

## DISSENTING OPINION OF JUDGE CANÇADO TRINDADE

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## I. Prolegomena

1. I regret not to be able to follow the Court's majority in the decision which the Court has just adopted in the present Judgment on preliminary objections in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia versus Russian Federation). My dissenting position encompasses the whole of the Court's reasoning, and its conclusions on the second preliminary objection and on jurisdiction, as well as its treatment of issues of substance and procedure raised before the Court. This being so, I care to leave on the records the foundations of my dissenting position, given the considerable importance that I attach to the issues raised by both Georgia and the Russian Federation in the *cas d'espèce*, bearing in mind the settlement of the dispute at issue ineluctably linked to the imperative of the *realization of justice* under a United Nations human rights treaty of the historical importance of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter the CERD Convention).

2. I thus present with all care the foundations of my entirely dissenting position on the whole matter dealt with by the Court in the Judgment which it has just adopted, out of respect for, and zeal in, the exercise of the international judicial function, guided above all by the ultimate goal precisely of the *realization of justice*. To that effect, I shall dwell upon all the aspects concerning the dispute brought before the Court which forms the object of the present Judgment of the Court, in the hope of thus contributing to the clarification of the issues raised and to the progressive development of international law, in particular in the international adjudication by this Court of cases on the basis of universal human rights treaties.

3. My first line of considerations concerns the genesis of the compulsory jurisdiction of the Hague Court (PCIJ and ICJ), which in my view cannot pass unnoticed in the consideration of compromissory clauses such as the one of the CERD Convention (Article 22). I shall next turn to the legislative history and development of the optional clause of compulsory jurisdiction of the Hague Court (PCIJ and ICJ). This will lead me into the consideration of the relationship between the optional clause/compromissory clauses and the nature and substance of the corresponding treaties wherein they are enshrined.

4. Attention will thus be drawn to the principle *ut res magis valeat quam pereat*, before I turn to the elements for the proper interpretation and application of the compromissory clause (Article 22) of the CERD Convention (encompassing its ordinary meaning, its *travaux préparatoires*, and the previous pronouncement of the Court itself on it). In considering, next, the ineluctable relationship between peaceful settlement and the realization of justice, particularly under human rights treaties, I shall dwell in particular, upon the question of the verification of prior attempts or efforts of negotiation, in the light of the relevant case-law of the Hague Court (PCIJ and ICJ)

5. In sequence, I shall single out the concern of contemporary *jus gentium* with the sufferings and needs of protection of the population, an issue which, in my view, assumes a central position in the consideration of the present case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. This will lead me to a review of the evolutive interpretation of human rights treaties, - such as the CERD Convention, - regarded constantly in international case-law and international legal doctrine as *living* instruments, so as to respond to new needs of protection of the human person, even in the most adverse circumstances. The path will then be paved for, last but not least, the presentation of my concluding observations, and my final reflections on an old dilemma that we keep on facing nowadays, in the light of contemporary *jus gentium*.

## II. Permanent Court of International Justice and International Court of Justice: Compulsory Jurisdiction Revisited

### 1. The Work on the PCIJ Statute of the Advisory Committee of Jurists (1920)

6. In June-July 1920, the Advisory Committee of Jurists appointed by the Council of the League of Nations to draft the Statute of the Permanent Court of International Justice (PCIJ), discussed at length the possibility of providing the PCIJ with compulsory jurisdiction<sup>1</sup>, so as to bring about a development in the system of international adjudication. The Committee considered a precise text on the compromissory clause, and soon reached consensus on the introduction of a rule whereby the PCIJ would be competent to hear certain disputes *without the need* of a previous (*ad hoc* or conventional) agreement between the contending parties.

7. Under the draft Statute, such compulsory jurisdiction virtually extended over all disputes of a “legal” nature, whereas consent would have still been required to bring other kinds of matters before the PCIJ. It was seemingly intended that the introduction of such system of compulsory jurisdiction in disputes of a “legal nature”, would also extend to other cases in so far as they were covered by general or specific conventions between the (contending) parties. The discussion of drafts of a jurisdictional clause, since the 10<sup>th</sup> meeting of the Committee, kept in mind particularly Article 14 of Covenant of the League of Nations, which expressly referred to disputes “submitted” by the parties to the PCIJ<sup>2</sup>.

8. A proposal was advanced to the effect that the (PCIJ) Statute itself was to be used as a general instrument whereby States would provide their consent to jurisdiction; in a working draft proposed by Baron Descamps, a last paragraph was added to the effect that: - “Any State subscribing to the present Act is considered as having agreed to settle by legal means all disputes [of a legal nature]”<sup>3</sup>. Already at the 14<sup>th</sup> meeting of the Committee (held on 02.07.1920), compulsory jurisdiction had been generally accepted<sup>4</sup>. Moving on to the applicable law, the Committee then considered the inclusion of general principles in the list of legal sources applicable by the PCIJ.

9. Pursuant to Article 34 of the Draft Statute, the PCIJ was to have jurisdiction (even without any special convention conferring it upon the Court) to hear and determine cases of a “legal nature” - between member States of the League of Nations - concerning: a) the interpretation of a treaty; b) any question of international law; c) the existence of any fact which, if established, would constitute a breach of an international obligation; d) the nature or extent of reparation to be made for the breach of an international obligation; e) the interpretation of a sentence passed by the Court. This latter was also to take cognizance of all disputes of any kind which may be submitted

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<sup>1</sup>. Cf., on the proposed basis for discussion, CPJI/Comité Consultatif de Juristes, *Procès-Verbaux des Séances du Comité* (16 juin – 24 juillet 1920), La Haye, Van Langenhuyzen Frères, 1920, p. 218. On a subsequent proposal (by Lord Phillimore) and amendment (by Mr. Hagerup), Annexes 2-3, pp. 252-253.

<sup>2</sup>. Article 14 of the Covenant read: - “The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly”.

<sup>3</sup>. CPJI/Comité Consultatif de Juristes, *Procès-Verbaux des Séances du Comité...*, *op. cit. supra* n. (1), Annex 1, p. 272, and cf. amendment, in *ibid.*, Annex 5, pp. 277-278.

<sup>4</sup>. Despite the concern – as to the applicable law – expressed by a couple of members; cf. *ibid.*, pp. 308-309 and 311.

to it on the basis of a general or particular convention between the parties. And, in the event of a dispute as to whether a certain case came within any of the aforementioned categories, the matter was to be settled by the decision of the Court<sup>5</sup>.

10. In the substantial debates of the Advisory Committee, of 02 July 1920, one of its members (E. Root), trying to restrain the prevailing view, stated that “the world was prepared to accept the compulsory jurisdiction of a Court which applied the universally recognized rules of International Law”; however, he did not think that it was disposed to accept “the compulsory jurisdiction of a Court which would apply principles, differently understood in different countries”<sup>6</sup>. Accordingly, in his view, “the beginning must be modest”, with a “relatively limited jurisdiction”<sup>7</sup>. The President of the Advisory Committee (Baron Descamps) promptly retorted that Mr. E. Root’s statement that “principles of justice” allegedly varied from country to country

“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. That was the law which could not be disregarded by a judge, a law which in practice, whether it is wished to or not, a judge never would disregard”<sup>8</sup>.

11. Baron Descamps added that it would be incumbent upon the Judges of the PCIJ “to consider whether the dictates of their conscience were in agreement with the conception of justice of civilized nations”<sup>9</sup>. Another member of the Committee (B.C.J. Loder) also retorted to Mr. Root’s view, arguing that it had incurred into a “confusion” with “compulsory arbitration”, that “did not come within the competence of the Committee”, which was “concerned with the rules to be applied by the Court” (the PCIJ); B.C.J. Loder repeated that “all possible confusion between the question of compulsory arbitration and that of the rules to be applied by the Court must be avoided”<sup>10</sup>.

12. The Advisory Committee ended up by propounding the compulsory jurisdiction of the Hague Court (PCIJ). Its final *Report* stated that:

“the Committee did not intend to enable a party to avoid the jurisdiction of the Court by alleging that there was still some hope of settlement by diplomatic means. (...) The Court, after satisfying itself *in limine litis* that an attempt has been made to settle the case by diplomatic means, (...) shall deliver judgment under certain conditions. Article 34 consequently lays down that the Court may hear and determine, without any special convention, disputes between States which are members of the League of Nations if such disputes are of a legal nature (...)”<sup>11</sup>.

