position which prevailed, but the ideal already marked presence, in that epoch, almost one century ago<sup>11</sup>.

11. The dogmatic position of the PCIJ Statute passed on to the ICJ Statute. Once again, the exclusively inter-State character of the *contentieux* before the ICJ has not appeared satisfactory at all. At least in some cases (cf. *infra*), pertaining to the condition of individuals, the presence of these latter (or of their legal representatives), in order to submit, themselves, their positions, would have enriched the proceedings and facilitated the work of the Court. The artificiality of the exclusively inter-State outlook of the procedures before the ICJ

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10 Cf. C. Brölmann, "The PCIJ and International Rights of Groups and Individuals", in *Legacies of the Permanent Court of International Justice* (eds. C.J. Tams, M. Fitzmaurice and P. Merkouris), Leiden, Nijhoff, 2013, pp. 123-143.

11 A.A. Cançado Trindade, *Os Tribunais Internacionais Contemporâneos*, Brasília, FUNAG, 2013, pp. 11-12.

has been disclosed by the very *nature* of some of the cases submitted to it.

12. Such artificiality has been criticised, time and time again, in expert writing, including by a former President of the Court itself. It has been recalled that “nowadays a very considerable part of international law” (e.g., law-making treaties) “directly affects individuals”, and the effect of Article 34(1) of the ICJ Statute has been “to insulate” the Court “from this great body of modern international law”. The ICJ remains thus

trapped by Article 34(1) in the notions about international law structure of the 1920s. (...) It is a matter for concern and for further thought, whether it is healthy for the World Court still to be, like the international law of the 1920s, on an entirely different plane from that of municipal courts and other tribunals<sup>12</sup>.

13. To the same effect, S. Rosenne expressed the view, already in 1967, that there was “nothing inherent in the character of the International Court itself to justify the complete exclusion of the individual from appearing before the Court in judicial proceedings relating of direct concern to him”<sup>13</sup>. The current practice of exclusion of the *locus standi in judicio* of the individuals concerned from the proceedings before the ICJ, - he added -, in addition to being artificial, could also produce “incongruous results”<sup>14</sup>.

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12 R.Y. Jennings, “The International Court of Justice after Fifty Years”, 89 *American Journal of International Law* (1995) p. 504.

13 S. Rosenne, “Reflections on the Position of the Individual in Inter-State Litigation in the International Court of Justice”, in *International Arbitration - Liber Amicorum for M. Domke* (ed. P. Sanders), The Hague, Nijhoff, 1967, p. 249, and cf. p. 242.

14 To him, it was thus highly desirable that that scheme be reconsidered, in order to grant *locus standi* to individuals in proceedings before the ICJ, as “it is in the interests of the proper administration of international justice that in appropriate cases the International Court of Justice should take advantage of all the powers which it already possesses, and permit an individual directly concerned to present himself before the Court, (...) and give his own version of the facts and his own construction of the law”; *ibid.*, p. 250, and cf. p. 243.

14. In a thoughtful International Symposium convened by the Max Planck Institute for Comparative Public Law and International Law in the early seventies, wherein the perceptions of judicial settlement of disputes were clearly disclosed, a lack of enthusiasm with judicial settlement was expressed by some participants<sup>15</sup>, as - in the view of one of them - “States were moving further and further away from the rule of law as the basis of their behaviour”<sup>16</sup>. The requirements of the rule of law, and of the unity of law, did not pass unnoticed. Furthermore, the need for consistency in international case-law was pointed out; significantly, already at that time the need was acknowledged of the creation of other international tribunals, and the view was expressed that the dynamics of international relations had already long surpassed the anachronistic inter-State dimension (as by then evidenced by the rise and growth of international organizations)<sup>17</sup>.

15. In my address in the centennial celebration of 23.09.2013 at The Hague, I deemed it fit to recall that the understanding that the *corpus juris gentium* applies to States and individuals alike is deeply-rooted in jusinternationalist thinking, - with roots going back, through the lessons of the “founding fathers” of international law (like F. Vitoria, F. Suárez and H. Grotius), to the classics upholding the *recta ratio*, such as the masterly *De Officiis* of Cicero. The subsequent devising of the strictly inter-State dimension (in the late XIXth. and in the XXth. centuries) represented an *involution*, with disastrous consequences. Fortunately, in the last decades, States themselves seem to have been acknowledging this, in lodging with the ICJ successive cases and matters which clearly transcend the inter-State level.

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15 Cf. [Various Authors,] *Judicial Settlement of International Disputes* (International Symposium, Max Planck Institute for Comparative Public Law and International Law), Berlin/Heidelberg, Springer Verlag, 1974, pp. 165-167, 169-170 and 189.

16 *Ibid.*, p. 168.

17 *Ibid.*, pp. 171, 173, 180, 182 and 187.

16. And the ICJ has been lately responding, at the height of these new challenges and expectations, in taking into account, in its decisions, the situation not only of States, but also of peoples, of individuals or groups of individuals alike (cf. *infra*). The gradual realization - that we witness, and have the privilege to contribute to, nowadays, - of the old ideal of justice at international level<sup>18</sup> has been revitalizing itself, in recent years, with the reassuring creation and operation of the multiple contemporary international tribunals.

17. This is a theme which has definitively assumed a prominent place in the international agenda of this second decade of the XXIst. century. Since the visionary ideas and early writings, of some decades ago, - of B.C.J. Loder, André Mandelstam, Nicolas Politis, Jean Spiropoulos, Alejandro Álvarez, Raul Fernandes, Édouard Descamps, Albert de La Pradelle, René Cassin, James Brown Scott, Georges Scelle, Max Huber, Hersch Lauterpacht, John Humphrey, among others<sup>19</sup>, - it was necessary to wait for some decades for the current developments in the realization of international justice to take place, not without difficulties<sup>20</sup>, now enriching and enhancing international law.

#### IV. INTERNATIONAL JUSTICE BEYOND THE INTER-STATE DIMENSION.

18. Nowadays, the international community fortunately counts on a wide range of international tribunals, adjudicating cases that take place not only at *inter-State* level, but also at *intra-State* level. This invites us to approach their work from the correct perspective of the *justiciables* themselves<sup>21</sup>, and brings us closer to their common

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18 For a general study, cf., e.g., J. Allain, *A Century of International Adjudication - The Rule of Law and Its Limits*, The Hague, T.M.C. Asser Press, 2000, pp. 1-186.

19 A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, pp. 7-11.

20 Cf., *inter alia*, e.g., G. Fouda, "La justice internationale et le consentement des États", in *International Justice - Thesaurus Acroasium*, vol. XXVI (ed. K. Koufa), Thessaloniki, Sakkoulas Publs., 1997, pp. 889-891, 896 and 900.

21 A.A. Cançado Trindade, *Évolution du Droit international au droit des gens - L'accès*

mission of securing the realization of international justice, either at *inter-State* or at *intra-State* level. From the standpoint of the needs of protection of the *justiciables*, each international tribunal has its importance, in a wider framework encompassing the most distinct situations to be adjudicated, in each respective domain of operation.

19. In a Colloquium organized to celebrate, in 1996, the 50<sup>th</sup> anniversary of the ICJ, critical views were expressed as to the traditional features of the inter-State mechanism of adjudication of contentious cases before the ICJ, which has kept on defying the passing of time to. A couple of examples were evoked as illustrations, such as the settlement of disputes on environmental issues<sup>22</sup>, requiring a wider range of participants in the procedure. One guest speaker, for example, recalled the manifest inadequacy of that mechanism in the handling of the case of the *Application of the 1902 Convention on the Guardianship of Infants (1958)*<sup>23</sup>. Another guest speaker was particularly critical of the handling of the *East Timor* case (1995), where the East Timorese people had no *locus standi* to request intervention in the proceedings, not even to present an *amicus curiae*, although the crucial point under consideration was that of sovereignty over their territory.

