

**FOUNDATIONS OF INTERNATIONAL LAW: THE ROLE AND
IMPORTANCE OF ITS BASIC PRINCIPLES¹**

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I. Introduction

One cannot study international law making abstraction of its foundations; otherwise it would be reduced to an instrumental of the establishment of international order. International law goes much further than that, in the quest of humankind for the realization of justice at both national and international levels. Nor can one study the foundations of international law making abstraction of its basic principles. A convenient starting-point for the examination of the matter would be the identification of the position and role of the general principles of law. This would lead, in my view, to an acknowledgement of the fundamental principles as *substratum* of the legal order itself. Those principles encompass also the principles of international law.

It is indeed the principles of international law which, by permeating the *corpus juris* of international law, render it a truly normative *system*. Without those principles, the norms and rules of international law would not have evolved, by their implementation, into a legal system². Principles of international law inspire, and are inspired by, the evolving *jus gentium*, in which the basic considerations of humanity

² P.G. VALLINDAS, *General Principles of Law and the Hierarchy of the Sources of International Law*, Bonn, SCHIMMELBUSH & Co in *Grundprobleme für internationalen Rechts - Festschrift für Jean Spiropoulos*, (1957), pp. 426 and 430-431.

have an important role to play³. Those principles are a manifestation of the international juridical conscience; they reflect the *status conscientiae* of the subjects of international law⁴.

Although such principles (as those listed in chapter I, Article 2, of the United Nations Charter) may be open, given their generality, to distinct interpretations⁵, they retain their importance, for the proper application of the norms and rules, and for guiding the evolution of the entire legal system⁶, so that this latter may readjust to the changing circumstances of international life, respond to the changing needs of the international community, and contribute to fulfill the aspirations of humankind. Bearing all this in mind, the way would be paved for a contemporary reassessment, at this beginning of the XXIst century, in particular, of the principles set forth in the 1970 U.N. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.

II. The Position and Role of the General Principles of Law

Every legal system has fundamental principles, which inspire, inform and conform their norms. It is the principles (derived etymologically from the Latin *principium*) that, evoking the first causes, sources or origins of the norms and rules, confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole. It is the general principles of law (*prima principia*) which confer to the legal order (both national and international) its ineluctable axiological dimension; it is they that reveal the values which inspire the whole legal order and which, ultimately, provide its foundations themselves⁷. This is how I conceive the presence and the position of the principles in any legal order, and their role in the conceptual universe of Law.

³ H. MOSLER, *General Principles of Law*, vol. 7, Amsterdam, North Holland, ed. R. Bernhardt, Max-Planck-Institute for Comparative Public Law and International Law in *Encyclopedia of Public International Law*, 1984, pp. 95 and 102.

⁴ A. VERDROSS, « Les principes généraux de Droit dans le système des sources du Droit international public », in *Recueil d'études de Droit international en hommage à Paul GUGGENHEIM*, Genève, IUHEI, 1968, p. 525 (to that effect the author quoted Quadri's General Course at The Hague Academy of International Law in 1964).

⁵ E.g., to G. TUNKIN, General principles of law (under Article 38(1)(c) of the ICJ Statute), based on "common legal conscience", are taken to mean, after the 1945 San Francisco Conference (of adoption of the U.N. Charter), not those common to all national legal systems, but rather those which constitute part of international law itself; G. Tunkin, "General Principles of Law' in International Law", in *Internationale Festschrift für Alfred Verdross* (eds. R. MARCIC *et Al.*), München/Salzburg, W. FINK VERLAG, 1971, pp. 525-532.

⁶ M. VIRALLY, « Le rôle des 'principes' dans le développement du Droit international », in *Recueil d'études de Droit international en hommage à Paul Guggenheim*, Genève, IUHEI, pp. 543, 546-547 and 553-554 (1968).

⁷ Cf., to this effect, Inter-American Court of Human Rights, Advisory Opinion n. 18, on *The Juridical Condition and the Rights of the Undocumented Migrants*, of 17.09.2003, Concurring Opinion of Judge A. A. CANÇADO TRINDADE, pars. 44-58.

The general principles of law entered into the legal culture, with historical roots which go back, e.g., to Roman law, and came to be linked to the very conception of the democratic State under the rule of law, above all as from the influence of the enlightenment thinking (*pensée illuministe*). Despite the apparent indifference with which they were treated by legal positivism (always seeking to demonstrate a "recognition" of such principles in the positive legal order), and despite the lesser attention dispensed to them by the shallow and reductionism legal doctrine of our days, nevertheless we will never be able to prescind from them.

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

The identification of the basic principles has accompanied *pari passu* the emergence and consolidation of all the domains of Law, and all its branches (civil, civil procedural, criminal, criminal procedural, administrative, constitutional, and so forth). This is so with Public International Law⁸, with the International Law of Human Rights, with International Humanitarian Law⁹, with the International Law of Refugees¹⁰, with International Criminal Law¹¹. However circumscribed or specialized a legal regime may be, its basic principles can there be found, as, e.g., in International Environmental Law¹², in the Law of the Sea¹³, in the Law of Outer

⁸ E.g., principle of the prohibition of the use or threat of force, principle of the peaceful settlement of international disputes, principle of non-intervention in inter-State relations, principle of the juridical equality of the States, principle of the equality of rights and the self-determination of peoples, principle of good faith in the compliance with the international obligations, principle of international cooperation. Cf. A.A. CANÇADO TRINDADE, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Edit. Renovar, 2002, pp. 91-140.

⁹ Principle of humanity, principle of proportionality, principle of distinction (between combatants and the civil population), principle whereby the election of methods or means of combat is not unlimited, principle which requires avoiding unnecessary sufferings or superfluous evils.

¹⁰ Principle of *non-refoulement*, principle of humanity.

¹¹ Principle of legality (*nullum crimen sine lege, nulla poena sine lege*), principle of individual penal responsibility, principle of the presumption of innocence, principle of non-retroactivity, principle of a fair trial.

¹² E.g., principle of precaution or due diligences, principle of prevention, principle of the common but differentiated responsibility, principle of intergenerational equity, polluter-pay principle.

¹³ E.g., principle of the common heritage of mankind (ocean floors), principle of the peaceful uses of the sea, principle of the equality of rights (in the high seas), principle of the peaceful settlement of disputes, principles of the freedom of navigation and of innocent

Space¹⁴, among many others. The International Labor Organization (ILO) itself has sought to identify the "fundamental principles and rights in work", by means of a Declaration adopted in June 1998.

Some of the basic principles are proper of certain areas of Law, others permeate all areas. The *corpus* of legal norms (national or international) operates moved by the principles, some of them ruling the relations themselves between human beings and the public power (as the principles of natural justice, of the rule of law, of the rights of the defense, of the right to the natural judge, of the independence of justice, of the equality of all before the law, of the separation of powers, among others). The principles enlighten the path of the legality and the legitimacy. Hence the continuous and eternal "rebirth" of natural law, which has never disappeared.

It is no longer a return to classic natural law, but rather the affirmation or restoration of a standard of justice, heralded by the general principles of law, whereby positive law is evaluated¹⁵. In sustaining that *opinio juris* is above the will of the State, F. Castberg has correctly pondered that

"the experiences of our own age, with its repellent cruelties and injustice under cover of positive law, have in fact confirmed the conviction that something - even though it is only certain fundamental norms - must be objectively valid. This may consist of principles which appear to be valid for every human community at any time (...). The law can and should itself move forward in the direction of greater expedience and justice, and to a higher level of humanity"¹⁶.

This "eternal return" to jusnaturalism has been, thus, recognized by the jusinternationalists themselves¹⁷, much contributing to the affirmation and consolidation of the primacy, in the order of values, of the obligations pertaining to

passage, principles of equidistance and of special circumstances (delimitation of maritime spaces).

¹⁴ E.g. principle of non-appropriation, principle of the peaceful uses and ends, principle of the sharing of benefits in space exploration.

¹⁵ C. J. FRIEDRICH, *Perspectiva Histórica da Filosofia do Direito*, Rio de Janeiro, ZAHAR, Ed., 1965, pp. 196-197, 200-201 and 207; and cf., in general, e.g., Y. R. SIMON, *The Tradition of Natural Law - A Philosopher's Reflections* (ed. V. KUIC), N.Y., Fordham Univ. Press, 2000 [reprint], pp. 3-189; A. P. D'ENTRÈVES, *Natural Law*, London, Hutchinson Univ. Library, 1972 [reprint], pp. 13-203.

¹⁶ F. CASTBERG, *Natural Law an Human Rights*, (1968) 1 *Revue des droits de l'homme / Human Rights Journal*, p. 37, and cf. pp. 21-22.

¹⁷ Cf., e.g., L. LE FUR, « La théorie du droit naturel depuis le XVIIe. siècle et la doctrine moderne », 18 *Recueil des Cours de l'Académie de Droit International de La Haye* (1927) pp. 297-399; A. TRUYOL y SERRA, « Théorie du Droit international public - Cours général », 183 *Recueil des Cours de l'Académie de Droit International de La Haie* (1981) pp. 142-143; A. TRUYOL Y SERRA, "Fundamentos de Derecho Internacional Público", (1977) 4th. rev. ed., Madrid, Tecnos, , pp. 69 and 105; J. PUENTE EGIDO, *Natural Law*, in *Encyclopedia of Public International Law* (ed. R. BERNHARDT/Max Planck Institute), vol. 7, Amsterdam, North-Holland, 1984, pp. 344-349.

human rights, *vis-à-vis* the international community as a whole¹⁸. What is certain is that there is no Law without principles, which inform and conform the legal norms and rules.

To the extent that a new *corpus juris* is formed, one ought to fulfill the pressing need of identification of its principles. Once identified, these principles ought to be observed, as otherwise the application of the norms would be replaced by a simple rhetoric of "justification" of the "reality" of the facts; if there is truly a legal system, it ought to operate on the basis of its fundamental principles, as otherwise we would be before a legal vacuum, before the simple absence of a legal system¹⁹.

The general principles of law have contributed to the formation of normative systems of protection of the human being. The recourse to such principles has taken place, at the substantive level, as a response to the new necessities of protection of the human being. No one would dare to deny their relevance, e.g., in the historical formation of the International Refugee Law, or, more recently, in the emergence, in recent years, of the international normative framework pertaining to the (internally) displaced persons²⁰. No one would dare to deny their incidence - to quote another example - in the legal regime applicable to foreigners. In this respect, it has been suggested that certain general principles of law apply specifically or predominantly to foreigners, e.g., the principle of the unity of the family, and the principle of the prohibition of extradition whenever this latter presents risks of violations of human rights²¹.

General principles, proper to the domain of protection of the human person, have displayed a continuing validity. In the case, e.g., of the *armed conflicts in Central America*, which broke out in the late seventies and generalized and aggravated in the region in the early eighties, and generated hundreds of thousands of refugees and displaced persons, one of the major concerns of the United Nations High Commissioner for Refugees (UNHCR) was to establish its grounds of action for providing protection and assistance to those in need of it, on the basis of the principles and criteria which should guide its action. On two occasions the UNHCR dwelt upon the examination of such principles and criteria to guide the application of

¹⁸ J. A. CARRILLO SALCEDO, "Derechos Humanos y Derecho Internacional", (2000) 22 *Isegoría - Revista de Filosofía Moral y Política* - Madrid p. 75.

¹⁹ G. ABI-SAAB, « Cours général de Droit international public », (1987) 207 *Recueil des Cours de l'Académie de Droit International de La Haye* p. 378: "soit il existe un système normatif, et dans ce cas il doit être apte à remplir sa tâche, soit il n'y a pas de système de tout".

²⁰ Cf. W. KÄLIN, *Guiding Principles on Internal Displacement - Annotations*, Washington D.C., (2000), ASIL/Brookings Institution, , pp. 6-74; and cf. F.M. DENG, *Protecting the Dispossessed - A Challenge for the International Community*, (1993), Washington D.C., Brookings Institution, , pp. 1-148.

²¹ C. PIERUCCI, « Les principes généraux du droit spécifiquement applicables aux étrangers », (1999) n. 37, 10 *Revue trimestrielle des droits de l'homme*, pp. 8, 12, 15, 17, 21, 24 and 29-30. Among such principles, applicable to foreigners, there are those set forth initially at international level (e.g., in the framework of the law of extradition, and the law of asylum and/or refuge) which have projected at the level of domestic law; cf. *ibid.*, pp. 7-32, esp. pp. 8, 15-21 and 30-32.

the norms and rules of International Refugee Law in the aforementioned case of the *armed conflicts in Central America*.

In a document adopted in 1989 resulting from consultations of a group of experts²², reference was made to the principles contained in the 1984 Cartagena Declaration on Refugees²³, complemented by the practice of the affected States and of international organizations. Half a decade later, in a new document, adopted in 1994, also resulting from consultations of another group of experts²⁴, an assessment was undertaken of the application of those principles. In both documents the UNHCR stressed the fundamental importance of the principle of *non-refoulement*, cornerstone of refugee protection, applicable irrespectively of the any formal determination of the condition of refugee by a State or an international organization, and largely regarded as belonging to the domain of *jus cogens*²⁵. The UNHCR also singled out the principles of non-discrimination and of the peaceful and humanitarian and apolitical character of the granting of asylum²⁶, and further referred to the fostering of the convergences between International Refugee Law, International Human Rights Law and International Humanitarian Law²⁷.

The perennial search for the guiding principles and the care and attention to the need of compliance with them are revealing of the belief in their continuing validity. General principles of law occupy a central position in any legal system, and play a prominent role in guiding the application of its norms and rules. In International Humanitarian Law, e.g., the 1949 Geneva Conventions and their Protocols of 1977, essentially victim-oriented, are inspired above all by the overriding principle of humanity, which calls for respect to the human person in any circumstances and at all times. As well pointed out by J. Pictet, the general principles in this domain permeate the whole *corpus juris* of International Humanitarian Law, which discloses a "*caractère impératif (jus cogens) et non dispositif*"²⁸; those principles are, ultimately, identified with the very foundations of International Humanitarian Law.

²² Formed by H. GROS ESPIELL, S. PICADO and L. VALLADARES LANZA.

²³ Restated in the 1994 San José Declaration on Refugees and Displaced Persons; cf. *Diez Años de la Declaración de Cartagena sobre Refugiados* (Memoria del Coloquio Internacional, San José of Costa Rica, 1994), San José of Costa Rica, UNHCR/IIHR, 1995, pp. 11-470.

²⁴ Formed by A. A. CANÇADO TRINDADE, R. GALINDO-POHL and C. SEPÚLVEDA.

²⁵ I. UNHCR, *Principios y Criterios para la Protección y Asistencia a los Refugiados, Repatriados y Desplazados Centroamericanos en América Latina* / II. *Evaluación de la Puesta en Práctica de las Disposiciones de Dicho Documento*, San José of Costa Rica, UNHCR, 1994, pp. 2 and 8 (1st. doc.), and pp. 5 and 7 (2nd. doc.). And cf. also J. ALLAIN, *The Jus Cogens Nature of Non-Refoulement*, *13 International Journal of Refugee Law*, pp. 533-558 (2002)

²⁶ I. UNHCR, *Principios y Criterios (...) / II. Evaluación de la Puesta en Práctica (...)*, *op. cit. supra* n. (26), pp. 7 and 9 (1st doc.), and pp. 6 and 8 (2nd doc.).

²⁷ *Id.*, pp. 16-17 (2nd doc.).

²⁸ J. PICTET, *Développement et principes du Droit international humanitaire*, (1983), Genève/Paris, Inst. H.-DUNANT/PÉDONÉ, , pp. 104-105, and cf. pp. 8, 53, 68-69 and 73-74.

III. The Fundamental Principles as *Substratum* of the Legal Order Itself

The general principles of law have thus inspired not only the interpretation and the application of the legal norms, but also the law-making process itself of its elaboration. They reflect the *opinio juris*, which, in its turn, lies on the basis of the formation of Law²⁹, and is decisive for the configuration of the *jus cogens*³⁰ (cf. *infra*). Such principles mark presence at both national and international levels. If, in the framework of this latter, one has insisted, in the chapter of the (formal) "sources" of international law on the general principles "recognized" *in foro domestico*, this was due to an endeavour to proceed with juridical security³¹, as such principles are present in every and any legal system (cf. *supra*), at national or international levels³². In sum, in every legal system (of domestic or international law) the general principles mark presence, assuring its coherence and disclosing its axiological dimension. When one moves away from the principles, one incurs into distortions, and grave violations of the legal order including the positive one.

There are general principles of law which appear truly *fundamental*, to the point of identifying themselves with the very foundations of the legal system³³. Such fundamental principles reveal the values and ultimate ends of the international legal order, guide it and protect it against the incongruencies of the practice of States, and fulfill the necessities of the international community³⁴. Such principles, as expression of the "idea of justice", have a universal scope; they do not emanate from the "will" of the States, but are endowed with an objective character which impose them to the observance of all the States³⁵. In this way, - as lucidly points out A. Favre, - they

²⁹ On the wide scope of the *opinio juris* in the formation of contemporary International Law, cf. A. A. CANÇADO TRINDADE, "A Formação do Direito Internacional Contemporâneo: Reavaliação Crítica da Teoria Clássica de Suas 'Fontes'", 29 *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* (2002) pp. 54-57, and cf. pp. 51-65.

³⁰ B. SIMMA, "International Human Rights and General International Law: A Comparative Analysis", 4 *Collected Courses of the Academy of European Law - Florence* (1993)-II, pp. 226-229.

³¹ *Id.*, p. 224.

³² Ch. ROUSSEAU, *Principes généraux du Droit international public*, vol. I, Paris, Pédone, 1944, pp. 891, 901 and 913-914; such principles reflect the "juridical conscience" of States, which regards them as necessarily belonging to any legal order (*ibid.*, p. 890).

³³ G. COHEN-JONATHAN, "Le rôle des principes généraux dans l'interprétation et l'application de la Convention Européenne des Droits de l'Homme", in *Mélanges en hommage à L. E. Pettiti*, Bruxelles, Bruylant, 1998, pp. 192-193; F. Sudre, "Existe-t-il un ordre public européen?", in *Quelle Europe pour les droits de l'homme?* Bruxelles, Bruylant, 1996, pp. 57-59.

³⁴ M. KOSKENNIEMI, *General Principles: Reflexions on Constructivist Thinking in International Law*, in *Sources of International Law* (ed. M. KOSKENNIEMI), Aldershot, Ashgate/Dartmouth, 2000, pp. 360-365, 377, 381, 387, 390 and 395-398.

³⁵ A. FAVRE, « Les principes généraux du droit, fonds commun du Droit des gens », in *Recueil d'études de Droit international en hommage à Paul Guggenheim*, Genève, IUHEI, 1968, pp. 374-374, and cf. p. 369.

secure the unity of Law, as from the idea of justice, to the benefit of the whole humankind³⁶.

It is evident that these principles of law do not depend on the "will", nor on the "agreement", nor on the consent, of the subjects of law; the fundamental rights of the human person being the "necessary foundation of every legal order", which knows no frontiers, the human being is *titulaire* of inalienable rights, which do not depend on his statute of citizenship or any other circumstance³⁷. In the domain of the International Law of Human Rights, an example of general principles of law lies in the *principle of the dignity of the human being*; another lies in that of the *inalienability of the rights inherent to the human being*. In the Advisory Opinion on *The Juridical Condition and the Rights of the Undocumented Migrants* (2003), the Inter-American Court has expressly referred to both principles³⁸.

Moreover, in its *jurisprudence constante*, the Inter-American Court, in interpreting and applying the American Convention, has also always resorted to the general principles of law³⁹. Among these principles, those which are endowed with a truly fundamental character, which I here refer to, in reality form the *substratum* of the legal order itself, revealing the *right to the Law* of which are *titulaires* all human beings⁴⁰, independently of their statute of citizenship or any other circumstance. And it could not be otherwise, as human rights are universal and inherent to all human beings, while the rights of citizenship vary from country to country and encompass only those which the positive law of the State considers citizens, not protecting, thus, the undocumented migrants. As vehemently proclaimed, in a rare moment of enlightenment, the Universal Declaration of Human Rights of 1948 (Article 1),

- "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".

