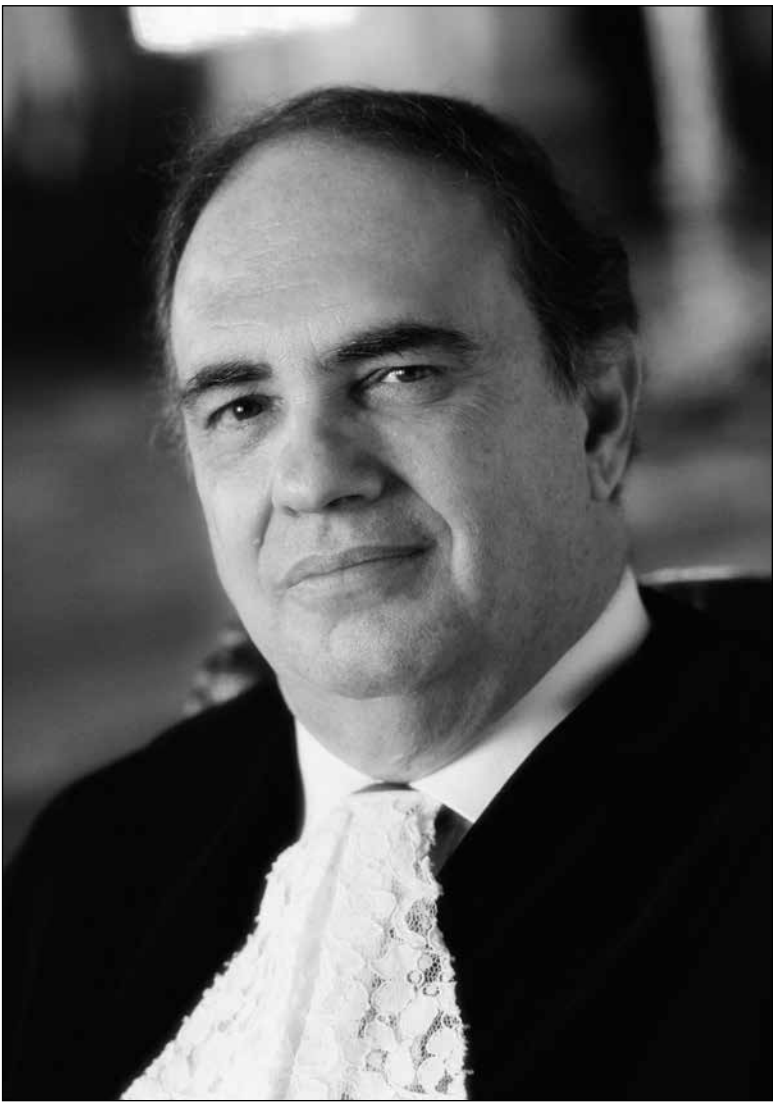
REFLECTIONS ON THE REALIZATION OF JUSTICE IN THE ERA OF CONTEMPORARY INTERNATIONAL TRIBUNALS

by

ANTÔNIO AUGUSTO CANÇADO TRINDADE



A. A. CANÇADO TRINDADE

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BIOGRAPHICAL NOTE

H. E. Antônio Augusto Cançado Trindade, born 17 September 1947 in Belo Horizonte, Brazil.

LLB in Law, Federal University of Minas Gerais (First Prize in Civil Law, 1969); LLM in International Law, University of Cambridge (1973); PhD in International Law, University of Cambridge (1977), with a thesis on "Developments in the Rule of Exhaustion of Local Remedies in International Law" (awarded the Yorke Prize).

Judge of the International Court of Justice (since 2009, re-elected in 2018); Judge (1995-2006) and President (1999-2004) of the Inter-American Court of Human Rights.

Doctor *Honoris Causa*, Central University of Chile, Santiago, Chile (2003); Doctor *Honoris Causa*, Catholic University of Peru, Lima (2003); Doctor *Honoris Causa*, American University of Paraguay, Asunción (2004); Doctor *Honoris Causa*, National University of La Plata, Argentina (2005); Doctor *Honoris Causa*, University Panteion of Athens, Greece (2014); Doctor *Honoris Causa*, Autonomous University of Madrid, Spain (2016); Doctor *Honoris Causa*, University Kiit of Bhubaneswar, India (2017); *Honoris* Title "Justice et Droit" Conseil de Napflio, Napflio, Greece (2018); Doctor *Honoris Causa*, Federal University of Minas Gerais, Belo Horizonte, Brazil (2018); Doctor *Honoris Causa*, National University of Tucumán, San Miguel de Tucumán, Argentina (2019).

Emeritus Professor of International Law at the University of Brasilia, Brazil (2010). Professor (Full Professor, *Professeur titulaire*) of Public International Law at the University of Brasilia (1978-2009) and of the Diplomatic Academy Rio Branco of Brazil (1979-2009). Between 1982 and 2019, Honorary or Visiting Professor of International Law, in several leading Universities in Latin America, Europe and Asia. International Committee of the Red Cross Lecturer in Havana, Cuba (1995-2002) and in Hong Kong and Macao (China, 1996). From 1981 to 2017, Lecturer of the annual Courses of the Organization of American States (OAS) Inter-American Juridical Committee, Rio de Janeiro and the International Institute of Human Rights, Strasbourg (1988-2019), among others. Lecturer at the European University Institute, Florence (General Course, 2007). Honours and prizes from various universities, international institutes and academic societies in several countries.

Legal Adviser to the Ministry of External Relations of Brazil (1985-1990); Delegate of Brazil to several international conferences (the United Nations, OAS and others), including the UN Conference on the Law of Treaties between States and International Organizations (Deputy Head of the Delegation, Vienna, 1986), and the Second World Conference on Human Rights (Vienna, 1993). Executive Director of the Inter-American Institute of Human Rights (1994-1996). Legal Adviser to projects of the UN Environment Programme (Nairobi, 1990-1992), the UN Development Programme (1988 and 1990), the UN High Commissioner for Refugees (1994, 2004 and 2014), International Committee of the Red Cross (1997-2000), the UN Educational, Scientific and Cultural Organisation (1997); member of the OAS Commission of Jurists for Nicaragua (1993-1994). Holder of several international and national decorations. Member of the *Curatorium* of the Hague Academy of International Law (since 2004); member of the Institut de Droit International (since 1997, current Vice-President); member of the Brazilian Academy of Juridical Letters; Honorary President of the Brazilian Institute of Human Rights.

PRINCIPAL PUBLICATIONS

The Application of the Rule of Exhaustion of Local Remedies in International Law, Cambridge, Cambridge University Press, 1983.

"Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", *Recueil des cours*, Vol. 202 (1987), p. 1-435.

A Proteção Internacional dos Direitos Humanos Fundamentos Jurídicos e Instrumentos Básicos, São Paulo, Saraiva, 1991.

A Proteção dos Direitos Humanos nos Planos Nacional e Internacional: Perspectivas Brasileiras (ed.), San José (Costa Rica), IIDH; Brasilia, Foundation F. Naumann, 1992.

Direitos Humanos e Meio-Ambiente: Paralelo dos Sistemas de Proteção Internacional, Porto Alegre, Sérgio Antonio Fabris, 1993.

La Protección Internacional de los Derechos Humanos en America Latina y el Caribe (Reunión Regional de América Latina y el Caribe Preparatoria de la Conferencia Mundial de Derechos Humanos de Naciones Unidas), San José (Costa Rica), IIDH/CEE, 1993. Also in UN Doc. A/CONF.157/PC/63/Add.3, 18 March 1993, p. 9-137.

Derechos Humanos, Desarrollo Sustentable y Medio Ambiente/Human Rights, Sustainable Development and the Environment/Direitos Humanos, Desenvolvimento Sustentável e Meio Ambiente (ed.), 2nd ed., San José (Costa Rica), IIDH; Brasilia, BID, 1995.

A Incorporação das Normas Internacionais de Proteção dos Direitos Humanos no Direito Brasileiro (ed.), 2nd ed., San José (Costa Rica)/Brasilia, IIDH/ACNUR/CICV/CUE/ASDI, 1996.

O Esgotamento de Recursos Internos no Direito Internacional, 2nd ed., Brasilia, Editora Universidade de Brasília, 1997.

Tratado de Direito Internacional dos Direitos Humanos, 3 vols. Vol. 1, 2nd ed., 2003. Vol. 2, 1st ed., 1999. Vol. 3, 2nd ed., 2003. Porto Alegre, Sérgio Antonio Fabris.

A *Proteção Internacional dos Direitos Humanos e o Brasil (1948-1997): As Primeiras Cinco Décadas*, 2nd ed., Brasilia, Editora Universidade de Brasília, 2000.

El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos, Bilbao, Universidad de Deusto, 2001.

O Direito Internacional em um Mundo em Transformação, Rio de Janeiro, Renovar, 2002.

[As rapporteur] *Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección*, Vol. 2, 2nd ed., San José (Costa Rica), IACtHR, 2003.

Pareceres dos Consultores Jurídicos do Itamaraty (1985-1990 – Pareceres), Vol. 8, Brasilia, MRE/Federal Senate, 2004.

"International Law for Humankind: Towards a New *Jus Gentium*" (General Course on Public International Law), *Recueil des cours*. Part I in Vol. 316 (2005), p. 31-439. Part II in Vol. 317 (2005), p. 19-312.

El Derecho Internacional de los Derechos Humanos en el Siglo XXI, 2nd ed., Santiago, Editorial Jurídica de Chile, 2006.

Derecho Internacional de los Derechos Humanos – Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006), 1st ed., Mexico City, Porrúa/Universidad Iberoamericana, 2007.

Évolution du Droit international au droit des *gens: L'accès des particuliers à la justice internationale: Le regard d'un juge*, Paris, Pédone, 2008.

The Access of Individuals to International Justice, Oxford, Oxford University Press, 2011.

El Derecho de Acceso a la Justicia en Su Amplia Dimensión, 2nd ed., Santiago (Chile), CECOH/Librotecnia, 2012.

Le Droit international pour la personne humaine, Paris, Pedone, 2012.
Repertório da Prática Brasileira do Direito Internacional Público, 6 vols., 2nd ed., Brasilia, FUNAG/MRE, 2012. Vol. 1, *Período 1889-1898*. Vol. 2, *Período 1899-1918*. Vol. 3, *Período 1919-1940*. Vol. 4, *Período 1941-1960*. Vol. 5, *Período 1961-1981*. Vol. 6, Índice Geral Analítico.
Conversación con Antônio Augusto Cançado Trindade – Reflexiones sobre la Justicia Internacional (interview with E. Bea), Valencia, Tirant lo Blanch, 2013.
El Principio Básico de Igualdad y No-Discriminación: Construcción Jurisprudencial, Santiago (Chile), Librotecnia, 2013.
La Protección de la Persona Humana frente a los Crímenes Internacionales y la Invocación Indebida de Inmunidades Estatales, Fortaleza, IBDH/IIDH/SLADI, 2013.
Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional, Buenos Aires, Ad-Hoc, 2013.
Os Tribunais Internacionais Contemporâneos, Brasilia, FUNAG, 2013.
A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013), Fortaleza, IBDH/IIDH/SLADI, 2014.
Direito das Organizações Internacionais, 6th rev. ed., Belo Horizonte, Del Rey, 2014.
Judge A.A. Cançado Trindade: The Construction of a Humanized International Law; A Collection of Individual Opinions (1991-2016), 3 vols. Vol. 1, *Inter-American Court of Human Rights*, 2014. Vol. 2, *International Court of Justice*, 2014; Vol. 3, *International Court of Justice*, 2017. Leiden, Brill/Nijhoff.
La Humanización del Derecho Internacional Contemporáneo, Mexico City, Porrúa/ Instituto Mexicano de Derecho Procesal Constitucional, 2014.
A Humanização do Direito Internacional, 2nd ed., Belo Horizonte, Del Rey, 2015.
A Responsabilidade do Estado sob a Convenção contra o Genocídio: Em Defesa da Dignidade Humana, The Hague, IBDH; Fortaleza, IIDH, 2015.
Esencia y Transcendencia del Derecho Internacional de los Derechos Humanos (Votos en la Corte Interamericana de Derechos Humanos, 1991-2008), 3 vols., 2nd rev. ed., Mexico City, Cámara de Diputados, 2015.
A Visão Humanista da Missão dos Tribunais Internacionais Contemporâneos, The Hague, IBDH; Fortaleza, IIDH, 2016.
A Obrigação Universal de Desarmamento Nuclear, Brasilia, MRE/FUNAG, 2017.
O Regime Jurídico Autônomo das Medidas Provisórias de Proteção, The Hague, IBDH; Fortaleza, IIDH, 2017.
Princípios do Direito Internacional Contemporâneo, 2nd ed., Brasilia, FUNAG, 2017.
The Universal Obligation of Nuclear Disarmament, Brasilia, MRE/FUNAG, 2017.
El Ejercicio de la Función Judicial Internacional – Memorias de la Corte Interamericana de Derechos Humanos, 5th rev. ed., Belo Horizonte, Del Rey, 2018.
La Reponsabilidad del Estado en Casos de Masacres Dificultades y Avances Contemporáneos en la Justicia Internacional, Mexico City, Porrúa/Escuela Libre de Derecho, 2018.
Vers un nouveau jus gentium humanisé: Recueil des Opinions Individuelles du Juge A.A. Cançado Trindade, Paris, L'Harmattan, 2018.
Direito à Reparação Origem e Evolução no Direito Internacional, Fortaleza, FB/Editora Universidade de Fortaleza, 2019.
Os Tribunais Internacionais e a Realização da Justiça, 3rd rev. ed., Belo Horizonte, Del Rey, 2019.
International Law for Humankind: Towards a New "Jus Gentium", 3rd rev. ed., Leiden, The Hague, Nijhoff, Hague Academy of International Law, 2020.

Also author of 79 other books and around 786 monographs, contributions to collections, essays and articles on international law, published in numerous countries and in several languages.

CHAPTER I

INITIAL CONSIDERATIONS

It is highly significant to me to deliver this Special Lecture today, 1 November 2019, in this side event of the Hague Academy of International Law, this time here at the headquarters of the United Nations in New York. This is an academic event of great significance, given the current historical moment of deep preoccupation affecting the United Nations, in view of the regrettable lack of resources facing it today. This contrasts with the much better situation it enjoyed a couple of years ago when it faced successive challenges and difficulties that had lasted over a long time.

The present situation imposed upon the United Nations is truly shocking, its resources having been largely cut off. At present, it only functions regularly from 10:00 a.m. to 5:00 p.m., when its doors are promptly closed. It no longer publishes its documents, not even its *Journal*; the official addresses of delegations can only be obtained through them, by electronic means. This is truly sad and worrisome, as in the last two years the United Nations has been irresponsibly dismantled, precisely in a historical moment with great need of multilateralism.

Its very history – which I have attentively accompanied through the years – is today threatened, with the recent cutting of its documents, in an expression of irrationality, constituting a tragedy. Human beings have not learned the lessons of the past. Hence the enlarged importance, in my view, of this event of the Hague Academy of International Law, being conducted here at the UN headquarters. I am very pleased to count here on the significant presence and company of the distinguished Secretary-General of the Hague Academy, Professor Jean-Marc Thouvenin, sharing this table with me.

We are beginning this morning's session, exceptionally, one hour earlier, at 9:00 a.m., and our auditorium is already full of participants from numerous UN Member States, on such a relevant moment for reflection. It is fortunate that there are still those, like all of us present here, who remain faithful to *recta ratio* and the realisation of justice. To us, the lessons from the past cannot be forgotten or overlooked. The achievement of the realisation of justice at the international level is one of the most significant achievements of the law of nations in our times.

In this respect, may I begin by recalling that, in my previous Special Lecture at the Hague Academy of International Law in 2017, I had the occasion to address the historical evolution of international tribunals and the development of their common mission of the realisation of justice. Now, two years later, on the present occasion of this academic event of the Hague Academy here at the headquarters of the United Nations in New York, I find the moment to retake and reassess the matter for further examination in the light of very recent developments.

In my lecture of 2017, I reserved one of the initial chapters of my study to the pre-history and emergence of international tribunals, examining their creation and development in historical fact, and in legal and philosophical writings. Soon the concern of international tribunals became focused on the needed protection of vulnerable and defenceless victims; in this way, the common mission of realising justice began to emerge, despite their own distinct jurisdictions, contributing to reinforce the aptitude of international law to settle distinct types of international disputes, at both *inter*-State and *intra*-State levels, thus enlarging considerably the number of *justiciables* in all parts of the world [1].

Keeping in mind the lessons extracted from the past as to the establishment and the Statutes of the Permanent Court of International Justice (PCIJ) and of the International Court of Justice (ICJ), I shall consider international justice beyond the strict *inter*-State dimension (Chap. III). Further to the development of compulsory jurisdiction (for contentious cases), the expansion of international jurisdiction is also illustrated, for example by the contribution of an expanded advisory jurisdiction (Chap. II). I then turn my attention to the expansion of international jurisdiction in distinct domains of international law, as illustrated, for example, by the operation of international human rights tribunals and international criminal tribunals (Chap. IV).

In sequence, my consideration of the relevance of international jurisdiction and responsibility encompasses the protection of vulnerable persons, the unity of the law in the interactions between international and domestic law and the importance of the realisation of justice (Chap. V). In the framework of contemporary international tribunals, attention should also be drawn to their (or some of them) move towards compulsory jurisdiction. Their contribution to the rule

1. A. A. Cançado Trindade, "Les tribunaux internationaux et leur mission commune de réalisation de la justice: développements, état actuel et perspectives", *Recueil des Cours*, Vol. 391 (2017), see Chap. 2, p. 21-28.

of law *(prééminence du droit)* in seeking the realisation of justice is to be valued.

In jusnaturalist thinking there is acknowledgement of a universal *jus gentium* as a true *jus necessarium*, transcending the limitations of the *jus voluntarium*. The evolution of the law of nations *(droit des gens)* is grounded on *recta ratio*, the *universal juridical conscience*, and is guided by general principles of law and human values. The needs of humankind as subject of international law transcend the misleading optics of the "will" of States only (Chap. VI).

Furthermore, I address (Chap. VII) the utmost relevance to international tribunals of general principles of law, which rest on the foundations of the law of nations, being essential to the mission of realisation of justice. It is important and necessary to keep this always in mind. In the cases of *Obligations Concerning Negotiations Relating to the Cessation of the Nuclear Arms Race and on Nuclear Disarmament*, lodged with the ICJ by the Marshall Islands (against the respondent States India, Pakistan and the United Kingdom), the ICJ avoided settling the matter in its three judgments (on preliminary objections) of 5 October 2016, to which I appended my three lengthy and strong dissenting opinions.

Shortly afterwards, by the end of 2016, in reaction to this absence of a settlement of the matter, the UN General Assembly decided to convene a conference for the adoption of a treaty prohibiting nuclear weapons. The conference promptly took place, and succeeded in adopting the Treaty on the Prohibition of Nuclear Weapons on 7 July 2017. This exercise, to the benefit of humankind, gave expression, in this difficult domain of the law of nations, to the primacy of universal juridical conscience over the "will" of States. Last but not least, I consider the jurisprudential construction among contemporary international tribunals (Chap. VIII), and then present my final considerations (Chap. IX).

CHAPTER II

THE NEW ERA OF INTERNATIONAL TRIBUNALS AND THE EXPANSION OF ADVISORY JURISDICTION

A. Introduction

In historical perspective, the emergence of the era of international tribunals much valued the judicial solution and the realisation of justice in the international legal order. Attention is focused mainly on the PCIJ and the ICJ, also acknowledging the pioneering role of the Central American Court of Justice (1907-1917). A significant role was played by the gradual jurisprudential construction of the PCIJ, followed by that of the ICJ. There was already sensitivity in favour of a wider dimension, to start with, of international jurisdiction and personality.