20. Worse still, the interests of a third State (which had not even accepted the Court's jurisdiction) were taken for granted for the purpose of protection, and promptly safeguarded by the Court, at no cost to itself, by means of the application of the so-called *Monetary Gold* "principle"<sup>24</sup>. This workshop is an occasion for

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des particuliers à la justice internationale: le regard d'un juge, Paris, Pédone, 2008, pp. 1-187.

22 M. Fitzmaurice, "Equipping the Court to Deal with Developing Areas of International Law: Environmental Law - Presentation", in: *Increasing the Effectiveness of the International Court of Justice...*, *op. cit. infra* n. (24), pp. 398-418.

23 S. Rosenne, "Lessons of the Past and Needs of the Future - Presentation", in: *Increasing the Effectiveness of the International Court of Justice (1996 Colloquy - eds. C. Peck and R.S. Lee)*, The Hague, Nijhoff, 1997, pp. 487-488, and cf. pp. 466-492.

24 C. Chinkin, "Increasing the Use and Appeal of the Court - Presentation", in *ibid.*, pp. 47-48, 53 and 55-56.

further reflection, rather than self-praise: the fact remains that inconsistencies of the kind have survived the passing of the century, and have now reached the centennial celebration of the Peace Palace. The aforementioned examples are far from being the only ones. They in fact abound in the ICJ history.

21. In respect of situations concerning individuals or groups of individuals, reference can further be made, e.g., to the *Nottebohm* case (1955) pertaining to double nationality; to the cases of the *Trial of Pakistani Prisoners of War* (1973), and of the *Hostages (U.S. Diplomatic and Consular Staff) in Teheran* case (1980); to the case of the *Application of the Convention against Genocide* (1996 and 2007); to the case of the *Frontier Dispute between Burkina Faso and Mali* (1998); to the triad of cases concerning consular assistance - namely, the cases *Breard* (1998), the case *LaGrand* (Germany *versus* United States, 2001), the case *Avena and Others* (Mexico *versus* United States, 2004).

22. In respect of those cases, one cannot fail to reckon that one of their predominant elements was precisely the concrete situation of the individuals directly affected, and not merely abstract issues of exclusive interest of the litigating States in their relations *inter se*. Moreover, one may further recall that, in the case of *Armed Activities in the Territory of Congo* (D.R. Congo *versus* Uganda, 2000), the ICJ was concerned with grave violations of human rights and of International Humanitarian Law; and the *Land and Maritime Boundary between Cameroon and Nigeria* (1996) was likewise concerned with the victims of armed clashes.

23. More recently, examples wherein the Court's concerns have had to go beyond the inter-State outlook have further increased in frequency. They include, e.g., the case on *Questions Relating to the Obligation to Prosecute or Extradite* (2009-2013) pertaining to the principle of universal jurisdiction under the U.N. Convention against Torture, the case of *A.S. Diallo* (Guinea *versus* D.R. Congo, 2010) on detention and expulsion of a foreigner, the case of the *Jurisdictional Immunities of the State* (2010-2012), the case of the *Application of the International Convention on the Elimination*

of *All Forms of Racial Discrimination* (2011), and the case of the *Temple of Preah Vihear* (provisional measures, 2011).

24. The same can be said of the two last Advisory Opinions of the Court, on the *Declaration of Independence of Kosovo* (2010), and on a *Judgment of the ILO Administrative Tribunal upon a Complaint Filed against the IFAD* (2012), respectively. The artificiality of the exclusively inter-State outlook has thus been made often manifest, and increasingly so; that outlook rests on a longstanding dogma of the past, which has survived to date as a result of mental lethargy. Those more recent contentious cases, and requests for Advisory Opinions, lodged with the Court, have asked this latter, by reason of their subject-matter, to overcome that outlook.

25. Even if the mechanism of dispute-settlement by the ICJ remains strictly or exclusively inter-State, the *substance* of those disputes or issues brought before the Court pertains also to the human person, as the aforementioned cases and Opinions clearly show. The truth is that the strictly inter-State outlook has an ideological content, is a product of its time, a time long past. In these more recent decisions (1999-2013), the ICJ has at times rightly endeavoured to overcome that outlook, so as to face the new challenges of our times, brought before it in the contentious cases and requests of Advisory Opinions it has been seized of. I shall come back to this point in my concluding observations (*infra*).

#### IV. THE EXPANSION OF INTERNATIONAL JURISDICTION.

26. The United Nations era has in effect been marked by the rise of multiple international tribunals. This is, in my perception, a reassuring phenomenon, which has filled a gap which persisted in the international legal order. It has contributed to the access to justice, at international level. The international procedural capacity of individuals has been exercised before *international human rights tribunals*, thanks to the system of international individual petitions<sup>25</sup>:

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25 A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales*

the European Court of Human Rights (ECtHR), which celebrated its 60<sup>th</sup> anniversary in 2010, and the Inter-American Court of Human Rights (IACtHR), which celebrated its 30<sup>th</sup> anniversary in 2009, have more recently (in 2006) been followed by African Court of Human and Peoples' Rights (ACtHPR).

27. Their contribution to the historical recovery of the position of the human person as subject of the law of nations (*droit des gens*) constitutes, in my understanding, the most important legacy of the international legal thinking of the last six decades<sup>26</sup>. The mechanism of the ECtHR has already evolved into the conferment of *jus standi* of individuals directly before the Court; that of the IACtHR has reached the stage of conferring *locus standi in judicio* to individuals in all stages of the procedure before the Court; each one lives its own historical moment, and operates in it, within the framework of the universality of human rights.

28. Another basic feature, and a remarkable contribution of the work of the European and Inter-American Courts is found in the position they have both firmly taken of setting limits to State voluntarism, thus safeguarding the integrity of the respective human rights Conventions and the primacy of considerations of *ordre public* over the will of individual States. This is illustrated, e.g., by the ECtHR's decisions in the cases of *Belilos* (1988), of *Loizidou* (preliminary objections, 1995), and of *Ilascu, Lesco, Ivantoc and Petrov-Popa* (2001), as well as, e.g., by the IACtHR's decisions in the cases of the *Constitutional Tribunal* and of *Ivtcher Bronstein* (jurisdiction, 1999), as well as of *Hilaire, Benjamin and Constantine* (preliminary objection, 2001).

29. Both international tribunals have thus set higher standards of State behaviour and have established some degree of control over the interposition of undue restrictions by States; they have

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*de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 34-35.

26 A.A. Cançado Trindade, *Évolution du Droit international au droit des gens...*, op. cit, supra n. (22), pp. 1-187; A.A. Cançado Trindade, *Le Droit international pour la personne humaine*, Paris, Pédone, 2012, pp. 45-368.

thereby reassuringly enhanced the position of individuals as subjects of international law, with full procedural capacity. By correctly resolving basic procedural issues raised in the aforementioned cases, both international tribunals have aptly made use of the techniques of public international law in order to strengthen their respective jurisdictions of protection of the human person, emancipated *vis-à-vis* her own State<sup>27</sup>. International human rights tribunals have drawn attention to the position of *centrality* of the victims, the *justiciables*.

30. Contemporary *international criminal tribunals* saw the light of day along the nineties, bearing in mind the precedents of the Nuremberg and the Tokyo Tribunals of the post-II world war. *Ad hoc* international criminal tribunals (for the Former Yugoslavia and for Rwanda) were established (in 1993 and 1994), by decision of the U.N. Security Council in the light of chapter VII of the U.N. Charter. They were followed by the permanent International Criminal Court (ICC - Rome Statute of 1998), and by the so-called “internationalized” or “hybrid” or mixed international tribunals (for Sierra Leona, East Timor, Kosovo, Bosnia-Herzegovina, Cambodia and Lebanon).

31. Each of these tribunals has contributed, in its own way, to the determination of the accountability of those responsible for grave violations of human rights and of international humanitarian law. They afford yet another illustration of the rescue of the international legal personality (and responsibility) of individuals, but, ironically, first as *passive* subjects of international law (international criminal tribunals), and, only afterwards, as *active* subjects of international law (international human rights tribunals).

