TOWARDS COMPULSORY JURISDICTION: CONTEMPORARY INTERNATIONAL TRIBUNALS AND DEVELOPMENTS IN THE INTERNATIONAL RULE OF LAW

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(PART I)*

Summary: I. Introduction: Developments in the International Rule of Law; II. The Search for Compulsory Jurisdiction: The Saga of the Optional Clause of Compulsory Jurisdiction; III. The Recurring Need and Quest for Compulsory Jurisdiction; IV. International Rule of Law: The Growth of International Jurisdiction.

I. Introduction: Developments in the International Rule of Law

Throughout the last decades, the expansion of international jurisdiction by means of the advent of new international tribunals has fostered the reassuring access to international justice an increasingly greater number of *justiciables*. This has brought to the fore the old issue of the search for compulsory jurisdiction, and has fostered new developments in the international rule of law. Most of the classic works on international adjudication date from a time when one counted only on, besides the Permanent Court of Arbitration and international arbitral tribunals, the Hague Court - the Permanent Court of International Justice [PCIJ] followed by its successor, the International Court of Justice [ICJ].

As international adjudication has experienced, in recent years, the aforementioned expansion (a considerable one), with the emergence of new international tribunals, this phenomenon appears to acknowledge, at first, that judicial settlement of international disputes comes to be seen as retaining a superiority, at least at conceptual level, in relation to political means of settlement, to the extent that the solution reached is based on the rule of law, and no State is to regard itself as standing above the law. International jurisdiction seems nowadays to go beyond the framework of methods of peaceful settlement of international disputes.

Its expansion in contemporary International Law, in effect responds and corresponds to a need of the international community of our times. The international rule of law finds expression no longer only at national, but also at international, level. At this latter, the idea of a *préeminence* of International Law has gained ground in recent years, as acknowledged, e.g., by the Advisory Opinion of the ICJ on the *Obligation to Arbitrate by Virtue of Section 21 of the 1947 U.N. Headquarters Agreement* (1988); this *idée-force* has fostered the search for the realization of justice

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under the rule of law at international level, and has stressed the universal dimension of a new *jus gentium* in our days[1].

The growth of international adjudicative organs transcends peaceful settlement of disputes, pointing to the gradual formation of a judicial branch of the international legal system[2]. There is great need for a sustained law-abiding system of international relations[3] (a true international rule of law); nowadays "any progress in International Law passes through progress in international adjudication"[4]. Judicial settlement bears testimony of the superiority of law over will or pressure or force. The applicable legal norms preexist the dispute itself.

Some advances have been achieved in recent years in the domain of international compulsory jurisdiction, although there appears to remain still a long way to go. A current reassessment of international adjudication can thus be appropriately undertaken, in my view, in historical perspective and in the context of the growth of international jurisdiction, bearing in mind the recurring need and quest for compulsory jurisdiction, in pursuance of the realization of international justice. This is what I purport to do this year, in this Course of International Law of 2010 organized by the Inter-American Juridical Committee of the OAS (Part I). The reflections that follow are not meant to be exhaustive, as I intend to complement them with a series of additional reflections on the developments examined herein, in the following Course of International Law next year, the Course of 2011 (Part II).

II. The Search for Compulsory Jurisdiction: The Saga of the Optional Clause of Compulsory Jurisdiction

1. From the Professed Ideal to a Distorted Practice

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

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[1] J.Y. Morin, "L'état de Droit: émergence d'un principe du Droit international", 254 *Recueil des Cours de l'Académie de Droit International de La Haye [RCADI]* (1995) pp. 199, 451 and 462.

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

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

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

> "The States Parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a) the interpretation of a treaty; b) any question of international law; c) the existence of any fact which, if established, would constitute a breach of an international obligation; d) the nature or extent of the reparation to be made for the breach of an international obligation".

Article 36(3) adds that "the declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time"[5].

The origin of the aforementioned provision is found in the *travaux préparatoires* of the original Statute of the PCIJ. This latter was drafted in 1920 by an Advisory Committee of Jurists (of 10 members)[6], appointed by the Council of the League of Nations, and which met at The Hague, in June-July 1920. On that occasion there were those who favoured the pure and simple recognition of the compulsory jurisdiction of the future PCIJ, to what the more powerful States were opposed, objecting that one had gradually to come to trust the international tribunal to be created, before conferring upon it compulsory jurisdiction *tout court*. In order to overcome the deadlock within the Committee of Jurists referred to, one of its members, the Brazilian jurist Raul Fernandes, proposed the ingenuous formula which was to become Article 36(2) of the Statute - the same as the one of the present Statute of the ICJ, - which came to be known as the "optional clause of the compulsory jurisdiction"[7]. The Statute, approved on 13.12.1920, entered into force on 01.09.1921[8].

At that time, the decision that was taken constituted the initial step that, during the period of 1921-1940, contributed to attract the acceptance of the compulsory jurisdiction - under the optional clause - of the PCIJ by a total of 45 States[9]. The

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

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

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

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

[9] Cf. the account of a Judge of the old PCIJ, M.O. Hudson, *International Tribunals - Past and Future*, Washington, Carnegie Endowment for International Peace/Brookings Institution, 1944, pp. 76-78. - That total of 45 States represented, in reality, a high proportion, at that epoch, considering that, at the end of the thirties, 52 States were members of the League of Nations (of which the old PCIJ was not part, distinctly from the ICJ, which is the

formula of Raul Fernandes[10], firmly supported by the Latin-American States[11], was incorporated into the Statute of the PCIJ; it served its purpose in the folowing two decades. Even before the creation and operation of the PCIJ in the period already referred to, the pioneering example of the Central American Court of Justice, created in 1907, should not pass unnoticed. That Court, endowed with a wide jurisdiction, and to which individuals had direct access (enabled to complain even against their own States), operated on a continuous basis during one decade (1908-1918). It heralded the advances of the rule of law at international level, and, during its existence, it was regarded as giving expression to the "Central American conscience"[12].

