

**PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES: CURRENT
STATE AND PERSPECTIVES¹**

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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 U.N. Charter provides for the general principle of the duty of member States of peaceful settlement of disputes which may put at risk international peace², on the other hand that duty coexists with the prerogative 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)³.

The domain of peaceful resolution of international conflicts appears thus constantly marked by the ineluctable and persistent ambivalence between, on the one hand, the States' general duty of peaceful settlement, - which ensues from a general principle of international law, - and, on the other hand, the freedom of choice accorded to them, - a faculty left to the States, - as to the means of settlement to be employed. The inherent tension between the general duty of peaceful resolution and the free choice of means has had a repercussion in the application of international instruments, in so far as peaceful settlement of disputes is concerned.

Preliminarily, before embarking on an examination of this significant and complex chapter of International Law, I would like to dedicate my present series of four lectures on the topic at issue, in this year's Course of International Law Organized by the Inter-American Juridical Committee of the Organization of American States (2004), to the memory of my distinguished colleague at the *Curatorium* of The Hague Academy of International Law, Professor Daniel

² A general principle which is incorporated in mandatory terms in the U.N. Charter - Article 2(3) - and restated in resolution 2625 (XXV) of 1970 of the U.N. General Assembly on Principles of International Law Governing Friendly Relations and Cooperation 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.

³ F.S. Northedge and M.D. Donelan, *International Disputes: the Political Aspects*, London, Europa Publs., 1971, p. 241.

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Bardonnet, a fine jurist and a *grand seigneur*, who passed away in Paris less than a month ago. The departure of this great and learned friend, who so much appreciated and fully understood the cultures of Latin America, is indeed a great loss to contemporary international law.

A few years ago we participated together, Bardonnet and I, in a previous version of this Course of International Law Organized by the Inter-American Juridical Committee here in Rio de Janeiro. On that occasion, he and I, in the company of another fine jurist, Dr. Keith Hight, former member of the aforementioned Committee, held - the three of us - a long and memorable panel precisely on the topic of the peaceful settlement of international disputes. Most of our remarks were formulated in an entirely spontaneous way. I understand that this panel was then recorded, but was never published, and will thus, most likely and regrettably, be vanished with the onslaught of time. In any case, I cannot let this occasion pass without dedicating my four current lectures of 2004 to my dear and recently departed friend Daniel Bardonnet, with whom I shared gratifying moments during the last three decades, in our common cultivation of international law in various countries, in Latin America and in Europe.

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 and considerations of accommodation of power, thereby resisting attempts of codification or systematization⁴. Despite that, multiple instruments of dispute-settlement have been devised and applied in the last decades, with varying results. And there seems to appear, in recent years, a growing awareness of the need to give greater weight to the general principle of the duty of peaceful settlement, which ought certainly to 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), there were endeavours to render widely obligatory the peaceful settlement of disputes (as exemplified by the 1924 Geneva Protocol on the Pacific Settlement of International Disputes and the 1925 Locarno Treaty). In the absence, in most cases, of a strict obligation of submitting pending disputes specifically to compulsory jurisdiction - without prejudice to the general principle of peaceful settlement - there persists the central problem of the matter:

“There is a clear obligation not to settle disputes by force, but the option left to

⁴ 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 of Disputes”, *Recueil d'études de Droit international en hommage à P. Guggenheim*, Genève, 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* (1969) pp. 70-90.

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the parties to choose among the possible methods of settlement such frequently indecisive methods as negotiation, enquiry or mediation results in a substantial proportion of cases in a stalemate rather than a settlement⁵.

However, keeping in mind this *caveat* as to the absence of a guarantee of a compulsory settlement, it is to be observed that it does not ensue therefore 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 U.N. Security Council⁶ are supplementary to the traditional methods of peaceful settlement of disputes (mentioned in Article 33(1) of the U.N. Charter)⁷, but it does not result therefore that the question at issue is 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, and nor even for the Security Council to exert its investigatory powers⁸; the Council can act on its own initiative, upon request of any member State of the U.N., or as a result of the initiative of the Secretary General⁹. 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 General¹⁰.

Closely linked to the basic issue of compulsory jurisdiction is the question of the efficacy of the methods of peaceful settlement of international disputes. Data for an examination of the issue are found not only in official publications of international organizations, but also in digests, prepared by individual authors, of cases pertaining to international peace and security¹¹; however, even such collections lack a more detailed assessment of the international experience in the peaceful settlement of disputes. Despite the difficulty to extract definitive conclusions on the efficacy of some means of peaceful settlement of international disputes, there are certain factors that often affect or undermine that efficacy, such as, e.g., strict reliance on State sovereignty, and the influence of deep-rooted attitudes in certain frontier conflicts; other attitudes of States can be added, such as, e.g., a certain reluctance in resorting to

⁵ 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 États qui auront accepté de l'être. L'État 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.

⁶ Chapter VI of the U.N. Charter.

⁷ D.W. Bowett, "The United Nations and Peaceful Settlement", *International Disputes: the Legal Aspects*, London, Europa Pbls, 1972, pp. 179-180.

⁸ Under Article 34; D. Davies Memorial Institute, *International Disputes: the Legal Aspects*, op. cit. supra n. (1), pp. 8-14.

⁹ Articles 34, 35 and 99, respectively. Ch. Rousseau, *Derecho Internacional Público Profundizado*, Buenos Aires, La Ley, 1966, p. 328; J. Stone, *Legal Controls of International Conflict*, N.Y., Rinehart & Co. Publ., 1954, pp. 187 and 193-194.

¹⁰ D.W. Bowett, *op.cit.*, *supra* n. (6), p. 128.

¹¹ E.g., M.D. Donelan and M.J. Grieve, *International Disputes: Case Histories 1945-1970*, London, Europa Pbls., 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*, N.Y., 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; W. Chamberlin, Th. Hovet Jr. and E. Hovet, *A Chronology and Fact Book of the United Nations 1945-1976*, Bobbs Ferry/N.Y., Oceana, 1976, pp. 11-88.

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the judicial solution, and a tendency to resort first to negotiation before contemplating other methods.

II. Interaction or complementarity of means of peaceful settlement

There are several illustrations, along the years, of the interaction in practice of distinct means of peaceful settlement of international disputes. That a same case can be susceptible of more than one of those means of settlement is illustrated, *inter alia*, at regional level, by 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). There is a complementarity between the distinct means of peaceful settlement utilized, also at global level, by the U.N.: in the case of *Cyprus*, e.g., the U.N. not only exerted the function of peace-keeping but also acted as initiator [cf.] of diplomatic exchanges; and resolution 186, of 1964, of the Security Council, providing for the strategy of U.N. organs, foresaw both diplomatic and regulatory functions¹².

The techniques of peaceful settlement employed by the General Assembly are similar to those followed by the Security Council (recommendations; offers of conciliation, mediation, good offices, among others, to the contending parties; establishment of a fact-finding body; and referral of conflicts to other organs e.g., of the Organization of American States, or of the Organization of African Unity) for settlement¹³. The provision of Article 33(1) of the U.N. Charter whereby the contending parties ought first to seek a solution by the traditional methods (*inter alia*, negotiation, conciliation, mediation), does *not* appear to have been interpreted as requiring that all those methods ought necessarily to be exhausted before resorting to the Security Council¹⁴.

The complementarity of methods of peaceful settlement of disputes has met with judicial recognition. Thus, in the *Nicaragua versus United States* case (Jurisdiction and Admissibility, 1984), the 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

¹² V. Pechota, *Complementary Structures of Third-Party Settlement of International Disputes*, N.Y., UNITAR, 1971, p. 10.

¹³ On this last point, cf. E. Jiménez de Aréchaga, “a coordination des systèmes de l'ONU et de l'OEA pour le règlement pacifique des différends et la sécurité collective”, 111 *Recueil des Cours de l'Académie de Droit International de La Haye* (1964) pp. 426-452; D.E. Acevedo, “Relationship between the Organization of American States and the United Nations with Regard to Settlement of Regional Disputes” in *Pacific Settlement of Disputes - Thesaurus Acroasium* (15th Session, 1987), vol. XVIII, Thessaloniki, Institute of Public International Law and International Relations, 1991, pp. 67-133.

¹⁴ D. Davies Memorial Institute, *International Disputes: the Legal Aspects*, *op.cit.*, *pra n.* (1), p. 14; D.W. Bowett, *op.cit.*, *supra n.* (6), p. 180, and cf. pp. 183-196; and cf. also D. Ciobanu, *Preliminary Objections Related to the Jurisdiction of the United Nations Political Organs*, The Hague, M. Nijhoff, 1975, pp. 81 and 83-90.

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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 seizing 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 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”¹⁵.

The ICJ further recalled its own *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 has been pursued *pari passu*”¹⁶. More recently, 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 Charter [of the United Nations] 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 (...)”¹⁷.

Still at global level, it is significant that the 1982 U.N. 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)¹⁸, composed of 21 members elected by the Assembly of Heads of State and Government. The Commission was to coexist with *ad hoc* committee’s subsidiary to the main organs of the OAU, for peaceful settlement (diplomatic means) of international disputes in Africa¹⁹.

In international practice on dispute settlement, the methods of fact-finding and conciliation not seldom have been combined, in 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" [cf.]²⁰. In sum, such methods of dispute settlement, instead of mutually excluding each other, appear

¹⁵ *ICJ Reports* (1984) pp. 440-441, pars. 106 and 108.

¹⁶ *Cit. in ibid.*, p. 440, par. 106.

¹⁷ *ICJ Reports* (1998) p. 303, par. 56.

¹⁸ Cf. T.O. Elias, "The Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity", 40 *British Year Book of International Law* (1964) pp. 336-348; D.W. Bowett, *The Law of International Institutions*, 2nd. ed., London, Stevens, 1970, pp. 280-282. [cf. 5th. ed.].

¹⁹ Cf. *infra*, as to the practice.

²⁰ L.B. Sohn, "The Function of International Arbitration Today", 108 *Recueil des Cours de l'Académie de Droit International* (1963) pp. 18-19.

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complementary to each other and not seldom have interacted in practice.

III. Diplomatic means of peaceful settlement

1. Negociation

In the inter-State diplomatic *contentieux*, *negotiation* can be singled out²¹ as generally an effective method of settlement of disputes, though not always successful; hence its recognized coexistence with other methods. Not seldom negotiation has been "complemented" by recourse to other methods of peaceful settlement²². Such other methods, as judicial settlement for example, may pave the way for subsequent negotiations (as in the *North Sea Continental Shelf* case)²³, or else precede 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 resort to other methods of peaceful settlement²⁴.

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, a successful outcome of negotiations occurred in cases such as those of the negotiations between Argentina and Uruguay over the River Plate and Maritime Front, between Brazil and Argentina over the use of waters of the Parana River, between the United States and Panama on the regime of the Panama Canal, there are also cases in which negotiations hang on for many years without satisfactory results, such as those between Venezuela and Guyana on their frontier dispute, between Venezuela and Colombia as to the maritime delimitation, and between Chile and Bolivia on this latter's claim of access to the sea²⁵.

However, in comparison with other methods, negotiation, perhaps because of its flexibility and the direct control of the process by the States concerned themselves, discloses, as already indicated, rather positive results, when they are sustained. When

²¹ For a general study, cf., e.g., P.J.I.M. de Waart, *The Element of Negotiation in the Pacific Settlement of Disputes between States*, The Hague, M. Nijhoff, 1973, pp. 1-202.

²² Cf., for examples, e.g., H.G. Darwin, "Methods of Peaceful Settlement – Negotiation", *International Disputes: the Legal Aspects*, London, Europa Publs., 1972, p. 81.