32. Such developments, due to a reaction of the conscience of humankind against crimes against peace, crimes against humanity,

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27 A.A. Cançado Trindade, “The Trans-Atlantic Perspective: The Contribution of the Work of the International Human Rights Tribunals to the Development of Public International Law”, in: *The European Convention on Human Rights at 50 - Human Rights Information Bulletin*, n. 50 (Special Issue), Strasbourg, Council of Europe, 2000, pp. 8-9; A.A. Cançado Trindade, “The Merits of Coordination of International Courts on Human Rights”, 2 *Journal of International Criminal Justice* ( 2004) pp. 309-312.

grave violations of human rights and of International Humanitarian Law, give testimony of the expansion not only of international personality (and capacity), but also of international jurisdiction and of international responsibility. This is a notable feature of our times, in this present era of international tribunals.

33. Their determination of responsibility, - with all its legal consequence, - has exercised a key role in the struggle against impunity. While international human rights tribunals determine the responsibility of States, international criminal tribunals determine the responsibility of individuals. Anywhere in the world, it is reckoned nowadays that the perpetrators of grave violations of human rights (be them States or individuals), as well as those responsible for acts of genocide, war crimes and crimes against humanity, ought to respond judicially for the atrocities committed, irrespective of their nationality or the position held in the hierarchical scale of the public power of the State.

34. Thanks to the work of those international tribunals, the international community no longer accepts impunity for international crimes, for *grave* violations of human rights and of international humanitarian law<sup>28</sup>. The determination of the international criminal responsibility of individuals by those tribunals is a reaction of contemporary international law to *grave* violations, guided by fundamental principles, and values shared by the international community as a whole<sup>29</sup>. There is no more room for impunity, with the present-day configuration of a true *droit au Droit*, of the persons victimized in any circumstances, including amidst the most complete adversity<sup>30</sup>. International human rights

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28 E. Möse, "Main Achievements of the ICTR", 3 *Journal of International Criminal Justice* (2005) pp. 932-933; E. Möse, "The International Criminal Tribunal for Rwanda", in *International Criminal Justice - Law and Practice from the Rome Statute to Its Review* (ed. R. Bellelli), Farnham/U.K., Ashgate, 2010, p. 90. And cf. also, likewise, A. Cassese, "The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice", 25 *Leiden Journal of International Law* (2012) p. 497.

29 S. Zappalà, *La justice penale internationale*, Paris, Montchrestien, 2007, pp. 15, 19, 23, 29, 31, 34-35, 43, 135, 137 and 145-146.

30 A.A. Cançado Trindade, *The Access of Individuals to International Justice*, *op. cit. supra*

tribunals as well as international criminal tribunals have operated decisively to put an end to impunity.

35. Their jurisprudential advances in recent years were unforeseeable, and even unthinkable, some decades ago<sup>31</sup>. International human rights tribunals have helped to awaken public conscience in respect of situations of utmost adversity or even defenselessness affecting individuals, and of widespread violence victimizing vulnerable segments of the population<sup>32</sup>. They have, in effect, brought justice to those victimized, even in situations of systematic and generalized violence, and mass atrocities. They have thus contributed, considerably and decisively, to the primacy of the *rule of law* at national and international levels, demonstrating that no one is above the law, - neither the rulers, nor the ruled, nor the States themselves. International law applies directly to States, to international organizations, and to individuals<sup>33</sup>.

36. In our days, the more lucid international legal doctrine has at last discarded empty euphemistic expressions used some years ago, - such as so-called “proliferation” of international tribunals, so-called “fragmentation” of international law, so-called “forum-shopping”, - which diverted attention to false issues of delimitation of competences, oblivious of the need to focus it on the imperative of an enlarged access to justice. Those expressions, narrow-minded and inelegant and derogatory, and devoid of any meaning, paid a disservice to our discipline; they missed the key point of the considerable advances

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n. (20), pp. 196-198, and cf. pp. 132-191.

31 As to the growing importance currently devoted to the theme, cf. Y. Beigbeder, *International Justice against Impunity - Progress and New Challenges*, Leiden, Nijhoff, 2005, pp. 1-235.

32 Cf., as to the ECtHR, e.g., M.D. Goldhaber, *A People's History of the European Court of Human Rights*, New Brunswick/London, Rutgers University Press, 2009, pp. 2, 11, 57, 123, 126-127, 149-151, 155-158 and 168; and, as to the IACtHR, e.g., A.A. Cançado Trindade, “Die Entwicklung des interamerikanischen Systems zum Schutz der Menschenrechte”, 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2010) pp. 629-699.

33 A.A. Cançado Trindade, *Os Tribunais Internacionais Contemporâneos*, *op. cit. supra* n. (12), pp. 109-110.

of the old ideal of international justice in the contemporary world.

37. It has become clear today that contemporary international tribunals, rather than threatening the cohesion of international law, enrich and strengthen it, in asserting its aptitude to resolve disputes in distinct domains of international law, at both *inter-State* and *intra-State* levels (cf. *supra*). Contemporary international law has thereby become more responsive to the fulfillment of the basic needs of the international community, of human beings and of humankind as a whole, amongst which that of the realization of justice.

38. The expansion of international jurisdiction by the establishment of contemporary international tribunals is but a reflection of the way contemporary international law has evolved, no longer indifferent to human suffering, and of the current search for, and construction of a *corpus juris* for the international community guided by the *rule of law* in democratic societies and committed to the realization of justice.

39. In the performance of their common mission of imparting justice, contemporary international tribunals have begun to take into account each other's case-law<sup>34</sup>. Jurisprudential cross-fertilization, furthermore, exerts a constructive function in the safeguard of the rights of the *justiciables*. It is thus to be expected that contemporary international tribunals remain increasingly aware of the case-law of each other, in their continuing performance of their common mission of imparting justice in distinct domains of international law<sup>35</sup>, thus preserving its basic *unity* (cf. *infra*). This

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34 For examples, cf. A.A. Cançado Trindade, "Contemporary International Tribunals: Their Jurisprudential Cross-Fertilization Pertaining to Human Rights Protection", in *The Global Community - Yearbook of International Law and Jurisprudence* (2011 Contemporary International) vol. I, Oceana, N.Y., 2012, pp. 309-319; A.A. Cançado Trindade, "Contemporary International Tribunals: Their Continuing Jurisprudential Cross-Fertilization, with Special Attention to the International Safeguard of Human Rights", in *The Global Community - Yearbook of International Law and Jurisprudence* (2012) vol. I, Oceana, N.Y., 2013, pp. 181-188.

35 A.A. Cançado Trindade, "Contemporary International Tribunals: Their Continuing Jurisprudential Cross-Fertilization, in Their Common Mission of Imparting Justice", in *The Global Community - Yearbook of International Law and Jurisprudence* (2013) vol. I, Oceana, N.Y., 2014, pp. 155-160; and cf., in general, e.g., G. de Vergottini and J.-J. Pardini, *Au-delà du dialogue entre les Cours*, Paris, Dalloz, 2013, pp. 39-138.

is to the benefit of the international community as a whole, and of all the *justiciables*, all subjects of law around the world, - States, international organizations and individuals alike.

## VI. THE CONTRIBUTION OF EXPANDED ADVISORY JURISDICTION.

40. It was with the PCIJ that, for the first time, an international tribunal was attributed the advisory function, - surrounded as it was by much discussion. It was originally conceived to assist the Assembly and the Council of the League of Nations, by the PCIJ, making good use of it, ended up by assisting not only those organs, but States as well: among the 27 Advisory Opinions it delivered, 17 of them addressed then existing aspects of disputes between States. It thus contributed to the avoidance of full-blown contentious proceedings, and exercise a preventive function, to the benefit of judicial settlement itself of international disputes<sup>36</sup>. The advisory function, as exercised by the PCIJ, thus contributed also to the progressive development of international law.

