PART VII

SETTLEMENT OF DISPUTES

CHAPTER XXIV

PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES: CURRENT STATE AND PERSPECTIVES

I. Introduction: The Basic Problem of Compulsory Jurisdiction

The fundamental problem underlying the whole chapter of International Law concerning peaceful settlement of international disputes remains the *vexata quaestio* of compulsory jurisdiction, largely unresolved from the days of the two Hague Peace Conferences (1899 and 1907) to date. For if, on the one hand, the UN Charter provides for the general principle of the duty of member States of peaceful settlement of disputes which may put at risk international peace[2035], on the other hand, that duty coexists with the prerrogative of the choice left to the contending parties (members or not of the United Nations) of adoption of one of the methods of peaceful settlement of disputes (within and outside the United Nations)[2036].

Such ineluctable and persistent ambivalence has had a repercussion in the application of international instruments. Traditional international legal doctrine has been, somewhat surprisingly, generally conniving with permissiveness (as to choice of methods). Dispute settlement has thus remained particularly vulnerable to manifestations of State voluntarism, thereby resisting attempts of codification or systematization[2037]. Yet, multiple instruments of dispute settle-

2035. A general principle which is incorporated in mandatory terms in the UN Charter — Article 2 (3) — and restated in resolution 2625 (XXV) of 1970 of the UN General Assembly on Principles of International Law Governing Friendly Relations and Co-operation among States; cf. David Davies Memorial Institute of International Studies, *International Disputes: the Legal Aspects* (Report of a Study Group), London, Europa Publs., 1972, pp. 8-14.

2036. F. S. Northedge and M. D. Donelan, *International Disputes: The Political Aspects*, London, Europa Publs., 1971, p. 241.

2037. Thus, it has on occasions been relegated to jurisdictional clauses appearing in Optional Protocols, rather than in the codification Conventions themselves. For a criticism, cf. H. W. Briggs, "The Optional Protocols of Geneva (1958) and Vienna (1961, 1963) concerning the Compulsory Settlement

ment have been devised and applied in the last decades amidst an apparently growing awareness of the need to give greater weight to the general principle of the duty of peaceful settlement, so as to make it prevail over the prerogative (of free choice of means) left to the contending parties.

In the years following the two Hague Peace Conferences (of 1899 and 1907), and throughout the twentieth century, there were successive endeavours to render widely obligatory the peaceful settlement of international disputes (cf. *infra*). In the absence, in most cases, of a strict obligation of submitting pending disputes specifically to compulsory jurisdiction, the option left to the parties to choose among distinct and at times indecisive (political) methods of settlement resulted, "in a substantial proportion of cases, in a stalemate rather than a settlement"[2038]. However, keeping in mind this caveat as to the absence of a guarantee of compulsory settlement, it does not ensue therefrom that the way would be entirely open to State voluntarism in the present domain of International Law.

It is certain that the procedures of the UN Security Council[2039] are supplementary to the traditional methods of peaceful settlement of disputes (mentioned in Article 33 (1) of the UN Charter)[2040], but it does not result therefrom that the question at issue would be wholly under the control of the "will" of the States: in fact, the consent of the contending parties is *not* necessary for a dispute to be taken before the Security Council or the General Assembly, nor for the Security Council to exert its investigatory powers[2041]; the Council

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of Disputes", *Recueil d'études de droit international en hommage à P. Guggenheim*, Geneva, IUHEI, 1968, pp. 628-641; and cf. S. Rosenne, "The Settlement of Treaty Disputes under the Vienna Convention of 1969", 31 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1971), pp. 1-62; R.-J. Dupuy, "Codification et règlement des différends — Les débats de Vienne sur les procédures de règlement", 15 *Annuaire français de droit international (AFDI)* (1969), pp. 70-90.

2038. C. W. Jenks, *The World beyond the Charter*, London, Allen & Unwin, 1969, p. 165, and cf. p. 166. Likewise, Witenberg used to warn that "seuls sont justiciables les Etats qui auront accepté de l'être. L'Etat ne sera justiciable que dans la mesure où il aura accepté de l'être"; J. C. Witenberg, *L'organisation judiciaire, la procédure et la sentence internationales — traité pratique*, Paris, Pédone, 1937, p. 3.

2039. Chapter VI of the UN Charter.

2040. D. W. Bowett, "The United Nations and Peaceful Settlement", in *International Disputes: the Legal Aspects,* London, Europa Publs., 1972, pp. 179-180, and cf. pp. 180 and 183-196.

2041. Under Article 34; D. Davies Memorial Institute, *International Disputes: The Legal Aspects*, *op. cit. supra* footnote 2035, pp. 8-14.

can act on its own initiative, upon request of any member State of the United Nations, or as a result of the initiative of the Secretary-General [2042]. And even if one of the parties refuses to appear before the Council, this latter can examine the situation at the request of a member State, of the General Assembly or the Secretary-General.

Closely linked to the basic issue of compulsory jurisdiction is the question of the efficacy of the specific methods of peaceful settlement of international disputes [2043]. There remain difficulties to extract generalized or definitive conclusions as to such efficacy. For example, international practice of direct negotiation, although vast, has not always been conducive to clearly concluding results, and does not seem to allow for generalizations. In Latin America, for example, while direct negotiations proved successful, for example, between Argentina and Uruguay over the River Plate and its maritime front, and between Brazil and Argentina over the use of waters of the River Paraná, and between the United States and Panama over the regime of the Canal — there have also been cases in which negotiations, extended for many years, have not produced entirely satisfactory results, such as, for example, the frontier dispute between Venezuela and Guyana, and the controversies between Venezuela and Colombia as to maritime delimitation [2044].

II. Interaction or Complementarity of Means of Peaceful Settlement

A more fertile ground for research seems to be provided by the interaction or complementarity of means of peaceful settlement, as

2042. Articles 34, 35 and 99, respectively. J. Stone, *Legal Controls of International Conflict*, New York, Rinehart & Co. Publ., 1954, pp. 187 and 193-194.

2043. For an assessment, cf., e.g., M. D. Donelan and M. J. Grieve, *International Disputes: Case Histories 1945-1970*, London, Europa Publs., 1973, pp. 13-279; C. G. Teng and K. L. Hancock, *Synopses of United Nations Cases in the Field of Peace and Security 1946-1965,* New York, Carnegie Endowment for International Peace, 1966, pp. 1-76; L. B. Sohn, *Cases on United Nations Law,* 2nd rev. ed., Brooklyn, Foundation Press, 1967, ch. VI, pp. 291-862.

2044. On the negotiations in the aforementioned cases, cf., e.g., H. Gros Espiell, "Le traité relatif au 'Rio de la Plata' et sa façade maritime", 21 *AFDI* (1975), pp. 241-249; Pr. R. Y. Chuang, "The Process and Politics of the Ratification of the Panama Canal Treaties in the United States", 56 *Revue de droit international de sciences diplomatiques et politiques* (1978), pp. 95-113; J. Dutheil de la Rochère, "L'affaire du Canal de Beagle", 23 *AFDI* (1977), pp. 408-435; P. Gilhodes, "Le conflit entre la Colombie et le Venezuela: quelques arpents d'eau salée?", 21 *Revue française de science politique* (1971), pp. 1272-1289.

often illustrated, throughout the years, by, for example, *inter alia*, at regional level, the dispute between Chile and Argentina concerning the *Beagle Channel* (which was object, since 1977, of an arbitral award, of attempts of negotiation and mediation), and the *territorial dispute between Algeria and Morocco* (shortly after the independence of the former, in 1962), when Syria and Ethiopia offered mediation, until an arbitral commission of the OAU intervened[2045]. Or else, at the United Nations level, by the case of *Cyprus*, wherein the United Nations not only exerted the function of peace-keeping but also acted as initiator of diplomatic exchanges[2046]. Article 33 (1) of the UN Charter, whereby the contending parties ought to seek a solution by the traditional methods (*inter alia*, negotiation, conciliation, good offices, mediation), does *not* appear to have been interpreted as requiring that all methods referred to therein ought necessarily to be exhausted before resorting to the Security Council[2047].

The complementarity of methods of peaceful settlement of disputes has met with judicial recognition. Thus, in the *Nicaragua* v. *United States* case (Jurisdiction and Admissibility, 1984), the International Court of Justice (ICJ) pondered that

> "even the existence of active negotiations in which both parties might be involved should not prevent both the Security Council and the Court from exercising their separate functions under the Charter and the Statute of the Court . . .
>
> In the light of the foregoing, the Court is unable to accept either that there is any requirement of prior exhaustion of regional negotiating processes as a precondition to seising the Court; or that the existence of the Contadora process constitutes in this case an obstacle to the examination by the Court of the Nicaraguan application and judicial determination in due course of the submissions of the Parties in the case. The Court

2045. M. D. Donelan and M. J. Grieve, *op. cit. supra* footnote 2043, pp. 145-146.

2046. Cf. V. Pechota, *Complementary Structures of Third-Party Settlement of International Disputes*, New York, UNITAR, 1971, p. 10.

2047. D. Davies Memorial Institute, *International Disputes: the Legal Aspects*, *op. cit. supra* footnote 2035, p. 14; on referral of conflicts to other organs, cf., e.g., E. Jiménez de Aréchaga, "La coordination des systèmes de l'ONU et de l'OEA pour le règlement pacifique des différends et la sécurité collective", 111 *RCADI* (1964), pp. 426-452.

> is therefore unable to declare the application inadmissible, as requested by the United States, on any of the grounds it has advanced as requiring such a finding."[2048]

The ICJ further recalled its dictum in the *Aegean Sea Continental Shelf* case (1978), to the effect that its own jurisprudence "provides various examples of cases in which negotiations and recourse to judicial settlement have been pursued *pari passu*"[2049]. Subsequently, in the case of the *Land and Maritime Boundary between Cameroon and Nigeria* (Preliminary Objections, 1998), the ICJ reiterated its understanding to the effect that

> "Neither in the [UN] Charter nor otherwise in International Law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court. No such precondition was embodied in the Statute of the Permanent Court of International Justice . . ."[2050]

Still at global level, it is significant that the 1982 UN Convention on the Law of the Sea foresees the operation of distinct methods of settlement of disputes in matters of the Law of the Sea, such as conciliation and judicial and arbitral settlement (cf. *infra*). And, at regional level, in the African continent, it is likewise significant that to the Charter of the (then) Organization of African Unity (OAU) was annexed a Protocol creating a Permanent Commission on Mediation, Conciliation and Arbitration (three methods of peaceful settlement)[2051], which was to coexist with *ad hoc* Committees subsidiary to the main organs of the former OAU (nowadays African Union), for peaceful settlement (diplomatic means) of international disputes in Africa[2052].

In international practice on dispute settlement, the methods of fact-finding and conciliation have not seldom been combined, in

2048. *ICJ Reports 1984*, pp. 440-441, paras. 106 and 108.
2049. Cit. in *ibid*., p. 440, para. 106.
2050. *ICJ Reports 1998*, p. 303, para. 56.
2051. Composed of 21 members elected by the Assembly of Heads of State and Government; cf. T. O. Elias, "The Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity", 40 *British Year Book of International Law (BYBIL)* (1964), pp. 336-348; D. W. Bowett, *The Law of International Institutions*, 2nd ed., London, Stevens, 1970, pp. 280-282.
2052. Cf. *infra*, as to the practice.

several treaties providing for the appointment of "commissions of fact-finding and conciliation"; likewise, several international agreements have stipulated that only after a recourse in vain to a commission of conciliation will a case be submitted to an arbitral tribunal, thus establishing a "close link" between those two procedures [2053]. In sum, such methods of dispute settlement, instead of mutually excluding each other, appear complementary to each other and have not seldom interacted in practice.

In the inter-State diplomatic *contentieux*, *negotiation* has often been "complemented" by recourse to other methods of peaceful settlement [2054], either following judicial settlement (as in the *North Sea Continental Shelf* case, 1969), or else preceding recourse to such other methods of settlement (when negotiations come to a standstill). Negotiations — or else consultations — are referred to in certain treaties sometimes as a preliminary to recourse to other methods of peaceful settlement [2055]. But when negotiations fail, the situation at issue may aggravate, and lead to severance of relations between the parties concerned, as illustrated, *inter alia*, by the *Hostages* case, the *contentieux* between the United States and Iran following the seizure of the US Embassy in Tehran in 1979 [2056].

Hence the importance of complementarity between negotiation and other methods of peaceful settlement. As aptly pointed out, more than once, by the ICJ [2057], there is no requisite in International Law whereby a State would be bound to "exhaust" negotiations before having recourse to other means of peaceful settlement. But if negotiations have not prospered, there would be all the more reason for resorting to other methods, this possibility being open at any time, even while negotiations are still pending, so as to avoid aggravating the dispute at issue. Endeavours have constantly been undertaken in the United Nations to foster *conciliation* as a means of dispute

2053. L. B. Sohn, "The Function of International Arbitration Today", 108 *RCADI* (1963), pp. 18-19.

2054. Cf., for examples, e.g., H. G. Darwin, "Methods of Peaceful Settlement — Negotiation", in *International Disputes: The Legal Aspects,* London, Europa Publs., 1972, p. 81.

2055. Cf. J. Collier and V. Lowe, *The Settlement of Disputes in International Law — Institutions and Procedures*, Oxford, University Press, 2000, p. 21.

2056. Cf. J. G. Merrills, *International Dispute Settlement*, 3rd ed., Cambridge, University Press, 1998, pp. 22-23.

2057. E.g., in the *Nicaragua* v. *United States* case, 1984, and in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria*, 1998 *(supra)*.

settlement[2058]. Both the Security Council and the General Assembly have in practice

> "not often themselves assumed the formal role of an organ of conciliation. In general their efforts of conciliation have taken the form of encouraging the parties to negotiate, or making available to them the good offices of the Presidents of the Security Council or General Assembly or of the Secretary General or of putting at their disposal the services of a mediator, and usually in conjunction with a peace-observation mission." [2059]

Parallel to the commissions of enquiry and conciliation, the United Nations has developed other techniques of the kind, in entrusting to the President of the General Assembly, in particular, certain missions of conciliation. Resort to these methods has not been limited to the United Nations level, but has been extended also at regional level, such as the Mission of Observation of the Organization of American States (OAS) in Belize in 1972[2060]. Conciliation, the nature of which has been much discussed[2061], has attracted growing attention in recent years; it is foreseen in several multilateral treaties (cf. *infra*), and it is nowadays regarded as a method which may foster compulsory recourse to peaceful dispute settlement.

On its part, the procedure of *international fact-finding*, from its institutionalization, as an autonomous method, by the two Hague Peace Conferences (of 1899 and 1907) to date, has undergone an interesting evolution. In this respect, one may recall the early attempt, by the UN General Assembly, of putting into practice the mechanism of a commission of fact-finding and conciliation (1949)

2058. J.-P. Cot, *La conciliation internationale,* Paris, Pedone, 1968, pp. 262-263; V. Pechota, *op. cit. supra* footnote 2046, pp. 3, 50 and 54. For a general study, cf. also H. Rolin, *La conciliation internationale,* Geneva, Inst. Dr. Intl. (extrait), 1959, pp. 1-38.

2059. D. Davies Memorial Institute, *International Disputes: The Legal Aspects . . ., op. cit. supra* footnote 2035, pp. 15-16; and cf. F. Vallat, "The Peaceful Settlement of Disputes", in *Cambridge Essays in International Law — Essays in Honour of Lord McNair,* London, New York, Stevens, Oceana, 1965, p. 164.

2060. By means of an agreement between Guatemala and the United Kingdom, this latter not an OAS member State.

2061. D. Bardonnet, "Problèmes intéressant les Etats nouveaux — l'Etat des ratifications des Conventions de La Haye de 1899 et de 1907 sur le règlement pacifique des conflits internationaux", 7 *AFDI* (1961), pp. 726-741.

to assist States in settling their disputes even outside the United Nations, or help the UN organs to that end. In 1967 it was decided to elaborate a list of experts in *fact-finding*[2062], at the disposal of States, to resort to so as to avoid or impede conflicts, thus singling out the *preventive* function of fact-finding[2063]. Early in UN practice the procedure of investigation began to be utilized[2064], the same happening in the purely inter-State *contentieux* (for example, the case of the *Red Crusader*[2065]).

At the regional level, in the period 1977-1979, during the frontier dispute between Costa Rica and Nicaragua, the OAS established three *Ad Hoc* Commissions of Observers and one Commission of Civil Observers[2066]. Another example is provided by the Consultative (Advisory) Committee of the (then) OAU on Nigeria (1967-1968), which acted during the "war of Biafra" or the "Nigerian civil war"[2067]. Furthermore, fact-finding can be put into practice either as an "autonomous" method, *per se*, of investigation, or "integrated" as a part of a system of settlement of disputes or of control in the application of international conventions[2068].

It is at global level that a most remarkable illustration of the

2062. With the names forwarded by the member States to the Secretary-General.

2063. A method based in Article 33 of the UN Charter; N. Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry,* London, RIIA, OUP, 1974, pp. 296-312 and 344-347.

2064. In cases such as those of Palestine (1947), Greece (1947-1949), Indonesia (1947-1948), Germany (1951-1953), South Africa (as from 1967); *ibid*., pp. 276-292; and cf. H. G. Darwin, "[Methods of Peaceful Settlement —] Factfinding and Commissions of Inquiry", *International Disputes: The Legal Aspects*, *op. cit. supra* footnote 2035, pp. 172-177; and cf. *ibid*., p. 23; as to the UN Security Council in particular, cf. E. L. Kerley, "The Powers of Investigation of the U.N. Security Council", 55 *American Journal of International Law (AJIL)* (1961), pp. 892-918.

2065. A dispute opposing Denmark to the United Kingdom dealt with by a fact-finding commission was established by the two States; cf. N. Bar-Yaacov, *op. cit. supra* footnote 2063, pp. 179-195.

2066. Given the virtual lack of application in practice of the Pact of de Bogotá; cf. E. Lagos, "Los Nuevos Mecanismos Procesales para la Eficácia de la Solución Pacífica de las Controvérsias, con Particular Referencia a la Práctica de la OEA en los Últimos Años", in *Perspectivas del Derecho Internacional Contemporáneo*, Vol. II, Santiago, Universidad de Chile, Instituto de Estudios Internacionales, 1981, pp. 79-91.

2067. On this latter, cf., e.g., Z. Cervenka, *The Organization of African Unity and Its Charter*, 2nd ed., London, C. Hurst & Co., 1969, pp. 209-210.

2068. Cf. T. Bensalah, *L'enquête internationale dans le règlement des conflits*, Paris, LGDJ, 1976, pp. 3-222; and, for an empirical study, cf. G. Fischer and D. Vignes, *L'inspection internationale — Quinze études de la pratique des Etats et des organisations internationales,* Brussels, Bruylant, 1976, pp. 3-518.

development of *good offices* is found: the exercise of these latter by the UN Secretary-General, on his own initiative (in the ambit of his competence) or at the request of a competent organ of the United Nations or the choice by the contending parties themselves. In practice, the powers of the UN Secretary-General to utilize good offices have enlarged considerably, parallel to the search for solutions by consensus and conciliation; Article 99 of the UN Charter [2069] has been interpreted as conferring upon the Secretary-General "all the necessary powers" for the search of peaceful settlement, including those of investigation [2070]. Examples of the growing exercise of good offices by the UN Secretary-General in international crises can be found, for example, *inter alia*, in the *Cuban missile crisis* (1962), in the *war of Vietnam* (1965-1971), in the conflict between *India and Pakistan* (1965-1971), in the tension between *Cambodia and Thailand* (1961-1968), at times "filling gaps" of the limited operation of the collective organs of the United Nations [2071]. Such exercise of good offices can take place also on the part of international organs [2072], as well as on the part of States, as it has often happened in practice [2073].

As to *mediation*, the United Nations has in fact resorted at times to private personalities to exert the function of mediators, and has from the start appointed a commission of "good offices" or a "mediator" for the settlement of disputes [2074]. At regional level, the practice

2069. For a study of its legislative history, cf. S. M. Schwebel, "The Origins and Development of Article 99 of the Charter", 28 *British Year Book of International Law (BYBIL)* (1951), pp. 371-382.

2070. V. Pechota, *The Quiet Approach — A Study of the Good Offices Exercised by the United Nations Secretary-General in the Cause of Peace,* New York, UNITAR, 1972, pp. 2-9, and cf. pp. 11 and 25. Cf. also M. W. Zacher, "The Secretary-General and the United Nations' Function of Peaceful Settlement", 20 *International Organization* (1966), pp. 725-726, 730, 733-734 and 738.