At the San Francisco Conference of 1945, the possibility was contemplated to take a step forward, with an eventual automatic acceptance of the compulsory jurisdiction of the new ICJ; nevertheless, the great powers - in particular the United States and the Soviet Union - were opposed to this evolution, sustaining the retention, in the Statute of the new ICJ, of the same "optional clause of compulsory jurisdiction" of the Statute of 1920 of the predecessor PCIJ. The *rapporteur* of the Commission of Jurists (entrusted with the study of the matter at the San Francisco Conference of 1945), the French jurist Jules Basdevant, pointed out that, although the majority of the members of the Commission favored the automatic acceptance of the compulsory jurisdiction, there was no political will at the Conference (and nor in the Dumbarton Oaks proposals) to take this step forward[13].

Consequently, the same formulation of 1920, which corresponded to a conception of International Law of the beginning of the XXth. century, was maintained in the present Statute of the ICJ. Due to the intransigent position of the more powerful States, a unique opportunity was lost to overcome the lack of

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main judicial organ of the United Nations, and whose Statute forms an organic whole with the U.N. Charter itself).

[10] In his book of memories published in 1967, Raul Fernandes revealed that the Committee of Jurists of 1920 was faced with the challenge of establishing the basis of the jurisdiction of the PCIJ (as from the mutual consent among the States) and, at the same time, of safeguarding and reaffirming the principle of the juridical equality of the States; cf. R. Fernandes, *Nonagésimo Aniversário - Conferências e Trabalhos Esparsos*, vol. I, Rio de Janeiro, M.R.E., 1967, pp. 174-175.

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

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

[13] Cf. the account of R.P. Anand, *op. cit. supra* n. (7), pp. 38-46; and cf. also, on the issue, S. Rosenne, *The Law and Practice of the International Court*, vol. I, Leyden, Sijthoff, 1965, pp. 32-36; Ian Brownlie, *Principles of Public International Law*, 6th. ed., Oxford, University Press, 2003, pp. 677-678; O.J. Lissitzyn, *The International Court of Justice*, N.Y., Carnegie Endowment for International Peace, 1951, pp. 61-64.

automatism of the international jurisdiction and to foster a greater development of the compulsory jurisdiction of the international tribunal. It may be singled out that all this took place at the level of purely inter-State relations. The formula of the optional clause of compulsory jurisdiction (of the ICJ) which exists today, is nothing more than a scheme of the twenties, stratified in time[14], and which, rigorously speaking, no longer corresponds to the needs of the international *contentieux* not even of a purely inter-State dimension[15].

Such is the case that, by mid-2005, for example, of the totality of member States of the United Nations, no more than 69 States were subject to the compulsory jurisdiction of the ICJ by acceptance of the optional clause of Article 36(2) of its Statute[16], - that is, roughly a third of the international community of our days. And several of the States which have utilized it, have made a distorted use of it, denaturalizing it, in introducing restrictions which militate against its *rationale* and deprive it of all efficacy. In reality, almost two-thirds of the declarations of acceptance of the aforementioned clause have been accompanied by limitations and restrictions which have rendered them "practically meaningless"[17].

One may, thus, seriously question whether the optional clause keeps on serving the same purpose which inspired it at the epoch of the PCIJ[18]. The rate of its acceptance in the era of the ICJ is proportionally inferior to that of the epoch of its predecessor, the PCIJ. Furthermore, throughout the years, the possibility opened by the optional clause of acceptance of the jurisdiction of the international tribunal became, in fact, object of excesses on the part of some States, which only accepted

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

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

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

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

[18] Cf. statistic data *in* G. Weissberg, *op. cit. supra* n. (17), pp. 160-161; however, one ought to recall the *clauses compromissoires* pertaining to the contentious jurisdiction of the ICJ, which, in the mid-seventies, appeared in about 180 treaties and conventions (more than two thirds of which of a bilateral character, and concerning more than 50 States - *ibid*., p. 164).

the compulsory jurisdiction of the ICJ in their own terms, with all kinds of limitations[19]. Thus, it is not at all surprising that, already by the mid-fifties, one began to speak openly of a *decline* of the optional clause[20].

Those excesses occurred precisely because, in elaborating the Statute of the new ICJ, one failed to follow the evolution of the international community. One abandoned the very basis of the compulsory jurisdiction of the ICJ to a voluntarist conception of International Law, which prevailed at the beginning of the last century, but was subsequently dismissed by its harmful consequences to the conduction of international relations, -such as vehemently warned by the more authoritative contemporary international juridical doctrine. There can be no doubt whatsoever that the distorted and incongruous practice, developed under Article 36(2) of the Statute of the ICJ, definitively does not serve as an example or model to be followed by the States Parties to treaties of protection of the rights of the human being (such as the European and American Conventions on Human Rights), in relation to the extent of the jurisdictional basis of the work of the European and Inter-American Courts of Human Rights.

2. International Compulsory Jurisdiction: Reflections *Lex Lata*

Contemporary International Law has gradually evolved, putting limits to the manifestations of a State voluntarism which revealed itself as belonging to another era[21]. Much progress has here been achieved due to the impact of the International Law of Human Rights upon Public International Law. The methodology of interpretation of human rights treaties[22], to start with, has been developed as from the rules of interpretation set forth in International Law (such as those formulated in Articles 31-33 of the two Vienna Conventions on the Law of Treaties, of 1969 and

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

[20] C.H.M. Waldock, "Decline of the Optional Clause", 32 *BYBIL* (1955-1956) pp. 244-287. And, on the origins of this decline, cf. the Dissenting Opinion of Judge Guerrero in the *Norwegian Loans* case (Judgment of 06.07.1857), *ICJ Reports* (1957) pp. 69-70.

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

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

1986), comprising not only the substantive norms (on the protected rights) but also the clauses that regulate the mechanisms of international protection.

The optional clauses of recognition of the contentious jurisdiction of both the European Court of Human Rights [ECtHR] (prior to Protocol n. 11 to the European Convention)[23] and the Inter-American Court of Human Rights [IACtHR] found inspiration in the model of the optional clause of compulsory jurisdiction of the ICJ, -a formula originally conceived more than 80 years ago (cf. *supra*). Despite the common origin, in search of the realization of the ideal of international justice, the *rationale* of the application of the optional clause has been interpreted in a fundamentally distinct way, on the one hand in inter-State litigation, and on the other hand in that of human rights. In the former, considerations of contractual equilibrium between the Parties, of reciprocity, of procedural balance in the light of the juridical equality of the sovereign States have prevailed to date; in the latter, there has been a primacy of considerations of *ordre public*, of the collective guarantee exercised by all the States Parties, of the accomplishment of a common goal, superior to the individual interests of each Contracting Party (cf. *infra*).