The PCIJ was the first international tribunal to be endowed with the advisory function, the exercise of which contributed to the progressive development of international law. The same occurred subsequently with the expanded advisory function of the ICJ. Other international tribunals have nowadays also been endowed with the advisory function, and there are illustrations of the widely recognised advisory jurisprudential construction in particular of the Inter-American Court of Human Rights (IACtHR), with its evolutive interpretation of the international law of human rights (ILHR).

B. The emergence of international tribunals

As I have recalled on previous occasions, the earlier initiatives taken at the beginning of the twentieth century were, with the advent of judicial solution proper, to become one of the sources of inspiration for the drafting of the Statute of the PCIJ in 1920 [2]. Although the projected

2. Cf. A. A. Cançado Trindade, "The Presence and Participation of Latin America at the II Hague Peace Conference of 1907", in Y. Daudet (ed.), *Actualité de la Conférence de La Haye de 1907, II Conférence de la Paix (Colloque de 2007)*, Leiden, Brill, Nijhoff, 2008, p. 66-73 and 51-84; D. J. Bederman, "The Hague Peace Conferences of 1899 and 1907", in M. W. Janis (ed.), *International Courts for the Twenty-First Century*, Dordrecht, Nijhoff, 1992, p. 10-11; S. Rosenne, "Introduction", in S. Rosenne (ed.), *The Hague Peace Conferences of 1899 and 1907 and International Arbitration: Reports and Documents*, The Hague, TMC Asser Press, 2001, p. xxi; A. Eyffinger, "A Highly Critical Moment: Role

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 to the evolution of international law, such as, *inter alia*, in some circumstances, the access of individuals directly to the international jurisdiction [3].

In effect, it was elsewhere, in Latin America, in the year of 1907, that the first modern international tribunal – the Central American Court of Justice – came into being. It operated for ten years, granting access not only to States but also to individuals [4]; in its decade of operation, the Court was seized of ten cases, five lodged with it by individuals and five *inter*-State cases [5]. It was in this respect truly pioneering [6], and contributed to the gradual expansion of international legal personality. It is important to keep in mind that the very advent of the permanent international jurisdiction at the beginning of the twentieth century, before the creation of the PCIJ, was thus *not* marked by a purely *inter*-State outlook of the international *contentieux* [7].

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and Record of the 1907 Hague Peace Conference", *Netherlands International Law Review*, Vol. 54, No. 2 (2007), p. 217 and 227.

3. 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", *American Journal of International Law*, Vol. 2 (1908), p. 22. The view prevailed that it would be in the interests of the States – particularly small or weaker ones – to avoid giving to this kind of case 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", *Recueil des cours*, Vol. 51 (1935), p. 38-40. Another point of significance was the future Court's *compétence de la compétence*; cf. J. Cabral, *Evolução do Direito International*, Rio de Janeiro, printed by Rodrigues & Cia., 1908, p. 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.

4. 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", *Netherlands International Law Review/Nederlands Tijdschrift voor international Recht*, Vol. 24 (1977), p. 376, and cf. p. 373-392.

5. Cf. *ibid*., p. 376-377; and cf. F. A. von der Heydte, "L'individu et les tribunaux internationaux", *Recueil des cours*, Vol. 107 (1962), p. 321.

6. C. J. Gutiérrez, *La Corte de Justicia Centroamericana*, San José (Costa Rica), Juricentro, 1978, p. 42, 106 and 150-152.

7. Cf. J.-C. Witenberg, "La recevabilité des réclamations devant les juridictions internationales", *Recueil des cours*, Vol. 41 (1932), p. 5-135; J. Stone, "The Legal Nature of Minorities Petition", *British Year Book of International Law*, Vol 12 (1931), p. 76-94; M. Sibert, "Sur la procédure en matière de pétition dans les pays sous mandat et quelques-unes de ses insuffissances", *Revue générale de droit international public*, Vol. 40 (1933), p. 257-272; M. St. Korowicz, *Une expérience en Droit international – La protection des minorités de Haute-Silésie*, Paris, Pédone, 1946, p. 81-174; C. A. Norgaard, *The Position of the Individual in International Law,* Copenhagen, Munksgaard, 1962, p. 109-128. Those experiments paved the way, in the era of the

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 1 February 2012) of *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, 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.

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. Yet the dogmatic position taken originally in 1920 on the occasion of the preparation and adoption of its Statute did not hinder the PCIJ from promptly occupying itself with cases pertaining to the treatment of minorities and inhabitants of cities or territories with a juridical statute of their own; the PCIJ here 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 in Danzig*, 1932; on *Minority Schools in Albania*, 1935) [8].

Ever since, the artificiality of that dimension has become noticeable and acknowledged, as it was already at an early stage of the case law of the PCIJ. 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,

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United Nations, for the consolidation of the mechanisms of international individual petition; cf. J. Beauté, *Le droit de pétition dans les territoires sous tutelle*, Paris, LGDJ, 1962.

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

> 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." [9]

The fact that the same dogmatic position adopted in the Statute of the PCIJ was later maintained in the adoption, in 1945, of the Statute of the ICJ does not mean that a definitive answer was given to the question at issue. Once again, the exclusively *inter*-State character of the *contentieux* before the ICJ has not appeared satisfactory at all. At least in some cases, 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 has been disclosed by the very *nature* of some of the cases submitted to it.

In my address on 23 September 2013 at the centennial celebration of the Peace Palace 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, A. Gentili and H. Grotius, among others) [10], to the classics upholding the *recta ratio* (such as the masterly *De Officis* of Cicero). The subsequent devising of the strictly *inter*-State dimension (in the late nineteenth and twentieth centuries) represented an *involution*, with disastrous consequences. Fortunately,

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9. A. A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, 3rd rev. ed., Belo Horizonte, Del Rey, 2019, p. 13-14.

10. A. A. Cançado Trindade, "La Perennidad del Legado de los 'Padres Fundadores' del Derecho Internacional", *Revista Interdisciplinar de Direito da Faculdade de Direito de Valença*, Vol. 13, No. 2 (2016), p. 15-43.

in recent 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 [11].

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 realisation – that we witness and have the privilege to contribute to nowadays – of the old ideal of justice at international level [12] has been revitalising itself in recent years, with the reassuring creation and operation of the multiple contemporary international tribunals.

This is a theme which has definitively assumed a prominent place in the international agenda of this, the second decade of the twenty-first century. Since the visionary ideas and early writings of some decades ago – for example, 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 and John Humphrey, among others [13] – it was necessary to wait some decades for the current developments in the realisation of international justice to take place, which are now, though not without difficulties [14], enriching and enhancing international law.

C. The contribution of expanded advisory jurisdiction

The PCIJ became, for the first time, an international tribunal attributed with the advisory function, originally conceived to assist the Assembly and the Council of the League of Nations. Making good use of it, the PCIJ ended up by assisting not only those organs, but States as well: among the twenty-seven advisory opinions it delivered, seventeen addressed then-existing aspects of disputes between States,

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11. Cançado Trindade, *Os Tribunais Internacionais* (note 9), p. 20-22.

12. For a general study, cf. e.g. J. Allain, *A Century of International Adjudication: The Rule of Law and Its Limits*, The Hague, TMC Asser Press, 2000.

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

14. Cf., *inter alia* e.g. G. Fouda, "La justice internationale et le consentement des Etats", in K. Koufa (ed.), *International Justice: Thesaurus Acroasium*, Vol. 26, Thessaloniki, Sakkoulas, 1997, p. 889-891, 896 and 900; D. Momtaz and A. G. Amirhandeh, "The Interaction between International Humanitarian Law and Human Rights Law and the Contribution of the ICJ", in K. Bannelier, Th. Christakis and S. Heathcote (eds.), *The ICJ and the Evolution of International Law*, London/New York, Routledge, 2012, p. 256-263; M. Zagor, "Elementary Considerations of Humanity", in *ibid*., p. 264-291.

contributing to the avoidance of full-blown contentious proceedings and exercising a preventive function [15]. The advisory function, as exercised by the PCIJ, thus contributed also to the progressive development of international law.

Ever since, the advisory jurisdiction has expanded. While the PCIJ Statute enabled only the League Council and Assembly to request advisory opinions, the ICJ Statute enabled other UN organs (besides the General Assembly, the Security Council and the Economic and Social Council) and specialised agencies and others to do so, and the ICJ has likewise issued twenty-seven advisory opinions to date, including its most recent one, on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* of 27 February 2019.

Advisory opinions of the ICJ, on their part, can also contribute, and have indeed done so, to the prevalence of the *rule of law* at national and international levels. Some of them have, likewise, contributed to the progressive development of international law (e.g. those given on *Reparation for Injuries*, 1949; on *Namibia*, 1970; on *Immunity from Legal Process of a Special Rapporteur of the UN Commission on Human Rights*, 1999; among others). Some of the ICJ's advisory opinions – like the aforementioned – have furthermore brought light and orientation to the work of the United Nations as a whole, and the General Assembly and Security Council in particular.

The relevance and impact of its most recent advisory opinion, the one on *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* of 2019, have been promptly acknowledged and supported by the UN General Assembly itself in its subsequent resolution A/RES/73/295 of 22 May 2019. I have appended my extensive separate opinion to the ICJ's advisory opinion of 2019, not only supporting it, but, furthermore, taking my own reasoning much further: I stressed in detail, *inter alia*, the remarkable historical contribution of the Law of the United Nations to decolonisation and situated the latter in the domain of *jus cogens*, with all legal consequences for the (two) States in breach of successive resolutions of the UN General Assembly in the present domain.

Other contemporary international tribunals have also been endowed with the advisory jurisdiction, and there are examples of frequent

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

use made of it, such as, in particular, the widely recognised advisory jurisprudential construction of the IACtHR. In the exercise of its advisory jurisdiction (Article 64 of the American Convention on Human Rights), the IACtHR delivered, *inter alia*, its 16th and 18th advisory opinions *(infra)*, which were soon to become of historical importance, given their foundations and impact [16].

In its ground-breaking and very relevant 16th advisory opinion of 1 October 1999 on the *Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, the IACtHR held that Article 36 of the 1963 Vienna Convention on Consular Relations recognises to the foreigner under detention individual rights – among which the right to information on consular assistance – to which correspond duties incumbent upon the receiving State [17]. The individual right to information under Article 36 (1) *(b)* of the Vienna Convention – the IACtHR added – secures full procedural equality and renders effective the right to the due process of law, with judicial guarantees [18].

This 16th advisory opinion of the IACtHR, truly pioneering, has served as inspiration for the emerging international case law, *in statu nascendi*, on the matter [19], and was promptly to have a sensible impact on

16. *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 16th Advisory Opinion, 1999; *Juridical Condition and Rights of Undocumented Migrants*, 18th Advisory Opinion, 2003.

17. The IACtHR then pointed out that the evolutive interpretation and application of the *corpus juris* of the ILHR have had a relevant impact on international law in developing the latter's aptitude to regulate the relations between States and human beings under their respective jurisdictions, and thus fostering the evolution of the fundamental rights of the human person in contemporary international law.

18. The IACtHR in this way linked the right at issue to the evolving guarantees of due process of law, with all the juridical consequences inherent to a violation of the kind, i.e. those pertaining to the international responsibility of the State and to the duty of reparation.

19. As promptly acknowledged by expert writing, e.g. in referring to the subsequent ICJ decision of 27 June 2001 in the *LaGrand* case, rendered "à la lumière notamment de l'avis de la Cour Interaméricaine des Droits de l'Homme du 1er octobre 1999"; G. Cohen-Jonathan, "Cour Européenne des Droits de l'Homme et droit international général (2000)", *Annuaire français de Droit international*, Vol. 46 (2000), p. 642. On the pioneering importance of the IACtHR's 16th advisory opinion of 1999, cf. also Ph. Weckel, M. S. E. Helali and M. Sastre, "Chronique de jurisprudence internationale", *Revue générale de Droit international public*, Vol. 104 (2000), p. 794 and 791. It has further been pointed out that the IACtHR's advisory opinion of 1999 contrasts with "la position restrictive prise par la Cour de La Haye" in its decision of 2001 in the *LaGrand* case; Ph. Weckel, "Chronique de jurisprudence internationale", *Revue générale de Droit international public*, Vol. 105 (2001), p. 764-765 and 770. And cf. also, in further acknowledgment of the pioneering contribution of the 16th advisory opinion of the IACtHR, M. Mennecke, "Towards the Humanization of the Vienna Convention of Consular Rights: The *LaGrand* Case before the International Court of Justice", *German Yearbook of International Law/ Jahrbuch für internationales Recht*, Vol. 44 (2001), p. 430-432, 453-455, 459-460 and 467-

the practice of the States of the region on the issue [20]. Four years later, on 17 September 2003, the IACtHR delivered its 18th advisory opinion, on the *Juridical Condition and Rights of Undocumented Migrants*, wherein it held that States ought to respect, and ensure respect for, human rights in the light of the basic principle of equality and non-discrimination; it added that any discriminatory treatment with regard to the protection and exercise of human rights generates the international responsibility of the States.

In sequence, the IACtHR furthermore held that the fundamental principle of equality and non-discrimination has entered into the domain of *jus cogens*. The IACtHR added that States ought to guarantee due process of law to any person, irrespective of his/her migratory status; undocumented migrant workers have the same labour rights as other workers in the State of employment, and this latter group ought to ensure respect for those rights in practice. The 18th advisory opinion of the IACtHR, on the *Juridical Condition and Rights of Undocumented Migrants* (2003), had, for all its implications, a considerable impact in the American continent, and its influence irradiated elsewhere as well, given the importance of the matter.

It propounded the same evolutive interpretation of the ILHR heralded by the IACtHR in its pioneering 16th advisory opinion of 1999. In 2003, the IACtHR thus reiterated and expanded on the forward-looking outlook of its 16th advisory opinion, this time in its 18th advisory opinion, constructed upon the evolving concepts of *jus cogens* and of obligations *erga omnes* of protection. As can be seen, the IACtHR's aforementioned advisory opinions (of 1999 and 2003) have helped to shed light on some central issues of the utmost importance [21], and to guide

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468; M. Mennecke and C. J. Tams, "The *LaGrand* Case", *International and Comparative Law Quarterly*, Vol. 51 (2002), p. 454-455.

20. The recognition and consolidation of the position of the human being as a full subject of the ILHR constitutes, in our days, an unequivocal and eloquent manifestation of the advances of the current process of *humanisation* of international law itself (the new *jus gentium* of our times); cf., on this point, A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. 3, 2nd ed., Porto Alegre, Sérgio Antonio Fabris, 2003, p. 447-497.

21. For a case study, cf. A. A. Cançado Trindade, "The Humanization of Consular Law: The Impact of Advisory Opinion n. 16 (1999) of the Inter-American Court of Human Rights on International Case-Law and Practice", *Chinese Journal of International Law*, Vol. 6, No. 1 (2007), p. 1-16; A. A. Cançado Trindade, "Le déracinement et la protection des migrants dans le Droit international des droits de l'homme", *Revue trimestrielle des droits de l'homme*, Vol. 19, No. 74 (2008), p. 289-328; A. A. Cançado Trindade, "The International Standards of Protection of the Human Person in the Developing Case-Law of the Inter-American Court of Human Rights (1982-2004)", *Journal of International Law and Diplomacy*, Vol. 104, No. 4 (2006), p. 6-11 and 33-36.

international case law thereon, concerning both the determination of the wide scope of the protected rights under the American Convention, and the operation of the inter-American system of human rights protection, within the framework of the ILHR as a whole.

CHAPTER III

THE REALISATION OF INTERNATIONAL JUSTICE BEYOND THE STRICT *INTER*-STATE DIMENSION

Since these days the international community 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 calls for an approach to their labour from the correct perspective of the *justiciables* themselves [22]. Moreover, this brings us closer to their common mission of securing the realisation 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 various domains of operation.

The matter has attracted attention over the years from some academics with a necessary critical view. For example, in a colloquium which commemorated the fiftieth anniversary of the ICJ (in 1996), critical views were expressed as to the traditional features of the *inter*-State mechanism of adjudication of some of the contentious cases by the ICJ. As illustrations that have kept on defying the passage of time, attention was drawn to the settlement of environmental issues [23], requiring a wider range of participants in the procedure.

Another example recalled was 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) [24]. 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.

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22. A. A. Cançado Trindade, Évolution du Droit international au droit des gens – L'accès des particuliers à la justice *internationale: Le regard d'un juge*, Paris, Pédone, 2008.

23. M. Fitzmaurice, "Equipping the Court to Deal with Developing Areas of International Law: Environmental Law – Presentation", in C. Peck and R. S. Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (1996 Colloquy), The Hague, Nijhoff, 1997, p. 398-418.

24. S. Rosenne, "Lessons of the Past and Needs of the Future – Presentation", in Peck and Lee (note 23), p. 487-488, and cf. p. 466-492.

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 prompt safeguard by the ICJ, at no cost to itself, by means of the application of the so-called *Monetary Gold* "principle"[25]. This is an occasion for further reflection on the matter, as the fact remains that inconsistencies of the kind have persisted to date. In effect, the aforementioned examples are far from being outliers; they in fact abound in the ICJ history. May I refer to other illustrations from the ICJ's recent case law.

In face of the ICJ's negative decision in the case concerning the *Application of the Convention against Genocide* (*Croatia* v. *Serbia*, judgment of 3 February 2015), I presented an extensive dissenting opinion wherein I warned that the present judgment of the ICJ missed the point and failed to render a service to the genocide convention. And I added that:

> "In a case pertaining to the interpretation and application of this latter, the Court even makes recourse to the so-called *Monetary Gold* 'principle'[26], which has no place in a case like the present one, and which does not belong to the realm of the *prima principia*, being nothing more than a concession to State consent, within an outdated State voluntarist framework." (para. 519)

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

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 *Armed Activities on the Territory of the Congo*

25. C. Chinkin, "Increasing the Use and Appeal of the Court – Presentation", in Peck and Lee (note 23), p. 47-48, 53 and 55-56.
26. Even if only to dismiss it (para. 116).

(*DRC* v. *Uganda*, 2000), the ICJ was concerned with grave violations of human rights and of international humanitarian law (IHL); and the *Land and Maritime Boundary between Cameroon and Nigeria* (1996) was likewise concerned with the victims of armed clashes.

Subsequently, examples wherein the ICJ's concerns have had to go beyond the *inter*-State outlook have further increased in frequency. They include, for example, the case on *Questions Relating to the Obligation to Prosecute or Extradite* (2009-2013) pertaining to the principle of universal jurisdiction under the UN Convention against Torture, the case of *A. S. Diallo* (*Guinea* v. *DRC*, 2010) on the detention and expulsion of a foreigner, the case of the *Jurisdictional Immunities of the State* (2010-2012), the cases of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (2011-2019) and the case of the *Temple of Preah Vihear* (provisional measures, 2011).

The same can be said of the last three advisory opinions of the ICJ so far, on the *Declaration of Independence of Kosovo* (2010), the *Judgment of the ILO Administrative Tribunal upon a Complaint Filed against the IFAD* (2012) and the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (of 27 February 2019). The artificiality of the exclusively *inter*-State outlook has thus been made often manifest, and increasingly so; that outlook rests on a long-standing 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 ICJ have asked the Court, by reason of their subject matter, to overcome that outlook.