2071. V. Pechota, *op. cit. supra* footnote 2046, pp. 10-11 and 17-18.

2072. E.g., in the case of the independence of Indonesia from Dutch ruling and its entry into the United Nations, an important role was exerted by the Committee of Good Offices established by the UN Security Council (particularly in the period 1949-1950).

2073. E.g., in the case of the emancipation of Algeria from French ruling (1955-1962), at a certain stage of the conflict (1957) it Morroco and Tunisia offered their good offices.

2074. E.g., cases of *Indonesia*, 1947-1950; of *Palestine*, 1947-1949; of the *conflict between India and Pakistan*, 1948; of *Korea*, 1951; of *Cyprus*, 1964; of the *Middle East crisis*, 1967; among others; H. G. Darwin, "[Methods of Peaceful Settlement —] Mediation and Good Offices", *International Disputes: The Legal Aspects,* London, Europa Publs., 1972, pp. 89-92.

of Latin American States bears witness of some cases of recourse to mediation, namely, for example, that by the Foreign Ministers of Costa Rica, Guatemala and Nicaragua in the *conflict between El Salvador and Honduras* (shortly before the beginning of the hostilities in 1969), and that of the Peruvian jurist Bustamante y Rivero, whose recommendations led to the settlement of the *conflict between El Salvador and Honduras* [2075].

The prolonged mediation conducted by the Holy See of the Argentinian-Chilean controversy over the *Beagle Channel*, drawing on the earlier arbitral award (of 1977) in the same case, was not tied up to a rigid procedure, and contemplated separate as well as joint meetings with the Delegations of the two countries, with the presence and intervention of the representative of the Holy See [2076]. The representative originally appointed by the Pope, Cardinal A. Samoré, played an active role throughout most of the mediatory process, but died before its conclusion. A personal account by a participant in the *célèbre* mediation, that of Santiago Benadava, credits Cardinal Samoré with the presentation, at a certain stage of the process (June 1980) of a list of "ideas" passed on to the contending parties, which, though containing concessions on the part of both,

> "did not assume abdication of any principle of natural law, did not contrast with the constitutional foundations of the Parties nor did they oppose substantially the ineluctable exigencies or dictates of the conscience of one or the other Party or of their representatives" [2077].

The patient endeavours of the Holy See were rewarded by the Peace Treaty at last concluded between Chile and Argentina on 29 November 1984, whereby the two Parties reiterated their duty to abstain from the threat or use of force, settled the maritime delimitation at issue, and established methods of settlement in case of future differences (comprising recourse to conciliation and arbitration).

2075. Cf., on this latter, e.g., A. A. Cançado Trindade and F. Vidal Ramírez, *Doctrina Latinoamericana del Derecho Internacional*, Vol. II, San José, Costa Rica, IACtHR, 2003, pp. 5-66.

2076. For an account, cf. A. Brouillet, "La médiation du Saint-Siège dans le différend entre l'Argentine et le Chili dans la zone australe", 25 *AFDI* (1979), pp. 47-73.

2077. S. Benadava, *Recuerdos de la Mediación Pontificia entre Chile y Argentina (1978-1985)*, Santiago de Chile, Edit. Universitaria, 1999, p. 75, and cf. pp. 66-67 and 156.

Numerous cases of systematic recourse to *arbitration* (some 400 instances), since the 1794 Jay Treaty until the end of the thirties in the twentieth century, are registered in A. M. Stuyt's *Survey of International Arbitrations 1794-1970*, to refer to but one source [2078]. At global level, the historical contribution of arbitral procedure to peaceful settlement is set forth in publications of arbitral awards in series [2079]. Throughout the twentieth century, most cases submitted to arbitration were settled mainly by *ad hoc* arbitral tribunals [2080]. Like other methods of peaceful settlement, arbitration has also been resorted to, throughout the last decades, with varying results [2081], as illustrated, for example, by the *Lac Lanoux* case *(France* v. *Spain)* (1957), the *Rann of Kutch* case *(India* v. *Pakistan)* (1968), the case of the *Delimitation of the Continental Shelf (United Kingdom* v. *France)* (1977), the *Beagle Channel* case *(Argentina* v. *Chile)* (1977-1984), the *Dubai/Sharjah Boundary* case (1981), the *Maritime Delimitation* case *(Guinea* v. *Guinea-Bissau)* (1985), the *La Bretagne* case *(Canada* v. *France)* (1986), the *Taba* case *(Egypt* v. *Israel)* (1988), the *Maritime Delimitation* case *(Guinea-Bissau* v. *Senegal)* (1989), the *St. Pierre and Miquelon* case *(Canada* v. *France)* (1992), the *Laguna del Desierto* case *(Argentina* v. *Chile)* (1994-1995), among others [2082].

In Latin America, despite the conclusion of multilateral instruments such as the Pact of Bogotá (1948), recourse to arbitration con-

2078. Followed by other subsequent cases; cf. A. M. Stuyt, *Survey of International Arbitrations 1794-1970*, 2nd printing, Leiden, New York, Sijthoff, Oceana, 1976, p. vii.

2079. Of the kind of the Moore's *History and Digest of International Arbitrations*, the La Pradelle and Politis's *Recueil des arbitrages internationaux*; the successive volumes of the series *Reports of International Arbitral Awards* (of the United Nations) and of the *International Law Reports* (ed. E. Lauterpacht), among others.

2080. Thus, in the era of the old PCIJ, while this latter dealt with 29 contentious cases (judicial settlement), some 80 cases were settled by *ad hoc* arbitral tribunals. In contrast, only seven cases (among which the case of *Sovereignty over Various Red Sea Islands (Eritrea* v. *Yemen)*) have been dealt with by the Permanent Court of Arbitration (PCA).

2081. For a general study, cf., e.g., J. L. Simpson and H. Fox, *International Arbitration,* London, Stevens, 1959, pp. 1 *et seq.*; and cf. J. J. Caicedo Castilla, "El Arbitraje en las Conferencias Panamericanas hasta el Pacto de Bogotá de 1948 sobre Soluciones Pacíficas", 4 *Boletim da Sociedade Brasileira de Direito Internacional (BSBDI)* (1948), No. 8, pp. 5-33.

2082. Cf., for an assessment, C. Gray and B. Kingsbury, "Inter-State Arbitration since 1945: Overview and Evaluation", in *International Courts for the Twenty-First Century* (ed. M. W. Janis), Dordrecht, Nijhoff, 1992, pp. 55-83, esp. p. 69.

tinued to take place on an *ad hoc* basis, from time to time, as illustrated by the cases of the *Beagle Channel* (1977) and of the *Laguna del Desierto* (1994-1995, cf. *infra*), both opposing Argentina to Chile. In the African continent, parallel to the OAU Permanent Commission of Mediation, Conciliation and Arbitration (1963, *supra*), which has remained to some extent inactive, member States of the former OAU (nowadays African Union) continued at times to resort to more flexible means of negotiated settlement (outside the Commission, cf. *supra*) — which has led, for example, to a settlement, outside the latter, of the *conflicts opposing Somalia to Kenya and to Ethiopia*, the *territorial dispute between Algeria and Morocco*, and the *controversies between Côte d'Ivoire and Guinea* over detention of diplomats [2083].

The fact remains that the arbitral solution does not appear susceptible of generalizations, as being an essentially *ad hoc* and casuistic means of settlement of international disputes. *Judicial settlement*, dealt with in more detail in the following chapter, has evolved to a large extent on the basis of an analogy with the function of tribunals at domestic law level [2084]. It may have occurred that at times expectations have not been amply fulfilled, and this may be partly due to the fact that not seldom what the contending parties were seeking was not so much an interpretation of the law, but rather a modification in the law [2085], or its progressive development. In any case, there has been lately a gradual *jurisdictionalization* of dispute settlement, as a result of the gradual creation and operation of multiple international tribunals [2086].

III. Settlement of Disputes in Multilateral Treaties

Throughout the twentieth century, a major effort in dispute settlement, in the inter-war period of the League of Nations, was represented by the 1928 General Act for the Pacific Settlement of

2083. D. W. Bowett, *op. cit. supra* footnote 2051, p. 283.

2084. R. Bierzanek, "Some Remarks on the Function of International Courts in the Contemporary World", 7 *Polish Yearbook of International Law* (1975), pp. 121-150. For critical remarks, cf. also, e.g., J. Fawcett, *International Economic Conflicts: Prevention and Resolution*, London, Europa Publs., 1977, pp. 80-81.

2085. F. S. Northedge and M. D. Donelan, *op. cit. supra* footnote 2036, pp. 326 and 330; and cf., for a general study, e.g., Max-Planck-Institut, *International Symposium on the Judicial Settlement of International Disputes,* Heidelberg, 1972, pp. 1-28 (mimeographed).

2086. Cf. Chap. XXV, *infra*.

International Disputes (revised in 1949), which provided for conciliation, judicial settlement and arbitration. Although it did not produce the expected results, it in a way stimulated the celebration of bilateral and regional treaties for dispute settlement[2087]. In our times, an elaborate scheme of dispute settlement can be found, for example, in the relevant provisions of the 1982 UN Convention on the Law of the Sea (Part XV, Arts. 279-299)[2088], comprising the Law of the Sea Tribunal (Annex VI, Statute), its Seabed Disputes Chamber (Arts. 186-191), and distinct or special chambers (provided by its Statute), a Commission of Conciliation (Annex V), arbitration (Annex VII, including the constitution of an Arbitral Tribunal), and special arbitration (Annex VIII, including the constitution of a Special Arbitral Tribunal, with fact-finding powers)[2089]. Article 297 of the Convention lists three options (the International Tribunal for the Law of the Sea itself, the ICJ, or arbitration), binding procedures (at the request of a contending party), thus setting limits to the traditional free choice of means invoked in this chapter of International Law.

The scheme at issue was the result of prolonged and complex negotiations in the preparatory work of the 1982 Montego Bay Convention. Throughout those *travaux préparatoires* the principle of compulsory settlement gave rise to much controversy. There were those who preferred an optional protocol, recalling to that end that solution, set forth in the corresponding provisions of the 1958 Conventions on the Law of the Sea. Others considered that proposal unacceptable for an all-embracing Convention such as that of Montego Bay, containing so many innovations likely to raise disputes which could only be resolved by the use of an obligatory third party procedure. The disagreements which prevailed rendered it unlikely to select a single method of peaceful settlement. Thus,

2087. E.g., in the European continent, the 1957 European Convention for the Peaceful Settlement of Disputes — like the aforementioned General Act of Geneva — had some of its 12 States Parties excluding so-called "non-legal disputes" from the application of the provisions on arbitration; K. Nakamura, "The Convention for the Pacific Settlement of International Disputes in Historical Perspective — In Commemoration of the Centennial of the I Hague Peace Conference", 43 *Japanese Annual of International Law* (2000), pp. 9, 15 and 18.

2088. For an account of the *travaux préparatoires*, cf., e.g., L. Valencia Rodríguez, *Arreglo de Controversias Según el Derecho del Mar*, Caracas, UNESCO, 1989, pp. 15-205.

2089. On this dispute settlement system, cf., e.g., A. O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea*, Dordrecht, Nijhoff, Kluwer, 1987, pp. 3-283.

> "Faced with this wide divergence of views, the negotiators of the Convention took the only practicable course and resolved the problem by . . . invoking . . . a choice of methods of binding settlement" [2090].

Hence the aforementioned options left to the States Parties, which had their freedom of choice thus sensibly limited, in addition of the introduction of an element of compulsory settlement.

The scheme of dispute-settlement set forth in the 1982 UN Convention on the Law of the Sea is particularly significant for such a Convention of a universal character. Moreover, it is indeed unique in comparison with other great codification Conventions of the United Nations, in which the ways and means of settling disputes remain left to the free choice of the parties [2091]. In addition, some other UN codification Conventions (for example, the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, the 1969 Convention on Special Missions) have adopted the system of separate Optional Protocols on peaceful settlement [2092]; in this respect, L. Caflisch has forcefully argued that, since any progress in the effective application of substantive law goes through the improvement of methods of peaceful settlement, there is a case for adding a system (preferrably of a jurisdictional nature) of peaceful settlement to the UN codification Conventions *themselves* [2093].

In this connection, a significant development has been the establishment of a *compulsory procedure of conciliation*, as adopted by the 1969 and 1986 Vienna Conventions on the Law of Treaties [2094], and the 1975 Convention on the Representation of States in Their Relations with International Organizations of Universal

2090. J. G. Merrills, *International Dispute Settlement*, *op. cit. supra* footnote 2056, pp. 172-173.

2091. G. Bosco, "40 Years of U.N.: The Evolution of International Law Concerning the Peaceful Settlement of Disputes", in *The Evolution of International Law since the Foundation of the UN, with Special Emphasis on the Human Rights — Thesaurus Acroasium*, Vol. XVI, Thessaloniki, IIPLIR, 1990, pp. 33-35.

2092. In practice, "ces Protocoles ont d'ailleurs connu un succès fort modeste"; R.-J. Dupuy, "Codification et règlement des différends . . .", *op. cit. supra* footnote 2037, p. 72, and cf. p. 73.

2093. L. Caflisch, "Cent ans de règlement pacifique des différends interétatiques", 288 *RCADI* (2001), pp. 261, 363 and 459, and cf. p. 286.

2094. Article 66, and Annex, in case of controversies as to nullity, termination and suspension of operation of treaties.

Character[2095], and the 1978 and 1983 Vienna Conventions on State Succession[2096]. In its turn, the 1959 Antarctic Treaty provides for consultations between the Contracting Parties, so that any controversy as to its interpretation or application is solved by negotiation, investigation, mediation, conciliation, arbitration, judicial settlement (recourse to the ICJ) or any other peaceful means of their choice (Art. XI). Similarly, the 1967 Treaty for the Prohibition of Nuclear Weapons in Latin America (or Treaty of Tlatelolco) provides that any question or controversy as to its interpretation or application can be submitted to the ICJ, except if the parties concerned agree on another method of peaceful settlement (Art. 24).

Recourse to conciliation (even when mentioned as an alternative among other means of peaceful settlement) is set forth in some environmental law treaties[2097]. At global UN level, when the Ozone Layer Convention was adopted in 1985, an episode occurred which should not pass unnoticed: according to an account, a group of 16 States annexed a declaration to the Final Act of the Conference of Plenipotentiaries on the Protection of the Ozone Layer (21 March 1985), stating that they expressed their regret that the Vienna Convention for the Protection of the Ozone Layer lacked any provision for the compulsory settlement of disputes (by third parties upon request of one party); furthermore, they appealed to all Parties to the Convention to make use of a possible declaration under Article 11 (3) of the aforesaid Convention[2098].

In the African continent, the Cairo Protocol on Mediation,

2095. Art. 85.

2096. Vienna Convention of 1978, Part VI, Art. 42; Vienna Convention of 1983, Part V, Art. 43.

2097. E.g., the 1963 Optional Protocol (Concerning the Compulsory Settlement of Disputes) to the Vienna Convention on Civil Liability for Nuclear Damage (which provides for the establishment of a conciliation procedure), the 1969 International Convention on Intervention on the High Seas in Cases of Oil Pollution Casualties, the 1985 Vienna Convention for the Protection of the Ozone Layer (which fosters the tendency towards unilateral recourse to conciliation), the 1992 Framework Convention on Climate Change, the 1992 Convention on Biological Diversity, the 1994 Convention to Combat Desertification; these last four Conventions also list, as other peaceful settlement means, arbitration (examples of which are provided, in distinct contexts, by the successful decisions of arbitral tribunals in the aforementioned *Lac Lanoux* case in 1957, and, much earlier on, in the *Bering Sea Fur Seals* case in 1893, opposing the United Kingdom to the United States) as well as judicial settlement (by the ICJ); cf. C. P. R. Romano, *The Peaceful Settlement of International Environmental Disputes*, The Hague, Kluwer, 2000, pp. 61-63 and 322.

2098. G. Bosco, *op. cit. supra* footnote 2091, p. 38.

Conciliation and Arbitration, of July 1964, annexed to the (then) OAU Charter, created a Permanent Commission on Mediation, Conciliation and Arbitration. As a complement to it, since the outbreak of the Algerian-Moroccan conflict of 1963, the main organs of the OAU established subsidiary *ad hoc* Committees to foster negotiations, or good offices, mediation, enquiry and conciliation; such *ad hoc* Committees, composed of member States (a maximum of ten) rather than personalities, have acted in the conflict of *Mali* v. *Haute Volta* (declaration of reconciliation of 1975), later settled by the ICJ (Judgment of 1986); they also acted in the civil war of Chad, and have become the most utilized means of settlement of inter-African conflicts to date[2099].

In turn, the (then) OAU Council of Ministers itself has exerted its good offices in the frontier dispute between Ethiopia and Somalia. The OAU Conference of Heads of State and Government declared that the mechanism instituted by the 1964 Cairo Protocol *(supra)* was an integral part of the (then) OAU Charter, and thus all OAU member States were automatically Parties to the Statute of the Permanent Commission on Mediation, Conciliation and Arbitration. The main objective of this mechanism is conflict-prevention, but it faces the difficulty of lack of resources; when recourse to arbitration is decided by common agreement, the institution of an arbitral tribunal is foreseen[2100].

IV. Current Developments: Fact-Finding and the Search for Justice and the Prevalence of the Rule of Law

As a technique of dispute-settlement, *fact-finding* has lately been utilized in pursuance of the prevalence of common and superior values, such as the search for justice and the safeguard of democracy and the rule of law. Some recent developments to this effect should not pass unnoticed. The use of fact-finding as a method of peaceful settlement of international disputes has much expanded through the work of international supervisory organs in the field of human

2099. H. Gharbi, "Le règlement des différends dans le cadre de l'Organisation de l'unité africaine (OUA)", *Règlement pacifique des différends internationaux* (ed. F. Horchani), Tunis, Brussels, Centre de Publication Universitaire, Bruylant, 2002, pp. 538-540.

2100. Composed of 21 member-States of the OAU Conference of Heads of State and Government; *ibid*., pp. 541-551 and 554.

rights[2101] and of commissions of enquiry under the ILO Constitution[2102]. In addition, from the mid-seventies onwards, successive *Truth Commissions* have been established in distinct parts of the world, for the determination of facts related to grave violations of human rights and in the framework of the struggle against impunity.

In the period of 1974-1994[2103], for example, 15 Truth Commissions then instituted have disclosed the following common characteristics: firstly, the operation as organs of fact-finding in a context of democratic transition in distinct countries; secondly, the examination of facts which occurred in the past, pertaining not so much to isolated events, but rather to a generalized situation of violations of human rights in given countries; and thirdly, a mandate with temporal limitation, expiring with the presentation of the final report with the results of the investigations[2104].

The mandates of those Truth Commissions have varied from case to case, as well as the results of their investigations: some have naturally been more successful than others. Among those that achieved concrete results, the Truth Commission for El Salvador (inspired by the experiences on the matter in Chile and Argentina) was the first of the kind to be sponsored and funded by the United Nations[2105]; others had a governmental origin, as exemplified by the

2101. Cf. B. G. Ramcharan (ed.), *International Law and Fact-Finding in the Field of Human Rights*, The Hague, M. Nijhoff, 1982, pp. 137-150, 151-159 and 176-179 (papers by E. Vargas Carreño, H. C. Kruger and B. G. Ramcharan, respectively).

2102. Cf. *ibid*., pp. 160-175 (paper by G. von Potobsky).

2103. Namely, Uganda (1974), Bolivia (1982), Argentina (Report *Nunca Más*, 1986), Uruguay (1985), Zimbabwe (1985), Uganda again (1986), Philippines (1986), Chile (National Commission on Truth and Reconciliation, 1990-1991), Chad (1990), South Africa (I African National Congress, 1992), Germany (1992), El Salvador (1991), Rwanda (1992-1993), South Africa again (II African National Congress, 1993), and Ethiopia (1992-1993). To those 15 Truth Commissions (cf. *op. cit. infra* footnote 2104), one is to add two other rather recent initiatives: that of the Truth Commission for Haiti, which did not produce satisfactory results (cf. [Centre international des droits de la personne et du développement démocratique,] *Proposition pour une Commission de la vérité en Haïti — Elements constitutifs*, Montreal, 27.11.1994, pp. 1-13), and that of the investigations undertaken by the National Comissariat of Protection of Human Rights, of Honduras (cf. Comisionado Nacional de Protección de los Derechos Humanos, *Los Hechos Hablan por Sí Mismos — Informe Preliminar sobre los Desaparecidos en Honduras 1980-1993*, Tegucigalpa, Ed. Guaymuras, 1994, pp. 11-496).