13. The Advisory Committee itself, commenting on this provision of the Draft, noted that:

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<sup>5</sup>. Cf. *ibid.*, p. 729, the final Report, whereby the Committee finalized the draft Articles and appended a commentary thereto; and cf. also the preliminary version, *in ibid.*, p. 566.

<sup>6</sup>. *Ibid.*, p. 308.

<sup>7</sup>. *Ibid.*, p. 309.

<sup>8</sup>. *Ibid.*, pp. 310-311.

<sup>9</sup>. *Ibid.*, p. 311.

<sup>10</sup>. *Ibid.*, p. 311.

<sup>11</sup>. *Ibid.*, pp. 726-727.

“in the opinion of the majority of the Committee, the grant of such powers, though perhaps not strictly in accordance with the letter of the Covenant, follows its spirit so exactly that it would seem a great pity, now that the Court is being definitely organized, not to complete the progress made by this last provision.

(...) [T]he majority [of the Committee] recognized that the States forming the League of Nations, in constituting the Court, must give it a competence in cases of a legal nature, without any convention other than the constituent Statute of the Court”<sup>12</sup>.

Such was the position espoused by the Advisory Committee of Jurists, entrusted [by the Council of the League of Nations] with the historical task of drafting the Statute of the Hague Court in 1920. The Council itself, however, was to take a different position, opposed to the proposed compulsory jurisdiction of the PCIJ. The matter was then referred to the Assembly of the League of Nations.

## 2. The Debates of the Assembly of the League of Nations and Subsidiary Organs (1920)

14. At the I Assembly, in 1920, the question of the compulsory jurisdiction of the PCIJ was object of a careful debate; some of the members of the Advisory Committee of Jurists were present therein, in their capacities of Delegates of their countries. By and large, in the Assembly debates that followed<sup>13</sup>, the proposed clause of compulsory jurisdiction of the PCIJ did not meet much enthusiasm on the part of most member States of the League, although some States endorsed it (cf. *infra*).

15. In particular, the originally proposed Article 34, then Article 36 in the final numbering of the Draft Statute of the PCIJ, was doubted to be in conflict with the Covenant of the League; hence a Sub-Committee was established to study the issue, and to consider whether the Statute could serve as an instrument whereby States could express their consent to the PCIJ’s jurisdiction<sup>14</sup>. The Sub-Committee acknowledged the controversy on the interpretation of the Covenant, but decided not to propose any amendment the relevant Articles of the Draft Statute<sup>15</sup>.

16. The negotiation deadlock was overcome thanks to a proposal by the Brazilian Delegate<sup>16</sup> (Raul Fernandes), who devised an alternate version of the jurisdictional clause, whereby parties to the Statute were free to adhere or not<sup>17</sup>; he then submitted a revised proposal focused on the possibility that States, which desired to extend the scope of compulsory jurisdiction of the Court,

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<sup>12</sup>. Cf. *ibid.*, pp. 727-728. Cf. also the commentary, on this provision, by J. Brown Scott, in *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists - Report and Commentary*, Washington, 1920, p. 98: - “ (...) It would seem to follow that one of the parties could, in the absence of a separate and special convention or of special consent, lay the case before the Court, which is competent to receive it, and that the Court, being competent, could not only entertain the case, but could, at the request of the complaining State, proceed to decide it in the absence of the defendant State invited to appear before the Court”.

<sup>13</sup>. Extensively reported in the League of Nations’ document: PCIJ, *Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant*, Geneva, PCIJ, 1921, pp. 1 *et seq.*

<sup>14</sup>. Cf. *ibid.*, pp. 91-92.

<sup>15</sup> Cf. *ibid.*, pp. 210-211, and cf. also p. 107, on relevant discussion in the Assembly.

<sup>16</sup> Cf. *ibid.*, Annex 49, at 222.

<sup>17</sup>. Cf. *ibid.*, p. 107, and Annex 11, p. 168.

were permitted to do so by means of a declaration. This proposal setting forth the optional clause was then approved in the Assembly (8<sup>th</sup> Meeting), together with the whole Draft Statute<sup>18</sup>.

17. The Norwegian Delegate (F. Hagerup), who – like R. Fernandes - had worked on the topic in the Advisory Committee, though noting with some regret that the *momentum* built by the Committee had been lost, in the debates of the Assembly welcomed the Brazilian amendment; he reminded the Assembly, however, that compulsory jurisdiction was in his view still into force even without recourse to the optional clause declaration, at least for “all matters specifically provided for in treaties and conventions in force”, as acknowledged by the amended jurisdictional clause<sup>19</sup>.

18. The main points made during the debates were reported in the minutes (*procès-verbaux*) of the Assembly’s III Committee, in charge of the Draft Statute of the PCIJ. In the debates of 24.11.1920 on compulsory jurisdiction, the Delegate of Argentina (H. Pueyrredon) stated that if the PCIJ’s “jurisdiction was not obligatory, the Court of Justice would (...) be merely an arbitration tribunal”<sup>20</sup>. The Delegate of Brazil (R. Fernandes) strongly criticized the modifications made by the League’s Council of the conclusions of the Advisory Committee of Jurists, and held that “[f]or legal questions the Court should have jurisdiction because the decisions of the Court are the application of law, and make law”<sup>21</sup>.

19. Likewise, the Delegate of Panama (H. Arias) thought that “the compulsory jurisdiction could well be maintained”, and “the parties should be obliged to bring the case before the Court if they had not agreed to submit it to arbitration or to enquiry by the Council”<sup>22</sup>. In the same line of thinking, the Delegate of Portugal (A. Costa) endorsed the Advisory Committee’s support of compulsory jurisdiction; he argued that:

“the Covenant imposed recourse to the Court as an obligation, being inspired by the principle, contrary to that held by Bismarck, that ‘right goes before might’. The League of Nations had undertaken the task of preventing war. The only means of effecting this was obligatory recourse to justice. If a Court with obligatory jurisdiction could not be established, the League was dead. (...) The League of Nations would gain strength by admitting the principle of the adaptation of the Covenant to the needs of humanity. Moreover, a Permanent Court without compulsory jurisdiction would not only contradict the great treaties of peace which conferred this jurisdiction upon it in special cases; it would also constitute a mere repetition of the Hague Court of Arbitration”<sup>23</sup>.

20. The Delegate of South Africa (Lord Robert Cecil), however, introduced doubts into that debate, by arguing that the will or consent of the parties should prevail (rather than compulsory jurisdiction), as the Court’s judgments “would not be enforced” if they “concerned vital interests” of the States<sup>24</sup>. The Norwegian Delegate (F. Hagerup) sharply disagreed with Lord Robert Cecil’s

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<sup>18</sup>. *Ibid.*, p. 110.

<sup>19</sup>. *Ibid.*, pp. 249-250.

<sup>20</sup>. Société des Nations/League of Nations, *Actes de la I Assemblée/Records of the I Assembly – Séances de la III Commission/Meetings of the III Committee (CJJI/PCIJ)*, Genève, 1920, p. 285.

<sup>21</sup>. *Ibid.*, p. 285.

<sup>22</sup>. *Ibid.*, p. 286.

<sup>23</sup>. *Ibid.*, pp. 287-288.

<sup>24</sup>. *Ibid.*, p. 287.

“reservation of vital interests”, and “regretted that the Council had not been able to adopt the point of view of the Jurists’s Committee”<sup>25</sup>. The Delegate of The Netherlands (B.C.J. Loder) also regretted the “misunderstanding between the Jurist’s Committee and the Council”, and held that “the establishment of compulsory jurisdiction was exactly the step forward which should be made, and the step desired by the Covenant”<sup>26</sup>; yet, to keep on insisting to take this step further would run “the risk of bringing about disagreement between different Powers and thus of failing to achieve any result” at all<sup>27</sup>.

21. In the continuing debates, of 26.11.1920, the strong criticism came this time from the Delegate of Belgium (H. Lafontaine), to whom the principle of compulsory jurisdiction was, by then (in 1920),

“considered as the only means of emerging from the situation created by the war. The resistance to the application of the principle was due to the two fetiches of unanimity and sovereignty. (...) The only admissible sovereignty was that of justice. (...) The Covenant bore the imprint of the fact that its authors were inspired by the fetiches of vital interests and honour, but at least these two expressions were not to be found in the Covenant, and this in itself constituted an element of progress”<sup>28</sup>.