In my separate opinion appended to the ICJ's order (on reparations, of 6 December 2016) in *Armed Activities on the Territory of the Congo* (*DRC* v. *Uganda*), after examining the acknowledgement of the dictates of *recta ratio* in the doctrinal writings of the "founding fathers" of the law of nations (sixteenth to eighteenth century) (paras. 11-16), which had found inspiration in the much earlier writings of Thomas Aquinas (from the thirteenth century), and pursued an anthropocentric outlook, I deemed it fit to recall and warn that:

> "The reductionist outlook of the international legal order, which came to prevail in the XIXth and early XXth centuries, beholding only absolute State sovereignties and subsuming human beings thereunder, led reparations into a standstill and blocked their conceptual development. This latter has been retaken in current

times, contributing to the historical process of humanization of contemporary international law.

The legacy of the 'founding fathers' of international law has been preserved in the most lucid international legal doctrine, from the XVIth-XVIIth centuries to date. It marks its presence in the universality of the law of nations, in the acknowledgment of the importance of general principles of law, in the relevance attributed to *recta ratio*. It also marks its presence in the acknowledgment of the indissoluble whole conformed by breach and prompt reparation." (paras. 17-18)

In this respect, may I here, furthermore, leave it on the record that, very recently, in the *Application of the Convention for the Suppression of the Financing of Terrorism and of the Convention on the Elimination of All Forms of Racial Discrimination* (preliminary objections, judgment of 8 November 2019, *Ukraine* v. *Russian Federation*), I pointed out, in my separate opinion, that:

"The prevalence of human beings over States marked presence in the writings of the 'founding fathers' of the law of nations, already attentive to the need of redress for the harm done to the human person. This concern marks presence in the writings of the 'founding fathers' of the XVIth. century, namely: Francisco de Vitoria (Second *Relectio – De Indis*, 1538-1539) [27]; Juan de la Peña (*De Bello contra Insulanos*, 1545); Bartolomé de Las Casas (*De Regia Potestate*, 1571); Juan Roa Dávila (*De Regnorum Justitia*, 1591); and Alberico Gentili (*De Jure Belli*, 1598).

Attention to the need of redress is likewise present in the writings of the 'founding fathers' of the following XVIIth century, namely: Juan Zapata y Sandoval (*De Justitia Distributiva et Acceptione Personarum ei Opposita Disceptatio*, 1609); Francisco Suárez (*De Legibus ac Deo Legislatore*, 1612); Hugo Grotius (*De Jure Belli*

27. Already in his pioneering writings, F. de Vitoria conceived the law of nations *(droit des gens)* as regulating an international community (*totus orbis*) comprising human beings organised socially in emerging States and conforming humanity; the reparation of violations of their rights reflected an international necessity addressed by the law of nations, with the same principles of *justice* applying likewise to States and individuals and peoples conforming them. Cf. A. A. Cançado Trindade, "*Totus Orbis*: A Visão Universalista e Pluralista do *Jus Gentium*: Sentido e Atualidade da Obra de Francisco de Vitoria", *Revista da Academia Brasileira de Letras Jurídicas*, Vol. 24, No. 32 (2008), p. 197-212.

> *ac Pacis*, 1625, book II, ch. 17); and Samuel Pufendorf (*Elementorum Jurisprudentiae Universalis – Libri Duo*, 1672; and *On the Duty of Man and Citizen According to Natural Law*, 1673); and is also present in the writings of other thinkers of the XVIIIth century. This is to be kept in mind." (paras. 40-41)

May I also add here that nowadays we are fortunate to live in the era of international tribunals, which were created for the exercise of the common mission of realisation of justice. International tribunals have overcome an outdated State voluntarist conception, and have been contributing to the expansion of international jurisdiction, responsibility, personality and capacity, to the benefit of humankind – as I have been pointing out through the years in successive writings [28]. The advances achieved so far are due to the awareness that human conscience stands above the "will".

There are those who miss this basic foundation of the law of nations *(recta ratio)*, and keep on insisting on the anachronism of reliance upon the will of States, and on their consent as a precondition of access to justice. The fact that judicial settlement is still confused by some with arbitral settlement [29] displays an absence of knowledge of the historical evolution of *jus gentium* and an undue minimisation of the general principles of international law [30].

International justice stands beyond the *inter*-State dimension, and a wide range of international tribunals nowadays adjudicate cases that take place at both *inter*-State and *intra*-State levels, to the benefit of human beings and the international community as a whole. Even if the mechanism of dispute settlement by the ICJ remains, by force of inertia, strictly an *inter*-State one, the *substance* of disputes or issues lodged with the ICJ pertains also to human persons, as the aforementioned cases and opinions clearly show.

The truth is that the strictly *inter*-State outlook has an ideological content and is a product of its time, a time long past. In these more

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28. For a recent general study, cf. Cançado Trindade, *Os Tribunais Internacionais* (note 9), and the extensive bibliography contained therein; and cf. also, *inter alia*, e.g. A. A. Cançado Trindade, "A Consciência sobre a Vontade: Os Tribunais Internacionais e a Humanização do Direito Internacional", *Revista da Faculdade de Direito da UFMG*, Vol. 73 (2018), p. 827-860.

29. For a discussion, cf. e.g. S. Forlati, *The International Court of Justice: An Arbitral Tribunal or a Judicial Body?*, Heidelberg, Springer, 2014.

30. On such historical evolution of *jus gentium*, and the relevance of general principles of international law, cf. A. A. Cançado Trindade, *International Law for Humankind: Towards a New "Jus Gentium"*, 3rd rev. ed., Leiden, The Hague, Nijhoff, Hague Academy of International Law, 2020.

recent decisions *(supra)*, the ICJ has at times rightly endeavoured to overcome that unsatisfactory outlook, so as to face the new challenges of our times, brought before it in contentious cases as well as in requests for advisory opinions that it has lately been seized of.

CHAPTER IV

THE EXPANSION OF INTERNATIONAL JURISDICTION IN DISTINCT DOMAINS OF INTERNATIONAL LAW

A. Introduction

The reassuring expansion of international jurisdiction by means of the present coexistence of international tribunals is a sign of our times, at the end of this second decade of the twenty-first century, so as to secure that each of those tribunals gives its effective contribution to the continuous evolution of international law in the commitment to the realisation of international justice. In effect, such expansion of international jurisdiction, with the rise and functioning of multiple international tribunals, has marked the United Nations era.

The UN Charter itself foresees (Art. 95) the creation of new international tribunals to attend the need of realising international justice. Contemporary international law has nowadays been better equipped with coexisting international tribunals, operating in distinct domains of international law. There is no hierarchy among them, and each one of the international tribunals is expected to be concerned, above all, with the excellence of its own judgments; the greater their dedication to the solid foundations of their own judgments, decisions and opinions, the more they contribute to international justice and peace [31].

The multiplicity of international tribunals is, in my perception, a reassuring phenomenon, one that has filled a gap that persisted in the international legal order. The aptitude of international tribunals has been asserted so as to resolve disputes in distinct domains of international law [32] at both *inter*-State and *intra*-State levels. In

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31. This is a theme which has attracted the attention of juridical circles in the last decades; cf. e.g. Università di Ferrara [various authors], *La Sentenza in Europa – Metodo, Tecnica e Stile*, Padua, CEDAM, 1988, p. 101-126, 217-229 and 529-542.

32. A. A. Cançado Trindade, "Reflexiones sobre los Tribunales Internacionales Contemporáneos y la Búsqueda de la Realización del Ideal de la Justicia Internacional", in Universidad del País Vasco [various editors], *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz/Vitoria-Gasteizko Nazioarteko Zuzenbidearen eta Nazioarteko Harremanen Ikastaroak* [Bilbao], Universidad del País Vasco, Servicio Editorial, 2010, p. 17-95; A. A. Cançado Trindade, "O Papel dos Tribunais Internacionais na Evolução do Direito Internacional Contemporâneo", *Curso*

doing so, this development has contributed to access to justice, at the international level, by distinct subjects of international law. The expansion of international jurisdiction has taken place *pari passu* with the corresponding expansions of international responsibility, as well as of international legal personality and capacity.

B. International human rights tribunals

The presence and operation of international tribunals have also been enhanced at the regional level. Thus, the international procedural capacity of individuals, for example, has been exercised before international human rights tribunals, thanks to the system of international individual petitions [33]. In historical sequence, the European Court of Human Rights (ECtHR), which celebrates its seventieth anniversary in 2020, and the IACtHR, which celebrated its fortieth in 2010, were followed, from 2006, by the African Court of Human and Peoples' Rights (ACtHPR).

The contribution of these three courts to the historical recovery of the position of the human person as a 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 seven decades [34]. The mechanism of the ECtHR has already evolved into conferring *jus standi* to individuals directly before the Court and 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 – both live their own historical moment, and operate in it, within the framework of the universality of human rights.

Another basic feature, and a remarkable contribution of the work of the ECtHR and the IACtHR, is found in the position they have both firmly taken in setting limits on State voluntarism, thus safeguarding the integrity of human rights conventions and of the primacy of considerations of *ordre public* over the will of individual States [35]. Both international tribunals have thus set higher standards of State behaviour

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de Derecho Internacional Organizado por el Comité Jurídico Interamericano de la OEA, Vol. 41 (2014), p. 37-88.

33. A. A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, p. 34-35.

34. Cançado Trindade, Évolution du Droit international (note 22); A. A. Cançado Trindade, *Le droit international pour la personne humaine*, Paris, Pédone, 2012, p. 45-368.

35. This is illustrated e.g. by the ECtHR's decisions in the cases of *Belilos* (1988), *Loizidou* (preliminary objections, 1995) and *Ilascu, Lesco, Ivantoc and Petrov-Popa* (2001), as well as e.g. by the IACtHR's decisions in *Constitutional Tribunal* and *Ivtcher Bronstein* (jurisdiction, 1999), as well as of *Hilaire, Benjamin and Constantine* (preliminary objection, 2001).

and have established some degree of control over the interposition of undue restrictions by States; they have thereby reassuringly enhanced the position of individuals as subjects of international law, with full procedural capacity [36].

International human rights tribunals have drawn attention to the position of *centrality* of the victims, the *justiciables*; as from the establishment of their jurisdiction, the ECtHR and the IACtHR have succeeded in sustaining the integrity and intangibility of their jurisdiction, not succumbing at all to the "will" of States in the course of proceedings. In discarding a voluntarist outlook, they have been conscious that they interpret and apply the *jus necessarium*, rather that the *jus voluntarium* [37]. And the younger ACtHPR has shown like awareness [38].

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36. 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* his/her own State; 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", special issue, *Human Rights Information Bulletin*, No. 50, Strasbourg, Council of Europe, 2000, p. 8-9; A. A. Cançado Trindade, "The Merits of Coordination of International Courts on Human Rights", *Journal of International Criminal Justice*, Vol. 2 (2004), p. 309-312.

37. For inside accounts, cf. the books of memories of former presidents of both international human rights tribunals: as to the IACtHR, cf. A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional – Memorias de la Corte Interamericana de Derechos Humanos*, 5th rev. ed., Belo Horizonte, Del Rey, 2018; and as to the ECtHR, cf. L. Wildhaber, *The European Court of Human Rights (1998-2006): History, Achievements, Reform*, Kehl, Engel, 2006; J.-P. Costa, *La Cour européenne des droits de l'homme – Des juges pour la liberté*, Paris, Dalloz, 2013.

38. Cf. T. Barsac, *La Cour africaine de justice et des droits de l'homme*, Paris, Pédone, 2012, p. 13-100; F. Ouguergouz, "The Long Awaited African Court on Human and Peoples' Rights: A Brief Historical Overview", in Ch. R. Majinge (ed.), *Rule of Law through Human Rights and International Criminal Justice: Essays in Honour of A. Dieng*, Newcastle upon Tyne, Cambridge Scholars Publishing, 2015, p. 313-322; F. Ouguergouz, "La Cour africaine des droits de l'homme et des peuples – Chronique d'une métamorphose annoncée", in M. Kamga and M. M. Mbengue (eds.), *Liber Amicorum R. Ranjeva – L'Afrique et le droit international: Variations sur l'Organisation Internationale*, Paris, Pédone, 2013, p. 265-275; J. Pina-Delgado, "The African Court on Human and Peoples' Rights and Its Position in the International and African Judicial Architectures", in D. Moura Vicente (ed.), *Towards a Universal Justice? Putting International Courts and Jurisdictions into Perspective*, Leiden, Brill, Nijhoff, 2016, p. 98-135; T. F. Yerima, "African Regional Human Rights Courts: Features and Comparative Critique with the European and Inter-American Courts of Human Rights", *Indian Journal of International Law*, Vol. 50 (2010), p. 592-616; R. Ben Achour, "Le système africain de protection des droits de l'homme", in *Dossier Documentaire/ Documentary File – XLVIII session d'enseignement*, Strasbourg, IIDH, 2017, p. 1-6; F. Ouguergouz, "The African Court of Justice and Human Rights", in A. A. Yusuf and F. Ouguergouz (eds.), *The African Union: Legal and Institutional Framework*, Dar-es-Salaam, Mkuki na Nyota, 2012, p. 119-142.

The ECtHR and the IACtHR have developed, through the years, a vast case law, particularly at the level of substantive law, in relation to the rights protected by both regional conventions of human rights. The ECtHR counts on a wide case law pertaining, for example, to the right to the protection of the liberty and security of the person (Article 5 of the European Convention), and to the right to the guarantees of the due process of law (Art. 6). For its part, the IACtHR has a significant case law on the fundamental right to life (Art. 4 of the American Convention), including conditions of living[39], as well as on the matter of reparations (Art. 63 (1)) [40].

C. *International criminal tribunals*

On their part, contemporary international criminal tribunals saw the light of day in the 1990s, bearing in mind the precedents of the post-World War II Nuremberg and the Tokyo tribunals. *Ad hoc* international criminal tribunals (for the former Yugoslavia and for Rwanda – ICTY and ICTR) were established, in 1993 and 1994 respectively, by the decision of the UN Security Council in the light of Chapter VII of the UN Charter, so as to preserve the belief in an international legal order in which those responsible for grave violations of human rights and IHL are judged and sanctioned, thus preventing future crimes [41].

Both *ad hoc* tribunals were prompt to disclose concrete results [42]. As their work has recently been completed, attention is now increasingly

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39. As from its decision in the paradigmatic case of the "*Street Children*" (*Villagrán Morales and Others* v. *Guatemala*, merits, 1999).

40. 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 (Costa Rica), IACtHR, 2007, p. 18-19; Cançado Trindade, *El Ejercicio de la Función Judicial Internacional* (note 38), p. 87-97.

41. Cf. A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. 2, Porto Alegre, Sérgio Antonio Fabris, 1999, p. 386-392; K. Lescure, *Le Tribunal Pénal International pour l'ex-Yougoslavie*, Paris, Montchrestien, 1994, p. 15-133; R. Kerr, *The International Criminal Tribunal for the Former Yugoslavia*, Oxford, Oxford University Press, 2004; A. Cassese, "The International Criminal Tribunal for the Former Yugoslavia and Human Rights", *European Human Rights Law Review*, Vol. 2 (1997), p. 329-352; R. S. Lee, "The Rwanda Tribunal", *Leiden Journal of International Law*, Vol. 9 (1996), p. 37-61.

42. Cf. J. R. W. D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 2nd ed., Ardsley, NY, Transnational Publishers, 1999; F. P. King and A.-M. La Rosa, "The Jurisprudence of the Yugoslavia Tribunal: 1994-1996", *European Journal of International Law*, Vol. 8 (1997), p. 155-160; P. Tavernier, "The Experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda", *International Review of the Red Cross*, Vol. 37, No. 321 (1997), p. 607-613.

focusing on their case law and their respective legacies. Both have completed their work, with closing sessions marking the end of their operation, for the ICTR at the end of 2015, and for the ICTY at the end of 2017.

There is currently an enhanced endeavour to elaborate further the assessment of the work of the two former *ad hoc* international criminal tribunals [43], also assessing their contribution to the evolution of international criminal law (ICL), including its relations with the ILHR and IHL [44]. In effect, international criminal tribunals and international human rights tribunals have greatly contributed to the struggle against impunity, in the present age of accountability, of individuals as well as States.

Thus, as to "hybrid" or "mixed" international tribunals, the same has happened with the Special Court for Sierra Leone (SCSL), which became the first of this category of international tribunal to complete its mandate, having concluded its work and ceased operation on 2 December 2013 [45]. In its landmark case of *Charles Taylor*, it convicted and sentenced the former president of Liberia and assumed the vanguard of the case law on conscription of child soldiers [46].

The creation and operation of the ICTY and ICTR paved the way for the establishment of a permanent international criminal jurisdiction, with the adoption, on 17 July 1998, of the Rome Statute of the International Criminal Court (ICC) [47]. The ICC Statute, which entered

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43. Cf. recently e.g. M. Sterio, "The Yugoslavia and Rwanda Tribunals: A Legacy of Human Rights Protection and Contribution to International Criminal Justice", in M. Sterio and M. P. Scharf (eds.), *The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing the ICTY's and the ICTR's Most Significant Legal Accomplishments*, Cambridge, Cambridge University Press, 2019, p. 11-24.

44. R. H. Steinberg, "Constructing the Legacy of the ICTY", in R. H. Steinberg (ed.), *Assessing the Legacy of the ICTY*, Leiden, Nijhoff, 2011, p. 3-10; P. L. Robinson, "Creating a Legacy that Supports Sustainable Rule of Law in the Region", in *ibid*., p. 21-26.

45. On the legacy of the SCSL, cf. V. E. Dittrich, "La Cour Spéciale pour la Sierra Leone et la portée de son héritage", *Etudes internationales – Québec*, Vol. 45, No. 1 (2014), p. 85-103; V. E. Dittrich, "Legacies in the Making: Assessing the Institutionalized Legacy Endeavour of the Special Court for Sierra Leone", in Ch. C. Jallob (ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*, Cambridge, Cambridge University Press, 2014, p. 663-691; Th. M. Clark, "Assessing the Special Court's Contribution to Achieving Transitional Justice", in *ibid.*, p. 746-769.

46. As well as the case law on forced marriages as a crime against humanity.

47. Cf. M. Ch. Bassiouni (ed.), *The Statute of the International Criminal Court: A Documentary History*, Ardsley, NY, Transnational Publishers, 1998; R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, The Hague, Kluwer, 1999; B. N. Schiff, *Building the International Criminal Court*, Cambridge, Cambridge University Press, 2008.

into force on 1 July 2002, defined *core crimes* (Art. 5) [48] and conceived the principle of complementarity with primacy to national jurisdictions. It thus reverted the position the principle of complementary had held in the operation of the ICTY and the ICTR, in which their jurisdictions had primacy over those of national tribunals.

Yet, in other aspects, the ICC Statute took a forward-looking position; for example, it inaugurated a new stage in the evolution of ICL in providing for the participation of victims in the proceedings before the ICC [49]. This new and comprehensive approach has been welcomed in international legal thinking throughout the first decade of operation of the ICC as a valuable contribution to "the development of the theory of justice for victims" also in the domain of ICL [50].

The ICC has, through the years, remained particularly attentive to the matter [51]. The horizon is enlarged if one takes into account the practice of other contemporary international criminal tribunals. Thus, besides the aforementioned *ad hoc* tribunals and the ICC, there has been also nowadays the operation of the so-called "internationalised" or "hybrid" or mixed international tribunals (for East Timor, Kosovo,

48. Cf. A. Cassese and M. Delmas-Marty (eds.), *Crimes internationaux et juridictions internationales*, Paris, PUF, 2002; [Various authors], in J. A. Carrillo Salcedo (ed.), *La Criminalización de la Barbarie: La Corte Penal Internacional*, Madrid, Consejo General del Poder Judicial, 2000, p. 17-504; M. Ch. Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd rev. ed., The Hague, Kluwer, 1999; Y. Jurovics, *Réflexions sur la spécificité du crime contre l'humanité*, Paris, LGDJ, 2002; G. Mettraux, *International Crimes and the Ad Hoc Tribunals*, Oxford, Oxford University Press, 2006 [reed.].