The two aforementioned international human rights Tribunals have found themselves under the duty to preserve the integrity of the regional conventional system of protection of human rights as a whole. In their common understanding, it would be inadmissible to subordinate the operation of the respective conventional mechanisms of protection to restrictions not expressly authorized by the European and American Conventions, interposed by the States Parties in their instruments of acceptance of the optional clauses of compulsory jurisdiction of the two Courts (Article 62 of the American Convention, and Article 46 of the European Convention before Protocol n. 11). This would not only immediately affect the efficacy of the operation of the conventional mechanism of protection at issue, but, furthermore, it would fatally impede its possibilities of future development.

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

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[23] Protocol n. 11 to the European Convention of Human Rights entered into force on 01.11.1998. On the original optional clause (Article 46) of the European Convention, cf. Council of Europe/Conseil de l'Europe, *Collected Edition of the `Travaux Préparatoires' of the European Convention on Human Rights/Recueil des Travaux Préparatoires de la Convention Européenne des Droits de l'Homme*, vol. IV, The Hague, Nijhoff, 1977, pp. 200-201 and 266-267; and vol. V, The Hague, Nijhoff, 1979, pp. 58-59.

judicial organs of protection[24]. Such conventional norms, essential to the efficacy of the system of international protection, ought to be interpreted and applied in such a way as to render their safeguards truly practical and effective, bearing in mind the special character of the human rights treaties and their collective implementation.

The ECtHR had the occasion to pronounce in this respect. Thus, in its Judgment on Preliminary Objections (of 23.03.1995) in the case of *Loizidou versus Turkey*, it warned that, in the light of the letter and the spirit of the European Convention the possibility cannot be inferred of restrictions to the optional clause relating to the recognition of the contentious jurisdiction of the ECtHR[25], by analogy with the permissive State practice under Article 36 of the Statute of the ICJ; under the European Convention, a practice of the States Parties was formed precisely *a contrario sensu*, accepting such clause without restrictions[26]. In the domain of the international protection of human rights, there are no "implicit" limitations to the exercise of the protected rights; and the limitations set forth in the treaties of protection ought to be restrictively interpreted. The optional clause of compulsory jurisdiction of the international tribunals of human rights makes no exception to that: it does not admit limitations other than those expressly contained in the human rights treaties at issue, and, given its capital importance, it could not be at the mercy of limitations not foreseen therein and invoked by the States Parties for reasons or vicissitudes of domestic order[27].

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[24] Cf., to this effect, the decision of the old European Commission of Human Rights (EComHR) in the case *Chrysostomos et alii versus Turkey* (1991), *in* EComHR, *Decisions and Reports*, vol. 68, Strasbourg, C.E., [1991], pp. 216-253; and cf., earlier on, the *obiter dicta* of the Commission, to the same effect, in its decisions i the *Belgian Linguistic Cases* (1966-1967) and in the cases *Kjeldsen, Busk Madsen and Pedersen versus Denmark* (1976).

[25] Article 46 of the European Convention, prior to the entry into force, on 01.11.1998, of Protocol n. 11 to the European Convention.

[26] Moreover, it referred to the fundamentally distinct context in which international tribunals operate, the ICJ being "a free-standing international tribunal which has no links to a standard-setting treaty such as the Convention"; cf. European Court of Human Rights (ECtHR), *Case of Loizidou versus Turkey* (Preliminary Objections), Strasbourg, C.E., Judgment of 23.03.1995, p. 25, par. 82, and cf. p. 22, par. 68. On the prevalence of the conventional obligations of the States Parties, cf. also the Court's *obiter dicta* in its previous decision, in the *Belilos versus Switzerland* case (1988). - The Hague Court, in its turn, in its Judgment of 04.12.1998 in the *Fisheries Jurisdiction* case (Spain *versus* Canada), yielded to the voluntarist subjectivism of the contending States (cf. *ICJ Reports* (1998) pp. 438-468), the antithesis of the very notion of international compulsory jurisdiction, - provoking Dissenting Opinions of five of its Judges, to whom the ICJ put at risk the future itself of the mechanism of the optional clause under Article 36(2) of its Statute, paving the way to an eventual desertion from it (cf. *ibid*., pp. 496-515, 516-552, 553-569, 570-581 and 582-738, respectively). - And cf. chapter XII, *supra*.

[27] Cf. IACtHR, case of *Castillo Petruzzi and Others versus Peru* (Preliminary Objections), Judgment of 04.09.1998, Series C, n. 41, Concurring Opinion of Judge A.A. Cançado Trindade, pars. 36 and 38.

In their classic studies on the basis of the international jurisdiction, C.W. Jenks and C.H.M. Waldock warned, already in the decades of the fifties and the sixties, as to the grave problem presented by the insertion, by the States, of all kinds of limitations and restrictions in their instruments of acceptance of the optional clause of compulsory jurisdiction (of the ICJ)[28]. Although those limitations had never been foreseen in the formulation of the optional clause, States, in the face of such legal vacuum, have felt, nevertheless, "free" to insert them. Such excesses have undermined, in a contradictory way, the basis itself of the system of international compulsory jurisdiction. As well pointed out in a classic study on the matter, the instruments of acceptance of the contentious jurisdiction of an international tribunal should be undertaken "on terms which ensure a reasonable measure of stability in the acceptance of the jurisdiction of the Court"[29], - that is, in the terms expressly provided for in the international treaty itself (cf. *infra*).

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

> "Recognition of the Court's compulsory jurisdiction is a fundamental clause (cláusula pétrea) to which there can be no limitations except those expressly provided for in Article 62(1) of the American Convention. Because the clause is so fundamental to the operation of the Convention's system of protection, it cannot be at the mercy of limitations not already stipulated but invoked by States Parties for reasons of domestic order"[30].

The permissiveness of the insertion of limitations, not foreseen in the human rights treaties, in an instrument of acceptance of an optional clause of compulsory jurisdiction[31], represents a regrettable historical distortion of the original conception

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[28] Examples of such excesses have been the objections of domestic jurisdiction (*domestic jurisdiction/compétence nationale exclusive*) of States, the foreseeing of withdrawal at any moment of the acceptance of the optional clause, the foreseeing of subsequent modification of the terms of acceptance of the clause, and the foreseeing of insertion of new reservations in the future; cf. C.W. Jenks, *The Prospects of International Adjudication*, London, Stevens, 1964, p. 108, and cf. pp. 113, 118 and 760-761; C.H.M. Waldock, "Decline of the Optional Clause", *op. cit. supra* n. (20), p. 270; and for criticisms of those excesses, cf. A.A. Cançado Trindade, "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations", 25 *International and Comparative Law Quarterly* (1976) pp. 744-751.