²³ For example, in the *North Sea Continental Shelf* case (1969), opposing Denmark and the Netherlands to the Federal Republic of Germany, the decision of the ICJ (cf. *ICJ Reports* (1969) pp. 5-54) served as initial basis for subsequent negotiations for settlement of the matter at issue among the States concerned.

²⁴ Cf. J. Collier and V. Lowe, *The Settlement of Disputes in International Law - Institutions and Procedures*, Oxford, University Press, 2000, p. 21.

²⁵ For comments 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 *Annuaire français de droit international* (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 *Annuaire français de droit international* (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; G. Echeverría D., M.T. Infante C., and W. Sánchez G., Chile y Bolivia: Conflicto y Negociación en la Subregión, in *Las Relaciones entre los Países de América Latina* (ed. W. Sánchez G.), Santiago, Ed. Universitaria, 1980, pp. 153-183.

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they fail, the situation may aggravate, and lead to severance of relations between the parties concerned, as illustrated, *inter alia*, by the *contentieux* between the United States and Iran following the seizure of the U.S. Embassy in Tehran in 1979²⁶. Hence the importance of complementarity between negotiation and other methods of peaceful settlement (cf. *infra*). Where one method proves insufficient or inadequate for the settlement of a given controversy, nothing would hinder the parties concerned to resort to other methods to avoid aggravating the dispute at issue.

As aptly pointed out, more than once, by the International Court of Justice (e.g., in the *Nicaragua versus United States* case, 1984, and in the case concerning *Land and Maritime Boundary between Cameroon and Nigeria*, 1998), there is no requisite in international law whereby a State would be bound to "exhaust" negotiations as a preliminary before resort is made to other means of peaceful settlement²⁷. 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.

2. Conciliation

Endeavours have constantly been undertaken in the United Nations to foster conciliation as a means of dispute settlement²⁸. It is known that the Security Council, e.g., can establish an organ of conciliation, and subsidiary organs of the United Nations have effectively acted in dispute settlement introducing an element of conciliation (with the absence of publicity, and informal consultations), but also disclosing features of mediation²⁹. 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"³⁰.

Parallel to the commissions of inquiry and conciliation, the U.N. has developed other techniques of peaceful settlement, in entrusting to the President of the General Assembly, in particular, certain missions of conciliation³¹. Resort to these methods has not been limited to the global, U.N. level; there are examples also at regional

²⁶ Cf. J.G. Merrills, *International Dispute Settlement*, 3rd ed., Cambridge, University Press, 1998, pp. 22-23.

²⁷ Cf. *ICJ Reports* (1984) pp. 382 and 440; *ICJ Reports* (1998) p. 275, par. 56.

²⁸ V. Pechota, *op. cit. supra* n. (11), p. 3; cf. also D.W. Bowett, *op.cit.*, *supra* n. (6), p. 207.

²⁹ J.-P. Cot, *La conciliation internationale*, Paris, Pédone, 1968, pp. 262-263; V. Pechota, *op.cit.*, *supra* n. (11), pp. 50 and 54. For a general study, cf. also H. Rolin, *La conciliation internationale*, Genève, Inst. Dr. Intl. (extrait), 1959, pp. 1-38.

³⁰ D. Davies Memorial Institute, *International Disputes: the Legal Aspects...*, *op.cit.*, *supra* n. (1), 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/N.Y., Stevens/Oceana, 1965, p. 164.

³¹ J.-P. Cot, *op.cit.* *supra* n. (29), p. 263.

level, such as the Mission of Observation of the Organization of American States (OAS) in Belize in 1972 (by means of an agreement between Guatemala and the United Kingdom, this latter not an OAS member State).

As far as conciliation is concerned, it may further be recalled that what is aimed at is not precisely to apply to a given controversy or claim certain well-defined legal rules, but rather to search an approximation between the contending parties conducive to an agreement which has the support of international law³². Conciliation, the nature of which has been much discussed³³, has attracted growing attention in recent years; it is foreseen in several multilateral treaties (cf. *infra*), like, *inter alia*, in the classic 1928 General Act for the Pacific Settlement of International Disputes (revised in 1949), and nowadays it is regarded as a method which may foster compulsory recourse to peaceful dispute-settlement.

3. Fact-finding or inquiry

From its institutionalization (as an autonomous method) by the two Hague Conferences (of 1899 and 1907) to date, the procedure of international fact-finding has undergone an interesting evolution. In this respect, one may recall the attempt, by the U.N. General Assembly, of putting into practice the mechanism of a commission of fact-finding and conciliation (1949) to assist States in settling their disputes even outside the U.N., or help the U.N. organs to that end. In 1967 it was decided to elaborate a list of experts in *fact-finding* (with the names forwarded by the member States to the Secretary General), at the disposal of States, to resort to so as to avoid or impede conflicts, thus singling out the *preventive* function of fact-findings³⁴. In the U.N. practice, the procedure of investigation was utilized in cases such as those of Palestine (1947), Greece (1947-1949), Indonesia (1947-1948), Germany (1951-1953), South Africa (as from 1967)³⁵. A case settled by means of investigation was that of the *Red Crusader*, a dispute opposing Denmark to the United Kingdom, in which a fact-finding commission was established not by the U.N., but rather by an exchange of notes between the two governments³⁶.

At regional level, the Organization of American States (OAS) had the occasion to embark on a new experience in the peaceful settlement of disputes, in the period 1977-1979, during the frontier dispute between Costa Rica and Nicaragua:

³² In this sense, e.g., V. Pechota, *op.cit.*, *supra* n. (11), pp. 58-59.

³³ D. Bardouillet, Problèmes intéressants les États nouveaux - l'État des ratifications des Conventions de La Haye de 1899 et de 1907 sur le règlement pacifique des conflits internationaux, 7 *Annuaire français de Droit international* (1961) pp. 726-741.

³⁴ A method based in Article 33 of the U.N. Charter; N. Bar-Yaacov, *The Handling of International Disputes by Means of Inquiry*, London, RIIA/O.U.P., 1974, pp. 296-311 and 344-347.

³⁵ *Id.*, pp. 276-292. The U.N. General Assembly, in its resolution 2329, of 1967, urged member States to utilize the already existing means of fact-finding; H.G. Darwin, “[Methods of Peaceful Settlement] Factfinding and Commissions of Inquiry”, *International Disputes: the Legal Aspects*, *op. cit. supra* n. (1), pp. 172-177; and cf. *ibid.*, p. 23; N. Bar-Yaacov, *op.cit.*, *supra* n. (33), pp. 299-312 and 347; as to the U.N. Security Council in particular, cf. E.L. Kerley, “The Powers of Investigation of the U.N. Security Council”, 55 *American Journal of International Law* (1961) pp. 892-918.

³⁶ Cf. N. Bar-Yaacov, *op.cit.*, *supra* n. (33), pp. 179-195.

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establishment of three *Ad Hoc* Commissions of Observers and one Commission of Civil Observers. The former were entrusted with the verification or investigation of the facts (by means of visits of inspection, interviews, examination of evidence or probatory elements), then reporting to the OAS Permanent Council; the latter also reported to the Council, which, in turn, adopted resolutions and recommendations. Despite the limited scope of that method (dependent on the mutual consent of the parties), the dispute no longer prolonged, and the experiment, besides original, was significant for a possible future improvement of the OAS Charter in respect of peaceful settlement of disputes, particularly given the virtual lack of application in practice of the Pact of de Bogotá³⁷.

Other examples could here be recalled, as the aforementioned OAS Mission of Observation in Belize (1972, *supra*), and the Consultative [Advisory] Committee of the Organization of African Unity (OAU) on Nigeria (1967-1968) which acted during the “war of Biafra” or the “Nigerian civil war”³⁸. A merit detected in fact-finding has been the little margin for reservations by the parties to the presentation of the final report, as this latter is based - in the settlement of the dispute - in the respective reports of the parties³⁹.

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 conventions⁴⁰. As a technique of dispute-settlement, fact-finding has lately been utilized in the 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.

a) Fact-finding and the search for justice: the experience of truth commissions

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 rights⁴¹ and of commissions of inquiry under the ILO Constitution⁴². In addition, from the mid-seventies onwards, successive Truth Commissions were 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

³⁷ E. Lagos, “Los Nuevos Mecanismos Procesales para la Eficacia de la Solución Pacífica de las Controversias, con Particular Referencia a la Práctica de la OEA en los Últimos Años”, *Perspectivas del Derecho Internacional Contemporáneo*, vol. II, Santiago, Universidad de Chile/Instituto de Estudios Internacionales, 1981, pp. 79-91.

³⁸ 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.

³⁹ N. Bar-Yaacov, *op.cit. supra* n. (33), pp. 326-327.

⁴⁰ 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 États et des organisations internationales*, Bruxelles, Bruylants, 1976, pp. 3-518.

⁴¹ 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).

⁴² Cf. *id.*, pp. 160-175 (paper by G. von Potobsky).

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against impunity. In the period of 1974-1994⁴³, 15 Truth Commissions instituted in those years disclosed the following common characteristics: firstly, the fact of operating as organs of fact-finding in a context of democratic transition in distinct countries; secondly, the examination of facts 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, which expires with the presentation of the final report with the results of the investigations⁴⁴.

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 in the experiences on the matter in Chile and Argentina) was the first of the kind to be sponsored and funded by the United Nations⁴⁵; others had a governmental origin, as exemplified by the Commission of Truth and Reconciliation of Chile, established in 1990 by the Presidency of the Republic⁴⁶; the Truth Commission for Rwanda (which reported in 1993) was, in turn, of non-governmental (international) character⁴⁷; 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 abuses⁴⁸. Recently, the Commission on Truth and Reconciliation of Peru concluded its work and presented, in August 2003, a substantial report⁴⁹.

⁴³ 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), Tchad (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 fifteen Truth Commissions (cf. *op.cit.*, *infra* n. (43)), one is to add two other rather recent initiatives: that of the Truth Commission for Haiti (cf. [Centre International des Droits de la Personne et du Développement Démocratique], *Proposition pour une Commission de la Vérité en Haïti - Éléments constitutifs*, Montréal, 27.11.1994, pp. 1-13), and that of the investigations undertaken by the National Commissariat 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). Unlike this latter, the Truth Commission for Haiti did not produce satisfactory results; cf. J.E. Méndez, "Derecho a la Verdad frente a las Graves Violaciones a los Derechos Humanos", in *La Aplicación de los Tratados sobre Derechos Humanos por los Tribunales Locales* (eds. M. Abregú and C. Courtis), Buenos Aires, CELS, 1997, p. 538.

⁴⁴ P.B. Hayner, "Fifteen Truth Commissions - 1974 to 1994: A Comparative Study", 16 *Human Rights Quarterly* (1994) pp. 598-604.

⁴⁵ Cf. *id.*, p. 599.

⁴⁶ For the results of the investigations, cf. *Informe Rettig - Informe de la Comisión Nacional de Verdad y Reconciliación*, vol. I, Santiago, Feb. 1991, pp. 1-448; *Informe Rettig - Informe de la Comisión Nacional de Verdad y Reconciliación*, vol. II, Santiago, Feb. 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 of 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 of Costa Rica, IIHR, 1996, pp. 35-52.

⁴⁷ P.B. Hayner, *op.cit.*, *supra* n. (43), pp. 600 and 629-632.

⁴⁸ *Id.*, 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.

⁴⁹ Cf., in particular, Comisión de la Verdad y Reconciliación, *Informe Final - Conclusiones Generales*, Lima, CVR/Peru, 2003, pp. 9-45.