49. Cf. e.g. J. Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties*, Oxford, Hart Publishing, 2008; G. M. Mabanga, *La victime devant la Cour Pénale Internationale*, Paris, L'Harmattan, 2009; M. Jacquelin, "De l'ombre à la lumière: l'intégration contrôlée des victimes au sein de la procédure pénale internationale", in G. Giudicelli-Delage and C. Lazerges (eds.), *La victime sur la scène pénale en Europe*, Paris, PUF, 2008, p. 179-204; R. Cario, "Les droits des victimes devant la Cour Pénale Internationale", *Actualité juridique pénale*, Vol. 6 (2007), p. 261-266; R. Maison, "La place de la victime", in H. Ascensio, E. Decaux and A. Pellet (eds.), *Droit international pénal*, Paris, Pédone, 2000, p. 779-784.

50. L. Moffett, *Justice for Victims before the International Criminal Court*, London, Routledge, 2014, p. 2, and cf. p. 86-289; and cf. also e.g. N. Tsereteli, "Victim Participation in ICC Proceedings", in C. Stahn and L. van den Herik (eds.), *Future Perspectives on International Criminal Justice*, The Hague, TMC Asser Press, 2010, p. 625-658; D. Scalia, "La place des victimes devant la CPI", in R. Kolb (ed.), *Droit international pénal*, Bruylant/Brussels, Helbing Lichtenhann/Bâle, 2008, p. 311-340.

51. It has advanced its position in regard to two points in particular, in respect of which the work of the ICTY and the ICTR is nowadays considered to have been unsatisfactory: namely, in relation to reparations (with results still to be achieved) and in respect of the participation of victims in the process. After all, retributive justice does not dispense with restorative justice.

Sierra Leone, Cambodia, Bosnia-Herzegovina and Lebanon)[52], successively established between 1999 and 2007[53]. Like the ICC, also in these "mixed" tribunals there has been the initiative to secure some kind of participation to the victims, – as illustrated by the unique "hybrid" tribunal; namely, the Extraordinary Chambers in the Court of Cambodia (ECCC).

The ECCC, after three decades, started to judge some of those responsible for the atrocities of the *Khmer Rouge* case[54]. The three most significant judgments, up until the end of 2018, are the condemnations: in *Kaing Guek Eav (Duch)* for crimes against humanity (judgment of 26 July 2010), and in *Nuon Chea* and *Khieu Samphan* also for crimes against humanity, as well as grave violations of the 1949 Geneva Conventions on IHL[55] (including murder, torture, cruel or inhuman treatment and damages, lack of access to justice) and the crime of genocide (judgments of 16 November 2018).

In effect, the "mixed" or "hybrid" or "internationalised" tribunals – a new experiment in search of international justice – have contributed, each in its own way, to the determination of the accountability[56] of those responsible for grave violations of human rights and of IHL. They afford yet another illustration of the rescue of the international

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52. Cf. e.g. S. Williams, *Hybrid and Internationalized Criminal Tribunals*, Oxford, Hart Publishing, 2012, p. 58-133; C. P. R. Romano, A. Nollkaemper and J. K. Kleffner (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford, Oxford University Press, 2004, p. 3-38.

53. The "hybrid" or "internationalized" tribunals for East Timor and for Kosovo in 1999; Sierra Leone in 2002; Cambodia in 2003; Bosnia-Herzegovina in 2005; and Lebanon in 2007. For an account, cf. R. Geiß and N. Bulinckx, "International and Internationalized Criminal Tribunals: A Synopsis", *International Review of the Red Cross*, Vol. 88, No. 861 (2006), p. 49-63.

54. A significant initiative, despite procedural limitations of the type of participation as *partie civile*; cf. P. Kroker, "Transitional Justice Policy in Practice: Victim Participation in the *Khmer Rouge* Tribunal", *German Yearbook of International Law*, Vol. 53 (2010), p. 753-791; M. Mohan, "The Paradox of Victim-Centrism: Victim Participation at the *Khmer Rouge* Tribunal", *International Criminal Law Review*, Vol. 9 (2009), p. 733-775; Hao Duy Phan, "Reparations to Victims of Gross Human Rights Violations: The Case of Cambodia", *East Asia Law Review*, Vol. 4 (2009), p. 277-298; N. H. B. Jorgensen, "The Extraordinary Chambers in the Courts of Cambodia and the Progress of the *Khmer Rouge* Trials", *Yearbook of International Humanitarian Law*, Vol. 11 (2008), p. 373-389.

55. Namely, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention relative to the Treatment of Prisoners of War; and Geneva Convention relative to the Protection of Civilian Persons in Time of War; all four Conventions of 12 August 1949.

56. Cf. S. Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice", *Criminal Law Forum*, Vol. 12 (2001), p. 185-246, esp. p. 245.

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).

CHAPTER V

THE RELEVANCE OF INTERNATIONAL JURISDICTION AND RESPONSIBILITY

A. Introduction

The aforementioned developments due to the work of international tribunals follow from the reactions of the conscience of humanity against grave violations of human rights and IHL, crimes against peace, crimes against humanity and acts of genocide. As I have indicated, the tribunals give testimony to the expansion not only of international personality (and capacity) but also of international jurisdiction and international responsibility. This is a notable feature of our times.

International tribunals' determination of responsibility – with all its legal consequences – 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 they 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 they hold in the hierarchical scale of the public power of the State.

Thanks to the work of all these international tribunals, the international community no longer accepts impunity for international crimes, for *grave* violations of human rights and of IHL[57]. The determination of the international criminal responsibility of individuals by competent international tribunals is a reaction of contemporary international law to *grave* violations, guided by fundamental principles and values shared

57. A. A. Cançado Trindade, "Reflections on the International Adjudication of Cases of Grave Violations of Rights of the Human Person", *Journal of International Humanitarian Legal Studies*, Vol. 9 (2018), p. 98-136; and cf. E. Möse, "The International Criminal Tribunal for Rwanda", in R. Bellelli (ed.), *International Criminal Justice: Law and Practice from the Rome Statute to Its Review*, Farnham, Ashgate, 2010, p. 90; E. Möse, "Main Achievements of the ICTR", *Journal of International Criminal Justice*, Vol. 3 (2005), p. 932-933; and cf. also, likewise, A. Cassese, "The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice", *Leiden Journal of International Law*, Vol. 25 (2012), p. 497.

by the international community as a whole [58]. International human rights tribunals as well as international criminal tribunals have operated decisively to put an end to impunity.

B. Protection of vulnerable persons

The jurisprudential advances of recent years could not have been anticipated some decades ago [59]. International human rights tribunals have helped to awaken the public conscience in respect of situations of utmost adversity or even defencelessness affecting individuals, and of widespread violence victimising vulnerable segments of the population [60]. They have, in effect, brought justice to those victimised, even in situations of systematic and generalised violence and mass atrocity [61].

In our days, international legal doctrine is more lucid and has at last discarded the empty euphemistic expressions used some years ago [62]. 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 in resolving disputes in distinct domains at both *inter*-State and *intra*-State levels (cf. *supra*). Contemporary international law has thereby become more responsive

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58. S. Zappalà, *La justice pénale internationale*, Paris, Montchrestien, 2007, p. 15, 19, 23, 29, 31, 34-35, 43, 135, 137 and 145-146. 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 amid the most complete adversity; Cançado Trindade, *Access of Individuals* (note 13), p. 196-198 and cf. p. 132-191.

59. As to the growing importance recently devoted to the theme, cf. Y. Beigbeder, *International Justice against Impunity: Progress and New Challenges*, Leiden, Nijhoff, 2005.

60. Cf. as to the ECtHR e.g. M. D. Goldhaber, *A People's History of the European Court of Human Rights*, New Brunswick, NJ, Rutgers University Press, 2009, p. 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", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 70 (2010), p. 629-699.

61. 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; Cançado Trindade, *Os Tribunais Internacionais* (note 9), p. 62-63.

62. Such as the so-called "proliferation" of international tribunals, the so-called "fragmentation" of international law or so-called "forum-shopping" – which diverted attention to false issues of delimitation of competences, oblivious to the need to focus on the imperative to enlarge access to justice. Those expressions, narrow-minded, inelegant and derogatory, and devoid of any meaning, paid a disservice to our discipline; they missed the key point of the considerable advances of the old ideal of international justice in the contemporary world.

to the fulfilment of the basic needs of the international community, of human beings and of humankind as a whole, among which is that of the realisation of justice.

Parallel to the expansion of international jurisdiction (cf. *supra*), contemporary international tribunals have been operating amid the expansion also of international responsibility (of States, international organisations and individuals). And they have fostered the recognition of the international legal personality and capacity of individuals to vindicate rights which are inherent to them as human beings, including *vis-à-vis* their own State (before international human rights tribunals).

The international subjectivity of individuals comes, thus, to be ineluctably linked to international responsibility (limited in the past to that of States, and then, more recently, enlarged to that of international organisations [63]). For years I have been expressing my understanding in the sense that the most precious legacy of jusinternationalist thinking in the second half of the twentieth century lies in the consolidation of the international legal personality and capacity of the human person [64].

C. Unity of the law in the interactions between international and domestic law

The labour of international human rights tribunals, as well as of international criminal tribunals, bears witness to the interactions between international and domestic law in their respective domains of operation. The realisation of justice becomes a common goal, and a converging one, of the domestic and international legal orders. Both types of tribunal testify to the *unity of the law* in the realisation of justice, a sign of our times. International human rights tribunals have shown

63. Cf. A. A. Cançado Trindade, *Direito das Organizações Internacionais*, 6th rev. ed., Belo Horizonte, Del Rey, 2014, chap. 27, p. 611-619 and cf. p. 705-723.

64. Cf. e.g. Cançado Trindade, *El Acceso Directo del Individuo* (note 31), p. 9-104; A. A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, 2nd ed., Santiago, Editorial Jurídica de Chile, 2006, p. 9-559; Cançado Trindade, Evolution du Droit international (note 22); Cançado Trindade, *Le Droit international* (note 35), p. 45-368; A. A. Cançado Trindade, "The International Law of Human Rights at the Dawn of the XXIst Century", *Cursos Euromediterráneos Bancaja de Derecho Internacional: Vol. III (1999)*, Castellón, Aranzadi, 2000, p. 145-221; A. A. Cançado Trindade, "Le développement du Droit international des droits de l'homme à travers l'activité et la jurisprudence des Cours européenne et interaméricaine des droits de l'homme", *Revue universelle des droits de l'homme*, Vol. 16 (2004), p. 177-180; A. A. Cançado Trindade, "Reflexões sobre a Personalidade Jurídica Internacional dos Indivíduos", *Revista da Academia Brasileira de Letras Jurídicas*, Vol. 37, Nos. 38-39 (2012-2013), p. 87-141.

that, in the great majority of cases lodged with them, international jurisdiction is resorted to when it is no longer possible to get justice at the domestic law level.

In effect, the expansion of international jurisdiction in securing the primacy of law *(préeminence du droit*, *rule of law)* has counted on the co-participation of national jurisdictions, as, after all, international law attributes international functions also to national tribunals [65]. Among international criminal tribunals, the ICC shows, *inter alia*, that the principle of complementarity, for example, signals a call for greater approximation, if not interaction, between the international and national jurisdictions – in constant interaction in the protection of the rights of the human person and in the struggle against the impunity of violators of those rights.

Also in the domain of the international protection of the rights of the human person, international and national jurisdictions interact to secure protection of the victims. There are, moreover, significant illustrations, in certain situations of extreme adversity to human beings, of international jurisdiction having even *preceded* national jurisdiction in the protection of the rights of the victimised and in the reparations due to them. 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 [66] and 2006 [67], 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) [68].

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 defence of the national one*, decisively contributing to the restoration of the État de Droit – as it occurred – besides having safeguarded the

65. Cf. Cançado Trindade, *Access of Individuals* (note 13), chap. 5, p. 76-112, on the interaction between international law and domestic law in human rights protection.

66. Judgments of 14 March 2001 (merits), 3 September 2001 (interpretation) and 30 November 2001 (reparations).

67. Judgment of 29 November 2006 (merits and reparations).

68. For a historical account, cf. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional* (note 38), p. 42-45; Cançado Trindade, *Os Tribunais Internacionais* (note 9), p. 56-59.

rights of the victimised [69]. This trilogy of historical cases will keep on being studied by present and future generations of internationalists and constitutionalists engaged with the protection of human rights.

D. The importance of the realisation of justice

The more than a hundred cases of adjudication in which I participated within the IACtHR, added to some others, through the last decade, within the ICJ, in disclosing, in my perception, the most sombre acts that exist in human nature (in grave violations of human rights and IHL, some of them with extreme cruelty), have reinforced my firm belief in the relevance of jurisdiction and responsibility. I am thankful for having been able to give my contribution to the access to international justice of those victimised.

International human rights tribunals – and, to a lesser degree, international criminal tribunals – have contributed to secure the *centrality of* victims in international legal procedure. Contemporary international tribunals, in fulfilling a real need of the international community (of securing the protection of those who need it, the most vulnerable), have fostered the reassuring historic process which we bear witness and contribute to, which I have deemed fit through the years to call the *humanisation* of contemporary international law [70].

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69. Almost three years after the IACtHR's judgment (of 31 January 2001) in the *Constitutional Tribunal*, I sent a letter to the latter (on 4 December 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". The text of the letter is reproduced in OAS, *Informe Anual de la Corte Interamericana de Derechos Humanos – 2003*, San José (Costa Rica), IACtHR, 2004, annex 57, p. 1459-1460 and cf. p. 1457-1458.

70. A. A. Cançado Trindade, "A Emancipação do Ser Humano como Sujeito do Direito Internacional e os Limites da Razão de Estado", *Revista da Faculdade de Direito da Universidade do Estado do Rio de Janeiro*, Vol. 6/7 (1998-1999), p. 425-434; A. A. Cançado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", *Revista da Faculdade de Direito da UFMG*, Vol. 40 (2001) p. 11-23; A. A. Cançado Trindade, "La Emancipación de la Persona Humana en la Reconstrucción del *Jus Gentium*", *Revista da Faculdade de Direito da UFMG*, Vol. 47 (2005) p. 55-74; A. A. Cançado Trindade, "As Manifestações da Humanização do Direito Internacional", *Revista da Academia Brasileira de Letras Jurídicas*, Vol. 23, No. 31 (2007), p. 159-170; A. A. Cançado Trindade, "Hacia el Nuevo Derecho Internacional para la Persona Humana: Manifestaciones de la Humanización del Derecho Internacional", *Ius Inter Gentes - Revista de Derecho Internacional*, Vol. 4 (2007), p. 12-21; A. A. Cançado Trindade, *A Humanização do Direito Internacional*, 2nd rev. ed., Belo Horizonte, Del Rey, 2015.

If we look back to recent decades, it becomes clear that human beings, with the advent of international human rights tribunals and international criminal tribunals, have become recognised as subjects of international law, ultimate addressees of the norms of the law of nations *(droit des gens)* [71]. The ICTY and ICTR recently concluded their cycle, leaving behind legacies for the future development of ICL [72].

In effect, the ICTR reached the end of its era on 31 December 2015 [73]; likewise, the the work of the ICTY came to an end on 21 December 2017. In a ceremony held on the occasion of the conclusion of the work of the ICTR in 2015, the UN Security Council recalled the establishment, five years earlier, by its resolution 1966 (2010), of the International Residual Mechanism for the International Criminal Tribunals, precisely to ensure that the successive ends of the work of the ICTR and the ICTY, did "not leave the door open to impunity" [74]. Their precious archives, of historic relevance, have passed to the custody of the Mechanism of International Criminal Tribunals (MICT) of the United Nations, as UN property, remaining, accordingly, inviolable [75].

At this historical time of conclusion of the era of *ad hoc* international criminal tribunals (ICTR and ICTY), attention has turned to the preservation of their legacy [76]. The ICTY has contributed to clarifying

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71. Cf. *Conversación con Antônio Augusto Cançado Trindade – Reflexiones sobre la Justicia Internacional* (interview with E. Bea), Valencia, Tirant lo Blanch, 2013, p. 90, 96 and 111.

72. Cf. [Various authors], in *2007, L'Année des bilans: Leçons et perspectives face à la clôture des premiers tribunaux internationaux*, Paris, IJT, 2007, p. 11-119; ICTY, *ICTY Manual on Developed Practices, as Part of a Project to Preserve the Legacy of the ICTY*, The Hague, ICTY; Turin, UNICRI, 2009.

73. Five years before its closing, attentions had already begun to turn to the issue of its legacy: cf. e.g. [Various authors], in *Symposium on the Legacy of International Criminal Courts and Tribunals in Africa, with a Focus on the Jurisprudence of the International Criminal Tribunal for Rwanda*, Waltham, Brandeis University, 2010, p. 1-49. And cf. on its legacy e.g. S. Kendall and S. M. H. Nouwen, "Speaking of Legacy: Toward an Ethos of Modesty at the International Criminal Tribunal for Rwanda", *American Journal of International Law*, Vol. 110 (2016), p. 212-232.

74. UN, *Security Council Press Statement on Closure of International Criminal Tribunal for Rwanda*, Press release, 31 December 2015, SC/12188-AFR/3296-L/3249, p. 1.

75. UN, *United Nations Mechanism for International Criminal Tribunals*, MICT Archives, 2015, p. 1 and 3.

76. Cf. e.g. [Various authors], in R. H. Steinberg (ed.), *Assessing the Legacy of the ICTY*, Leiden, Nijhoff, 2011, p. 3-311; [Various authors], in *ICTY Global Legacy* (2011 Hague Conference Proceedings), The Hague, ICTY Outreach Programme, 2012, p. 9-175; [Various authors], in *Legacy of the ICTY in the Former Yugoslavia* (Sarajevo and Zagreb Conferences Proceedings), The Hague, ICTY Outreach Programme, 2012, p. 11-216; [Various authors], *20 Years of the ICTY: Anniversary Events and Legacy Conference Proceedings*, Sarajevo, UN/ICTY, 2014, p. 9-107. And, for a general study, cf. e.g. [Various authors], in B. Swart, A. Zahar and G. Sluiter (eds.), *The Legacy of the*

the constitutive elements of war crimes, crimes against humanity and genocide, as well as to the relation of gender crimes (e.g. rape and sexual violence) with each one of those international crimes [77]. The ICTY has also contributed to the development of ICL and of IHL [78] and further clarified the development of customary international law. The case law of the ICTY has much influenced the case law of "internationalised" or "mixed" international criminal tribunals.

The ICTR, for its part, was the first international tribunal to pronounce, in its judgment in *Akayesu* (1998), on the crime of genocide, sustaining that rape (and other inhuman sexual violations) can amount to the crime of genocide when intending to destroy a particular group. The decision in *Akayesu* [79] oriented the case law of the SCSL in the sense that, in order to determine rape, it is not necessary to prove the absence of consent of the victim, given the coercitive context in which rape takes place.

There were other occasions in which the ICTR condemned genocide, for example in *J. Kambanda* (judgment of 4 September 1998), in which it became the first international criminal tribunal to condemn a former Head of State who admitted responsibility for genocide. The ICTY also contributed with its determination of genocide in Srebrenica (in 1995), in the *R. Krstic* (judgment of 19 April 2004) and *R. Karadzic* (judgment of 24 March 2016) cases. The ICTR (with its strong case law on the matter), the ICTY and the ECCC (cf. *supra*) have determined their condemnation of the crime of genocide and have contributed to its prosecution. This is part of their legacy for the future.