2104. P. B. Hayner, "Fifteen Truth Commissions — 1974 to 1994: A Comparative Study", 16 *Human Rights Quarterly* (1994), pp. 598-604.

2105. Cf. *ibid*., p. 599.

Commission of Truth and Reconciliation of Chile, established in 1990 by the Presidency of the Republic[2106]; the Truth Commission for Rwanda (which reported in 1993) was, in turn, of non-governmental (international) character[2107]; the two Truth Commissions for South Africa (appointed by Nelson Mandela) resulted from an original decision of the African National Congress of investigating and reporting publicly on past human rights abuses[2108]. Recently, the Commission on Truth and Reconciliation of Peru concluded its work and presented, in August 2003, a substantial report[2109].

Amidst the diversity of their mandates and of the results achieved, Truth Commissions have — as a characteristic feature of their work — operated in the investigation of past events in relation to which the national society at issue had been profoundly divided and polarized; such investigation is regarded as remaining, however, necessary, as what happened in the past may have influence in the present and the future of the social environment at issue[2110]. Overcoming operational difficulties, Truth Commissions have proven to be, in most cases, a relevant instrument in the crystallization of the right to truth[2111]

2106. For the results of the investigations, cf. *Informe Rettig — Informe de la Comisión Nacional de Verdad y Reconciliación*, Vol. I, Santiago, February 1991, pp. 1-448; *Informe Rettig — Informe de la Comisión Nacional de Verdad y Reconciliación*, Vol. II, Santiago, February 1991, pp. 449-890; and, for an account of the experience, cf. P. Aylwin, "La Comisión de la Verdad y Reconciliación de Chile", in *Estudios Básicos de Derechos Humanos*, Vol. II (eds. A. A. Cançado Trindade and L. González Volio), San José, Costa Rica, Inter-American Institute of Human Rights (IIHR), 1995, pp. 105-119; P. Aylwin, "La Comisión Chilena sobre la Verdad y Reconciliación", in *Estudios Básicos de Derechos Humanos*, Vol. VII (eds. A. A. Cançado Trindade, G. Elizondo Breedy, L. González Volio and J. Ordóñez), San José, Costa Rica, IIHR, 1996, pp. 35-52.

2107. P. B. Hayner, *op. cit. supra* footnote 2104, pp. 600 and 629-632.

2108. *Ibid*., pp. 600, 625-626 and 632-634; and cf. A. Omar, "Truth and Reconciliation in South Africa: Accounting for the Past", 4 *Buffalo Human Rights Law Review* (1998), pp. 5-14.

2109. Cf., in particular, Comisión de la Verdad y Reconciliación, *Informe Final — Conclusiones Generales*, Lima, CVR, Peru, 2003, pp. 9-45.

2110. [Various Authors,] *Truth Commissions: A Comparative Assessment* (Seminar of Harvard Law School, of May 1996), Cambridge, Mass., Harvard Law School, 1997, pp. 16, 70 and 81.

2111. On the meaning of fact-finding, in the search for truth, on *past* violations of human rights, cf. M. Parlevliet, "Considering Truth — Dealing with a Legacy of Gross Human Rights Violations", 16 *Netherlands Quarterly of Human Rights* (1998) pp. 141-174. And on the relationship between truth and justice, cf. T. G. Phelps, *Shattered Voices — Language, Violence and the Work of Truth Commissions*, Philadelphia, University of Pennsylvania Press, 2004, pp. 53-54, 61-67, 79-82, 86, 111-117 and 128.

in its relations with the search for justice and the struggle against impunity[2112].

On rare occasions fact-finding has been undertaken also in pursuance of the prevalence of what comes to be perceived as the *right to the juridical or constitutional order*. This is what occurred in the case of the *Institutional Crisis of Nicaragua* (1993-1994). Upon request of the Nicaraguan Government, the then Secretary-General of the OAS (J. C. Baena Soares), in the ambit of a decision of the OAS Permanent Council of 3 September 1993 entitled "Support to the Constitutional Government of Nicaragua", appointed the Commission of Jurists of the OAS for Nicaragua to "establish the reality of the facts"[2113]. The Commission[2114] was set up by the OAS Secretary-General in Managua, on 7 September 1993, when received by the President of the Republic of Nicaragua (Violeta Barrios de Chamorro). In the following months the work of fact-finding, as from a strictly juridical approach, was conducted by the Commission, which was aware that the facts had taken place in a highly politicized and polarized context[2115].

The difficult work undertaken by the Commission of Jurists disclosed a *sui generis* feature, in that questions of an essentially constitutional and domestic order were taken up to the examination and consideration of an *ad hoc* international fact-finding organ at the request of the Government of the State concerned. The sole precedent of the kind, and a rather distant one in time, found by the Commission of Jurists, was the case of the *Compatibility of Certain Decrees-Laws of Danzig with the Constitution of the Free City of Danzig* (1935), in which a request was made to a judicial organ, the old Permanent Court of International Justice (PCIJ) — entirely distinct from the Commission of Jurists of the OAS for Nicaragua, the

2112. For an assessment, cf. A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. II, Porto Alegre, Brazil, S.A. Fabris Ed., 1999, pp. 400-406; N. Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford, Oxford University Press, 1995, pp. 3-381; K. Ambos, *Impunidad y Derecho Penal Internacional*, Medellín, Fund. K. Adenauer *et al.*, 1997, pp. 25-451.

2113. Pertaining to conflicts in the National Assembly of that country (which led virtually to its paralysis) and to the procedure of removal of the *Contralor General* of the Republic.

2114. Integrated by A. A. Cançado Trindade (Brazil), E. Ferrero Costa (Peru) and A. Gómez-Robledo Verduzco (Mexico).

2115. The applicable law was identified as being essentially Nicaraguan domestic law, placing the two questions under examination in the ambit of the imperative of the prevalence of the rule of law *(Estado de Derecho)*.

latter devoid of jurisdictional functions as an essentially fact-finding organ —, to resolve whether certain decrees-laws of Danzig were or not compatible with the Constitution of the Free City of Danzig [2116].

The case of the *Institutional Crisis of Nicaragua* had, thus, no precedent in the American continent. On 4 February 1994 the three members of the aforementioned Commission of Jurists handed its substantial final Report to the OAS Secretary-General at the headquarters of the Organization in Washington DC. The Report, promptly transmitted by the OAS Secretary-General to the Government of Nicaragua, much contributed to put an end to the serious institutional crisis which affected that country, and in particular to the reopening of the work, on a regular and permanent basis, of the Nicaraguan National Assembly.

Only four years later, in 1998, the Commission's Report was published [2117], when it was deemed that the issues dealt with therein had found a solution, as their contents had a bearing on historical facts that would no longer affect the politico-institutional framework of the country concerned. There thus already exist, in our days, elements — although insufficiently known so far — for an in-depth study of the right to the constitutional order (directly linked to the prevalence of democracy and the rule of law), bringing closer together the international and domestic legal orders, as illustrated by the mission of fact-finding undertaken by the Commission of Jurists of the OAS in the case of the *Institutional Crisis of Nicaragua* (1993-1994).

2116. Cf. doc. cit. footnote 2117 *infra*, p. 336. The PCIJ, in an Opinion of 4.12.1935, concluded that such decrees-laws were incompatible with the guarantees of individual rights set forth in the Constitution of Danzig. The PCIJ understood that, once the question was raised to the international level (the guarantee by the League of Nations of the Constitution of Danzig), it was incumbent upon it to pronounce on the matter; cf. PCIJ, *Series A/B*, *No. 65*, 1935, pp. 41-57, especially pp. 50 and 57.

2117. A. A. Cançado Trindade, E. Ferrero Costa and A. Gómez-Robledo Verduzco, "Caso da Crise Institucional da Nicarágua (1993-1994): Informe de la Comisión de Juristas de la Organización de los Estados Americanos (OEA) para Nicarágua", 113/118 *Boletim da Sociedade Brasileira de Direito Internacional* (1998), pp. 335-386. The report was subsequently republished in monograph form: A. A. Cançado Trindade, E. Ferrero Costa and A. Gómez-Robledo Verduzco, "Gobernabilidad Democrática y Consolidación Institucional: El Control Internacional y Constitucional de los *Interna Corporis* — Informe de la Comisión de Juristas de la OEA para Nicarágua (Febrero de 1994)", 67 *Boletín de la Academia de Ciencias Políticas y Sociales*, Caracas, Venezuela (2000-2001), No. 137, pp. 593-669.

V. The Search for ad hoc *Solutions*

International practice has disclosed a variety of means of dispute settlement resorted to by States, ranging from negotiations and consultations to good offices and conciliation, from fact-finding to mediation, and also including arbitration and judicial solution. In the American continent, parallel to the constant and unsuccessful endeavours to secure some degree of effectiveness to the comprehensive codifying treaty on peaceful settlement of disputes in the region (the 1948 Pact of Bogotá), a significant practice of dispute settlement has been developing on an *ad hoc* basis, seeking individual solutions to each *cas d'espèce*.

This practice of peaceful settlement has in some instances produced concrete positive results; and this has taken place in some instances also *outside* the institutional mechanisms of the regional system of peace. Pertinent examples are afforded, for instance, in Central and South America, in the last three decades[2118]. The *conflict between El Salvador and Honduras*, for example, was settled by the mediation of J. L. Bustamante y Rivero, which led to the Treaty of Peace of 1980 between the two countries concerned[2119]. Some cases transcended the ambit of regional arrangements and were taken into the global — United Nations — level, such as the *cause célèbre*, in the Caribbean, of the *Cuban missile crisis* (1962), taken up to the UN Security Council[2120].

The search for *ad hoc* solutions has by no means been limited to the American continent. In the African continent, one may recall the co-existence *(supra)* between the OAU Permanent Commission on Mediation, Conciliation and Arbitration and *ad hoc* Committees subsidiary to the main organs of the former OAU (nowadays African Union), reflecting the old professed purpose of finding African solutions for inter-African disputes[2121]. And, in the Asian continent, an

2118. E.g., the handling of the border problem between Costa Rica and Nicaragua, in 1977-1979, and of the conflict between El Salvador and Honduras in 1980; and, in South America, the handling of the crisis opposing Peru and Ecuador, in the eighties and nineties *(infra)*.

2119. H. Gros Espiell, "La Paz entre El Salvador y Honduras", 30 *Revista Internacional y Diplomática* (1981), No. 361, pp. 28-29.

2120. For an account, cf. A. Chayes, *The Cuban Missile Crisis*, Oxford, University Press, 1974, pp. 1-154.

2121. Cf. J.-M. Bipoun-Woum, *Le droit international africain*, Paris, LGDJ, 1970, pp. 269-273; O. Okongwu, "The OAU Charter and the Principle of Domestic Jurisdiction in Intra-African Affairs", 13 *Indian Journal of Inter-*

example is afforded by the 1997 fisheries agreement between China and Japan, whereby the two countries revised their earlier agreement of 1975 in the light of the entry into force — in respect of them — of the 1982 UN Convention on the Law of the Sea[2122]; reference can also be made to the *Southern Bluefin Tuna* case *(Australia and New Zealand* v. *Japan)* (1993-2000), encompassing both the arbitral procedure under that Convention and negotiations between the contending parties[2123]. Two such experiences of the search for *ad hoc* solutions may be singled out, given their contribution to contemporary techniques of dispute settlement, namely, those of the *process of Contadora*, and of recourse to *guarantor States*.

1. The experience of Contadora

In the eighties, given the intensification of tension in the Central American region, coupled with the incapacity of international organizations — such as the OAS — to resolve the conflict, the Foreign Ministers of Panama, Mexico, Venezuela and Colombia convened a meeting in the Island of Contadora in January 1983, to formulate a proposal of dialogue and negotiation to reduce tension and re-establish peaceful co-existence among Central American States. The document ensuing therefrom was called the Declaration of Contadora (of 9 January 1983), and the articulation of the four countries came to be known as the Group of Contadora.

Following initial efforts of good offices on the part of the Presidents of those four countries, in June 1984 the Foreign Ministers of the Group of Contadora drew a document (the so-called Act of Contadora)[2124] containing the points and recommendations agreed upon. In September of the same year, the Group of Contadora forwarded to the Heads of State of the Central American countries a

national Law (1973), pp. 589-593; M. Bedjaoui, "Le règlement pacifique des différends africains", 18 *AFDI* (1972), p. 92.

2122. The new 1997 agreement significantly sets up a "provisional measures zone", as "a zone of joint management where the two countries partially exercise joint control or enforcement measures, pending the delimitation of their maritime boundaries"; M. Miyoshi, "New Japan-China Fisheries Agreement — An Evaluation from the Point of View of Dispute Settlement", 41 *Japanese Annual of International Law* (1998), p. 30, and cf. pp. 31-43.

2123. Cf., e.g., N. Tanaka, "Some Observations on the *Southern Bluefin Tuna* Arbitration Award", 44 *Japanese Annual of International Law* (2001), pp. 9-34.

2124. Its full title was "Act of Contadora for Peace and Cooperation in Central America".

revised version of the Act of Contadora[2125], stressing the need for re-establishment of peace in the region on the basis of compliance with the principles of International Law and of the *joint* search for a regional solution to the Central American crisis; it moreover described the instruments of verification and inspection foreseen for the execution and follow-up of the engagements agreed upon[2126].

The major difficulties remained the reduction of armaments and demilitarization, the operation of mechanisms of verification and control, and the internal reconciliation. On the other hand, however, the negotiations pursued — together with consultations, *ad hoc* mechanisms of fact-finding, and good offices — and the international support they received, avoided the aggravation of the conflict with unforeseeable consequences not only for the region but for the whole continent. In mid-1985, the Foreign Ministers of Argentina, Brazil, Peru and Uruguay held informal consultations which led to the creation of the so-called Group of Support to Contadora. The two Groups had their first joint meeting in Cartagena, in August 1985. In the following months, with the frequency of meetings of the Chancellors of the Groups of Contadora and of Support, the tendency was formed to the effect of minimizing the distinction between the two Groups and of foreseeing common operational initiatives[2127]. This was the historical root of the establishment, later on, parallel to the OAS, of the so-called Group of Rio, with a much-expanded agenda (no longer centred on the Central American crisis).

Support to the process of Contadora came at last from the Presidents of the five Central American countries themselves (Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica), in the declaration they adopted in their meeting in Esquipulas, Guatemala, on 25 May 1986 (Esquipulas I). It was followed by the Plan Arias, adopted by the five Central American Presidents in San José of Costa Rica on 15 February 1987. On 6-7 August 1987 they met again in Esquipulas, where they at last agreed on and signed the "Procedure for the Establishment of the Firm and Lasting Peace in Central America" (Esquipulas II). The main engagements undertaken were directed towards national reconciliation, cease-fire, democrati-

2125. Accompanied by four Additional Protocols.

2126. For a study, cf. A. A. Cançado Trindade, "Mécanismes de règlement pacifique des différends en Amérique centrale: de Contadora à Esquipulas-II", 33 *AFDI* (1987), pp. 798-822.

2127. For an account, cf. *ibid.*, pp. 798-822.

zation and free elections, cessation of aid to irregular forces and rebels, non-use of territory to attack other States, assistance to refugees and displaced persons, the consolidation of democracy [2128]. Two supervisory organs were promptly set up, namely, the International Commission of Verification and Follow-up and the Executive Committee.

The Procedure worked out in August 1987 managed to save time and occupy political space in the negotiating and fact-finding process, which finally led to the creation of a new atmosphere of peace in the Central American region. The Contadora/Esquipulas II process, as a whole, had the merit and importance of avoiding the escalation of the regional conflict into one of possibly much greater proportions and unforeseeable consequences for the whole continent. This process, as already pointed out, evolved outside the institutional framework of the OAS and the United Nations — but eventually counted on the support of both organizations [2129] (and of virtually the whole international community), which reckoned that they could not effectively replace it. The process — even before Esquipulas I and II — was soon recognized as the only viable way to a negotiated peace in the region. Ultimately, it amounted to a non-institutionalized regional Latin American initiative of settlement of the Central American crisis on the basis of consensus of all parties concerned. Negotiations and fact-finding played a very important role in the settlement. The strong International Law tradition of Latin American countries was another element of relevance in the successive formulas negotiated, which proved conducive to peace in the region.

2. The experience of guarantor States

In South America, the prolonged border problem between Ecuador and Peru, which led to armed confrontation between the two countries in 1981 and 1994-1995, was handled invariably by the *guarantors* designated in the 1942 Protocol of Rio de Janeiro, settled at last in 1998. To the Declaration of Peace of Itamaraty, signed by Peru and Ecuador in Brasilia, on 17 February 1995, in the presence of representatives of the four guarantor States (Argentina, Brazil,

2128. Points 7, 10 and 11 of Esquipulas II were of particular importance to the means of peaceful settlement.

2129. Cf. A. A. Cançado Trindade, *op. cit. supra* footnote 2126, pp. 798-822, esp. p. 810, n. 57.

Chile and the United States), followed the Declaration of Montevideo of 28 February of the same year, signed by the Foreign Ministers of Ecuador and Peru, together with the Foreign Ministers of Argentina, Brazil and Chile, and the Secretary of State of the United States, in which they ratified their will to comply fully with the Declaration of Peace of Itamaraty.

The exercise of mediation undertaken by the guarantor States of the 1942 Protocol of Rio de Janeiro (Argentina, Brazil, Chile and United States) intensified as from 1995[2130]. The Declaration of the Guarantors signed in Brasilia on 16 April 1997 took note of the exchange of the descriptive explanations of the respective "lists of deadlocks" *(listas de impasses)*. The document further recalled that it was the "exclusive responsibility" of the contending parties to carry on the peace conversations, as to the guarantors corresponded the "autonomous capacity" to make recommendations, suggestions, exhortations, declarations and evaluations on the peace process. The operation of this *ad hoc* mechanism contributed decisively to ease the tensions between Ecuador and Peru, in the search for a peaceful settlement of their border problem.

The successful outcome of the exercise culminated in the final Peace Agreement of 26 October 1998 between Peru and Ecuador. This latter, which insisted in the renegotiation of the frontier as established in the 1942 Protocol, by means of the 1995 Declaration of Peace of Itamaraty admitted that the Protocol remained in force in exchange for the Peruvian recognition that the conclusion of the demarcation foreseen in that instrument required the prior settlement of substantive questions. In October 1996, by the Agreement of Santiago, the contending parties agreed to entrust the guarantor States with the initiative of proposed formulas for peaceful settlement. The first one of them, accepted by all, was the formula of "single undertaking", whereby no individual aspect of the dispute was to be resolved independently of an over-all solution of the conflict.

Ecuador and Peru, for the first time since 1942, set up a common agenda of discussion, suspending temporarily their respective claims; assisted by the guarantor States[2131], and "recommendatory

2130. Successive documents were signed in Quito (agreement of 23.2.1996), Buenos Aires (communiqué of 19.6.1996), and Santiago (agreement of 29.10. 1996).

2131. The consultations followed the formula "2 plus 4", that is, the two contending parties together with the four guarantor States.

opinions" on minor issues, they started holding direct bilateral meetings, most often in Brasilia; in difficult moments of the exercise each contending party met with the guarantor States in separate rooms. The colegial and concerted exercise of the contending parties together with the guarantor States enlarged the negotiating "package", so as to add to the frontier issue other aspects pertaining to cooperation and joint development in the region. The strategy succeeded[2132], and the peace process culminated in the ceremony of the signature of the final peace document of 26 October 1998, which put an end to the misunderstandings which had prevailed until 1995. This is a positive contemporary example of a successful mediation stressing the key role of the guarantor States.

VI. Endeavours of Systematization

At the regional level, the systematization of peaceful settlement of international disputes undertaken by the 1948 American Treaty of Peaceful Settlement (Pact of Bogotá) was much awaited[2133], but despite the contribution of this latter at the conceptual level[2134], there remained a practical problem. As the Pact entered into force through the successive ratifications of the States Parties, the effects of previous treaties on peaceful settlement of disputes[2135] ceased for these latter[2136]; but as some States of the region had ratified the Pact

2132. Oral testimonies that I collected in private interviews with protagonists in the peace process from distinct sides.

2133. The mechanism of (multilateral) *reciprocal consultations* (in case of threat to peace in the region) was created earlier, by the 1936 Convention on the Maintenance, Preservation and Re-establishment of Peace, and was institutionalized shortly afterwards by the Declaration of Lima of 1938. This mechanism is the same one which operated continuously in the course of the following decades, and until the eighties, in the consideration of successive crises, such as, e.g., in the *Anglo-Argentinian conflict in the South Atlantic* over the Falklands/Malvinas Islands (1982).