22. Insisting on his criticism, the Delegate of Belgium (H. Lafontaine) saw “a contradiction in Article 14 of the Covenant, in that it provided for a real Court of Justice to which, however, the parties would have recourse only if they both agreed to do so”<sup>29</sup>. The Delegate of the British Empire (Sir Cecil Hurst), however, did not think that the draftsmen of the Covenant had the intention to establish a Court with compulsory jurisdiction; he beheld as the “true solution”, if arbitration did not succeed, “to induce States to conclude mutual treaties” foreseeing recourse to a Court<sup>30</sup>. This was the way, in his view, to overcome “the hesitation of some States to accept universal compulsory jurisdiction”<sup>31</sup>. H. Lafontaine expressed some skepticism, in reply to the proposal of Sir Cecil Hurst<sup>32</sup>.

23. In the remaining debates on the matter, of 01 and 13.12.1920, the Delegate of Greece (N. Politis) remarked that, since it seemed “impossible to accept the idea of compulsion”, which “could not be imposed upon minds which had not spontaneously accepted it”, the solution appeared to be “to establish a network of separate conventions extending the jurisdiction of the Court”<sup>33</sup>. For his part, the Delegate of Switzerland (Max Huber) suggested the possibility of adoption of a convention for compulsory arbitration<sup>34</sup>. The Delegate of Colombia (F.J. Urrutia) stated that:

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<sup>25</sup>. *Ibid.*, p. 289.

<sup>26</sup>. *Ibid.*, p. 288.

<sup>27</sup>. *Ibid.*, p. 288.

<sup>28</sup>. *Ibid.*, p. 292.

<sup>29</sup>. *Ibid.*, p. 293.

<sup>30</sup>. *Ibid.*, pp. 293-294.

<sup>31</sup>. *Ibid.*, p. 294.

<sup>32</sup>. *Ibid.*, p. 294.

<sup>33</sup>. Société des Nations/CPIJ, *Documents au sujet de Mesures prises par le Conseil de la Société des Nations aux termes de l’article 14 du Pacte et de l’adoption par l’Assemblée du Statut de la Cour Permanente*, Genève, SdN/CPIJ, 1920, p. 142.

<sup>34</sup>. *Ibid.*, p. 142.

“The principle of compulsory arbitration is not only a principle of international justice; it is a democratic principle, since it is the logical result of the legal equality of States. It is deeply rooted in the history, traditions and institutions of the American peoples”<sup>35</sup>.

24. In the same line of thinking, the Peruvian Delegate (M.H. Cornejo) stated that “Peru has always defended compulsory arbitration”, and remarked that “Latin America, by a very great majority, perhaps unanimously, desires compulsory jurisdiction and the reign of peace”<sup>36</sup>. Likewise, the Delegate of Cuba (Mr. de Agüero) observed that:

“although the principle of compulsory jurisdiction is not included in the resolution of the III Committee, we will vote for that resolution. We understand the saying of the Latin philosopher: *natura non fecit saltus*. Perfection cannot be attained in a moment from that which does not as yet exist. The laws of evolution govern all things. We must begin by building a little chapel, and in the course of time the League of Nations will be able to build a cathedral”<sup>37</sup>.

To the same effect, the Delegate of Switzerland (Mr. Motta) added that the setting up of a tribunal with compulsory jurisdiction “would have been the ideal, but the present state of human society is still unfavourable to its realization. (...) Article 36, however imperfect it may be, will be the starting-point of a great movement towards freedom, out of which will arise universal compulsory jurisdiction”<sup>38</sup>.

25. For his part, the Delegate of Bolivia (Mr. Tamayo), expressed support for “the just, humane and truthful principle of compulsory arbitration”; anything short of that, he added, amounted to “promising us justice for tomorrow”, and “not giving it us today”<sup>39</sup>. And the Delegate of Portugal (A. Costa) insisted on his view that Articles 12-15 of the Covenant “implied the principle of compulsory jurisdiction for the International Court of Justice”, and he added, with a premonitory tone:

“When we realize the necessity of remaining faithful to the declarations of the preamble to the Covenant and of declaring ourselves on the question of compulsory jurisdiction, we shall be forced to accept compulsion. The tribunal we are going to found will then be provided with compulsory jurisdiction, which will be admitted by all the Members of the League of Nations. Such is my wish. I accept the institution of a Permanent Court of International Justice because I have confidence in the future. If we are not to reach the end of which I have spoken, we are deceiving ourselves. The tribunal will disappear, and with it the League of Nations, if, to settle their disputes, the Members of the League are still at liberty to resort to war”<sup>40</sup>.

26. The compromise solution was the optional clause, proposed by the Brazilian Delegate (Raul Fernandes), as pointed out by the *rapporteur* of the III Committee (F. Hagerup), in his *Report* on the discussions of the Committee, in respect of what was to become Article 36 the Statute of the

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<sup>35</sup>. *Ibid.*, pp. 241-242.

<sup>36</sup>. *Ibid.*, p. 244.

<sup>37</sup>. *Ibid.*, pp. 246-247.

<sup>38</sup>. *Ibid.*, p. 249.

<sup>39</sup>. *Ibid.*, p. 248.

<sup>40</sup>. *Ibid.*, p. 246.



PCIJ<sup>41</sup>. Furthermore, the Norwegian Delegate (F. Hagerup), in the concluding discussions of 13.12.1920, deemed it fit to state, in support of compulsory jurisdiction, that:

“There are already in existence a large number of conventions which provide for compulsory jurisdiction. I am happy to pay tribute here to the important part played by the States of South America in this movement. They deserve a large share of the credit for the extension of the idea. (...) [T]he States of Europe have also not been behindhand. Several of them, including some great powers, have concluded a number of treaties which set up compulsory jurisdiction. (...) I wish to emphasize here how highly desirable it would be for all States, which are bound by treaties providing for compulsory jurisdiction in a general way, to modify them so that this jurisdiction shall henceforth devolve upon the Court which we are about to set up. Such an attitude will greatly help to extend the Court’s jurisdiction. I have already in my first speech pointed out the importance of the motion of the Brazilian Delegation, (...) according to which States which desire to extend the scope of compulsory jurisdiction are permitted to do so by means of a simple declaration. (...) I have been, from the outset, a champion of the principle of compulsory jurisdiction. I can accept wholeheartedly the proposal now presented”<sup>42</sup>.

### **3. The Debates on the ICJ Statute of the United Nations Conference on International Organization and Subsidiary Organs (1945)**

27. In the new era inaugurated with the creation of the United Nations, on the occasion of the U.N. Conference on International Organization, a Committee of Jurists was appointed in 1945 to review the PCIJ Statute in view of the adoption of the Statute of the new International Court of Justice (ICJ). The Committee of Jurists entrusted a Subcommittee to draft the text of, in particular, Article 36 (on compulsory jurisdiction). On 14.04.1945 the Subcommittee reported:

“The Subcommittee, having given careful consideration to the various proposals that had been presented as well as to the views previously expressed by the different Delegates before the Committee of Jurists, unanimously agreed upon the following:

“The Court, being the principal judicial organ of the United Nations, should possess definite jurisdiction, if not in all cases, at least in those cases which are peculiarly susceptible of judicial settlement, namely, legal disputes.

It may be recalled that as far back as 1920 compulsory jurisdiction was proposed by the Committee of Jurists which drafted the existing Statute. The Governments were not prepared at that time to accept the proposal and the result was the adoption of what is known as the optional clause.

The exercise of compulsory jurisdiction by the Court will promote the rule of law among nations. Public opinion throughout the world is strongly in favor of conferring on the Court compulsory jurisdiction”<sup>43</sup>.

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<sup>41</sup>. Cf. *ibid.*, p. 222.

<sup>42</sup>. *Ibid.*, p. 250.

<sup>43</sup>. U.N., *Documents of the United Nations Conference on International Organization* (UNCIO), vol. XIV (U.N. Committee of Jurists), San Francisco, 1945, doc. Jurist-43, G/33, of 14.04.1945, pp. 286-287.