³⁶ *Id.*, pp. 375-376, and cf. p. 379.

³⁷ *Id.*, pp. 376-380, 383, 386 and 389-390.

³⁸ Paragraph 157 of the aforementioned Advisory Opinion.

³⁹ Cf. Inter-American Court of Human Rights (IACHR), case of the *Five Pensioners versus Peru* (Judgment of 28.02.2003), par. 156; IACHR, case *Cantos versus Argentina* (Prel. Obj., Judgment of 07.09.2001), par. 37; IACHR, case *Baena Ricardo and Others versus Panama* (Judgment of 02.02.2001), par. 98; IACHR, case *Neira Alegría versus Peru* (Prel. Obj., Judgment of 11.12.1991), par. 29; IACHR, case *Velásquez Rodríguez versus Honduras* (Judgment of 29.07.1988), par. 184; and cf. also IACHR, Advisory Opinion n. 17, on the *Juridical Condition and Human Rights of the Child* (of 28.08.2002), pars. 66 and 87; IACHR, Advisory Opinion n. 16, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of 01.10.1999), pars. 58, 113 and 128; IACHR, Advisory Opinion n. 14, on the *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the American Convention on Human Rights* (of 09.12.1994), par. 35.

⁴⁰ A.A. CANÇADO TRINDADE, "Tratado de Direito Internacional dos Direitos Humanos", (2003) vol. II, Porto Alegre, S. A. FABRIS Ed., pp. 524-525.

The safeguard and prevalence of the principle of respect of the dignity of the human person human are identified with the end itself of Law, of the legal order, both national and international. By virtue of this fundamental principle, every person ought to be respected by the simple fact of belonging to the human kind, independently of her condition, of her statute of citizenship, or any other circumstance⁴¹. The principle of the inalienability of the rights inherent to the human being, in its turn, is identified with a basic premise of the construction of the whole *corpus juris* of the International Law of Human Rights.

As to the general principles of International Humanitarian Law, it has been persuasively argued, on the basis of *obiter dicta* of the International Court of Justice in the *Nicaragua versus United States* case (1986), that, rather than attempting to identify provisions of the 1949 Geneva Conventions, or of the 1977 Additional Protocols, that might be regarded as expressing general principles, one ought to consider the whole of those Conventions and other humanitarian law treaties as being the expression - and the development - of those general principles, applicable in any circumstances, so as to secure better the protection of the victimized⁴².

There can be no doubts as to the extent of application of the fundamental principles which permeate the whole international legal order; if, by chance, any doubts were raised, it is the function of the jurist to clarify them and not to perpetuate them, so that Law may accomplish its fundamental function of giving justice⁴³. It is here that the ineluctable recourse to the general principles of law can help to dispel any doubt which may be raised as to the scope of the individual rights. It is certain that the norms are the ones juridically binding, but when they move away from the principles, their application leads to breaches of individual rights and to serious injustices (e.g., the discrimination *de jure*).

In reality, when we recognize the fundamental principles which conform the *substratum* of the legal order itself, we enter into the domain of *jus cogens*, of the peremptory law (cf. *infra*). In fact, it is perfectly possible to visualize the peremptory law (the *jus cogens*) as identified with the general principles of law of material order which are guarantors of the legal order itself, of its unity, integrity and cohesion⁴⁴. Such principles are indispensable (the *jus necessarium*), are prior and superior to the will; in expressing an "idea of objective justice" (the natural law), they are consubstantial to the international legal order itself⁴⁵.

⁴¹ B. MAURER, *Le principe de respect de la dignité humaine et la Convention Européenne des Droits de l'Homme*, Paris, CERIC/Univ. d'Aix-Marseille, 1999, p. 18.

⁴² R. ABI-SAAB, "Les `principes généraux' du Droit humanitaire selon la Cour Internationale de Justice", (1987), 766 *Revue internationale de la Croix-Rouge* pp. 386 and 389.

⁴³ M. CHEMILLIER-GENDREAU, "Principe d'égalité et libertés fondamentales en Droit international", in *Liber Amicorum Judge Mohammed Bedjaoui*, eds. E. YAKPO and T. BOUMEDRA, The Hague, Kluwer, 1999, pp. 659-669.

⁴⁴ R. KOLB, *Théorie du jus cogens international*, Paris, PUF, 2001, p. 98.

⁴⁵ *Id.*, pp. 104-105 and 110-112.

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Already in 1935, in his lectures delivered at the Hague Academy of International Law, A. Verdross invoked the "general principle of *jus cogens*"⁴⁶. In dismissing the voluntarist conception of international law, he sustained that

"(...) il faut reconnaître que l'idée du droit ne peut entrer dans la vie humaine que par l'intermédiaire d'une conscience humaine qui la formule (...). Le droit des gens ne peut avoir d'autre base que tout droit, à savoir, l'idée du droit et les principes qui en découlent"⁴⁷.

Those principles are "recognized by the juridical conscience", and it is *in the light* of those principles that "*tout le droit des gens doit être interprété et appliqué*"⁴⁸. *Jus cogens*, so identified with general principles of law of material order, serves the superior interests of the international community as a whole⁴⁹; such interests, in turn, find expression in the peremptory norms of international law (*jus cogens*), emanating from the universal juridical conscience in each historical moment⁵⁰, and paving the way for the construction of a new *jus gentium*, the international law for humankind.

IV. The Acknowledgement of General Principles of Law by the Statute of the Hague Court (PCIJ and ICJ)

1. General Principles of Law and the Quest for Justice

In the course of the drafting of the Statute of the Permanent Court of International Justice (PCIJ), in June-July 1920, the Advisory Committee of Jurists encharged with the task was the stage of a memorable debate pertaining to the "sources" of international law (Article 38 of the Statute). One of the most interesting aspects of that debate concerned the role of principles in any legal system, whether at domestic or at international level. From the start, E. Root argued that the Committee should limit itself to "rules contained in conventions and positive international law", otherwise the States, in his view, would not accept its project⁵¹. In opposition to this view, M. Loder remarked that there were recognized rules which were "not yet of the nature of positive law", but were respected all over the world, and it was the duty of

⁴⁶ And referred, in this connection, to the Separate Opinion of Judge Schücking in the *Oscar Chinn* case (1934) before the Permanent Court of International Justice; cf. A. VERDROSS, «Les principes généraux du droit dans la jurisprudence internationale», 52 *Recueil des Cours de l'Académie de Droit International de La Haye* (1935) pp. 206 and 243.

⁴⁷ A. VERDROSS, "Les principes généraux du droit...", *op. cit. supra* n. (47), pp. 202-203, and cf. p. 222.

⁴⁸ *Id.*, pp. 224 and 227; he added that one is to be led by such "idée fondamentale du droit" (*ibid.*, p. 235).

⁴⁹ G. M. DANILENKO, "International *Jus Cogens*: Issues of Law-Making", 2 *European Journal of International Law* (1991) p. 45.

⁵⁰ A. GÓMEZ ROBLEDO, *El Jus Cogens Internacional (Estudio Histórico Crítico)*, Mexico, UNAM, p. 140 (1982).

⁵¹ PCIJ/Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee (16 June/24 July 1920) with Annexes*, The Hague, Van Langenhuysen Brothers, 1920, p. 294.

the Court (PCIJ) "to develop law", to "ripen (...) principles universally recognized", so as to "crystallise them into positive rules"⁵².

E. Root retorted that the world was not yet prepared to accept the compulsory jurisdiction of a Court which would apply "universally recognized rules" and "principles, differently understood in different countries"⁵³. States would not agree - he insisted - to be brought before a Court which would base its sentences on "its subjective conceptions of the principles of justice"⁵⁴. The Committee's President, Baron Descamps, replied that the law of nations was formed not only by recognized rules, "but also by the demands of public conscience"⁵⁵. And as to E. Root's statement that "the principles of justice varied from country to country", Baron Descamps added significantly "that might be partly true as to certain rules of secondary importance. But it is no longer true when it concerns the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations"⁵⁶.

That, in Descamps's view, was the law which could not be disregarded by judges, and "it would be incumbent on them to consider whether the dictates of their conscience were in agreement with the conception of justice of civilised nations"⁵⁷. In support for the principle of compulsory jurisdiction, A. de La Pradelle favoured giving the Court (PCIJ) "the widest possible jurisdiction"⁵⁸. Baron Descamps reiterated that judges should render their decisions in conformity with the dictates of "the legal conscience of civilised nations"⁵⁹. To Lord Phillimore, the general principles of law, referred to in the proposed draft under discussion, were those "which were accepted by all nations *in foro domestico*"⁶⁰.

Seeking a conciliation of the views expressed, on the one hand, by Baron Descamps, and, on the other hand, by E. Root, Raul Fernandes argued that if the judges were confined to apply only treaties and positive international law (as suggested by E. Root), in many cases the "possibility of administering justice" in legal relations between States would be "taken away from them"⁶¹. More often than not judges would find it necessary to resort to guiding general principles, and this would render the sentences thus passed "generally the more just", because

"the principles are always based on justice, while strict law often departs from it"⁶².

⁵² *Id.*, p. 294.

⁵³ *Id.*, p. 308.

⁵⁴ *Id.*, p. 309.

⁵⁵ *Id.*, p. 310.

⁵⁶ *Id.*, pp. 310-311.

⁵⁷ *Id.*, p. 311.

⁵⁸ *Id.*, p. 312.

⁵⁹ *Id.*, pp. 318-319.

⁶⁰ *Id.*, p. 335.

⁶¹ *Id.*, p. 345.

⁶² *Id.*, pp. 345-346.

In international affairs, - added R. Fernández, - where "legislation is lacking" and customary law is of a rather slow formation, "the practical necessity of recognizing the application of such principles is much greater"; in any case, - he concluded, - the Court (PCIJ) could not become a "registry" for the "acts of the strong against the weak"⁶³. At the end of the Committee's work, the general principles of law were included in the formal "sources" of international law listed in Article 38 of the Statute of the Hague Court (the PCIJ, and, later, the ICJ).

General principles of law were, thus, acknowledged as integrating the formal "sources" of international law. In this understanding, they were taken to mean, basically, those principles of law found *in foro domestico*, in the national legal systems (e.g., *bona fides*, *res judicata*, equality before the law, presumption of innocence, prohibition of abuse of rights, among others). Parallel to them, the international legal system itself has evolved in the light of certain fundamental principles. These are distinct from the general meaning attributed to general principles of law, although some of these latter have been transposed to international procedural law as well. While admitting channels of communication between the two sets of principles, the principles of international law can be appropriately approached in a distinct way, not as one of the formal "sources" of international law, but rather as pertaining to the *substratum* of all international legal norms, and, accordingly, to the very foundations of the international legal system.

2. Principles of International Law as Pillars of the International Legal System

Despite that, considerably more attention was devoted to the principles of international law half a century ago than in our days, however surprising this may appear. Yet, those principles retain their utmost importance, as they inform and conform the legal norms of any juridical system. Successive doctrinal works were dedicated to the study of the principles of international law⁶⁴, in the framework of the

⁶³ *Id.*, p. 346.

⁶⁴ Cf., e.g., L. RODRÍGUES PEREYRA, *Princípios de Direito Internacional*, vols. I and II, Rio de Janeiro, J. Ribeiro dos Santos Ed., 1902 and 1903; T.J. Lawrence, *Les principes de droit international*, 5th. ed. (transl. J. DUMAS and A. DE LA PRADELL), Oxford, University Press, 1920, pp. 99-120; P. DEREVITZKY, *Les principes du Droit international*, Paris, Pédone, 1932; Ch. Rousseau, *Principes généraux du Droit international public*, vol. I, Paris, Pédone, 1944; BIN CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, London, Stevens, 1953; G. SCELLE, *Précis de droit des gens - principes et systématique*, Paris, Rec. Sirey, 1934; M. MIELE, *Principi di Diritto Internazionale*, 2nd. ed., Padova, Cedam, 1960; L. DELBEZ, *Les principes généraux du contentieux international*, Paris, LGDJ, 1962; L. DELBEZ, *Les principes généraux du Droit international public*, 3rd. ed., Paris, LGDJ, 1964; H. KELSEN, *Principles of International Law*, 2nd. ed., N. Y., Holt Rinehart & Winston, 1966; W. FRIEDMANN, *The Uses of 'General Principles' in the Development of International Law*, 57 *American Journal of International Law*, pp. 279-299 (1963); M. VIRALLY, « Le rôle des 'principes' dans le développement du Droit international », *Recueil d'études de Droit international en hommage à Paul Guggenheim*, Genève, IUHEI, 1968, pp. 531-554; M. BARTOS, "Transformations des principes généraux en règles positives du Droit international", *Mélanges offerts à Juraj*

foundations of the discipline and the consideration of the validity of its norms. In the fifties and the sixties some courses delivered at the Hague Academy of International Law addressed the theme of the principles of international law⁶⁵, which was retaken in monographs in the sixties and the seventies. Subsequently, there appeared to occur, somewhat surprisingly, a decline in the interest in the study of the matter, parallel to the dissemination of a rather pragmatic approach to the study of international law.

An *exposé de motifs* of a declaration of principles of international law, published on the eve of the outbreak of the II world war, characterized the period at issue as an epoch essentially of *transition*, from an old international law into a new international legal order, in which a great number of pending international problems were waiting for solution. The task of rebuilding international law was not easy, given the diversity of doctrines and diverging opinions, the pessimism manifested in legal circles after the failure of the Hague Codification Conference (of 1930), and above all the "state of uncertainty" in which international law was then found.

Thus, in the reconstruction of international law for the future, one was to find inspiration - without falling into "pure doctrinism" - in the "experience of international life" itself, - as Alejandro Álvarez put it, - without thereby being limited to an upholding only of positive law: on the contrary, legal norms encompassed, besides the *rules*, also the *principles*. These latter were fundamental precepts prevailing in the whole of international law, following the evolution of the "new conditions of international life" and appearing normally as "manifestations of the juridical conscience of the peoples"⁶⁶.

Andrassy, La Haye, Nijhoff, 1968, pp. 1-12; B. VITANYI, «La signification de la 'généralité' des principes de droit», 80 *Revue générale de Droit international public* (1976) pp. 536-545; I. BROWNLIE, *Principles of Public International Law*, 5th. ed., Oxford, Clarendon Press, 1999 (reprint); A.A. CANÇADO TRINDADE, "Princípios do Direito Internacional Contemporâneo", Brasília, Edit. University of Brasília, 1981.

⁶⁵ Cf., e.g., H. ROLIN, «Les principes de Droit international public», 77 *Recueil des Cours de l'Académie de Droit International de La Haye* (1950) pp. 309-479; G. SCHARZENBERG, *The Fundamental Principles of International Law*, 87 *Recueil des Cours de l'Académie de Droit International de La Haye* (1955) pp. 195-385; P. GUGGENHEIM, «Les principes de Droit international public», 80 *Recueil des Cours de l'Académie de Droit International de La Haye* (1952) pp. 5-189; Ch. Rousseau, "Principes de Droit international public", 93 *Recueil des Cours de l'Académie de Droit International de La Haye* (1958) pp. 369-549; G. FITZMAURICE, *The General Principles of International Law*, Considered from the Standpoint of the Rule of Law", 92 *Recueil des Cours de l'Académie de Droit International de La Haye* (1957) pp. 1-223; M. SORENSEN, «Principes de Droit international public», 101 *Recueil des Cours de l'Académie de Droit International de La Haye* (1960) pp. 1-251; P. Reuter, "Principes de Droit international public", 103 *Recueil des Cours de l'Académie de Droit International de La Haye* (1961) pp. 429-656; R. Y. JENNINGS, «General Course on Principles of International Law», 121 *Recueil des Cours de l'Académie de Droit International de La Haye* (1967) pp. 327-600.

⁶⁶ ALEJANDRO ÁLVAREZ, *Exposé de motifs et Déclaration des grands principes du Droit international moderne*, 2a. ed., Paris, Éds. Internationales, 1938, pp. 8-9 and 16-23, and cf. pp. 27 and 51.

Although concern with the need to consider the principles of international law appears to have declined in the last quarter of century, those principles have, nevertheless, always marked presence in the doctrine of international law, including in the contemporary one⁶⁷. The principles of international law permeate the entire international legal system. They play an important role in international law-making as well as in the application of international law⁶⁸. In some cases, such as, e.g., in the law of outer space, they paved the way for the construction of a new *corpus juris*, in a new domain of international law which required regulation, and the principles originally proclaimed have fully retained their value to date⁶⁹.

The principles of international law are guiding principles of general content, and in that they differ from the norms or rules of positive international law, and transcend them. As basic pillars of the international legal system (as of any legal system), those principles give expression to the *idée de droit*, and furthermore to the *idée de justice*, reflecting the conscience of humankind⁷⁰. Irrespective of the distinct approaches to them, those principles stand ineluctably at a superior level than the norms or rules of positive international law. Such rules and norms are binding, but it is the principles which guide them⁷¹. The principles of international law are indeed the pillars of the international legal system; without them, this latter would be reduced to a set of rules or techniques, which could serve whatever purposes. This would be wholly untenable.

V. The 1970 U.N. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States Revisited

1. General Considerations in Historical Perspective

A quarter of a century after the adoption of the United Nations Charter, the principles set forth therein were restated in the Declaration of Principles of International concerning Friendly Relations and Cooperation among States in Accordance with the United Nations Charter, adopted by the U.N. General Assembly on October 24 1970. State representatives undertook themselves the task of restating those principles, pursuant to consultations and proposals made by the U.N. General Assembly (1960-1962). The *travaux préparatoires* were entrusted to the Special

⁶⁷ Cf., e.g., *inter alia*, H. THIERRY, « L'évolution du Droit international - Cours général de Droit international public », 222 *Recueil des Cours de l'Académie de Droit International de La Haye* (1990) pp. 123-185; G. ABI-SAAB, « Cours général de Droit international public », 207 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987) pp. 328-416.

⁶⁸ G. HERCZEGH, *General Principles of Law and the International Legal Order*, Budapest, Akadémiai Kiadó, 1969, pp. 90, 122 and 126.

⁶⁹ Cf. M. LACHS, « Le vingt-cinquième anniversaire du traité régissant les principes du droit de l'espace extra-atmosphérique, 1967-1992 », 184 *Revue française de droit aérien et spatial* (1992) n. 4, pp. 365-373, esp. pp. 370 and 372.

⁷⁰ G. M. DANILENKO, *Law-Making in the International Community*, Dordrecht, Nijhoff, 1993, pp. 7, 17 175 and 186-187, and cf. p. 215.

⁷¹ BIN CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, Grotius, 1987 [reprint], p. 393.

Committee on Principles of International Law Governing Friendly Relations and Cooperation among States, established on December 16 1963 as a subsidiary organ of the VI Committee of the General Assembly, and composed of representatives of States⁷². The Special Committee held six sessions in the period between 1964 and 1970, which led to the adoption of the Declaration⁷³.

An examination of the proceedings of that Special Committee, of the reports at that time of the VI Committee to the General Assembly, and the written testimonies of some of the participants of that legislative exercise, disclose that the Declaration duly reflected the perception and practice of States on the principles of international law that it came to embody⁷⁴. The Declaration was formulated and adopted in an international scenario marked by the historical phenomenon of decolonization, the articulation of the non-aligned movement, the nuclear stalemate, and the endeavours to secure the peaceful coexistence of all States⁷⁵. By the time the work on the Declaration started in Mexico City in 1964, and throughout that work until 1970, its draftsmen were able to count on other historically important Declarations adopted by the U.N. General Assembly⁷⁶.

The debates on the matter disclosed the prevailing view whereby the 1970 Declaration constituted an "authentic interpretation" of the U.N. Charter and a restatement of its principles⁷⁷, which were to have a bearing in subsequent custom as

⁷² And not experts acting in their personal capacity.