2134. With, e.g., its elaborate definitions of means of settlement; for a study, cf., e.g., J. M. Yepes, "La Conférence panaméricaine de Bogotá et le droit international américain", *Revue générale de droit international public* (1949), pp. 52-74.

2135. For example, the Gondra Treaty (1923, of prevention of disputes between the American States), the two General Conventions of Washington of Inter-American Conciliation and Arbitration (1928-1929), the Anti-Bellic Treaty of Non-Aggression and Conciliation (1933, also known as Treaty Saavedra Lamas), the Convention on Maintenance, Preservation and Re-establishment of Peace (1936, setting up the system of reciprocal consultations), and the Treaties on Prevention of Disputes and on Good Offices and Mediation (both of 1936).

2136. Art. LVIII.

and others had not *(infra)*, this gave rise to a diversity of situations where individual States were bound either by the Pact of Bogotá itself, or by earlier treaties or — as in the case of several Caribbean countries — by none.

The Pact was in fact invoked in a *boundary conflict between Honduras and Nicaragua* in 1957[2137], but this was a rather isolated instance in this respect. Three decades later, in the mid-eighties, there remained 18 member States of the OAS which were *not* Parties to the Pact of Bogotá; half of those were bound by earlier treaties[2138], thus forming a rather diversified — if not confusing — framework of international legal instruments for dispute settlement. This unsatisfactory legal framework has remained unchanged to date. Nowadays, of the 34 member States of the OAS, only 14 have ratified the Pact (8 of which with reservations)[2139]. It was thus not surprising to witness, throughout the years, successive calls for ratification by all OAS member States of the Pact as the "best way" to improve and consolidate the regional system of peace[2140], and also for revision of the Pact[2141].

In the meantime, recourse to distinct methods continued to take place, moreover rendering it difficult to generalize as to their effectiveness. The resolution of the *controversy between Chile and Argentina over the Beagle Channel* (shortly after the 1977 arbitral award, followed by the mediation of the Holy See, as from 1979), by means of the adoption of treaty of peace of 1984 between those two

2137. J. C. Lupinacci, "Los Procedimientos Jurisdiccionales en el Tratado Americano de Soluciones Pacíficas (Pacto de Bogotá)", *Anuario Uruguayo de Derecho Internacional* (1962), pp. 205-206.

2138. Cf. OAS, document OEA/Ser.G/CP/CAJP-541/84, of 30 July 1984, pp. 80-82; and cf. footnote 2135, *supra*.

2139. Except for the Dominican Republic and Haiti, Caribbean countries have not ratified it at all; cf. OAS *Treaty Series*, Nos. 17 and 61 (General Information of the Treaty A-42). To this one could add the lack of accession by *new* OAS member States to the Pact.

2140. Comité Jurídico Interamericano, *Recomendaciones e Informes — Documentos Oficiales 1967-1973*, Vol. X, OAS General Secretariat, 1978, pp. 392-407; Comité Jurídico Interamericano, *Recomendaciones e Informes — Documentos Oficiales 1965-1966*, Vol. IX, Rio de Janeiro, Gráf. IBGE, 1970, p. 321.

2141. Cf., e.g., C. Sepúlveda, "The Reform of the Charter of the Organization of American States", 137 *RCADI* (1972), pp. 107-108, and cf. pp. 99-101 and 131. On the historical experience of the old Inter-American Commission of Peace (formally constituted in 1948), cf. A. Herrarte, "Solución Pacífica de las Controversias en el Sistema Interamericano", *VI Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* (1979), Washington DC, OAS General Secretariat, 1980, p. 231, and cf. pp. 222-223.

countries, for example, paved the way for the settlement of another boundary dispute between Argentina and Chile, over the *Laguna del Desierto*. This latter was submitted to an arbitral tribunal, which rendered its award on 21 October 1994 (followed by another award — on Chile's requests for revision and interpretation — of 13 October 1995)[2142]; the 1994 award is of interest for the consideration of the concept of *res judicata*, and the application of the principle *non ultra petita partium* in the domain of International Law.

The field of peaceful settlement of disputes became in fact the object of special attention of the second reform of the OAS Charter — that of the Protocol of Cartagena de Indias of 1985. Attentive to the prevailing situation in the region, endeavours focused on the search for individual solutions, adequate to each *cas d'espèce*. This implied an acknowledgment of the virtual immobility of the regional Organization to take effective action in this field as from the first reform of its Charter (the 1967 Protocol of Buenos Aires). This prompted the 1985 reform to devise more flexible methods of operation in conflict resolution. Accordingly, the OAS Charter as amended by the 1985 Protocol of Cartagena de Indias was to authorize any party to a dispute — in relation to which none of the procedures foreseen in the Charter was being made use of — to resort to the OAS Permanent Council to obtain its good offices (Art. 84); such direct recourse replaced the previous requirement of prior consent of both, or all, contending parties. Moreover, the former Inter-American Commission on Peaceful Settlement, set up by the 1967 reform of the OAS Charter (*supra*), was replaced by the OAS Permanent Council's new faculty of establishing *ad hoc* Commissions, with the acquiescence of the contending parties (Arts. 85-87).

With the new OAS Charter reforms of 1985[2143], a more practical and flexible mechanism was thus devised, carefully avoiding, at the same time, to "impose solutions" upon either of the parties[2144].

2142. For an account, cf. F. O. Salvioli, "Las Sentencias del Tribunal Arbitral sobre el Diferendo Argentino-Chileno en Relación al Recorrido del Límite entre el Hito 62 y el Monte Fiz Roy", 101/103 *Boletim da Sociedade Brasileira de Direito Internacional* (1996), pp. 187-205.

2143. For an assessment, cf. J. C. Baena Soares, "Aspectos Jurídico-Políticos das Recentes Reformas da Carta da Organização dos Estados Americanos (OEA)", 87/90 *Boletim da Sociedade Brasileira de Direito Internacional* (1993), pp. 59-71; J.-M. Arrighi, "Les réformes à la Charte de l'Organisation des Etats américains: Problèmes des droits de traités", 43 *AFDI* (1997), pp. 1-12.

2144. The new mechanism in a way resembled that of the old Inter-American Commission of Peace *(supra)*.

Furthermore, the OAS Secretary-General became endowed with the new faculty or initiative of bringing to the attention of the OAS General Assembly or Permanent Council any question which in his opinion might affect peace in the continent (Art. 116). While these initiatives of institutional reform of the OAS methods of action were being taken, with the apparent understanding that it would be proper and convenient to leave open to contending parties the largest possibilities or schemes of peaceful settlement, once again, not only inside but also outside the regional Organization new means were pursued to tackle a grave situation which was indeed affecting peace in the continent throughout the eighties: the Central-American crisis (the Contadora experiment, cf. *supra*).

At the global UN level, the Special Committee of the Charter of the United Nations and of the Strengthening of the Role of the Organization, established in December 1975 and composed of 47 member States, soon turned its attention precisely to the chapter of peaceful settlement of international disputes[2145]. In March 1978 the aforementioned Special Committee prepared a list of 51 proposals[2146], and decided, in 1980, to elaborate a draft Declaration on Peaceful Settlement of Disputes[2147]. In 1982, the Special Committee concluded the draft of the Manila Declaration on Peaceful Settlement of International Disputes[2148]. The principles of good faith, of peaceful settlement of disputes, of sovereign equality of States, were reaffirmed therein[2149]. Part II of the draft, with 6 paragraphs, started by calling upon member States to utilize the provi-

2145. United Nations, *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization,* Suppl. No. 33 (A/32/33), 1977, pp. 39 and 42-46. There was support for the strengthening of the functions of the Security Council, the General Assembly and the Secretary-General as to fact-finding, through the more effective use of groups of experts and fact-finding panels — as well as for more effective conciliatory procedures; cf. *ibid.*, pp. 143-145.

2146. Cf. United Nations, *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization,* Suppl. No. 33 (A/33/33), 1978, pp. 3-4 and 63-70. The Special Committee recalled the drafting of the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the UN Charter; cf. *ibid.*, pp. 15 and 21. And cf. Chap. III, *RCADI*, Vol. 316 (2005).

2147. Cf. United Nations, *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization,* Suppl. No. 33 (A/35/33), 1980, pp. 63-108.

2148. Submitted to the appreciation of the UN General Assembly. The draft started with a preamble (with 11 *consideranda*), followed by Part I, with 13 paragraphs.

2149. Cf. *loc. cit. supra*, Suppl. No. 33 (A/37/33), 1982, pp. 9-11.

sions of the UN Charter — particularly those of Chapter VI — on peaceful settlement of disputes.

The document reaffirmed the function of the UN General Assembly of debate and — under Article 12 — recommendation of measures for peaceful settlement of situations which could affect friendly relations among States, and called upon States to utilize consultations in the ambit of the Assembly (and subsidiary organs) aiming at facilitating peaceful settlement (para. 3). It reasserted the main function of the UN Security Council in the area (for example, Art. 33), referring to its investigatory powers (of fact-finding) and to the utilization of subsidiary organs in the exercise of its functions (para. 4)[2150]. The functions of the UN Secretary-General were reaffirmed, in connection with the operation of the Security Council and the General Assembly, in the settlement of international disputes (para. 6).

The Manila Declaration on Peaceful Settlement of International Disputes was adopted by the UN General Assembly resolution 37/10, of 15 November 1982.

VII. Peaceful Settlement and the Renunciation of the Use of Force in International Relations

From the two Hague Peace Conferences (1899 and 1907) to date, successive endeavours have been undertaken with the concrete purpose of securing peaceful settlement and prohibiting the use or threat of force in the conduct of international relations[2151]. Subsequently, the system of collective security was formed (in the United Nations era), determined, to a great extent, by the nuclear deadlock, by the growing economic interdependence among States, and by the general rejection of the unilateral use of force by the States[2152].

In 1980, in the debates on dispute settlement of the UN Special Committee on Enhancing the Effectiveness of the Principle of Non-

2150. It further pointed out the utility of recourse to the ICJ in disputes with a predominantly juridical character and endorsed the practice of insertion into treaties of clauses foreseeing such recourse for the settlement of disputes about their interpretation and application (para. 5).

2151. Cf. J. Zourek, *L'interdiction de l'emploi de la force en droit international*, Leiden, Geneva, Sijthoff, Inst. H.-Dunant, 1974, pp. 39-42.

2152. *Ibid.*, pp. 47-49.

Use of Force in International Relations, there was expression for the concern of non-aligned countries with their security and stability, to be better served by the emphasis on the need of a full implementation of the provisions of Chapter VII of the Charter and the development of the system of peaceful settlement of disputes contained in Chapter VI (rather than by the adoption of a new treaty reiterating the existing obligations)[2153]. For the representatives of Spain as well as India, for example, the principle of the non-use of force in international relations had become a peremptory norm of International Law *(jus cogens)*[2154]. In the debates of 1981, three countries of Eastern Europe — Romania, Bulgaria and Poland — lent support to the thesis that the principle of non-use of force had become an imperative norm of International Law[2155].

In the framework of the interrelationship between peaceful settlement and the renunciation of the use or threat of force in international relations, special attention is to be given to the endeavours of *prevention* of disputes at international level. Fact-finding has often been contemplated to that end. The 1988 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in This Field, for example, called for the "full use of the fact-finding capabilities of the Security Council, the General Assembly and the Secretary-General" in the preservation of international peace and security[2156]. The *Handbook on the Peaceful Settlement of Disputes between States* prepared by the UN Office of Legal Affairs, and published in 1992, contains in fact several examples of initiatives of *prevention*, as well as settlement, of international disputes, undertaken by the UN Security Council, General Assembly and the Secretary-General[2157].

2153. United Nations, *Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations,* Suppl. No. 41 (A/34/41), 1979, pp. 25-26.

2154. In the meaning of Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treates; cf. *ibid.*, pp. 11 and 28-29.

2155. United Nations, *Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations,* Suppl. No. 41 (A/37/41), 1982, pp. 17, 37, 39, 49, 55, 57, 60-61 and 84-85, respectively; that thesis was to appear in the report of the Working Group of the Special Committee; *ibid.,* pp. 54 and 59.

2156. United Nations, *Handbook on the Peaceful Settlement of Disputes between States*, New York, United Nations Office of Legal Affairs, Codification Division, 1992, p. 25.

2157. *Ibid*., pp. 120-121 and 127-129.

VIII. Peaceful Settlement beyond State Voluntarism: Some New Trends

As from the aforementioned United Nations debates of the eighties, an awareness seems to have been formed to the effect of overcoming the vicissitudes of free will in the present domain of International Law. In this respect, on successive occasions the initiative of a *compulsory recourse to conciliation* has been taken. Such proposal found expression in the 1982 UN Convention on the Law of the Sea (Arts. 297 (2) and (3) and 298 (1) *(a)*), just as it likewise did in some of the "codification Conventions" (for example, the 1969 Vienna Convention on the Law of Treaties, the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, the 1975 Vienna Convention on Representation of States in Their Relations with International Organizations of Universal Character, the 1978 Vienna Convention on State Succession in Respect of Treaties, the 1983 Vienna Convention on State Succession in Respect of State Property, Archives and Debts); compulsory recourse to conciliation was also enshrined into the 1985 Vienna Convention on the Protection of the Ozone Layer, the 1992 Framework Convention on Climate Change, the 1992 Convention on Biological Diversity.

In the same line of thinking, the 1997 Ottawa Convention on Anti-Personnel Mines and the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses lent support to the idea of *compulsory recourse to fact-finding*. Although the result of either conciliation or fact-finding is not compulsory, recourse to one or the other becomes so, under those respective Conventions, and it has rightly been suggested that the fact that such recourse is provided for in those multilateral treaties "may have the effect of guiding States to conform to the substantive rules of the Conventions"[2158].

These initiatives further suggest a determination of overcoming sheer State voluntarism, and gradually moving towards the configuration of some degree of compulsory settlement also in relation to the operation of non-jurisdictional methods of dispute settlement —

2158. T. Treves, "Recent Trends in the Settlement of International Disputes", 1 *Cursos Euromediterráneos Bancaja de Derecho Internacional*, Castellón (1997), pp. 415-417.

to the benefit, ultimately, of the international community as a whole. Still at United Nations level, the 1982 Manila Declaration on Peaceful Settlement of International Disputes, the 1988 Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations in This Field, and the 1991 Declaration on Fact-Finding by the United Nations in the Field of the Maintenance of International Peace and Security, disclose an outlook of the matter which could hardly fit into a rigid positivist outlook of strict application of legal rules. They surely go beyond that outlook, in propounding peaceful settlement of international disputes also on the basis of the general principles of International Law.

Another illustration to the effect that the domain of peaceful settlement of international disputes is no longer entirely open to manifestations of State voluntarism lies in the fairly recent establishment of the mechanism of dispute settlement in the ambit of the World Trade Organization (WTO). In this latter one can identify, in fact, the advent of a jurisdictionalized mechanism of settlement of disputes (with double degree of jurisdiction[2159]), of compulsory character, in the ambit of the law on international trade. This mechanism comes to emphasize (although still with some imperfections in practice[2160]) multilateralism in contemporary international relations, with rather satisfactory results to date[2161]. The new multilateral mechanism of settlement of disputes of the WTO represents, by its very existence, a sensible advance in the present domain of International Law. To start with, it establishes an obligation of conduct, in the sense of the observance of pre-established proceedings. The decisions are binding, and bring about legal consequences; the mechanism, in sum, is an integral part of Public International Law[2162], and orients itself by

2159. That is, the panels and the Appellate Body.

2160. Calling for, e.g., the adoption of rules of its own of more universal acceptance (rather than by reference to more circumscribed experiments, such as OECD).

2161. In the operation of the WTO mechanism referred to, the relationship between the environment and international trade, for example, has been considered. Cf. the *Shrimp/Turtle* case (1999), and comments in Ph. Sands, "Turtles and Torturers: The Transformation of International Law", 33 *New York University Journal of International Law and Politics* (2000), p. 534.

2162. J. Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?", 95 *AJIL* (2001), pp. 535-578; D. Palmeter and P. C. Mavroidis, "The WTO Legal System: Sources of Law", 92 *AJIL* (1998), pp. 398-413.

the *due process of law*, what is endowed with significance and relevance.

In fact, the procedure of the mechanism of settlement of disputes of the WTO was conceived as a way of promoting, as far as possible, the foreseeability and the stability in the *contentieux* of international trade; hence its tendency to a preponderantly juridical outlook. The Appellate Body, of the mechanism of peaceful settlement of the WTO, in some of its reports — mainly in the first of them — has emphasized that the WTO mechanism referred to — guided by an essentially "rule-oriented" outlook — effectively integrates International Law, and the cases resolved by it fall into the ambit of the *contentieux* proper of Public International Law[2163]. In a chapter of International Law constantly marked, to a large extent, by inter-State voluntarism, the operation of a compulsory and jurisdictionalized mechanism of peaceful settlement of international disputes is at last achieved in the field of international trade, which fulfils the need of juridical security (also in this domain), oriented by the principles and norms of Law rather than considerations of power — which in turn reverts itself, ultimately, to the benefit of the evolution of International Law itself[2164].

In sum, the old ambivalence between the duty of peaceful settlement and the free choice of means (cf. *supra*) needs to be reassessed in our days. The time seems to have come to tip the balance in favour of the former, which corresponds to a general principle of International Law, and its prevalence over the latter, which is but a faculty open to the contending parties. The international community seems to have attained a level of consciousness to concede that the principle of peaceful settlement ought to condition the free choice of means. Developments in the present chapter of International Law in recent decades, as already indicated, appear to point in this direction. The growing institutionalization of dispute settlement systems[2165], in

2163. J. H. Jackson, *The World Trade Organization — Constitution and Jurisprudence*, London, Royal Institute of International Affairs, 1999 (reprint), pp. 61-62, 89 and 98. The Appellate Body has made it clear, in its practice, that the general principles of international law (also in the matter of interpretation of treaties) are applicable to the agreements of the WTO.

2164. J. Cameron and K. R. Gray, "Principles of International Law in the WTO Dispute Settlement Body", 50 *International and Comparative Law Quarterly* (2001), pp. 248-298.

2165. Such as, *inter alia*, as already seen, the panels and the Appelate Body of the current mechanism of dispute settlement of the World Trade Organization (WTO, *supra*).

particular under some multilateral treaties[2166], is bound to foster a less permissive and more clearly rule of law-oriented approach, emphasizing obligations to co-operate, which at times may appear as being truly *erga omnes partes*[2167]. Such developments are reassuring, as they appear in keeping with the general interests of the international community.

IX. Peaceful Settlement and the General Interests of the International Community

It can hardly be doubted that peaceful settlement of international disputes is in keeping with the general interests of the international community. By and large, at the universal level, States have displayed in most cases a certain preference for less rigid and more flexible methods of conflict resolution, suitable to the circumstances of the *cas d'espèce* — but this has not impeded them to resort, in some cases, to arbitral and judicial solutions. There have lately been attempts of codification and progressive development of the matter at universal UN level[2168], and some progress has indeed been achieved in recent years, as illustrated by the mechanism of dispute settlement of the 1982 UN Convention on the Law of the Sea.

Furthermore, the reaction of some States expressing their preference for compulsory settlement of disputes under the 1985 Vienna Convention for the Protection of the Ozone Layer has disclosed a greater awareness in the international community as to the need of international compulsory jurisdiction[2169].

If international practice yielded in the past to State voluntarism, such posture is in our days under heavy criticism[2170]; distinct

2166. E.g., compulsory recourse to conciliation and to fact-finding *(supra)*.

2167. A. Peters, "International Dispute Settlement: A Network of Cooperational Duties", 14 *European Journal of International Law* (2003), pp. 1-5, 9-11 and 30-34.

2168. Such as, e.g., at global (United Nations) level, the 1982 Manila Declaration on the Peaceful Settlement of International Disputes; the 1988 UN Declaration on the Prevention and Removal of Disputes and Situations Which May Threaten International Peace and Security and on the Role of the United Nations on This Field; and various UN General Assembly resolutions (including resolution 44/21, of 15.11.1989) on the enhancement of international peace in accordance with the UN Charter. Cf. B. Boutros-Ghali, *An Agenda for Peace* (1995), 2nd ed. (with Supplement), New York, United Nations, 1995, p. 52.