28. Moreover, the Subcommittee recalled that consensus among jurists was in place at least since the 1920 negotiations, and that 45 out of 51 States had already accepted the optional clause. Shortly afterwards, on 19.04.1945, the Subcommittee further reported on the matter that:

“The question of compulsory jurisdiction was debated at the time of the initial preparation of the Statute of the Court. Admitted by the Advisory Committee of Jurists, in 1920, compulsory jurisdiction was rejected in the course of the examination of the Draft Statute by the League of Nations to yield place, on the successful initiative of a Brazilian jurist, to an optional clause permitting the States to accept in advance the compulsory jurisdiction of the Court in a domain delimited by Article 36. This debate has been resumed and very many Delegations have made known their desire to see the compulsory jurisdiction of the Court affirmed by a clause inserted in the revised Statute so that, as the latter is to become an integral part of the United Nations Charter, the compulsory jurisdiction of the Court would be an element of the International Organization which it is proposed to institute at the San Francisco Conference. Judging from the preferences thus indicated, it does not seem doubtful that the majority of the Committee was in favour of compulsory jurisdiction, but it has been noted that, in spite of this predominant sentiment, it did not seem certain, nor even probable, that all the nations whose participation in the proposed International Organization appears as necessary, were now in a position to accept the rule of compulsory jurisdiction, and that the Dumbarton Oaks Proposals did not seem to affirm it; some, while retaining their preferences in this respect, thought that the counsel of prudence was not to go beyond the procedure of the optional clause inserted in Article 36, which has opened the way to the progressive adoption, in less than 10 years, of compulsory jurisdiction by many States which in 1920 refused to subscribe to it. Placed on this basis, the problem was found to assume a political character, and the Committee thought that it should defer it to the San Francisco Conference.

The suggestion was made by the Egyptian Delegation to seek a provisional solution in a system which, while adopting compulsory jurisdiction as the compulsory rule, would permit each State to escape it by a reservation. Rather than accept this view, the Committee has preferred to facilitate the consideration of the question by submitting two texts as suggestions rather than as a recommendation.

One is submitted in case the Conference should not intend to affirm in the Statute the compulsory jurisdiction of the Court, but only to open the way for it by offering the States, if they did not think it apropos, acceptance of an optional clause on this subject. This text reproduces Article 36 of the Statute with an addition in case the United Nations Charter should make some provision for compulsory jurisdiction.

The second text, also based on Article 36 of the Statute, establishes compulsory jurisdiction directly without passing through the channel of an option which each State would be free to take or not take. Thus it is simpler than the preceding one. It has even been pointed out that it would be too simple. The Committee, however, thought that the moment has not yet come to elaborate it further and see whether the compulsory jurisdiction thus established should be accompanied by some reservations, such as one concerning differences belonging to the past, one concerning disputes which have arisen in the present war, or those authorized by the General Arbitration Act of 1928. If the principle enunciated by this second text were accepted, it could serve as a basis for working out such provisions applying the principle which it enunciates with such modifications as might be deemed opportune.

Some Delegations desired to see inserted in Article 36(1) the specific statement that the jurisdiction of the Court extends to ‘justiciable’ matters or those ‘of a legal nature’

which the parties might submit to it. Objections were made to the insertion of such a specific statement in a provision covering the case in which the jurisdiction of the Court depends on the agreement of the parties. Some refused to restrict in this way the jurisdiction of the Court. Fears were also expressed regarding difficulties in interpretation which such a provision might cause, whereas practice has not shown any serious difficulties in the application of Article 36(1). So it was not changed as indicated”<sup>44</sup>.

29. In the light of the aforementioned, the Subcommittee proposed, on the occasion, a revision of the aforementioned Article 36, to be read as follows:

“1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters especially provided for in the Charter of the United Nations and in treaties and conventions in force.

2. The members of the United Nations and States Parties to the Statute recognize as among themselves the jurisdiction of the Court as compulsory *ipso facto* and without special agreement in all or any of the classes of legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation.

3. In the event of a dispute as to whether the Court has jurisdiction, the matter is settled by decision of the Court”<sup>45</sup>.

30. After further consideration, the Committee of Jurists acknowledged that this solution could prove unpalatable in the Assembly, and then provided this latter with two alternative texts for Article 36 of the Statute: one set forth the clause on compulsory jurisdiction, whereas the other retained the mechanism of the optional clause<sup>46</sup>. The two alternative texts were submitted to the IV Committee, which came to the conclusion that the mechanism of the optional clause declaration was more likely to meet the general agreement of the States Parties; accordingly, it discarded the alternate text, though acknowledging that the willingness to establish the ICJ’s compulsory jurisdiction had prevailed within the Committee of Jurists<sup>47</sup>.

31. The support expressed, on distinct occasions, - at the beginning of the eras of both the League of Nations (1920) and of the United Nations (1945), just reviewed, - for the compulsory jurisdiction of the Hague Court, should not pass unnoticed, or be forgotten, in our days, at this beginning of the second decade of the XXIst. Century. In this respect, the debates of the U.N.

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<sup>44</sup>. U.N., *UNCIO*, vol. XIV (U.N. Committee of Jurists), doc. Jurist 61 (rev.), of 19.04.1945, pp. 667-668.

<sup>45</sup>. U.N., *UNCIO*, 1945, vol. XIV (Committee of Jurists), doc. Jurist-43, G/33, of 14.04.1945, p. 287.

<sup>46</sup>. Cf. *UNCIO, Report on Draft of Statute of an International Court of Justice referred to in Chapter VII of the Dumbarton Oaks Proposals (rapporteur, Jules Basdevant)*, vol. XIV, 1945, pp. 821 and 839-842.

<sup>47</sup>. Cf. *UNCIO, Compte-rendu du Sous-Comité IV/1 sur l'article 36 du Statut de la Cour Internationale de Justice*, vol. XIII, 1945, pp. 562-565.

Committee of Jurists, of 12-13 April 1945, were particularly illuminating. On the occasion, the Delegate of Brazil (A. Camillo de Oliveira) began the discussions on Draft Article 36 by stating that:

“the time is right to make an amendment to this Article so that the jurisdiction of the Court be obligatory for all categories of disputes enumerated in the Article”<sup>48</sup>.

He added that, since 1920, when the optional clause was inserted, “the idea of making the Court’s jurisdiction obligatory had greatly advanced”<sup>49</sup>.

32. In the same sense, the Delegate of China (Wang Chung-hui), stated that “the exercise of compulsory jurisdiction by the Court would promote the rule of law in international society”<sup>50</sup>. On his turn, the Delegate of Turkey (C. Bilsel) declared that he “supported the thesis of the Brazilian and Chinese Delegates with regard to the revision of Article 36”, which he regarded as “one of the most important Articles in the Statute”<sup>51</sup>. And the Delegate of Turkey added that:

“the time had come to accept the idea of compulsory international justice. The idea of international justice (...) has clearly progressed (...). The Committee of Jurists had proposed compulsory jurisdiction of the Court but (...) the Council of the League had not agreed, and (...) the Assembly had compromised through the optional clause. (...) The establishment of compulsory jurisdiction of the Court would represent a great step forward in international justice”<sup>52</sup>.

33. Further support to the Court’s compulsory jurisdiction came from the Delegate of Uruguay (J.A. Mora Otero), who stated that, having “heard with satisfaction the different points of view endorsing compulsory jurisdiction”, he thought that “the Court of International Justice should be competent to have jurisdiction in any international dispute that has not been resolved by any other pacific means”<sup>53</sup>. Yet, like what had happened in 1920 (cf. *supra*), also in 1945 compulsory jurisdiction had its opponents. The Delegate of the [then] Soviet Union (USSR, N.V. Novikov) declared that “such compulsory jurisdiction was absolutely unacceptable to his Government”<sup>54</sup>.

34. And, for his part, the Delegate of the United States (G.H. Hackworth) pondered, as Chairman, that he “should not like to see this group so sharply divided”; he then warned that “if the signature of the Statute should involve *ipso facto* the acceptance of the compulsory jurisdiction of the Court, some States would find it difficult to become a party to the Statute”<sup>55</sup>. The IV Commission (Judicial Organization) of the 1945 San Francisco Conference was duly informed of this “sharp division of opinion” among participating States on the question of the compulsory

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<sup>48</sup>. U.N., *UNCIO*, 1945, vol. XIV (Committee of Jurists), doc. Jurist-34, G/25, of 12.04.1945, p. 146.