[29] C.W. Jenks, *op. cit. supra* n. (28), pp. 760-761.

[30] IACtHR, case of the *Constitutional Tribunal* (Competence), Judgment of 24.09.1999, Series C, n. 55, p. 44, par. 35; CtIADH, case of *Ivcher Bronstein* (Competence), Judgment of 24.09.1999, Series C, n. 54, p. 39, par. 36.

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

of such clause, in my view unacceptable in the field of the international protection of the rights of the human person.

It is the duty of an international tribunal of human rights to look after the due application of the human rights treaty at issue in the framework of the domestic law of each State Party, so as to secure the effective protection in the ambit of this latter of the human rights set forth in such treaty[32]. Any understanding to the contrary would deprive the international human rights tribunal at issue of the exercise of the function and of the duty of protection inherent to its jurisdiction, failing to ensure that the human rights treaty has the appropiate effects (*effet utile*) in the domestic law of each State Party.

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

> "A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.
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> Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member States of the Organization and to the Secretary of the Court"[33].

In fact, the modalities of acceptance, by a State Party to the Convention, of the contentious jurisdiction of the IACtHR, are expressly stipulated in the aforementioned provisions. The formulation of the optional clause of compulsory jurisdiction of the IACtHR, in Article 62 of the American Convention, is not simply illustrative, but clearly *precise*. No State is obliged to accept an optional clause, as its

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

[33] Paragraph 3 of Article 62 of the Convention adds that: -"The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement".

own name indicates[34]. But if a State Party decides to accept it, it ought to do so in the terms expressly stipulated in such clause. According to Article 62(2) of the Convention, the acceptance, by a State Party, of the contentious jurisdiction of the IACtRH, can be made in four modalities, namely: a) unconditionally; b) on the condition of reciprocity; c) for a specified period; and d) for specific cases. Those, and only those, are the modalities of acceptance of the contentious jurisdiction of the IACtHR foreseen and authorized by Article 62(2) of the Convention, which does not authorize the States Parties to interpose any other conditions or restrictions (*numerus clausus*).

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

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

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

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

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

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

In the theory and practice of International Law one has sought to distinguish a "reservation" from an "interpretative declaration"[35], in conformity with the legal effects which are intended to be attributed to one and the other[36]. In any case, in considering the meaning and scope of a declaration of acceptance of an optional clause of compulsory jurisdiction, - such as the one presented by Trinidad and Tobago under Article 62 of the American Convention and interposed as preliminary objection in the present case *Hilaire*, - one has to bear in mind the *nature* of the treaty in which that clause appears. This corresponds to the "context", precisely the

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[35] Cf. U.N./International Law Commission, "Draft Guidelines on Reservations to Treaties", *in*: U.N., *Report of the International Law Commission on the Work of Its 51st Session* (May/July 1999), *G.A.O.R.* - Suppl. n. 10 (A/54/10/Corr.1-2), 1999, pp. 18-24, item 1.3; and *in*: *Report of the International Law Commission on the Work of Its 52nd Session* (May/June and July/August 2000), *G.A.O.R.* - Suppl. n. 10 (A/55/10), 2000, pp. 229-272, item 1.7.

[36] For an examination of the question, cf., e.g., F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague/Uppsala, T.M.C. Asser Instituut/Swedish Institute of International Law, 1988, pp. 98-110 and 229-337, and cf. pp. 184-222; D.M. McRae, "The Legal Effect of Interpretative Declarations", 49 *BYBIL* (1978) pp. 155-173. Thus, if one intends to clarify the meaning and scope of a given conventional provision, it is an interpretative declaration, while if one intends to modify a given conventional provision or to exclude its application, it is a reservation. In practice, it has not always been easy to draw the dividing line between one and the other, as illustrated by the controversy which has surrounded, in the last decades, the question of the legal effects of declarations inserted into the instruments of acceptance of the optional clause of compulsory jurisdiction, given the *sui generis* character of such clause. It may be recalled that in the well-known case of *Belilos versus Switzerland* (1988), the ECtHR considered that a declaration interposed by Switzerland amounted to a reservation - of a general character - to the European Convention on Human Rights, incompatible with the object and purpose of this latter. ECtHR, *Belilos versus Switzerland* case, Judgment of 29.04.1988, Series A, n. 132, pp. 20-28, pars. 38-60.

second component element of the general rule of interpretation of treaties set forth in Article 31 of the two Vienna Conventions on the Law of Treaties. In the *Hilaire versus Trinidad and Tobago* case (*supra*), the IACtHR had duly done so, in stressing the special character of the human rights treaties (pars. 94-97).

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

> *"(...) In contracting conventional obligations of protection, it is not reasonable, on the part of the State, to assume a discretion so unduly broad and conditioning of the extent itself of such obligations, which would militate against the integrity of the treaty.(...)* In so far as human rights treaties are concerned, one is to bear always in mind the objective character of the obligations enshrined therein, the autonomous meaning (in relation to the domestic law of the States) of the terms of such treaties, the collective guarantee underlying them, the wide scope of the obligations of protection and the restrictive interpretation of permissible restrictions. These elements converge in sustaining the integrity of human rights treaties, in seeking the fulfillment of their object and purpose, and, accordingly, in establishing limits to State voluntarism"[37].

3. International Compulsory Jurisdiction: Reflections *De Lege Ferenda*

A further line of reflections, *de lege ferenda*, on international compulsory jurisdiction, is here called for. The "judicial decisions", referred to in the enumeration of the formal sources and evidences of International Law, set forth in Article 38(1)(d) of the Statute of the ICJ[38], certainly are *not* limited to the case-law of the ICJ itself[39]. They likewise comprise, nowadays, the judicial decisions of the international tribunals (Inter-American and European Courts) of human rights, of the *ad hoc* International Criminal Tribunals (for ex-Yugoslavia[40] and for Rwanda[41]), of

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[37] IACtHR, case *Blake versus Guatemala* (Reparations), Judgment of 22.01.1999, Series C, n. 48, Separate Opinion of Judge A.A. Cançado Trindade, pp. 114-115, pars. 32-33.