2169. Cf. Chap. XXV, *infra*, on the matter.

2170. Cf. Chap. I, *RCADI*, Vol. 316 (2005).

domains of Public International Law have long overcome the voluntarist dogma[2171], and there is reason for hope that dispute-settlement may also evolve to the same effect. There exists nowadays, at least, a growing awareness of some factors which can pave the way for advances in this matter to this end[2172]. First, there is consensus nowadays as to the importance of *prevention* — of taking all possible preventive measures to avoid the outbreak and escalation of conflicts. Secondly, the understanding seems now to prevail whereby settlement of disputes cannot focus only on the symptoms, but ought also to encompass the underlying causes which generate them, and their removal — if a durable solution is to be achieved at all. And thirdly, there is today, furthermore, generalized awareness of the need to find such permanent solutions to conflicts, and of the virtual impossibility to reach them without a sense of fairness and justice. After all, peace and justice go hand in hand; one cannot be achieved without the other.

Thus, although peaceful settlement of international disputes remains a chapter of International Law marked by the ambivalence between the general duty underlying it and — in most cases — the prerogative of free choice of means, it is bound to benefit from recent advances in international adjudication in particular[2173]. After all, this is also a domain of International Law which, despite that ambivalence, for over a century — from the two Hague Peace Conferences of 1899 and 1907 to date — has been constantly revised and revitalized by initiatives aiming to explore the potential of the consolidated methods of dispute settlement[2174]. The advent of the League of Nations, added to the 1928 Briand-Kellogg Pact, in

2171. E.g., the international protection of human rights, the law of international organizations, the international regulation of spaces — particularly as regards the so-called "global commons" —, the international protection of the environment, to name a few.

2172. A. A. Cançado Trindade, "Regional Arrangements and Conflict Resolution in Latin America", in *Conflict Resolution: New Approaches and Methods*, Paris, UNESCO, 2000, pp. 141-162.

2173. Cf. Chap. XXV, *infra*.

2174. In historical perspective, it is reckoned that the two aforementioned Hague Peace Conferences contributed in particular to such methods as mediation and good offices, besides dwelling upon investigation and arbitral procedure; L. Caflisch, *op. cit. supra* footnote 2093, pp. 308-309 and 325. And cf. also, generally, Permanent Court of Arbitration, *The Hague Peace Conferences of 1899 and 1907 and International Arbitration — Reports and Documents* (ed. S. Rosenne), The Hague, T.M.C. Asser Press, 2001, pp. 21-457; R. Redslob, *Traité de droit des gens*, Paris, Rec. Sirey, 1950, pp. 354-359 and 368-377.

turn, contributed to relate peaceful settlement to advances in the substantive law itself[2175]. In the United Nations era, there have been successive initiatives of institutionalization of procedures of peaceful settlement (for example, conciliation), under codification Conventions and other multilateral treaties (cf. *supra*).

Thus, the new approach to the technique of choice of procedures, inaugurated by the 1982 Law of the Sea Convention, was retaken (in a simplified way, with a choice between the ICJ and arbitration) by the 1991 Protocol of Madrid on the Protection of the Antarctic Environment. This is likewise found (in the same simplified formula), although without a compulsory character, in the 1985 Convention on the Protection of the Ozone Layer, in the 1992 Framework Convention on Cimate Change, and in the 1992 Helsinki Conventions on Protection and Utilization of Transfrontier Watercourses and International Lakes, and on Transfrontier Effects of Industrial Accidents; although rendered entirely optional by those treaties, the latitude of choice of procedures open to the contending parties at least seeks to ensure the settlement of disputes thereunder[2176].

Parallel to the multilateral treaties, the UN General Assembly has, on distinct occasions, expressed the need and has lent support to the institutionalization of procedures. It has, for example, contemplated the method of *investigation* operating on a permanent basis (including even a list of fact-finders)[2177]; it has, furthermore, recommended a wider use of a general procedure of *conciliation*[2178], given its usefulness in practice. In one of its well-known resolutions in the present context, incorporating the Manila Declaration on Peaceful Settlement of Disputes (of 15 November 1982), the General Assembly restated the principles of peaceful settlement and good faith, and stressed its own role in the present domain (consultations within the Assembly), apart from that of the Security Council. Approved by consensus, the Manila Declaration drew renewed attention to the present chapter of International Law, and was regarded as being, above all, the

"expression d'une conscience de plus en plus aiguë du besoin

2175. L. Caflisch, *op. cit. supra* footnote 2093, pp. 259-261.
2176. *Ibid.*, pp. 448-449.
2177. GA resolution 2329 (XXII) of 13.12.1967.
2178. GA resolution 50/50, of 11.12.1995.

de la réalisation pratique du principe du règlement pacifique des différends"[2179].

In 1999, in the centennial celebration of the first Hague Peace Conference (1899), attention was again drawn to ideas and proposals on dispute settlement. They included, for example, the following ones: the relevance of *prevention* of international disputes[2180], further use of conciliation, flexible forms of mediation, institutionalization of enquiry and fact-finding, contribution in recent years of Truth and Reconciliation Commissions, enhancement of the advisory function of the ICJ, participation of non-State entities and individuals in ICJ proceedings, rendering regional organizations entitled to request advisory opinions from the ICJ[2181]. The current reconsideration of the matter discloses the renewed importance attributed to it by the international community.

There is, moreover, a variety of forms of dispute settlement, some of them not necessarily involving two or more States. There are distinct kinds of disputes at international level. Considerable progress has been achieved, for example, in the settlement of disputes opposing individual complainants to respondent States, as disclosed by the advances in the domain of the International Law of Human Rights. Much has been achieved also in specialized areas, such as those of environmental as well as commercial dispute settlement, among others. Progress may appear somewhat slow in the settlement of traditional inter-State disputes, but even here a certain awareness seems to have been developing in recent years — otherwise the initiatives already referred to (cf. *supra*), and materialized, some of them, in multilateral treaties, would not have been taken and would not have flourished. Given the factual inequalities of power among juridically equal States, peaceful settlement of international disputes may be perceived as beneficial to States, and, ultimately, to the international community as a whole.

2179. M. Sahovic, "La Déclaration de Manille sur le règlement pacifique des différends internationaux", in *Essays in International Law in Honour of Judge Manfred Lachs* (ed. J. Makarczyk), The Hague, Nijhoff, 1984, p. 458, and cf. pp. 452-453.

2180. As in, e.g., International Environmental Law.

2181. Cf., generally, e.g., F. Orrego Vicuña and C. Pinto, "Peaceful Settlement of Disputes: Prospects for the XXIst Century (Revised Report Prepared for the Centennial of the I International Peace Conference)", in *The Centennial of the I International Peace Conference — Reports and Conclusions* (ed. F. Kalshoven), The Hague, Kluwer, UNITAR, 2000, pp. 268-399.

After all, settlement of disputes on the basis of the rule of law is bound to serve better the interests of contending States than calculations of power with their characteristic unpredictability. When bilateral negotiations appear no longer viable, third-party dispute settlement appears needed as a guarantee against "unilateral interpretation by a State" (usually, the factually more powerful one) of given provisions[2182]. Peaceful settlement by means of the application of the methods known in International Law draws attention to the juridical equality of States and to the role of law in the present domain. States seem at last to have become aware that they cannot at all be expected to endanger international peace and security by placing what they perceive as their own individual interests above the general and superior interests of the international community in the maintenance of peace and realization of justice.

X. Concluding Observations

The fact that the general duty of peaceful settlement of disputes has appeared to date coupled with the free choice of means left to the contending parties does not mean that it is in the nature of this chapter of International Law that it should always and ineluctably be so. Not at all. That general duty ensues from a general principle of International Law, that of peaceful settlement of disputes. The free choice of means is *not* a principle of International Law, but rather a faculty which States — duly or unduly, I see no point in indulging into conjectures here — have reserved for themselves. The 1982 Manila Declaration on Peaceful Settlement of International Disputes, though rightly sharing, with other Declarations of the kind, an approach of the matter on the basis of general principles of International Law (cf. *supra*), in one specific aspect fell into an imprecision: it mistakenly called the free choice of means a "principle", when it is nothing but a faculty granted to the contending parties, and an increasingly residual one.

In that respect, the 1982 Manila Declaration drew on the 1970 Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States[2183], but the Manila

2182. M. M. T. A. Brus, *Third Party Dispute Settlement in an Interdependent World*, Dordrecht, Nijhoff, 1995, p. 183.

2183. Second principle, para. 5. And cf. Chapter III, *RCADI*, Vol. 316 (2005).

Declaration added a qualification, to the effect that peaceful settlement of disputes by the means freely chosen by the contending parties should be undertaken "in conformity with obligations under the Charter of the United Nations and with the principles of justice and International Law"[2184]. It should not pass unnoticed that Article 33 (1) of the UN Charter, in opening up a wide choice of means of peaceful settlement to contending parties (negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional arrangements), lays down, in imperative terms ("shall . . . seek a solution"), the principle of the duty of States to settle peacefully any dispute the continuance of which is likely to endanger the maintenance of international peace and security.

This is the basic principle guiding the whole matter, that of peaceful settlement, set forth in mandatory terms in Article 2 (3) of the UN Charter. The free choice of means is but a prerogative open to contending parties to make sure that that duty is duly complied with. Moreover, it could hardly be doubted that there have been advances in international dispute settlement in recent years, surveyed herein, tipping the balance nowadays in favour of the general principle of peaceful settlement. This is reassuring. As the prolongation and aggravation of certain international disputes can put directly at risk international peace and security, it is to be hoped that this trend will continue, and that States will be increasingly conscious that their common and general interests are much better served by reliance upon the general principle of peaceful settlement than stubborn insistence upon voluntarism, i.e., an entirely free choice of means.

Almost two decades ago, in my lectures of 1987 at this Hague Academy of International Law, I saw it fit to ponder that

> "the terminology itself of human rights treaties provides a clear indication that the *rationale* of their implementation, *directed* to protection of human rights, cannot be equated to that of the classic means of peaceful settlement of inter-State conflicts of interests. . . . The chapter on peaceful settlement of international disputes has constantly been particularly vulnerable to manifestations of State voluntarism. . . .
>
> . . . In contrast, in the fulfilment of their international obli-

2184. Third principle, para. 3, and cf. para. 10; and cf. A. A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms . . .", *op. cit. infra* footnote 2185, pp. 387-388 and n. 1284.

> gations . . . concerning the settlement of 'human rights cases', States cannot be expected to claim or count on the same degree of freedom of action or margin of appreciation. Moreover, the relationship of equilibrium dictated by the principle of sovereign equality of States *(supra)* is no longer present in the settlement of human rights complaints, which is directed to the *protection* of the ostensibly weaker party, the alleged victims." [2185]

The international experience gathered and accumulated in recent years, for example, in the settlement of human rights cases [2186], has contributed to shift the emphasis on to considerations of general interest or *ordre public* in the peaceful settlement of international disputes in general. To this the purpose of *prevention* of disputes is to be added. And here we are faced with the basic legacy of the two Hague Peace Conferences (of 1899 and 1907), which has been characterized as "a landmark in the history of mankind", in recalling, *inter alia*, the passage of the Final Act of the I Conference (of 1899) whereby the substantial restriction of military charges would be "extremely desirable for the increase of the material and moral welfare of mankind" [2187].

In peaceful dispute settlement, in any case, despite recurring invocations of the faculty of free choice of means, the specification, by several multilateral treaties of various kinds, of choices of means of settlement of disputes open to States Parties as to their interpretation and application, notably reduces in practice the traditionally wide — and almost limitless — freedom of choice of means of peaceful settlement that States used to enjoy, or used to believe to be entitled to enjoy. The time seems now come to have a more generalized recourse to binding methods of peaceful settlement, which may operate to the benefit not only of contending parties, in settling their differences, but also, ultimately, of humankind itself, in preserving

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2185. A. A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *RCADI* (1987), pp. 385-389, and cf. p. 390.

2186. In the same line of thinking, K. Vasak has aptly emphasized the primacy, in this last domain, of the "valeurs communes à l'ensemble des Etats parties" to the human rights treaties at issue; K. Vasak, "Le droit international des droits de l'homme", 140 *RCADI* (1974), pp. 383-384.

2187. F. Kalshoven (ed.), *The Centennial of the First International Peace Conference — Reports and Conclusions*, The Hague, Kluwer/UNITAR, 2000, pp. 1 and 54 (interventions by F. Kalshoven and H. Blix, respectively).

international peace and security. The decreasing discretion left to contending States is nowadays noticeable in, besides the International Law of Human Rights, also such other domains of International Law, as the International Law of the Sea (cf. *supra*), among others.

There is greater awareness nowadays that peaceful settlement of international disputes transcends the interests of contending States, and is in keeping with the general interests of the international community as a whole. It does in fact constitute a response to the necessities and requirements of contemporary international relations. Recent initiatives such as those of a compulsory recourse to conciliation as well as to fact-finding, and the growing emphasis on prevention of disputes, are illustrative of the aforementioned greater awareness. Here the recourse to such methods is what becomes binding, even though the solution or outcome is not compulsory. But this trend likewise illustrates the growing awareness of the relevance of peaceful settlement, to the ultimate benefit not only of the contending parties themselves but of the international community as a whole. In a vulnerable world such as ours, the fate of one appears linked to that of the others.

In fact, the international community itself is increasingly conscious that, if international disputes remain unsettled and are likely to spread, they may affect other States and, as pointed out by V. Pechota, impair "common shared values"[2188]; the UN Charter itself refers to disputes or situations likely to affect friendly relations among States and to endanger international peace and security (Arts. 33 and 14), and, throughout the last decades, the concept of "international concern" has come to apply to a growing variety of situations. Thus, even a chapter of International Law so much marked in the past by State voluntarism as the present one may be approached in the light of common and superior interests, so as to promote the values shared by the international community. Third-party settlement functions may thus be regarded as endowed with a new feature, in so far as their exercise contributes not only to settle disputes but also to restore the equilibrium of values of the international community[2189].

2188. V. Pechota, "Complementary Structures of Third-Party Settlement of International Disputes", in *Dispute Settlement through the United Nations* (ed. K. Venkata Raman), Dobbs Ferry, NY, Oceana, 1977, p. 174, and cf. 217.

2189. Cf. *ibid*., pp. 175-176 and 178-180.

The relationship between the principles of peaceful settlement of disputes and of the duty of international co-operation in the present domain of International Law has already been pointed out (cf. *supra*). Other principles of International Law come likewise into play, such as that of the prohibition of the use or threat of force. Moreover, in acting in good faith (in pursuance of another basic principle), States will not only be complying with International Law, but also serving their own interests in implementing it, as, ultimately, International Law is the guardian of their own rights; in not acting in good faith, they would — as pertinently warned by M. Lachs — be risking much more than what they would have to gain[2190].

Bearing recent developments on the matter in mind, the conditions seem to be met for international legal doctrine to move definitively away from voluntarism and ample permissiveness (as to choice of methods) and to place greater weight upon the sense of responsibility and obligation (of peaceful setttlement of disputes), in conformity with a general principle of International Law, and in fulfilment of the general interests of the international community as a whole. Those recent developments indicate that an appropriate study of the matter at issue, if it is to reflect faithfully its present stage of evolution, should no longer take as a starting point — as the legal doctrine of the past did — the free choice of means; it should rather start from the duty of peaceful settlement emanating from a general principle of International Law, bearing in mind that the outbreak and persistence of international disputes cause damage to international relations, and their aggravation puts at risk international peace and security. Hence the pressing need to have them peacefully settled, in pursuance also of the principle of the prohibition of the threat or use of force in International Law[2191].

Furthermore, the spectre of nuclear deadlock, and the current threat of the arsenals of weapons of mass destruction, and of the

2190. M. Lachs, "Some Thoughts of the Role of Good Faith in International Law", in *Declarations on Principles, A Quest for Universal Peace — Liber Amicorum Discipulorumque B. V. A. Roling,* Leyden, Sijthoff, 1977, p. 54; and cf. E. Zoller, *La bonne foi en droit international public*, Paris, Pedone, 1977, pp. 3-354.

2191. The principles of international co-operation and good faith have also a role to play herein, disclosing the function of law in dispute-settlement; P. J. I. M. de Waart, *The Element of Negotiation in the Pacific Settlement of Disputes between States*, The Hague, Nijhoff, 1973, pp. 27-28 and 202, and cf. p. 5.

arms trade, as well as the outbreak of violent (internal) conflicts in different latitudes in recent years, mark their alarming presence in current concerns with the need to secure greater effectiveness for methods of peaceful settlement of international disputes. In the present era of blatant vulnerability of humankind, the prevalence of an international legal order giving expression to values shared by the international community as a whole appears as, more than voluntary, truly necessary[2192]. Peaceful settlement of disputes, in particular those which may endanger international peace and security, operates thus to the ultimate benefit of humankind as a whole. This outlook of the matter ought to illuminate the present chapter of the new *jus gentium*, of the International Law for humankind, at this beginning of the twenty-first century. With the preceding considerations in mind, and in the same line of reasoning, the way appears now paved for the examination of what I regard as the necessity of compulsory jurisdiction for the improvement of international adjudication in particular.

2192. Cf. *The Collected Papers of J. Westlake on Public International Law* (ed. L. Oppenheim), Cambridge, Cambridge University Press, 1914, p. 79; M. Bourquin, "L'humanisation du droit des gens", *La technique et les principes du droit public — Etudes en l'honneur de Georges Scelle,* Vol. I, Paris, LGDJ, 1950, p. 35; M. Bos, "Dominant Interests in International Law", 21 *Revista Española de Derecho Internacional* (1968), p. 234.

CHAPTER XXV

INTERNATIONAL RULE OF LAW: THE NEED AND QUEST FOR INTERNATIONAL COMPULSORY JURISDICTION

I. International Rule of Law beyond Peaceful Settlement of Disputes

Most of the classic works on international adjudication date from a time when one counted only on, besides the Permanent Court of Arbitration and international arbitral tribunals, the Hague Court — the Permanent Court of International Justice (PCIJ) followed by its successor, the International Court of Justice (ICJ). In recent years international adjudication has experienced a considerable expansion, with the emergence of new international tribunals. This phenomenon appears to acknowledge that judicial settlement of international disputes comes to be seen as retaining a superiority, at least at the conceptual level, in relation to political means of settlement, to the extent that the solution reached is based on the rule of law, and no State is to regard itself as standing above the law.

International jurisdiction seems nowadays to go beyond the framework of methods of peaceful settlement of international disputes. Its expansion in contemporary International Law responds and corresponds to a need of the international community of our times. The international rule of law finds expression no longer only at the national, but also at the international, level. At this latter, the idea of a *préeminence* of International Law has gained ground in recent years, as acknowledged, for example, by the Advisory Opinion of the ICJ on the *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947* (1988); this *idée-force* has fostered the search for the realization of justice under the rule of law at the international level, and has stressed the universal dimension of a new *jus gentium* in our days [2193].

The growth of international adjudicative organs transcends peaceful settlement of disputes, pointing to the gradual formation of a

2193. J.-Y. Morin, "L'état de droit: émergence d'un principe du droit international", 254 *RCADI* (1995), pp. 199, 451 and 462.

judicial branch of the international legal system[2194]. There is great need for a sustained law-abiding system of international relations[2195] (a true international rule of law); nowadays "any progress in International Law passes through progress in international adjudication"[2196]. Judicial settlement bears testimony of the superiority of law over will or pressure or force. The applicable legal norms pre-exist the dispute itself. Some advances have been achieved in recent years in the domain of international compulsory jurisdiction, although there appears to remain still a long way to go. A current reassessment of international adjudication can thus be appropriately undertaken, in my view, in historical perspective and in the context of the growth of international jurisdiction, bearing in mind the recurring need and quest for compulsory jurisdiction, in pursuance of the realization of international justice.

II. International Rule of Law: The Saga of the Optional Clause of Compulsory Jurisdiction

1. From the professed ideal to a distorted practice

In this respect, one may initially recall the legislative history of the provision of the optional clause of compulsory jurisdiction, as found in Article 36 (2) of the Statute of the ICJ, which is essentially the same as the corresponding provision of the Statute of its predecessor, the old PCIJ. The aforementioned Article 36 (2) establishes that

> "The States Parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

2194. J. Allain, "The Future of International Dispute Resolution — The Continued Evolution of International Adjudication", in *Looking Ahead: International Law in the 21st Century/Tournés vers l'avenir: Le droit international au 21e siècle* (Proceedings of the 29th Annual Conference of the Canadian Council of International Law, Ottawa, October 2000), The Hague, Kluwer, 2002, pp. 65, 67, 69 and 71, and cf. pp. 61 and 64.