Their case law reveals the importance of general principles of law, of conventional and customary international law, bringing together ICL, ILHR and IHL. They devoted attention to the importance of witnesses' memories, given the passing of time and its effects. In effect, both the ICTY and the ICTR, having concluded their eras of work, have contributed much to the improvement of procedural rules, including in

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International Criminal Tribunal for the Former Yugoslavia, Oxford, Oxford University Press, 2011, p. 7-536.

77. For a parallel between the case law of the ICTR and the ICTY on gender crimes (crimes relating to sexual violence), cf. I. Piccolo (ed.), *The Crime of Rape in International Criminal Law*, The Hague, ICA, 2013, p. 5-78; [Various authors], in S. Brammertz and M. Jarvis (eds.), *Prosecuting Conflict-Related Sexual Violence at the ICTY*, Oxford, Oxford University Press, 2016.

78. The crime of torture, in particular, first emerged in the ILHR, and then, later on, also in ICL.

79. Which served as precedent for judgment in the *M. Muhimana* case (2005).

probative matters in relation to international crimes, so as to put an end to impunity.

The case law of international human rights tribunals and of international criminal tribunals, as well as some of the decisions of the ICJ *(supra)*, bear witness to the reaction of the human conscience, of the universal juridical conscience, to grave violations of the rights of the human person [in their pursuance of the realisation of justice]. The vulnerability of victims has been duly taken into account as an aggravating circumstance, with all legal effects. Universal human values are likewise duly stressed. Their case law has contributed to the current historical process of humanisation of international law[80].

80. Cf., for a general study, Cançado Trindade, *Os Tribunais Internacionais* (note 9); Cançado Trindade, *International Law for Humankind* (note 31); and cf. A. A. Cançado Trindade, *Judge A. A. Cançado Trindade: The Construction of a Humanized International Law; A Collection of Individual Opinions (1991-2013)*, 3 vols., Leiden, Brill, Nijhoff, Vol. 1 (IACtHR), 2014; Vol. 2 (ICJ), 2014; Vol. 3 (ICJ), 2017.

CHAPTER VI

THE *JUS NECESSARIUM*: THE MOVE TOWARDS COMPULSORY JURISDICTION AND THE CONTRIBUTION TO THE RULE OF LAW

A. Introduction

The relevance of international jurisdiction and responsibility, as we have just seen, is nowadays widely acknowledged, there being other key related aspects to keep in mind. Contemporary international law counts on multiple international tribunals, engaged in the realisation of justice. The advances of the international legal order correspond to the awareness of human conscience of the need of realisation of justice in pursuance of the common good. True jusinternationalist thinking, in my understanding, conceives international law as being endowed with its own intrinsic value, and being thus certainly superior to a simply "voluntary" law.

This proper conception derives its authority from *recta ratio* itself *(est dictatum rectae rationis)*, which has always called for a truly universal law of nations. For those who dedicate themselves to the law of nations, it has become evident that one can only correctly approach its foundations and validity as from *universal juridical conscience*, in conformity with the *recta ratio*. In the framework of contemporary international tribunals, attention should also be drawn to their move (or some of them) towards compulsory jurisdiction.

This brings us to another key point, namely that of the contribution of contemporary international tribunals to the rule of law *(prééminence du droit)*, stressing the needed construction of a *corpus juris* committed to the realisation of justice. In faithfulness to jusnaturalist thinking, there is acknowledgement of a universal *jus gentium*, as a true *jus necessarium*, transcending the limitations of the *jus voluntarium*.

The evolution of the law of nations *(droit des gens)* is guided by general principles of law and human values. The needs of humankind as subjects of international law transcends the optics of States only.

B. International tribunals in their move towards compulsory jurisdiction

International tribunals have been attentive to their common mission of realisation of justice in a framework in which there has been a move towards compulsory jurisdiction. I do not intend to dwell upon details of the bases of jurisdiction of contemporary international tribunals, as I have already done so in detail elsewhere [81] as well as in my lengthy dissenting opinion (paras. 1-214) in the ICJ judgment (preliminary objections, of 1 April 2011) in the *Application of the Convention on the Elimination of All Forms of Racial Discrimination* (CERD) (*Georgia* v. *Russian Federation*).

I shall here instead focus on the difficulties that have been experienced through the decades in the long path towards compulsory jurisdiction. To start with, may I recall that there has always been one or more lucid jurists (not many) in each generation. For example, in his thoughtful book *La Justice Internationale*, published in 1924, four years after the adoption of the Statute of the old PCIJ, Nicolas Politis, in recalling the historical evolution from private justice to public justice, advocated for the evolution, at international level, from optional to compulsory jurisdiction [82].

Throughout recent decades, advances could here have been much greater if State practice had not 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 the acceptance of compulsory jurisdiction the way one would freely want. Only in this way would one, as originally envisaged, achieve greater development in the realisation of justice at international level on the basis of compulsory jurisdiction.

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81. A. A. Cançado Trindade, "Towards Compulsory Jurisdiction: Contemporary International Tribunals and Developments in the International Rule of Law – Part I", in *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano – 2010*, Vol. 37, Washington, DC, OAS General Secretariat, 2011, p. 233-259; A. A. Cançado Trindade, "Towards Compulsory Jurisdiction: Contemporary International Tribunals and Developments in the International Rule of Law – Part II", in *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano – 2011*, Vol. 38, Washington, DC, OAS General Secretariat, 2012, p. 285-366.

82. N. Politis, *La Justice Internationale*, Paris, Hachette, 1924, esp. p. 193-194 and 249-250. In a subsequent study, published two decades later, N. Politis reiterated that "les règles du droit des gens peuvent, moyennant certaines conditions, faire l'objet d'un contrôle juridictionnel"; N. Politis, *La morale internationale*, New York, Brentano's, 1944, p. 67.

After all, the foundation of compulsory jurisdiction lies, ultimately, in the confidence in the *rule of law* at the international level [83]. The very nature of a court of justice (beyond traditional arbitration) calls for compulsory jurisdiction [84]. Conscience stands above the "will". Renewed hopes to that effect were expressed in compromissory clauses enshrined in multilateral and bilateral treaties [85]. These hopes have grown in recent years, with the increasing recourse to compromissory clauses as the basis of jurisdiction [86]. In any case, be that as it may, the ICJ retains at least the function and duty to address *motu proprio* the issue of jurisdiction [87].

The time has come to overcome definitively the regrettable lack of automatism of international jurisdiction, which, despite all difficulties, is no longer an academic dream or utopia but has become reality in respect of some international tribunals. 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 peaceful settlement of international disputes well beyond State voluntarism, keeping in mind the general concerns of the international community as a whole [88]. 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 [89].

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

84. Cf., in this sense, B. C. J. Loder, "The Permanent Court of International Justice and Compulsory Jurisdiction", *British Year Book of International Law*, Vol. 2 (1921-1922), p. 11-12. And cf., likewise, Politis 1924 (note 83), p. 193-194 and 249-250.

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

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

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

88. A. A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium*" (General Course on Public International Law – Part II), *Recueil des cours*, Vol. 317 (2005), Chaps. 24-25, p. 173-245.

89. H. Steiger, "Plaidoyer pour une juridiction internationale obligatoire", in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century:*

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 1 November 1998, affords another conspicuous example of automatic compulsory jurisdiction [90].

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 UN 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 (Art. 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 disputes under the UN Law of the Sea Convention [91]. 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

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Essays in Honour of K. Skubiszewski, The Hague, Kluwer, 1996, p. 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", *Canadian Yearbook of International Law*, Vol. 8 (1970), p. 21, 33 and 37.

90. Another 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. 2, 2nd ed., San José (Costa Rica), IACtHR, 2003, p. 1-64. And, on the methodology of interpretation of human rights treaties, cf. Cançado Trindade, *El Derecho Internacional* (note 65), p. 17-60.

91. L. Caflisch, "Cent ans de règlement pacifique des différends interétatiques", *Recueil des cours*, Vol. 288 (2001), p. 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, p. 61-62.

> 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.*" [92]

An international tribunal such as the Court of Justice of the European Communities – now the Court of Justice of the European Union (CJEU) – 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 [93] (such as its primacy 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 necessary primacy of the *jus necessarium* over the *jus voluntarium*. I would add that the contemporary phenomenon of the multiplicity of international tribunals is in effect related to the move towards international compulsory jurisdiction [94]. I have in fact just referred to examples of contemporary international tribunals that have been contributing to this effect *(supra)*. There is of course a wider scope for advances of the realisation of justice at international level, including the ICJ itself.

As to the ICJ (and earlier on to the PCIJ), the original purpose of the optional clause (Art. 36 (2) of the Statute) was to attract general

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92. Cançado Trindade, "Towards Compulsory Jurisdiction – Part II" (note 82), p. 310-311.

93. Cf. e.g. P. J. G. Kapteyn, "The Role of the Court of Justice in the Development of the Community Legal Order", in F. Salerno (ed.), *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), Padua, CEDAM, 1995, p. 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, Scientifica, 2011, p. 63-137.

94. Cf. H. Ascensio, "La notion de juridiction internationale en question", in *La juridictionnalisation du droit international* (SFDI, Colloque de Lille de 2002), Paris, Pedone, 2003, p. 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.

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 – on each State's free "will" – to the acceptance of the optional clause unduly distorted the purpose originally propounded [95]. In my aforementioned dissenting opinion in the ICJ judgment (preliminary objections, of 1 April 2011) in the case of the *CERD Convention* (*Georgia* v. *Russian Federation*), I examined in detail the origins of the optional clause and its initial application at the PCIJ during the period of 1921-1940, before the era of the ICJ (from 1945 onwards).

In my dissent, I pondered *inter alia* that, at that time, the formula of Raul Fernandes [96], firmly supported by the Latin American states [97], was incorporated into the Statute of the PCIJ (1921-1940), wherein "it was intended to pave the way for further development towards compulsory jurisdiction, and served its purpose in the following two decades" (para. 38). Unfortunately, the ideal of R. Fernandes was never duly followed by a series of States, which appended undue restrictions to their acceptance of the optional clause.

Many years passed until compromissory clauses began to be invoked from time to time. As they are applied nowadays, there has emerged a renewed hope in the growing use of such compromissory clauses as jurisdictional basis in the *contentieux* before the ICJ. For the consideration of such clauses one is, in my view, to take into account the respective conventions as a whole (including their object and purpose) in the path towards strengthening the international compulsory jurisdiction. The realisation of justice is advancing gradually, and the *jus necessarium* likewise being enhanced, in the current move towards compulsory jurisdiction.

C. International tribunals in their contribution to the rule of law

Contemporary international tribunals have contributed to the rule of law *(prééminence du droit)*, attentive to human suffering and the

95. For a general and critical study, cf. Cançado Trindade, *Os Tribunais Internacionais* (note 9).

96. In his book of memories published in 1967, Raul Fernandes revealed that the Committee of Jurists of 1920 was faced with the challenge of establishing the basis of the jurisdiction of the PCIJ and, at the same time, of safeguarding and reaffirming the principle of the juridical equality of the States; cf. R. Fernandes, *Nonagésimo Aniversário – Conferências e Trabalhos Esparsos*, Vol. 1, Rio de Janeiro, MRE, 1967, p. 174-175.

97. Cf. J.-M. Yepes, "La contribution de l'Amérique Latine au développement du Droit international public et privé", *Recueil des cours*, Vol. 32 (1930), p. 712; F.-J. Urrutia, "La Codification du Droit International en Amérique", *Recueil des cours*, Vol. 22 (1928), p. 148-149.

need for the construction of a *corpus juris* committed to the realisation of justice. This is reflected in their jurisprudence itself [98], engaged in a configuration of a true *droit au Droit*, of the victimised persons in any circumstances, including amid the most complete adversity [99]. Both international human rights tribunals and international criminal tribunals have operated decisively to put an end to impunity [100]. They have effectively brought justice to the victimised, including in situations of systematic and generalised violence, and in mass atrocity.

The *ad hoc* ICTY in its first years, and the IACtHR in the period of 1999-2004 (more than any other contemporary international tribunal), greatly contributed to the jurisprudential construction of the enlarged material content of *jus cogens* [101]. The *ad hoc* ICTR, for its part, contributed (as from its own statutory definition) to a better understanding of the material content of crimes against humanity [102]. In the ICJ, in my extensive dissenting opinion in *Jurisdictional Immunities of the State* (*Germany* v. *Italy*, *with Greece intervening*, judgment of 3 February 2012), I firmly sustained the primacy of the right of access to justice over the undue invocation of State immunity in face of international crimes perpetrated in execution of a State policy (paras. 1-316). Subsequent developments on the matter were in the sense of my dissent [103], as I could also confirm *in loco* [104].

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98. Cf. e.g. X. Souvignet, *La prééminence du droit dans le droit de la Convention Européenne des Droits de l'Homme*, Brussels, Bruylant, 2012.

99. Cançado Trindade, *Access of Individuals* (note 13), p. 196-198 and cf. p. 132-191.

100. Cf. Y. Beigbeder, *International Justice against Impunity: Progress and New Challenges*, Leiden, Nijhoff, 2005.

101. A. A. Cançado Trindade, "*Jus Cogens*: The Determination and the Gradual Expansion of its Material Content in Contemporary International Case-Law", in *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano – 2008*, Vol. 35, Washington, DC, OAS General Secretariat, 2009, p. 3-29.

102. L. J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Leiden, Nijhoff, 2005, p. 270-271.

103. Thus, in Italy, the Constitutional Court, in its judgment (no. 238) of 22 October 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, 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. Moreover, at the end of its biannual session, held in Tallinn, Estonia, the *Institut de Droit International* adopted a reassuring resolution (on 30 August 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".

104. On 1 July 2014, I was received in a visit to the Distomo community in Greece, and visited their Memorial Museum. Later on, on 12 June 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

Whenever contemporary international tribunals have duly pursued their common mission of realisation of justice, there have been reassuring advances pertaining to the right of direct access to justice at international level from the perspective of the *justiciables* [105], faithful to human conscience as the ultimate *material* source of all law [106]. Protection has thus been extended to victims even in the most adverse conditions, including in relation to mass crimes [107], in the gradual realisation of international justice and renovation of hope in the construction of a better world.

The law of nations as *jus necessarium* brings us closer to its essence and historical development, as from the writings of its "founding fathers" *(supra)* to today. Emerging States were not seen as exclusive subjects of the law of nations, which comprised, moreover, peoples and individuals; humankind was taken into account even before the emerging States. The international legal order was, from the start, *necessary* rather than "voluntary", with *recta ratio* in its foundations.

In the sixteenth century, in his pioneering *Relecciones Teológicas* (1538-1539), F. de Vitoria sustained, as to the legal order, that the international community *(totus orbis)* has primacy over the "will" of each individual State [108]; furthermore, it is coextensive with humankind itself. The new *jus gentium* secured the unity of *societas gentium* [109],

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dissenting opinion. Those moments are unforgettable to me, confirming that international law is oriented towards the *justiciables*.

105. Cançado Trindade, Évolution du Droit international (note 22).

106. A. A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium*" (General Course on Public International Law – Part I), *Recueil des Cours*, Vol. 316 (2005), p. 177-202; Cançado Trindade, *A Humanização do Direito Internacional* (note 71).

107. Cf. e.g. A. A. Cançado Trindade, *La Responsabilidad del Estado en Casos de Masacres – Dificultades y Avances Contemporáneos en la Justicia Internacional*, Mexico City, Porrúa/Escuela Libre de Derecho, 2018; A. A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice*, Utrecht, Universiteit Utrecht, 2011; [Various authors], in O. de Frouville (ed.), *Punir les crimes de masse: Entreprise criminelle commune ou co-action?*, Brussels, Nemesis/Anthemis, 2012.

108. Cf. F. de Vitoria, *Relecciones – del Estado, de los Indios, y del Derecho de la Guerra*, Mexico City, Porrúa, 1985; and cf. F. de Vitoria, *De Indis – Relectio Prior* (1538-1539), in T. Urdanoz (ed.), *Obras de Francisco de Vitoria – Relecciones Teológicas*, Madrid, BAC, 1960, p. 675.

109. F. de Vitoria defined this new *jus gentium* as *quod naturalis ratio inter omnes gentes constituit, vocatur jus gentium*. This latter could not derive from the "will" of its subjects of law (including the emerging national States) but was based rather on a *lex praeceptiva* apprehended by human reason. Cf. A. A. Cançado Trindade, *A Recta Ratio nos Fundamentos do Jus Gentium como Direito Internacional da Humanidade*, Rio de Janeiro/Belo Horizonte, Academia Brasileira de Letras Jurídicas/Del Rey, 2005, p. 21-61.

and provided the foundations – emanating from a *lex praeceptiva* of natural law – for the *totus orbis*, susceptible of being found by the *recta ratio* inherent to humankind. The way was thus paved for a universal *jus gentium*, for the apprehension by reason of *jus gentium* as a true *jus necessarium*, transcending the limitations of the *jus voluntarium*.

The new *jus gentium*, as from its emergence, came to be associated with humankind itself, engaged in securing its unity and in attending its needs and aspirations, pursuant to an essentially universalist conception. Furthermore, attention was devoted to reparation for violations of rights, with the same principles of justice applying to emerging States as well as to individuals or peoples forming them [110], seeking thus to secure the fair relationship between the members of the universal *societas gentium*.

Regrettably, this universal outlook was opposed by the emergence of legal positivism, endowing States with a "will" of their own and reducing the rights of human beings to those "granted" by States. Voluntarist positivism, grounded on the consent or "will" of States and denying *jus standi* to human beings, envisaged a strictly *inter*-State law, no longer *above* but *between* sovereign States. It resisted the ideal of the emancipation of human beings and their recognition as subjects of international law, keeping them under the absolute control of the State. Voluntarist positivism has by itself rendered a disservice to international law.

The posture of absolute State sovereignty, with which legal positivism aligned itself, led to the irresponsibility and alleged omnipotence of the State, not to impeding the successive atrocities committed by it against human beings. With the passing of time this distortion became entirely groundless, as its disastrous consequences became widely known. The truth is that, from the "founding fathers" of the law of nations grounded on the *recta ratio* to our own times, jusnaturalist thinking in international law has never faded away [111]; it overcame all crises,

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110. A. A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", *Recueil des cours*, Vol. 202 (1987) p. 411; J. Brown Scott, *The Spanish Origin of International Law*: *Francisco de Vitoria and his Law of Nations*, Oxford/London, Clarendon Press/H. Milford for Carnegie Endowment for International Peace, 1934, p. 140, 150, 163-165, 172, 272-273 and 282-283.

111. In effect e.g. States cannot discriminate or tolerate situations to the detriment of migrants (including undocumented ones), and ought to secure access to justice for any person, irrespective of his or her migratory status, as well as to oppose successive and systematic restrictions. Contemporary international law counts on the mechanisms of protection of human beings in situations of adversity (ILHR, IHL, international law

in its perennial reaction of the human conscience against successive atrocities committed against human beings, which regrettably counted on the subservience and cowardice of legal positivism.

In effect, voluntarist positivism was unable to explain the process of formation of the norms of general international law. In my perception, the basic mistake of positivists was their minimisation of principles, which rest on the foundations of any legal system, conforming the legal order at issue to the aim of realising justice. While legal positivism statically focused rather on the "will" of States, the evolution itself of the law of nations disclosed the prevalence of human conscience *(recta ratio)* over the "will" [112].