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Amidst the diversity of their mandates and of the results achieved, the 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 issue⁵⁰. Overcoming operational difficulties, Truth Commissions have proven to be, in most cases, a relevant instrument in the crystallization of the right to truth⁵¹ in its relations with the search for justice and the struggle against impunity⁵².

b) Fact-finding and the prevalence of democracy and the rule of law

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 fairly recently 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 03.09.1993 titled “Support to the Constitutional Government of Nicaragua”, appointed the Commission of Jurists of the OAS for Nicaragua to “establish the reality of the facts” 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.

The Commission of Jurists of the OAS for Nicaragua⁵³ was set up by the OAS Secretary-General in Managua, on 07 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. 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*).

The difficult work undertaken by the Commission of Jurists disclosed *sui generis* feature, in that questions of an essentially constitutional and domestic order were

⁵⁰ [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.

⁵¹ 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.

⁵² 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; P.B. Hayner, “International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal”, 59 *Law and Contemporary Problems* (1996) pp. 173-180; J.M. Pasqualucci, “The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System”, 12 *Boston University International Law Journal* (1994) pp. 321-370. - And, for a general study of the struggle against impunity, cf., *inter alia*, 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 alii*, 1997, pp. 25-451.

⁵³ Integrated by A.A. Cançado Trindade (Brazil), E. Ferrero Costa (Peru) and A. Gómez-Robledo Verdúzco (Mexico).

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taken up to the examination and consideration of an *ad hoc* international fact-finding organ at the request of the Government of the country 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, this 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 Danzig⁵⁴.

The case of the *Institutional Crisis of Nicaragua* had, thus, no precedent in the American continent. On 04 February 1994 the three members of the aforementioned Commission of Jurists handled its substantive final *Report*⁵⁵ to the OAS Secretary-General at the headquarters of the Organization in Washington D.C.. 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 published⁵⁶, when it was deemed that the issues dealt with therein had found a solution, as their contents had a bearing on historical facts would no longer affect the politico-institutional framework of the country concerned⁵⁷. 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).

⁵⁴ Cf. doc. cit. n. (55) *infra*, p. 336. The PCIJ, in an Opinion of 04.12.1935, 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, n. 65, 1935, pp. 41-57, especially pp. 50 and 57.

⁵⁵ *Informe de la Comisión de Juristas de la OEA para Nicaragua*, of 04.02.1994, pp. 1-109 (internal circulation).

⁵⁶ 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 Nicaragua", 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) n. 137, pp. 593-669.

⁵⁷ Earlier on (in 1994), a *Report* of the kind was also published, of the Commission of Jurists on aspects pertaining to the administration of justice and human rights in Peru; cf. *Informe de la Comisión de Juristas Internacionales sobre la Administración de la Justicia en el Perú*, Lima, Instituto de Defensa Legal (IDL), 1994, pp. 7-335 (this Commission was integrated by R.K. Goldman (United States), L.C. Arslanian (Argentina), F. Imposimato (Italy) and J. Raffucci (United States)).

4. Good offices

It is at global level that a most remarkable illustration of the development of good offices is found: the exercise of these latter by the U.N. Secretary General, on his own initiative (in the ambit of his competence) or at the request of a competent organ of the U.N. or the choice by the contending parties themselves. In practice, the powers of the U.N. Secretary General to utilize good offices have enlarged considerably, parallel to the search for solutions by consensus and conciliation; Article 99 of the U.N. Charter has been interpreted as conferring upon the Secretary General “all the necessary powers” for the search of peaceful settlement, including those of investigation⁵⁸.

As at the time of the drafting of chapter VI of the U.N. Charter the function of the Secretary General was not defined with precision, the subsequent practice itself has served as element of interpretation of its powers of good offices; thus, there have been numerous examples of performance of the Secretary General in international crises, such as, e.g., *inter alia*, the *Cuban missile crisis* (1962), the *war of Vietnam* (1965-1971), the conflict between India and Pakistan (1965-1971), the tension between Cambodia and Thailand (1961-1968), at times “filling gaps” of the limited operation of the collective organs of the United Nations⁵⁹.

The exercise of good offices can of course take place not only on the part of international organs but also on the part of States. 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 Security Council (particularly in the period 1949-1950); in turn, in the case of the emancipation of Algeria from French ruling (1955-1962), at a certain stage of the conflict (1957) it was Morocco and Tunisia which offered their good offices⁶⁰. Shortly after the independence of Algeria (1962), with the aggravation of a territorial dispute between this latter and Morocco, Syria and Ethiopia offered mediation, until an arbitral commission of the OAU intervened⁶¹, in yet another example of complementarity of the means of peaceful settlement already referred to (*supra*).

5. Mediation

In practice, the U.N. has at time resorted to “private personalities” to exert the

⁵⁸ What illustrates the application of the doctrine of the “implied powers” of the U.N.; V. Pechota, *The Quiet Approach - A Study of the Good Offices Exercised by the United Nations Secretary-General in the Cause of Peace*, N.Y., 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; G. Fischer, “Les compétences du Secrétaire Général”, 1 *Annuaire français de droit international* (1955) pp.346-348. - For a study of the legislative history of Article 99 of the U.N. Charter (on the powers of the U.N. Secretary General), cf. S.M. Schwebel, “The Origins and Development of Article 99 of the Charter”, 28 *British Year Book of International Law* (1951) pp. 371-382.

⁵⁹ V. Pechota, *op.cit.*, *supra* n. (11), pp. 10-11 and 17-18.

⁶⁰ A. A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Ed. Renovar, 2002, pp. 424-432.

⁶¹ M.D. Donelan and M.J. Grieve, *op. cit. supra* n. (10), pp. 145-146.

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function of mediators⁶². Not seldom the U.N. has appointed a commission of “good offices” or a “mediator” for the settlement of disputes⁶³: thus, in the case of Indonesia (1947-1950), the Security Council created the already mentioned Committee of Good Offices, subsequently (in 1949) named U.N. Commission for Indonesia; in the question of Palestine (1947-1949), the General Assembly appointed a mediator and a commission of conciliation for Palestine; in the conflict between India and Pakistan (1948), the Security Council created a Committee of Mediation, which became known as the U.N. Commission for India and Pakistan (UNCIP); in relation to Korea, in 1951, the General Assembly established a Committee of Good Offices; for the question of Cyprus (1964), a mediator was appointed upon recommendation of the Security Council; in the Middle East crisis (1967), the Council suggested to the Secretary General to appoint a Special Representative (not a mediator) to foster the negotiations between the contending parties⁶⁴.

At regional level, the practice of Latin American States bears witness of some cases of recourse to mediation, namely: that by the Vatican (starting in 1979) in the conflict between Chile and Argentina concerning the *Beagle Channel*; 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); that of the Peruvian jurist Bustamante y Rivero, whose recommendations led to the settlement of the conflict between El Salvador and Honduras⁶⁵.

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 See⁶⁶. 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.

The most complete personal account of the *célèbre* mediation published to date, 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

⁶² J.-P. Cot, *op.cit.*, *supra* n. (28), p. 263.

⁶³ While good offices would consist in an action aiming at facilitating negotiations but without going into the merits of the dispute, mediation would encompass also these latter; D. Davies Memorial Institute, *International Disputes: the Legal Aspects*, *op.cit.*, *supra* n. (1), p. 34.

⁶⁴ H.G. Darwin, “[Methods of Peaceful Settlement -] Mediation and Good Offices”, *International Disputes: the Legal Aspects*, London, Europa Publs., 1972, pp. 89-92.

⁶⁵ Cf., on this latter, e.g., A.A. Cançado Trindade and F. Vidal Ramírez, *Doctrina Latinoamericana del Derecho Internacional*, vol. II, San José de Costa Rica, Inter-American Court of Human Rights, 2003, pp. 5-66.

⁶⁶ For an account, cf. A. Brouillet, “La médiation du Saint-Siège dans le différend entre l'Argentine et le Chili dans la zone austral”, 25 *Annuaire français de Droit international* (1979) pp. 48ss.

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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 representatives⁶⁷.

The patient endeavours of the Holy See were rewarded by the Peace Treaty at last concluded between Chile and Argentina on November 29 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)⁶⁸.

For a general assessment of the application of the political methods of dispute settlement there persists the practical difficulty that elements pertaining to the settlement of some disputes have been published or circulated while those pertaining to other disputes have not yet⁶⁹. As to suggestions advanced for the future, in respect of mediation, reference can be made to the thesis in favour of the competence of a third State to interpret the rules relating to the exercise of its functions of peaceful settlement⁷⁰ and that future U.N. resolutions come to define the competence of interpretation of the mediator⁷¹.

6. Arbitral and judicial settlement

Numerous cases of systematic recourse to arbitration (some 400 instances), since the 1794 Jay Treaty until the end to the thirties in the XXth century, are registered in the *Survey of International Arbitrations 1794-1970* (by A.M. Stuyt), to refer but to one source⁷². At global level, the historical contribution of arbitral procedure to peaceful settlement is set forth in publications of arbitral awards in series⁷³. Along the XXth century, most cases submitted to arbitration were settled mainly by *ad hoc* arbitral tribunals⁷⁴. Further examples of resort to arbitration are found in the early beginnings of what came to be known as the inter-American system⁷⁵. In Latin

⁶⁷ 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.

⁶⁸ Cf. nota (67), *supra*.

⁶⁹ S.D. Bailey, *Peaceful Settlement of Disputes: Ideas and Proposals for Research*, New York, 1971, p. 21.

⁷⁰ As exemplified by what occurs with, e.g., the U.N. General Assembly and Security Council (and subsidiary organs), which retain such competence of interpretation.

⁷¹ V. Pechota, *op.cit.*, *supra* n. (11), pp. 54-55.

⁷² Followed by other subsequent cases; cf. A.M. Stuyt, *Survey of International Arbitrations 1794-1970*, 2nd. printing, Leiden/N.Y., Sijhoff/Oceana, 1976, p. VII.

⁷³ 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 U.N.) and of the *International Law Reports* (ed. E. Lauterpacht), among others.

⁷⁴ Thus, in the era of the old Permanent Court of International Justice (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 versus Yemen) have been dealt with by the Permanent Court of Arbitration. On its part, the U.N. General Assembly has adopted successive resolutions recommending member States to accept the compulsory jurisdiction of the International Court of Justice (ICJ), but expectations have not been fulfilled to date. Cf. K. Nakamura, "The Convention for the Pacific Settlement..." *op.cit.*, *infra* n. (85), 10 and 12.

⁷⁵ Ch.G. Fenwick, "El Sistema Regional Interamericano: Cincuenta Años de Progreso", *Anuario Jurídico Interamericano* (1955-1957) pp. 44-45; and cf. J.J. Caicedo Castillo, "El Arbitraje en las Conferencias Panamericanas hasta el Pacto de Bogotá de 1948 sobre Soluciones Pacíficas", *4 Boletim da Sociedade Brasileira de Direito*

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America, despite the conclusion of multilateral instruments such as the Pact of Bogotá (1948), recourse to arbitration continued to take place on an *ad hoc* basis, from time to time⁷⁶, as illustrated by the cases of the *Beagle Channel* (1977) and of the *Laguna del Desierto* (1994-1995)⁷⁷, both opposing Argentina to Chile.