⁷³ By the time it first met in 1964, it had 27 Delegations, but in the following year the number of its members had increased to 31, so as to reflect better their geographical distribution. The definitive geographical distribution became the following: Western Europe and North America, 8; Africa, 7; Asia, 6; Latin America, 5; and Eastern Europe, 5. Cf. M. SAHOVIC, « Codification des principes... », *op. cit. infra* n. (75), p. 274.

⁷⁴ Cf. M. SAHOVIC, « Codification des principes du Droit international des relations amicales et de la coopération entre les États », 137 *Recueil des Cours de l'Académie de Droit International de La Haye* (1972) pp. 262-263 and 272; R. Rosenstock, « The Declaration of Principles of International Law Concerning Friendly Relations: A Survey », 65 *American Journal of International Law* (1971) p. 735.

⁷⁵ M. SAHOVIC, « Codification des principes.. », *op. cit. supra* n. (75) pp. 255-261; and cf. J. CASTAÑEDA, *The Underdeveloped Nations and the Development of International Law*, 15 *International Organization* (1961) pp. 38 and 44-48.

⁷⁶ E.g., 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, 1962 Declaration on Permanent Sovereignty of States over Their Natural Resources, and 1965 Declaration on the Inadmissibility of Intervention in the Internal Affairs of States and the Protection of Their Independence and Sovereignty; cf. G. ARANGIO-RUIZ, *The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations*, 137 *Recueil des Cours de l'Académie de Droit International de La Haye* (1972) pp. 431-432; and cf., generally, O. Y. ASAMOAH, *The Normative Role of the General Assembly of the United Nations*, The Hague, M. NIJHOFF, 1966, pp. 1-75 and 227-245; J. CASTAÑEDA, *Legal Effects of United Nations Resolutions*, N.Y., Columbia University Press, 1969, pp. 1-196; E. HAMBRO, *Some Notes on the Development of the Sources of International Law*, 17 *Scandinavian Studies in Law* (1973) p. 93 and n. 4.

⁷⁷ Although its formulation of the principles (1970 Declaration) was not identical to that of the principles set forth in Article 2 of the U.N. Charter.

well as treaty-making⁷⁸. The seven paragraphs of Article 2 of the U.N. Charter listed respectively seven basic principles, namely: the equality of all the member States of the United Nations; their compliance in good faith with the obligations undertaken in accordance with the Charter; the peaceful settlement of international disputes; the prohibition of the use or threat of force against the territorial integrity or political independence of any State; the assistance to the United Nations in an operation which it may resort to; the guarantee that non-member States act in accordance with such principles; and the non-intervention by the United Nations in matters which fall under the domestic jurisdiction of any State (except for coercive measures under chapter VII of the Charter). On its turn, the 1970 Declaration set forth the following seven fundamental principles: the prohibition of, or renunciation to, the use or threat of force in international relations; the peaceful settlement of international disputes; the non-intervention; the duty of international cooperation; the equality of rights and the self-determination of peoples; the sovereign equality of States; the good-faith in the compliance with international obligations.

Already by the second session of the Special Committee (New York, 1996), it was made clear that that was not an exercise of "informal amendment" of the U.N. Charter, but rather of interpretation of its principles in the light of the development of international law in more than two decades; it was, thereby, an exercise also of "progressive development" of international law⁷⁹. A Declaration of the kind, even if not binding, was bound to have influence on international practice⁸⁰. In the Special Committee's third session (Geneva, 1967), the Draft Declaration was related to the chapter of the "sources" of "universal international law"⁸¹. In fact, in the Special Committee's debates of 1967 one of the delegates saw it fit to warn, in 1967, as if in anticipation to what was actually to occur three years later, that only if the Draft Declaration of Principles was ultimately adopted by the General Assembly with unanimous or quasi-unanimous approval, could it be said that it expressed a "universal juridical conviction" to be thus related to the "sources" of international law set forth in Article 38(1)(c) of the ICJ Statute⁸².

The elaboration and adoption of the 1970 Declaration owes its accomplishment, to a large extent, to the decision taken by the Special Committee at its first session (1964) to work on the basis of *consensus*. Had it not been for that decision, one might wonder whether it would have been possible to reach a relative early agreement (already by 1966) as to the formulation of the two principles of peaceful settlement of disputes and juridical [sovereign] equality of States and, three of four years later, as to the formulation of the two most debated principles within the Special

⁷⁸ H. BLIX, *The Helsinki Declaration on Principles Guiding Relations Between States in Europe*, 31 *Revue égyptienne de droit international*, p. 4, and cf. pp. 1-15 (1975).

⁷⁹ U.N., document A/6547, pars. 24-25.

⁸⁰ And some other U.N. Declarations of that kind (particularly in the domain of human rights) had led to the establishment of mechanisms of international implementation of its principles, thus accelerating the formation of customary norms; M. VIRALLY, *The Sources of International Law*, in *Manual of Public International Law* (ed. M. SORENSEN), London, MacMillan, 1968, p. 162.

⁸¹ U.N., document A/6955, pars. 31 and 123.

⁸² U.N., document A/6955, par. 109.

Committee, namely, that of the prohibition of the use or threat of force, and that of the equality of rights and self-determination of peoples. In any case, consensus was regarded as an adequate method of decision-making in the consideration of the principles of international law⁸³.

Already in its first session (Mexico City, 1964), the Special Committee had a clear idea of the hard task before it⁸⁴, amidst the threat of destruction of humankind by the arms race, the need of peaceful coexistence among States with different economic-social systems, the decolonization process, and initiatives of the epoch to foster development, - added to other changes that had occurred at international level in the previous two decades. In the session of New York of 1966, it was recommended to bear constantly in mind the interrelationship between the principles to be formulated⁸⁵.

In the session of Geneva of 1967, some members of the Special Committee expressly admitted that the Committee's work was being affected not only by juridical considerations, but also by the "international situation" prevailing at the time⁸⁶. It need only be recalled that the decade had been particularly disturbed, by episodes such as the war of Vietnam, the Arab-Israeli conflict, the Cuban missile crisis, added to those of the Dominican Republic and of Tchechoslovakia, among others. The fact that the Special Committee and the VI Committee of the General Assembly succeeded in concluding their work, under the pressure of events, in such a turmoiled environment, should not pass unnoticed. In historical perspective, it appears much to their credit to have restated in 1970 the needed principles concerning friendly relations and cooperation among States in accordance with the U.N. Charter.

Today, almost 35 years having lapsed since the adoption of that memorable Declaration of Principles, the question may be raised whether, and to what extent, the principles set forth therein are still recognized as such, and how to assess the international practice of the matter through the last three and a half decades. In order to tackle this question, and for a better appreciation of the principles enshrined in the 1970 Declaration, it would be adequate to recall, albeit summarily⁸⁷, the main points of the long preparatory work of the U.N. Special Committee on the Principles of International Law concerning Friendly Relations and Cooperation among States, with special attention to the process of formulation of those principles.

⁸³ A. A. CANÇADO TRINDADE, "*Princípios do Direito Internacional Contemporâneo*", Brasília, Edit. University of Brasília, 1981, p. 30.

⁸⁴ Cf. L. T. LEE, *The Mexico City Conference of the U.N. Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation Among States*, 14 *International and Comparative Law Quarterly* pp. 1296 ss.. (1965).

⁸⁵ U.N., document A/6547, par. 34; and cf. U.N., document A/6955, par. 32.

⁸⁶ U.N., document A/6955, par. 24.

⁸⁷ For a fuller account, cf., e.g., A.A. CANÇADO TRINDADE, "*Princípios do Direito Internacional...*", *op. cit. supra* n. (84), pp. 51-94.

2. The Formulation of the Principles of International Law

a) Prohibition of the Use or Threat of Force

Throughout the whole work of the Special Committee, one of the most widely debated principles was that of the renunciation to the use or threat of force in international relations. Within the Committee, there were those who considered that principle, together with that of equality of rights and self-determination of peoples, and that of non-intervention in the domestic affairs of States, as "the three most important principles for the maintenance of international peace and security"⁸⁸. This first principle was considered in the light of developments of State practice in the framework of international law. In this context, despite the frequent recourse to force by certain States, the general principle subsisted of the non-use or threat of force against the territorial integrity or political independence of any State, set forth in Article 2(4) of the U.N. Charter. That principle was considered "the foundation of the international juridical order"⁸⁹, integrating "the very essence of international law, in a world of interdependent States (...) in which the arms race continued"⁹⁰.

The Special Committee debates kept in mind Article 2(4) of the U.N. Charter, in addition to which reference was made to the express references to the principle of non-use or threat of force found in several inter-American instruments, in the 1964 Cairo Declaration of the Non-Aligned Countries, and in the 1949 Draft Declaration on the Rights and Duties of States prepared by the U.N. International Law Commission⁹¹. Other references were further made, e.g., to the condemnation, by both the General Assembly and the Security Council, of the use or threat of force by certain States on some occasions⁹². And reference was also made to the provision, e.g., of Article 17 of the OAS Charter⁹³, which is peremptory in affirming the principle of the territorial inviolability of the State and in condemning measures of force.

Despite all these elements, the debates of the Special Committee did not pass without difficulty, particularly when tackling the use of force in "colonial situations", raised by the [then] recently emancipated States. Thus, an attempt was made to relate the use of force in such situations to the principle of equality of rights and self-determination of peoples⁹⁴, to the effect of acknowledging the right of self-defence (under Article 51 of the U.N. Charter) not only on the part of States but also of the "peoples defending themselves against colonial domination and struggling for

⁸⁸ U.N., document A/6955, par. 23.

⁸⁹ U.N., document A/6955, par. 37.

⁹⁰ U.N., document A/7809, par. 14.

⁹¹ U.N., document A/6955, par. 44.

⁹² One recalled, e.g., resolutions 110(II) of 1947 and 381(V) of 1950 of the General Assembly, condemning any war of propaganda. Resolution 2160(XXI) of 1966 the General Assembly was likewise quoted, more than once; *id.*, pars. 37 and 41.

⁹³ *Id.*, pars. 41, 44 and 48.

⁹⁴ U.N., document A/7809, par. 15.

freedom and self-determination"⁹⁵. To some representatives (particularly from Afro-Asian States) "self-defence against colonial domination should be regarded as an exception to the general rule, since (...) colonialism was an act of force and constituted indeed an aggression"⁹⁶. On this specific point, at the end of four years of debates, the view prevailed among the participating Delegations that, in the world of that time, the expression "international relations" could no longer be limited to the purely inter-State relations, since, e.g., the relations between a non-self-governing territory and an authority entrusted with its administration have an "international character", in the light of the "international responsibilities" imposed by chapter XI of the U.N. Charter⁹⁷.

The condemnation of the "war of aggression" was peremptory, and a proposal of Tcheoslovaquia to this effect⁹⁸ found no difficulty to be approved, given the precedents in international practice (international instruments going back to the 1928 Briand-Kellogg Pact). Several representatives stressed the need to invoke, in the formulation of the principle, the "responsibility of States which waged wars of aggression or committed other crimes against peace"⁹⁹. One participant, in dwelling upon the historical evolution of the principle proclaimed in Article 2(4) of the U.N. Charter, affirmed that "in contemporary international law the prohibition of the use of force had become a norm of *jus cogens*"¹⁰⁰.

Other points were considered, such as the relationship between the principle of the prohibition of the use or threat of force and the other principles under consideration (especially that of non-intervention in the internal affairs of States)¹⁰¹. It was, furthermore, pointed out that the prohibition of threat or use of force should refer "not only to (national) frontiers but also to other international lines of demarcation"¹⁰², as exemplified by what was occurring, in those days, e.g., in Vietnam, Korea, Germany, and the Middle East. Attention was also drawn to the question of the use of force by the United Nations Organization itself (pursuant in

⁹⁵ U.N., document A/6547, par. 43; and, in the same sense, U.N., document A/6165, par. 31. Some representatives went further, expressing the wish that the formulation of the principle "should include" a prohibition of the use of force for repression of movements of [national] liberation or for denial of the right of self-determination; U.N., document A/6547, par. 41. On the other hand, there were also those who considered "unacceptable" to extend the doctrine of self-defence to the colonial context; cf. U.N., document A/6955, par. 49.

⁹⁶ U.N., document A/6955, par. 49. - In this respect, cf. comments, on resolutions 1514(XV) and 2621(XXV) of the U.N. General Assembly, of A. RIGO SUREDA, *The Evolution of the Right of Self-Determination*, Leiden, Sijthoff, 1973, pp. 261-264; and cf. also S. CALOGEROPOULOS-STRATIS, "*Le droit des peuples à disposer d'eux-mêmes*", Bruxelles, Brylant, 1973, pp. 120-133; U. O. UMOZURIKE, *Self-Determination in International Law*, Hamden/Conn., Archon Books, 1972, pp. 3-299.

⁹⁷ R. ROSENSTOCK, *op. cit. infra* n. (113), p. 720.

⁹⁸ Cf. U.N., document A/AC.125/L.16, par. 2. On the Czech initiative, cf. also P.-H. HOUBEN, "Principles of International Law Concerning Friendly Relations and Co-operation Among States", 61 *American Journal of International Law* (1967) pp. 705-706.

⁹⁹ U.N., document A/6955, par. 42.

¹⁰⁰ *Id.*, par. 38.

¹⁰¹ U.N., document A/6955, par. 39.

¹⁰² U.N., documents A/6547, par. 41, and A/6165, par. 22.

particular to a decision of the Security Council)¹⁰³, as well as to the prohibition of the use of force in reprisals (distinct from self-defence)¹⁰⁴, regarded as incompatible with the purposes and principles of the United Nations¹⁰⁵.

But in relation to the prohibition of the use or threat of force in international relations, few problems raised so much debate as that of the meaning and scope to be attributed to the term "force". There was at first general agreement that the term properly covered "armed force"¹⁰⁶, but some delegates were reluctant to widen its scope for the purpose of the formulation of the principle at issue¹⁰⁷. On the other hand, several delegates pressed for a wider scope for the principle of non-use or threat of force, so as to cover also "political or economic pressure", which in their view was "at times as dangerous as the use of armed force"¹⁰⁸; in favour of this interpretation, they recalled the OAS Charter, the Programme for Peace and International Cooperation adopted by the II Conference of Heads of State or Government of the Non-Aligned Countries (Cairo, 1964), and resolution 2160(XXI) of 1966 of the U.N. General Assembly¹⁰⁹.

Most of the representatives of Afro-Asian States, and of Eastern European States, and of some Latin American States, favored such a wide interpretation of the prohibition of "force", while a more restrictive interpretation was supported by the delegates of Western States, some other Latin American States and other individual States; the 1970 Declaration did not manage to provide a clear answer to the problem, in the view of some deliberately, in opting for a rather more abstract drafting of the principle at issue so as to overcome the difficulty¹¹⁰. The same uncertainties were to be found also in expert writing, disclosing either a wider interpretation of the prohibition of force¹¹¹, or a rather stricter one¹¹².

b) Peaceful Settlement of International Disputes

In the debates on the formulation of the principle of peaceful settlement of disputes¹¹³, the old maxim was reiterated that the acceptance by States of a given procedure of peaceful settlement of existing or future disputes, which they were parties to, should not be regarded as incompatible with the "sovereign equality of

¹⁰³ U.N., documents A/6955, par. 38, and A/6547, par. 44.

¹⁰⁴ U.N., document A/6165, par. 26.

¹⁰⁵ As a result of developments in this sense of the so-called law of the United Nations (as reflected, e.g., already in resolution 188 of 1964 of the Security Council).

¹⁰⁶ U.N., document A/6547, par. 37.

¹⁰⁷ Cf. U.N., documents A/6165, par. 25, and A/6547, par. 39.

¹⁰⁸ U.N., documents A/6165, par. 25; A/7809, par. 20; A/6547, par. 38.

¹⁰⁹ U.N., document A/6955, par. 41; and cf. also U.N. document A/6547, par. 38.

¹¹⁰ Cf. R. ROSENSTOCK, *op. cit. infra* n. (113), p. 724.

¹¹¹ G. ARANGIO-RUIZ, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", 137 *Recueil des Cours de l'Académie de Droit International de La Haye* (1972), pp. 529-530.

¹¹² R. ROSENSTOCK, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 *American Journal of International Law* p. 725 (1971).

¹¹³ Cf., e.g., U.N., documents A/6230, pars. 157-272; and A/5746, pars. 128-201.

States"¹¹⁴. The optional clause of compulsory jurisdiction of the ICJ Statute (Article 36(2)) was recalled in the debates¹¹⁵, although certain States¹¹⁶ appeared to have presumably preference for the method of direct negotiations. This is what ensued from the position taken by some Delegations, to the effect that "negotiation, mediation and conciliation were methods which could be used to alter an existing juridical situation, while the methods of arbitration and judicial settlement applied the law as it existed"¹¹⁷.

In the New York session of 1966 of the Special Committee, two representatives remarked that "negotiation was the most effective method of settlement of international disputes"¹¹⁸, while others warned, however, that "negotiation had its limitations, as it involved a relation of power based on the particular interests of the States and not on the general welfare", and that "to give prominence *de jure* to negotiation was not desirable, as it could limit the freedom of the parties to choose the most appropriate means to settle the dispute at issue"¹¹⁹. At last, references were made to the functions of political organs of international organizations - both the United Nations (Security Council and General Assembly) and regional organizations - in the settlement of disputes¹²⁰.

c) Non-Intervention in the Internal Affairs of States

The third principle considered by the Special Committee - that of the duty of non-intervention - was strongly supported, e.g., by the representatives mainly of Latin American and also of Eastern European States. In session of Geneva of 1967 of the Special Committee, in recalling, e.g., that the principle at issue was set forth in the 1933 Montevideo Convention on the Rights and Duties of States, as well as in the OAS Charter (and those of the OAU and the United Nations), some representatives argued that "the history of Latin America was the history of the principle of non-intervention in the internal affairs of States. For the peoples of Latin America, the principle, far from being a mere formal clause, reflected their profound beliefs and constituted the main juridical defence of their independence and sovereignty"¹²¹.

One of the participants reported that there were Delegations in the Special Committee which deemed that the principle of non-intervention amounted in fact to a principle of international law of Latin American origin¹²². In this respect, as recalled by the representative of Mexico, the principle at issue, already contained in the Drago doctrine, was considered in the Inter-American Conference of Havana of 1928, and

¹¹⁴ For the insistence on this last point, cf., e.g., U.N., documents A/6547, par. 47; and A/6165, par. 34.

¹¹⁵ Cf., e.g., U.N., documents A/6165, par. 35; A/6547, par. 48; and A/6955, par. 96.

¹¹⁶ Cf. U.N. document A/6955, par. 97.

¹¹⁷ U.N., document A/6165, par. 33.

¹¹⁸ U.N., document A/6547, par. 49.

¹¹⁹ *Id.*, par. 49. - On the element of good faith in the peaceful settlement of disputes, cf. *Id.*, par. 50.

¹²⁰ U.N., documents A/6165, pars. 36-37; and A/6547, par. 51.

¹²¹ U.N., document A/6955, par. 89.

¹²² Cf. G. ARANGIO-RUIZ, *op. cit. supra* n. (112), pp. 549 and 560.

for the first time formally affirmed at the Conference of Montevideo of 1933, and subsequently, in a definitive way, established by the Inter-American Conference of Buenos Aires of 1936 in the Additional Protocol on Non-Intervention. That principle, reiterated in the Conferences of Lima of 1938 and of Chapultepec of 1945, received its wider and more rigorous formulation in the Pact of Bogotá of 1948 and in the provisions of Articles 15 and 16 of the OAS Charter¹²³. Thus, in his view, - added the Mexican delegate (J. CASTAÑEDA), - "the inter-American concept of non-intervention was universally applicable"¹²⁴.