<sup>49</sup>. *Ibid.*, p. 147.

<sup>50</sup>. *Ibid.*, p. 147.

<sup>51</sup>. *Ibid.*, p. 148.

<sup>52</sup>. *Ibid.*, p. 149.

<sup>53</sup>. U.N., *UNCIO*, 1945, vol. XIV (Committee of Jurists), doc. Jurist-66(34), G/53, of 19.04.1945 (*corrigendum*), p. 161.

<sup>54</sup>. U.N., *UNCIO*, 1945, vol. XIV (Committee of Jurists), doc. Jurist-40, G/30, of 13.04.1945, p. 166.

<sup>55</sup>. *Ibid.* p. 164.

jurisdiction of the Court, and the I Committee then decided to retain the optional clause by 31 votes to 14<sup>56</sup>.

35. Despite the support expressed for compulsory jurisdiction, “[l]a crainte s’est toutefois manifestée qu’en poursuivant la réalisation de cet idéal on compromettrait les possibilités de rallier l’accord général tant au Statut de la Cour qu’à la Charte elle-même”<sup>57</sup>. Accordingly, as reported on 31.05.1945, “le système de juridiction facultative semble actuellement plus susceptible de réunir l’adhésion générale”<sup>58</sup>. It had become clear that the collegiality of participating States was not yet prepared in 1945, like a quarter of a century earlier (1920), to accept compulsory jurisdiction for the Hague Court. Once again, in this particular, inertia prevailed, to the detriment of the full realization of justice.

36. Shortly before the 1945 San Francisco Conference, M.O. Hudson had recalled that Article 36 of the Statute of the PCIJ had, in 1920, been “the result of the greatest contest waged in the creation of the Court”, given that, at least within the 1920 Committee of Jurists, the view prevailed, in succeeding preliminary projects, to confer on the PCIJ “a broad compulsory jurisdiction”<sup>59</sup>. The compromise subsequently found was the optional clause proposed by Raul Fernandes (Brazil), drafted later<sup>60</sup>. And, one and a half decade after the 1945 San Francisco Conference, R.P. Anand pointed out that by then it had become clear that “[t]he most common method of accepting the compulsory jurisdiction of the Court [was] through the acceptance of jurisdictional clauses in multilateral or bilateral treaties”<sup>61</sup>. Yet, “commentators on the Court and governmental experts” remained “reluctant to acknowledge” the relevance of such compromissory clauses as “a basis for the Court’s compulsory jurisdiction”<sup>62</sup>. The emphasis continued to be laid on the optional clause of Article 36(2) of the Statute (even in the Court’s *Yearbooks*), despite the fact that “the greater part of the Court’s compulsory jurisdiction” was derived from the compromissory clauses themselves<sup>63</sup>.

### **III. The Optional Clause of Compulsory Jurisdiction: From the Professed Ideal to a Distorted Practice**

37. As a result of those prolonged debates of 1920, the ingenuous formula of Article 36(2) of the Statute – of the PCIJ, and, later on, also the ICJ, - was adopted, overcoming the difference between those who supported the prompt recognition of the compulsory jurisdiction of the future PCIJ, and those - the representatives of the more powerful States – who opposed that, objecting that one had gradually to come to trust the international tribunal to be created, before conferring upon it

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<sup>56</sup>. U.N., *UNCIO*, 1945, vol. XIII (Commission IV – Judicial Organization), 1945, pp. 390-392.

<sup>57</sup>. U.N. *UNCIO*, 1945, vol. XIII (Commission IV – Judicial Organization), 1945, doc. 702-IV/1/55, of 31.05.1945, p. 564.

<sup>58</sup>. *Ibid.*, p. 563.

<sup>59</sup>. M.O. Hudson, *The Permanent Court of International Justice, 1920-1942 - A Treatise*, N.Y., MacMillan Co., 1943, p. 190.

<sup>60</sup>. *Ibid.*, pp. 192-193.

<sup>61</sup>. R.P. Anand, *Compulsory Jurisdiction of the International Court of Justice*, New Delhi/Bombay, Asia Publishing House, 1961, p. 134.

<sup>62</sup>. *Ibid.*, p. 139.

<sup>63</sup>. *Ibid.*, pp. 139-140.

compulsory jurisdiction *tout court*. The Statute, approved on 13.12.1920, entered into force on 01.09.1921<sup>64</sup>.

38. At that time, the decision that was taken constituted the initial step that, during the period of 1921-1940, contributed to attract the acceptance of the compulsory jurisdiction - under the optional clause - of the PCIJ by a total of 45 States<sup>65</sup>. The formula of Raul Fernandes<sup>66</sup>, firmly supported by the Latin-American States<sup>67</sup>, was incorporated into the Statute of the PCIJ; it was intended to pave the way for further development towards compulsory jurisdiction, and served its purpose in the following two decades.

39. Subsequently, at the San Francisco Conference of 1945, the possibility was contemplated to take a step forward, with an eventual automatic acceptance of the compulsory jurisdiction of the new ICJ. Nevertheless, the great powers - in particular the Soviet Union and the United States - were opposed to this evolution, sustaining the retention, in the Statute of the new ICJ, of the same "optional clause of compulsory jurisdiction" of the Statute of 1920 of the predecessor PCIJ. The *rapporteur* of the Commission of Jurists of 1945, Jules Basdevant, pointed out that, although the majority of the members of the Commission favoured the automatic acceptance of the compulsory jurisdiction, there was no political will at the Conference (and nor in the Dumbarton Oaks proposals) to take this step forward<sup>68</sup>.

40. Consequently, the same formulation of 1920, which corresponded to a conception of International Law of the beginning of the XXth century, was maintained in the present Statute of the ICJ. Due to the intransigent position of the more powerful States, a unique opportunity was lost to overcome the lack of automatism of the international jurisdiction and to foster a greater development of the compulsory jurisdiction of the international tribunal. It may be singled out that all this took place at the level of purely inter-State relations. The formula of the optional clause of compulsory jurisdiction (of the ICJ) which exists today, is nothing more than a scheme of the

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<sup>64</sup>. For an account of the approval of the Statute, cf., *inter alia*, J.C. Witenberg, *L'organisation judiciaire, la procédure et la sentence internationales - Traité pratique*, Paris, Pédone, 1937, pp. 22-23; L. Gross, "Compulsory Jurisdiction under the Optional Clause: History and Practice", *The International Court of Justice at a Crossroads* (ed. L.F. Damrosch), Dobbs Ferry/N.Y., ASIL/Transnational Publs., 1987, pp. 20-21.

<sup>65</sup>. Cf. the account of a Judge of the old PCIJ, M.O. Hudson, *International Tribunals - Past and Future*, Washington, Carnegie Endowment for International Peace/Brookings Institution, 1944, pp. 76-78. - That total of 45 States represented, in reality, a high proportion, at that epoch, considering that, at the end of the thirties, 52 States were members of the League of Nations (of which the old PCIJ was not part, distinctly from the ICJ, which is the main judicial organ of the United Nations, and whose Statute forms an organic whole with the U.N. Charter itself).

<sup>66</sup>. In his book of memories published in 1967, Raul Fernandes revealed that the Committee of Jurists of 1920 was faced with the challenge of establishing the basis of the jurisdiction of the PCIJ and, at the same time, of safeguarding and reaffirming the principle of the juridical equality of the States; cf. R. Fernandes, *Nonagésimo Aniversário - Conferências e Trabalhos Esparsos*, vol. I, Rio de Janeiro, M.R.E., 1967, pp. 174-175.

<sup>67</sup>. J.-M. Yepes, "La contribution de l'Amérique Latine au développement du Droit international public et privé", 32 *Recueil des Cours de l'Académie de Droit International de La Haye* (1930) p. 712; F.-J. Urrutia, "La Codification du Droit International en Amérique", 22 *Recueil des Cours de l'Académie de Droit International de La Haye* (1928) pp. 148-149; and cf., more recently, S.A. Alexandrov, *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice*, Dordrecht, Nijhoff, 1995, pp. 7-8.