Like other methods of peaceful settlement, arbitration has also been resorted to, along the last decades, with varying results, as illustrated, e.g., by the *Lac Lanoux* case (France *versus* Spain, 1957), the *Rann of Kutch* case (India *versus* Pakistan, 1968), the case of the *Delimitation of the Continental Shelf* case (United Kingdom *versus* France, 1977), the *Beagle Channel* case (Argentina *versus* Chile, 1977), the *Dubai/Sharjah Boundary* case (1981), the *Maritime Delimitation* case (Guinea *versus* Guinea Bissau, 1985), the *La Bretagne* case (Canada *versus* France, 1986); the *Taba* case (Egypt *versus* Israel, 1988), the *Maritime Delimitation* case (Guinea Bissau *versus* Senegal, 1989), the *St. Pierre and Miquelon* case (Canada *versus* France, 1992), among others⁷⁸. In fact, the contribution of international arbitration to the development of the chapter of peaceful settlement of international disputes is well known, and properly acknowledged, at global and regional levels.

If results proved satisfactory to one or another State, the fact remains that the arbitral solution does not appear susceptible of generalizations, for being an essentially *ad hoc*, casuistic and discontinuous means of settlement of international disputes. 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 OAU continued at times to resort to more flexible means of negotiated settlement (outside the Commission - cf. *supra*), - what has led, e.g., to a settlement (outside this 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 diplomats⁷⁹.

Judicial means of settlement, dealt with in more detail in another study⁸⁰, has evolved in a way on the basis of an analogy with the function of tribunals at domestic

Internacional (1948) n. 8, pp. 5-33; and cf, for a general study, e.g., J.L. Simpson and H. Fox, *International Arbitration*, London, Stevens, 1959, pp. 1ss.

⁷⁶ Cf. Ch.G. Fenwick, "Inter-American Regional Procedures for the Settlement of Disputes", 10 *International Organization* (1956) pp. 12-13.

⁷⁷ Cf. M.E. García Jiménez, "La Sentencia Arbitral de 21.10.1994: Controversia sobre el Recorrido de la Traza del Límite entre el Hito 62 y el Monte Fitzroy (Laguna del Desierto, Chile/Argentina)", 12 *Anuario de Derecho Internacional* - Navarra (1996) pp. 379-405; M.E. García Jiménez, "Sentencia del Tribunal Arbitral (Chile/Argentina) de 13.10.1995 sobre la Solicitud de Revisión y, en Subsidio, de Interpretación Planteada por Chile Respecto de la Sentencia de 21.10.1994 (Laguna del Desierto)", 13 *Anuario de Derecho Internacional* - Navarra (1997) pp. 131-176.

⁷⁸ 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.

⁷⁹ D.W. Bowett, *op.cit.*, *supra* n. (6), p. 283.

⁸⁰ Cf. A.A. Cançado Trindade, "Las Cláusulas Pétreas de la Protección Internacional del Ser Humano: El Acceso Directo de los Individuos a la Justicia a Nivel Internacional y la Intangibilidad de la Jurisdicción Obligatoria de los Tribunales Internacionales de Derechos Humanos", in *El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI - Memoria del Seminario* (Nov. 1999), vol. I, 2nd. ed., San José of Costa Rica, Inter-American Court of Human Rights, 2003, pp. 3-68.

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law level⁸¹. It may have occurred that at times expectations have not been amply fulfilled, and this may be partly due, to some extent, to the fact that not seldom what the contending parties seek is not so much an interpretation of the law, but rather a modification in the law⁸², or its progressive development.

In another line of thinking, it should further be pointed out that one of the features of contemporary international law has been the gradual *jurisdictionalization* of dispute settlement, as a result of the gradual creation and operation of multiple international tribunals; some are “specialized” in certain domains of international law, such as the European and Inter-American Courts of Human Rights, the Courts of Justice of the European Communities and of the Andean Union, and more recently of the Southern Cone Market (*Mercosur*), the International Tribunal for the Law of the Sea⁸³, the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and for Rwanda, the International Criminal Court, so as to settle distinct categories of disputes, endowed with a specificity of their own⁸⁴.

IV. Settlement of disputes in multilateral treaties

In the XXth Century, in the inter-war period of the League of Nations, a major effort in dispute-settlement was represented by the 1928 General Act for the Pacific Settlement of International Disputes (revised in 1949) 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. Thus, in the European continent, the 1957 European Convention for the Peaceful Settlement of Disputes had 12 States acceding to it, and, like the aforementioned General Act of Geneva, had some of its States Parties excluding so-called “non-legal disputes” from the application of the provisions on arbitration⁸⁵.

In fact, in reviewing some multilateral treaties, an elaborate scheme of dispute settlement can be found in the relevant provisions of the 1982 U.N. Convention on the Law of the Sea (Part XV, Articles 279-299)⁸⁶, comprising the Law of the Sea

⁸¹ 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.: F. Honig, “The Diminishing Role of the World Court”, 34 *International Affairs* (1958) pp. 184-194; C.H.W. Waldoock, “Decline of the Optional Clause”, 32 *British Year Book of International Law* (1955-1956) pp. 244-287; J. Fawcett, *International Economic Conflicts: Prevention and Resolution*, London, Europa Publs., 1977, pp. 80-81.

⁸² F.S. Northedge and M.D. Donelan, *op.cit.*, *supra* n. (2), 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).

⁸³ For a study of its dispute-settlement system, cf., e.g., L. Valencia Rodríguez, “Sistema de Solución de Controversias en la Convención sobre el Derecho del Mar”, in *X Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* (1983-1984) n. 3, pp. 27-47; 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.

⁸⁴ For a recent debate, stressing the complementary roles of multiple international tribunals, cf., e.g., [Various Authors.] *La juridictionnalisation du Droit international* (Colloque de Lille de 2002), Paris, Pédone/Société Française pour le Droit International, 2003, pp. 7-545.

⁸⁵ 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.

⁸⁶ For an account of the *travaux préparatoires*, cf., e.g., L. Valencia Rodríguez, *Arreglo de Controversias Según el*

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Tribunal (Annex VI, Statute), its Seabed Disputes Chamber (Articles 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). Article 297 of the Convention lists three options (the International Tribunal for the Law of the Sea itself, the International Court of Justice, or arbitration), binding procedures (at the request of a contending party), thus setting limits to the traditional free choice of means which has been kept 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,

“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”⁸⁷.

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 U.N. Convention on the Law of the Sea is particularly significant for a Convention of a universal character such as the present one. 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 parties⁸⁸. In addition, some other U.N. codification Conventions (e.g., 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 settlement⁸⁹; in this respect, L. Caflisch has forcefully argued that, since any

Derecho del Mar, Caracas, UNESCO, 1989, pp. 15-205.

⁸⁷ J.G. Merrills, *International Dispute Settlement*, *op. cit. supra* n. (26), pp. 172-173.

⁸⁸ 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 U.N., with Special Emphasis on the Human Rights - Thesaurus Acroasium* - vol. XVI, Thessaloniki, IIPLIR, 1990, pp. 33-35.

⁸⁹ In practice, “ces Protocoles ont d’ailleurs connu un succès fort modeste”; R.-J. Dupuy, “Codification et règlement des différends...”, *op.cit.*, *supra* n. (3), p. 72. For a criticism of the consideration of that solution for an (earlier) international regime on the law of the sea, cf. *id.*, p. 73.

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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 (preferably of a jurisdictional nature) of peaceful settlement to the U.N. codification Conventions *themselves*⁹⁰.

In this connection an important development has been the establishment of a *compulsory procedure of conciliation*, as adopted by the 1969 and 1986 Vienna Conventions on the Law of Treaties⁹¹, and the 1975 Convention on the Representation of States in Their Relations with International Organizations of Universal Character⁹², and the 1978 and 1983 Vienna Conventions on State Succession⁹³. On its turn, the 1959 Antarctica 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 (Article 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 (Article 24).

Recourse to conciliation (even when mentioned as an alternative among other means of peaceful settlement) is set forth in some environmental law treaties, 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, arbitration⁹⁴ and judicial settlement (by the ICJ)⁹⁵.

At global U.N. level, when the Ozone Layer Convention was adopted in 1985, an episode occurred which should not pass unnoticed: according to an account of the occasion, a group of 16 States annexed a declaration to the Final Act of the Conference of Plenipotentiaries on the Protection of the Ozone Layer (21.03.1985), stating that they expressed their regret that the Vienna Convention for the Protection

⁹⁰ L. Caflisch, "Cent ans de règlement pacifique des différends interétatiques", 288 *Recueil des Cours de l'Académie de Droit International de La Haye* (2001) pp. 261, 363 and 459, and cf. p. 286.

⁹¹ Article 66, and Annex, in case of controvérsias quanto a nulidade, terminação e suspensão de tratados.

⁹² Article 85.

⁹³ Vienna Convention of 1978, Part VI, Article 42; id., pp. 363-364; and H. Caminos, "Nuevos Mecanismos Procesales para la Eficacia de la Solución Pacífica de Controversias, con Particular Referencia a la Solución No Judicial en el Ámbito de las Naciones Unidas", in *Perspectivas del Derecho Internacional Contemporáneo*, vol. II, Santiago, Universidad de Chile/Instituto de Estudios Internacionales, 1981, pp. 21-23.

⁹⁴ Examples of which are provided, in distinct contexts, by the successful decisions of arbitral tribunals in the aforementioned *Lac Lanoux* case (1957), and, much earlier on, in the *Bering Sea Fur Seals* case (United Kingdom *versus* United States, 1893).

⁹⁵ Cf. C.P.R. Romano, *The Peaceful Settlement of International Environmental Disputes*, The Hague, Kluwer, 2000, pp. 61-63 and 322.

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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 Convention⁹⁶.

At regional level, prior to the systematization of peaceful settlement of international disputes undertaken by the 1948 American Treaty of Peaceful Settlement (Pact of Bogotá), resort to arbitration was not seldom contemplated and concretized in the practice of some Latin American States⁹⁷. The mechanism of (multilateral) *reciprocal consultations* (in case of threat to peace in the region) was created by one of the five instruments adopted by the Inter-American Conference of Buenos Aires of 1936⁹⁸, and was institutionalized shortly afterwards by the Declaration of Lima of 1938⁹⁹.

This latter specified that the procedure of consultations would take place through the Meeting of Consultation of Ministers of External Relations. By the time that procedure was created, there was concern with previous treaties which had not yet obtained sufficient ratifications¹⁰⁰ to enter into force. It was hoped that the launching of the system of reciprocal consultations would from then onwards enhance the effectiveness of the procedures of peaceful settlement agreed upon, and consolidate peace in the continent¹⁰¹.

At the Lima Conference of 1938, it was in fact pointed out that the instruments of conflict prevention in the American continent were dispersed in numerous treaties and declarations, it having become necessary to co-ordinate them. The much-awaited systematization came with the adoption of the Pact of Bogotá of 1948. But despite the contribution of this latter at conceptual level (with, e.g., its elaborate definitions of means of settlement)¹⁰², 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 disputes¹⁰³ ceased for these latter¹⁰⁴; but as some

⁹⁶ G. Bosco, *op.cit.*, *supra* n. (88), p. 38.

⁹⁷ Cf., e.g., 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* (1948) pp. 5-33.

⁹⁸ Namely, the Convention on the Maintenance, Preservation and Reestablishment of Peace.

⁹⁹ It should not pass unnoticed that the organ that institutionalized it in 1938 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, for example, in the Anglo-Argentinean conflict in the South Atlantic over the Falklands/Malvinas Islands (1982).

¹⁰⁰ They were object of attention of the 1936 Convention to Coordinate, Extend and Assure the Fulfillment of Existing Treaties between the American States. This Convention had, as antecedent, the so-called “Code of Peace” prepared by the Conference of Montevideo of 1933.

¹⁰¹ Ch. G. Fenwick, *The Organization of American States*, Washington, Kaufmann Pr., 1963, pp. 182-187.