In the prolonged debates on the subject¹²⁵, several representatives (e.g., in the 1967 Geneva session of the Special Committee) advocated that the formulation of the principle should cover intervention in any form, direct or indirect, in any of the internal affairs of a State¹²⁶ (and not only armed intervention)¹²⁷. One representative pondered that, given the difficulties of defining intervention in all its forms, it should be incumbent upon the "international competent organs" to determine in each concrete case whether intervention had occurred or not¹²⁸. Some Delegations stressed the relationship between the duty of non-intervention and the principle of self-determination of peoples¹²⁹. There were representatives who argued that Article 2(7)

¹²³ U.N., document A/AC.119/SR.30, pp. 4-5, and cf. also p. 7. On the Latin-American practice in this respect, cf., furthermore, e.g., I. FABELA, *Intervention*, Paris, Pédone, 1961, pp. 67-212; A.V.W. THOMAS and A. J. THOMAS Jr., *Non-Intervention - The Law and Its Import in the Americas*, Dallas, Southern Methodist University Press, 1956, pp. 55-64. And cf.: Comité Jurídico Interamericano, "Contribución del Continente Americano al Desarrollo y a la Codificación de los Principios del Derecho Internacional que Rigen la Responsabilidad del Estado", in *Recomendaciones e Informes, Documentos Oficiales* - vol. VII, Opinion of 25.08.1961, pp. 177-250; OAS, document OEA/Ser.I/VI.2 - CIJ-58, Inter-American Juridical Committee, "Opinion on the Legal Aspects of the Draft Declaration on Non-Intervention Presented by the Mexican Delegation", of 22.09.1960, pp. 1-12; Comité Jurídico Interamericano, "Diferencias entre Intervención y Acción Colectiva", in *Recomendaciones e Informes, Documentos Oficiales* - vol. IX, Opinion of 23.09.1965, pp. 111-127. - For a subsequent study, cf. R. J. VINCENT, *Non-Intervention and International Order*, Princeton, University Press, 1974, pp. 1ss.; and for a study of cases, cf. J.E.S. FAWCETT, *Intervention in International Law: A Study of Some Recent Cases*, 103 Recueil des Cours de l'Académie de Droit International de La Haye, pp. 347-421 (1961).

¹²⁴ U.N., document A/AC.119/SR.30, p. 11. - For stricter viewpoints, cf. U.N., documents A/AC.119/SR.32, p. 12, and A/AC.119/SR.29, pp. 7-8 and 11.

¹²⁵ Cf. U.N. documents A/5746, pars. 202-292; A/6230, pars. 273-355; and A/6799, pars. 301-366.

¹²⁶ U.N., documents A/6955, par. 92; A/AC.119/SR.25, pp. 4-6, 9-10 and 12; A/AC.119/SR.26, p. 8; A/AC.119/SR.28, p. 5, 7 and 18, and cf. pp. 11-17; A/AC.119/SR.29, p. 7; and A/AC.119/SR.31, pp. 10-11; and cf. U.N. document A/6165, par. 43.

¹²⁷ Cf. U.N., document A/AC.119/SR.32, pp. 23 and 29; and cf. U.N., docs. A/AC.119/SR.31, pp. 11-12; A/AC.119/SR.30, pp. 20-21; and A/AC.119/SR.32, pp. 25-30.

¹²⁸ U.N., document A/AC.119/SR.30, p. 21. And cf. also U.N., docs. A/AC.119/SR.26, pp. 5-6; and doc. A/AC.119/SR.28, pp. 7-9. - As to prior endeavours of the States to codify the principle of non-intervention, cf. U.N., document A/5671, p. 23.

¹²⁹ U.N., document A/AC.119/SR.25, pp. 5 and 10.

of the U.N. Charter implied *a fortiori* a prohibition of intervention also at the level of inter-State relations¹³⁰.

During the sessions of 1966-1967 of the Special Committee, a few delegates tried to cast doubts on the usefulness of taking into account the General Assembly resolution 2131(XX) of 1965, containing the Declaration on the Inadmissibility of Intervention in the Internal Affairs of States and the Protection of Their Independence and Sovereignty¹³¹. But other representatives reacted, arguing that the aforementioned resolution 2131(XX) should serve as basis for the work of the Committee, for expressing a "universal juridical conviction" in the principle of non-intervention and for having been adopted without any votes against it¹³².

The majority of the members of the Committee considered that the substance of resolution 2131(XX) should be taken into account in the formulation of the principle at issue; on the occasion, it was observed that "there were other important examples of adoption of declarations of conscious juridical content, by recommendation of the political organs of the United Nations, and the *corpus* of resolutions of the General Assembly could be a source of customary international law"¹³³. By 22 votes to 8, with one abstention, the Special Committee at last decided (New York session of 1966) to take into account resolution 2131(XX) and to conduct its work on the principle at issue in such a way as to widen the area of consensus of resolution 2131(XX) of the U.N. General Assembly¹³⁴.

As to the determination and scope of the so-called reserved domain of the States, one of the representatives observed that "acts such as genocide, crimes against humanity, the denial of the right of self-determination of peoples under colonial or foreign domination, or acts committed in breach of international agreements", would not fall under the reserved domain of States¹³⁵. Another delegate stressed that the principle at issue "could not be constructed in such a way as to mean that a country could violate the fundamental human rights of its citizens without such violations becoming a concern of the whole international community"¹³⁶.

Another participant remarked that the determination whether a question fell or not under the domestic jurisdiction of a State could only take place after one had examined all the international obligations of that State regarding the question at issue; moreover, the development of communications across national frontiers

¹³⁰ Cf. U.N., documents A/AC.119/SR.31, p. 12; and A/AC.119/SR.32, p. 23.

¹³¹ Cf. U.N., documents A/6955, pars. 80-82, and A/6547, par. 54. And, on that resolution, cf., generally, e.g., N. OUCHAKOY, « La compétence interne des États et la non-intervention dans le droit international contemporain », 141 *Recueil des Cours de l'Académie de Droit International de La Haye* (1974) pp. 65-80.

¹³² Cf. U.N., document A/6955, par. 83; resolution 2131(XX) had been adopted by 109 votes in favour, none against, with one abstention.

¹³³ *Id.*, par. 53; cf. also, in the same sense, U.N., document A/6230, p. 134.

¹³⁴ U.N., documents A/6547, par. 52, and A/8018, suppl. 18, p. 14, and cf. pp. 36-37 for the text of the decision of the Special Committee.

¹³⁵ U.N., document A/6955, par. 91.

¹³⁶ *Id.*, par. 91.

fostered international concern, and very few questions could be deemed to be "entirely domestic", and this led to a continuous reduction of the reserved domain of the States, to the extent that "legal protection was recognized and extended to the real interest of States in the territory of others"¹³⁷. In fact, in the previous three decades the practice of the United Nations and regional organizations, and particularly of U.N. political organs, had been seeking to stress the responsibility of States for breaches of their international obligations, not allowing that States which interposed objections on the basis of the so-called "reserved domain" impeded the inclusion of the topic at issue in the agendas of those organs for subsequent discussion at international level¹³⁸.

The outcome of the work of the Special Committee on the duty of non-intervention was significant. The principle, as formulated by the Committee, was unequivocal in providing that "armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law"; it further stipulated that "no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to extract from it advantages of any kind". The text added that "every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State"; it asserted, at last, that nothing in those clauses should be interpreted as affecting the relevant provisions of the U.N. Charter concerning international peace and security¹³⁹. With that, the definition of this principle discarded any doubts that could eventually subsist as to the consideration of the first principle, - that of the prohibition of the use or threat of force in international relations (*supra*), - as to the proper meaning of the term "force": the formulation by the Special Committee of the duty of non-intervention was peremptory in condemning intervention in all its forms.

d) Duty of International Cooperation

At the very start of the debates of the Special Committee on the fourth principle, it was pondered that international cooperation should always take place "on the basis of the absolute equality of States"¹⁴⁰. In the view of some Delegations, one should avoid any type of discrimination, particularly in economic and commercial relations¹⁴¹. During the debates on the duty of international cooperation¹⁴² references were made to regional endeavours of cooperation in the area of development and

¹³⁷ U.N., documents A/AC.119/SR.29, p. 5, and A/5746, p. 124.

¹³⁸ A. A. CANÇADO TRINDADE, *The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organizations*, 25 *International and Comparative Law Quarterly* pp. 764-765 (1976).

¹³⁹ Text in: U.N. General Assembly, *Resolutions Adopted on the Report of the Sixth Committee - 25th Session*, 1970, p. 213 (A.G. res. 2625(XXV) of 1970): cf. also U.N., document A/8028, suppl. 28, p. 123, and cf. pp. 121-124.

¹⁴⁰ U.N., document A/6165, par. 52.

¹⁴¹ *Id.*, par. 52, and cf. also U.N., document A/6955, par. 56.

¹⁴² Cf., U.N., documents A/6230, pars. 414-445; and A/6799, pars. 114-170.

technical assistance¹⁴³. In the Geneva session of 1967 of the Special Committee, several representatives successfully insisted on the inclusion, in the formulation of the principle, of a clause providing for the duty of cooperation of the States in the promotion of respect for, and observance of, human rights and the elimination of all forms of racial discrimination and religious intolerance¹⁴⁴. It was further stressed that the present principle of the duty of cooperation constituted a precondition, or else a corollary, of the concept of peaceful coexistence in constant relation with the other principles of international law¹⁴⁵.

In recalling Article 23 of the Covenant of the League of Nations and Articles 13, 55 and 56 of the U.N. Charter, one representative remarked that the principle of cooperation among States encompassed also their duty to cooperate in the juridical field as well, and "particularly in the progressive development of international law and its codification"¹⁴⁶. If, on the one hand, there were areas which continued, more than ever, to require urgently the cooperation of States, such as, *inter alia*, those of disarmament, exploration of outer space, protection of the environment, exploration of ocean resources, eradication of hunger, peaceful uses of Antarctica, - on the other hand one should acknowledge the intense activity of international cooperation developed in recent years within the United Nations and regional organizations, which appeared as an expression of the *opinion juris sive necessitatis* of the States¹⁴⁷.

e) Equality of Rights and Self-Determination of Peoples

The consideration of principles of international law by the Special Committee did not limit itself to a simple reassessment of the basic principles already found in Article 2 of the U.N. Charter, but extended itself also to principles the contents of which were still in evolution¹⁴⁸, as exemplified by that of the equality of rights and self-determination of peoples. This latter, with the still ongoing historical process of decolonization was characteristic of that time, besides reflecting an important achievement of the United Nations¹⁴⁹. Self-determination of peoples had by then established itself as a principle of contemporary international law¹⁵⁰, of universal

¹⁴³ U.N., document A/6955, par. 55.

¹⁴⁴ *Id.*, par. 58.

¹⁴⁵ *Id.*, pars. 51 and 53.

¹⁴⁶ E. USTOR, *The Principle of Co-operation Among States and the Development of International Law, in Questions of International Law* (Hungarian Branch of the International Law Association), Budapest, Progresprint, 1971, pp. 245-246; and cf. also, on the principle at issue, E. McWHINNEY, *Friendly Relations and Co-operation Among States: Debate at the Twentieth General Assembly, United Nations*, 60 *American Journal Of International Law*, p. 360 (1966).

¹⁴⁷ E. USTOR, *op. cit. supra* n. (147), pp. 244-245.

¹⁴⁸ M. SAHOVIC, *op. cit. supra* n. (75), p. 287.

¹⁴⁹ U.N., documents A/6955, par. 62; and A/7831, par. 22.

¹⁵⁰ U.N., document A/6955, par. 63.

application¹⁵¹; this was made clear by the participating Delegations in the debates of the New York session of 1966 of the Special Committee¹⁵².

In the course of the preparatory work of the Draft Declaration, references were made to relevant resolutions of the U.N. General Assembly on decolonization¹⁵³. In the prolonged debates on the principle at issue¹⁵⁴, there was support for the view that States had to abstain themselves of any action contrary to the exercise of self-determination, and that colonial peoples struggling for emancipation were entitled to search for and receive all kinds of assistance in accordance with the principles and purposes of the U.N. Charter¹⁵⁵. This was one of the rare and exceptional situations in which the use of force, thus understood, was contemplated, on behalf of colonial peoples and in the light of the U.N. Charter¹⁵⁶.

There were also some words of precision in the formulation of the principle, with the Special Committee distinguishing (as proposed by some delegates) the separate and distinct *status* of a non-self-governing territory from that of the territory of the State administering it, bearing in mind the people of the former's right to self-determination in accordance with the purposes and principles of the U.N. Charter¹⁵⁷. There were also some words of caution in the formulation of the principle at issue, with some representatives seeing it fit to warn that this latter was not to be utilized so

¹⁵¹ U.N., document A/7831, par. 23; moreover, it came to integrate the foundations of the U.N. system; U.N., doc. A/6955, pars. 63 and 71; and cf. U.N. docs. A/7831, pars. 24 and 27.

¹⁵² U.N., document A/6547, par. 69.

¹⁵³ Such as, e.g., resolutions 1514(XV) of 1960 (the contents of which were particularly significant for the conceptualization of self-determination in the context of decolonization), 2105(XX) of 1965 (of support to movements of national liberation), as well as resolutions 2160(XXI) of 1966, 1541(XV) of 1960, and 2131(XX) of 1965; U.N., documents A/7831, par. 22, A/6547, par. 71, A/6955, pars. 62 and 65. - It is to be noted, however, that the definitive formulation of the principle in the Declaration of 1970 did *not* quote expressly any of those resolutions of the General Assembly. Resolution 1514(XV) of 1960, e.g., *inter alia* related self-determination (as a right) - under the U.N. Charter - to the domain of human rights; on the implementation of that historical resolution, cf. the subsequent resolution 2621(XXV) of 1970 of the U.N. General Assembly (Plan of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples).

¹⁵⁴ Cf., e.g., U.N., documents A/6799, pars. 171-235; and A/6230, pars. 456-521.

¹⁵⁵ U.N., documents A/6165, par. 61; and A/7831, par. 28.

¹⁵⁶ U.N., document A/7831, pars. 29-30; and cf., on the matter, J. ZOUREK, *L'interdiction de l'emploi de la force en droit international*, Leiden/Genève, Sijthoff/Institut H.-DUNANT, 1974, ch. XI, pp. 93-112. As to the use of force in the context of self-determination of peoples, cf., in the same sense, D. TOURET, «La Déclaration universelle des droits des peuples», 55 *Revue de droit international de sciences diplomatiques et politiques* (1977) pp. 296-297. - And cf., generally, I. BROWNLIE, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963, pp. 1-436; R. HIGGINGS, *The Legal Limits to the Use of Force by Sovereign States - United Nations Practice*, 37 *British Year Book of International Law*, pp. 269-319. (1961)

¹⁵⁷ U.N., document A/7831, par. 31; and cf. U.N. General Assembly, *Resolutions Adopted on the Report of the Sixth Committee*, 25th session, 1970, p. 124 (G.A. res. 2625(XXV) of 1970).

as to encourage secession and territorial dismemberment, mainly in respect of multicultural States and those which had minorities. Thus, an attempt was made to draw a distinction between the typical cases of self-determination (in the immediately colonial context) and those of secession (in an already independent country)¹⁵⁸. In any case, the formulation of the principle of self-determination ranked among the great achievements of the Special Committee, not only for the contribution to the progressive development of international law (cf. *infra*) but also bearing in mind that some States had not previously accepted self-determination as a right of peoples. Hence, this was an example also of progressive development of international law.

f) Sovereign Equality of States

The consideration by the Special Committee of the principle of sovereign equality of States may at first sight have appeared redundant and conducive to a simple reassertion of Article 2(1) of the U.N. Charter. But a new element emerged in relation to Article 2(1), namely, the recognition by the Committee members of the right of the State of free choice and development of its political, social, economic and cultural systems, as in fact disclosed by the Committee debates on the subject¹⁵⁹. Throughout the work on the formulation of that principle, there was a constant concern with the *de facto* inequalities among States, which, - it was believed, - should not be "legalized"¹⁶⁰. One of the points most often debated was surely the right of States to dispose freely of their wealth and their natural resources, which was considered an essential aspect of the principle at issue in the economic domain; in this respect, references were made to successive General Assembly resolutions on the matter¹⁶¹.

g) Good Faith in the Compliance with International Obligations

As to the debates on the last principle, that of good faith in compliance with international obligations¹⁶², it was argued by several representatives that the only obligations encompassed by that principle were those that had been "freely contracted" and that were "compatible with the [U.N.] Charter and general international law. The principle would not cover, for example, obligations sanctioning aggression, colonial domination or inequality among States, unequal treaties, treaties imposed by force or fraud, or treaties legally terminated"¹⁶³. Insistence was made particularly on the question of unequal treaties, as "in recent years new States emerged which opted between different economic and social

¹⁵⁸ Cf. U.N., documents A/7831, par. 26; and A/6955, par. 68.

¹⁵⁹ Cf., e.g., U.N., documents A/5746, pars. 293-352; A/6799, pars. 409-437; and A/6230, pars. 356-413.

¹⁶⁰ Cf., U.N., documents A/6547, par. 59; and A/6955, par. 99.

¹⁶¹ E.g., General Assembly resolutions 1803(XVII) of 1962, 2158(XXI) of 1966, and 2200 A(XXI) of 1966, on the matter at issue; cf. U.N., documents A/6955, par. 100; and A/6547, par. 61; and cf. also A/6165, par. 45. The Declaration, however, did not expressly quote any of those resolutions of the General Assembly in the formulation of the principle at issue.

¹⁶² Cf. U.N., documents A/6799, pars. 236-300; and A/6230, pars. 522-566.

¹⁶³ U.N., document A/6165, par. 64; and cf. also U.N., document A/6547, par. 74.

systems", a choice that gave a new direction to international law, endorsing the right to refuse to feel obliged by "treaties concluded under the old regime"¹⁶⁴.

Although other aspects were also considered¹⁶⁵ of the principle at issue, which was already set forth in Article 2(2) of the U.N. Charter, the relatively succinct form which was given to it (in 1967) by the Special Committee attracted some criticism from certain of its members. One of them found somewhat strange that the text dealt with "complex and delicate questions", such as, e.g., the relations between the U.N. Charter and the law of treaties, between the U.N. Charter and customary international law, and between the law of treaties and customary international law, which "had not been adequately explored from a theoretical or practical point of view"¹⁶⁶. Some representatives regretted that the Drafting Committee of the Special Committee had not expressly recognized, in the formulation of the principle, the primacy of international legal obligations over those derived from domestic law¹⁶⁷. But the formulation of the seventh principle set forth in the 1970 Declaration was, however, careful enough to provide, *inter alia*, that, when obligations derived from international agreements entered into conflict with the obligations of the member States of the United Nations in accordance with its Charter, these latter would prevail¹⁶⁸.

3. Assessment

At the Geneva session of 1967 of the Special Committee, it was pointed out that, pursuant to Article 13(1)(a) of the U.N. Charter, the Draft Declaration was not conceived as a binding document, but was to have the form of a resolution on the principles of international law. Yet, the fact that, throughout its whole work, the Committee endeavoured to decide by consensus on substantive issues, indicated that it was aware of its prudence - and that of the General Assembly - when it came to formulate and develop principles of international law, in conformity with the provision of Article 13(1) of the U.N. Charter¹⁶⁹.

The 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, adopted by unanimity by the XXV General Assembly shortly after the last session of the Special Committee (Geneva, 1970),

¹⁶⁴ U.N., document A/6955, par. 77. However, it was warned that such considerations did not apply to every and any unequal treaty, since some unequal treaties appeared "justified", such as a treaty whereby a country, "without any *quid pro quo*", allowed permanent access to the sea to another country without maritime coast; *ibid.*, par. 77.

¹⁶⁵ One delegate observed, e.g., that the *status* of permanent neutrality of his country did not hinder it "to comply in good faith with its obligations as member of the United Nations", as he was convinced that "that special *status*, which had been duly notified, would be duly taken into account by the Security Council and all the member States of the United Nations" (*Id.*, par. 78).

¹⁶⁶ *Id.*, par. 74.

¹⁶⁷ Cf. *Id.*, par. 79.

¹⁶⁸ Text *in*: U.N. General Assembly, *Resolutions Adopted on the Report of the Sixth Committee*, 25th session, 1970, p. 124 (G.A. res. 2625(XXV) of 1970).