[38] As "subsidiary means for the determination of rules of law".

[39] As this latter itself has acknowledged, e.g., in its Judgment of 18.11.1960 in the case of the *Arbitral Award of the King of Spain of 1906* (Honduras *versus* Nicaragua), *ICJ Reports* (1960) pp. 204-217.

[40] Cf. K. Lescure, *Le Tribunal Pénal International pour l'ex-Yougoslavie*, Paris, Montchrestien, 1994, pp. 15-133; R. Kerr, *The International Criminal Tribunal for the Former Yugoslavia*, Oxford, OUP, 2004, pp. 1-219; A. Cassese, "The International Criminal

the International Tribunal for the Law of the Sea, of other international[42] and arbitral tribunals[43], as well as of national tribunals in matters of International Law[44]. This development may confer an increasingly greater importance to case-law as a formal "source" of International Law, as one considers the further creation (in 2002), - parallel to the international tribunals aforementioned, - of the new mixed or "internationalized" criminal courts[45] (for Sierra Leone, Kosovo, East Timor, and Cambodia, each one with its own distinctive features)[46]. This expansion of international jurisdiction has been contributing, in my understanding, to enlarge the aptitude of International Law to encompass legal relations in distinct domains of human activity[47].

The IACtHR, by means of the Judgments on Preliminary Objections in the cases of *Hilaire*, *Benjamin*, and *Constantine*, as well as its earlier Judgments on Competence in the cases of the *Constitutional Tribunal* and *Ivcher Bronstein*,

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Tribunal for the Former Yugoslavia and Human Rights", 2 *European Human Rights Law Review* (1997) pp. 329-352.

[41] Cf., e.g., L.J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Leiden, Nijhoff, 2005, pp. 1-284; R.S. Lee, "The Rwanda Tribunal", 9 *Leiden Journal of International Law* (1996) pp. 37-61; [Various Authors,], "The Rwanda Tribunal: Its Role in the African Context", 37 *International Review of the Red Cross* (1997) n. 321, pp. 665-715 (studies by F. Harhoff, C. Aptel, D. Wembou, C.M. Peter, and G. Erasmus and N. Fourie).

[42] Reference may be made to other contemporary international tribunals, such as the Tribunal of the Andean Union, based in Quito (with a vast case-law); the Central American Court of Justice, based in Managua; and, more recently, the Permanent Tribunal of Revision of Mercosur (set up in Asunción on 13.08.2004). For a general study, cf., e.g., K.N. Metcalf and I. Papageorgiou, *Regional Integration and Courts of Justice*, Antwerpen/Oxford, Intersentia, 2005, pp. 1-118.

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

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

[45] With both national and international judges.

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

[47] Cf. IACtHR, case *Blake versus Guatemala* (Reparations), Judgment of 22.01.1999, Series C, n. 48, Separate Opinion of Judge A.A. Cançado Trindade, pp. 110 and 112, pars. 23 and 27-28.

safeguarded the integrity of the American Convention on Human Rights, remained master of its own jurisdiction and acted in accordance with the high responsibilities accorded to it by the American Convention. The same can be said of the ECtHR, by means of its Judgment on Preliminary Objections in the case *Loizidou versus Turkey*, in so far as the European Convention on Human Rights is concerned. Thus, those two international Tribunals of human rights (recently joined by a third one, the African Court of Human and Peoples´ Rights, established in 2006), in their converging case-law on the question, have refused to yield to undue manifestations of State voluntarism, have fully performed the functions attributed to them by the human rights treaties which created them, and have given a worthy contribution to the strengthening of the international jurisdiction and to the realization of the old ideal of international justice[48].

In the last 85 years, the advances in this particular domain could have been much greater if State practice would not have betrayed the purpose which inspired the creation of the mechanism of the optional clause of compulsory jurisdiction (of the PCIJ and the ICJ), that is, the submission of political interests to Law by means of the development in the realization of justice at international level. The time has come to overcome definitively the regrettable lack of automatism of the international jurisdiction. With the distortions of their practice on the matter, States face today a dilemma which should have been overcome a long time ago: either they return to the voluntarist conception of International Law, abandoning for good the hope in the primacy of Law over political interests[49], or else they retake and achieve with determination the ideal of construction of an international community with greater cohesion and institutionalization in the light of Law and in search of Justice, moving resolutely from *jus dispositivum* to *jus cogens*[50].

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[48] A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, ch. XV-XVI, pp. 60-83 and 147-168.

[49] Cf. a warning of Ch. de Visscher, *Aspects récents du droit procédural de la Cour Internationale de Justice*, Paris, Pédone, 1966, p. 204; and cf. also L. Delbez, *Les principes généraux du contentieux international*, Paris, LGDJ, 1962, pp. 68, 74 and 76-77. - For subsequent criticisms by two former Presidents of the ICJ of the unsatisfactory and bad use made by the States of the mechanism of the optional clause (of the compulsory jurisdiction of the ICJ) of the Statute of the Court, cf. R.Y. Jennings, *op. cit. supra* n. (15), p. 495; and E. Jiménez de Aréchaga, "International Law in the Past Third of a Century", 159 *RCADI* (1978) pp. 154-155, And cf. further criticisms by H.W. Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice", 93 *RCADI* (1958) p. 273. And cf., in general, J. Sicault, "Du caractère obligatoire des engagements unilatéraux en Droit international public", 83 *Revue générale de Droit international public* (1979) pp. 633-688. - Such distorted State practice cannot, definitively, serve as model to the operation of the judicial organs created by human rights treaties.

[50] And always bearing in mind that the protection of fundamental rights places us precisely in the domain of *jus cogens*; cf., e.g., my intervention in the debates of 12.03.1986 of the Vienna Conference on the Law of Treaties between States and International Organizations or between International Organizations: U.N., *United Nations Conference on the Law of Treaties between States and International Organizations or between International*

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

> "The time has come to consider, in particular, in a future Protocol of amendments to the procedural part of the American Convention on Human Rights, aiming at strengthening its mechanism of protection, the possibility of an amendment to Article 62 of the American Convention, in order to render such clause also mandatory, in conformity with its character of fundamental clause (cláusula pétrea), thus establishing the automatism[51] of the jurisdiction of the Inter- American Court of Human Rights[52]. There is pressing need for the old ideal of the permanent international compulsory jurisdiction to become reality also in the American continent, in the present domain of protection, with the necessary adjustments in order to face its reality of human rights and to fulfil the growing needs of effective protection of the human being" (par. 39).