2195. Bin Cheng, "Whither International Law?", in *Contemporary Issues in International Law* (eds. D. Freestone, S. Subedi and S. Davidson), The Hague, Kluwer, 2002, pp. 56 and 35.

2196. J. Allain, *A Century of International Adjudication: The Rule of Law and Its Limits*, The Hague, T.M.C. Asser Press, 2000, p. 186, and cf. p. 185.

(a) the interpretation of a treaty;
(b) any question of International Law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation."

Article 36 (3) adds that "the declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time"[2197].

The origin of the aforementioned provision is found in the *travaux préparatoires* of the original Statute of the PCIJ. This latter was drafted in 1920 by an Advisory Committee of Jurists (of 10 members)[2198], appointed by the Council of the League of Nations, and which met at The Hague, in June-July 1920. On that occasion there were those who favoured the pure and simple recognition of the compulsory jurisdiction of the future PCIJ, to which the more powerful States were opposed, objecting that one had gradually to come to trust the international tribunal to be created before conferring upon it compulsory jurisdiction *tout court*. In order to overcome the deadlock within the Committee of Jurists referred to, one of its members, the Brazilian jurist Raul Fernandes, proposed the ingenious formula which was to become Article 36 (2) of the Statute — the same as the one of the present Statute of the ICJ — which came to be known as the "optional clause of the compulsory jurisdiction"[2199]. The Statute, approved on 13 December 1920, entered into force on 1 September 1921[2200].

At that time, the decision that was taken constituted the initial

2197. And Article 36 (6) determines that "in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court".

2198. Namely: Mr. Adatci (Japan), Altamira (Spain), Fernandes (Brazil), Baron Descamps (Belgium), Hagerup (Norway), De La Pradelle (France), Loder (The Netherlands), Lord Phillimore (Great Britain), Ricci Busatti (Italy) and Elihu Root (United States).

2199. Cf. R. P. Anand, *Compulsory Jurisdiction of the International Court of Justice*, New Delhi, Bombay, Asia Publ. House, 1961, pp. 19 and 34-36.

2200. For an account, cf., *inter alia*, J. C. Witenberg, *L'organisation judiciaire, la procédure et la sentence internationales — Traité pratique*, Paris, Pedone, 1937, pp. 22-23; L. Gross, "Compulsory Jurisdiction under the Optional Clause: History and Practice", *The International Court of Justice at a Crossroads* (ed. L. F. Damrosch), Dobbs Ferry NY, ASIL, Transnational Publs., 1987, pp. 20-21.

step that, during the period of 1921-1940, contributed to attract the acceptance of the compulsory jurisdiction — under the optional clause — of the PCIJ by a total of 45 States [2201]. The formula of Raul Fernandes [2202], firmly supported by the Latin American States [2203], was incorporated into the Statute of the PCIJ; it served its purpose in the folowing two decades. Even before the creation and operation of the PCIJ in the period already referred to, the pioneering example of the Central American Court of Justice, created in 1907, should not pass unnoticed. That Court, endowed with a wide jurisdiction, and to which individuals had direct access (enabled to complain even against their own States), operated on a continuous basis during one decade (1908-1918). It heralded the advances of the rule of law at international level, and, during its existence, it was regarded as giving expression to the "Central American conscience" [2204].

At the San Francisco Conference of 1945, the possibility was contemplated to take a step forward, with an eventual automatic acceptance of the compulsory jurisdiction of the new ICJ; nevertheless, the great powers — in particular the United States and the Soviet Union — were opposed to this evolution, sustaining the retention, in the Statute of the new ICJ, of the same "optional clause of compulsory jurisdiction" of the Statute of 1920 of the predecessor PCIJ. The rapporteur of the Commission of Jurists (entrusted with the study of the matter at the San Francisco Conference of 1945), the French

2201. Cf. the account of a Judge of the old PCIJ, M. O. Hudson, *International Tribunals — Past and Future*, Washington, Carnegie Endowment for International Peace, Brookings Institution, 1944, pp. 76-78. That total of 45 States represented, in reality, a high proportion, at that epoch, considering that, at the end of the thirties, 52 States were members of the League of Nations (of which the old PCIJ was not part, distinctly from the ICJ, which is the main judicial organ of the United Nations, and whose Statute forms an organic whole with the UN Charter itself).

2202. 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 (as from the mutual consent among the States) 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. I, Rio de Janeiro, M. R. E., 1967, pp. 174-175.

2203. J.-M. Yepes, "La contribution de l'Amérique latine au développement du droit international public et privé", 32 *RCADI* (1930), p. 712; F.-J. Urrutia, "La codification du droit international en Amérique", 22 *RCADI* (1928), pp. 148-149; and cf., more recently, S. A. Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice*, Dordrecht, Nijhoff, 1995, pp. 7-8.

2204. C. J. Gutiérrez, *La Corte de Justicia Centroamericana*, San José, Costa Rica, Ed. Juricentro, 1978, pp. 31, 42, 106, 150-154 and 157-158.

jurist Jules Basdevant, pointed out that, although the majority of the members of the Commission favoured the automatic acceptance of the compulsory jurisdiction, there was no political will at the Conference (and nor in the Dumbarton Oaks proposals) to take this step forward [2205].

Consequently, the same formulation of 1920, which corresponded to a conception of International Law of the beginning of the twentieth century, was maintained in the present Statute of the ICJ. Due to the intransigent position of the more powerful States, a unique oportunity was lost to overcome the lack of automatism of the international jurisdiction and to foster a greater development of the compulsory jurisdiction of the international tribunal. It may be singled out that all this took place at the level of purely inter-State relations. The formula of the optional clause of compulsory jurisdiction (of the ICJ) which exists today is nothing more than a scheme of the twenties, stratified in time [2206], and which, rigorously speaking, no longer corresponds to the needs of the international *contentieux* not even of a purely inter-State dimension [2207].

Such is the case that, by mid-2005, for example, of the totality of member States of the United Nations, no more than 69 States were subject to the compulsory jurisdiction of the ICJ by acceptance of the optional clause of Article 36 (2) of its Statute [2208] — that is, roughly a third of the international community of our days. And several of the States which have utilized it have made a distorted use of it, denaturalizing it, in introducing restrictions which militate against its rationale and deprive it of all efficacy. In reality, almost two-thirds of the declarations of acceptance of the aforementioned

2205. Cf. the account of R. P. Anand, *op. cit. supra* footnote 2199, pp. 38-46; and cf. also, on the issue, S. Rosenne, *The Law and Practice of the International Court*, Vol. I, Leyden, Sijthoff, 1965, pp. 32-36; Ian Brownlie, *Principles of Public International Law*, 6th ed., Oxford, University Press, 2003, pp. 677-678; O. J. Lissitzyn, *The International Court of Justice*, New York, Carnegie Endowment for International Peace, 1951, pp. 61-64.

2206. For expressions of pessimism as to the practice of States under that optional clause, at the end of the seventies, cf. J. G. Merrills, "The Optional Clause Today", 50 *British Year Book of International Law (BYBIL)* (1979), pp. 90-91, 108, 113 and 116.

2207. Regretting (as former President of the ICJ) that this outdated position has insulated the Hague Court from the great *corpus* of contemporary International Law, cf. R. Y. Jennings, "The International Court of Justice after Fifty Years", 89 *American Journal of International Law* (1995), p. 504.

2208. For the most recently published texts of the declarations of acceptance, cf. ICJ, *Yearbook 2002-2003*, Vol. 57, The Hague, ICJ, 2003, pp. 127-172 (by then, 64 States had deposited their declarations of acceptance).

clause have been accompanied by limitations and restrictions which have rendered them "practically meaningless" [2209].

One may, thus, seriously question whether the optional clause keeps on serving the same purpose which inspired it at the epoch of the PCIJ [2210]. The rate of its acceptance in the era of the ICJ is proportionally inferior to that of the epoch of its predecessor, the PCIJ. Furthermore, throughout the years, the possibility opened by the optional clause of acceptance of the jurisdiction of the international tribunal became, in fact, the object of excesses on the part of some States, which only accepted the compulsory jurisdiction of the ICJ in their own terms, with all kinds of limitations [2211]. Thus, it is not at all surprising that, already by the mid-fifties, one began to speak openly of a *decline* of the optional clause [2212].

Those excesses occurred precisely because, in elaborating the Statute of the new ICJ, one failed to follow the evolution of the international community. One abandoned the very basis of the compulsory jurisdiction of the ICJ to a voluntarist conception of International Law, which prevailed at the beginning of the last century, but was subsequently dismissed by its harmful consequences to the conduction of international relations — such as vehemently warned by the more authoritative contemporary international juridical doctrine. There can be no doubt whatsoever that the distorted and incongruous practice, developed under Article 36 (2) of

2209. G. Weissberg, "The Role of the International Court of Justice in the United Nations System: The First Quarter Century", *The Future of the International Court of Justice* (ed. L. Gross), Vol. I, Dobbs Ferry, NY, Oceana Publs., 1976, p. 163; and, on the feeeling of frustration that this generated, cf. *ibid*., pp. 186-190. Cf. also *Report on the Connally Amendment — Views of Law School Deans, Law School Professors, International Law Professors* (compiled under the auspices of the Committee for Effective Use of the International Court by Repealing the Self-Judging Reservation), New York, [1961], pp. 1-154.

2210. Cf. statistic data in G. Weissberg, *op. cit. supra* footnote 2209, pp. 160-161; however, one ought to recall the *clauses compromissoires* pertaining to the contentious jurisdiction of the ICJ, which, in the mid-seventies, appeared in about 180 treaties and conventions (more than two-thirds of which of a bilateral character, and concerning more than 50 States, *ibid*., p. 164).

2211. Some of them gave the impression that they thus accepted that aforementioned optional clause in order to sue other States before the ICJ, trying, however, to avoid themselves to be sued by other States; J. Soubeyrol, "Validité dans le temps de la déclaration d'acceptation de la juridiction obligatoire", 5 *Annuaire français de droit international* (1959), pp. 232-257, esp. p. 233.

2212. C. H. M. Waldock, "Decline of the Optional Clause", 32 *BYBIL* (1955-1956), pp. 244-287. And, on the origins of this decline, cf. the Dissenting Opinion of Judge Guerrero in the *Norwegian Loans* case (Judgment of 6.7. 1857), *ICJ Reports 1957*, pp. 69-70.

the Statute of the ICJ, definitively does not serve as an example or model to be followed by the States Parties to treaties of protection of the rights of the human being (such as the European and American Conventions on Human Rights), in relation to the extent of the jurisdictional basis of the work of the European and Inter-American Courts of Human Rights.

2. International compulsory jurisdiction: reflections lex lata

Contemporary International Law has gradually evolved, putting limits to the manifestations of a State voluntarism which revealed itself as belonging to another era[2213]. Much progress has here been achieved due to the impact of the International Law of Human Rights upon Public International Law. The methodology of interpretation of human rights treaties[2214], to start with, has been developed as from the rules of interpretation set forth in International Law (such as those formulated in Articles 31-33 of the two Vienna Conventions on the Law of Treaties, of 1969 and 1986), comprising not only the substantive norms (on the protected rights) but also the clauses that regulate the mechanisms of international protection.

The optional clauses of recognition of the contentious jurisdiction of both the European Court of Human Rights (ECtHR) (prior to Protocol No. 11 to the European Convention)[2215] and the Inter-American Court of Human Rights (IACtHR) found inspiration in the model of the optional clause of compulsory jurisdiction of the ICJ — a formula originally conceived more than 80 years ago (cf. *supra*).

2213. When this outlook still prevailed to some extent, in a classic book published in 1934, Georges Scelle, questioning it, pointed out that the self-attribution of discretionary competence to the rulers, and the exercise of functions according to the criteria of the power-holders themselves, were characteristics of a not much evolved, imperfect, and still almost anarchical international society; G. Scelle, *Précis de droit des gens — Principes et systématique*, Part II, Paris, Rec. Sirey, 1934 (re-ed. 1984), pp. 547-548. And cf., earlier on, to the same effect, L. Duguit, *L'Etat, le droit objectif et la loi positive*, Vol. I, Paris, A. Fontemoing Ed., 1901, pp. 122-131 and 614.

2214. As can be inferred from the vast international case-law in this respect, analysed in detail in A. A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Santiago, Mexico, Buenos Aires, Barcelona, Editorial Jurídica de Chile, 2001, pp. 15-58.

2215. Protocol No. 11 to the European Convention on Human Rights entered into force on 1.11.1998. On the original optional clause (Art. 46) of the European Convention, cf. Council of Europe/Conseil de l'Europe, *Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights/Recueil des travaux préparatoires de la Convention européenne des droits de l'homme*, Vol. IV, The Hague, Nijhoff, 1977, pp. 200-201 and 266-267; and Vol. V, The Hague, Nijhoff, 1979, pp. 58-59.

Despite the common origin, in search of the realization of the ideal of international justice, the rationale of the application of the optional clause has been interpreted in a fundamentally distinct way, on the one hand in inter-State litigation and on the other hand in that of human rights. In the former, considerations of contractual equilibrium between the Parties, of reciprocity, of procedural balance in the light of the juridical equality of the sovereign States have prevailed to date; in the latter, there has been a primacy of considerations of *ordre public*, of the collective guarantee exercised by all the States Parties, of the accomplishment of a common goal, superior to the individual interests of each Contracting Party (cf. *infra*).

The two aforementioned international human rights Tribunals have found themselves under the duty to preserve the integrity of the regional conventional system of protection of human rights as a whole. In their common understanding, it would be inadmissible to subordinate the operation of the respective conventional mechanisms of protection to restrictions not expressly authorized by the European and American Conventions, interposed by the States Parties in their instruments of acceptance of the optional clauses of compulsory jurisdiction of the two Courts (Article 62 of the American Convention, and Article 46 of the European Convention before Protocol No. 11). This would not only immediately affect the efficacy of the operation of the conventional mechanism of protection at issue, but, furthermore, it would fatally impede its possibilities of future development.

By virtue of the principle *ut res magis valeat quam pereat*, which corresponds to the so-called *effet utile* (sometimes called the principle of effectiveness), widely supported by case-law, States Parties to human rights treaties ought to secure to the conventional provisions the proper effects at the level of their respective domestic legal orders. Such principle applies not only in relation to substantive norms of human rights treaties (that is, those which provide for the protected rights), but also in relation to procedural norms, in particular those relating to the right of individual petition and to the acceptance of the contentious jurisdiction of the international judicial organs of protection[2216]. Such conventional norms, essential

2216. Cf., to this effect, the decision of the old European Commission of Human Rights (EComHR) in the case *Chrysostomos et al.* v. *Turkey* (1991), in EComHR, *Decisions and Reports*, Vol. 68, Strasbourg, CE, [1991], pp. 216-253; and cf., earlier on, the *obiter dicta* of the Commission, to the same effect, in its

to the efficacy of the system of international protection, ought to be interpreted and applied in such a way as to render their safeguards truly practical and effective, bearing in mind the special character of the human rights treaties and their collective implementation.

The ECtHR had the occasion to pronounce in this respect. Thus, in its Judgment on Preliminary Objections (of 23 March 1995) in the case of *Loizidou* v. *Turkey*, it warned that, in the light of the letter and the spirit of the European Convention the possibility cannot be inferred of restrictions to the optional clause relating to the recognition of the contentious jurisdiction of the ECtHR[2217], by analogy with the permissive State practice under Article 36 of the Statute of the ICJ; under the European Convention, a practice of the States Parties was formed precisely *a contrario sensu*, accepting such clause without restrictions[2218]. In the domain of the international protection of human rights, there are no "implicit" limitations to the exercise of the protected rights; and the limitations set forth in the treaties of protection ought to be restrictively interpreted. The optional clause of compulsory jurisdiction of the international tribunals of human rights makes no exception to that: it does not admit limitations other than those expressly contained in the human rights treaties at issue, and, given its capital importance, it could not be at the mercy of limitations not foreseen therein and invoked by the States Parties for reasons or vicissitudes of domestic order[2219].

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decisions in the *Belgian Linguistic Cases* (1966-1967) and in the cases *Kjeldsen, Busk Madsen and Pedersen* v. *Denmark* (1976).

2217. Article 46 of the European Convention, prior to the entry into force, on 1.11.1998, of Protocol No. 11 to the European Convention.

2218. Moreover, it referred to the fundamentally distinct context in which international tribunals operate, the ICJ being "a free-standing international tribunal which has no links to a standard-setting treaty such as the Convention"; cf. European Court of Human Rights (ECtHR), *Case of Loizidou* v. *Turkey* (Preliminary Objections), Strasbourg, CE, Judgment of 23.3.1995, p. 25, para. 82, and cf. p. 22, para. 68. On the prevalence of the conventional obligations of the States Parties, cf. also the Court's *obiter dicta* in its previous decision, in the *Belilos* v. *Switzerland* case (1988). The Hague Court, in its turn, in its Judgment of 4.12.1998 in the *Fisheries Jurisdiction (Spain* v. *Canada)* case, yielded to the voluntarist subjectivism of the contending States (cf. *ICJ Reports 1998*, pp. 438-468), the antithesis of the very notion of international compulsory jurisdiction — provoking Dissenting Opinions of five of its Judges, to whom the ICJ put at risk the future itself of the mechanism of the optional clause under Article 36 (2) of its Statute, paving the way to an eventual desertion from it (cf. *ibid*., pp. 496-515, 516-552, 553-569, 570-581 and 582-738, respectively). And cf. Chap. XII, *RCADI*, Vol. 316.

2219. Cf. IACtHR, case of *Castillo Petruzzi and Others* v. *Peru* (Preliminary Objections), Judgment of 4.9.1998, Series C, No. 41, Concurring Opinion of Judge A. A. Cançado Trindade, paras. 36 and 38.

In their classic studies on the basis of the international jurisdiction, C. W. Jenks and C. H. M. Waldock warned, already in the decades of the fifties and the sixties, as to the grave problem presented by the insertion, by the States, of all kinds of limitations and restrictions in their instruments of acceptance of the optional clause of compulsory jurisdiction (of the ICJ)[2220]. Although those limitations had never been foreseen in the formulation of the optional clause, States, in the face of such legal vacuum, have felt, nevertheless, "free" to insert them. Such excesses have undermined, in a contradictory way, the basis itself of the system of international compulsory jurisdiction. As well pointed out in a classic study on the matter, the instruments of acceptance of the contentious jurisdiction of an international tribunal should be undertaken "on terms which ensure a reasonable measure of stability in the acceptance of the jurisdiction of the Court"[2221] — that is, in the terms expressly provided for in the international treaty itself (cf. *infra*).

The clause pertaining to the compulsory jurisdiction of international human rights tribunals constitutes, in my view, a fundamental clause *(cláusula pétrea)* of the international protection of the human being, which does not admit any restrictions other than those expressly provided for in the human rights treaties at issue. This has been so established by the IACtHR in its Judgments on Competence in the cases of the *Constitutional Tribunal* and *Ivcher Bronstein* v. *Peru* (1999):

> "Recognition of the Court's compulsory jurisdiction is a fundamental clause *(cláusula pétrea)* to which there can be no limitations except those expressly provided for in Article 62 (1) of the American Convention. Because the clause is so fundamental to the operation of the Convention's system of protection, it

2220. Examples of such excesses have been the objections of domestic jurisdiction *(domestic jurisdiction/compétence nationale exclusive)* of States, the foreseeing of withdrawal at any moment of the acceptance of the optional clause, the foreseeing of subsequent modification of the terms of acceptance of the clause, and the foreseeing of insertion of new reservations in the future; cf. C. W. Jenks, *The Prospects of International Adjudication*, London, Stevens, 1964, p. 108, and cf. pp. 113, 118 and 760-761; C. H. M. Waldock, "Decline of the Optional Clause", *op. cit. supra* footnote 2212, p. 270; and for criticisms of those excesses, cf. A. A. Cançado Trindade, "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations", 25 *International and Comparative Law Quarterly* (1976), pp. 744-751.

2221. C. W. Jenks, *op. cit. supra* footnote 2220, pp. 760-761.

> cannot be at the mercy of limitations not already stipulated but invoked by States Parties for reasons of domestic order." [2222]

The permissiveness of the insertion of limitations, not foreseen in the human rights treaties, in an instrument of acceptance of an optional clause of compulsory jurisdiction [2223], represents a regrettable historical distortion of the original conception of such clause, in my view unacceptable in the field of the international protection of the rights of the human person.