41. Ever since the advisory jurisdiction expanded. While the PCIJ Statute enabled only the League Council and Assembly to request Advisory Opinions, the ICJ Statute enabled other United Nations organs (besides de General Assembly, the Security Council and ECOSOC) and specialized agencies and others to do so, and the ICJ has issued 27 Advisory Opinions to date. Other contemporary international tribunals have been endowed with the advisory jurisdiction, and there are examples of frequent use made of it, such as the advisory jurisprudential construction of the IACtHR.

42. Advisory Opinions of the ICJ, on their part, can also contribute, and have indeed done so, to the prevalence of the *rule*

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36 M.G. Samson and D. Guilfoyle, "The Permanent Court of International Justice and the 'Invention' of International Advisory Jurisdiction", in *Legacies of the Permanent Court of International Justice* (eds. C.J. Tams, M. Fitzmaurice and P. Merkouris), Leiden, Nijhoff, 2013, pp. 41-45, 47, 55-57 and 63.

of law at national and international levels. Some of them have, likewise, contributed to the progressive development of international law (e.g., the ones on *Reparation for Injuries*, 1949; on *Namibia*, 1970; on *Immunity from Legal Process of a Special Rapporteur of the U.N. Commission on Human Rights*, 1999; among others). The same can be said of some of the Advisory Opinions of the IACtHR (e.g., the ones on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 1999; on the *Juridical Condition and Human Rights of the Child*, 2002; on the *Juridical Condition and Rights of Undocumented Migrants*, 2003).

## VII. THE MOVE TOWARDS COMPULSORY JURISDICTION.

43. It is not my intention today, in this *aula magna* at the University of Vilnius, to dwell upon the bases of jurisdiction of contemporary international tribunals, as I have already done so in detail elsewhere<sup>37</sup>, and recently in my lengthy Dissenting Opinion (paras. 1-214) in the ICJ's Judgment (of 01.04.2011) in the case of the *Application of the Convention on the Elimination of All Forms of Racial Discrimination*; but I cannot refrain from recalling today the difficulties experienced in the long path towards compulsory jurisdiction.

44. Throughout the last decades, advances could have been much greater if State practice would not have undermined or betrayed the purpose which originally inspired the creation of the mechanism of the optional clause of compulsory jurisdiction (of the PCIJ and the ICJ), that is, the submission of political interests to Law, rather than

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37 A.A. Cançado Trindade, "Towards Compulsory Jurisdiction: Contemporary International Tribunals and Developments in the International Rule of Law - Part I", in XXXVII *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - 2010*, Washington D.C., OAS General Secretariat, 2011, pp. 233-259; A.A. Cançado Trindade, "Towards Compulsory Jurisdiction: Contemporary International Tribunals and Developments in the International Rule of Law - Part II", in XXXVIII *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - 2011*, Washington D.C., OAS General Secretariat, 2012, pp. 285-366.

the acceptance of compulsory jurisdiction the way one freely wishes. Only in this way would one, as originally envisaged, achieve greater development in the realization of justice at international level on the basis of compulsory jurisdiction. The foundation of compulsory jurisdiction lies, ultimately, in the confidence in the *rule of law* at international level<sup>38</sup>. The very nature of a court of justice (beyond traditional arbitration) calls for compulsory jurisdiction<sup>39</sup>. Conscience stands above the will.

45. Soon renewed hopes to that effect were expressed in compromissory clauses enshrined into multilateral and bilateral treaties<sup>40</sup>. These hopes have grown in recent years, with the increasing recourse to compromissory clauses as basis of jurisdiction<sup>41</sup>. In any case, be that as it may, the ICJ retains at least the power and duty to address *motu proprio* the issue of jurisdiction<sup>42</sup>. The time has come to overcome definitively the regrettable lack of automatism of the international jurisdiction, which, despite all difficulties, is no longer an academic dream or utopia, but has become reality in respect of some international tribunals.

46. I pointed this out in my General Course on Public International Law delivered at the Hague Academy of International Law in 2005, wherein, *inter alia*, I reviewed the developments in the domain of

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38 Cf., in this sense, C.W. Jenks, *The Prospects of International Adjudication*, London, Stevens, 1964, pp. 101, 117, 757, 762 and 770.

39 Cf., in this sense, B.C.J. Loder, "The Permanent Court of International Justice and Compulsory Jurisdiction", 2 *British Year Book of International Law* (1921-1922) pp. 11-12. And cf., earlier on, likewise, N. Politis, *La justice internationale*, Paris, Libr. Hachette, 1924, pp. 7-255, esp. pp. 193-194 and 249-250.

40 E. Hambro, "Some Observations on the Compulsory Jurisdiction of the International Court of Justice", 25 *British Year Book of International Law* (1948) p. 153.

41 Cf. R. Szafarz, *The Compulsory Jurisdiction of the International Court of Justice*, Dordrecht, Nijhoff, 1993, pp. 4, 31-32, 83 and 86; R.P. Anand, "Enhancing the Acceptability of Compulsory Procedures of International Dispute Settlement", 5 *Max Planck Yearbook of United Nations Law* (2001) pp. 5-7, 11, 15 and 19.

42 R.C. Lawson, "The Problem of the Compulsory Jurisdiction of the World Court", 46 *American Journal of International Law* (1952) pp. 234 and 238, and cf. pp. 219, 224 and 227.

peaceful settlement of international disputes well beyond State voluntarism, and keeping in mind the general concerns of the international community<sup>43</sup>. More recently, I have reiterated that

International jurisdiction is becoming, in our days, an imperative of the contemporary international legal order itself, and compulsory jurisdiction responds to a need of the international community in our days; although this latter has not yet been fully achieved, some advances have been made in the last decades<sup>44</sup>. The Court of Justice of the European Communities provides one example of supranational compulsory jurisdiction, though limited to community law or the law of integration. The European Convention of Human Rights, after the entry into force of Protocol n. 11 on 01.11.1998, affords another conspicuous example of automatic compulsory jurisdiction. The International Criminal Court is the most recent example in this regard; although other means were contemplated throughout the *travaux préparatoires* of the 1998 Rome Statute (such as cumbersome 'opting in' and 'opting out' procedures), at the end compulsory jurisdiction prevailed, with no need for further expression of consent on the part of States Parties to the Rome Statute. This was a significant decision, enhancing international jurisdiction.

The system of the 1982 U.N. Convention on the Law of the Sea, in its own way, moves beyond the traditional regime of the optional clause of the ICJ Statute. It allows States Parties to the Convention the option between the International Tribunal for the Law of the Sea, or the ICJ, or else arbitration (Article 287); despite the exclusion of certain matters, the Convention succeeds in establishing a compulsory procedure containing coercitive elements; the specified choice of procedures at least secures law-abiding settlement of

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43 A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law - Part II", 317 *Recueil des Cours de l'Académie de Droit International de la Haye* (2005), chapters XXIV-XXV, pp. 173-245.

44 H. Steiger, "Plaidoyer pour une juridiction internationale obligatoire", in *Theory of International Law at the Threshold of the 21st Century - Essays in Honour of K. Skubiszewski* (ed. J. Makarczyk), The Hague, Kluwer, 1996, pp. 818, 821-822 and 832; and cf. R.St.J. MacDonald, "The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice", 8 *Canadian Yearbook of International Law* (1970) pp. 21, 33 and 37.

disputes under the U.N. Law of the Sea Convention<sup>45</sup>. In addition to the advances already achieved to this effect, reference could also be made to recent endeavours in the same sense.

These illustrations suffice to disclose that compulsory jurisdiction is already a reality, - at least in some circumscribed domains of International Law, as indicated above. International compulsory jurisdiction is, by all means, a juridical possibility. If it has not yet been attained on a world-wide level, in the inter-State *contentieux*, this cannot be attributed to an absence of juridical viability, but rather to misperceptions of its role, or simply to a lack of conscience as to the need to widen its scope. Compulsory jurisdiction is a manifestation of the recognition that International Law, more than voluntary, is indeed *necessary*<sup>46 47</sup>.