III. The Recurring Need and Quest for Compulsory Jurisdiction

Despite the undeniable advances experienced by the idea of compulsory jurisdiction in the domain of the International Law of Human Rights (*supra*), the picture appears somewhat distinct in the sphere of purely inter-State relations: it is hard to escape the assessment that, herein, compulsory jurisdiction has made a rather modest progress in recent decades. As pointed out by C.W. Jenks over forty years ago, the foundation of compulsory jurisdiction is, ultimately, the confidence in the rule of law at international level[53]. While full confidence is still lacking, not much progress is bound to be achieved in the present domain.

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

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Organizations (Vienna, 1986) - Official Records, volume I, N.Y., U.N., 1995, pp. 187-188 (intervention by A.A. Cançado Trindade).

[51] Which became a reality, as to the European Court of Human Rights, as from the entry into force, on 01.11.1998, of Protocol n. 11 to the European Convention of Human Rights (cf. *infra*).

[52] With the necessary amendment, - by means of a Protocol, - to this effect, of Article 62 of the American Convention, putting an end to the restrictions therein foreseen and expressly discarding the possibility of any other restrictions, and also putting and end to reciprocity and the optional character of the acceptance of the contentious jurisdiction of the Court, which would become compulsory to all the States Parties.

[53] C.W. Jenks, *The Prospects...*, *op. cit. supra* n. (28), pp. 101, 117, 757, 762 and 770. Likewise, in his book on international tribunals published in 1944, M.O. Hudson positioned himself clearly in support of compulsory jurisdiction, so as to "strengthen the foundations of international law"; cf. M.O. Hudson, *International Tribunals - Past and Future*, *op. cit. supra* n. (9), pp. 83, 153 and 251.

> "submission to law through acceptance of recourse to international courts and arbitral tribunals is an essential complement to the renunciation of recourse to force in international relations"[54].

In order to overcome the unsatisfactory situation, the resolution *inter alia* called for the development of the practice of insertion into general conventions of a clause, binding on all States Parties, of submission of disputes, relating to the interpretation or application of the respective conventions, to international courts and tribunals[55].

The plea for compulsory jurisdiction has been duly expressed in expert writing along the last eight decades. In a monograph published as early as in 1924 (four years after the adoption of the Statute of the old PCIJ), Nicolas Politis, in recalling the historical evolution from private justice to public justice, advocated the evolution, at international level, from optional justice to compulsory justice[56]. Subsequently, despite the alleged "decline" of the optional clause of the ICJ Statute (cf. *supra*), one decade after the adoption by the *Institut de Droit International* (in 1959) of the aforementioned resolution, C.W. Jenks wrote that

> "The problem of compulsory jurisdiction (...) remains one of the central problems of world organization. (...) A larger measure of compulsory jurisdiction remains a fundamental element in the progress of the rule of law among nations. (...) The progress of compulsory jurisdiction presupposes a parallel progress of the substantive law in adjusting itself to the changing needs of a changing society"[57].

International jurisdiction is becoming, in our days, an imperative of the contemporary international legal order itself, and compulsory jurisdiction responds to a need of the international community in our days; although this latter has not yet been fully achieved, some advances have been made in the last decades[58]. The Court of Justice of the European Communities provides one example of supranational compulsory jurisdiction, though limited to community law or the law of integration. The European Convention of Human Rights, after the entry into force of Protocol n. 11, affords another conspicuous example of automatic compulsory jurisdiction. The

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[54] *Annuaire de l'Institut de Droit International* (1959), *cit. in* C.W. Jenks, *op. cit. supra* n. (48), pp. 113-114.

[55] *Annuaire de l'Institut de Droit International* (1959), *cit. in ibid*., p. 115.

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

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

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

International Criminal Court is the most recent example in this regard; although other means were contemplated throughout the *travaux préparatoires* of the 1998 Rome Statute (such as cumbersome "opting in" and "opting out" procedures), at the end compulsory jurisdiction prevailed, with no need for further expression of consent on the part of States Parties to the Rome Statute[59]. This was a significant decision, enhancing international jurisdiction.

The system of the 1982 U.N. Convention on the Law of the Sea, in its own way, moves beyond the traditional regime of the optional clause of the ICJ Statute. It allows States Parties to the Convention the option between the International Tribunal for the Law of the Sea, or the ICJ, or else arbitration (Article 287); despite the exclusion of certain matters, the Convention succeeds in establishing a compulsory procedure containing coercitive elements; the specified choice of procedures at least secures law-abiding settlement of disputes under the U.N. Law of the Sea Convention[60].

These illustrations suffice to disclose that compulsory jurisdiction is already a reality, - at least in some circumscribed domains of International Law, as indicated above. International compulsory jurisdiction is, by all means, a juridical possibility. If it has not yet been attained on a world-wide level, this cannot be attributed to an absence of juridical viability, but rather to misperceptions of its role, or simply to a lack of conscience as to the need to widen its scope. Compulsory jurisdiction is a manifestation of the recognition that International Law, more than voluntary, is indeed necessary. In addition to the advances already achieved to this effect, reference could also be made to endeavours in the same sense. One such example is found in the Proposals for a Draft Protocol to the American Convention on Human Rights, which I prepared as *rapporteur* of the IACtHR, which *inter alia* advocates an amendment to Article 62 of the American Convention so as to render the jurisdiction of the IACtHR in contentious matters automatically compulsory upon ratification of the Convention[61].

Furthermore, several international treaties[62] foresee a compulsory resort to the jurisdiction of the ICJ. To the extent that they do so, States Parties would be under

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

[60] L. Caflisch, "Cent ans de règlement pacifique des différends interétatiques", 288 *RCADI* (2001) pp. 365-366 and 448-449; J. Allain, "The Continued Evolution....", *op. cit. supra* n. (2), pp. 61-62; S. Karagiannis, "La multiplication des juridictions internationales...", *op. cit. infra* n. (67), p. 34; M. Kamto, "Les interactions des jurisprudences internationales...", *op. cit. infra* n. (68), p. 424.