It is the duty of an international tribunal of human rights to look after the due application of the human rights treaty at issue in the framework of the domestic law of each State Party, so as to secure the effective protection in the ambit of this latter of the human rights set forth in such treaty [2224]. Any understanding to the contrary would deprive the international human rights tribunal at issue of the exercise of the function and of the duty of protection inherent to its jurisdiction, failing to ensure that the human rights treaty has the appropiate effects *(effet utile)* in the domestic law of each State Party.

The case of *Hilaire* v. *Trinidad and Tobago* (Preliminary Objections, Judgment of 1 September 2001) before the IACtHR led one to a more detailed examination of that specific point. Article 62 (1) and (2) of the American Convention on Human Rights provides that

> "A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, *ipso facto*, and not requiring special agreement, the jurisdiction of the Court on all

2222. IACtHR, case of the *Constitutional Tribunal* (Competence), Judgment of 24.9.1999, Series C, No. 55, p. 44, para. 35; CtIADH, case of *Ivcher Bronstein* (Competence), Judgment of 24.9.1999, Series C, No. 54, p. 39, para. 36.

2223. Exemplified by State practice under Article 36 (2) of the ICJ Statute *(supra)*.

2224. If it were not so, there would be no juridical security in international litigation, with harmful consequences above all in the domain of the international protection of human rights. The intended analogy between the classic inter-State *contentieux* and the international *contentieux* of human rights — fundamentally distinct domains — is manifestly inadequate, as in this latter the considerations of a superior order (international *ordre public*) have primacy over State voluntarism. The States cannot count on the same latitude of discretionality which they have reserved to themselves in the traditional context of the purely inter-State litigation.

> matters relating to the interpretation or application of this Convention.
>
> Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member States of the Organization and to the Secretary of the Court." [2225]

In fact, the modalities of acceptance, by a State Party to the Convention, of the contentious jurisdiction of the IACtHR, are expressly stipulated in the aforementioned provisions. The formulation of the optional clause of compulsory jurisdiction of the IACtHR, in Article 62 of the American Convention, is not simply illustrative, but clearly *precise*. No State is obliged to accept an optional clause, as its own name indicates [2226]. But if a State Party decides to accept it, it ought to do so in the terms expressly stipulated in such clause. According to Article 62 (2) of the Convention, the acceptance, by a State Party, of the contentious jurisdiction of the IACtRH, can be made in four modalities, namely: *(a)* unconditionally; *(b)* on the condition of reciprocity; *(c)* for a specified period; and *(d)* for specific cases. Those, and only those, are the modalities of acceptance of the contentious jurisdiction of the IACtHR foreseen and authorized by Article 62 (2) of the Convention, which does not authorize the States Parties to interpose any other conditions or restrictions *(numerus clausus).*

In my Concurring Opinion in the aforementioned *Hilaire versus Trinidad and Tobago* case, I saw it fit to ponder that,

> ". . . In this matter, it cannot be sustained that what is not prohibited, is permitted. This posture would amount to the traditional — and surpassed — attitude of the *laisser-faire, laisser-passer*, proper to an international legal order frag-

2225. Paragraph 3 of Article 62 of the Convention adds that:

> "The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."

2226. Thus, a "reservation" to the optional clause of compulsory jurisdiction of the IACtHR of Article 62 of the American Convention would amount simply to the non-acceptance of that clause, which is foreseen in the Convention.

> mented by the voluntarist State subjectivism, which in the history of Law has ineluctably favoured the more powerful ones. *Ubi societas, ibi jus* . . . At this beginning of the XXIst century, in an international legal order wherein one seeks to affirm superior common values, among considerations of international *ordre public*, as in the domain of the International Law of Human Rights, it is precisely the opposite logic which ought to apply: *what is not permitted, is prohibited.*
>
> If we are really prepared to extract the lessons of the evolution of International Law in a turbulent world throughout the XXth century, . . . we cannot abide by an international practice which has been subservient to State voluntarism, which has betrayed the spirit and purpose of the optional clause of compulsory jurisdiction — to the point of entirely denaturalizing it — and which has led to the perpetuation of a world fragmented into State units which regard themselves as final arbiters of the extent of the contracted international obligations, at the same time that they do not seem truly to believe in what they have accepted: the international justice." (Paras. 24-25.)

In its Judgment in the case of *Hilaire* v. *Trinidad and Tobago*, the IACtHR rightly observed that, if restrictions interposed in the instrument of acceptance of its contentious jurisdiction were accepted, in the terms proposed by the respondent State in the *cas d'espèce*, not expressly foreseen in Article 62 of the American Convention, this would lead to a situation in which it would have "as first parameter of reference the Constitution of the State and only subsidiarily the American Convention", a situation which would "bring about a fragmentation of the international legal order of protection of human rights and would render illusory the object and purpose of the American Convention" (para. 93). And the Court correctly added that

> ". . . The instrument of acceptance, on the part of Trinidad and Tobago, of the contentious jurisdiction of the Tribunal, does not fit into the hypotheses foreseen in Article 62 (2) of the Convention. It has a general scope, which ends up by subordinating the application of the American Convention to the domestic law of Trinidad and Tobago in a total way and pursuant to what its national tribunals decide. All this implies that this instrument of acceptance is manifestly incompatible with the object and purpose of the Convention." (Para. 88.)

This conclusion of the IACtHR found clear support in the precise, and quite clear, formulation of Article 62 (2) of the American Convention. Bearing in mind the three component elements of the general rule of interpretation *bona fides* of treaties — text in the current meaning, context, and object and purpose of the treaty — set forth in Article 31 (1) of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986), it could be initially inferred that the text, in the current meaning *(numerus clausus)*, of Article 62 (2) of the American Convention, fully corroborated the decision taken by the IACtHR in that Judgment.

In the theory and practice of International Law one has sought to distinguish a "reservation" from an "interpretative declaration"[2227], in conformity with the legal effects which are intended to be attributed to one and the other[2228]. In any case, in considering the meaning and scope of a declaration of acceptance of an optional clause of compulsory jurisdiction — such as the one presented by Trinidad and Tobago under Article 62 of the American Convention and interposed as preliminary objection in the present case *Hilaire* —, one has to bear in mind the *nature* of the treaty in which that clause appears. This corresponds to the "context", precisely the second component element of the general rule of interpretation of

2227. Cf. United Nations, International Law Commission, "Draft Guidelines on Reservations to Treaties", in United Nations, *Report of the International Law Commission on the Work of Its 51st Session* (May/July 1999), *Official Records of the General Assembly Suppl. No. 10* (A/54/10/Corr.1-2), 1999, pp. 18-24, item 1.3; and in *Report of the International Law Commission on the Work of Its 52nd Session* (May/June and July/August 2000), *Official Records of the General Assembly Suppl. No. 10* (A/55/10), 2000, pp. 229-272, item 1.7.

2228. For an examination of the question, cf., e.g., F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague, Uppsala, T.M.C. Asser Instituut, Swedish Institute of International Law, 1988, pp. 98-110 and 229-337, and cf. pp. 184-222; D. M. McRae, "The Legal Effect of Interpretative Declarations", 49 *BYBIL* (1978), pp. 155-173. Thus, if one intends to clarify the meaning and scope of a given conventional provision, it is an interpretative declaration, while if one intends to modify a given conventional provision or to exclude its application, it is a reservation. In practice, it has not always been easy to draw the dividing line between one and the other, as illustrated by the controversy which has surrounded, in the last decades, the question of the legal effects of declarations inserted into the instruments of acceptance of the optional clause of compulsory jurisdiction, given the *sui generis* character of such clause. It may be recalled that in the well-known case of *Belilos* v. *Switzerland* (1988), the ECtHR considered that a declaration interposed by Switzerland amounted to a reservation — of a general character — to the European Convention on Human Rights, incompatible with the object and purpose of this latter. ECtHR, *Belilos* v. *Switzerland* case, Judgment of 29.4.1988, Series A, No. 132, pp. 20-28, paras. 38-60.

treaties set forth in Article 31 of the two Vienna Conventions on the Law of Treaties. In the *Hilaire* v. *Trinidad and Tobago* case *(supra)*, the IACtHR had duly done so, in stressing the special character of the human rights treaties (paras. 94-97).

Likewise, the IACtHR has kept constantly in mind the third component element of that general rule of interpretation, namely, the "object and purpose" of the treaty at issue, the American Convention on Human Rights (paras. 82-83 and 88). Thus, the understanding advanced in the *cas d'espèce* by the respondent State of the scope of its own acceptance of the optional clause of compulsory jurisdiction of the IACtHR, did not resist the proper interpretation of Article 62 of the American Convention, developed in the light of the canons of interpretation of the law of treaties. As I saw it fit to point out, in this respect, in my Separate Opinion in the case *Blake* v. *Guatemala* (Reparations, 1999) before the Inter-American Court,

> ". . . In contracting conventional obligations of protection, it is not reasonable, on the part of the State, to assume a discretion so unduly broad and conditioning of the extent itself of such obligations, which would militate against the integrity of the treaty.
>
> . . . In so far as human rights treaties are concerned, one is to bear always in mind the objective character of the obligations enshrined therein, the autonomous meaning (in relation to the domestic law of the States) of the terms of such treaties, the collective guarantee underlying them, the wide scope of the obligations of protection and the restrictive interpretation of permissible restrictions. These elements converge in sustaining the integrity of human rights treaties, in seeking the fulfillment of their object and purpose, and, accordingly, in establishing limits to State voluntarism."[2229]

3. International compulsory jurisdiction: reflections de lege ferenda

A further line of reflections, *de lege ferenda*, on international compulsory jurisdiction, is here called for. The "judicial decisions", referred to in the enumeration of the formal sources and evidences of

2229. IACtHR, case *Blake* v. *Guatemala* (Reparations), Judgment of 22.1.1999, Series C, No. 48, Separate Opinion of Judge A. A. Cançado Trindade, pp. 114-115, paras. 32-33.

International Law, set forth in Article 38 (1) *(d)* of the Statute of the ICJ[2230], certainly are *not* limited to the case-law of the ICJ itself[2231]. They likewise comprise, nowadays, the judicial decisions of the international tribunals (Inter-American and European Courts) of human rights, of the *ad hoc* International Criminal Tribunals (for former Yugoslavia[2232] and for Rwanda[2233]), of the International Tribunal for the Law of the Sea, of other international[2234] and arbitral tribunals[2235], as well as of national tribunals in matters of International Law[2236]. This development may confer an increasingly greater importance to case-law as a formal "source" of International Law[2237], as one considers the further creation (in 2002) — parallel to the international tribunals aforementioned — of the new mixed or "internationalized" criminal courts[2238] (for Sierra Leone, Kosovo, East Timor, and Cambodia, each one with its own distinctive

2230. As "subsidiary means for the determination of rules of law".

2231. As this latter itself has acknowledged, e.g., in its Judgment of 18.11. 1960 in the case of the *Arbitral Award of the King of Spain of 1906 (Honduras* v. *Nicaragua)*, *ICJ Reports 1960*, pp. 204-217.

2232. Cf. K. Lescure, *Le Tribunal pénal international pour l'ex-Yougoslavie*, Paris, Montchrestien, 1994, pp. 15-133; R. Kerr, *The International Criminal Tribunal for the Former Yugoslavia*, Oxford, OUP, 2004, pp. 1-219; A. Cassese, "The International Criminal Tribunal for the Former Yugoslavia and Human Rights", 2 *European Human Rights Law Review* (1997), pp. 329-352.

2233. Cf., e.g., L. J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Leiden, Nijhoff, 2005, pp. 1-284; R. S. Lee, "The Rwanda Tribunal", 9 *Leiden Journal of International Law* (1996), pp. 37-61; [Various Authors,] "The Rwanda Tribunal: Its Role in the African Context", 37 *International Review of the Red Cross* (1997), No. 321, pp. 665-715 (studies by F. Harhoff, C. Aptel, D. Wembou, C. M. Peter, G. Erasmus and N. Fourie).

2234. Reference may be made to other contemporary international tribunals, such as the Tribunal of the Andean Union, based in Quito (with a vast case-law); the Central American Court of Justice, based in Managua; and, more recently, the Permanent Tribunal of Revision of Mercosur (set up in Asunción on 13.8.2004). For a general study, cf., e.g., K. N. Metcalf and I. Papageorgiou, *Regional Integration and Courts of Justice*, Antwerp, Oxford, Intersentia, 2005, pp. 1-118.

2235. E.g., the Iran-United States Claims Tribunal, which, by mid-2005, has issued 314 awards, 30 partial awards, 238 awards on agreed terms, and 18 partial awards on agreed terms. For a general study, cf., e.g., W. Mapp, *The Iran-United States Claims Tribunal — The First Ten Years, 1981-1991*, Manchester, University Press, 1993, pp. 3-350.

2236. R. A. Falk, *The Role of Domestic Courts in the International Legal Order*, Syracuse University Press, 1964, pp. 21-52 and 170; J. A. Barberis, "Les arrêts des tribunaux nationaux et la formation du droit international coutumier", 46 *Revue de droit international de sciences diplomatiques et politiques* (1968), pp. 247-253; F. Morgenstern, "Judicial Practice and the Supremacy of International Law", 27 *BYBIL* (1950), p. 90.

2237. Cf. Chap. V, *RCADI*, Vol. 316 (2005).

2238. With both national and international judges.

features)[2239]. This expansion of international jurisdiction has been contributing, in my understanding, to enlarge the aptitude of International Law to encompass legal relations in distinct domains of human activity[2240].

The IACtHR, by means of the Judgments on Preliminary Objections in the cases of *Hilaire*, *Benjamin*, and *Constantine*, as well as its earlier Judgments on Competence in the cases of the *Constitutional Tribunal* and *Ivcher Bronstein*, safeguarded the integrity of the American Convention on Human Rights, remained master of its own jurisdiction and acted in accordance with the high responsibilities accorded to it by the American Convention. The same can be said of the ECtHR, by means of its Judgment on Preliminary Objections in the case *Loizidou* v. *Turkey*, in so far as the European Convention on Human Rights is concerned. Thus, the two existing international Tribunals of human rights to date, in their converging case-law on the question, have refused to yield to undue manifestations of State voluntarism, have fully performed the functions attributed to them by the human rights treaties which created them, and have given a worthy contribution to the strengthening of the international jurisdiction and to the realization of the old ideal of international justice[2241].

In the last 80 years, the advances in this particular domain could have been much greater if State practice would not have betrayed the purpose which 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 by means of the development in the realization of justice at international level. The time has come to overcome definitively the regrettable lack of automatism of the international jurisdiction. With the distortions of

2239. For a general study, cf., *Internationalized Criminal Courts — Sierra Leone, East Timor, Kosovo, and Cambodia* (eds. C. P. R. Romano, A. Nollkaemper and J. K. Kleffner), Oxford, University Press, 2004, pp. 3-444. And cf. also, e.g., S. Linton, "Cambodia, East Timor and Sierra Leone: Experiments in International Justice", 12 *Criminal Law Forum* (2001), pp. 185-246; R. Rossano, "La Corte Speciale per la Sierra Leone", 12 *I Diritti dell'Uomo* (2001), pp. 83-87; S. de Bertodano, "Current Developments in Internationalized Courts", 1 *Journal of International Criminal Justice* (2003), pp. 226-244.

2240. Cf. IACtHR, case *Blake* v. *Guatemala* (Reparations), Judgment of 22.1.1999, Series C, No. 48, Separate Opinion of Judge A. A. Cançado Trindade, pp. 110 and 112, paras. 23 and 27-28.

2241. A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. III, Porto Alegre, Brazil, S.A. Fabris Ed., 2003, Châps. XV-XVI, pp. 60-83 and 147-168.

their practice on the matter, States face today a dilemma which should have been overcome a long time ago : either they return to the voluntarist conception of International Law, abandoning for good the hope in the primacy of Law over political interests [2242], or else they retake and achieve with determination the ideal of construction of an international community with greater cohesion and institutionalization in the light of Law and in search of Justice, moving resolutely from *jus dispositivum* to *jus cogens* [2243].

As I concluded in my Concurring Opinion in the *Hilaire* v. *Trinidad and Tobago* case before the IACtHR,

> "The time has come to consider, in particular, in a future Protocol of amendments to the procedural part of the American Convention on Human Rights, aiming at strengthening its mechanism of protection, the possibility of an amendment to Article 62 of the American Convention, in order to render such clause also *mandatory*, in conformity with its character of fundamental clause *(cláusula pétrea)*, thus establishing the *automatism* [2244] of the jurisdiction of the Inter-American Court of Human Rights [2245]. There is pressing need for the old ideal of

2242. Cf. a warning of Ch. De Visscher, *Aspects récents du droit procédural de la Cour internationale de Justice*, Paris, Pedone, 1966, p. 204 ; and cf. also L. Delbez, *Les principes généraux du contentieux international*, Paris, LGDJ, 1962, pp. 68, 74 and 76-77. For subsequent criticisms by two former Presidents of the ICJ of the unsatisfactory and bad use made by the States of the mechanism of the optional clause (of the compulsory jurisdiction of the ICJ) of the Statute of the Court, cf. R. Y. Jennings, *op. cit. supra* footnote 2207, p. 495 ; and E. Jiménez de Aréchaga, "International Law in the Past Third of a Century", 159 *RCADI* (1978), pp. 154-155, And cf. further criticisms by H. W. Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice", 93 *RCADI* (1958), p. 273. And cf., in general, J. Sicault, "Du caractère obligatoire des engagements unilatéraux en droit international public", 83 *Revue générale de droit international public* (1979), pp. 633-688. Such distorted State practice cannot, definitively, serve as model to the operation of the judicial organs created by human rights treaties.

2243. And always bearing in mind that the protection of fundamental rights places us precisely in the domain of *jus cogens* ; cf., e.g., my intervention in the debates of 12.3.1986 of the Vienna Conference on the Law of Treaties between States and International Organizations or between International Organizations : United Nations, *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 1986) — Official Records*, Vol. I, New York, United Nations, 1995, pp. 187-188 (intervention by A. A. Cançado Trindade).

2244. Which became a reality, as to the European Court of Human Rights, as from the entry into force, on 1.11.1998, of Protocol No. 11 to the European Convention of Human Rights (cf. *infra*).

2245. With the necessary amendment — by means of a Protocol — to this effect, of Article 62 of the American Convention, putting an end to the restric-

> the permanent international compulsory jurisdiction to become reality also in the American continent, in the present domain of protection, with the necessary adjustments in order to face its reality of human rights and to fulfil the growing needs of effective protection of the human being." (Para. 39.)

III. The Recurring Need and Quest for Compulsory Jurisdiction

Despite the undeniable advances experienced by the idea of compulsory jurisdiction in the domain of the International Law of Human Rights *(supra),* the picture appears somewhat distinct in the sphere of purely inter-State relations: it is hard to escape the assessment that, herein, compulsory jurisdiction has made a rather modest progress in recent decades. As pointed out by C. W. Jenks over forty years ago, the foundation of compulsory jurisdiction is, ultimately, the confidence in the rule of law at international level[2246]. While full confidence is still lacking, not much progress is bound to be achieved in the present domain.

In this respect, for example, the Institut de Droit International, already in its Neuchâtel session of 1959, adopted unanimously a resolution in support of the compulsory jurisdiction of international courts and tribunals. Noting with concern that the evolution of international jurisdiction was already lagging behind the needs of international justice, the resolution pondered that

> "submission to law through acceptance of recourse to international courts and arbitral tribunals is an essential complement to the renunciation of recourse to force in international relations"[2247].

In order to overcome the unsatisfactory situation, the resolution *inter alia* called for the development of the practice of insertion into general conventions of a clause, binding on all States Parties, of submission of disputes, relating to the interpretation or appli-

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tions therein foreseen and expressly discarding the possibility of any other restrictions, and also putting and end to reciprocity and the optional character of the acceptance of the contentious jurisdiction of the Court, which would become compulsory to all the States Parties.

2246. C. W. Jenks, *The Prospects* . . ., *op. cit. supra* footnote 2220, pp. 101, 117, 757, 762 and 770.

2247. *Annuaire de l'Institut de droit international* (1959), cit. in C. W. Jenks, *op. cit. supra* footnote 2220, pp. 113-114.

cation of the respective conventions, to international courts and tribunals [2248].