<sup>68</sup>. Cf. the account of R.P. Anand, *Compulsory Jurisdiction...*, *op. cit. supra* n. (...), pp. 38-46; and cf. also, on the issue, S. Rosenne, *The Law and Practice of the International Court*, vol. I, Leyden, Sijthoff, 1965, pp. 32-36; Ian Brownlie, *Principles of Public International Law*, 6th. ed., Oxford, University Press, 2003, pp. 677-678; O.J. Lissitzyn, *The International Court of Justice*, N.Y., Carnegie Endowment for International Peace, 1951, pp. 61-64.

twenties, stratified in time<sup>69</sup>, and which, rigorously speaking, no longer corresponds to the needs of the international *contentieux* not even of a purely inter-State dimension<sup>70</sup>.

41. And several of the States which have utilized it, have made a distorted use of it, denaturalizing it, in introducing restrictions which militate against its *rationale* and deprive it of all efficacy. In reality, almost two-thirds of the declarations of acceptance of the aforementioned clause have been accompanied by limitations and restrictions which have rendered them "practically meaningless"<sup>71</sup>. One may, thus, seriously question whether the optional clause keeps on serving the same purpose which inspired it at the epoch of the PCIJ. Curiously enough, not until more recently the compromissory clauses, pertaining to the compulsory jurisdiction of the ICJ, began to attract greater attention in expert writing.

42. The rate of acceptance of the optional clause in the era of the ICJ is proportionally inferior to that of the epoch of its predecessor, the PCIJ. Furthermore, throughout the years, the possibility opened by the optional clause of acceptance of the jurisdiction of the international tribunal became, in fact, object of excesses on the part of some States, which only accepted the compulsory jurisdiction of the ICJ in their own terms, with all kinds of limitations<sup>72</sup>. Thus, it is not at all surprising that, already by the mid-fifties, one began to speak openly of a *decline* of the optional clause<sup>73</sup>.

43. In their classic studies on the basis of the international jurisdiction, C.W. Jenks and C.H.M. Waldock warned, already in the decades of the fifties and the sixties, as to the grave problem presented by the insertion, by the States, of all kinds of limitations and restrictions in their instruments of acceptance of the optional clause of compulsory jurisdiction (of the ICJ)<sup>74</sup>. Although those limitations had never been foreseen in the formulation of the optional clause, States, in the face of such legal vacuum, have felt, nevertheless, "free" to insert them. Such excesses have undermined, in a contradictory way, the basis itself of the system of international compulsory jurisdiction.

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<sup>69</sup>. For expressions of pessimism as to the practice of States under that optional clause, at the end of the seventies, cf. J.G. Merrills, "The Optional Clause Today", 50 *British Year Book of International Law* (1979) pp. 90-91, 108, 113 and 116.

<sup>70</sup>. Regretting (as former President of the ICJ) that this outdated position has insulated the Hague Court from the great *corpus* of contemporary International Law, cf. R.Y. Jennings, "The International Court of Justice after Fifty Years", 89 *American Journal of International Law* (1995) p. 504.

<sup>71</sup>. G. Weissberg, "The Role of the International Court of Justice in the United Nations System: The First Quarter Century", *The Future of the International Court of Justice* (ed. L. Gross), vol. I, Dobbs Ferry N.Y., Oceana Publs., 1976, p. 163; and, on the feeling of frustration that this generated, cf. *ibid.*, pp. 186-190. Cf. also *Report on the Connally Amendment - Views of Law School Deans, Law School Professors, International Law Professors* (compiled under the auspices of the Committee for Effective Use of the International Court by Repealing the Self-Judging Reservation), New York, [1961], pp. 1-154.

<sup>72</sup>. Some of them gave the impression that they thus accepted that aforementioned optional clause in order to sue other States before the ICJ, trying, however, to avoid themselves to be sued by other States; J. Soubeyrol, "Validité dans le temps de la déclaration d'acceptation de la juridiction obligatoire", 5 *Annuaire français de Droit international* (1959) pp. 232-257, esp. p. 233.

<sup>73</sup>. C.H.M. Waldock, "Decline of the Optional Clause", 32 *British Year Book of International Law* (1955-1956) pp. 244-287. And, on the origins of this decline, cf. the Dissenting Opinion of Judge Guerrero in the *Norwegian Loans* case (Judgment of 06.07.1957), *ICJ Reports* (1957) pp. 69-70.

<sup>74</sup>. Examples of such excesses have been the objections of domestic jurisdiction (*domestic jurisdiction/compétence nationale exclusive*) of States, the foreseeing of withdrawal at any moment of the acceptance of the optional clause, the foreseeing of subsequent modification of the terms of acceptance of the clause, and the foreseeing of insertion of new reservations in the future; cf. C.W. Jenks, *The Prospects of International Adjudication*, London, Stevens, 1964, p. 108, and cf. pp. 113, 118 and 760-761; C.H.M. Waldock, "Decline of the Optional Clause", *op. cit. supra* n. (20), p. 270; and for criticisms of those excesses, cf. A.A. Cançado Trindade, "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations", 25 *International and Comparative Law Quarterly* (1976) pp. 744-751.

44. Those excesses occurred precisely because, in elaborating the Statute of the new ICJ, one failed to follow the evolution of the international community. One abandoned the very basis of the compulsory jurisdiction of the ICJ to an outdated voluntarist conception of International Law, which had prevailed at the beginning of the last century, despite the warnings of lucid jurists of succeeding generations as to its harmful consequences to the conduction of international relations. Yet, a considerable part of the legal profession continued to stress the overall importance of individual State *consent*, regrettably putting it well above the imperatives of the realization of justice at international level.

#### IV. The Old Ideal of Automatism of Compulsory Jurisdiction of the Hague Court

45. As well pointed out in a classic study on the matter, the instruments of acceptance of the contentious jurisdiction of an international tribunal should be undertaken "on terms which ensure a reasonable measure of stability in the acceptance of the jurisdiction of the Court"<sup>75</sup>, - that is, in the terms expressly provided for in the corresponding treaties themselves, necessarily bearing in mind their nature and substance. As pointed out by C.W. Jenks almost half a century ago, the foundation of compulsory jurisdiction is, ultimately, the confidence in the rule of law at international level<sup>76</sup>. While full confidence is still lacking, not much progress is bound to be achieved in the present domain of international jurisdiction. In the last 90 years, the advances in this particular domain could have been much greater if State practice would not have undermined the purpose which inspired the creation of mechanisms of compulsory jurisdiction (optional clause and compromissory clauses) for the PCIJ and the ICJ, so as to achieve the submission to Law of State strategic interests underlying international disputes, and so as to secure the development in the realization of justice at international level.

46. The time has come to overcome definitively the regrettable lack of automatism of the international jurisdiction, after decades of operation of the Hague Court. With the distortions of State practice on the matter, States face today a dilemma which should have been overcome a long time ago: either they return to the voluntarist conception of International Law, abandoning for good the hope in the primacy of Law over what they regard as their own strategic interests<sup>77</sup>, or else they retake and achieve with determination the ideal of construction of an international community with greater cohesion and institutionalization in the light of Law and in search of Justice.

47. The plea for compulsory jurisdiction has been duly expressed in expert writing along the last nine decades, since the adoption of the PCIJ Statute. Shortly after the completion in 1920 of the work of the League's Advisory Committee of Jurists, B.C.J. Loder published an essay in which he commented that :

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<sup>75</sup>. C.W. Jenks, *The Prospects of International Adjudication*, *op. cit. supra* n. (74), pp. 760-761.

<sup>76</sup>. *Ibid.*, pp. 101, 117, 757, 762 and 770.

<sup>77</sup>. Cf. a warning of Ch. de Visscher, *Aspects récents du droit procédural de la Cour Internationale de Justice*, Paris, Pédone, 1966, p. 204; and cf. also L. Delbez, *Les principes généraux du contentieux international*, Paris, LGDJ, 1962, pp. 68, 74 and 76-77. - For subsequent criticisms by two former Presidents of the ICJ of the unsatisfactory and bad use made by the States of the mechanism of the optional clause (of the compulsory jurisdiction of the ICJ) of the Statute of the Court, cf. R.Y. Jennings, "The International Court of Justice...", *op. cit. supra* n. (71), p. 495; and E. Jiménez 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. 154-155, And cf. further criticisms by H.W. Briggs, "Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice", 93 *Recueil des Cours de l'Académie de Droit International de La Haye* (1958) p. 273. And cf., in general, J. Sicault, "Du caractère obligatoire des engagements unilatéraux en Droit international public", 83 *Revue générale de Droit international public* (1979) pp. 633-688.