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

[62] E.g., *inter alia*, the 1957 European Convention on Peaceful Settlement of Disputes, Article 1.

the Court's jurisdiction to settle disputes pertaining to those treaties, paving the way for a broader acceptance of compulsory jurisdiction on a world-wide basis. In this connection, in the years immediately following the end of the cold-war period, e.g., the then Soviet Union (succeeded by the Russian Federation), and some other Eastern European States, withdrew declarations they had previously made to exclude compulsory settlement of disputes in several Conventions they had celebrated during the cold-war period[63]. In fact, the optional clause (of the ICJ Statute) is not the only basis of compulsory jurisdiction of the ICJ; another basis consists precisely of jurisdictional or compromissory clauses[64] inserted into treaties conferring jurisdiction on international tribunals to settle disputes concerning their interpretation and application.

Although not so often invoked as they possibly could, a more systematic inclusion in treaties of such jurisdictional or arbitration clauses would contribute to widen the scope of compulsory jurisdiction[65]. Such expansion is bound to occur to the extent that States realize that it is ultimately in their own interest, and in the common or general interest, to have their disputes normally settled by judicial means. This latter is the most perfected way of peaceful settlement, for all that it affords: preexisting rules, rigour and juridical security. Beyond such settlement, compulsory jurisdiction is an expression of the rule of law at international level, conducive to a more cohesive international legal order inspired and guided by the imperative of justice.

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

It is well-known that the international community counts nowadays on a multiplicity of international tribunals (e.g., besides the ICJ, the International Tribunal for the Law of the Sea, the permanent International Criminal Court, the international tribunals - Inter-American and European Courts - of human rights, the *ad hoc* International Criminal Tribunals - for ex-Yugoslavia and for Rwanda, - the Court of Justice of the European Communities, among others[66]). This is symptomatic of the

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

[64] Cf., on such compromissory clauses, e.g., H.M. Cory, *Compulsory Arbitration of International Disputes*, N.Y., Columbia University Press, 1932 [reprint 1972], ch. VI, pp. 160-191.

[65] C.W. Jenks, *The Prospects..., op. cit. supra* n. (28), p. 761, and cf. pp. 109 and 111.

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

way contemporary International Law has evolved, and of an increasing recourse to international adjudication. Throughout the last years the old ideal of international justice has been revitalized and has gained ground, with the considerable expansion of the international judicial function, reflected in the creation of new international tribunals; the work of these latter has been enriching contemporary international case-law, contributing, as already indicated, to assert and develop the aptitude of International Law to regulate adequately juridical relations in distinct domains of human activity (cf. *supra*).

Disputes submitted to international adjudication in our days are no longer vested with strict inter-State dimension; hence the creation and co-existence of multiple specialized international tribunals of our times, reflecting a decentralized international legal order[67]. Still more significantly, in expanding international jurisdiction, contemporary multiple international tribunals have enlarged the access to international justice of the subjects of International Law (other than States)[68]. They have done what the ICJ alone has not been capable of doing (by force of the constraints of its Statute). They are responding to a pressing need of the contemporary international community[69]. The human person has at last been granted access to justice, no longer only at national level, but likewise at international level.

Specialized international tribunals, such as the European and Inter-American Courts of Human Rights, and the *ad hoc* International Criminal Tribunals for Ex-Yugoslavia and Rwanda, have asserted universalist principles, and the primacy of humanitarianism over traditional techniques of inter-State litigation[70]. Their work,

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established (on 13.08.2004) of the Permanent Tribunal of Revision of the Mercosur (in Asunción).

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

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

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

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

lately fostering comparative studies[71], has thus proved to be complementary to that of the ICJ, and they have contributed to erect contemporary international adjudication into a new universalist dimension, beyond peaceful settlement of international disputes on a strictly inter-State basis. They have thereby enriched contemporary Public International Law.

The multiplication of international tribunals is, thus, a reassuring phenomenon, in providing additional forums for the access to, and realization of, justice at international level. Attention should be focused on this healthy substantial development which is a reflection of the expansion of the application of International Law in general and of judicial settlement in particular[72], instead of attempting - as some international lawyers have tried to do - to create a "problem" with the traditional concern with delimitation of competences. The issues arising from the co-existence of international tribunals can be properly addressed by means of dialogue among international judges, not by self-assertions of alleged supremacy[73].

Contemporary international tribunals, working in a cooperative and complementary way, have the common mission of realization of justice at international level. Far more important than the classic question of the delimitation of competences is the advance they have accomplished in the ideal of realization of international justice: they have already considerably enlarged the circles of justiciable persons, and this is a very significant contemporary phenomenon indeed. In this spirit, some international specialized tribunals are entrusted with the task of deciding on highly specific or technical matters, giving moreover their contribution to the evolution of an expanded International Law[74].

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

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

[73] There is currently no basis in any international instrument for asserting the supremacy of the ICJ, or any other international tribunal, over the other international courts; nowhere is such "supremacy" set forth in any text whatsoever. L. Caflisch, "Cent ans de règlement pacifique...", *op. cit. supra* n. (60), p. 431. And cf., to the same effect, H. Caminos, "The Creation of Specialised Courts: The Case of the International Tribunal for the Law of the Sea", *in Liber Amicorum Judge S. Oda* (eds. N. Ando, E. McWhinney and R. Wolfrum), vol. I, The Hague, Kluwer, 2002, pp. 569-574; C.-A. Fleischhauer, "The Relationship between the International Court of Justice and the Newly Created International Tribunal for the Law of the Sea in Hamburg", 1 *Max Planck Yearbook of United Nations Law* (1997) pp. 327-333. - Article 95 of the U.N. Charter foresees the creation of new international tribunals without in any way suggesting any such "supremacy".

[74] There has been an expansion of the international judicial function itself, beyond the purely inter-State level, encompassing the settlement of disputes involving also non-State entities. K. Oellers-Frahm, "Multiplication of International Courts and Tribunals and Conflicting Jurisdiction - Problems and Possible Solutions", 5 *Max Planck Yearbook of*

The co-existing international human rights Tribunals to date, the ECtHR and the IACtHR, have, for example, succeeded in setting forth approximations and convergences in their respective case-law, despite the distinct factual realities of the two continents in which they operate[75]. The work of the ECtHR and the IACtHR has indeed contributed to the creation of an international *ordre public* based upon the respect for human rights in all circumstances. Moreover, the dynamic or evolutive interpretation of the respective human rights Conventions (the intertemporal dimension) has been followed by both the ECtHR[76] and the IACtHR[77]. This outlook grows in importance for having come at a time when the establishment of a new international human rights Tribunal (an African Court on Human and Peoples' Rights) under the 1998 Protocol to the African Charter on Human and Peoples' Rights appears forthcoming.