The plea for compulsory jurisdiction has been duly expressed in expert writing along the last eight decades. In a monograph published as early as 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 the evolution, at international level, from optional justice to compulsory justice [2249]. Subsequently, despite the alleged "decline" of the optional clause of the ICJ Statute (cf. *supra*), one decade after the adoption by the Institut de Droit International (in 1959) of the aforementioned resolution, C. W. Jenks wrote that

> "The problem of compulsory jurisdiction . . . remains one of the central problems of world organization. . . . A larger measure of compulsory jurisdiction remains a fundamental element in the progress of the rule of law among nations. . . . The progress of compulsory jurisdiction presupposes a parallel progress of the substantive law in adjusting itself to the changing needs of a changing society." [2250]

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 [2251]. 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

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2248. *Annuaire de l'Institut de droit international* (1959), cit. in *ibid*., p. 115.

2249. Cf. N. Politis, *La justice internationale*, Paris, Libr. Hachette, 1924, pp. 7-255, esp. pp. 193-194 and 249-250.

2250. C. W. Jenks, *The World beyond the Charter*, London, G. Allen and Unwin, 1969, p. 166.

2251. H. Steiger, "Plaidoyer pour une juridiction internationale obligatoire", in *Theory of International Law at the Threshold of the 21st Century — Essays in Honour of K. Skubiszewski* (ed. J. Makarczyk), The Hague, Kluwer, 1996, pp. 818, 821-822 and 832. And cf. R. St. J. MacDonald, "The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice", 8 *Canadian Yearbook of International Law* (1970), pp. 21, 33 and 37. In support of the need for "a system of general compulsory and binding dispute settlement procedures", cf. further M. M. T. A. Brus, *Third Party Dispute Settlement in an Interdependent World*, Dordrecht, Nijhoff, 1995, p. 182.

Rights, after the entry into force of Protocol No. 11, affords another conspicuous example of automatic compulsory jurisdiction. The International Criminal Court is the most recent example in this regard; although other means were contemplated throughout the *travaux préparatoires* of the 1998 Rome Statute (such as cumbersome "opting in" and "opting out" procedures), at the end compulsory jurisdiction prevailed, with no need for further expression of consent on the part of States Parties to the Rome Statute[2252]. 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 coercive elements; the specified choice of procedures at least secures law-abiding settlement of disputes under the UN Law of the Sea Convention[2253].

These illustrations suffice to disclose that compulsory jurisdiction is already a reality — at least in some circumscribed domains of International Law, as indicated above. International compulsory jurisdiction is, by all means, a juridical possibility. If it has not yet been attained on a world-wide level, 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. In addition to the advances already achieved to this effect, reference could also be made to endeavours in the same sense. One such example is found in the Proposals for a Draft Protocol to the American Convention on Human Rights, which I prepared as rapporteur of the IACtHR, which *inter alia* advocates an amendment to Article 62 of

2252. H. Corell, "Evaluating the ICC Regime: The Likely Impact on States and International Law", The Hague, T. M. C. Asser Institute, 2000, p. 8 (internal circulation).

2253. L. Caflisch, "Cent ans de règlement pacifique des différends interétatiques", 288 *RCADI* (2001) pp. 365-366 and 448-449; J. Allain, "The Continued Evolution . . .", *op. cit. supra* footnote 2194, pp. 61-62; S. Karagiannis, "La multiplication des juridictions internationales . . .", *op. cit. infra* footnote 2260, p. 34; M. Kamto, "Les interactions des jurisprudences internationales . . .", *op. cit. infra* footnote 2261, p. 424.

the American Convention so as to render the jurisdiction of the IACtHR in contentious matters automatically compulsory upon ratification of the Convention [2254].

Furthermore, several international treaties [2255] foresee a compulsory resort to the jurisdiction of the ICJ. To the extent that they do so, States Parties would be under the Court's jurisdiction to settle disputes pertaining to those treaties, paving the way for a broader acceptance of compulsory jurisdiction on a world-wide basis. In this connection, in the years immediately following the end of the cold-war period, for example, the then Soviet Union (succeeded by the Russian Federation), and some other Eastern European States, withdrew declarations they had previously made to exclude compulsory settlement of disputes in several Conventions they had celebrated during the cold-war period [2256]. In fact, the optional clause (of the ICJ Statute) is not the only basis of compulsory jurisdiction of the ICJ; another basis consists precisely of jurisdictional or compromissory clauses [2257] inserted into treaties conferring jurisdiction on international tribunals to settle disputes concerning their interpretation and application.

Although not so often invoked as they possibly could be, a more systematic inclusion in treaties of such jurisdictional or arbitration clauses would contribute to widen the scope of compulsory jurisdiction [2258]. Such expansion is bound to occur to the extent that States realize that it is ultimately in their own interest, and in the common or general interest, to have their disputes normally settled by judicial means. This latter is the most perfected way of peaceful settlement, for all that it affords: pre-existing rules, rigour and juridical security. Beyond such settlement, compulsory jurisdiction is an expression of the rule of law at the international level, conducive to a more

2254. A. A. Cançado Trindade, *Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección*, Vol. II, 2nd ed., San José, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 1-64.

2255. E.g., *inter alia*, the 1957 European Convention on Peaceful Settlement of Disputes, Art. 1.

2256. T. Treves, "Recent Trends in the Settlement of International Disputes", 1 *Bancaja Euromediterranean Courses of International Law* (1997), pp. 404-405.

2257. Cf., on such compromissory clauses, e.g., H. M. Cory, *Compulsory Arbitration of International Disputes*, New York, Columbia University Press, 1932 (reprint 1972), Chap. VI, pp. 160-191.

2258. C. W. Jenks, *The Prospects . . .*, *op. cit. supra* footnote 2220, p. 761, and cf. pp. 109 and 111.

cohesive international legal order inspired and guided by the imperative of justice.

IV. International Rule of Law: The Growth of International Jurisdiction

It is well known that the international community counts nowadays on a multiplicity of international tribunals (for example, besides the ICJ, the International Tribunal for the Law of the Sea, the permanent International Criminal Court, the international tribunals — Inter-American and European Courts — of human rights, the *ad hoc* International Criminal Tribunals — for former Yugoslavia and for Rwanda —, the Court of Justice of the European Communities, among others [2259]). This is symptomatic of the way contemporary International Law has evolved, and of an increasing recourse to international adjudication. Throughout the last years the old ideal of international justice has been revitalized and has gained ground, with the considerable expansion of the international judicial function, reflected in the creation of new international tribunals; the work of these latter has been enriching contemporary international case-law, contributing, as already indicated, to assert and develop the aptitude of International Law to regulate adequately juridical relations in distinct domains of human activity (cf. *supra*).

Disputes submitted to international adjudication in our days are no longer vested with strict inter-State dimension; hence the creation and co-existence of multiple specialized international tribunals of our times, reflecting a decentralized international legal order [2260].

2259. Such as the internationalized criminal courts (cf., e.g., C. P. R. Romano *et al.* (eds.), *Internationalized Criminal Courts — Sierra Leone, East Timor, Kosovo, and Cambodia*, Oxford, University Press, 2004, pp. 3-444), and subregional integration courts, such as the Central American Court of Justice (cf., e.g., A. León Gómez, *Doctrina de la Corte Centroamericana de Justicia*, Managua, UCA, 2002, pp. 1-501; R. Chamorro Mora, *La Corte de Justicia de la Comunidad Centroamericana*, Managua, IAG, 2000, pp. 3-203), the Andean Court of Justice (cf., e.g., F. Novak Talavera and L. G.-C. Moyano, *Derecho Internacional Público*, Vol. III, Lima, PUC/Peru, 2005, pp. 189-194; G. Larenas Serrano, *El Tribunal de Justicia Andino*, Quito, Ed. Casa de la Cultura Ecuatoriana, 1980, pp. 13-162), and the newly established (on 13.8.2004) of the Permanent Tribunal of Revision of the Mercosur (in Asunción).

2260. S. Karagiannis, "La multiplication des juridictions internationales: un système anarchique?", in Société française pour le droit international, *La juridictionnalisation du droit international* (colloque de Lille), Paris, Pedone, 2003, pp. 61 and 156; E. Jouannet, "La notion de jurisprudence internationale en question", in *ibid.*, p. 365; M. Bedjaoui, "La multiplication des tribunaux internationaux ou la bonne fortune du droit des gens", in *ibid.*, pp. 530 and 539.

Still more significantly, in expanding international jurisdiction, contemporary multiple international tribunals have enlarged the access to international justice of the subjects of International Law (other than States)[2261]. They have done what the ICJ alone has not been capable of doing (by force of the constraints of its Statute). They are responding to a pressing need of the contemporary international community[2262]. The human person has at last been granted access to justice, no longer only at the national level, but likewise at the international level.

Specialized international tribunals, such as the European and Inter-American Courts of Human Rights, and the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda, have asserted universalist principles, and the primacy of humanitarianism over traditional techniques of inter-State litigation[2263]. Their work, lately fostering comparative studies[2264], has thus proved to be complementary to that of the ICJ, and they have contributed to erect contemporary international adjudication into a new universalist dimension, beyond peaceful settlement of international disputes on a strictly inter-State basis. They have thereby enriched contemporary Public International Law.

The multiplication of international tribunals is, thus, a reassuring phenomenon, in providing additional forums for the access to, and realization of, justice at the international level. Attention should be

2261. H. Ascensio, "La notion de juridiction internationale en question", in *La juridictionnalisation du droit international* (colloque de Lille), Paris, Pedone, 2003, p. 198; M. Kamto, "Les interactions des jurisprudences internationales et des jurisprudences nationales", in *ibid*., pp. 414 and 459; J.-P. Cot, "Le monde de la justice internationale", in *ibid*., pp. 517 and 521; M. Bedjaoui, "La multiplication des tribunaux internationaux ou la bonne fortune du droit des gens", in *ibid*., pp. 541-544.

2262. Moreover, studies of the case-law of the specialized international tribunals take regularly into account the contribution of the case-law of other international tribunals. Cf., e.g., *inter alia*, L. J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Leiden, Nijhoff, 2005, pp. 1-284; A. A. Cançado Trindade and M. E. Ventura Robles, *El Futuro de la Corte Interamericana de Derechos Humanos*, 3rd ed., San José, Costa Rica, IACtHR, UNHCR, 2005, pp. 7-629.

2263. M. Koskenniemi and P. Leino, "Fragmentation of International Law? Postmodern Anxieties", 15 *Leiden Journal of International Law* (2002), pp. 576-578.

2264. Cf., e.g., G.-J. A. Knoops, *An Introduction to the Law of International Criminal Tribunals — A Comparative Study*, Ardsley, New York, Transnational Publs., 2003, pp. 1-199; J. R. W. D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 2nd. ed., Ardsley NY, Transnational Publs., 2000, pp. 3-643.

focused on this healthy substantial development which is a reflection of the expansion of the application of International Law in general and of judicial settlement in particular[2265], instead of attempting — as some International Lawyers have tried to do — to create a "problem" with the traditional concern with delimitation of competences. The issues arising from the co-existence of international tribunals can be properly addressed by means of dialogue among international judges, not by self-assertions of alleged supremacy[2266].

Contemporary international tribunals, working in a co-operative and complementary way, have the common mission of realization of justice at the international level. Far more important than the classic question of the delimitation of competences is the advance they have accomplished in the ideal of realization of international justice: they have already considerably enlarged the circles of justiciable persons, and this is a very significant contemporary phenomenon indeed. In this spirit, some international specialized tribunals are entrusted with the task of deciding on highly specific or technical matters, giving moreover their contribution to the evolution of an expanded International Law[2267].

The co-existing international human rights Tribunals to date, the ECtHR and the IACtHR, have, for example, succeeded in setting forth approximations and convergences in their respective case-law, despite the distinct factual realities of the two continents in which

2265. Cf. J. I. Charney, "Is International Law Threatened by Multiple International Tribunals?", 271 *RCADI* (1998), pp. 116, 121, 125, 135, 347, 351 and 373.

2266. There is currently no basis in any international instrument for asserting the supremacy of the ICJ, or any other international tribunal, over the other international courts; nowhere is such "supremacy" set forth in any text whatsoever. L. Caflisch, "Cent ans de règlement pacifique . . .", *op. cit. supra* footnote 2253, p. 431. And cf., to the same effect, H. Caminos, "The Creation of Specialised Courts: The Case of the International Tribunal for the Law of the Sea", in *Liber Amicorum Judge S. Oda* (eds. N. Ando, E. McWhinney and R. Wolfrum), Vol. I, The Hague, Kluwer, 2002, pp. 569-574; C.-A. Fleischhauer, "The Relationship between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg", 1 *Max Planck Yearbook of United Nations Law* (1997), pp. 327-333. Article 95 of the UN Charter foresees the creation of new international tribunals without in any way suggesting any such "supremacy".

2267. There has been an expansion of the international judicial function itself, beyond the purely inter-State level, encompassing the settlement of disputes involving also non-State entities. K. Oellers-Frahm, "Multiplication of International Courts and Tribunals and Conflicting Jurisdiction — Problems and Possible Solutions", 5 *Max Planck Yearbook of United Nations Law* (2001), p. 69; J. Collier and V. Lowe, *The Settlement of Disputes in International Law — Institutions and Procedures*, Oxford, OUP, 2000, p. 14.

they operate [2268]. The work of the ECtHR and the IACtHR has indeed contributed to the creation of an international *ordre public* based upon the respect for human rights in all circumstances. Moreover, the dynamic or evolutive interpretation of the respective human rights Conventions (the intertemporal dimension) has been followed by both the ECtHR [2269] and the IACtHR [2270]. This outlook grows in importance for having come at a time when the establishment of a new international human rights Tribunal (an African Court on Human and Peoples' Rights) under the 1998 Protocol to the African Charter on Human and Peoples' Rights appears forthcoming.

Despite the challenges that the two human rights Tribunals in operation nowadays face, particularly with the increasing overload of cases (the ECtHR to a far greater extent than the IACtHR), individuals have been raised as subjects of the International Law of Human Rights, endowed with full procedural capacity, and have recovered their faith in human justice when it appeared to fade away at domestic law level [2271]. This significant procedural development, with the automatism of the international jurisdiction of the ECtHR and recent developments to this effect as regards the IACtHR, strongly suggests, as far as the two international human rights Tribunals are concerned, that the old ideal of the *realization of international justice* is finally seeing the light of the day. This is the point

2268. This converging case-law has generated their common understanding that human rights treaties are endowed with a special nature (as distinguished from multilateral treaties of the traditional type); that human rights treaties have a normative character, of *ordre public*; that their terms are to be autonomously interpreted; that in their application one ought to ensure an effective protection *(effet utile)* of the guaranteed rights; that the obligations enshrined therein do have and objective character, and are to be duly complied with by the States Parties, which have the additional common duty of exercise of the collective guarantee of the protected rights; and that permissible restrictions (limitations and derogations) to the exercise of guaranteed rights are to be restrictively interpreted. A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. II, Porto Alegre, Brazil, S.A. Fabris Ed., 1999, Chap. XI, pp. 23-58 and 185-194; and cf. A. A. Cançado Trindade, "Approximations and Convergences in the Case-Law of the European and Inter-American Courts of Human Rights", in *Le rayonnement international de la jurisprudence de la Cour européenne des droits de l'homme* (eds. G. Cohen-Jonathan and J.-F. Flauss), Brussels, Nemesis, Bruylant, 2005, pp. 101-138.

2269. Cases *Tyrer* v. *United Kingdom*, 1978; *Airey* v. *Ireland*, 1979; *Marckx* v. *Belgium*, 1979; *Dudgeon* v. *United Kingdom*, 1981, among others.

2270. Advisory Opinion No. 16, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 1999; and Advisory Opinion No. 18, on *Juridical Condition and Rights of Undocumented Migrants*, 2003.

2271. Cf. Chaps. IX and X, *RCADI*, Vol. 316 (2005).

I have seen fit to single out in my address at the ceremony of opening of the judicial year of 2004 of the ECtHR (on 22 January 2004, at the Palais des Droits de l'Homme in Strasbourg), as follows:

> ". . . In some international legal circles attention has been diverted in recent years from this fundamental achievement to the false problem of the so-called 'proliferation of international tribunals'. This narrow-minded, unelegant and derogatory expression simply misses the key point of the considerable advances of the old ideal of international justice in the contemporary world. The establishment of new international tribunals is . . . an acknowledgment of the superiority of the judicial means of settlement of disputes, bearing witness of the prevalence of the rule of law in democratic societies, and discarding any surrender to State voluntarism.
>
> Since the visionary writings and ideas of Nicolas Politis and Jean Spiropoulos of Greece, Alejandro Álvarez of Chile, André Mandelstam of Russia, Raul Fernandes of Brazil, René Cassin and Georges Scelle of France, Hersch Lauterpacht of the United Kindgom, John Humphrey of Canada, among others, it was necessary to wait for decades for the current developments in the realization of international justice to take place, nowadays enriching rather than threatening International Law, strengthening rather than undermining International Law. The reassuring growth of international tribunals is a sign of our new times, and we have to live up to it, to make sure that each of them gives its contribution to the continuing evolution of International Law in the pursuit of international justice."[2272]

In the domain of the protection of the fundamental rights of the human person, the growth and consolidation of international human rights jurisdictions in the European and American continents, have set higher standards of State behaviour and established some degree of control over the interposition of undue restrictions by States, and have reassuringly enhanced the position of individuals as subjects of

2272. A. A. Cançado Trindade, "Speech Given on the Occasion of the Opening of the Judicial Year [of the European Court of Human Rights], 22 January 2004", in ECtHR, *Annual Report 2003*, Strasbourg, ECtHR, 2004, pp. 41-49; (and *Rapport annuel 2003*, Strasbourg, CourEDH, 2004, pp. 41-50); and cf. A. A. Cançado Trindade, "The Merits of Coordination of International Courts on Human Rights", 2 *Journal of International Criminal Justice* (2004), pp. 309-312.

the International Law of Human Rights, endowed with full procedural capacity. In so far as the basis of the jurisdictions of the IACtHR and the ECtHR in contentious matters is concerned, eloquent illustrations of their firm stand in support of the integrity of the mechanisms of protection of the two Conventions are afforded, for example, by recent decisions of the ECtHR [2273] as well as of the IACtHR [2274]. The two international human rights Tribunals, by correctly resolving basic procedural issues raised in such recent cases, have aptly made use of the techniques of Public International Law in order to strengthen their respective jurisdictions of protection of the rights of the human person. They have decisively safeguarded the integrity of the mechanisms of protection of the American and European Conventions on Human Rights, whereby the juridical emancipation of the human person vis-à-vis her own State is achieved.

Human rights treaties such as the European and American Conventions have, by means of an interpretative interaction, reinforced each other mutually, to the ultimate benefit of the protected human beings [2275]. Interpretative interaction has in a way contributed to the universality of the conventional law on the protection of human rights. This has paved the way for a *uniform* interpretation of the *corpus juris* of contemporary International Human Rights Law. Such uniform interpretation in no way threatens the unity of International Law. Quite on the contrary, instead of threatening "to fragment" International Law, the two Tribunals at issue have helped to develop and achieve the aptitude of International Law to regulate efficiently relations which have a specificity of their own — at *intra-State*, rather than *inter-State*, level, opposing States to individuals under their respective jurisdictions — and which require a special-

2273. In the *Belilos* v. *Switzerland* case (1988), in the *Loizidou* v. *Turkey* case (Preliminary Objections, 1995), and in the *I. Ilascu, A. Lesco, A. Ivantoc and T. Petrov-Popa* v. *Moldovia and the Russian Federation* case (2001).

2274. In the *Constitutional Tribunal* and *Ivtcher Bronstein* v. *Peru* cases, Jurisdiction (1999), and in the *Hilaire, Constantine and Benjamin and Others* v. *Trinidad and Tobago* (Preliminary Objection, 2001).

2275. A. A. Cançado Trindade, "The Development of International Human Rights Law by the Operation and the Case-Law of the European and Inter-American Courts of Human Rights", 25 *Human Rights Law Journal* (2004), Nos. 5-8, pp. 157-160; 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", 16 *Revue universelle des droits de l'homme* (2004), Nos. 5-8, pp. 177-180.

ized knowledge from the Judges. The unity and effectiveness of Public International Law itself can be measured precisely by its aptitude to regulate legal relations in distinct contexts with equal adequacy.

From all the aforesaid one can detect the current historical process of *humanization* of International Law (a new *jus gentium*), disclosing a new outlook of the relations between public power and the human being — an outlook which is summed up, ultimately, in the recognition that the State exists for the human being, and not vice versa. In operating, and constructing their converging case-law, to that effect, the two international human rights Tribunals, the European and the Inter-American Courts, have indeed contributed to enrich and humanize contemporary Public International Law. They have done so as from an essentially and necessarily anthropocentric outlook, as aptly foreseen, since the sixteenth century, by the so-called founding fathers of the *law of nations* (the *droit des gens*).