¹⁶⁹ U.N., document A/6955, par. 30.

was composed of a preamble, seven principles and a general part, which pointed out that the principles enshrined therein were interrelated and constituted "basic principles of international law". Despite its imperfections and insufficiencies, it was deemed that it could assist in detecting the *opinio juris* of the international community¹⁷⁰, at the time of its adoption, on the fundamental issue of the principles of international law.

Taken as a whole, the 1970 Declaration appeared more comprehensive than earlier attempts of systematization of the matter, and more adequate to the exigencies and needs of the epoch, and represented a sensible advance when compared with the Draft Declaration on the Rights and Duties of States prepared by the International Law Commission in 1949¹⁷¹. The 1970 Declaration restated the principles of international law taking into account the relevant international practice under the U.N. Charter since its adoption¹⁷². As already seen, at a stage of the preparatory work the hope was expressed that the Declaration was to amount to an expression of a "universal juridical conviction" on the matter (cf. *supra*).

The impact of the Declaration was promptly to be felt throughout the seventies. It was referred to by the International Court of Justice in its Advisory Opinion on the *Western Sahara* (1975), and invoked in the course of its advisory proceedings. The Declaration was referred to in the assertion of one of its principles, that of self-determination of peoples, reiterating the basic need of taking into account the aspirations of the people at issue¹⁷³. Shortly afterwards, personalities and representatives of movements of national liberation signed in Argel the 1976 Universal Declaration on the Rights of Peoples, proclaiming *inter alia* self-determination already as a right and no longer as but a principle. This new document contained provisions deriving particularly from the two principles of sovereign equality of States and equality of rights and self-determination of peoples, whose drafting was recognized influenced by the contents of the 1970 Declaration of Principles¹⁷⁴.

In the debates of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law (Geneva, four sessions, 1974-1977), conducive to the adoption of Additional Protocols I and II of 1977 to the

¹⁷⁰ For the view that the 1970 Declaration on Principles, as an interpretation and elaboration of the U.N. Charter principles, is binding on States Parties, and, as its principles are also general international law, it is likewise binding on States non-members of the U.N. as well, cf. B. Sloan, "General Assembly Resolutions Revisited (Forty Years Later)", 58 *British Year Book of International Law* (1987) pp. 88 and 57.

¹⁷¹ E. USTOR, *The Principle of Co-operation Among States...*, *op. cit. supra* n. (147), pp. 238-239.

¹⁷² M. SAHOVIC, « Codification des principes... », *op. cit. supra* n. (75), pp. 290 and 292.

¹⁷³ International Court of Justice (ICJ), Advisory Opinion on the *Western Sahara*, *ICJ Reports* (1975) p. 33, par. 58.

¹⁷⁴ Cf. D. TOURET, « La Déclaration universelle des droits des peuples », 55 *Revue de droit international de sciences diplomatiques et politiques* (1977) pp. 288-298, esp. pp. 293 and 296-297.

Geneva Conventions of 1949 on International Humanitarian Law¹⁷⁵, references were made to the 1970 Declaration of Principles of 1970, in particular in relation to the right of self-determination of peoples in connection with the current debates of the epoch on the *status* of movements of national liberation in the international law of the time¹⁷⁶.

The 1970 Declaration had already come then to be widely invoked, also at doctrinal level, in the context of the right of States to dispose freely of their natural resources¹⁷⁷. In particular, the principle of sovereign equality of States, set forth in the 1970 Declaration, became object of a systematic reassessment in the light of developments of international law at that time. Earlier on, already by the beginning of the sixties, the general impact of international organizations on the principle of the equality of States had been stressed¹⁷⁸. In a work published in 1970, C.A. Colliard dwelt upon the transformations of the principle of the equality of States within international organizations, and in the parallel shaping of the specificities - economic, geographical, and technical - of the States reflected in their line of action in the international organizations and in the conclusion of international conventions¹⁷⁹. In

¹⁷⁵ Cf. « Conférence Diplomatique sur la Réaffirmation et le Développement du Droit International Humanitaire applicable dans les conflits armés - Résumé des travaux de la quatrième session », (July 1977), 703 *Revue internationale de la Croix Rouge* pp. 381-418.

¹⁷⁶ Cf. G. ABI-SAAB, *Wars of National Liberation and the Development of Humanitarian Law, in Declarations on Principles, A Quest for Universal Peace - LIBER AMICORUM DISCIPULORUMQUE B.V.A. RÖLING, LEYDEN, SIJTHOFF*, pp. 145-148, 150, 153-158, 164 and 167, 1977.

¹⁷⁷ Cf., e.g., A. J. LLEONART Y AMBSELEM, "Derecho de los Estados a Disponer Libremente de sus Recursos Naturales", (1976), Madrid, *Consejo Superior de Investigaciones Científicas/Instituto Francisco de Vitoria*, pp. 225, 328-346 and 412-413. - On the theme, cf.: S.M. SCHWEBEL, *The Story of the U.N.'s Declaration on Permanent Sovereignty over Natural Resources*, 49 *AMERICAN BAR ASSOCIATION JOURNAL* pp. 463-469 (1963); K.N. GESS, "Permanent Sovereignty over Natural Resources", 13 *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY*, pp. 398-449 (1964); E. ATIMOMO, *Natural Resources and the United Nations*, 10 *JOURNAL OF WORLD TRADE LAW*, pp. 280-289 (1976); P.J.I.M. de WAART, "Permanent Sovereignty over Natural Resources as a Cornerstone for International Economic Rights and Duties", 24 *Netherlands International Law Review*, pp. 304-322 (1977).

¹⁷⁸ B. BOUTROS-GHALI, «Le Principe d'égalité des États et les Organisations Internationales», (1960), 100 *Recueil des Cours de l'Académie de Droit International de La Haye*, pp. 11 and 14-15; B. BROMS, *The Doctrine of Equality of States as Applied in International Organizations* (Doctoral Dissertation), Faculty of Law of the University of Helsinki, pp. 63-340 (1959). The factual inequalities among States were reflected in the ambit of international organizations not only with regard to the work of political organs (cf., e.g., J. CASTAÑEDA, "The Underdeveloped Nations and the Development of International Law", 15 *International Organization* (1961) pp. 38-48), but also in respect of judicial organs; cf. K. WOLFKE, "The Privileged Position of the Great Powers in the International Court of Justice", 56 *Die Friedens-Warte* (1961-1966) pp. 156-167.

¹⁷⁹ C. A. COLLIARD, Égalité ou spécificité des États dans le droit international public actuel", in *Mélanges offerts à M. Le Doyen Louis Trotabas*, Paris, LGDJ, 1970, pp. 529-558.

subsequent years the issue came to be developed with reference to the 1970 Declaration of Principles¹⁸⁰.

In a perspicacious study edited in 1974, E. David, starting from the assumption that the juridical equality and the economic equality do not necessarily belong to distinct categories of thinking, in a way related the principle of equality of States with those of non-intervention and of the prohibition of the use or threat of force¹⁸¹. Parallel to the principle of juridical equality, there persisted the reality of economic inequalities among States, and the sovereignty of a State could appear threatened not only as to its territorial element, but also as to the other elements (population, government of one's own), by virtue, e.g., of the action of powerful foreign economic groups¹⁸² (distinct modalities of economic intervention). There subsisted, however, the difficulty that the *travaux préparatoires* of the 1970 Declaration of Principles (*supra*) did not succeed in obtaining a consensus about a definition of what precisely could constitute economic intervention¹⁸³.

The 1974 U.N. Definition of Aggression (composed of a preamble and eight articles), retaking a subject which was being debated since 1923 (in the League of Nations)¹⁸⁴, in its search for consensus was limited to a restrictive conception ("armed force" in violation of the sovereignty of the territorial State, Article 1), but such definition and the enumeration of acts of aggression (Article 3) were not meant to be exhaustive, as warned in Article 4, which attributed to the Security Council the faculty to determine any other acts which might constitute aggression pursuant to the provisions of the U.N. Charter¹⁸⁵. The 1974 Definition of Aggression was influenced by the 1970 Declaration of Principles¹⁸⁶; the former contained two express references to this latter (preamble, eighth *considerandum*; and Article 7, reaffirming the right of self-determination of peoples)¹⁸⁷.

Both Declarations were based in the law of the United Nations, comprising not only the U.N. Charter but also the practice there under. Thus, Article 5 of the 1974 Declaration enunciated the important rule of the non-recognition of situations generated by aggression: this provision, by linking the question to the international

¹⁸⁰ Cf., e.g., F. A.-M. RIAD, *Equality Among Nations*, 31 REVUE EGYPTIENNE DE DROIT INTERNATIONAL, pp. 157-178, and cf. p. 77 (ref. to the 1970 Declaration) (1975).

¹⁸¹ Cf. E. DAVID, « Quelques réflexions sur l'égalité économique des États », (1974), 10 *Revue belge de droit international*, pp. 399-424.

¹⁸² *Id.*, pp. 404-416.

¹⁸³ Cf. *Id.*, p. 423, and cf. also pp. 417-418, and p. 407 n. 21.

¹⁸⁴ On the arguments in favour and against the definition of aggression, in several debates since 1923, cf. S. M. SCHWEBEL, *Aggression, Intervention and Self-Defence in Modern International Law*, 136 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE, pp. 419-488 (1972).

¹⁸⁵ Cf. final comments of the members of the Special Committee entrusted with the question of the definition of aggression, in U.N., *Report of the Special Committee on the Question of Defining Aggression*, doc. A/9619 - suppl. n. 19, U.N./N.Y., 1974, pp. 1-42.

¹⁸⁶ B. BROMS, *The Definition of Aggression*, 154 *Recueil des Cours de l'Académie de Droit International de La Haye* (1977) pp. 330, 339-340, 357-361, 367, 386-387 and 392.

¹⁸⁷ Cf. text in U.N., document A/9890, of 06.12.1974, pp. 4 and 7, respectively.

responsibility itself, could be taken to amount to a true international statute of aggression¹⁸⁸. However, the issue of the definition of aggression did not appear to have been entirely resolved in a definitive and wholly satisfactory way (as subsequent developments were to demonstrate). In any case, the international practice taken into account contained elements of responses to situations that were regarded as amounting to aggression.

As for the 1970 Declaration of Principles, at first sight it did not appear wholly conclusive in this respect, given the rather abstract drafting of the principle of prohibition of the use or threat of force, so as to overcome the deadlock between the restrictive and wide interpretations of the term "force". It was, however, the treatment of the principle of non-intervention in the internal affairs of States which came to dispel doubts on the matter, in condemning peremptorily intervention in all its forms, - political, economic or cultural (cf. *supra*).

The adoption itself of the 1970 Declaration of Principles was a very positive development, not only for the conclusion of the work in a difficult time (marked, *inter alia*, by the Vietnam war and the conflicts in the Middle East), - a factor which prompted its draftsmen to conduct their work bearing in mind the relationship between the formulation of basic principles of international law and the imperative of securing the peaceful coexistence of States belonging to different ideological blocs at that time¹⁸⁹. Likewise significant was the fact that the Declaration succeeded in intermingling principles which, years earlier, were *de lege ferenda*, and which only in recent decades had been incorporated into the conceptual universe of international law (such as that of self-determination of peoples) together with principles which had already been enshrined into the *corpus juris* of international law for a long time, in the course of the XXth century (e.g., that of the duty of non-intervention)¹⁹⁰.

¹⁸⁸ Cf. J. ZOUREK, «En fin une définition de l'aggression, 20 *Annuaire français de droit international* » (1974) pp. 9-30; V. BLANCO GASPARG, *La Agresión Internacional: Intentos de Definición*, Madrid, Consejo Superior de Investigaciones Científicas/Instituto Francisco de Vitoria, 1973, pp. 25-31.

¹⁸⁹ Cf., on the theme, e.g., G. I. TUNKIN, *Co-existence and International Law*, 95 *Recueil des Cours de l'Académie de Droit International de La Haye*» (1958) pp. 5-78; L. FOCSANEANU, «Les 'cinq principes' de la coexistence et le droit international», 2 *Annuaire français de droit international* (1956) pp. 150-180.

¹⁹⁰ *The practice of Inter-American Conferences contributed decisively to the crystallization of certain principles in inter-American relations* (cf. *Conferencias Internacionales Americanas*, vols. I-II (Supplements), Washington, Carnegie Endowment for International Peace, 1943 and 1956, respectively), such as those of non-intervention and equality of States, the Calvo clause, the Calvo doctrine on equality between nationals and foreigners (as to civil rights), the Drago doctrine (of prohibition of the use of force in the recovery of contractual debts of a State, - a doctrine which was formulated at the beginning of the XXth century and that contributed decisively to the enunciation of the principle of general prohibition of the use of force in international relations, in Article 2(4) of the U.N. Charter), the Stimson doctrine of non-recognition of acquisition of territories by force. The principle of the duty of non-intervention, debated in the Conferences of Havana (1928), Montevideo (1933) and Buenos Aires (1936), at last found expression in Article 15 of the 1948 OAS Charter (Article 18 of the reforms of the 1967 Protocol of Buenos Aires), as well as in resolution 2131(XX) of 1965, of the U.N. General Assembly. - On the principle of non-intervention in the inter-

VI. Some Projections in Time of the Principles of International Law

The principles of international law, as formulated in the U.N. Charter and restated in the 1970 U.N. Declaration of Principles, besides retaining their full validity in our days¹⁹¹, have had significant projections in time, accompanying *pari passu*, and guiding, the evolution of international law itself. This applies to all aforementioned principles, but some striking illustrations may be singled out, such as, in my view, those pertaining, respectively, to the projections in time of the *equality of rights and self-determination of peoples*, and of the *primacy of international law over force* as an imperative of *jus cogens*.

1. The Evolving Principle of Self-Determination of Peoples

a) The International Legal Status of Non-Self-Governing Territories and the Right of Self-Determination of Peoples.

The case of *East Timor* is illustrative of the primacy of the principle of self-determination. Prior to independence, East Timor was a non-self-governing territory, the international status of which was governed by the law of the United Nations (chapter XI of the U.N. Charter). Shortly after Indonesia's military occupation of East Timor 07 December 1975 (followed by its annexation by a law of 15 July 1976), the U.N. Security Council deplored the armed intervention of Indonesia in East Timor (resolutions 384(1975), of 22.12.1975, and 389(1976), of 22.04.1976); in its turn, the U.N. General Assembly (resolution 3485(XXX), of 12.12.1975, besides seven other resolutions), in addition to likewise deploring the Indonesian military intervention, came to refer to Portugal as the "administering power" of East Timor, in the ambit of the law of the United Nations, - a condition which Portugal was to maintain for years, in the light of successive General Assembly resolutions on the international legal status of the then Territory of East Timor¹⁹².

American system, cf., e.g., C. SEPULVEDA, "Las Fuentes del Derecho Internacional Americano", Mexico, Ed. Porrúa, 1975, pp. 77-84 and 95-103; C. SEPULVEDA, "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. 96-98 and 102-108; anc cf. also I. FABELA, *Intervention*, Paris, Pédone, 1961, pp. 67-212. - Subsequently, in an Opinion published in January 1962 on the "Contribution of the American Continent to the Principles of International Law Concerning the Responsibility of the State", the OAS Inter-American Juridical Committee *inter alia* recapitulated all the endeavours of the States of the continent to crystallize the principle of non-intervention, by means of the Inter-American Conferences, protocols, provisions of treaties and declarations; the document considered the principle of non-intervention as the most fundamental one of the inter-American system, for being at the time "contractually binding for 21 American Republics"; OAS, doc. OEA/Ser.I/VI.2 - CIJ-61, ch. IV, pp. 9-12.

¹⁹¹ Cf. General Conclusions (item VII), *infra*.

¹⁹² Such resolutions (eight of the General Assembly, and two others of the Security Council), are referred to in paragraph 14 of the Judgment of 30.06.1995 of the ICJ in the case of *East Timor* (Portugal versus Australia); *ICJ Reports* (1995) p. 96.

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In its resolutions, the U.N. General Assembly stressed the right of self-determination of the people of East Timor, in the understanding that that right had not been exercised. It was precisely in the condition of "administering power" that Portugal lodged a complaint against Australia before the ICJ for alleged breach of the right to self-determination of the Timorese people, for having Australia celebrated a treaty (known as that of the Timor Gap) with Indonesia relating to the exploration of oil resources in the continental shelf of East Timor¹⁹³. This episode contributed to place the case of East Timor again in a position of relevance in the political agenda of the United Nations¹⁹⁴; with the complaint of Portugal - as "administering power" - before the ICJ, the case of the *East Timor* again gained *momentum*¹⁹⁵.

Earlier on, the assertion of the right of self-determination by the 1960 U.N. Declaration on the Granting of Independence to Colonial Countries and Peoples and subsequent resolutions of the U.N. General Assembly on the matter, came to count on judicial recognition, mainly by means of the Advisory Opinions of the International Court of Justice on *Namibia* (of 21.06.1971) and on the *Western Sahara* (of 16.10.1975). In the first Advisory Opinion, the Hague Court pondered, in relation to the mandates system, that the developments in the last fifty years - disclosing the expansion of the *corpus juris gentium* in the present domain - left little margin for doubt that "the ultimate objective of the sacred trust was *the self-determination and independence of the peoples concerned*"¹⁹⁶. And, in the second Advisory Opinion, the Court concluded in favour of the application of resolution 1514 (XV) of the U.N.

¹⁹³ On the increased foreign interest in oil resources in the region (continental shelf of East Timor), cf. R. S. CLARK, "The 'Decolonisation' of East Timor and the United Nations Norms on Self-Determination and Aggression", *International Law and the Question of East Timor*, London, CIIR/IPJET, 1995, pp. 90-91.

¹⁹⁴ For a historical account of the case of East Timor, cf., in general, e.g., J. RAMOS HORTA, *Funu - The Unfinished Saga of East Timor*, Trenton/New Jersey, Red Sea Press, 1987, pp. 1-207; S. INBARAJ, *East Timor - Blood and Tears in ASEAN*, Chiang Mai/Thailand, Silkworm Books, 1995, pp. 1-183; G. C. GUNN, *East Timor and the United Nations - The Case for Intervention*, Lawrenceville/New Jersey, Red Sea Press, 1997, pp. 1-105; C. O. QUAYE, *Liberation Struggles in International Law*, Philadelphia, Temple University Press, 1991, pp. 177-182. - The case of East Timor had lost space in the U.N. agenda as from 1983, presumably as a result of the continued occupation of the Island by Indonesia and of the attitude of some States - the United States, Japan, Canada, Australia, New Zealand, and Papua New Guinea - of acquiescence, manifested in debates in the United Nations, in the annexation of East Timor by Indonesia. In the aforementioned *contentieux* before the ICJ, for example, Australia pointed out that it had recognized the sovereignty *de facto* (not *de jure*) of Indonesia over East Timor, but "not the means" that led Indonesia to reach that result. Such attitude of acquiescence seems to have lost sight of the principle *ex injuria jus non oritur*. In one aspect, however, the case of East Timor never failed to appear in the agenda of the United Nations: that pertaining to the abuses against the rights of the Timorese and to the need to safeguard those rights; L. HANNIKAINEN, "The Case of East Timor from the Perspective of *Jus Cogens*", *International Law and the Question of East Timor*, London, CIIR/IPJET, 1995, pp. 108-111.

¹⁹⁵ Cf. A. A. CANÇADO TRINDADE, "Parecer: O Caso do Timor-Leste (1999): O Direito de Autodeterminação do Povo Timorense", 1 *Revista de Derecho de la Universidad Católica del Uruguay* (2000) pp. 63-83.

¹⁹⁶ ICJ, Advisory Opinion on *Namibia*, *ICJ Reports* (1971) p. 31, par. 53 (emphasis added).

General Assembly "in the decolonization of Western Sahara and, in particular, of the principle of self-determination through *the free and genuine expression* of the will of the peoples of the Territory"¹⁹⁷.