47. An international tribunal such as the Court of Justice of the European Communities (CJEC), for example, has contributed considerably to the consolidation of the *autonomous* nature of community law, to its effectiveness and to the specificity of Community treaties, and to the identification of the essential characteristics of the Community legal order<sup>48</sup> (such as its primacy

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45 L. Caflisch, “Cent ans de règlement pacifique des différends interétatiques”, 288 *Recueil des Cours de l’Académie de Droit International de La Haye* (2001) pp. 365-366 and 448-449; J. Allain, “The Future of International Dispute Resolution - The Continued Evolution of International Adjudication”, in *Looking Ahead: International Law in the 21st Century* (Proceedings of the 29th Annual Conference of the Canadian Council of International Law, Ottawa, October 2000), The Hague, Kluwer, 2002, pp. 61-62.

46 One such example is found in the Proposals for a Draft Protocol to the American Convention on Human Rights, which I prepared as *rapporteur* of the IACtHR, which *inter alia* advocates an amendment to Article 62 of the American Convention so as to render the jurisdiction of the IACtHR in contentious matters automatically compulsory upon ratification of the Convention. Cf. A.A. Cançado Trindade, *Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección*, vol. II, 2nd. ed., San José of Costa Rica, Inter-American Court of Human Rights, 2003, pp. 1-64.

47 A.A. Cançado Trindade, “Towards Compulsory Jurisdiction: Contemporary International Tribunals and Developments in the International Rule of Law - Part II”, in *op. cit. supra* n. (38), pp. 310-311.

48 Cf., e.g., P.J.G. Kapteyn, “The Role of the Court of Justice in the Development of the Community Legal Order”, in *Il Ruolo del Giudice Internazionale nell’Evoluzione del Diritto Internazionale e Comunitario - Atti del Convegno di Studi in Memoria di G. Morelli* (Università di Reggio Calabria, 1993 - ed. F. Salerno), Padova, CEDAM, 1995,

over the law of member States, and the direct effect of several of its provisions, applicable alike to their nationals and to member States themselves). The aforementioned advances towards *compulsory* international jurisdiction seek indeed to secure the primacy of the *jus necessarium* over the *jus voluntarium*.

48. I would add that the present-day phenomenon of the multiplicity of international tribunals is in effect related to the move towards international compulsory jurisdiction<sup>49</sup>. As to the ICJ, the original purpose of the optional clause (Article 36(2) of the Statute) was to attract general acceptance so as to establish international compulsory jurisdiction, in the light of the principle of juridical equality of States; the subsequent practice of adding restrictions - at each State's free will - to the acceptance of the optional clause distorted the purpose originally propounded. But there is today renewed hope in the growing use of compromissory clauses, as jurisdictional basis in the *contentieux* before the ICJ; for their consideration one is, in my view, to take into account the respective conventions as a whole (including their object and purpose), in the path towards international compulsory jurisdiction.

## VIII. THE RELEVANCE OF GENERAL PRINCIPLES OF LAW.

49. This brings me to the general principles of law as the next point to consider, to which I turn attention now. General principles of law, enlisted among the formal sources of international law (Article 38 of the ICJ Statute), encompass those found in all national legal systems<sup>50</sup> (thus ineluctably linked with the very foundations

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pp. 161-162, 165-167 and 170-173. And cf., recently, e.g., A. von Bogdandy, *I Principi Fondamentali dell'Unione Europea - Un Contributo allo Sviluppo del Costituzionalismo Europeo*, Roma, Edit. Scientifica, 2011, pp. 63-137.

49 Cf. H. Ascensio, "La notion de juridiction internationale en question", in *La juridictionnalisation du droit international* (SFDI, Colloque de Lille de 2002), Paris, Pédone, 2003, pp. 192-194; E. McWhinney, *Judicial Settlement of International Disputes - Jurisdiction, Justiciability and Judicial Law-Making on the Contemporary International Court*, Dordrecht, Nijhoff, 1991, p. 13.

50 Cf. H. Mosler, "To What Extent Does the Variety of Legal Systems of the World Influence

of Law), and likewise the general principles of international law<sup>51</sup>. Such principles, in my own conception, inform and conform the norms and rules of international law, being a manifestation of the universal juridical conscience; in the *jus gentium* in evolution, basic considerations of humanity play a role of the utmost importance<sup>52</sup>.

50. The aforementioned general principles of law have always marked presence in the search for Justice, despite the distinct perceptions of this latter in distinct countries. International human rights tribunals and international criminal tribunals have ascribed great importance to such general principles of law<sup>53</sup>. Those principles have been reaffirmed time and time again, and retain full validity in our days. Legal positivism has always attempted, in vain, to minimize their role, but the truth is that, without those principles, there is no legal system at all, be it national or international. They give expression to the idea of an *objective justice*, paving the way to the application of the *universal* international law, the new *jus gentium* of our times<sup>54</sup>.

51. I have had the occasion to ponder, for example, in my Concurring Opinion in the ground-breaking Advisory Opinion n.

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the Application of the General Principles of Law within the Meaning of Article 38(1) (c) of the Statute of the International Court of Justice”, in *International Law and the Grotian Heritage* (Hague Colloquium of 1983), The Hague, T.M.C. Asser Instituut, 1985, pp. 173-185.

51 It is not surprising that the heralds of absolute sovereignty of the past have resisted to the applicability to the general principles of law at international level; F.O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, Leiden, Nijhoff, 2008, pp. 59 and 41.

52 A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, 2<sup>nd</sup>. rev. ed., Leiden/The Hague, Nijhoff, 2013, pp. 1-726.

53 To this effect, cf., *inter alia*, e.g., K. Grabarczyk, *Les principes généraux dans la jurisprudence de la Cour Européenne des Droits de l’Homme*, Aix-Marseille, Presses Universitaires d’Aix-Marseille, 2008, pp. 375-473; M. Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal - A Judge’s Recollection*, Oxford, Oxford University Press, 2012, pp. 55, 57, 86, 88-89, 185 and 203.

54 A.A. Cançado Trindade, *International Law for Humankind...*, *op. cit. supra* n. (53), pp. 1-726.

18, de 17.09.2003, of the IACtHR, on the *Juridical Condition and Rights of Undocumented Migrants*:

Every legal system has fundamental principles, which inspire, inform and conform their norms. It is the principles (derived etymologically from the Latin *principium*) that, evoking the first causes, sources or origins of the norms and rules, confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole. It is the general principles of law (*prima principia*) which confer to the legal order (both national and international) its ineluctable axiological dimension; it is they that reveal the values which inspire the whole legal order and which, ultimately, provide its foundations themselves. This is how I conceive the presence and the position of the principles in any legal order, and their role in the conceptual universe of Law. (...)

From the *prima principia* the norms and rules emanate, which in them find their meaning. The principles are thus present in the origins of Law itself. The principles show us the legitimate ends to seek: the common good (of all human beings, and not of an abstract collectivity), the realization of justice (at both national and international levels), the necessary primacy of law over force, the preservation of peace. Contrary to those who attempt - in my view in vain - minimize them, I understand that, if there are no principles, nor is there truly a legal system. Without the principles, the 'legal order' simply is not accomplished, and ceases to exist as such" (paras. 44 and 46).

52. An international tribunal like the ICJ has resorted to general principles of law (recognized in domestic legal system and in international law) in its *jurisprudence constante*. For their part, international human rights tribunals have always kept in mind the principle of the dignity of the human person, as well as the principle (*pro victima*) of the application of the norm most favourable to the victim. And international criminal tribunals have kept in mind the principle of humanity, as well as the principle of universal jurisdiction; and one may add, in respect of the ICC, the principle of complementarity (enshrined in its Statute), - to refer to some examples.