It is clear that human conscience stands well above the "will" of States. The emergence, formation, development and expansion of the law of nations *(droit des gens)* are grounded on *recta ratio*, and are guided by general principles of law and human values. Humankind as subject of international law cannot at all be restrictively visualised from the optics of States only; definitively, what imposes itself is to recognise the limits of States as from the optics of humankind, this latter likewise being a subject of contemporary international law. Law and justice are interrelated; they evolve together.

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of refugees) as well as the operation of the law of international organizations. On this latter, cf. Cançado Trindade, *Direito das Organizações Internacionais* (note 64).

112. For a recent study, cf. Cançado Trindade, "A Consciência sobre a Vontade" (note 29), p. 827-860.

CHAPTER VII

FUNDAMENTAL PRINCIPLES AND THE PROTECTION OF HUMANKIND

A. Introduction

General principles of law are of the utmost importance, resting as they do on the foundations of the law of nations, and being essential to the realisation of justice. International human rights tribunals and international criminal tribunals have, in particular, ascribed such importance to them. The basic posture of an international tribunal is to be necessarily *principiste*, without concessions to State voluntarism; human conscience stands well above the "will" of States, this being essential to the realisation of justice. Whenever this is overlooked, justice is not done.

Hence the necessity of perennial attention to fundamental principles, even more so in order to secure the protection of humankind in compliance with the prohibition of nuclear weapons, and the primacy of *raison d'humanité* over *raison d'État* in the present domain. Since the matter is extensively dealt with in a case study elsewhere [113], I shall render my account here rather succinct, focusing on three points to be considered in sequence, with the result assessed being of historical significance.

B. International tribunals and the relevance of general principles of law

As to the labour of international tribunals in the realisation of the ideal of international justice, it is necessary to acknowledge the relevance of general principles of law (encompassing international law); in my own conception, they inform and conform the norms and rules of international law, being a manifestation of the universal juridical conscience [114]. Such general principles of law have always marked

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113. See note 119.

114. Cançado Trindade, *International Law for Humankind* (note 31); A. A. Cançado Trindade, "Foundations of International Law: The Role and Importance of Its Basic Principles", in *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano*, Vol. 30, Washington, DC, OAS General Secretariat, 2003, p. 359-415.

presence in the search for justice in the *jus gentium* in evolution, where basic considerations of humanity play a role of the utmost importance.

In particular, international human rights tribunals and international criminal tribunals have ascribed great importance to such general principles of law [115], reaffirmed time and time again. Legal positivism has always attempted, in vain, to minimise 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.

I have had the occasion to ponder – for example, in my concurring opinion in the ground-breaking 18th advisory opinion of 17 September 2003 of the IACtHR on the *Juridical Condition and Rights of Undocumented Migrants (supra)* – that every legal system has fundamental principles that inspire, inform and conform their norms; those general principles of law confer to the legal order its ineluctable axiological dimension, revealing the values which inspire it. And I added that:

> "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)

The basic posture of an international tribunal can only be *principiste*, without making undue concessions to State voluntarism [116]. Subsequently,

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115. To this effect cf. *inter alia* e.g. Cançado Trindade, *International Law for Humankind* (note 31); 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, p. 375-473; M. Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection*, Oxford, Oxford University Press, 2012, p. 55, 57, 86, 88-89, 185 and 203.

116. I had the occasion to point this out, as guest speaker, in the opening of the judicial year of the ECtHR on 22 January 2004 at the Palais des Droits de l'Homme in Strasbourg, in the following terms:

within the ICJ, I have likewise sustained the same position, for example in my lengthy separate opinion in the ICJ advisory opinion (of 22 July 2010) on the *Declaration of Independence of Kosovo*, where 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.

Likewise, in my extensive dissenting opinion in the *CERD Convention* case (*Georgia* v. *Russian Federation*, ICJ judgment of 1 April 2011), I sustained the pressing need of the realisation of justice on the basis of the compromissory clause (Art. 22) of the CERD Convention, discarding any yielding to State voluntarism (paras. 1-214).

An international tribunal, in order to settle a dispute, nowadays cannot find itself limited only to what the contending parties say; in my understanding, it has to go beyond that, and state 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 determining the applicable law, an international tribunal can go beyond the arguments of the contending parties[117], in pursuance of the principle of *juria novit curia*.

There are circumstances wherein the judgments of international tribunals may have repercussions beyond the States parties to a case[118], in giving expression to the idea of an *objective* justice. In this way, they contribute to the evolution of international law itself, and to the *rule*

"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."

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, p. 41-50; also reproduced in Cançado Trindade, *El Desarrollo del Derecho Internacional* (note 41), p. 41-42, para. 13.

117. Cf. M. O. Hudson, *International Tribunals: Past and Future*, Washington, DC, Carnegie Endowment for International Peace/Brookings Institution, 1944, p. 104-105; M. Cappelletti, *Juízes Legisladores?*, Porto Alegre, Sérgio Antonio Fabris, 1993, p. 73-75 and 128-129.

118. As exemplified by the well-known judgments of the IACtHR (having as a leading case that of *Barrios Altos*, 2001), which held amnesties allowing impunity to be incompatible with the American Convention on Human Rights. For an account, cf. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional* (note 38), p. 243-245.

of law at national and international levels in democratic societies. 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. Reason and persuasion permeate the operation of justice, and this goes back to the historical origins of its conception.

C. Protection of humankind in the prohibition of nuclear weapons: Primacy of "raison d'humanité" *over* "raison d'état"

This is a most relevant point to be kept in mind, even more necessarily in cases concerning humankind as a whole. A relevant occasion to this effect has been provided by the submission of an important problem to the ICJ in three recent cases pertaining to nuclear disarmament. As I wrote and published an extensive case study of the matter shortly after the Court's decisions and their effects [119], I shall render my account here rather succinct, focusing successively on three points, namely: the three inconclusive judgments of the ICJ of 2016, my three extensive dissenting opinions appended to them, and the following events at the United Nations, leading to the adoption of the Convention on the Prohibition of Nuclear Weapons in 2017.

D. The three judgments of the ICJ of 5 October 2016

An example of attention to the need of protection of humankind is provided by the cases of *Obligations Concerning Negotiations Relating to the Cessation of the Nuclear Arms Race and on Nuclear Disarmament*, lodged with the ICJ by the Marshall Islands on 24 April 2014 [120]. The three respondent States (India, Pakistan and the United Kingdom) raised some preliminary objections (on jurisdiction and admissibility), considered by the ICJ in the public hearings held between 9 and 16 March 2016 [121].

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119. Cf. A. A. Cançado Trindade, *The Universal Obligation of Nuclear Disarmament*, Brasilia, MRE/FUNAG, 2017, p. 41-224; A. A. Cançado Trindade, *A Obrigação Universal de Desarmamento Nuclear*, Brasília, MRE/FUNAG, 2017, p. 41-224.

120. Originally, the application was lodged by the Marshall Islands concerning all nuclear-weapon states (China, France, India, Israel, North Korea, Pakistan, Russian Federation, the United Kingdom and the United States) but only three suits were carried forward (concerning India, Pakistan and the United Kingdom) on the basis of acceptance of the ICJ's jurisdiction under Article 36 (2) of its Statute.

121. With the presence of the applicant State, the Marshall Islands, and two of the respondents, the United Kingdom and India (Pakistan remained absent).

The ICJ delivered its three judgments on 5 October 2016, in which it concentrated on one of the preliminary objections; applying a high (and unprecedented) requirement to demonstrate the existence of a legal controversy, it reached the conclusion that such dispute between the Marshall Islands and the three respondent States had not been demonstrated. The ICJ then accepted the preliminary objection and declared itself without jurisdiction (competence) to examine the suit under Article 36 (2) of its Statute. The ICJ was entirely divided in reaching this unprecedented decision[122]. In the three cases I presented my lengthy and strong dissenting opinions.

1. My three dissenting opinions appended thereto

In my three extensive dissenting opinions (composed of twenty-one parts each), appended to the ICJ's three judgments of 5 October 2016, I stressed that the new and high requirement of the ICJ to demonstrate the existence of a legal dispute was unprecedented in the *jurisprudence constante* of the Hague Court (PCIJ and ICJ) and has been in contradiction with it since its historic beginnings. This new requirement *(awareness test)*, I added, besides being formalistic and artificial, creates an undue and regretful obstacle to the very access to justice in a matter of concern for humankind as a whole.

After demonstrating that contradiction, I went on to examine the distinct series of resolutions of the UN General Assembly, in which it warns against the dangers of the nuclear arms race to humankind and to the survival of civilisation. I recalled that there are four such series of General Assembly resolutions, namely: *(a)* resolutions on the importance of nuclear disarmament (1961-1981); *(b)* resolutions on the freezing of nuclear weapons (1982-1992); *(c)* resolutions on the condemnation of nuclear weapons (1982-2015); and *(d)* resolutions on the follow-up of the 1996 ICJ's advisory opinion on the *Threat or Use of Nuclear Weapons* (1996-2015).

Next, I argued that those resolutions of the General Assembly call upon *all* States to comply promptly with the obligation to conclude a new Treaty on the Prohibition of Nuclear Weapons (as, for example, do the already existing Conventions on the Prohibition of Bacteriological

122. In the case against the United Kingdom, the decision on the lack of jurisdiction because of the absence of a legal dispute was taken by eight votes to eight, with the casting vote of its president; in the other two cases concerning India and Pakistan, it was taken by nine votes to seven.

Weapons (1972) and Chemical Weapons (1993)); I then recalled, in this connection, the Antarctic Treaty, the five Treaties establishing Denuclearized Zones (Tlatelolco, 1967; Rarotonga, 1985; Bangkok, 1995; Pelindaba, 1996; and Semipalatinsk, 2006) and their respective Protocols, as well as the status of Mongolia as a nuclear weapon-free country. I further examined the resolutions of the UN Security Council on the obligation to pursue negotiations in good faith about nuclear disarmament.

As a matter of fact, I recalled, already in 1961 the UN General Assembly had adopted, by means of Resolution 1653 (XVI), the "Declaration on the Prohibition of Use of Nuclear and Thermonuclear Weapons", which remains contemporary today, almost six decades later. In my perception, I continued in my dissenting opinions, the obligation of nuclear disarmament emerged and crystallised both in conventional and customary international law, and the United Nations has been giving a most valuable contribution in that direction.

The fact that the Conventions on the Prohibition of Bacteriological Weapons (1972) and Chemical Weapons (1993) have existed now for many years, while a Convention on the Prohibition of Nuclear Weapons has yet to see the light of day, I warned, is a legal absurdity. Positivists, I added, can only see the individual consent of States [123]. After recalling, in my three dissenting opinions that since the beginning of the nuclear age and up to present times the great thinkers of the world have inquired as to whether humankind has a future, I stated that it is imperative to pay attention to the respect to life and to humanistic values.

I reiterated the position that I have always upheld within the ICJ that the ultimate *material* source of international law is the universal juridical conscience. I recalled, moreover, that the Charter of the United Nations itself is attentive to peoples and to the safeguarding of values that are common to humankind as a whole. Furthermore, the common denominator of the remarkable cycle of UN World Conferences through the nineties (and until 2001) – in which I participated and of which I remember with fondness – was the concern with the living conditions of all human beings everywhere.

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123. It was precisely with the aim of extending the scope of consideration of the matter that, at the ICJ's public sitting of 16 March 2016, I deemed it fit to formulate questions to the contending parties present therein (Marshall Islands, India and the United Kingdom) on the emergence of the *opinio juris communis* through the adoption of the series of UN General Assembly resolutions; the parties promptly presented their written answers.

It was thus urgent, I pointed out, that the reasoning of the ICJ in cases like the three present ones went beyond the strictly *inter*-State focus and concentrated instead on peoples, and not on *inter*-State susceptibilities, in consonance with a necessarily humanist outlook. I warned that the principle of humanity must be taken into consideration and guide the reasoning, with the prevalence of *jus necessarium* over *jus voluntarium*. The general principles of law *(prima principia)* rest on the foundations of a legal system, I added, and the present cases pertaining to the prohibition of nuclear weapons, in my perception, stress that *raison d'humanité* prevails over *raison d'État*.

I then proceeded in my opinions to a scathing criticism of the so-called strategy of "deterrence", whereby nuclear powers continue attempting to explain and impose their so-called "national security interests" above the security of humankind as a whole. In my understanding, the *opinio juris communis* about the illegality of all weapons of mass destruction, including nuclear weapons, cannot at all be ignored. I added that, contrary to positivist thinking, there is an inter-relationship between law and ethics, and humankind as such is also a subject of international law. Nuclear weapons, I proceeded, are a contemporary manifestation of evil in its perennial trajectory that goes back to the Book of Genesis.

The principles of *recta ratio* that guide *lex praeceptiva* emanate from human conscience and sustain the ineluctable inter-relationship between law and ethics. In this respect, I further examined the contribution of the Non-Proliferation Treaty Review Conferences (1975-2015) to *opinio juris communis necessitatis* in supporting the conventional and customary obligation of nuclear disarmament, as well as the contribution of the series of Conferences on the Humanitarian Impact of Nuclear Weapons (Oslo, 2012; Nayarit, beginning of 2014; and Vienna, end of the same year) to a better understanding of the devastating effects (also in the medium and long terms) of nuclear tests and detonations on many victims.

In my remaining considerations, I sustained that the prohibition of nuclear weapons is one of a *jus cogens* prohibition. Over time, the main organs of the United Nations, such as the General Assembly, the Security Council and the Secretary-General, have provided consistent contributions to nuclear disarmament. It was expected that the ICJ, as the main judicial organ of the United Nations, would in the present cases remain attentive to the basic considerations of humanity and their incidence on the examination of questions of both jurisdiction and admissibility as well as of substantive law.

I added that a small group of countries – those in possession of nuclear weapons – cannot continue to ignore or minimise the many resolutions of the United Nations (cf. *supra*) on the obligation of nuclear disarmament that are valid for all UN Member States. In view of all this, my three dissenting opinions, on the basis of fundamental principles and values, took a diametrically opposed position with regard to that of the (divided) majority of the ICJ. I concluded my three opinions warning that the ICJ, as the principal judicial organ of the United Nations, should have displayed sensitivity on the matter, so as to give its contribution to nuclear disarmament, a question of the greatest concern nowadays for the vulnerable international community and indeed for humankind as a whole.

2. *Prompt effects at the United Nations: Negotiation and adoption of the UN Treaty on the Prohibition of Nuclear Weapons (7 July 2017)*

Shortly after the three judgments of the ICJ (of 5 October 2016), the repercussions were promptly felt at the United Nations in New York, when the First Committee of the General Assembly took a memorable decision, triggered by a draft resolution presented by a core group of six States (Austria, Brazil, Ireland, Mexico, Nigeria and South Africa). Furthermore, in a declaration made on 8 October 2016, the UN Secretary-General (Ban Ki-Moon) recalled that he was the first UN Secretary-General to have visited the Semipalatinsk nuclear test site, as well as the first to have participated in the ceremony at the Peace Memorial in Hiroshima [124].

In the debates of the First Committee in October 2016, several delegations urged that the vast sums of resources spent on nuclear armament should be channelled to the struggle against poverty and in favour of development [125]. I accompanied the debates which followed at the United Nations in New York, since they coincided with the presentation to the United Nations of the annual report of the ICJ. In eight meetings over more than ten days, more than 150 delegations participated in the debates of the First Committee on a large number of questions, urging nuclear disarmament and considering aspects of international security [126].

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124. UN Doc. SG/SM/18189-DC/3664, 8 October 2016, p. 2.
125. UN Doc. GA/DIS/3550, 10 October 2016, p. 1-10.
126. UN Doc. GA/DIS/3552, 12 October 2016, p. 1-2. On the concern with nuclear terrorism, cf. UN Doc. GA/DIS/3553, 13 October 2016, p. 1-8.

Many delegations supported convening a conference in 2017 to start considering a convention to prohibit nuclear weapons, against the resistance and opposition of the nuclear armed States [127]. There were also calls for the expansion of nuclear weapon-free zones (cf. *supra*), to encompass the Middle East also [128]. At the close of the debates, the First Committee adopted the draft Resolution (UN Doc. A/C.1/71/1.41) [129] convening a UN Conference to negotiate a treaty on the prohibition of nuclear weapons, leading to their "complete elimination", so as to "achieve a world free" of them [130]. Some days later, on 27 October 2016, the draft resolution was approved by the First Committee by 123 votes to 38, with 16 abstentions.

In November, the Fifth Committee of the General Assembly began considering the budgetary implications of the project, before the plenary of the General Assembly would take a decision on it [131]; That decision occurred on the eve of Christmas of 2016, with the General Assembly proceeding to the convocation of the Conference by means of Resolution A/71.258 of 23 December 2016 [132]. This was a most significant step; a response to the considerable repercussions felt at the United Nations of the need to achieve nuclear disarmament and decision to begin examining the theme to the benefit of humankind as a whole.

The negotiations that promptly followed in 2017, leading to the adoption of the Treaty on the Prohibition of Nuclear Weapons the same year, were quite fruitful. Since I have published a detailed account of the matter, originally presented in my lectures in an Organization of American States (OAS) course of international law delivered in Rio de Janeiro that year [133], I shall again be brief here. The process initiated with a brief organisation session (of one day, on 16 February

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127. UN Doc. GA/DIS/3554, 14 October 2016, p. 1-10.

128. UN Doc. GA/DIS/3563, 27 October 2016, p. 1-19. Concern with ongoing events in the Korean Peninsula was also expressed (UN Doc. GA/DIS/3552, 12 October 2016, p. 2), in view of the recent nuclear tests conducted by North Korea.

129. Originally issued on 14 October 2016 and titled "Taking Forward Multilateral Nuclear Disarmament Negotiations"; see p. 1-4.

130. UN Doc. A/C.1/71/1.41, p. 3-4, preamble and paras. 8 and 12.

131. UN Doc. A/C.5/71/12, 4 November 2016, p. 1-4.

132. The resolution was co-sponsored by the *core group* of six States which advanced the original initiative (namely, Austria, Brazil, Ireland, Mexico, Nigeria and South Africa – *supra*).

133. A. A. Cançado Trindade, "A Conferência da ONU sobre o Tratado de Proibição de Armas Nucleares", *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano*, Vol. 44, Washington, DC, OAS General Secretariat, 2017, p. 11-49.

2017), preceding the two working sessions, all taking place at the UN headquarters in New York.

The first session (27 to 31 April 2017) focused mainly on principles and prohibitions, preamble and rules of procedure, having counted on the interventions of States, groups of States, international entities and the survivors of atomic bombings *(hibakusha)* in Hiroshima and Nagasaki [134]. At the close of the session it was agreed that a preliminary draft Treaty would be prepared and circulated to the participants before the second session of the Conference, containing general positive obligations aiming at nuclear disarmament. Such a preliminary draft Treaty was prepared, and circulated in time, on 22 May 2017, focusing on those obligations and warning against the "catastrophic humanitarian consequences" of any use of nuclear weapons, keeping in mind ILHR and IHL [135].

The long second session (15 June to 7 July 2017) of the Conference started with a general call to all future States Parties to the forthcoming Treaty to destroy their existing nuclear arsenals. Positive obligations were clearly expressed, with attention drawn to public health; to the assistance to, and rehabilitation of, victims; and to environmental remediation. Several delegations drew attention to the risks created by nuclear weapons to public health and the survival of humankind, and the principle of humanity was invoked [136]. A revised version of the draft Treaty was circulated on 27 June 2017, and the following sessions took place behind closed doors; the delegations consulted their capitals over discarding the policy of "deterrence" [137].