The well-known Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514 (XV) of the U.N. General Assembly, of 14.12.1960) came to strengthen the international status of non-self governing territories and of territories under the trusteeship system (paragraph 5) and to affirm in a categorical way the right of self-determination of their peoples. The question was likewise considered in the process of elaboration of the 1970 U.N. Declaration on Principles of International Law (cf. *supra*); as already seen, the understanding prevailed among most Delegations that the expression "international relations" by then was no longer limited to purely inter-State relations, as the relations between a non-self governing territory and the authority entrusted with its administration were of an international character, bearing in mind the international responsibilities established by chapter XI of the U.N. Charter¹⁹⁸. In the definitive formulation of the principle of equality of rights and self-determination of peoples in the aforementioned 1970 Declaration, a clause was inserted explaining that a non-self-governing territory - under the U.N. Charter - has a separate and distinct status from the territory of the State which administers it, which persists until the people living in it exert their right of self-determination in accordance with the principles and purposes of the U.N. Charter¹⁹⁹.

In sum, a non-self governing territory in the sense of chapter XI of the U.N. Charter has an international legal status which generates obligations of respect to the right of self-determination of the people living in it, of the safeguard of the human rights of its inhabitants, and of non-exploration of their natural resources²⁰⁰. Such obligations are opposable *erga omnes*, both *vis-à-vis* the State which administers the territory at issue and *vis-à-vis* all the other States: they are obligations owed to the international community as a whole.

¹⁹⁷ ICJ, Advisory Opinion on the *Western Sahara*, *ICJ Reports* (1975) p. 68, par. 162 (emphasis added).

¹⁹⁸ A. A. CANNÇADO TRINDADE, "Princípios do Direito Internacional Contemporâneo, (1981), Brasília, Editora Universidade de Brasília, p. 61.

¹⁹⁹ *Id.*, p. 72.

²⁰⁰ Cf., in this respect, e.g., Ian BROWNLIE, "The Rights of Peoples in Modern International Law", *The Rights of Peoples* (ed. J. CRAWFIRD), Oxford, Clarendon Press, 1988, pp. 1-16; [Various authors,] *Les résolutions dans la formation du droit international du développement* (Colloque de 1970), Genève, IUHEI, 1971, pp. 63-67 (permanent sovereignty over natural resources); O. Y. ASAMOAH, *The Legal Significance of the Declarations of the General Assembly of the United Nations*, The Hague, Nijhoff, 1966, pp. 163-185; J. CASTAÑEDA, *Legal Effects of United Nations Resolutions*, N.Y., Columbia University Press, 1969, pp. 174-176; A. J. LLEONART Y AMSELEM, "Derecho de los Estados a Disponer Libremente de Sus Recursos Naturales", Madrid, CSIC/Instituto Francisco de Vitoria, 1976, pp. 15-478.

b) External and Internal Dimensions of Self-Determination

Recent developments in contemporary international law disclose the dimensions both *external* and *internal* of the right of self-determination of peoples: the former means the right of every people to be free from any form of foreign domination, and the latter refers itself to the right of every people to choose their destiny and to affirm their own will, if necessary against their own government. This distinction, endorsed by contemporary doctrine²⁰¹, challenges the purely inter-State paradigm of classic international law: the emergence of the International Law of Human Rights came to concentrate attention in the treatment dispensed by the State to all human beings under its jurisdiction, in the conditions of living of the population, in sum, in the function of the State as promoter of the common good.

The theory and practice of contemporary international law effectively acknowledge the vindication of the rights of peoples. An international instrument such as the African Charter of Human and Peoples' Rights of 1981, for example, sets forth, in a same list, civil and political rights (Articles 3-14), economic, social and cultural (Articles 15-18), as well as the rights of peoples (Articles 19-24), with a mechanism of implementation common to all (Articles 46-59 and 62). The rights of peoples have, moreover, counted on judicial recognition; in the case of the *Maritime Delimitation between Guinea and Guinea-Bissau*, for example, in its award of 18.02.1983, the Arbitral Tribunal which decided the case referred to the "legitimate claims" of the parties as developing States and to the right of the peoples concerned to achieve the level of economic and social development which preserves fully their dignity²⁰².

Furthermore, in the international *contentious*, cases of initiatives of States on behalf of peoples, so as to protect them, may be recalled: clear indications to this effect are found, e.g., in two unilateral applications instituting proceedings before the International Court of Justice, namely, that of New Zealand (against France) in the case of the *Nuclear Tests* (1973-1974), and that of Nauru (against Australia) in the case of the *Phosphate Lands* (1989-1992)²⁰³. The well-known aforementioned *obiter dicta* of the Hague Court affirming the applicability of self-determination to all non-self-governing territories (Advisory Opinion on *Namibia*, 1971) and recognizing the right of self-determination through the "free and genuine expression of the will of the peoples of the Territory" (Advisory Opinion on the *Western Sahara*, 1975), came to

²⁰¹ Cf. A. CASSESE, *Self-Determination of Peoples - A Legal Reappraisal*, Cambridge, University Press, 1995, pp. 1-365; P. Thornberry, "The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism", *Modern Law of Self-Determination* (ed. Ch. TOMUSCHAT), Dordrecht, NIJHFF, 1993, pp. 101-138; Ch. TOMUSCHAT, *Self-Determination in a Post-Colonial World*, in *Id.*, pp. 1-20; A. Rosas, "Internal Self-Determination", in *ibid.*, pp. 225-251; J. SALMON, *Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?*, in *ibid.*, pp. 253-282.

²⁰² *Cit. in* Ian BROWNLIE, *The Human Right to Development*, London, COMMONWEALTH SECRETARIAT (OCCASIONAL PAPER SERIES), pp. 1-2, and cf. p. 13 n. 1 (1989).

²⁰³ A. A. CANÇADO TRINDADE, "Direitos Humanos e Meio-Ambiente - Paralelo dos Sistemas de Proteção Internaciona" 1993, 1, Porto Alegre, S.A. Fabris Ed., pp. 186-187.

foster the definitive consolidation of the justifiability of the right of self-determination of peoples²⁰⁴. In the fortunate expression of the Separate Opinion of Judge Dillard in the Advisory Opinion on the *Western Sahara*, "it is for the people to determine the destiny of the territory and not the territory the destiny of the people"²⁰⁵. There is, thus, a whole doctrinal and jurisprudential development, corroborated by the practice of States and of international organizations, in support of the right of self-determination of peoples²⁰⁶.

2. The Primacy of International Law over Force

a) The Continuing Validity of the Principle of Non-Use of Force

The principle of non-use of force, enshrined into Article 2(4) of the U.N. Charter, has been commonly regarded, in historical perspective, as one of the most important provisions of the U.N. Charter. It may be recalled that, four years after the adoption of the Charter, the ICJ affirmed, in the *Corfu Channel* case (1949), the inadmissibility of intervention, in any form, as, "from the nature of things, it would be reserved for the most powerful States" only²⁰⁷. As to the scope of Article 2(4) of the U.N. Charter, it has been argued in expert writing that States ought to settle any

²⁰⁴ M.C. MAFFEI, *The Case of East Timor before the International Court of Justice - Some Tentative Comments*, 4 *European Journal of International Law* pp. 223-238 (1993); C.M. CHINKIN, *East Timor Moves into the World Court*, in *id.*, pp. 206-222. - On the position of the so-called Organization of Unrepresented Nations and Peoples (UNPO), cf. M. C. VAN WATL VAN PRAAG, *The Position of UNPO in the International Legal Order*", *Peoples and Minorities in International Law* (eds. C. BROLMANN, R. LEFEBER and M. ZIECK), DORDRECHT, NIJHOFF, 1993, pp. 313-325.

²⁰⁵ ICJ Reports (1975) p. 122.

²⁰⁶ It may further be recalled that the two U.N. Covenants on Human Rights (respectively on Civil and Political Rights, and on Economic, Social and Cultural Rights, of 1966) determine, in their Article 1, that all peoples have the right to self-determination, and, by virtue of that right, they determine freely their political statute and secure freely their economic, social and cultural development. In its general comment n. 12 (of 1984) on that provision, the Human Rights Committee (supervisory organ of the Covenant on Civil and Political Rights) conceptualized the right of self-determination as "an inalienable right of all peoples", the realization of which constitutes an "essential condition" to the effective guarantee and the observance of individual human rights; this is what can be inferred from its own enunciation in Article 1 of both U.N. Covenants on Human Rights, - added the Committee, - before and above all rights set forth therein. United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. doc. HRI/GEN/1/Rev.3, of 15.08.1997, p. 13 (pars. 1-2). The Committee at last singled out the importance of paragraph 3 of Article 1 of both Covenants, whereby States Parties assume obligations not only in relation to their own peoples but further on *vis-à-vis* all peoples that had not been able to exercise, or had been deprived of the possibility to exercise, their right of self-determination; *ibid.*, p. 13 (par. 6).

²⁰⁷ ICJ, *Corfu Channel* case (United Kingdom *versus* Albania, Merits), *ICJ Reports* (1949) p. 35.

dispute peacefully (by the methods provided under Article 33 of the U.N. Charter) until the Security Council makes a determination under Article 39 of the Charter²⁰⁸.

In the same year of the adoption of the 1970 Declaration of Principles, the Non-Aligned Movement considered for the first time a proposal (at its summit conference in Lusaka in September 1970) of celebration of a world treaty on the non-use of force in international relations. The proposal was taken by the Soviet Union and later presented at the United Nations, which adopted a resolution²⁰⁹ in 1977 for consideration of the matter. It was believed that the new era of *détente* would welcome the proposal for the negotiation and celebration of a treaty of the kind. The U.N. Special Committee on Enhancing the Effectiveness of the Principle of the Non-Use of Force in International Relations considered the issue in its annual sessions from 1977 onwards, for one decade²¹⁰.

In the course of the Committee's work it was remarked that the prohibition of force set forth in Article 2(4) of the U.N. Charter was "not subject to the discretion of the parties", and due account was taken of the 1970 Declaration of Principles. It was pondered, in this connection, that the envisaged new treaty would cast doubt on, or weaken, the principle stated in Article 2(4) of the Charter; if, however, it were to be concluded, it should add to the prohibition of the use of force against the unity and territorial integrity of States the obligation to refrain from the use of nuclear weapons, there being no justification for the very high costs of the arms race. And, as to the scope of Article 51 of the U.N. Charter,

"the prevalent view with regard to the exceptions based on Article 51 had been that they should be interpreted strictly, and that the State which allegedly or in fact found itself threatened by war preparations by another State should have immediate recourse to the Security Council, rather than to have recourse to measures of anticipatory self-defence"²¹¹.

In its report of 1985, the Committee noted that, although no conclusion had been reached as to the proposed new treaty, which was thereby abandoned, a "common denominator" emerged, however, from the discussions:

"it was precisely the firm conviction, which everyone seems to share, that the principle [of non-use of force] was a fundamental one, from which no derogation was possible"²¹².

²⁰⁸ T. O. ELIAS, *Scope and Meaning of Article 2(4) of the United Nations Charter*, in *Contemporary Problems of International Law: Essays in Honour of G. SCHARZENBERGER on his 80th Birthday* (eds. Bin CHENG and E. D. BROWN), London, Stevens, pp. 70-74 and 77 (1988).

²⁰⁹ General Assembly Resolution 32/150 of December 1977.

²¹⁰ T. O. ELIAS, *The General Assembly and the Problems of Enhancing the Effectiveness of the Non-Use of Force in International Relations*, in *Liber Amicorum for Lord Wilberforce* (eds. Maarten BOS and Ian BROWNLIE), Oxford, Clarendon Press, 1987, pp. 13-17.

²¹¹ *Id.*, p. 20, and cf. pp. 17-20.

²¹² *Cit. in Id.*, p. 21.

Shortly after, in 1986-1987, the Committee embarked on the elaboration of a Declaration, rather than a Treaty (as originally envisaged), on Non-Use of Force; the Soviet Union accepted the change of approach, in comparison with its original proposal of one decade earlier (*supra*). The draft finally adopted by the Committee in 1987, in urging U.N. member States to abide by the system of collective security, affirmed that the threat or use of force constituted "a violation of international law and of the Charter of the United Nations" and entailed "international responsibility"²¹³. The 1987 Declaration on Enhancing the Effectiveness of the Principle of the Non-Use of Force (conformed by a preamble of 21 paragraphs and an operative part with 33 paragraphs) restated the principle as set forth in the U.N. Charter and numerous other documents; referred to, and insisted on, disarmament; asserted the universal character of the principle (par. 10); and acknowledged the relations between the principle at issue and other principles of international law, such as those of peaceful settlement of disputes and of the duty of international cooperation. Such acknowledgement of the interrelation between principles of international law has been regarded as a contribution of the aforementioned 1987 Declaration towards achieving the effectiveness of such principles²¹⁴.

This Declaration was preceded not only by the 1970 Declaration of Principles (*supra*), but also by the Definition of Aggression, adopted in 1974 by the U.N. General Assembly, on the basis of the prolonged preparatory work and proposal of its Special Committee on the Question of the Definition of Aggression. The Definition, comprising eight articles, which reflected a minimum consensus on a matter surrounded by much discussion, limited itself to the use of armed force in inter-State relations, conferring upon the U.N. Security Council the power of determination of the act of aggression. The Definition incorporated the principle of non-recognition of situations generated by aggression, and had the merit of securing the least, namely, the Security Council could no longer ignore an act of aggression alleged by certain States, without opposition; moreover, despite its purely recommendatory character, the Definition provided standards for evaluation of the conduct of States, which, it was hoped, could in certain circumstances constitute a factor of inhibition of the use of force by States²¹⁵.

Thus, in three significant declarations, adopted by the U.N. General Assembly in a period of less than two decades, - the aforementioned 1970 Declaration on Principles of International Law, the 1974 Definition of Aggression, and the 1987 Declaration on the Non-Use of Force, - the General Assembly clearly expressed the prevailing view in the international community that the prohibition of the use of force or of forcible intervention was enunciated and generally understood in absolute

²¹³ Pars. 1 and 26-27, and preamble, in: United Nations, *Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations* (1987), in *G.A.O.R.* - Suppl. n. 41 (A/42/41), N.Y., U.N., 1987, pp. 21 and 24.

²¹⁴ Cf. T. TREVES, *La Déclaration des Nations Unies sur le renforcement de l'efficacité du principe du non-recours à la force*, 33 *Annuaire français de Droit international* (1987) pp. 383, 388-390 and 396-398.

²¹⁵ J. ZOUREK, *Enfin une définition de l'aggression*, 20 *Annuaire français de Droit international* (1974) pp. 9-30; A. A. CANÇADO TRINDADE, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Edit. Renovar, 2002, pp. 783-789.

terms²¹⁶. On the occasion of the fiftieth anniversary of the Hague Academy of International Law, in his survey of the contribution of the courses at the Academy to the development of international law, R.-J. DUPUY remarked that

"l'Académie a, sans nul doute, éprouvé dès le début beaucoup de répugnance à admettre qu'il puisse y avoir un droit de l'État à recourir à la force"²¹⁷.

The ICJ itself, in the *Nicaragua versus United States* case (1986), reasserted the principle of the prohibition of the use of force as "being not only a principle of customary international law but also a fundamental or cardinal principle of such law"²¹⁸. The principle at issue, furthermore, along the years has served as basis for the conclusion of numerous treaties and instruments in the domains of disarmament and of maintenance of international peace and security²¹⁹.

Thus, in face of an episode such as that of the *invasion and occupation of Iraq* (2003), by a so-called "coalition of States", outside the framework of the U.N. Charter, one cannot consent in the attempted deconstruction of the principles of international law, and in the apparent destruction of the system of collective security of the Charter, essential to world peace; this system was erected upon the principles of the prohibition of the threat or use of force in inter-State relations and of the peaceful settlement of international disputes. These principles warn that any exception to the regular operation of such system ought to be restrictively interpreted.

In fact, the more lucid legal doctrine and the more learned commentaries of the U.N. Charter point out that the letter and spirit of its Article 51 (on self-defence) are opposed to the pretension of the so-called "preventive self-defence", and definitively disauthorize it²²⁰. Its own legislative history clearly indicates that Article 51 is subordinated to the fundamental principle of the general prohibition of the threat or

²¹⁶ C. GRAY, *International Law and the Use of Force*, Oxford, University Press, 2000, pp. 5, 27-28 and 51.

²¹⁷ R.-J. DUPUY, «La contribution de l'Académie au développement du Droit international», (1973), 138 *Recueil des Cours de l'Académie de Droit International de La Haye*, p. 58.

²¹⁸ ICJ, *Nicaragua versus United States* case, Judgment of 27 June 1986 (Merits), *ICJ Reports* (1986) p. 100, par. 190; in this connection, the ICJ expressly referred to the 1970 Declaration on Principles, and to the 1975 Helsinki Final Act; cf. *id.*, p. 100, pars. 188-189.

²¹⁹ *Id.*, p. 84.

²²⁰ Cf., e.g., B. SIMMA (ed.), *The Charter of the United Nations - A Commentary*, Oxford, Oxford University Press, 1994, pp. 675-676; A. CASSESE, "Article 51", in *La Charte des Nations Unies - Commentaire article par article* (eds. J.-P. COT and A. PELLET), Paris/Bruxelles, Economica/Bruylant, 1985, pp. 770, 772-773, 777-778 and 788-789; I. BROWNLIE, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1981 [reprint], pp. 275-278; J. ZOUREK, *L'interdiction de l'emploi de la force en Droit international*, Leiden/Genève, Sijthoff/Inst. H. DUNANT, 1974, p. 106, and cf. pp. 96-107; H. KELSEN, *Collective Security under International Law* (1954), Union/New Jersey, Lawbook Exchange Ltd., 2001 [reprint], pp. 60-61; Chr. Gray, *International Law and the Use of Force*, *op. cit. supra* n. (217), pp. 112-115 and 192-193.

use of force (Article 2(4) of the Charter), besides being subjected to the control of the Security Council²²¹.

It is important to recall the long history behind the fundamental principle of the prohibition of threat or use of force, particularly in a moment as difficult for international law as the present one, of outburst of generalized violence all over the world, of unilateralism and of indiscriminate use of force, presenting a considerable challenge to all those who deposit their faith in the law of nations (*droit des gens*). The contemporary apologists of the use of force seem to make abstraction of one century of evolution of international law.

In the course of such evolution, in the League of Nations era, the 1928 General Treaty for the Renunciation of War as an Instrument of National Policy, a precursor of the United Nations Charter on the matter at issue, became of almost universal application, playing a considerable role throughout that era²²², and remaining still in force. Two decades later, in the *Corfu Channel* case (1949) the ICJ endorsed the principle of non-use of force in clear and emphatic terms:

"The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, it would be reserved for the most powerful States, and might easily lead to perverting the administration of international justice itself"²²³.

Half a century later, the Ministerial Declaration of 24 September 1999 of the Meeting of Foreign Ministers of the Group of 77, as pertinently recalled by Ian Brownlie, distinguished between "humanitarian assistance" and other U.N. activities, and "rejected the so-called right of humanitarian intervention" as without foundation in the U.N. Charter or in international law (paragraph 69); this represented the view of 132 States, including 23 from Asia, 51 from Africa, 22 from Latin America and 13 from the Arab world²²⁴.

²²¹ Cf. H. KELSEN, *The Law of the United Nations*, London, Stevens, 1951, p. 792. - The frustrated and unconvincing attempts to enlarge its scope, in order to comprise an alleged and unsustainable "preventive self-defence", have never succeeded in providing and answer to the objection in the sense that to admit it would be to open the doors to reprisals, to the generalized use of force, to aggression, amidst the most complete conceptual imprecision; J. DELIVANIS, «*La légitime défense en Droit international public moderne*», Paris, LGDJ, 1971, pp. 50-53, and cf. pp. 42, 56 and 73.

²²² As recently recalled, it has been ratified or adhered to by 63 States, and before the second world war only 4 States were not bound by its provisions; cf. I. BROWNLIE, *op. cit. infra* n. (225), pp. 23 and 25.