53. From this outlook, the basic posture of an international tribunal can only be *principiste*, without making undue concessions

to State voluntarism. I had the occasion of pointing this out, as guest speaker, in the opening of the judicial year of the ECtHR, on 22.01.2004, at the *Palais des Droits de l'Homme* in Strasbourg, in the following terms:

La Cour européenne et la Cour interaméricaine ont toutes deux, à juste titre, imposé des limites au volontarisme étatique, protégé l'intégrité de leurs Conventions respectives des droits de l'homme, ainsi que la prépondérance des considérations d'*ordre public* face à la volonté de tel ou tel État, élevé les exigences relatives au comportement de l'État, instauré un certain contrôle sur l'imposition de restrictions excessives par les États, et, de façon rassurante, mis en valeur le statut des individus en tant que sujets du Droit International des Droits de l'Homme en les dotant de la pleine capacité sur le plan procédural<sup>55</sup>.

54. More recently, within the ICJ, I have likewise sustained the same position. For example, in my lengthy Separate Opinion in the ICJ's Advisory Opinion (of 22.07.2010) on the *Conformity with International Law of the Declaration of Independence of Kosovo*, I singled out, *inter alia*, the relevance of the principles of international law in the framework of the Law of the United Nations, and in relation with the *human ends* of the State (paras. 177-211), leading also to the overcoming of the strictly inter-State paradigm in contemporary international law. Subsequently, in my extensive Dissenting Opinion in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (CERD, Georgia versus Russian Federation, Judgment of 01.04.2011), I sustained the pressing need of the realization of justice on the basis of the compromissory clause (Article 22) of the CERD Convention, discarding any yielding to State voluntarism (paras. 1-214).

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55 *In*: "Discours de A.A. Cançado Trindade, Président de la Cour Interaméricaine des Droits de l'Homme", Cour Européenne des Droits de l'Homme, *Rapport annuel 2003*, Strasbourg, CourEDH, 2004, pp. 41-50; também reproduzido in A.A. Cançado Trindade, *El Desarrollo del Derecho Internacional de los Derechos Humanos mediante el Funcionamiento y la Jurisprudencia de la Corte Europea y la Corte Interamericana de Derechos Humanos*, San José de Costa Rica/Strasbourg, CtiADH, 2007, pp. 41-42, para. 13.

55. With the operation of international tribunals, there have gradually emerged two basic distinct conceptions of the exercise of the international judicial function: one, - a strict one, - whereby the tribunal has to limit itself to settle the dispute at issue and to handle its resolution of it to the contending parties (a form of transactional justice), addressing only what the parties had put before it; the other, a larger one, - the one I sustain, - whereby the tribunal has to go beyond that, and say what the Law is (*juris dictio*), thus contributing to the settlement of other like situations as well, and to the progressive development of international law. In the interpretation itself - or even in the search - of the applicable law, there is space for judicial creativity; each international tribunal is free to find the applicable law, independently of the arguments of the contending parties<sup>56</sup>, - in pursuance of the principle *juria novit curia*.

56. Furthermore, there are circumstances wherein the judgments of international tribunals may have repercussions beyond the States parties to a case, - as exemplified by the well-known Judgments of the IACtHR (having as leading case that of *Barrios Altos*, 2001), which held amnesties leading to impunity to be incompatible with the American Convention on Human Rights<sup>57</sup>. Such repercussions tend to occur when the judgments succeed to give expression to the idea of an *objective* justice. In this way, they contribute to the evolution of international law itself, and to the *rule of law* at national and international levels in democratic societies.

57. The more international tribunals devote themselves to explaining clearly the foundations of their decisions, the greater their contribution to justice and peace is bound to be. This issue

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56 Cf. M. Cappelletti, *Juizes Legisladores?*, Porto Alegre/Brazil, S.A. Fabris Ed., 1993, pp. 73-75 and 128-129; M.O. Hudson, *International Tribunals - Past and Future*, Washington D.C., Carnegie Endowment for International Peace/Brookings Inst., 1944, pp. 104-105.

57 For an account, cf. A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, 3<sup>rd</sup>. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013, pp. 267-268.

has attracted the attention of juridical circles in the last decades<sup>58</sup>. In my conception, in judgments of international tribunals (also at regional level, in addition to national tribunals as well), the *motifs* and the *dispositif* go together: one cannot separate the decision itself from its foundations, from the reasoning which upholds it. Reason and persuasion permeate the operation of justice, and this goes back to the historical origins of its conception.

## IX. INTERACTIONS BETWEEN INTERNATIONAL AND DOMESTIC LAW: THE UNITY OF THE LAW

58. The work of international human rights tribunals, as well as of contemporary international criminal tribunals (cf. *supra*), bear witness of the interactions between international and domestic law in their respective domains of operation. The realization of justice becomes a common goal, and a converging one, at the domestic and international legal orders. They both testify the *unity of the Law* in the realization of justice, a sign of our times. International human rights tribunals have shown that, in the great majority of cases lodged with them, international jurisdiction is resorted to when there is no longer a possibility to find justice at domestic law level.

59. And there have been occasions wherein the international jurisdiction has come to support national jurisdiction (*infra*), so as to secure also within this latter the primacy of law (*préeminence du droit, rule of law*). In effect, the expansion of international jurisdiction (cf. *supra*) has counted on the co-participation of national jurisdictions<sup>59</sup>. After all, international law attributes

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58 Cf., e.g., [Various Authors,] *La Sentenza in Europa - Metodo, Tecnica e Stile* (Atti del Convegno Internazionale di Ferrara di 1985), Padova, CEDAM, 1988, pp. 101-126, 217-229 and 529-542.

59 Cf., in general, e.g., Y. Shany, *Regulating Jurisdictional Relations between National and International Courts*, Oxford, Oxford University Press, 2009, p. 1-200. – For an account of the relations between the Prosecutors' offices of the *ad hoc* International Tribunals for the Former Yugoslavia and for Rwanda (ICTFY and ICTR) and the competent national authorities, cf. V. Peskin, *International Justice in Rwanda and the Balkans - Virtual Trials*

international functions also to national tribunals<sup>60</sup>. These latter have a role to play also in the search of the primacy of the international *rule of law*<sup>61</sup>.

60. Among international criminal tribunals, the ICC shows, *inter alia*, that the principle of the principle of complementarity, for examples, signals the call for a greater approximation, if not interaction, between the international and national jurisdictions. And it could not be otherwise, particularly in our times, when, with growing frequency, the most diverse matters are brought before judicial control at international level<sup>62</sup>. Contrary to what keeps on being assumed in various legal circles, national and international jurisdictions, in our times, are not concurring or conflictive, but rather complementary, in constant interaction in the protection of the rights of the human person and in the struggle against the impunity of the violators of those rights.

61. It is not certain either, - also contrary to what is usually assumed, - that the international jurisdiction for the protection of the rights of the human person is always and only “subsidiary” to national jurisdiction, or “autonomous” in relation to it. The two jurisdictions interact in the present domain of protection. And, further than that, there are significant illustrations, in certain situations of extreme adversity to human beings, of the international jurisdiction having even *preceded* national jurisdiction in the

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*and the Struggle for State Cooperation*, Cambridge, Cambridge University Press, 2009 [reed.], pp. 3-257.

60 Cf. A.A. Cançado Trindade, *The Access of Individuals to International Justice*, *op. cit. supra* n. (20), ch. V, pp. 76-112 (on the interaction between international law and domestic law in human rights protection).

61 A. Nollkaemper, *National Courts and the International Rule of Law*, Oxford, Oxford University Press, 2011, pp. 1-304.

62 T. Koopmans, “Judicialization” , in *Une communauté de droit - Festschrift für G.C. Rodríguez Iglesias* (eds. N. Colneric *et alii*), Berlin, Berliner Wissenschafts-Verlag (BWV), 2003, pp. 51-57; G. Ulfstein, “The International Judiciary”, in *The Constitutionalization of International Law* (eds. J. Klabbers, A. Peters e G. Ulfstein), Oxford, Oxford University Press, 2011 [reed.], pp. 126-152.

protection of the rights of the victimized and in the reparations due to them.