¹⁰² For a study, cf., e.g., J.M. Yépez, “La Conférence Panaméricaine de Bogotá et le droit international américain”, *Revue générale de droit international public* (1949) pp. 52-74.

¹⁰³ At the regional Latin American level, the work of codification of the methods of peaceful settlement of disputes materialized in the Pact of Bogotá (1948) represented at a time the culminating point of an evolution marked by a succession of several multilateral treaties on the matter, as, for example, the Gondra Treaty (1923, of prevention of disputes between the American States), the two General Conventions of Washington of Inter-American Conciliation

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States of the region had ratified the Pact 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 1957¹⁰⁵, but this was a rather isolated instance in this respect. Three decades later, in the mid-eighties, there remained 18 member States of the Organization of American States (OAS) which were *not* Parties to the Pact of Bogotá; half of those were bound by earlier treaties¹⁰⁶, 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); except for the Dominican Republic and Haiti, Caribbean countries have not ratified it at all¹⁰⁷. Furthermore, the lack of accession by new OAS member States rendered the Pact virtually ineffective. This explains the evolution of the matter in Latin America: it was not surprising to witness, along 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 peace¹⁰⁸, and also for revision of the Pact¹⁰⁹.

One might also here recall the example of the Inter-American Commission of Peace, created by a resolution of the Meeting of Consultation of Ministers of External Relations held in Havana (of 1940)¹¹⁰ and formally constituted in 1948, which, curiously coexisting with the procedures of the Pact of Bogotá and of the Inter-American Treaty of Reciprocal Assistance (TIAR), came to assume a relevant function in the peaceful settlement of international disputes in the region. The creation of such Commission reflected the search in the American continent for practical and flexible methods of peaceful settlement.

Despite its non-conventional basis, the Commission was effectively resorted to on numerous occasions, on account of its flexibility of action and agility (able to act

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 Reestablishment 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).

¹⁰⁴ Article LVIII.

¹⁰⁵ 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.

¹⁰⁶ Cf. OAS; document OEA/Ser.G/CP/CAJP-541/84, of 30 July 1984, pp. 80-82.

¹⁰⁷ Cf. OAS *Treaty Series*, ns. 17 and 61 (General Information of the Treaty A-42).

¹⁰⁸ 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.

¹⁰⁹ Cf., e.g., C. Sepúlveda, "The Reform of the Charter of the Organization of American States", 137 *Recueil des Cours de l'Académie de Droit International de La Haye* (1972) pp. 107-108, and cf. pp. 99-101 and 131.

¹¹⁰ Resolution XIV of the Meeting of the Ministers of External Relations (Havana) in 1940; the Commission was formally established in 1948.

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motu proprio)¹¹¹. It became possible to attribute its success precisely to the flexibility of action (without the difficulties of the procedures of the Pact of Bogotá and of the TIAR) and to the expediency of operation (not subject to the rigid interpretation and obligations derived from treaties), it being entitled to act on its own initiative¹¹².

The Commission had its faculties enlarged in 1959, but, on the occasion of the first reform of the OAS Charter (Protocol of Buenos Aires of 1967, operative as from 1970), it was replaced by the Inter-American Commission on Peaceful Settlements, with wider powers but to operate as a subsidiary organ of the OAS Permanent Council¹¹³. The fact that the action of this new Commission became conditioned by the requirement of prior consent of the contending parties accounted for a certain immobility on the part of the regional Organization in the field of peaceful settlement from then onwards. Hence the continuing resort to *ad hoc* solutions, outside the institutional framework of the regional Organization, - with the resulting use of different methods of conflict resolution, depending on the circumstances of each case.

In the African continent, the Cairo Protocol on Mediation, Conciliation and Arbitration, of July 1964, annexed to the OAU Charter, created a Permanent Commission on Mediation, Conciliation and Arbitration. Parallel to it, since the irruption of the Algerian-Moroccan conflict of 1963, the OAU has resorted, as a complementary and flexible means of dispute-settlement, to the establishment by its main organs of subsidiary *ad hoc* committees (to foster negotiations, or good offices, mediation, inquiry and conciliation); such *ad hoc* committees have endeavoured achieving peaceful settlement without explicitly condemning a member-State of the regional Organization¹¹⁴. Those *ad hoc* committees, - composed of member-States (a maximum of ten) rather than personalities, - have acted in the conflict of *Mali versus Haute Volta* (declaration of reconciliation of 1975), later settled by the ICJ (Judgment of 1986); they also acted in the civil war of Tchade, and have become the most utilized means of settlement of inter-African conflicts to date¹¹⁵.

In turn, the 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, - which has also acted in the domain of dispute-settlement, - declared that the mechanism instituted by the 1964 Cairo Protocol (*supra*) was an integral part of the OAU Charter, and thus all OAU member-States were

¹¹¹ “A. Herrarte, “Solución Pacífica de las Controversias en el Sistema Interamericano”, *VI Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* (1979-1980), Washington D.C., OAS General Secretariat, 1980 [cf.], p. 231, and cf. pp. 222-223.

¹¹² Ch.G. Fenwick, *The Organization of American States*, Washington, Kaufmann Pr., 1963, pp. 198-208.

¹¹³ C. Sepúlveda, “The Reform of the Charter...”, *op.cit.*, *supra* n. (109), pp. 129-130, and cf. p. 118; F. García Amador (org.), *Sistema Interamericano a través de Tratados, Convenciones y Otros Documentos*, vol. I, Washington D.C., General Secretariat of the OAS, 1981, pp. 751-772.

¹¹⁴ H. Gharbi, “Le règlement des différends dans le cadre de l’Organisation de l’Unité Africaine (OUA)”, in *Règlement pacifique des différends internationaux* (ed. F. Horchani), Tunis/Bruxelles, Centre de Publication Universitaire/Bruxellant, 2002, pp. 538-539.

¹¹⁵ *Id.*, p. 540.

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automatically Parties to the Statute of the Permanent Commission on Mediation, Conciliation and Arbitration¹¹⁶. 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 foreseen¹¹⁷.

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 the 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; in any case, this has taken place in most instances *outside* the institutional mechanisms of the regional system of peace.

Pertinent examples to this effect are afforded, e.g., in Central America, by the handling of the border problem between Costa Rica and Nicaragua, in the late seventies, and of the conflict between El Salvador and Honduras in 1980; and, in South America, by the handling of the crisis opposing Peru and Ecuador, in the eighties and nineties (*infra*). Other examples, from a more distant past, could also be referred to¹¹⁸. In Central America, in order to settle the tensions in the border between Nicaragua and Costa Rica (1977-1979), *ad hoc* Commissions on Fact-Finding were established, and promptly conducted *in loco* observations, and reported to the OAS Permanent Council; this led to the solution of the conflict, on an *ad hoc* basis¹¹⁹.

As for the conflict between El Salvador and Honduras, it was settled by the mediation of J.L. Bustamante y Rivero, which led to the Treaty of Peace of 1980 between the two countries concerned¹²⁰. Some cases transcended the ambit of

¹¹⁶ Composed of 21 member-States of the OAU Conference of Heads of State and Government; *id.*, pp. 541-551 and 554.

¹¹⁷ *Id.*, pp. 545, 551 and 554.

¹¹⁸ In a more distant past, there were conflicts settled by inter-American procedures (such as, e.g., the controversy between Haiti and the Dominican Republic in 1937, resolved by the Commission of Investigation and Conciliation established under the 1923 Treaty to Prevent Conflicts between American States (the so-called Gondra Treaty) and the 1929 Washington Convention of Inter-American Conciliation), as well as conflicts resolved *not* by mechanisms of existing treaties, but rather by *ad hoc* Commissions (such was, e.g., the frontier disputes opposing Guatemala and Honduras in 1930, and Peru and Ecuador in 1942; the conflict of Chaco in 1929; and the controversy of Leticia between Colombia and Peru in 1934, - the last two with the assistance of the League of Nations).

¹¹⁹ E. Lagos, "Los Nuevos Mecanismos Procesales para la Eficacia de la Solución Pacífica de las Controversias, con Particular Referencia a la Práctica de la OEA en los Últimos Años", *Perspectivas del Derecho Internacional Contemporáneo*, vol. II, Santiago, Universidad de Chile, 1981, pp. 79-91. - In the early seventies, fact-finding was also employed by the OAS Mission of Observation in Belize (in 1972, pursuant to an agreement between Guatemala and the United Kingdom).

¹²⁰ H. Gros Espiell, "La Paz entre El Salvador y Honduras", 30 *Revista Internacional y Diplomática* (1981) n. 361,

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regional arrangements and were taken into the global - United Nations - level, such as the *cause célèbre* of the *Cuban missile crisis* (1962), taken up to the U.N. Security Council¹²¹. Still in the American continent, two such experiences may be singled out, given their contribution to contemporary techniques of dispute settlement: those of the process of Contadora, and of 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 reestablish peaceful co-existence among Central American States. The document ensuing therefrom was called the Declaration of Contadora (of 09 January 1983), and 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)¹²² 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 revised version of the Act of Contadora¹²³, stressing the need of reestablishment 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 (*compromisos*) agreed upon¹²⁴.

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

pp. 28-29.

¹²¹ For an account, cf. A. Chayes, *The Cuban Missile Crisis*, Oxford, University Press, 1974, pp. 1-154.

¹²² Its full title was "Act of Contadora for Peace and Cooperation in Central America".

¹²³ Accompanied by four Additional Protocols.

¹²⁴ For a study, cf. A.A. Cançado Trindade, "Mécanismes de règlement pacifique des différends en Amérique Centrale: de Contadora à Esquipulas-II", 33 *Annuaire français de droit international* (1987) pp. 798-822.

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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 initiatives¹²⁵. 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 centered 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 06-07 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, democratization and free elections, cessation of aid to irregular forces and rebels, non-use of territory to attack other States, assistance to refugees, displaced persons and the consolidation of democracy¹²⁶. Two supervisory organs were promptly set up, namely, the International Commission of Verification and Follow-up and the Executive Committee¹²⁷.

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/Equipulas-II process, as a whole, had the merit and importance of avoiding the escalade of the regional conflict into one of possibly much greater proportions and unforeseeable consequences for the whole continent¹²⁸. 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 organizations¹²⁹ (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.

¹²⁵ For an account, cf. *id.*, pp. 798-822.

¹²⁶ Points 7, 10 and 11 of Esquipulas II were of particular importance to the means of peaceful settlement.

¹²⁷ For details, cf. A.A. Cançado Trindade, *op.cit.*, *supra* n. (124), pp. 798-822.

¹²⁸ For assessments, cf., e.g., J. Ordóñez and N. Gamboa (eds.), *Esquipulas, Diez Años Después: Hacia Dónde Va Centroamérica?*, San José of Costa Rica, CSUCA, 1997, pp. 1-30; V. Flores Olea (ed.), *Relación de Contadora*, México, Fondo de Cultura Económica, 1988, pp. 15-358.

¹²⁹ Cf. A.A. Cançado Trindade, *op.cit.*, *supra* n. (124), pp. 798-822, esp. p. 810, n. 57.

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, Chile and 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 1995¹³⁰. 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 States¹³¹, and "recommendatory opinions" on minor issues, they started holding direct bilateral meetings, most often in Brasilia; in difficult moments of the exercise

¹³⁰ Successive documents were signed in Quito (agreement of 23.02.1996), Buenos Aires (communiqué of 19.06.1996), and Santiago (agreement of 29.10.1996).

¹³¹ The consultations followed the formula "2 plus 4", that is, the two contending parties together with the four guarantor States.