“(…) There was a desire in the world that justice should be obtainable, and for that reason the organ [the PCIJ] was created. Its members are *judges*, not amiable *compositeurs*. The words ‘compulsory jurisdiction’ mean that the plaintiff can summon the defending party without previous agreement between the two, even *against* the latter’s will, and the Court is, therefore, competent and even bound to adjudicate, whether the offending party puts in an appearance or not.

The answer to *that* question is given in the very name ‘Court of Justice’. The peculiar characteristic of a Court of Justice, in contrast with one of arbitration, is that the competency of the judges is not derived from the voluntary agreement of the disputing parties, but from elsewhere. (...) [I]t is from the very nature of the Court itself that the compulsory jurisdiction is derived”<sup>78</sup>.

48. B.C.J. Loder, who was promptly to become - by mid-February 1922 – the first President of the PCIJ, expanded on the point he made in his account:

“(…) Although on the one hand it was perceived that the opposition of the Council to the proposal of the Committee of Jurists should be respected, on the other hand it would not do to overlook the wishes of the great majority, for they saw in compulsory jurisdiction the only guarantee of enforcing justice. The condition for a satisfactory solution was to find a compromise between these two views.

The honour of having found this is due to the Delegate from Brazil, Senhor Fernandes, one of the ten jurists, a man as sagacious as he is energetic. To cast this solution into a form acceptable to everybody was the task of the Sub-Commission of the III Committee.

Everything is now embodied in a new Article 36 (...)”<sup>79</sup>.

49. Shortly afterwards, in a monograph published in 1924, Nicolas Politis, in recalling the historical development from private justice to public justice, advocated the evolution, at international level, from optional justice to compulsory justice<sup>80</sup>. Two decades later, in another monograph, N. Politis again pondered that the “*règles du droit des gens peuvent, moyennant certaines conditions, faire l’objet d’un contrôle juridictionnel*”<sup>81</sup>. At the time of the adoption of the ICJ Statute in 1945, - like at that of the adoption of the Statute of its predecessor the PCIJ in 1920, - a key issue remained that of compulsory jurisdiction. To that end, both Courts, the PCIJ and the ICJ, had a wide horizon before themselves, and beheld the optional clause as well as compromissory clauses as basis for compulsory jurisdiction.

50. Shortly after the adoption of the ICJ Statute, E. Hambro suggested that compromissory clauses in multilateral and bilateral treaties were “probably” the “most common way” for

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<sup>78</sup>. B.C.J. Loder, “The Permanent Court of International Justice and Compulsory Jurisdiction”, 2 *British Year Book of International Law* (1921-1922) pp. 11-12.

<sup>79</sup>. *Ibid.*, p. 24.

<sup>80</sup>. Cf. N. Politis, *La justice internationale*, Paris, Libr. Hachette, 1924, pp. 7-255, esp. pp. 193-194 and 249-250.

<sup>81</sup>. N. Politis, *La morale internationale*, N.Y., Brentano’s, 1944, p. 67. And he added: “À la différence des profits de l’injustice et de l’illégalité, qui, s’ils peuvent être rapides, ne sont pas assurés de durer, ceux de la justice et de la légalité, sans doute plus lents, sont certainement plus durables”; *ibid.*, pp. 161-162.

acceptance of the compulsory jurisdiction of the ICJ<sup>82</sup>. A couple of years later, in the early fifties, the point was made that one could envisage a “voluntary” acceptance of such compulsory jurisdiction in so far as the ICJ Statute itself had been “voluntarily accepted”; that was the moment of expression of consent, and the Court retained the power and duty to address *motu proprio* the issue of jurisdiction, and interpretation ought to await the jurisprudential construction of the Court<sup>83</sup>.

51. Throughout the fifties, for half a decade (1954-1959) the issue of the compulsory jurisdiction of the ICJ was examined by the *Institut de Droit International*. In its Aix-en-Provence (1954) and Granada (1956) sessions, the discussions (*rapporteur*, P. Guggenheim) centred on the elaboration of a model clause of compulsory jurisdiction of the ICJ<sup>84</sup>. At the end of that exercise, in 1956 the *Institut* adopted a recommendation to States and international organizations to adopt, in the elaboration of multilateral or bilateral treaties, a clause conferring jurisdiction (along the lines it indicated) upon the ICJ in any dispute relating to the interpretation or application of those treaties<sup>85</sup>.

52. In its Amsterdam (1957) and Neuchâtel (1959) sessions, the debates at the *Institut* (*rapporteur*, C.W. Jenks) focused attention on the larger topic of compulsory jurisdiction of international courts and tribunals (encompassing judicial and arbitral instances)<sup>86</sup>. At the end of that new exercise, in 1959 the *Institut* adopted a resolution in support of the compulsory jurisdiction of international courts and tribunals. In its preamble, noting with concern that the evolution of compulsory jurisdiction was already lagging behind the needs of international justice, the resolution pondered that “submission to law” (“*respect du droit*”) through acceptance of compulsory jurisdiction was “an essential complement to the renunciation of recourse to force in international relations”<sup>87</sup>.

53. In order to overcome such unsatisfactory situation, the resolution *inter alia* called for the development of the practice of insertion into general treaties or conventions, of a clause, binding on all States Parties, of submission of disputes, relating to the interpretation or application of such treaties or conventions, to international courts and tribunals, thus fostering greater acceptance of compulsory jurisdiction, in particular of the ICJ<sup>88</sup>. In its operative part, the 1959 resolution of the *Institut* provided that:

“Afin d’assurer l’application effective et l’unité d’interprétation des conventions générales, il importe de maintenir et de développer la pratique consistant à insérer dans ces conventions une clause, obligatoire pour toutes les parties, qui permette de saisir la Cour Internationale de Justice par voie de requête unilatérale ou de soumettre

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<sup>82</sup>. E. Hambro, “Some Observations on the Compulsory Jurisdiction of the International Court of Justice”, 25 *British Year Book of International Law* (1948) p. 153.

<sup>83</sup>. R.C. Lawson, “The Problem of the Compulsory Jurisdiction of the World Court”, 46 *American Journal of International Law* (1952) pp. 234 and 238, and cf. pp. 219, 224 and 227.

<sup>84</sup>. Cf. reports and following debates in: 45 *Annuaire de l’Institut de Droit International* (1954)-I, pp. 310-406; and 46 *Annuaire de l’Institut de Droit International* (1956) pp. 178-264.

<sup>85</sup>. Cf. 46 *Annuaire de l’Institut de Droit International* (1956) pp. 360-361.

<sup>86</sup>. Cf. reports and following observations and debates in: 47 *Annuaire de l’Institut de Droit International* (1957)-I, pp. 34-322; and 48 *Annuaire de l’Institut de Droit International* (1959)-II, pp. 55-177.

<sup>87</sup>. “(...) un complément essentiel à la renonciation au recours à la force dans les relations internationales”; *cit. in*: 48 *Annuaire de l’Institut de Droit International* (1959)-II, p. 358.

<sup>88</sup>. Cf. *ibid.*, pp. 358-359.

à une autre instance judiciaire ou arbitrale les différends relatifs à l'interprétation ou à l'application de la convention (...)"<sup>89</sup>.

54. The *Institut's* resolution was thinking of the future, in the light – above all - of the imperatives of international justice. This remained a concern, in the years to follow, of those devoted to the study of the matter at issue. In a monograph published the following year (1960), for example, B.V.A. Röling observed that "[i]nternational courts and tribunals consummated the incorporation of the standard of civilization in international law by holding that non-compliance with it involved international responsibility"<sup>90</sup>.

55. Subsequently, by the end of the sixties, despite the alleged "decline" of the optional clause of the ICJ Statute (cf. *supra*), one decade after the adoption by the *Institut de Droit International* (in 1959) of the aforementioned resolution, C.W. Jenks wrote that :

"The problem of compulsory jurisdiction (...) remains one of the central problems of world organization. (...) A larger measure of compulsory jurisdiction remains a fundamental element in the progress of the rule of law among nations. (...) The progress of compulsory jurisdiction presupposes a parallel progress of the substantive law in adjusting itself to the changing needs of a changing society"<sup>91</sup>.