The Treaty on the Prohibition of Nuclear Weapons was at last adopted, as scheduled, on 7 July 2017, with 122 votes in favour, one against (Netherlands) and one abstention (Singapore). Various delegations pointed out with satisfaction that, after such a long delay of many years, finally on that historic day armed weapons were now legally prohibited and condemned, to the benefit of all humankind. The ceremony of signature of the Treaty was scheduled for 20 September 2017, with the need asserted to secure ratification of the Treaty after the signature, so as to avoid and oppose any violation of ILHR, IHL, or international environmental law [138].

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134. All examined in *ibid*., p. 20-26.
135. Examined in *ibid*., p. 26-28.
136. Cf. *ibid*., p. 29-30.
137. Cf. *ibid*., p. 31-32.
138. Cf. *ibid*., p. 33-36. Thirteen years earlier, in a lecture delivered at the University of Hiroshima on 20 December 2004, I drew attention to the illegality in international

The ceremony took place on 20 September 2017 at the United Nations in New York, at the end of which the Treaty counted fifty signatures, as well as three ratifications (Guyana, Holy See and Thailand) [139]. Basic considerations of humanity prevailed, acknowledging the primacy of *raison d'humanité* over *raison d'Etat* (cf. *supra*), and encouraging confidence in the survival of humankind. The central position under the Treaty is that of the human person, in line with jusnaturalist thinking.

The Treaty counts today, halfway through 2020, on eighty-one signatures, as well as thirty-one ratifications and one accession. It provides that it shall enter in force ninety days after the fiftieth instrument of ratification (or accession) has been deposited (Art. 15). With the prohibition of nuclear weapons in the new Treaty, the universal juridical conscience has manifested itself in defence of all humankind, thus moving ahead the (current) historical process of *humanisation* of international law.

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law of all weapons of mass destruction, starting with nuclear weapons; cf. Cançado Trindade, *Le Droit international* (note 35), see chap. 1, p. 61-90.

139. For an account, cf. Cançado Trindade, "A Conferência da ONU" (note 134), p. 38-41.

CHAPTER VIII

JURISPRUDENTIAL CONSTRUCTION AMONG CONTEMPORARY INTERNATIONAL TRIBUNALS

In my lecture of 2017 at the Hague Academy of International Law, I dedicated a whole chapter to an examination of the dialogue maintained by contemporary international tribunals, their coordination in successive meetings and their joint endeavours towards jurisprudential harmonisation[140]. It is not my intention to reiterate here what has already been published there in the *Recueil des cours* but rather to focus attention on some important effects in distinct domains of international law of this joint mission of contemporary international tribunals in the realisation of justice[141].

The dialogue sustained on a permanent basis by the IACtHR with the ECtHR, particularly in the period of 1999-2004, for example, generated a spirit of mutual *confidence*[142], and paved the way for a remarkable jurisprudential cross-fertilisation that has been persisted to this day. By means of their interpretative interaction, the ECtHR and the IACtIHR have contributed to the universality of conventional law on the safeguard of human rights. To evoke a remarkable example, in *Varnava and Others* v. *Turkey* (judgment of 18 September 2009), concerning the forced disappearance of persons[143], a noticeable feature of the

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140. Cançado Trindade, "Les tribunaux internationaux" (note 1), chap. 8, p. 72-91.

141. For example, the two international human rights tribunals that have been in operation already for a long time (the ECtHR and the IACtHR) met for the first time, also with the new ACtHPR, in Strasbourg, on 8 to 9 December 2008. I participated of the event – the first to bring together the three international human rights tribunals coexisting today – in which a productive dialogue took place among those present on questions of common interest, such as access to justice, provisional measures of protection and forms of reparation, among others. Cf. accounts in: A. A. Cançado Trindade, "Quelques réflexions à l'occasion de la première Réunion des trois Cours régionales des droits de l'homme", *Revista do Instituto Brasileiro de Direitos Humanos*, Vol. 9 (2009), p. 229-239; Ph. Weckel, "La justice internationale et le soixantième anniversaire de la Déclaration Universelle des Droits de l'Homme", *Revue générale de droit international public*, Vol. 113 (2009), p. 5-17.

142. For a recent historical account, cf. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional* (note 38), p. 185-202.

143. The case, lodged with the ECtHR by eighteen Cypriot nationals, concerned the disappearance of persons after their detention by Turkish military forces during the military operations carried out by the Turkish army in Northern Cyprus in 1974. The Court rejected the respondent State's objections as to lack of temporal jurisdiction; it sustained that, the fact that the persons (victims) were missing for over thirty-four years

ECtHR's judgment was its elaborate cross-referencing to the relevant or pertinent case law of the IACtHR, in particular the leading case of *Blake* v. *Guatemala* (1996-1998) and the case of the *Sisters Serrano Cruz* v. *El Salvador* (2004-2005) (paras. 93-97, 138 and 147) [144].

In connection with such jurisprudential cross-fertilisation, the ECtHR issued in 2012 a useful research tool, the first of its kind, namely its Report on References to the Inter-American Court of Human Rights in the Case-Law of the European Court of Human Rights [145]. After the publication of the report, the ECtHR delivered its judgment of 27 May 2012 in *Margus* v. *Croatia*, wherein it observed that international tribunals have, in their judgments, "held that amnesties are inadmissible when they are intended to prevent the investigation and punishment of those responsible for grave human rights violations or acts constituting crimes under international law" (para. 135).

Before reaching this significant conclusion, the ECtHR quoted four paragraphs of the leading case – a decision to the same effect – of the jurisprudence of the IACtHR on the matter, namely its judgment of 14 March 2001 in *Barrios Altos* v. *Peru* (para. 60). Furthermore, the ECtHR quoted one paragraph of my own concurring opinion appended to the judgment of the IACtHR in the *Barrios Altos* case (para. 60). The two international tribunals thus share the understanding that those amnesties are incompatible with the provisions of the American and European conventions on human rights.

Several other examples of the kind were referred to [146]. In its judgment (of 12 May 2014) on reparations (just satisfaction) in the case *Cyprus* v. *Turkey*, the ECtHR Grand Chamber recalled (para. 41) the well-known *obiter dictum* of the PCIJ in the *Chorzów Factory* case (jurisdiction, 1927), whereby "the breach of an engagement involves an obligation to make reparation in an adequate form" (p. 21). Furthermore, it made cross-references to the relevant case law of the ICJ (paras. 24, 26, 41,

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did not change the obligation of an effective investigation towards them. There was a *continuing* obligation of determination or disclosure of the whereabouts and fate of the missing persons in the present case.

144. The ECtHR found the occurrence, in the *cas d'espèce*, of a "continuing violation" of Articles 2, 3 and 5 of the European Convention of Human Rights.

145. ECtHR, Research Report: References to the Inter-American Court of Human Rights in the Case-Law of the European Court of Human Rights, Strasbourg, Council of Europe/ECtHR, 2012, p. 1-20.

146. For a study of other cases, cf. A. A. Cançado Trindade, "The Right to Cultural Heritage in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights", in Sienho Yee and J.-Y. Morin (eds.), *Multiculturalism and International Law: Essays in Honour of E. McWhinney*, Leiden, Nijhoff, 2009, p. 477-499.

45-46 and 58), being particularly attentive to the ICJ judgment on reparations in *A. S. Diallo* (*Guinea* v. *DRC*, paras. 46 and 58).

Other examples in the recent case law of the ECtHR may here be recalled; for example, in its judgment in *Al-Dulimi and Montana Management Inc.* v. *Switzerland* (2016), the ECtHR Grand Chamber made successive references to the case law of the ICJ [147]. In other cases, it made cross-references to the case law of the IACtHR on distinct issues brought before it [148]. In *Baka* v. *Hungary* (2016), the ECtHR Grand Chamber referred to the case law of both the IACtHR [149] and the CJEU [150]. Further cross-references by the ECtHR, this time to the case law of the ICJ and of international criminal tribunals (in particular the ICTY) [151], are made in its decision in *M. Mustafic-Mujic and Others* v. *Netherlands*.

The fact that international tribunals have distinct jurisdictions in no way hinders jurisprudential cross-fertilisation: on the contrary, it calls for it. In the African continent, the ACtHPR, for example, has also made cross-references, in particular to the case law of the ECtHR and the IACtHR [152]. In a case concerning Libya, the ACtHPR referred to the case law of the ECtHR [153] and the ICC [154]; in *F. D. Omary and Others* v. *Tanzania*, to ICJ (para. 52); and in *I. V. Umuhoza* v. *Rwanda*, to ECtHR (order of 3 June 2016, para. 48), as well as to the IACtHR judgment of 24 September 1999 in *Ivcher Bronstein* v. *Peru* (ruling of 5 September 2016, para. 63).

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147. Cf. ECtHR (Grand Chamber), *Al-Dulimi and Montana Management Inc.* v. *Switzerland*, Judgment of 21 June 2016, paras. 41-43.

148. Cf. e.g. ECtHR (Grand Chamber), *Khlaifia and Others* v. *Italy*, Judgment of 15 December 2016, paras. 230, 233; ECtHR (Grand Chamber), *M. Helsinki Bizottság* v. *Hungary*, Judgment of 8 November 2016, paras. 61, 146; and cf. also ECtHR (3rd Section), *A. Tomás* v. *Spain*, Judgment of 14 June 2016, paras. 52-53, 55.

149. Cf. ECtHR (Grand Chamber), *Baka* v. *Hungary*, Judgment of 23 June 2016, paras. 84-85 and 114.

150. *Ibid*., paras. 69-70 and 114. Further references to CJEU case law are found in *Ramadan* v. *Malta* (2016); Cf. ECtHR (4th Section), *Ramadan* v. *Malta*, Judgment of 21 June 2016, paras. 47-48.

151. Cf. ECtHR (3rd Section), *M. Mustafic-Mujic and Others* v. *Netherlands*, Decision on Application no. 49037/15, paras. 48, 84, 104, 109.

152. Cf. ACtHPR, *Actions pour la Protection des Droits de l'Homme (APDH)* v. *Côte d'Ivoire*, Judgment of 18 November 2016, paras. 64, 95, 134 and 148; ACtHPR, *L. Issa Konate* v. *Burkina Faso*, Judgment of 3 June 2016, para. 58. In *M. Abubakari* v. *Tanzania* (judgment of 3 June 2016), in addition to the case law of the ECtHR (paras. 27, 121, 158, 193 and 224) and the IACtHR (para. 158), the ACtHPR also referred to the case law of the ICTY (para. 153).

153. Cf. ACtHPR, *African Commission on Human and Peoples' Rights* v. *Libya*, Judgment of 3 June 2016, para. 95.

154. ACtHPR, Judgment of 3 June 2016, para. 50.

The cross-references reviewed herein are not exhaustive but rather illustrative of the attention paid by contemporary international tribunals to the work of each other. There are several other jurisprudential cross-references (e.g. those of contemporary international criminal tribunals *inter se*) [155]; and also references by international criminal tribunals to the case law of other international tribunals (cf. *infra*). The SCSL, for example, from the beginning of its work showed its disposition to take into consideration the decisions of the ICTY and ICTR, expressly referring to them [156]. In its turn, the Special Tribunal for Lebanon (STL) has made cross-references to the case law of international human rights tribunals and the ICJ [157].

In its judgment of 30 January 2015 in *V. Popović, L. Beara, D. Nikolić et alii*, the ICTY Appeals Chamber made cross-references, mostly in footnotes, to the case law of distinct international tribunals, namely, and mainly, of the ICTR (paras. 16, 68, 80, 90, 137, 343, 481, 537 and 544), as well as of the ICJ (paras. 438-439), of the ICC (paras. 462, 464 and 1671), of the ECCC (para. 1671), of the SCSL (para. 1732) and of the STL (para. 1671). Furthermore, in the *R. Karadzic* case (2016), the ICTY made cross-references to the case law of the ICJ [158], as well as to that of the ICTR [159]. In *M. Stanisic and S. Zupljanin* (2016) the ICTY briefly referred also to the case law of the ECtHR [160].

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155. On distinct aspects of their common denominator, cf. *inter alia* e.g. Jones (note 43); F. O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, Leiden, Nijhoff, 2008; Mettraux (note 49); Romano *et al*. (note 53).

156. Cf. e.g. ICTR, *Symposium on the Legacy of International Criminal Courts and Tribunals in Africa*, The Hague, ICTR, 2010, p. 41.

157. For example, in its *Ordonnance* of 15 April 2010 the STL referred to the judgments of the IACtHR in *Barrios Altos* v. *Peru* (of 14 March 2001) and *Goiburú and Others* v. *Paraguay* (of 22 September 2006, paras. 24 and 29), as well as to the ECtHR judgments *inter alia* in *Golder* v. *United Kingdom* (of 21 February 1975) and *Vaestberga Taki Aktiebolag and Vulig* v. *Sweden* (of 23 July 2002, paras. 25 and 34, n. 37). The STL also referred to several of my own dissenting and separate opinions in successive judgments of the IACtHR delivered in 2006-2007 (para. 29). Finally, the STL further referred to ICJ case law, namely its advisory opinion (of 28 May 1951) on *Reservations to the Convention against Genocide* (para. 30) and its judgment (of 3 February 2006) in the case of *Armed Activities on the Territory of the Congo* (*DRC* v. *Rwanda*) (para. 30, n. 34).

158. ICTY, Judgment of 24 March 2016, paras. 449 (n. 1483), 539 (n. 1714), 544 (n. 1731), 545 (nn. 1733-1734), 551 (n. 1751), 553 (n. 1758).

159. *Ibid*., paras. 539 (n. 1714), 544 (nn. 1729-1730), 547 (n. 1739), 550-551 (nn. 1749-1750, 1752).

160. ICTY, Judgment of 30 June 2016, para. 1082 (n. 3585).

For its part, from the very start of its case law, the ICC has contributed to jurisprudential cross-fertilisation [161]. In *W. S. Ruto and J. A. Sang (Situation in the Republic of Kenya)*, the ICC referred first (decision of 18 June 2013) to the case law of the ICTR and the ECtHR (paras. 37 and 46), as well as the ICJ (paras. 39, 52 and 91-92) and subsequently (decision of 25 October 2013), the ICC further referred to the case law of the ECtHR (paras. 49 and 51), the ICTR (para. 61) and the ICTY (para. 61). And, more recently, in *W. S. Ruto and J. A. Sang*, the ICC Trial Chamber V(A) (judgment of 5 April 2016) again referred to the case law of the ECtHR (paras. 328 and 382).

In *J.-P. Bemba Gombo (Situation in the Central African Republic*, 2016), the ICC Trial Chamber III made successive cross-references to the case law of the ICJ [162]. Earlier, in its judgment on reparations in the *Th. Lubanga Dyilo* case (*Situation in the Democratic Republic of Congo*, 2015), the ICC Appeals Chamber referred to the case law of the IACtHR, in particular to its judgments in *Aloeboetoe et allii* v. *Suriname* (1991) and *Bulacio* v. *Argentina* (2003) [163].

Like other contemporary international tribunals, the International Tribunal for the Law of the Sea (ITLOS) has also given its contribution to jurisprudential cross-fertilisation. Thus in its judgment of 14 March 2012 in the *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, the ITLOS made several cross-references to decisions of the ICJ in distinct cases of maritime delimitation [164]. Earlier, in its first advisory opinion (of 1 February 2011), on *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, the ITLOS (Seabed Disputes Chamber) effected likewise successive cross-references (paras. 39, 57, 115, 135, 147 and 169) to pertinent *obiter dicta* of other decisions of the ICJ [165], as well as to its advisory opinion (of 22 July

161. Thus, in its judgment (of 14 March 2012), the ICC, in the handling of distinct points, made cross-references to judgments by the ICTY (paras. 533, 538, 340-541, 946, 957 and 997), the ICTR (para. 946), the ICJ (paras. 540 and 542), ECtHR (para. 581) and the SCSL (para. 582).

162. Taking note e.g. of "the repeated acknowledgement by the ICJ" of rules in treaty interpretation that "are part of customary international law"; it further briefly referred to the case law of the ECtHR; ICC (Trial Chamber III), Judgment of 21 March 2006, paras. 71 and 747.

163. ICC (Appeals Chamber), Judgment of 3 March 2015 (reparations), para. 128.

164. Paras. 90, 95, 117, 185, 191, 211, 229-230, 233, 264, 294-295 and 330.

165. In particular to its judgment (of 20 April 2010) in *Pulp Mills on the River Uruguay* (paras. 57, 115, 135 and 147), as well as to the ICJ advisory opinion (of 22 July 2010) on the *Declaration of Independence of Kosovo* (paras. 39 and 60).

2010) on the *Declaration of Independence of Kosovo* (paras. 39 and 60).

The ICJ itself has, in recent years, been called upon to pronounce on cases and matters the examination of which goes *well beyond* the strictly *inter*-State dimension [166]. In *A. S. Diallo* (*Guinea* v. *DRC*, merits, judgment of 30 November 2010) [167], for example, for the first time in its history the ICJ established violations of two human rights treaties, namely the UN Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights – both in the framework of the universality of human rights – in addition to the established breach of the 1963 Vienna Convention on Consular Relations (Art. 36 (1) *(b)*), as a consequence of the detentions of A. S. Diallo in the Democratic Republic of Congo and of his expulsion from the country. Also a historical first, the ICJ expressly recognised the relevant case law of the ECtHR and the IACtHR (para. 68), thus moving from *inter*-State to *intra*-State level.

The ICJ, in pursuance of the unprecedented trend inaugurated by its judgment of 2010 on the merits in *A. S. Diallo*, in its subsequent judgment of 19 June 2012 on reparations in the same case it again referred to the pertinent case law of other international tribunals, including the ECtHR, the IACtHR, the ITLOS and the Iran-United States Claims Tribunal. In respect of compensation for non-material damage, the ICJ referred to the judgment (of 3 December 2001) of the IACtHR in *Cantoral Benavides* v. *Peru*, as well as to the judgment (of 7 July 2011) of the ECtHR (Grand Chamber) in *Al-Jedda* v. *United Kingdom*. Likewise, in respect of compensation for material damage, the ICJ further referred to recent decisions of the ECtHR and the

166. Namely 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 UN Convention against Torture; the case of *A. S. Diallo* (*Guinea* v. *DRC*, 2010) on the detention and expulsion of a foreigner; the case of the *Jurisdictional Immunities of the State* (2010-2012); the advisory opinion of the Court on the *Declaration of Independence of Kosovo* (2010); the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (2011); the case of the *Temple of Preah Vihear* (provisional measures, 2011); the advisory opinion on a *Judgment of the ILO Administrative Tribunal upon a Complaint Filed against the IFAD* (2012); the three judgments (of 5 October 2016) in the three cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (*Marshall Islands* v. *United Kingdom, India and Pakistan*).

167. The case was originally lodged with the Court by Guinea, in the exercise of discretionary (*inter*-State) diplomatic protection; yet, in the course of the proceedings as to the merits (written and oral phases), it became clear, from the arguments of the contending parties themselves, that the case pertained in fact to the protection of human rights.

IACtHR, and made cross-references to the case law of other tribunals, such as ITLOS and the Iran-United States Claims Tribunal.

In my extensive separate opinion appended to the ICJ's decision in *A. S. Diallo* (merits, 2010), in referring, *inter alia*, to the hermeneutics of human rights treaties (paras. 82-92), I underlined the relevance of the new position assumed by the ICJ, and invoked the *principle of humanity* as well as the principle of *pro persona humana*, in the case law of the Court (currently) in course, in the struggle against the manifestations of arbitrary power. Moreover, I endorsed the aforementioned conclusions of the Court as well as its determination of the violation of the individual right to information on consular assistance (Art. 36 (1) *(b)* of the Vienna Convention on Consular Relations of 1963), but I did so on the basis of the forward-looking and pioneering approach propounded by the IACtHR in its 16th advisory opinion (1999) on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, giving witness of the current process of humanisation of consular law [168] (paras. 158-188) [169].