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each contending party met with the guarantor States in separate rooms. The collegial 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 succeeded¹³², and the peace process culminated in the ceremony of the signature of the final peace document of 26.10.1998, 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.

3. Other experiences

It becomes rather difficult to generalize as to the effectiveness of each of the methods of peaceful settlement. If direct negotiations proved successful, for example, between Argentina and Uruguay over the river Plate and its maritime front¹³³, and between Brazil and Argentina over the use of waters of the Paraná river, and between the United States and Panama over the regime of the Canal¹³⁴, - there have also been also cases in which negotiations, extended for many years, have not produced entirely satisfactory results, such as, e.g., the territorial problem between Venezuela and Guyana, and the controversy between Venezuela and Colombia as to maritime delimitation¹³⁵, and the old issue between Bolivia and Chile concerning Bolivia's access to the sea¹³⁶.

Other initiatives involving methods of peaceful settlement other than direct negotiations have likewise been resorted to. In the controversy between Chile and Argentina over the Beagle Channel, for example, shortly after the arbitral award of 1977, the mediation of the Holy See (as from 1979) led to the treaty of peace of 1984 between the two countries¹³⁷. The resolution of the controversy over the Beagle Channel 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)¹³⁸.

Given this most diversified regional framework of resort to means of conflict resolution, most of them outside the institutional machinery of the Organization of

¹³² Oral testimonies that I collected in private interviews with protagonists in the peace process from distinct sides.

¹³³ On the negotiations, cf. H. Gros Espiell, “Le traité relatif au Rio de la Plata et sa façade maritime”, 21 *Annuaire français de droit international* (1975) pp. 241-249.

¹³⁴ Cf., e.g., 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.

¹³⁵ For comments on this latter, cf. 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.

¹³⁶ Cf., e.g., G. Echeverría, M.T. Infante and W. Sánchez, “Chile y Bolivia: Conflicto y Negociación en la Subregión”, *Las Relaciones entre los Países de América Latina* (ed. W. Sánchez), Santiago, Ed. Universitaria, 1980, pp. 153-183.

¹³⁷ On the arbitral award, cf., e.g., J. Dutheil de la Rochère, “L'affaire du Canal de Beagle”, 23 *Annuaire français de droit international* (1977) pp. 408-435.

¹³⁸ For comments, 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.

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American States, it was not surprising to find that, already in its first period of sessions, in 1971, the OAS General Assembly had displayed some concern with the need to strengthen the Inter-American system of peace¹³⁹. Two years later, in 1973, the Special Commission to Study the Inter-American System and to Propose Measures for its Restructuring (CEESI) dwelt upon the theme of the enhancement of the regional system of peaceful settlement¹⁴⁰. Over a decade later, in an opinion of 1985, the Inter-American Juridical Committee went as far as proposing concrete changes in some of the provisions of the Pact of Bogotá¹⁴¹.

The field of peaceful settlement of disputes became in fact 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 reality of the matter in the region, endeavours focussed on the search for individual solutions, adequate to each *cas d'espèce*. This implied an acknowledgement of the virtual immobility of the regional Organization to take effective action in this field as from the first reform of its Charter in 1967 (Protocol of Buenos Aires, effective). 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 of Indias, Colombia, 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 (Article 84); such unilateral 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 (Articles 85-87).

With the new OAS Charter reforms of 1985¹⁴², a much more practical and flexible mechanism was thus devised, carefully avoiding, at the same time, to

¹³⁹ Cf. Comité Jurídico Interamericano, *Recomendaciones e Informes - Documentos Oficiales 1967-1973*, vol. X, OAS General Secretariat, 1978, pp. 347-348 and 356.

¹⁴⁰ Cf. OAS, document OEA/Ser.G/CP/CAJP-54I/84, of 30 July 1984, pp. 88-89. - The 1947 Inter-American Treaty of Reciprocal Assistance (TIAR), a typical product of the cold-war period, though not in force, became likewise object of revision (given the increasing dissatisfaction with its invocation), with the adoption of the 1975 Protocol of Reforms to TIAR, advocating a more restrictive approach to it, whilst at the same time not precluding States of the region to resort to the U.N. Security Council or General Assembly. Cf. Rafael de la Colina, *El Protocolo de Reformas al Tratado Interamericano de Asistencia Recíproca*, Tlatelolco/México, Secretaría de Relaciones Exteriores, 1977, pp. 49, 51, 53 and 55; A. Gómez Robledo, "El Protocolo de Reformas al Tratado Interamericano de Asistencia Recíproca", in *III Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano*, Washington D.C., General Secretariat of the OAS, 1976-1977, pp. 135-137.

¹⁴¹ Cf. Inter-American Juridical Committee, *Recommendations and Reports 1985*, vol. XVII, OAS General Secretariat, 1987, pp. 57-94; and cf. account in Isidoro Zanotti, "[Report:] Regional and International Activities", 17 *University of Miami Inter-American Law Review* (1986) pp. 339-344.

¹⁴² 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 États Américains: Problèmes des droits de traités", 43 *Annuaire français de droit international* (1997) pp. 1-12.

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“impose solutions” upon either of the parties¹⁴³. 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 (Article 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 that means were pursued to tackle a grave situation which was indeed affecting peace in the continent throughout the eighties: the Central-American crisis (cf. *supra*).

The search for *ad hoc* solutions has by no means been limited to the American continent. In the African continent, reference has already been made to the coexistence between the OAU Permanent Commission on Mediation, Conciliation and Arbitration and *ad hoc* committee's subsidiary to the main organs of the regional Organization. These initiatives are but a reflection of the old professed purpose of finding African solutions for inter-African disputes¹⁴⁴. And, in the Asian continent, a recent example is found in 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 U.N. Convention on the Law of the Sea¹⁴⁵; reference can also be made to the *Southern Bluefin Tuna* case (Australia and New Zealand *versus* Japan (1993-2000), encompassing both the arbitral procedure under that Convention and negotiations between the contending parties¹⁴⁶.

VI. The work of the special committee on the charter of the United Nations and on the strengthening of the role of the organization

At global U.N. level, the Special Committee of the Charter of the United Nations and of the Strengthening of the Role of the Organization, established in December 1975¹⁴⁷ and composed of 47 member States¹⁴⁸, soon turned its attentions precisely to the chapter of peaceful settlement of international disputes as an aspect of priority for the United Nations, as the possibilities opened by the Charter "had not been fully utilized"¹⁴⁹. It was observed, from the start, that only 7 States had until then adhered to the Revised General Act of Peaceful Settlement of International Disputes (which

¹⁴³ The new mechanism in a way resembled that of the old Inter-American Commission of Peace (*supra*).

¹⁴⁴ 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 International Law* (1973) pp. 589-593; M. Bedjaoui, “Le règlement pacifique des différends africains”, ...*Annuaire français de droit international* (1972) p. 92.

¹⁴⁵ 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.

¹⁴⁶ Cf., e.g., N. Tanaka, “Some Observations on the *Southern Bluefin Tuna* Arbitration Award”, 44 *Japanese Annual of International Law* (2001) pp. 9-34.

¹⁴⁷ U.N. General Assembly resolution 3499 (XXX), of 15.12.1975.

¹⁴⁸ Cf. U.N. suppl. n. 33 (A/33/33), *cit. infra* n. (154), pp. 2-3.

¹⁴⁹ U.N., *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization*, suppl. n° 33 (A/32/33), 1977, pp. 39 e 42.

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had entered into force in 1950), and that perhaps one should restudy the mechanisms of peaceful settlement in connection with a proposal of elaboration of a treaty on non-use of force in international relations¹⁵⁰ (cf. *infra*).

In this respect, the Secretary General prepared a study (February 1976) containing a series of suggestions advanced by member States. The possibility was contemplated of a general treaty, and, concerning the mechanisms of peaceful settlement, of an enlargement of the ideas incorporated into chapter VI of the Charter; as to the options available under Article 33, it was suggested that one should foresee a sequence between direct negotiations and interposition of third parties (for disputes not settled by the former), and of the acceptance of arbitral or judicial solution when negotiation, investigation, mediation or conciliation appeared insufficient¹⁵¹.

More concretely, the strengthening of the functions of the Security Council, the General Assembly and the Secretary General as to fact-finding was supported, through the more effective use of groups of experts and fact-finding panels; there was also support for preventive diplomacy and a wider use of good offices by the Secretary General, as well as for more effective conciliatory procedures; hence the suggestion that emerged of the creation of a Commission of Conciliation and Arbitration, to remain permanently at the disposal of States¹⁵², and of permanent commission (of the General Assembly, pursuant Articles 10, 14 and 22 of the U.N. Charter) exercising the functions of mediation, good offices and conciliation, both in dispute settlement and in the prevention of the aggravation of controversies¹⁵³.

In March 1978 the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization decided to establish a Working Group, the basic priority of which would become the topic of peaceful settlement of disputes. The Special Committee preliminarily prepared a list of 51 proposals¹⁵⁴ and examined the report of the Working Group in 1979¹⁵⁵. After consultations with the governments and collection of the working papers presented by them, the Working Group reached the conclusion, in 1980, that it should prepare a draft Declaration on Peaceful Settlement of Disputes¹⁵⁶. Once launched the drafting process, in the

¹⁵⁰ *Id.* pp. 42-46.

¹⁵¹ *Id.* pp. 140-143.

¹⁵² Such Commission would be created by the Security Council (Article 29), and composed of 5, 7, 9 or 11 persons of recognized merit (such as former Presidents of the General Assembly), respected the equitable geographical distribution; it would adopt its own procedures and methods, and its work would be conducted in a confidential way; *id.* pp. 143-144.

¹⁵³ There were naturally also those who opposed those suggestions (of creation of permanent organs) on the basis of State sovereignty and of the right of States of free choice of means of peaceful settlement of disputes; cf. *id.* pp. 144-145.

¹⁵⁴ Cf. U.N., *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization*, suppl. n. 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 Governing Friendly Relations and Cooperation among States in Accordance with the U.N. Charter; cf. *id.* pp. 15 and 21.

¹⁵⁵ Cf. U.N., *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization*, suppl. n. 33 (A/34/33), 1979, pp. 5-18.

¹⁵⁶ Cf. U.N., *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the*

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following year a detailed study was undertaken of the texts prepared by the Working Group and through informal consultations (to member States) made by the Special Committee¹⁵⁷.

At last, in 1982, the Special Committee concluded the draft of the Manila Declaration on Peaceful Settlement of International Disputes, submitted to the appreciation of the U.N. General Assembly; the draft started with a preamble (with 11 *consideranda*), followed by part I, with 13 paragraphs. Therein were reaffirmed the principles of good faith, of peaceful settlement of disputes, of sovereign equality of States¹⁵⁸. Part II of the draft, with 6 paragraphs, started by calling upon member States to utilize the provisions of the U.N. Charter - particularly those of chapter VI - on peaceful settlement of disputes. Especially significant were paragraphs 3 to 6, devoted, respectively, to the General Assembly, the Security Council, the International Court of Justice and the U.N. Secretary General.

Paragraph 3 reaffirmed the function of the U.N. 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. Paragraph 4 reassured the main function of the U.N. Security Council in the area (e.g., Article 33), referring to its investigatory powers (of *fact finding*) and to the utilization of subsidiary organs in the exercise of its functions. The following paragraph pointed out the utility of recourse to the International Court of Justice 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 application¹⁵⁹.