62. For example, the determination, by the IACtHR, of the international responsibility of the respondent State for grave violations of human rights in the cases of the massacres of *Barrios Altos* and *La Cantuta* (Judgments of 2001<sup>63</sup> and 2006<sup>64</sup>, respectively), preceded the condemnation, by the Special Penal Chamber of the Peruvian Supreme Court (in 2007-2010), of the former President of the Republic (A. Fujimori)<sup>65</sup>. In those two cases, in addition to the paradigmatic case of the *Constitutional Tribunal* (IACtHR's Judgment of 2001) - pertaining to the destitution of three magistrates, later reincorporated into the Tribunal - the *international jurisdiction effectively intervened in defense of the national one*, decisively contributing to the restoration of the *État de Droit*, - as it occurred, - besides having safeguarded the rights of the victimized<sup>66</sup>. In the history of the relations - and interactions - between national and international jurisdictions, this trilogy of cases will surely keep on being studied by the present and future generations of internationalists and constitutionalists.

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63 Judgments of 14.03.2001 (merits), 03.09.2001 (interpretation), and 30.11.2001 (reparations).

64 Judgment of 29.11.2006 (merits and reparations).

65 For a historical account, cf. A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional...*, *op. cit. supra* n. (50), pp. 42-45; A.A. Cançado Trindade, *Os Tribunais Internacionais Contemporâneos*, *op. cit. supra* n. (12), pp. 84-90.

66 Almost three years after the IACtHR's Judgment (of 31.01.2001) in the case of the *Constitutional Tribunal*, I sent a letter to this latter (on 04.12.2003), as then President of the IACtHR, in which I expressed *inter alia* that "we can appreciate this Judgment of the IACtHR in historical perspective (...), as a landmark one not only (...) [in the] inter-American system of protection of human rights. (...) [It] constitutes an unprecedented judicial decision also at world level. It has had repercussions not only in our region but also in other continents. It has marked a starting point of a remarkable and reassuring approximation between the judicial power at national and international levels (...)". Text of the letter reproduced in: OAS, *Informe Anual de la Corte Interamericana de Derechos Humanos - 2003*, San José of Costa Rica, IACtHR, 2004, Anexo LVII, pp. 1459-1460, and cf. pp. 1457-1458.

## X. CONCLUDING OBSERVATIONS: THE TASKS AHEAD, AND PROSPECTS FOR THE FUTURE.

63. May I now proceed to my concluding observations. In the present era of multiple international tribunals, the effects of their joint work can already be perceived. These effects have been, in my perception, first, their *law-making* endeavours, not only applying but also creating an *objective* law, beyond the will or consent of individual States, on the basis of the consciousness of human values; secondly, the acknowledgment of the fundamental importance of general principles of law<sup>67</sup>; thirdly, the development of international legal procedure (with a blend of traditions of national legal systems around the world, and the acknowledgment of the importance for the justiciables of the holding of oral hearings); fourthly, the fostering of the *unity* of law, with the interactions between international law and domestic law; and fifthly, the aforementioned fostering of respect for the *rule of law* at national and international levels.

64. The assertion of an *objective* law (first point), beyond the will of individual States, is a revival of jusnaturalist thinking. Judicial settlement of international disputes is needed as a guarantee against unilateral interpretation by a State of conventional obligations. After all, the basic foundations of international law emanate ultimately from the human conscience, from the universal juridical conscience, and not from the “will” of individual States<sup>68</sup>. The assertion of the *unity* of the law is intertwined with the *rule of law* at national and international levels, as access to justice takes place, and ought to be preserved, at both levels<sup>69</sup>.

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67 A.A. Cançado Trindade, “Foundations of International Law: The Role and Importance of Its Basic Principles”, in *XXX Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano - OAS* (2003) pp. 359-415.

68 M.M.T.A. Brus, *Third Party Dispute Settlement in an Interdependent World*, Dordrecht, Nijhoff, 1995, pp. 142 and 182-183; A.A. Cançado Trindade, “La *Recta Ratio* dans les Fondements du *Jus Gentium* comme Droit International de l’Humanité”, 10 *Revista do Instituto Brasileiro de Direitos Humanos* (2010) pp. 11-26.

69 A.A. Cançado Trindade, *Os Tribunais Internacionais Contemporâneos*, *op. cit. supra* n. (12), pp. 80-82.

65. The ICJ itself, despite its anachronistic inter-State mechanism of operation, has been attentive to developments in the domains of the International Law of Human Rights<sup>70</sup> and of International Humanitarian Law<sup>71</sup>. In this respect, it should not pass unnoticed that distinct trends of protection of the *justiciables* (International Law of Human Rights, International Humanitarian Law, International Law of Refugees, International Criminal Law) *converge*, rather than conflict with each other, at normative, hermeneutic and operative levels<sup>72</sup>.

66. As to the prospects for the future, - keeping in mind the lessons learned along a century of experience sedimented in the domain of international justice, - it is high time, in my view, to begin focusing attention constantly on the proper ways of achieving the realization of justice, rather than keeping cultivating strategies of litigation for the sake of it, making abstraction of human values. Likewise, it is high time to accompany consistently the ongoing expansion of international jurisdiction, and of international legal personality and capacity, as well as international responsibility, by drawing closer attention to *all* subjects of international law, not only States, but also international organizations, peoples and individuals.

67. In the last five years, the ICJ has given signs of its preparedness to do so. Thus, in its Order of Provisional Measures of Protection of 18.07.2011, in the case of the Temple of Preah Vihear, the ICJ,

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70 Cf., *inter alia*, e.g., A.A. Cançado Trindade, “La jurisprudence de la Cour Internationale de Justice sur les droits intangibles / The Case-Law of the International Court of Justice on Non-Derogable Rights”, in *Droits intangibles et états d’exception / Non-Derogable Rights and States of Emergency* (eds. D. Prémont, C. Stenersen and I. Osередczuk), Bruxelles, Bruylant, 1996, pp. 53-71 e 73-89.

71 Cf., *inter alia*, e.g., G. Zyberi, *The Humanitarian Face of the International Court of Justice*, Utrecht, Intersentia, 2008, pp. 26-60 and 259-341.

72 Cf. A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 7-185; A.A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, Rio de Janeiro, Edit. Renovar, 2015, pp. 1-507; A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario - Aproximaciones y Convergencias*, Geneva, ICRC, [2000], pp. 1-66.

in deciding *inter alia* to order the establishment of a provisional demilitarized zone around the Temple (part of the world's cultural and spiritual heritage) and its vicinity, it extended protection (as I pointed out in my Separate Opinion, paras. 66-113) not only to the territory at issue, but also to the local inhabitants, in conformity with the *principle of humanity* in the framework of the new *jus gentium* of our times (paras. 114-117). Territory and people go together.

68. Subsequently, in the recent of the *Frontier Dispute* (Judgment of 16.04.2013), the contending parties (Burkina Faso and Niger) themselves expressed before the Court their concern, in particular with local nomadic and semi-nomadic populations, and assured that their living conditions would not be affected by the tracing of the frontier. Once again, as I pointed out in my Separate Opinion (paras. 90, 99 and 104-105), the *principle of humanity* permeated the handling of the case by the ICJ.

69. In the aforementioned *A.S. Diallo* case (Judgment on reparations, of 2012), the ultimate beneficiary of the reparations ordered by the ICJ was, in my perception, the individual concerned, rather than his State of nationality. On another recent occasion, the application, by the ICJ, of the principle of *universal jurisdiction* under the 1984 U.N. Convention against Torture in the case of *Questions Relating to the Obligation to Prosecute or Extradite* (Judgment of 20.07.2012), has a bearing, in my understanding, on restorative justice (the realization of justice itself) for the numerous victims of the Habré regime (1982-1990) in Chad, as I pointed out in my lengthy Separate Opinion (paras. 169-184).