In the same line of thinking, I sustained, in my lengthy dissenting opinion in the *CERD Convention* case (*Georgia* v. *Russian Federation*, judgment of 1 April 2011), that the compromissory clause (Art. 22) of the aforementioned Convention should have been interpreted bearing in mind the nature and material content of said Convention, besides its object and purpose, as a human rights treaty (paras. 64-118), and not in an undifferentiated and inattentive way as the Court's majority had done. The path of realisation of international justice is difficult, but one ought to persevere in pursuing it.

There are many other aspects of jurisprudential cross-fertilisation requiring particular attention for the progressive development of international law [170]. There are other cross-references, likewise, in the handling (2007-2012) of the case of *Th. Lubanga Dyilo* (*Situation in the Democratic Republic of the Congo*) by the ICC, which was marked, from the start, by the attention it dispensed to the relevant case law of

168. For a study of the matter, cf. Cançado Trindade, "The Humanization of Consular Law" (note 21).

169. I further expressed hope for advances towards a new era of international adjudication of human rights cases by the ICJ itself (paras. 232-245).

170. For example, in the ICJ, in my separate opinion appended to the judgment (merits, 2012) in the case of the *Obligation to Prosecute or Extradite* (*Belgium* v. *Senegal*), I referred to the fact that the IACtHR, as well as the *ad hoc* ICTY, have been "the two contemporary international tribunals which have most contributed so far to the jurisprudential construction of the absolute prohibition of torture, in the realm of *jus cogens*" (para. 88); cf. Cançado Trindade, "*Jus Cogens*" (note 102).

international human rights tribunals [171], among others as to evidentiary matters [172].

The ICC (Trial Chamber I), in its decision of 7 August 2012 coming to the establishment of the principles and procedures to be applied to reparations, in the same case of *Th. Lubanga Dyilo* again referred to the pertinent case law of international human rights tribunals (paras. 21, 86-87 and 98). When it comes to its treatment of specific issues concerning reparations, the ICC (Trial Chamber I) has, to a far greater extent, made express cross-references to the relevant case law of the IACtHR in particular. Thus, as to the beneficiaries of reparations, the ICC has referred, for example, to the judgment of the IACtHR (of 1989) in *Aloeboetoe* et alii v. *Suriname* (para. 195, n. 386) [173].

As to the *rehabilitation of the victims*, the ICC has referred to the decisions of the IACtHR in the *cycle of cases of massacres*, such as, for example, the IACtHR judgments of 15 September 2005 in *Massacre of Mapiripán* v. *Colombia*, and of 19 November 2004 in *Massacre of Plan de Sánchez* v. *Guatemala* (para. 233, n. 422) [174]. As to other modalities of reparations, the ICC has evoked the IACtHR decisions, for example, in the same case of the *Massacre of Plan de Sánchez*, as well as in the cases of *J. H. Sánchez* v. *Honduras* (of 7 June 2003) and *Tibi* v. *Ecuador* (of 7 September 2004) (para. 237, n. 426).

In the performance of their common mission of imparting justice, contemporary international tribunals, as can be seen from the preceding pages, have proceeded to take into account one another's case law, and nowadays continue to contribute to jurisprudential cross-fertilisation [175].

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171. This has been so since the decision of its Pre-Trial Chamber I (of 29 January 2007, on confirmation of charges), which contained cross-references to pertinent decisions of the IACtHR (*Ivcher Bronstein* case, 2001) and the ECtHR (*Soering* 1989 and *Mamatkulov and Askarov* 2005 cases). As to the identification of victims for the purposes of reparations, the ICC (Pre-Trial Chamber I) further referred, in the same judgment in the *Lubanga* case, to the judgments of the IACtHR in *Aloeboetoe et alii* v. *Suriname* (reparations, of 1993) and *Massacre of Plan de Sánchez* v. *Guatemala* (reparations, of 2004). And cf. also Trial Chamber I decision of 7 August 2012.

172. On such matters, the ICC referred to the case law of the ICJ (*Armed Activities on the Territory of the Congo*, 2005) and the ICTY (e.g. *Delalic et alii*, 1998-2001).

173. As to the scope of reparations, the ICC observed that "[i]ndividual and collective reparations are not mutually exclusive, and they may be awarded concurrently", and referred, in this respect, to the judgment (of 2005) of the IACtHR in *Moiwana Community* v. *Suriname* (para. 220, n. 406). As to the award of compensation, the ICC referred to a series of decisions by both the IACtHR and the ECtHR (paras. 229-230).

174. For a study of the international adjudication by the IACtHR of this cycle of cases of massacres, cf. Cançado Trindade, *State Responsibility in Cases of Massacres* (note 108); Cançado Trindade, *La Responsabilidad del Estado* (note 108).

175. For other examples of recent jurisprudential cross-fertilisation, cf. A. A. Cançado Trindade, "Contemporary International Tribunals: Their Continuing

Such jurisprudential cross-fertilisation ensuing therefrom, in turn, exerts a constructive function in the safeguard of the rights of the *justiciables*. Law and justice come together.

It is thus to be expected that contemporary international tribunals remain increasingly aware of each other's case law in their continued execution of the common mission of imparting justice in distinct domains of international law [176], thus preserving its basic *unity*. This is to the benefit of the international community as a whole, and of all *justiciables*, all subjects – States, international organisations and individuals alike – of law around the world, in particular.

Jurisprudential Cross-Fertilization, in Their Common Mission of Imparting Justice", in *The Global Community: Yearbook of International Law and Jurisprudence (2013)*, Vol. 1, New York, Oceana, 2014, p. 155-160; 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 (2014)*, Vol. 1, Oxford, Oxford University Press, 2015, p. 215-219; A. A. Cançado Trindade, "Contemporary International Tribunals: Jurisprudential Cross-Fertilization in Their Common Mission of Realization of Justice", in *The Global Community: Yearbook of International Law and Jurisprudence (2015)*, Oxford, Oxford University Press, 2016, p. 209-216.

176. Cf., 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. 1, New York, Oceana, 2013, p. 188, and cf. p. 181-188. And cf. in general e.g. G. de Vergottini and J.-J. Pardini, *Au-delà du dialogue entre les cours*, Paris, Dalloz, 2013, p. 39-138.

CHAPTER IX

FINAL CONSIDERATIONS

The time has now come for the presentation of my final considerations on the realisation of justice at international level as the common mission of all contemporary international tribunals, in their contribution to a more stable international legal order, with greater precision in relation to customary international law[177]. International tribunals have overcome the classical *inter*-State dimension, unsatisfactory and dangerous, and have thus contributed to the progressive development of international law[178] and the securing of justice to be rendered to the complainant victims.

After all – as I have been sustaining for years – 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[179]. This is quite in conformity with the safeguard of the inalienable character of rights inherent to the human person[180]. Advances have been achieved *(supra)*, but there remain points that make claims on our continuing attention so as to identify prospects

177. Cf. L. Caflisch and A. A. Cançado Trindade, "Les conventions américaine et européenne des droits de l'homme et le droit international général", *Revue générale de droit international public*, Vol. 108 (2004), p. 5-62 ; and cf. also F. Vanneste, *General International Law before Human Rights Courts*, Antwerp, Intersentia, 2010, p. 203-205, 574-575 and 577-579.

178. Cf. in this sense e.g. A. A. Cançado Trindade, "A Century of International Justice and Prospects for the Future", in A. A. Cançado Trindade and D. Spielmann (eds.), *A Century of International Justice and Prospects for the Future/Rétrospective d'un siècle de justice internationale et perspectives d'avenir*, Oisterwijk, Wolf Publications, 2013, p. 16-17; A. A. Cançado Trindade, "Quelques réflexions sur les systèmes régionaux dans le cadre de l'universalité des droits de l'homme", in *Select Proceedings of the European Society of International Law*, *Vol. 4: 2012 Valencia Colloquy*, Oxford, Portland, Hart Publishing, 2015, p. 345-347; [Various authors], in A. von Bogandy and I. Venzke (eds.), *International Judicial Lawmaking*, Heidelberg, Springer, 2012, p. 9-15 and 35-36; A. von Bogandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication*, Oxford, Oxford University Press, 2016 [reed.], p. 49 and 62.

179. A. A. Cançado Trindade, "La *Recta Ratio* dans les Fondements du *Jus Gentium* comme Droit International de l'Humanité", *Revista do Instituto Brasileiro de Direitos Humanos*, Vol. 10 (2010), p. 11-26.

180. A. A. Cançado Trindade, "Le droit international contemporain et la personne humaine", *Revue générale de droit international public*, Vol. 120, No. 3 (2016), p. 497-514.

for the future and to achieve (as soon as possible) further juridical development.

In the course of my current presentation, I have from time to time referred to recent developments in international case law, in particular on the part of the ICJ. Thus, may I here add that, in recent years, the ICJ has also been dwelling upon the State's duty to provide reparation for damages it caused. At conceptual level, there is a pressing need for further jurisprudential developments in the matter of reparations, as well as of provisional measures of protection, both still in their infancy. I pointed this out, as to reparations, for example, in my separate opinion in *A. S. Diallo* (judgment of 19 June 2012).

More recently, I dwelt further upon the matter in my separate opinion in the ICJ judgment in *Certain Activities Carried out by Nicaragua in the Border Area* (*Compensation owed by Nicaragua to Costa Rica*, 2 February 2018), as well as in my separate opinion in the ICJ's order in *Armed Activities on the Territory of the Congo* (of 6 December 2016) [181]. The jurisprudential construction particularly of the IACtHR in respect of distinct forms or reparations is surely deserving of closer attention on the part of other international tribunals [182]. The matter discloses the relevance of the rehabilitation of victims.

And as to provisional measures of protection, I have made in the ICJ the same point, for example 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 July 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. It is necessary to keep on cultivating the conceptual elaboration of this autonomous legal regime in the jurisprudential construction to this effect on the matter [183].

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181. For a recent study cf. A. A. Cançado Trindade, "The Right to Reparation: Historical Origin and Evolution of the State's Duty to Provide Reparation for Damages in International Law", in *Curso de Derecho International del Comité Jurídico Interamericano – 2018*, Vol. 45, Washington, DC, OAS General Secretariat, 2019, p. 217-267. And for a recent general study, in historical perspective, cf. A. A. Cançado Trindade, *Direito à Reparação – Origem e Evolução no Direito Internacional*, Fortaleza, FB/Editora Universidade de Fortaleza, 2019, p. 5-285.

182. Cf. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional* (note 38), p. 367-394.

183. In this respect, I soon identified the component elements of such *autonomous legal regime*, namely: the rights to be protected, the obligations proper to provisional measures of protection; the prompt determination of responsibility (in case of non-compliance), with its legal consequences; the presence of the victim (or potential

In earlier years, I engaged myself in this construction in another international tribunal, the IACtHR, and explained it in detail in my book of memories of my contribution to the jurisprudential construction of the IACtHR[184], and in my writings thereon through the years. I pointed out, for example, that provisional measures of protection have, in the present domain, disclosed a character more than *cautionary*, truly *tutelary*[185]. They have, moreover, revealed the importance of the *preventive* dimension of the protection of the rights of the human person, starting with the fundamental human rights.

Of like importance, 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 open to improvement. May it here be recalled that, some years ago, the ECtHR, in the case *Hornsby* v. *Greece* (judgment of 19 March 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.

This issue pertains, as pointed out by the ECtHR, to the *rule of law* itself, so as to secure "the proper administration of justice" (paras. 40-41). 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*[186]. In the same line of thinking, the IACtHR, in its judgment (on jurisdiction, of 28 November 2003) in *Baena Ricardo and Others (270 Workers)* v. *Panama*, stated that its jurisdiction comprises likewise "the supervision of compliance with the judgment", on which depends its effectiveness (paras. 72-74).

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victim, already at this stage); and the duty of reparations for damages. For a recent study on the matter cf. A. A. Cançado Trindade, *O Regime Jurídico Autônomo das Medidas Provisórias de Proteção*, The Hague, IBDH; Fortaleza, IIDH, 2017, p. 13-348.

184. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional* (note 38), see chaps. 5 (pp. 47-52) and 22 (pp. 199-208).

185. Cf. e.g. A. A. Cançado Trindade, "Les mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", in G. Cohen-Jonathan and J.-F. Flauss (eds.), *Mesures conservatoires et droits fondamentaux*, Brussels, Bruylant, Nemesis, 2005, p. 145-163; A. A. Cançado Trindade, "The Evolution of Provisional Measures of Protection under the Case-Law of the Inter-American Court of Human Rights (1987-2002)", *Human Rights Law Journal*, Vol. 24, No. 5-8 (2003), p. 162-168.

186. Cf. on the matter A. A. Cançado Trindade, *El Derecho de Acceso a la Justicia en Su Amplia Dimensión*, 2nd ed., Santiago (Chile), CECOH/Librotecnia, 2012, p. 79-574.

Only with due compliance with the judgments can the rights at issue be effectively protected; the execution of judgments, the IACtHR added lucidly, "ought to be considered an integral part of the right of access to justice, this latter understood *lato sensu*"; in case the respondent State does not comply with the judgment and does not provide the measures of reparation ordered by the Court, "it would be denying the right of access to international justice" (paras. 82-83). Despite the experience accumulated so far, this remains an open issue, awaiting further development.

It is to be hoped that parallel to the distinct mechanisms for the supervision of compliance with judgments of contemporary international tribunals, States adopt procedures of *domestic* law to secure, on a *permanent* basis, the faithful compliance with the judgments of international tribunals. This amounts to a legitimate concern of all contemporary international tribunals, in the understanding that 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 *(supra)*.

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 enlargement in the number of the *justiciables*, in all parts of the world, even in the most adverse conditions, and including in relation to mass crimes [187]. They have been duly 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 [188].

May I now focus my remaining considerations on the matter examined in the present lecture here at the headquarters of the United Nations. First, as I pointed out at the beginning of my presentation today, the present era of international tribunals has, from its earliest endeavours, valued considerably the judicial solution and the realisation of justice,

187. Cf. e.g. [Various authors], in R. Nollez-Goldbach and J. Saada (ed.), *La justice pénale internationale face aux crimes de masse – Approches critiques*, Paris, Pédone, 2014, p. 15-241; [Various authors], in de Frouville (note 108), p. 13-232.

188. Cf. in this respect e.g. A. A. Cançado Trindade, *El Principio Básico de Igualdad y No-Discriminación: Construcción Jurisprudencial*, Santiago (Chile), Librotecnia, 2013, p. 39-748; A. A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)*, Fortaleza, IBDH/IIDH/SLADI, 2014, p. 13-363.

as reflected in the tribunals' jurisprudential construction. This has been highly significant for the evolution of international law.

One of its relevant initial aspects has been that the exercise of the advisory function has contributed to the progressive development of international law (in particular on the part of the PCIJ/ICJ and the IACtHR). Moreover, as the international community today counts on a wide range of international tribunals, which adjudicate cases taking place at *inter*-State as well as *intra*-State levels, this calls for a proper approach to their labour from the correct perspective of the *justiciables* themselves.

Each international tribunal has its importance in such a wider framework encompassing the most distinct situations to be adjudicated, in various domains of operation. They are nowadays aware of each other's work. It is necessary that contemporary international tribunals maintain their conscious dialogue, their coordination in successive meetings and their joint endeavours towards jurisprudential harmonisation, so as to keep on securing the realisation of justice in distinct domains of international law. In this common mission, contemporary international tribunals have been rendering a service unto humankind; but there remains a long way to go.

With the reassuring expansion of international jurisdiction in the United Nations era, each international tribunal can give its effective contribution to the continuous evolution of international law in the realisation of justice. Contemporary international law is nowadays better equipped with coexisting international tribunals, operating in distinct domains of international law. The greater their dedication to the solid foundations of their own judgments and opinions, the more enlarged will their contribution be to international justice and peace, as well as to the access to justice by distinct subjects of international law.

The expansion of international jurisdiction has taken place *pari passu* with the corresponding expansions of international responsibility, as well as of international legal personality and capacity. The aforementioned developments ensuing from the work of international tribunals also encompass a reaction of the conscience of humankind against grave violations of human rights and of IHL, crimes against peace, crimes against humanity and acts of genocide. Their determination of responsibility – with all its legal consequences – has exercised a key role to put an end to impunity.

Due to the work of all international tribunals, the international community no longer accepts impunity for international crimes or grave violations of human rights and of IHL. While international human rights

tribunals determine the responsibility of States, international criminal tribunals determine the responsibility of individuals; such determination by the competent international 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.

The advances of the international legal order correspond to the awareness of the human conscience of the need to realise justice in pursuance of the common good. This proper conception emanates from *recta ratio* itself, which has always called for a truly universal law of nations, endowed with its own intrinsic value, and being thus certainly superior to a simply "voluntary" law. One can only correctly approach the foundations and validity of the law of nations from *universal juridical conscience*, in conformity with the *recta ratio*.

In the framework of contemporary international tribunals, attention should also be drawn to the move of some of them towards compulsory jurisdiction. Furthermore, attention is also to be focused on their contribution to the rule of law *(prééminence du droit)*, stressing the needed construction of a *corpus juris* committed to the realisation of justice. In pursuance of jusnaturalist thinking, there is acknowledgement of a universal *jus gentium*, as a true *jus necessarium*, transcending the limitations of the *jus voluntarium*.

The evolution of the humanist law of nations *(droit des gens)* is guided by general principles of law and human values. General principles of law, of the utmost importance, rest on the foundations of the law of nations, being essential to the realisation of justice. The basic posture of an international tribunal is to be necessarily *principiste*, without concessions to State voluntarism; human conscience stands well above the "will" of States, this being essential to the realisation of justice. Whenever this is overlooked, justice is not done.

There is need of perennial attention to fundamental principles, so as to secure the protection of humankind in compliance with the prohibition of nuclear weapons, and the primacy of *raison d'humanité* over *raison d'État*. As I have already pointed out [189], the First Committee of the UN General Assembly approved, on 27 October 2016, its resolution on the convening of a UN conference to draft a treaty on the prohibition of nuclear weapons; I was present at the encouraging session, shortly after the presentation (at the General Assembly and Security Council) of the annual report of the ICJ.

189. Chapter VII, *supra*.

Shortly afterwards, on the eve of Christmas of 2016, the General Assembly proceeded significantly to the convocation of that conference by means of its resolution of 23 December 2016. Throughout the first half of 2017, the Treaty on the Prohibition of Nuclear Weapons was negotiated and drafted, and at last adopted, as scheduled, on 7 July 2017 [190]; once again, I was present at what was a meaningful and unforgettable session. The ceremony of signature of the Treaty was scheduled for 20 September 2017, when in effect it took place at the United Nations in New York *(supra)*.

The present delivery of this lecture here at the headquarters of the United Nations, in this side event of the Hague Academy of International Law, is to me the occasion quite proper to stress the high significance and relevance of this historical achievement of the United Nations, faithful to its principles, at a time when it is suffering attacks on its resources on the part of those who do not believe in international law. Human conscience stands above the "will".

There are certainly other challenges to peace and justice in our times, which leads us to carry on supporting fully the law of nations and the work of contemporary international tribunals. May I thank all of you present here in the United Nations today for the kind attention and care with which you have distinguished me today, 1 November 2019. I dare to keep nourishing faith and hope that our universalist and humanist outlook for the construction and consolidation of an international legal order in our world will succeed in consolidating more peace and justice in the international community. I trust this will continue to be cultivated by the present and new generations of scholars devoted to a jusnaturalist international law.

190. Its adoption was with 122 votes in favour, one against, and one abstention.