Paragraph 6 reaffirmed the functions of the U.N. Secretary-General, in connection with the operation of the Security Council and the General Assembly, in the settlement of international disputes¹⁶⁰. Part III contained provisions, in the light of the U.N. Charter itself and without prejudice to the right of self-determination of peoples, as a decisive step to the strengthening of the peaceful settlement of disputes and the effectiveness of the U.N. in this area by means of the progressive

¹⁵⁷ *Role of the Organization*, suppl. n. 33 (A/35/33), 1980, pp. 63-108.

¹⁵⁸ Cf. U.N., *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role for the Organization*, suppl. n. 33 (A/36/33), 1981, pp. 71-91.

¹⁵⁹ It further referred to the faculty (mistakenly termed by the draft as "principle") of free choice of means of peaceful settlement (negotiation, investigation, mediation, conciliation, arbitration, judicial settlement, recourse to regional organs, good offices or other peaceful means). Recourse to regional organs was not regarded as a prerequisite to lodge a dispute with the U.N. Security Council or the General Assembly, and in the case of failure of any of the means of peaceful settlement (*supra*), recourse to the Security Council was foreseen. The threat or use of force by the contending parties was prohibited. Cf. U.N., *Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization*, suppl. n. 33 (A/37/33), 1982, pp. 9-11; the draft Declaration further referred to the 1970 Declaration on Principles of International Law Governing Friendly Relations and Cooperation among States in Accordance with the U.N. Charter; cf. *id.*, p. 11.

¹⁶⁰ After calling upon States to recognize as compulsory the jurisdiction of the Court (Article 36 of the Statute), paragraph 5 raised the possibility that the organs and specialized agencies of the U.N. request - duly authorized - opinions from the Court on juridical questions pertaining to the ambit of their activities; cf. note (150), *infra*.

¹⁶⁰ Cf. *id.*, pp. 12-14.

development and codification of international law¹⁶¹. The Manila Declaration on the Peaceful Settlement of International Disputes was at last adopted by U.N. General Assembly resolution 37/10, of 15 November 1982.

VII. Peaceful settlement and the renunciation of the use of force in international relations

In the past, from the Hague Conventions of 1899 and 1907 on peaceful settlement of international disputes to date, endeavours were undertaken with the concrete purpose of prohibiting the use or threat of force in the conduct of international relations. Thus, for example, in the same year when the League of Nations sponsored the General Act of Geneva on Peaceful Settlement of International Disputes (1928)¹⁶², the well-known Pact Briand-Kellogg (or Treaty of Paris, of renunciation to war) heralded the acknowledgement of the three basic principles of peaceful settlement of disputes, of condemnation of war as a means of settlement of disputes, and of renunciation of recourse to war as an instrument of foreign policy¹⁶³. As from 1932, one started invoking, in inter-State relations, the so-called Stimson doctrine of non-recognition of situations generated by force¹⁶⁴. And, in the American continent, the Anti-Belligerent Treaty of Non-Aggression and Conciliation (or Pact Saavedra Lamas - cf. *supra*) was celebrated in 1933.

Some years later, the system of collective security was formed (in the United Nations era), - endorsing the principles of peaceful settlement of international disputes and of the prohibition of the use of force by the States in their international relations, - 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 States¹⁶⁵. Just as the notion of sovereignty no longer exerted any function whatsoever in the *interpretation* of treaties¹⁶⁶, the notion of "vital interests" of the States became anachronical in the specific context of the peaceful settlement of international disputes¹⁶⁷.

In the late seventies, in the debates of the U.N. Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations, in

¹⁶¹ Cf. *id.*, p. 14; herein once again a reference was made to the Declaration of Principles of International Law Governing Friendly Relations and Cooperation Among States in Accordance with the U.N. Charter.

¹⁶² Revised, by the U.N., in 1949, having entered into force in the following year.

¹⁶³ J. Zourek, *L'interdiction de l'emploi de la force en droit international*, Leiden/Genève, Sijthoff/Inst. H. -Dunant, 1974, pp. 39-42.

¹⁶⁴ Doctrine formulated by the U.S. Secretary of State Stimson on 07.01.1932 (following the Japanese invasion of Mandchuria), consisting in the non-recognition by the U.S. government of situations in conflict with the Pact Briand-Kellogg of 1928 of renunciation to war. Cf. C.-A. Collard, *Institutions internationales*, Paris, Dalloz, 1956, pp. 195-208; Alf Ross, *A Textbook of International Law - General Part*, London, Longmans, 1947, pp. 118-122; P. Reuter and A. Gros, *Traité et documents diplomatiques*, Paris, P.U.F., 1963, pp. 510-514.

¹⁶⁵ J. Zourek, *op.cit.* *supra* n. (163), pp. 47-49.

¹⁶⁶ Lord McNair, "Treaties and Sovereignty , *Symbolae Verzijl* (présentées au Professeur J.H.W. Verzijl à l'occasion de son LXXième. anniversaire)", La Haye, M. Nijhoff, 1958, pp. 222-237.

¹⁶⁷ J. Zourek, *op.cit.* *supra* n. (163), p. 121.

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considering the topic of settlement of disputes, a then current preference was detected for flexible and *ad hoc* solutions (surpassing arbitral or judicial settlement), and emphasis was laid on the relevance of fact-finding capacity of the General Assembly and of the Security Council (and subsidiary organs of both) and of the powers of the Secretary General under Article 99 of the U.N. Charter¹⁶⁸. It was observed, in the debates that followed in 1980, that the concern of the non-aligned countries with their security and stability could 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 than by the adoption of a new treaty reiterating the existing obligations¹⁶⁹.

For the representatives of Spain as well as India, for example, the principle of the non-use of force in international relations had become an imperative norm of international law (*jus cogens*, in the meaning of Articles 53 and 64 of the 1969 Vienna Convention on the Law of Treaties)¹⁷⁰, the delegate of India recalling that the principle at issue had already been reasserted in various instruments, such as the 1970 Declaration of Principles of International Law Governing Friendly Relations and Cooperation among States, the 1970 Declaration on the Strengthening of International Security, the 1974 Definition of Aggression, and the resolution 2936 (XXVII) on the non-use of force in international relations and the permanent prohibition of the use of nuclear weapons¹⁷¹. 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 law¹⁷², - a thesis which was to appear in the report of the Working Group [of the Special Committee]¹⁷³.

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, calls 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 security¹⁷⁴. The *Handbook on the Peaceful Settlement of Disputes between States* prepared by the Office of Legal Affairs of the United Nations, and published in 1992, contains in fact several examples of initiatives of

¹⁶⁸ U.N., *Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations*, suppl. n° 41 (A/34/41), 1979, p. 25.

¹⁶⁹ Cf. U.N., *Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations*, suppl. n. 41 (A/35/41), 1980, p. 26.

¹⁷⁰ Cf. *id.*, pp. 11 and 28.

¹⁷¹ *Id.*, p. 29. One attempted to reach a definition of the threat or use of force (*ibid.*, pp. 47-55), and the report of the Working Group referred *inter alia* to the process of conciliation in the ambit of the Security Council initiated by the Secretary General or any member State (*id.*, p. 43).

¹⁷² U.N., *Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations*, suppl. n. 41 (A/37/41), 1982, pp. 17, 37, 39, 49, 55, 57, 60-61 and 84-85, respectively.

¹⁷³ *Id.*, pp. 54 and 59.

¹⁷⁴ U.N., *Handbook on the Peaceful Settlement of Disputes...*, *op.cit.*, *infra* n. (175), p. 25.

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prevention, as well as settlement, of international disputes, undertaken by the U.N. Security Council, General Assembly and the Secretary-General¹⁷⁵.

VIII. Peaceful Settlement beyond state voluntarism: some new trends

As from the aforementioned United Nations debates of the eighties, an awareness seemed to have been formed to the effect of overcoming the vicissitudes of free will in the present domain of international law. Thus, a point proposed, in relation to dispute settlement, in the work not only of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, but also throughout the work of the III U.N. Conference on the Law of the Sea, was the institutionalization of recourse to conciliation, the operation of which could, in turn, foster negotiations towards attaining peaceful settlement¹⁷⁶. In fact, on successive occasions the initiative of a *compulsory recourse to conciliation* has been taken.

Such proposal found expression in the 1982 U.N. Convention on the Law of the Sea (Articles 297(2) and (3) and 298(1)(a)), just as it likewise did in some of the "codification Conventions" (e.g., 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 on Treaties, the 1983 Vienna Convention on State Succession on Assets, Archives and State 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 Diversity¹⁷⁷.

In the same line of thinking, the 1997 Ottawa Convention on Anti-Personnel Mines and the 1997 U.N. 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"¹⁷⁸.

These initiatives further suggest a determination of overcoming sheer State voluntarism, and gradually moving towards the configuration of some degree of

¹⁷⁵ U.N., *Handbook on the Peaceful Settlement of Disputes between States*, N.Y., U.N. Office of Legal Affairs/Codification Division, 1992, pp. 120-121 and 127-129.

¹⁷⁶ H. Caminos, *op.cit.*, *supra* n. (93), p. 28; and cf. *supra*.

¹⁷⁷ T. Treves, "Recent Trends in the Settlement of International Disputes", 1 *Cursos Euromediterráneos Bancaria de Derecho Internacional - Castellón* (1997) pp. 415-416.

¹⁷⁸ *Id.*, pp. 416-417.

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compulsory settlement also in relation to the operation of non-jurisdictional methods of dispute settlement, - to the benefit, ultimately, of the international community as a whole. These developments cannot pass unperceived in a general assessment of the peaceful settlement of international disputes, which nowadays ought necessarily to be directly related to the general interests of the international community.

At United Nations level, the 1982 Manila Declaration on the 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 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 [cf.] mechanism of settlement of disputes (with double degree of jurisdiction¹⁷⁹), of compulsory character, in the ambit of the law on international trade. This mechanism comes to emphasize (although still with some imperfections in practice¹⁸⁰) multilateralism in contemporary international relations, with rather satisfactory results to date.

In the operation of the WTO mechanism referred to, the relationship between the environment and international trade, for example, has been considered¹⁸¹. 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 law¹⁸², and orients itself by 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 in a way of promoting, as far as possible, the foreseeability and the

¹⁷⁹ That is, the panels and the Appellate Body.

¹⁸⁰ 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).

¹⁸¹ Thus, e.g., in the well-known *Shrimp/Turtle* case (1999), - one of the most relevant of its practice to date, - it was deemed that a country can have a legal interest in activities, undertaken in another country, harmful to migratory species and species in extinction; Ph. Sands, "Turtles and Torturers: The Transformation of International Law", 33 *New York University Journal of International Law and Politics* (2000) p. 534.

¹⁸² J. Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?", 95 *American Journal of International Law* (2001) pp. 535-578; D. Palmer and P.C. Mavroidis, "The WTO Legal System: Sources of Law", 92 *American Journal of International Law* (1998) pp. 398-413.

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stability in the *contentieux* of international trade; hence its tendency to a preponderantly juridical outlook¹⁸³. 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 Law¹⁸⁴. 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, - what in turn reverts itself, ultimately, to the benefit of the evolution of International Law itself¹⁸⁵.

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 systems¹⁸⁶, in particular under some multilateral treaties¹⁸⁷, is bound to foster a less permissive and more clearly rule of law-oriented approach, emphasizing obligations to cooperate, which at times may appear as being truly *erga omnes partes*¹⁸⁸. 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

¹⁸³ J.H. Jackson, *The World Trade Organization - Constitution and Jurisprudence*, London, Royal Institute of International Affairs, 1999 [reprint], pp. 61-62.

¹⁸⁴ *Id.*, pp. 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.

¹⁸⁵ 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.