70. Moving to another point, it is now time to accompany the expansion of international jurisdiction, also by fostering the dialogue and co-ordination between contemporary international tribunals. Endeavours of co-ordination already exist, but have been far from sufficient to date. There is nowadays pressing need for greater dialogue and co-ordination of contemporary international tribunals, in their common mission of imparting justice. At conceptual level, there is pressing need of further jurisprudential developments in the matter of reparations, as well as provisional measures of protection, both still in their infancy.

71. I have recently pointed this out, as to reparations, in my Separate Opinion in the case of *A.S. Diallo* (ICJ Judgment on reparations, of 19.06.2012). The jurisprudential construction of the IACtHR in respect of distinct forms or reparations is surely deserving of close attention from other international tribunals. The matter discloses the relevance of the rehabilitation of victims. And as to provisional measures of protection, I have made the same point, recently, in my Dissenting Opinion in the joined cases of *Certain Activities Carried out by Nicaragua in the Border Area* and of *Construction of a Road in Costa Rica along the San Juan River* (Order of 16.07.2013), where I stressed the need to contribute to the conformation of an autonomous legal regime of those measures, beyond the traditional inter-State dimension, in the proper exercise of the international judicial function.

72. Likewise, the issue of compliance with judgments and decisions of international tribunals requires far greater attention and study on the part of international tribunals, - some of them being already engaged in its careful consideration currently. Here, each international tribunal counts on a mechanism of its own; yet, all of them are susceptible of improvement. May it here be recalled that, some years ago, the ECtHR, in the case *Hornsby versus Greece* (Judgment of 19.03.1997), stressed the relevance of the execution of judgments for the *effectiveness* itself of the right of access to a tribunal under Article 6(1) of the European Convention of Human Rights. In its own words,

that right would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6(1) should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention (para. 40).

73. This issue pertains, as pointed out by the ECtHR, to the *rule of law* itself, so as to secure “the proper administration of justice” (para. 41). Thus, not one formal access, but also the guarantees of the due process of law, and the due compliance with the judgment, integrate the right of access to justice *lato sensu*<sup>73</sup>. In the same line of thinking, the IACtHR, in its Judgment (on jurisdiction, of 28.11.2003) in the case of *Baena Ricardo and Others (270 Workers) versus Panama*, stated that

(...) The jurisdiction comprises the faculty to impart justice; it is not limited to declaring the law, but also comprises the supervision of compliance with the judgment (...), [which is] one of the elements which integrate the jurisdiction. (...) Compliance (...) is the materialization of justice for the concrete case (...). The effectiveness of the Judgments depends on compliance with them, (...) [which is] closely linked with the right of access to justice, (...) set forth in Articles 8 (judicial guarantees) and 25 (judicial protection) of the American Convention (paras. 72-74).

74. Only with the due compliance with the Judgments the proclaimed rights are effectively protected; the execution of judgments, added that IACtHR lucidly,

ought to be considered an integral part of the right of access to justice, this latter understood *lato sensu* (...). If the responsible State does not execute at national level the measures of reparation ordered by the Court, it would be denying the right of access to international justice (paras. 82-83).

Despite all the experience accumulated so far, this remains an open issue, which - may I insist on this point - is still in its infancy, like those of reparations and of provisional measures of protection (*supra*).

75. It is to hoped that the on-going reflections within some international tribunals on how to improve their respective mechanisms in this respect prove fruitful. The issue does not exhaust

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73 On the matter, cf. A.A. Cançado Trindade, *El Derecho de Acceso a la Justicia en Su Amplia Dimensión*, 2nd. ed., Santiago de Chile, CECOHLibrotécnica, 2012, pp. 79-574.

itself at international level. It is highly desirable that, parallel to the distinct mechanisms for the supervision of compliance with Judgments of contemporary international tribunals, the States adopt procedures of *domestic* law to secure, on a *permanent* basis, the faithful compliance with the Judgments of international tribunals, thus avoiding casuistic solutions.

76. After all, such faithful compliance with, or execution of, their Judgments is a legitimate concern of all contemporary international tribunals. Such compliance ought to be integral, rather than partial or selective. This is a position of principle, in relation to an issue which pertains to the international *ordre public*, and to the *rule of law* (*préeminence du droit*) at international and national levels. In sum, the present era of international tribunals has brought about remarkable advances, and the expansion of international jurisdiction has been accompanied by the considerable increase in the number of the *justiciables*, granted access to justice, in distinct domains of international law, and in the most diverse situations, including in circumstances of the utmost adversity, and even defencelessness. Yet, there remains a long way to go.

## **XI. POST SCRIPTUM.**

77. My closing words are of appreciation for the questions and comments of participants, following my *aula magna*; I much value this dialogue, the open-mindedness and empathy disclosed in this memorable encounter here at the University of Vilnius. Coming from a distant region of the world, you can be sure that, as a scholar, I shall keep the best memories of this morning of 04 September 2015 at your secular University. I greatly value this inter-generational dialogue. I think our empathy can be largely explained by the fact that I come from a region, the Latin-American, known for the defensive character of its international legal doctrine, of its contributions to our discipline. To that, I add the humanist approach to the law of nations, which I have been sustaining for a long time.

78. In the law of nations, situations of injustice are not sustainable. In this connection, I am pleased to see that my Dissenting Opinion

in the case of the *Jurisdictional Immunities of the State* (Germany *versus* Italy, Greece intervening; merits, Judgment of 03.02.2012) has grasped your attention, as just pointed out in one of your comments. In that Dissent, I firmly sustained, as you know, the primacy of the right of access to justice over the undue invocation of State immunities in face of international crimes. We have been witnessing the late developments on the matter since the Judgment of 03.02.2012 of the ICJ.

79. In Italy, the Constitutional Court, in its Judgment (n. 238) of 22.10.2014, stated that the aforementioned ICJ Judgment could not be executed in the Italian legal order, given the primacy therein of the right to a judicial remedy in face of war crimes and crimes against humanity. In Greece, shortly later, in early 2015, the Greek Parliament decided to re-establish the Parliamentary Committee on reparations to individual victims of war crimes, so as to enforce the *Areios Pagos* Judgment.

80. Last year, on 01.07.2014, I was received in a visit to the Distomo community in Greece, and visited their Memorial Museum; this year, on 12.06.2015, I was likewise received in a visit to the Civitella community, and also visited their Memorial Museum (as well as that of San Pancrazio). I was very honoured on both occasions by their invitations, and was touched when they told me that they had found justice in my aforementioned Dissenting Opinion. Those moments are unforgettable to me, confirming that international law is oriented towards the *justiciables*. No dispute can be settled by *summum jus, summa injuria*. Situations of injustice cannot sustain themselves.

81. This is a proper place - the University of Vilnius - to make this point clearly. This secular University is a proper place for a free dialogue on this matter, in the true spirit of *Universitas*, which is also that of *humanitas*<sup>74</sup>. May I at last convey to you a very recent and

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74 A.A. Cançado Trindade, “*Universitas and Humanitas: A Plea for Greater Awareness of Current Challenges*”, in *International Journal for Education Law and Policy - Brussels/Antwerp* (2013 - Special Issue: Dignity in Education [Proceedings of the II World Conference on the Right to Education]) pp. 7-16.

reassuring news. A few days ago, at the end of its biannual session, held this time in Tallinn, Estonia, the *Institut de Droit International* has adopted a resolution (on 30.08.2015), with my firm support and vote in favour, on “universal civil jurisdiction with regard to reparation for international crimes”. Its Article 5 provides that “[t]he immunity of States should not deprive victims of their right to reparation”. The path towards justice is indeed a long one, and we ought not to allow hope ever to vanish. Thank you for the kind attention with which you have distinguished me this morning.

Vilnius, Lithuania, 04.09.2015.

A.A.C.T