Despite the challenges that the two human rights Tribunals in operation nowadays face, particularly with the increasing overload of cases (the ECtHR to a far greater extent than the IACtHR), individuals have been raised as subjects of the International Law of Human Rights, endowed with full procedural capacity, and have recovered their faith in human justice when it appeared to fade away at domestic law level. This significant procedural development, with the automatism of the international jurisdiction of the ECtHR and recent developments to this effect as regards the IACtHR, strongly suggests, as far as the two international human rights Tribunals are concerned, that the old ideal of the *realization of international justice* is finally seeing the light of the day. This is the point I have seen it fit to single out in my address at the ceremony of opening of the judicial year of 2004 of the ECtHR (on 22.01.2004, at the *Palais des Droits de l'Homme* in Strasbourg), as follows:

United Nations Law (2001) p. 69; J. Collier and V. Lowe, *The Settlement of Disputes in International Law - Institutions and Procedures*, Oxford, OUP, 2000, p. 14.

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

[76] Cases *Tyrer versus United Kingdom*, 1978; *Airey versus Ireland*, 1979; *Marckx versus Belgium*, 1979; *Dudgeon versus United Kingdom*, 1981, among others.

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

> "(...) In some international legal circles attention has been diverted in recent years from this fundamental achievement to the false problem of the so-called `proliferation of international tribunals'. This narrow-minded, unelegant and derogatory expression simply misses the key point of the considerable advances of the old ideal of international justice in the contemporary world. The establishment of new international tribunals is (...) an acknowledgment of the superiority of the judicial means of settlement of disputes, bearing witness of the prevalence of the rule of law in democratic societies, and discarding any surrender to State voluntarism.
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> Since the visionary writings and ideas of Nicolas Politis and Jean Spiropoulos of Greece, Alejandro Álvarez of Chile, André Mandelstam of Russia, Raul Fernandes of Brazil, René Cassin and Georges Scelle of France, Hersch Lauterpacht of the United Kindgom, John Humphrey of Canada, among others, it was necessary to wait for decades for the current developments in the realization of international justice to take place, nowadays enriching rather than threatening International Law, strengthening rather than undermining International Law. The reassuring growth of international tribunals is a sign of our new times, and we have to live up to it, to make sure that each of them gives its contribution to the continuing evolution of International Law in the pursuit of international justice"[78].

In the domain of the protection of the fundamental rights of the human person, the growth and consolidation of international human rights jurisdictions in the European and American continents, have set higher standards of State behaviour and established some degree of control over the interposition of undue restrictions by States, and have reassuringly enhanced the position of individuals as subjects of the International Law of Human Rights, endowed with full procedural capacity. In so far as the basis of the jurisdictions of the IACtHR and the ECtHR in contentious matters is concerned, eloquent illustrations of their firm stand in support of the integrity of the mechanisms of protection of the two Conventions are afforded, for example, by recent decisions of the ECtHR[79] as well as of the IACtHR[80]. The two international human rights Tribunals, by correctly resolving basic procedural issues raised in such recent cases, have aptly made use of the techniques of Public International Law in order to strengthen their respective jurisdictions of protection of the rights of the

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

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

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

human person. They have decisively safeguarded the integrity of the mechanisms of protection of the American and European Conventions on Human Rights, whereby the juridical emancipation of the human person *vis-à-vis* her own State is achieved[81].

Human rights treaties such as the European and American Conventions have, by means of an interpretative interaction, reinforced each other mutually, to the ultimate benefit of the protected human beings[82]. Interpretative interaction has in a way contributed to the universality of the conventional law on the protection of human rights. This has paved the way for a *uniform* interpretation of the *corpus juris* of contemporary International Human Rights Law. Such uniform interpretation in no way threatens the unity of International Law. Quite on the contrary, instead of threatening "to fragment" International Law, the two Tribunals at issue have helped to develop and achieve the aptitude of International Law to regulate efficiently relations which have a specificity of their own - at *intra-State*, rather than *inter-State*, level, opposing States to individuals under their respective jurisdictions, - and which require a specialized knowledge from the Judges. The unity and effectiveness of Public International Law itself can be measured precisely by its aptitude to regulate legal relations in distinct contexts with equal adequacy.

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

These are the considerations on the matter at issue, that I wished to present for your further thoughts, as scholars of the new generations, in the present Course of International Law of 2010 organized by the Inter-American Juridical Committee of

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[81] Cf. recently, on this particular point, A.A. Cançado Trindade, *Évolution du droit international au droit des gens – L´accès des individus à la justice internationale: Le regard d´un juge*, Paris, Pédone, 2008, pp. 1-188; A.A. Cançado Trindade, "The Emancipation of the Individual from His Own State – The Historical Recovery of the Human Person as Subject of the Law of Nations", *in Human Rights, Democracy and the Rule of Law – Liber Amicorum L. Wildhaber* (eds. S. Breitenmoser *et alii*), Zürich/Baden-Baden, Dike/Nomos, 2007, pp. 151-171.

[82] A.A. Cançado Trindade, "The Development of International Human Rights Law by the Operation and the Case-Law of the European and Inter-American Courts of Human Rights", 25 *Human Rights Law Journal* (2004) n. 5-8, pp. 157-160; A.A. Cançado Trindade, "Le développement du Droit international des droits de l'homme à travers l'activité et la jurisprudence des Cours européenne et interaméricaine des droits de l'homme", 16 *Revue universelle des droits de l'homme* (2004) n. 5-8, pp. 177-180.

the OAS (Part I). My reflections, as I indicated at the beginning, are not meant to be exhaustive, as, in the Course of International Law of next year, of 2011, I intend to dwell further upon the prospects for the International Court of Justice itself, which I have had the honor to be serving for the last two years; I intend then to turn closer attention to compromissory clauses in particular (Part II), in the framework of the recurring endeavours towards compulsory jurisdiction.

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