²²³ ICJ, *Corfu Channel* case (United Kingdom versus Albania, Merits), *ICJ Reports* (1949) p. 35.

²²⁴ I. BROWNLIE, "International Law and the Use of Force by States Revisited", 21 *Australian Year Book of International Law* (2001) p. 21.

A. A. CANÇADO TRINDADE

From the thinking of the founding fathers of the law of nations to our days, an idea of justice underlies international law; if interests condition international rules, they have to be harmonized with the moral aspirations of the human beings, so as to achieve enduring and just rules that secure international peace²²⁵. Considerations of power, on their turn, are not static or permanent factors at the international level, but are rather changing, "lasting or disappearing in the evolution of history"²²⁶; invoking a "collective conscience"²²⁷, A. Ulloa drew attention to the progressive universalization of international law, remarking that it was not surprising that the "rules of humanitarian character" were the first ones to be universally applied²²⁸. Those who have regarded the norms of positive law as a means for the realization of justice²²⁹ have insisted on the primacy of law over force. Among them, E. Jiménez de Aréchaga characterized the prohibition of the threat or use of force as a pillar of the peaceful relations among States, and as a guiding principle of international law itself²³⁰.

It has been in moments of world crisis, such as the one we live in nowadays, that qualitative advances have been achieved, as manifestations of the universal juridical conscience, ultimate material source of all Law²³¹. Illustrations are currently found, for example, in the evolution of the protective case-law of the international tribunals (European and Inter-American Courts) of human rights (parallel to the crystallization of the personality and capacity of the individual as subject of the law of nations), in the realization of the old ideal of the establishment of a permanent international criminal jurisdiction, in the elaboration of the international social agenda of the XXIst century by the cycle of the World Conferences of the United Nations along the

²²⁵ A. ULLOA, "Derecho Internacional Público", (1939), vol. I, 2nd. ed., Lima, Impr. Torres Aguirre, pp. 3 and 14.

²²⁶ A. ULLOA, "Derecho Internacional Público", (1857), vol. II, 4th. ed., Madrid, Ed. Iberoamericanas, p. 218, and cf. p. 460.

²²⁷ *Id.*, vol. II, p. 301.

²²⁸ A. ULLOA, "Derecho Internacional Público", vol. I, *cit. supra* n. (226), pp. 21-22 and 74.

²²⁹ Cf., to this effect, the testimony of the legacy of J. L. BUSTAMANETE y RIVERO, in: *76 Revista del Foro - Colegio de Abogados de Lima* (1989) n. 1, pp. 42-43.

²³⁰ E. JIMENEZ DE ARÉCHAGA, *International Law in the Past Third of a Century*, 159 *Recueil des Cours de l'Académie de Droit International de La Haye* (1978) pp. 87 and 111-113.

²³¹ A. A. CANÇADO TRINDADE, "Reflexiones sobre el Desarraigo como Problema de Derechos Humanos Frente a la Conciencia Jurídica Universal", in *La Nueva Dimensión de las Necesidades de Protección del Ser Humano en el Inicio del Siglo XXI* (de A. A. CANÇADO TRINDADE and J. RUIZ DE SANTIAGO), 2nd. ed., San José of Costa Rica, UNHCR, 2003, pp. 19-78.

nineties and at the turn of the new century²³², and in the adoption of new techniques of peaceful settlement of international disputes²³³.

b) The Primacy of Law over Force as an Imperative of *Jus Cogens*

It is in difficult moments of world crisis such as the current one that one ought to, with all the more reason, preserve the foundations of international law, and the principles and values which democratic societies profess. It is in critical moments such as the one we live today that one ought to reaffirm firmly, more than ever, and faithfully to the teachings of the jurists of the preceding generations, the necessary primacy of international law over force. Contrary to what one may *prima facie* assume, when one resorts to the use of weapons, Law does not silence; Law cannot become silent, nor can one pretend that it remains silent. And those who stand by the Law, support its primacy over force, even amidst that shadows that fall upon the world in our days.

In fact, the somber worsening of the primitivism of the indiscriminate use of force in the international scenario has aggravated as from 1998, with the attempt to "justify" such use of force by means of the invocation of an alleged "implicit authorization" of the U.N. Security Council; the following year, an attempt was made to "explain" the use of force by means of an alleged "authorization *ex post facto*", by the same Security Council (bombardments of Iraq, 1998, and of Kosovo, 1999, respectively). Such initiatives, on the basis of allegations by no means persuasive, appear to try - in vain - to render somewhat "relative" one of the basic principles of the U.N. Charter that of the prohibition of the threat or use of force, set forth in Article 2(4) of the Charter.

Such "implicit authorization" and "authorization *ex post facto*" of the use of force are manifest distortions of chapter VII of the U.N. Charter. In the operation of the system of collective security, there is a presumption in favour of peaceful settlement, and eventual exceptions to that are to be restrictively interpreted, as that system was built upon the principles of non-use of force and peaceful settlement of disputes²³⁴. This appears, moreover, as the only way to secure a "minimum of international cohesion" in face of the challenges currently facing the international legal order²³⁵.

²³² Cf. A. A. CANÇADO TRINDADE, *Sustainable Human Development and Conditions of Life as a Matter of Legitimate International Concern: The Legacy of the U.N. World Conferences, in Japan and International Law - Past, Present and Future* (International Symposium to Mark the Centennial of the Japanese Association of International Law), The Hague, Kluwer, 1999, pp. 285-309.

²³³ Especially in the field of international trade; cf. A. A. CANÇADO TRINDADE and A. MARTINEZ MORENO, "Doctrina Latinoamericana del Derecho Internacional", San José de Costa Rica, Inter-American Court of Human Rights, 2003, pp. 36-37.

²³⁴ L.-A. SICILIANOS, « L'autorisation par le Conseil de Sécurité de recourir à la force: une tentative d'évaluation », (2002), 106 *Revue générale de Droit international public* pp. 7, 39-40 and 42-43.

²³⁵ *Id.*, pp. 47-48.

In our days, with the alarming proliferation of weapons of mass destruction, the principle of the prohibition of threat or use of force (Article 2(4) of the U.N. Charter) imposes itself with even greater vigour²³⁶, disclosing a truly imperative character. In fact, in the case *Nicaragua versus United States* (1986), the ICJ, in stressing the role of *opinio juris*, affirmed the fundamental character of the principle of the prohibition of the threat or use of force, present both in the U.N. Charter and in customary international law²³⁷. In this respect, doctrine has gone even further, characterizing that principle as belonging to the domain of *jus cogens*²³⁸, - and adding that the violations of that principle do not weaken its imperative character²³⁹. The "condemnation of the use of force" has been qualified by some as the "most remarkable" feature of the U.N. Charter²⁴⁰, - representing, effectively, a notable advance in relation to the Covenant of the League of Nations.

The principle of the prohibition of threat or use of force has been regarded by some as raised to the level of *jus cogens*, and acknowledged as such by the international community as a whole²⁴¹. The U.N. International Law Commission itself, it has been recalled, endorsed (in 1966) the understanding that the prohibition by the U.N. Charter of the use of force has the character of *jus cogens*, and expressed (in 1978) the understanding that a violation of the prohibition of aggression can result in an international crime²⁴².

On its turn, the U.N. Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations, in its 1987 *Report* containing the Draft Declaration on the matter, stated that it was considered

"indispensable to stress that the principle of non-use of force was a peremptory and universal norm which admitted of no deviation through bilateral agreements or

²³⁶ G. I. TUNKIN, "El Derecho y la Fuerza en el Sistema Internacional", Mexico, UNAM, 1989, pp. 121, 151 y 155; and cf., in the same sense, the warning - in face of the constant increase of the human capacity of destruction - by Quincy Wright, *A Study of War*, 2nd. ed., Chicago/London, University of Chicago Press, 1983 [Midway reprint], pp. 404 and 372-373.

²³⁷ Cf. *ICJ Reports* (1986) p. 97 par. 181; and cf. C. Lang, *L'affaire Nicaragua/États-Unis devant la Cour Internationale de Justice*, Paris, LGDJ, 1990, pp. 135, 149 and 158.

²³⁸ C. LANG, *op. cit. supra* n. (236), pp. 135 and 253 (in relation to International Humanitarian Law).

²³⁹ M. DÍEZ DE VELAZCO, "Las Organizaciones Internacionales", 12th. ed., Madrid, Tecnos, 2002, p. 177.

²⁴⁰ D. URIBE VARGAS, *La Paz es una Trégua - Solución Pacífica de Conflictos Internacionales*, 3rd. ed., Bogotá, Universidad Nacional de Colombia, 1999, p. 109.

²⁴¹ R.St J. MACDONALD, *Reflections on the Charter of the United Nations*, in *Des Menschen Recht zwischen Freiheit und Verantwortung - Festschrift für Karl Josef Partsch*, Berlin, Duncker & Humblot, 1989, p. 45; and cf., subsequently, R. MACDONALD, "The Charter of the United Nations in Constitutional Perspective, 20 AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW p. 215 (1999) - It has been warned that the use of force, - with the exceptions of the hypotheses of self defence and of sanction ordered or duly authorized by the constitutive charter of an international organization such as the United Nations, - constitutes a delict. E. JIMÉNEZ DE ARÉCHAGA, "El Derecho Internacional Contemporáneo", Madrid, Tecnos, 1980, pp. 116-117.

²⁴² M. DÍEZ DE VELAZCO, "Las Organizaciones...", *op. cit. supra* n. (238), pp. 177-178.

unilateral doctrines and the violation of which could not be justified by any consideration of any kind"²⁴³.

In the same understanding of the absolute prohibition of recourse to force have also manifested themselves successive resolutions of the U.N. General Assembly, as well as the Final Act of the Conference of Security and Cooperation in Europe (Helsinki, 1975), and the Charter of Paris for a New Europe (of 21.11.1990). In this way, the restatements of that fundamental principle of international law multiply themselves along the years, in doctrine, in case-law, and in international practice, giving unequivocal testimony of its imperative character.

In the last decades, one has witnessed a true conversion of the traditional and surpassed *jus ad bellum* into the *jus contra bellum* of our days, this being one of the most significant transformations of the contemporary international legal order²⁴⁴. This being so, irrespective of the results of the indiscriminate use of force (such as in the *invasion and occupation of Iraq*, as from April 2003, outside the framework of the U.N. Charter), one could hardly escape the old maxim: *ex injuria jus non oritur*. For a long time already, it has been contended that, even eventual recourse to force by States, on given occasions, has never affected the primacy of the *jus cogens* provision of Article 2(4) of the U.N. Charter²⁴⁵. Law has an objective validity, which resists the violation of its norms. It is inadmissible to try to equate Law with force, which would moreover reflect a mental vice consisting in not distinguishing the world of *Sein* from that of *Sollen*²⁴⁶.

The violation of a basic principle of international law does not generate a "new practice", but rather engages the international responsibility of the wrongdoers. Every true jusinternationalist has the ineluctable duty to stand against the apology of the use of force, which is manifested in our days through distinct "doctrinal" elaborations. One attempts, e.g., to widen the scope of Article 51 of the U.N. Charter so as to encompass an unsustainable "preventive self-defence". One advocates recourse to undefined "countermeasures", outside the framework of the truly central chapter of

²⁴³ United Nations, *Report of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations* (1987), in *G.A.O.R.* - Suppl. n. 41 (A/42/41), N.Y., U.N., 1987, p. 11, par. 26.

²⁴⁴ M. C. MARQUEZ CARRASCO, "Problemas Actuales sobre la Prohibición del Recurso a la Fuerza en Derecho Internacional", Madrid, Tecnos, 1998, p. 263.

²⁴⁵ Cf., e.g., T. O. ELIAS, *op. cit. supra* n. (209), p. 84.

²⁴⁶ A. TRUYOL y SERRA, *Fundamentos del Derecho Internacional Público*, 4th. ed., Madrid, Tecnos, 1977, pp. 47 and 56-57.

international law, that of the international responsibility of States²⁴⁷. The invocation of such terms in international law are a "troubling development"²⁴⁸.

One invokes, for example, "humanitarian intervention or *ingérence*", instead of vindicating the right of the affected populations to humanitarian assistance²⁴⁹. The common denominator of all these new "doctrines" is their minimization or undervaluing of the foundations of international law, besides the emphasis in the primitivism of the indiscriminate use of force. In this respect, the XXII Congress of the Hispano-Luso-American Institute of International Law (IHLADI), held in San Salvador, El Salvador, adopted a declaration, approved by ample majority on 13 September 2002, which dismissed categorically the "doctrine" of the so-called "preventive self-defence". In the preamble, the declaration of the IHLADI expressed its preoccupation with the "marked tendency of certain States which place particular interests before the superior interests of the international community", affected as a whole by facts such as terrorism, a "very grave violation of human rights"; moreover, it manifested its preoccupation also by the "announced adoption of unilateral conducts which debilitate institutions already consolidated in international law and which are guarantee of peace and security".

In its operative part, the aforementioned declaration warned that the U.N. Charter, customary international law and the general principles of law "constituted the legal framework to which the exercise of the right of self-defence ought necessarily to adjust itself"; it must, furthermore, fully observe, in any circumstances, the norms and the principles of International Humanitarian Law. The declaration of IHLADI next expressed its "categorical rejection" of the so-called "preventive self-defence", even as a means to "combat terrorism"; and manifested, at last, its equal repudiation to international terrorism, which ought to be "severely punished", in the "framework of Law", by "all the States of the international community"²⁵⁰. It is known that, for the necessary struggle against terrorism, within the Law, there are

²⁴⁷ It has been pertinently warned that the practice of "countermeasures", remindful of the old reprisals and retaliation, ensues from the "domain of interests", and, "more precisely, from the reciprocity of State interests"; thus, "les dangers de cette pratique sont éminemment politiques: c'est l'escalade susceptible d'être déclenchée par une contre-mesure (...)"; M. VIRALLY, "Panorama du droit international contemporain - Cours général de droit international public", 183 *Recueil des Cours de l'Académie de Droit International de La Haye* (1983) p. 218.

²⁴⁸ It could hardly be denied that "countermeasures", for example, are "the continuation of force by other means"; the international community should strive to go beyond "physical force and retaliation as methods of survival" or progress, as "the foundation of law is not force but justice. To place the concept of countermeasures at the very heart of legal responsibility, at the very heart of the character of a legal system, is thus to elevate to a position of high dignity one of society's least dignified and least sociable aspects. To do so in international law is to condemn international society to be what it is". Ph. ALLOT, "State Responsibility and the Unmaking of International Law", 29 *Harvard International Law Journal* (1988) pp. 23-24.

²⁴⁹ A. A. CANÇADO TRINDADE, *Reply [on Humanitarian Assistance]*, 70 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL, -I, pp. 536-540 (2002-2003).

²⁵⁰ Text of the declaration reproduced in: IHLADI, 16 *Anuario del Instituto Hispano-Luso-Americano de Derecho Internacional* - Madrid (2003) pp. 657-658.

today twelve international conventions, which are to be applied and duly complied with.

At the present moment of world crisis, - a true crisis of values, - of sombre and worrisome rupture of the international system of collective security, there is pressing need to reassert the primacy of international law over brute force, as an imperative of *jus cogens*. There is pressing need, in opposition to the militarism and the unilateralism which despise world public opinion, to rescue the principles, foundations and institutions of international law, in which are found the elements to detain and combat terrorism, violence and the arbitrary use of power, - faithfully abiding by the Law. "Preventive" armed attacks and indefinite "countermeasures" do not find any support in international law; on the contrary, they openly violate it. They are spurious "doctrines", which show the way back to the law of the jungle²⁵¹, besides multiplying their defenseless, silent and innocent victims.

The dangerous fantasy of the "preventive" armed attacks is destructive not only of the whole structure of the organized international community, but also of the values which inspire it. If, in the domestic legal order, society precedes law, at international level - as pondered the former U.N. Secretary General, B. Boutros-Ghali, - occurs precisely the opposite: it is international law which precedes international society, and this latter cannot even be conceived or exist without the former²⁵². It is the law which is preventive or anticipatory, and not force, in the form of armed attacks, aggressions, unilateral interventions, and terrorist acts, which violate it openly.

VII. General Conclusions

In the light of the considerations developed in the present study, it may be concluded that the principles of international law shed light into the interpretation and application of international law as a whole. They pertain to the very *substratum* of this latter, being identified with the very foundations of the international legal system. They permeate every legal system. Their continuing validity is beyond question. Principles of international law are essential to humankind's quest for justice, and of key importance to the endeavours of construction of a truly universal international law.

1. The Sustained Validity of the Principles of International Law

As proclaimed in the U.N. Charter in 1945, and restated in the 1970 U.N. Friendly Relations Declaration, the principles of international law retain their full validity in our days. It is simply not possible to study international law making

²⁵¹ Cf. *cit.*, in this sense, in A. CASSESE, "Article 51", in *La Charte des Nations Unies - Commentaire article par article* (eds. J.-P. COT and A. PELLET), Paris/Bruxelles, Economica/Bruylant, 1985, p. 777.

²⁵² B. BOUTROS-GHALI, « Le Droit international à la recherche de ses valeurs: paix, développement, démocratisation », 286 *Recueil des Cours de l'Académie de Droit International de La Haye* (2000) pp. 20, 18 and 30, and cf. p. 37.

abstraction of them. A violation of a norm or rule of international law does not mean that such norm or rule ceased to exist; it means that international law has been violated, engaging the international responsibility of the wrongdoers. This is bound to occur in any domain of law. A violation of a norm or rule of international law does not affect the validity of its *corpus juris* and its guiding principles. There is a constant recourse to such principles, bearing witness of their continuing validity.

Given the overriding importance of those principles, not surprisingly they found expression in the United Nations Charter, adopted in 1945. A quarter of a century afterwards they were the object of a remarkable restatement: in fact, the 1970 Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States (cf. *supra*) asserted in its final paragraph that the principles of the U.N. Charter embodied therein constituted "basic principles of international law"; the Declaration was thus meant to be a law-declaring resolution as to those basic principles, so as to serve as a guide for all States in their behaviour. The U.N. Declaration of Principles, though not exhaustive in its content, proved to be, in the following years, a source for other exercises of the kind, such as the declaration of principles enshrined into the Helsinki Final Act (1975) which formed the basis for the subsequent creation of the CSCE (Conference on Security and Cooperation in Europe) process²⁵³.

One of the final clauses of the 1970 Declaration further asserted that each of the principles contained therein was to be interpreted and applied in the context of the other principles, interrelated as they all were. Thus, while the traditional general principles of law (found *in foro domestico*) disclosed a rather procedural character, the general principles of international law - such as the ones proclaimed in the 1970 Declaration - revealed instead a substantive content (so as to guide State conduct)²⁵⁴, proper of the very foundations of international law. Such general principles of international law (as found in the 1970 Declaration of Principles) are thus vested with universal importance for the international community itself²⁵⁵.

In international practice, principles of international law are invoked, or resorted to, not in isolation, but often in their relationships with each other. Such interrelationships, as already indicated, were recalled or pointed out, more than once, in the course of the *travaux préparatoires* of the 1970 Declaration of Principles of International Law (cf. *supra*). An interrelationship of the kind is evident, e.g., with regard to the principle of the prohibition of the use or threat of force, and the principle of peaceful settlement of international disputes. The same can be said of the

²⁵³ I. SINCLAIR, *The Significance of the Friendly Relations Declaration, in The United Nations and the Principles of International Law - Essays in Memory of M. AKEHURT* (eds. V. LOWE and C. WARBRICK), London/N.Y., Routledge, 1994, pp. 5-10 and 26-29.

²⁵⁴ Cf. debates on *The Role of General Principles of Law and General Assembly Resolutions, in Change and Stability in International Law-Making* (eds. A. CASSESE and J. H. H. WEILER), Berlin, W. DE GRUYTER, 1988, pp. 47-48 (interventions of J. H. H. WEILER and E. JIMÉNEZ DE ARRÉCHAGA).