¹⁸⁶ Such as, *inter alia*, as already seen, the panels and the Appellate Body of the current mechanism of dispute settlement of the World Trade Organization (WTO, *supra*).

¹⁸⁷ E.g., compulsory recourse to conciliation and to fact-finding (*supra*).

¹⁸⁸ A. Peters, "International Dispute Settlement: A Network of Cooperative Duties", 14 *European Journal of International Law* (2003) pp. 1-5, 9-11 and 30-34.

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keeping with the general interests of the international community. By and large, at 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 a few cases, to arbitral and judicial solutions. It is therefore very difficult to generalize as to the greater or lesser effectiveness of a given method of peaceful settlement. The pattern of diversity of means of conflict resolution and of the search for individual solutions is, besides clearly identifiable, a reflection of the perennial tension between the States' general duty of peaceful settlement and their freedom of choice as to the means of settlement (which might appear more suitable to them). Such ambivalence has always permeated this area (of conflict resolution) of public international law.

There has thus been an element of unpredictability in dispute settlement, which remains a domain of international law still impregnated to some extent with elements of State voluntarism, despite all attempts of its recent codification and progressive development at universal U.N. level¹⁸⁹. Yet, it is undeniable that some progress has been achieved in recent years, as illustrated by the mechanism of dispute settlement of the 1982 U.N. Convention on the Law of the Sea; in addition, 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 disclosed a greater awareness in the international community as to the need of international compulsory jurisdiction.

If international practice yielded in the past to State voluntarism, such posture is in our days under heavy criticism: in fact, if it is by their free will that States apply norms of international law, - as that conception sustains, - it is also by their free will that they violate those norms, and the voluntarist conception thus revolves in vicious circles that can hardly provide a reasonable explanation for the evolution itself of general international law¹⁹⁰. Other domains of public international law have long overcome the voluntarist dogma (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), 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 end¹⁹¹.

¹⁸⁹ Such as, e.g., at global (United Nations) level, the 1982 Manila Declaration on the Peaceful Settlement of International Disputes; the 1988 U.N. 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 U.N. General Assembly resolutions (including resolution 44/21, of 15.11.1989) on the enhancement of international peace in accordance with the U.N. Charter. Cf. B. Boutros-Ghali, *An Agenda for Peace* (1995), 2nd. ed. (with Supplement), N.Y., U.N., 1995, p. 52; and cf. also United Nations, *Handbook on the Peaceful Settlement of Disputes between States*, New York, U.N., 1992, pp. 1-153.

¹⁹⁰ A.A. Cançado Trindade, "The Voluntarist Conception of International Law: A Reassessment", 59 *Revue de droit international de sciences diplomatiques et politiques* (1981) pp. 201-240, esp. pp. 224-225.

¹⁹¹ 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 [cf.].

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First, there is consensus today on the importance of *prevention*, - of taking all possible preventive measures to avoid the outbreak and escalade of conflicts. Secondly, the understanding now prevails whereby the settlement of disputes cannot focus only on the symptoms, but ought to encompass also the underlying causes which generate them¹⁹², and their removal, - if a durable solution is to be achieved at all. Thirdly, and last but not least, 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 prerrogative of free choice of means, it is bound to benefit from recent advances on international adjudication in particular. 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.

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 procedure¹⁹³. The advent of the League of Nations, added to the 1928 Briand-Kellogg Pact, in turn, contributed to relate peaceful settlement to advances in the substantive law itself¹⁹⁴. In the United Nations era, there have been successive initiatives of institutionalization of procedures of peaceful settlement (e.g., 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 retaken¹⁹⁵ by the 1991 Protocol of Madrid on the Protection of the Antarctica Environment. This is likewise found¹⁹⁶, although without a compulsory character, in the 1985 Convention on the Protection of the Ozone Layer, in the 1992 Framework Convention on Climate 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

¹⁹² B. Boutros-Ghali, *op.cit.*, *supra* n. (189), p. 37, and cf. pp. 5-72.

¹⁹³ L. Caflisch, *op.cit.*, *supra* n. (90), 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. Redslab, *Traité de droit des gens*, Paris, Rec. Sirey, 1950, pp. 354-359 and 368-377.

¹⁹⁴ L. Caflisch, *op.cit.*, *supra* n. (90), pp. 259-261.

¹⁹⁵ In a simplified way, with a choice between the ICJ and arbitration.

¹⁹⁶ In the same simplified formula.

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of procedures open to the contending parties at least seeks to ensure the settlement of disputes thereunder¹⁹⁷.

Parallel to the multilateral treaties, the U.N. General Assembly has, on distinct occasions, expressed the need and lends support to the institutionalization of procedures. It has, e.g., contemplated the method of *investigation* operating on a permanent basis (including even a list [roster] of fact-finders)¹⁹⁸; it has, furthermore, recommended a wider use of a general procedure of *conciliation*¹⁹⁹, given its usefulness in practice. In one of its best known resolutions in the present context, incorporating the Manila Declaration on Peaceful Settlement of Disputes (of 15.11.1982), 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 de la réalisation pratique du principe du règlement pacifique des différends”²⁰⁰.

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, e.g., the following ones: the relevance of *prevention* of international disputes²⁰¹, further use of conciliation, flexible forms of mediation, institutionalization of inquiry and fact-finding, contribution in recent years of Truth and Reconciliation Commissions, enhancement of the advisory function of the ICJ, participation of non-State actors and individuals in ICJ proceedings, rendering regional organizations entitled to request advisory opinions from the ICJ²⁰². The current reconsideration of the matter discloses the renewed importance attributed to it by the international community.

There is, in addition, 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. A considerable progress has been achieved, e.g., 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 Rights²⁰³. Much has

¹⁹⁷ L. Caflisch, *op.cit. supra* n. (90), pp. 448-449.

¹⁹⁸ G.A. resolution 2329(XXII) of 13.12.1967.

¹⁹⁹ G.A. resolution 50/50, of 11.12.1995.

²⁰⁰ 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.

²⁰¹ As in, e.g., international environmental law.

²⁰² 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.

²⁰³ Cf. A.A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Santiago, Editorial Jurídica de Chile, 2001, pp. 15-455; A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104.

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been achieved also in specialized areas, such as those of environmental dispute settlement and 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 States, which are juridical equal, peaceful settlement of international disputes may be perceived as beneficial to States, and, ultimately, to the international community as a whole.

After all, the settlement of disputes on the basis of the rule of law is bound to serve better the interests of contending States than the calculations of power with their characteristically 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 provisions²⁰⁴. Peaceful settlement by means of the application of the methods known in international law draws attention to the juridical equality of States and the role of law in the present domain. States seem at last to have become aware that they can not 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 Governing Friendly Relations and Cooperation among States (2nd. principle, par. 5), but the Manila Declaration added a

²⁰⁴ M.M.T.A. Brus, *Third Party Dispute Settlement in an Interdependent World*, Dordrecht, Nijhoff, 1995, p. 183.

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qualification, to the effect that the 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” (3rd. principle, par. 3, and cf. par. 10)²⁰⁵. It should not pass unnoticed that Article 33(1) of the U.N. Charter, in opening up a wide choice of means of peaceful settlement to contending parties (negotiation, inquiry, 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 U.N. 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 in the present chapter of this General Course, 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 means of inter-State conflicts of interests. (...) The chapter on peaceful settlement of international disputes has constantly been particularly vulnerable to manifestations of State voluntarism. (...) The actual behaviour of States in this way conditions not only the settlement of a dispute (between two or more of them) but its very configuration. (...) In contrast, in the fulfillment of their international obligations (...) 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”. (...) Rather than trying to reach a settlement of a conflict of interests between two or more States, (...) here (...) the concern with reaching a form of “settlement” ought to weigh less than the concern with ensuring the due application (...) of the relevant international norms”²⁰⁶.

²⁰⁵ A.A. Cançado Trindade, “Co-existence and Co-ordination of Mechanisms...”, *op.cit.*, *infra* n. (206), pp. 387-388 and n. 1284.

²⁰⁶ A.A. Cançado Trindade, “Co-existence and Coordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)”, 202 *Recueil des Cours de l’Académie de Droit International de La Haye*

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In the same line of thinking, Karel Vasak has aptly emphasized the primacy, in this last domain, of the “valeurs communes à l'ensemble des États parties” to the human rights treaties at issue²⁰⁷. The international experience gathered and accumulated in recent years in the settlement of human rights cases has contributed to shift the emphasis to considerations of general interest or *order 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”²⁰⁸.

In peaceful-dispute settlement, in any case, despite recurring invocations of the faculty 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 traditional wide - and almost limitless - freedom of choice of means of peaceful settlement that States were used to enjoy, or were 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 international peace and security. The decreasing discretion left to contending States is nowadays noticeable, besides the International Law of Human Rights, in 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.

(1987) pp. 385-389, and cf. p. 390.

²⁰⁷ K. Vasak, “Le droit international des droits de l'homme”, 140 *Recueil des Cours de l'Académie de Droit International de La Haye* (1974) pp. 383-384.

²⁰⁸ F. Kalshoven (ed.), *The Centennial of the First International Peace Conference - Reports and Conclusions*, The Hague, Kluwer, 2000, pp. 1 and 54 (interventions by F. Kalshoven and H. Blix, respectively).

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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"²⁰⁹; the U.N. Charter itself refers to disputes or situations likely to affect friendly relations among States and to endanger international peace and security (Articles 33 and 14), and, throughout the last decades, the concept of "international concern" came 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, insofar as their exercise contributes not only to settle disputes but also to restore the equilibrium of values of the international community²¹⁰.

The relationship between the principles of peaceful settlement of disputes and of the duty of international cooperation 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 gain²¹¹.

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 settlement of disputes), in conformity with a general principle of international law, and in fulfillment of the general interests of the international community as a whole. Recent developments in the domain of peaceful settlement of international disputes indicate that an appropriate study of the matter, 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.

The general principle of peaceful settlement of international disputes, in turn, brings to the fore other principles in support of this approach: after all, the irruption and persistence of international disputes cause damage to international relations, and their aggravation put at risk international peace and security. Hence the pressing need to have them peacefully settled, in pursuance also of the principle of the prohibition

²⁰⁹ V. Pechota, "Complementary Structures of Third-Party Settlement of International Disputes", in *Dispute Settlement through the United Nations* (ed. K. Venkata Raman), Dobbs Ferry N.Y., Oceana, 1977, p. 174, and cf. 217.

²¹⁰ Cf. *id.*, pp. 175-176 and 178-180.

²¹¹ M. Lachs, "Some Thoughts of the Role of Good Faith in International Law", *Declarations on Principles, A Quest for Universal Peace - Liber Amicorum Discipulorumque B.V.A. Roling*, Leyden, Sijthoff, 1977, p. 54. E cf. E. Zoller, *La bonne foi en droit international public*, Paris, Pédone, 1977, pp. 3-354.

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of the threat or use of force in international law. The principles of international cooperation and good faith have also a role to play herein, disclosing the function of law in dispute settlement²¹².

Furthermore, the spectre of nuclear deadlock, and the current threat of the arsenals of weapons of mass destruction, and of the arms trade, as well as the irruption of violent [internal] conflicts in different latitudes in recent years, mark their alarming presence in current concerns with the need to secure greater effectiveness to 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 necessary²¹³. 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*, - centred on the human person rather than on the State, - of the international law for humankind, at this beginning of the XXIst. 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. The determination of safeguarding the integrity of international jurisdiction is nowadays illustrated by a few recent developments on judicial settlement, as illustrated, in particular, by the recent case-law of international tribunals of human rights.

²¹² 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.

²¹³ Cf. *The Collected Papers of John 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 - Études 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.