²⁵⁵ Cf. *Id.*, pp. 54-55 (intervention of A. CASSESE).

principle of the duty of international cooperation, with regard to the principle of good faith in the compliance with international obligations.

The principle of good faith is generally regarded as providing the foundation of the international legal order, in the sense that it asserts the basic need of compliance with binding international obligations (*pacta sunt servanda*), arising from conventional as well as customary international law²⁵⁶. One could not neglect that the principle of *pacta sunt servanda*, enshrined into the Vienna Convention on the Law of Treaties of 1969 (Article 26 and preamble), gives concrete expression to norms also of customary international law. The principle *pacta sunt servanda*, - asserted by that of good faith (*bona fides*)²⁵⁷, - effectively transcends the law of treaties²⁵⁸, being characterized by doctrine as either a norm of customary law²⁵⁹ or as a general principle of international law²⁶⁰.

Its insertion into the aforementioned Vienna Convention was endowed with a clearly axiomatic character: it came to appear in a convention of codification, which asserted in an incontrovertible way its wide scope. But, already well before its acknowledgement in the Vienna Convention of 1969 referred to²⁶¹, the principle *pacta sunt servanda* effectively appeared, as already indicated, as, more than a general rule of interpretation of treaties, a norm of customary international law or a true general principle of international law, endowed with wide jurisprudential

²⁵⁶ G. WHITE, *The Principle of Good Faith, in The United Nations and the Principles of International Law - Essays in Memory of M. AKEHURST* (eds. V. LOWE and C. WARBRICK), London/N.Y., Routledge, 1994, pp. 231 and 236.

²⁵⁷ M. LACHS, *Some Thoughts on the Role of Good Faith in International Law, in Declarations on Principles, a Quest for Universal Peace - Liber Amicorum Discipulorumque B.V.A. Roling*, Leyden, Sijthoff, 1977, pp. 47-55; M. K. YASSEEN, « L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités », 151 *Recueil des Cours de l'Académie de Droit International de La Haye* (1976) p. 20; Clive Parry, "Derecho de los Tratados", in *Manual de Derecho Internacional Público* (ed. M. Sorensen), 5th. reimpr., Mexico, Fondo de Cultura Económica, 1994, pp. 229 and 200-201.

²⁵⁸ It should be born in mind that the law of treaties, like the law on the international responsibility of the States, are closely linked to the very foundations of International Law; P. Reuter, *Introduction au droit des traités*, 2nd. ed., Paris, PUF, 1985, p. 32.

²⁵⁹ E.g., B. CONFORTI, "Derecho Internacional", Buenos Aires, Zavalia Ed., 1995, p. 67; and cf. H. MOSLER, *The International Society as a Legal Community*, 140 *Recueil des Cours de l'Académie de Droit International de La Haye* (1974) pp. 115-116. - Rules (such as that of the *pacta sunt servanda*) set forth in treaties can perfectly be evidence of customary international law; R. R. BAXTER, *Treaties and Custom*, 129 *Recueil des Cours de l'Académie de Droit International de La Haye*, (1970) pp. 31, 43, 57 and 102-103.

²⁶⁰ Ian BROWNLIE, *Principles of Public International Law*, 5th. ed., Oxford, University Press, 1998, p. 620.

²⁶¹ Cf. Lord McNAIR, *The Law of Treaties*, Oxford, Clarendon Press, 1961, pp. 493 and 505; and, for the historical and doctrinal evolution of the rule *pacta sunt servanda*, cf., e.g., M. SIBERT, *The Rule Pacta Sunt Servanda: From the Middle Ages to the Beginning of Modern Time*, 5 *Indian Yearbook of International Affairs* (1956) pp. 219-226; J. B. WHITTON, "La règle *pacta sunt servanda*", 49 *Recueil des Cours de l'Académie de Droit International de La Haye*, (1934) pp. 151-268.

recognition²⁶². The extent of the rule *pacta sunt servanda*, as well as the ultimate question of the validity of the norms of international law, transcend the ambit of the law of treaties²⁶³. The rule *pacta sunt servanda* is, in any case, deeply rooted in the system of international law as a whole²⁶⁴.

Good faith is inherent to any legal order, guiding the behaviour of the subjects of law. Four years after the adoption of the 1970 U.N. Declaration of Principles of International Law, the ICJ, in the *Nuclear Tests* case (1974), stressed the fundamental character of the principle of good faith, in pondering that

"one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith"²⁶⁵.

The principle of good faith has a key position in international law and all legal systems, providing them with an ethical basis, and surely standing above positive law; it is metajuridical, and constitutes "the starting point of a progressive moralization of international law"²⁶⁶.

The principle of the duty of international cooperation has gained ground in the last decades, if one bears in mind, e.g., the relevance of international cooperation in various areas, such as, e.g., peacekeeping and peacebuilding within the ambit of the law of the United Nations²⁶⁷. Intensified international cooperation accounts for the impressive developments in recent decades in certain domains of international law, such as, e.g., the international protection of human rights and of the human environment. The principle of the duty of international cooperation is indeed related to that of *bona fides*: one can in fact find express support in international case-law for the principle of the duty of international cooperation in good faith²⁶⁸. The principles of international law, in sum, were simply not meant to be resorted to in isolation from each other, as guides to international practice. They constitute altogether the pillars of the international legal system itself.

²⁶² E. DE LA GUARDIA and M. DELPECH, *El Derecho de los Tratados y la Convención de Viena*, (1970), Buenos Aires, La Ley, p. 276.

²⁶³ Perhaps the ultimate basis of an international obligation is of a metajuridical character; J. L. BRIERLY, *The Basis of Obligation in International Law*, Oxford, Clarendon Press, 1958, p. 65; J. L. BRIERLY, *The Law of Nations*, 6th. ed., Oxford, Clarendon Press, 1963, p. 54.

²⁶⁴ M. LACHS, *Pacta Sunt Servanda*, in *Encyclopedia of Public International Law* (ed. R. BEMHARDT), vol. 7, Amsterdam, North-Holland/Max Planck Institute, 1984, pp. 364-371.

²⁶⁵ ICJ, *Nuclear Tests* case (Australia versus France), *ICJ Reports* (1974) p. 268, par. 46.

²⁶⁶ E. ZOLLER, « *La bonne foi en Droit international public* », Paris, Pédone, 1977, pp. 354 and 339-340, and cf. pp. 12-13, 346 and 352.

²⁶⁷ Cf., e.g., A. JAMES, "The Principle of Co-operation: United Nations Peacekeeping", in *The United Nations and the Principles of International Law - Essays in Memory of M. Akehurst* (eds. V. LOWE and C. WARBRICK), London/N.Y., Routledge, 1994, pp. 160-174.

²⁶⁸ Cf. Ph. CAHIER, « *Changements et continuité du Droit international - Cours général de Droit international public* », 195 *Recueil des Cours de l'Académie de Droit International de La Haye* (1985) pp. 85-86 and 89.

As the clause of domestic jurisdiction (Article 2(7)) of the U.N. Charter had in mind the relations between the Organization and member States and did not expressly address intervention in inter-State relations, it was much to the credit of the 1970 Declaration of Principles to have formulated the principle of non-intervention by a State or group of States in the internal or external affairs of another State²⁶⁹. One and a half decades later, the International Court of Justice (ICJ), in the *Nicaragua versus United States* case (1986), in expressly invoking *inter alia* the 1970 Declaration of Principles, stated that the principle at issue

"forbids all States or groups of States to intervene directly or indirectly in the internal or external affairs of other States. (...) Intervention is wrongful when it uses methods of coercion (...). The element of coercion, which defines, and indeed forms the essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, either in the direct form of military action, or in indirect form of support for subversive or terrorist armed activities within another State. (...) These forms of action are therefore wrongful in the light of both the principle of non-use of force, and that of non-intervention"²⁷⁰.

To the Special Committee which drafted the 1970 Declaration of Principles the formulation of the principle of non-intervention expressed a "universal legal conviction"; the principle had its basis in customary law, and was reasserted in successive international treaties²⁷¹. And as for judicial practice, it may be recalled that, already in 1949, in the *Corfu Channel* case, the ICJ warned that intervention was but a "manifestation of a policy of force (...) reserved for the most powerful States", which "might easily lead to perverting the administration of international justice itself"²⁷².

2. Principles of International Law, the Quest for Justice and the Universality of International Law

In fact, on successive occasions the principles of international law have proved to be of fundamental importance to humankind's quest for justice. This is clearly illustrated by the role played, *inter alia*, by the principle of juridical equality of States²⁷³. This fundamental principle, proclaimed in the U.N. Charter and enunciated

²⁶⁹ G. ABI-SAAB, *Some Thoughts on the Principle of Non-Intervention, in International Law: Theory and Practice - ESSAYS IN HONOUR OF ERIC SUY* (ed. K. Wellens), The Hague, Nijhoff, pp. 227-234 (1998)

²⁷⁰ ICJ, *Nicaragua versus United States* case, Judgment of 27 June 1986 (Merits), *ICJ Reports* (1986) p. 108, par. 205.

²⁷¹ T. MITROVIC, "Non-Intervention in the Internal Affairs of States", in *Principles of International Law Concerning Friendly Relations and Cooperation* (ed. M. SAHOVIC), Belgrade/N.Y., Institute of International Politics and Economics/Oceana, 1972, pp. 221, 256-257 and 248.

²⁷² ICJ, *Corfu Channel* case (United Kingdom versus Albania), Judgment of 09 April 1949 (Merits), *ICJ Reports* (1949) p. 35.

²⁷³ Already in 1921, Raul FERNÁNDEZ stressed the importance of the principle of juridical equality of States for the realization of justice at international level; R. FERNÁNDEZ, «Le

also in the 1970 Declaration of Principles, means ultimately that all States, - factually strong and weak, great and small, - are equal before international law, are entitled to the same protection under the law and before the organs of international justice, and to equality in the exercise of international rights and duties²⁷⁴.

Despite successive attempts to undermine it, the principle of juridical equality of States has remained, from the II Hague Peace Conference of 1907 to date²⁷⁵, one of the basic pillars of international law. It has withstood the onslaught of time, and shown itself salutary for the peaceful conduction of international relations, being ineluctably associated - as it stands - with the foundations of international law. This principle has been very important for the international legal system itself²⁷⁶. The principle at issue has proven to be a cornerstone of international law in the United Nations era. In fact, the U.N. Charter gave to it a new dimension, and the principle of juridical equality of States, in turn, paved the way for, and contributed to rendering possible, new developments such as that of the system of collective security, within the ambit of the law of the United Nations, on the basis of the understanding that the preservation of international peace and security is a matter of international concern, is a common concern of all States and of the international community²⁷⁷, and indeed of the humankind as a whole.

In its turn, the emergence and consolidation of the principle of equality of rights and self-determination of peoples came to herald the overcoming in our times of the old inter-State dimension of international law; self-determination, in particular, takes into account subjects of international law other than States, and could simply not exist or operate in a simply or exclusively inter-State context²⁷⁸. Its remarkable projection in the last decades, as already pointed out, was to enable the discernment of the external and internal dimensions of self-determination (cf. *supra*), and the definitive incorporation of the rights of peoples into the conceptual universe of contemporary international law.

principe de l'égalité juridique des États dans l'activité internationale de l'après-guerre», Genève, Impr. A. KUNDIG, 1921, pp. 18-19 and 21-22.

²⁷⁴ A. MAGARASEVIC, *The Sovereign Equality of States*, in *Principles of International Law Concerning Friendly Relations and Cooperation* (ed. M. SAHOVIC), Belgrade/N.Y., Institute of International Politics and Economics/Oceana, 1972, pp. 176-178, 197 and 212.

²⁷⁵ Cf. R. P. ANAND, *Sovereign Equality of States in International Law*, 197 *Recueil des Cours de l'Académie de Droit International de La Haye* (1986) pp. 54-58, 63-66, 77-79, 91-100, 117-126, 157-159 and 189-195.

²⁷⁶ A. MIELE, "La Comunità Internazionale", G. TORINO, GIAPPICHELLI Ed., 2000, pp. 8 and 24.

²⁷⁷ C. WARBRICK, *The Principle of Sovereign Equality*, in *The United Nations and the Principles of International Law - ESSAYS IN MEMORY OF M. AKEHURST* (eds. V. LOWE and C. WARBRICK), London/N.Y., Routledge, 1994, pp. 210 and 213-214.

²⁷⁸ G. ABI-SAAB, «*La reformulation des principes de la Charte et la transformation des structures juridiques de la communauté internationale*, in *Le droit international au service de la paix, de la justice et du développement – Mélanges*». M. VIRALLY, Paris, Pédone, 1991, pp. 4 and 6-7.

Likewise remarkable has been the projection in time of the cardinal principle of the prohibition of the threat or use of force. In fact, nothing in international law authorizes a State or group of States to proclaim themselves defenders of "civilization", - and those who take such course of action, making recourse to the indiscriminate use of force, outside the framework of the U.N. Charter, do so in the opposite sense to the purpose professed. More than half a century ago (in 1950), the learned historian Arnold Toynbee warned that the growing expenditures with militarism would fatally lead to the "ruin of civilizations"²⁷⁹; thus, the improvement of military technique was, to him, symptomatic of the "decline of a civilization"²⁸⁰. Another remarkable writer of the XXth century, Stefan Zweig, in referring to the "old savagery of war", likewise warned against the *décalage* between technical progress and moral ascent, in the face of "a catastrophe which with one sole blow made us move backwards a thousand years in our humanitarian endeavours"²⁸¹.

Already the ancient Greeks were aware of the devastating effects of war over both winners and losers, revealing the great evil of the substitution of the ends by the means: since the times of the *Illiad* of Homer until today, all the "belligerents" are transformed in means, in things, in the senseless struggle for power, incapable even to "subject their actions to their thoughts". As Simone Weil so perspicaciously observed, the terms "oppressors and oppressed" almost lose meaning, in face of the impotence of everyone in front of the machine of war, converted into a machine of destruction of the spirit and of fabrication of the in conscience²⁸². As in the *Illiad* of Homer, there are no winners and losers, all are taken by force, possessed by war, degraded by brutalities and massacres²⁸³.

In the armed conflicts and despotisms of the XXth century, 86 million human beings were killed, of which 58 million in the two world wars. This devastating panorama was formed amidst the inhumanity linked to technological advance, in the face of the omission of so many. This tragic legacy of the victims of the armed conflicts of last century seems to have been forgotten by those responsible for the decision to launch the contemporary international armed conflicts outside the framework of the U.N. Charter, who thus disclose an inhumane and irresponsible vision, entirely indifferent to the suffering of the present and past generations.

Nothing in the U.N. Charter transfers to one or more of its member States the power to decide unilaterally - as it was done in the *invasion and occupation of Iraq*, as from April 2003, that the peaceful means of settlement of international disputes

²⁷⁹ A. TOYNBEE, "Guerra e Civilizaçã"o, Lisboa, Ed. Presença, (1963), (reed.), pp. 20 and 29.

²⁸⁰ *Id.*, pp. 178-179. - And cf. J. DE ROMILLY, «*La Grèce antique contre la violence*», Paris, Ed. FALLOIS, 2000, pp. 18-19 and 129-130.

²⁸¹ S. ZWEIG, "O Mundo que Eu Vi", Rio de Janeiro, Ed. Record, 1999 (reed.), p. 19, and cf. pp. 474 and 483, and cf. p. 160.

²⁸² S. WEIL, "Reflexiones sobre las Causas de la Libertad y de la Opresión Social", Barcelona, Ed. Paidós/Universidad Autónoma de Barcelona, 1995, pp. 81-82, 84 and 130-131.

²⁸³ S. WEIL, «*L'Illiade ou le Poème de la Guerre (1940-1941)*» in *Oeuvres*, Paris, Quarto Gallimard, 1999, pp. 527-552.

were "exhausted", and nothing in the U.N. Charter authorizes one or more of its member States to decide *motu proprio* and pursuant to their own criteria (or lack of them) and strategies as to the use of armed force. Those who proceed in this way, besides violating the U.N. Charter - with the aggravating circumstance of this latter being endowed with the vocation of constitution of the organized international community - and the basic principles of international law, have their international responsibility engaged. In sum, no State is allowed to place itself above the Law. It was necessary to wait for decades to achieve the tipification of war crimes; nowadays, beyond these latter, one could hardly evade the characterization of the war of aggression, *per se*, as a crime²⁸⁴.

In this sombre beginning of the XXIst century, more than ever, one needs to reaffirm the primacy of Law over force. This reassertion is an ineluctable duty of every jurist, who cannot contribute with his silence to the deconstruction of international law. The function of the jusinternationalist, from the times of H. Grotius until the present, is not simply that of taking note of what States do; his function is that of saying what the Law is, the Law which derives its authority from certain principles of sound reasoning (*est dictatum rectae rationis*)²⁸⁵. Law, definitively, does not silence, not even when recourse is made to weapons. Well above force stands the Law, just as above the will stands the conscience.

Last but not least, it is not surprising to find that voluntarist positivists have always attempted to minimize the role of the general principles of law; they have always met the opposition of those who sustain the relevance of those principles, as ensuing from the idea of an objective justice²⁸⁶, and guiding the interpretation and application of legal norms and rules. The international legal system is supported not only by the observance by States of international norms and rules, but also - and above all - by their commitment to preserve and promote that system as a whole²⁸⁷; and it is the *principles* of this latter that can best ensure the cohesion and integrity of the international legal system as a whole. C. Wilfred Jenks believed that an inquiry into the general principles of law (found in distinct legal system, and further encompassing the principles of international law itself) could much contribute to provide the "basic foundations of a universal system of international law"²⁸⁸. This is, in fact, a key role of those principles, which are intertwined with the very foundations of international law, pointing the way to the universality of this latter.

Writing in 1935, A. Verdross propounded the "universal idea of law", emanating from human conscience, conforming the existence of a "fonds juridique commun",

²⁸⁴ A. A. CANÇADO TRINDADE, "A Guerra como Crime", in *Correio Braziliense*, Brasília, 20.03.2003, p. 5.

²⁸⁵ A. A. CANÇADO TRINDADE, "O Direito Internacional em um Mundo em Transformação", Rio de Janeiro, Edit. Renovar, 2002, p. 1109.

²⁸⁶ Ch. ROUSSEAU, *Principes généraux du Droit...*, *op. cit. supra* n. (65), vol. I, pp. 926-927.

²⁸⁷ J. I. CHARNEY, "Universal International Law", 87 *American Journal of International Law* (1993) p. 532.

²⁸⁸ C. W. JENKS, *The Common Law of Mankind*, London, Stevens, 1958, pp. 106 and 120-121, and cf. p. 172.

source of the general principles of law²⁸⁹. Over three decades later, A. Favre sustained, in 1968, that general principles of law are "the expression of the idea of justice" having a universal scope and expressing the "juridical conscience of humankind"; rather than deriving from the will of the States, they have an "objective character" and constitute a "fonds juridique commun pour l'ensemble des États", thus securing the unity of law and enhancing the idea of justice to the benefit of humankind as a whole²⁹⁰. One cannot prescind from the general principles of law, encompassing the principles of international law, in the construction of a new *jus entium*, the international law for humankind.

²⁸⁹ A. VERDRPSS, « Les principes généraux du droit... », *op. cit. supra* n. (47), p. 202. - On his part, H. LAUTEPACHT sustained that the "universality a substantial body of international law" is to a large extent based on the general principles of law, which "by definition" have a universal character and application, "independently of any express or implied manifestation of the will" of the members of the international community; furthermore, the universality of some provisions of conventional international law stems from "compelling considerations of humanity"; *International Law Being the Collected Papers of Hersch LAUTERPACHT* (ed. E. LAUTERPACHT), vol. I (General Works), Cambridge, University Press, 1970, pp. 114-117.

²⁹⁰ A. FAVRE, « Les principes généraux du Droit, fonds commun du Droit des gens », in *Recueil d'études de Droit international en hommage à Paul Guggenheim*, Genève, IUHEI, 1968, pp. 369, 374-375, 379, 383 and 390.