56. Contemporary international law counts on multilateral conventions - as aptly pointed out by Kéba Mbaye in the late eighties - that safeguard the "vital interests" not of States, but of humankind; this being so, and given their importance,

"il est parfaitement justifiée qu'il soit permis aux États membres d'une collectivité déterminée, et auxquels les prescriptions de ladite convention sont applicables, d'agir dans le but d'une sorte de contrôle objectif ayant pour finalité de sauvegarder les intérêts en question"<sup>92</sup>.

The "intérêt pour agir" would then develop in the rhythm of evolution of the organised international society itself, which has general interests of its own, generating duties on the part of States *vis-à-vis* itself<sup>93</sup>. This would amount to going beyond individual State consent, when fundamental human rights – of concern to the international community as a whole - are at stake.

57. Compromissory clauses (existing for many years, in both the PCIJ and ICJ eras)<sup>94</sup>, inserted into numerous treaties, by conferring jurisdiction on international tribunals such as the Hague Court to settle disputes concerning their interpretation and application, have contributed (whenever properly interpreted and applied) to a broader acceptance of compulsory jurisdiction. From the

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<sup>89</sup>. Paragraph 4 of the aforementioned resolution; *cit. in*: 48 *Annuaire de l'Institut de Droit International* (1959)-II, pp. 360-361.

<sup>90</sup>. B.V.A. Röling, *International Law in an Expanded World*, Amsterdam, Djambatan N.V., 1960, p. 39.

<sup>91</sup>. C.W. Jenks, *The World beyond the Charter*, London, G. Allen and Unwin, 1969, p. 166.

<sup>92</sup>. Kéba Mbaye, "L'intérêt pour agir devant la Cour Internationale de Justice", 209 *Recueil des Cours de l'Académie de Droit International de La Haye* (1988) p. 271.

<sup>93</sup>. *Ibid.*, pp. 340-341.

<sup>94</sup>. Cf., on such compromissory clauses, e.g., H.M. Cory, *Compulsory Arbitration of International Disputes*, N.Y., Columbia University Press, 1932 [reprint 1972], ch. VI, pp. 160-191.

start, compromissory clauses were in fact regarded as a means towards attaining compulsory jurisdiction.

58. As they were inserted, e.g., already in the inter-war period in the first half of the XXth century, in the minorities and the mandates treaties for their interpretation and application, the PCIJ soon had the occasion to pronounce upon them (cf. *infra*), having pursued a teleological approach. The ICJ, likewise, has not interpreted compromissory clauses strictly, so as to achieve the peaceful settlement of the disputes at issue<sup>95</sup>. The fact is that, although consent could be expressed in distinct ways (*ante hoc*, *ad hoc*, or *post hoc*), States came to accept treaties containing compromissory clauses, with the underlying hope to count on compulsory jurisdiction<sup>96</sup>, thus enhancing the rule of law also at international level.

59. Despite the initial high expectations, State practice was to disclose incongruities as well, and hesitations at times to accept unqualified compulsory jurisdiction in inter-State disputes, though there seems to be an increasing awareness of the need to have recourse to judicial settlement of disputes<sup>97</sup>. A more systematic inclusion in treaties and invocation of such jurisdictional clauses would contribute much further to widen the scope of compulsory jurisdiction, on a world-wide basis<sup>98</sup>, providing that such clauses are appropriately interpreted and applied. Such expansion is bound to occur to the extent that States realize that it is ultimately in their own interest, and in the common or general interest, to have their disputes normally settled by judicial means. This latter is the most perfected way of peaceful settlement, for all that it affords: preexisting rules, rigour and juridical security.

60. Compulsory jurisdiction is, ultimately, an expression of the rule of law at international level, conducive to a more cohesive international legal order inspired and guided by the imperative of the realization of justice. Despite all the attention that the matter at issue attracted from jurists of succeeding generations, and advances achieved, it seems, however, that there is still a long way to go to attain the ideal of automatism of compulsory jurisdiction in the inter-State *contentieux*, at least when fundamental human rights are at stake. This old ideal should not be despised or minimized by the static partisans of State sovereignty: there is nothing more invincible than an ideal that has not been attained, it passes from one generation to another, it is always present in the minds of lucid jurists, - even if forming a minority, - waiting for the conjunction of stars for it to be attained. Compulsory jurisdiction is, in fact, no longer an academic dream, it has already become a reality in a few legal regimes.

61. International jurisdiction is becoming, in our days, an imperative of the contemporary international legal order itself, and compulsory jurisdiction responds to a need of the international community in our days; although this latter has not yet been fully achieved, some advances have

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<sup>95</sup>. L.B. Sohn, "Settlement of Disputes Relating to the Interpretation and Application of Treaties", 150 *Recueil des Cours de l'Académie de Droit International de La Haye* (1976) pp. 234, 245-249 and 256. Of more than 4.800 treaties registered with the League of Nations (period 1920-1946) and 12.500 treaties registered with the United Nations in its first three decades (period 1946-1976), some 4.000 included compromissory clauses, so as to avoid the need to resort to and reach a special *compromis* after a dispute had arisen; *ibid.*, pp. 259 and 268.

<sup>96</sup>. R. Szafarz, *The Compulsory Jurisdiction of the International Court of Justice*, Dordrecht, Nijhoff, 1993, pp. 4, 31-32, 83 and 86, and cf. pp. 25 and 94.

<sup>97</sup>. Cf. R.P. Anand, "Enhancing the Acceptability of Compulsory Procedures of International Dispute Settlement", 5 *Max Planck Yearbook of United Nations Law* (2001) pp. 5-7, 11, 15 and 19.

<sup>98</sup>. C.W. Jenks, *The Prospects...*, *op. cit. supra* n. (74), p. 761, and cf. pp. 109 and 111.

been made in the last decades<sup>99</sup>. The Court of Justice of the European Communities provides one example of supranational compulsory jurisdiction, though limited to community law or the law of integration. The European Convention of Human Rights, after the entry into force of Protocol n. 11 on 01.11.1998, affords another conspicuous example of automatic compulsory jurisdiction. The International Criminal Court is the most recent example in this regard; although other means were contemplated throughout the *travaux préparatoires* of the 1998 Rome Statute (such as cumbersome "opting in" and "opting out" procedures), at the end compulsory jurisdiction prevailed, with no need for further expression of consent on the part of States Parties to the Rome Statute. This was a significant decision, enhancing international jurisdiction.

62. The system of the 1982 U.N. Convention on the Law of the Sea, in its own way, moves beyond the traditional regime of the optional clause of the ICJ Statute. It allows States Parties to the Convention the option between the International Tribunal for the Law of the Sea, or the ICJ, or else arbitration (Article 287); despite the exclusion of certain matters, the Convention succeeds in establishing a compulsory procedure containing coercitive elements; the specified choice of procedures at least secures law-abiding settlement of disputes under the U.N. Law of the Sea Convention<sup>100</sup>. In addition to the advances already achieved to this effect, reference could also be made to recent endeavours in the same sense<sup>101</sup>.

63. These illustrations suffice to disclose that compulsory jurisdiction is already a reality, - at least in some circumscribed domains of International Law, as indicated above. International compulsory jurisdiction is, by all means, a juridical possibility. If it has not yet been attained on a world-wide level, in the inter-State *contentieux*, this cannot be attributed to an absence of juridical viability, but rather to misperceptions of its role, or simply to a lack of conscience as to the need to widen its scope. Compulsory jurisdiction is a manifestation of the recognition that International Law, more than voluntary, is indeed *necessary*.

## **V. The Relationship of the Optional Clause/Compromissory Clauses with the Nature and Substance of the Corresponding Treaties**

64. Neither the optional clause, nor compromissory clauses, can be properly considered outside the framework of compulsory jurisdiction. This latter is what is aimed at. Hence the attention that I devote to the matter in this Dissenting Opinion, in the present case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. Moreover, compromissory clauses are to be further considered, in their ordinary meaning, also *in their relationship with the nature and substance of the corresponding treaties* wherein they are enshrined. The acknowledgement of the special nature of human rights treaties has much

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<sup>99</sup>. H. Steiger, "Plaidoyer pour une juridiction internationale obligatoire", in *Theory of International Law at the Threshold of the 21st Century - Essays in Honour of K. Skubiszewski* (ed. J. Makarczyk), The Hague, Kluwer, 1996, pp. 818, 821-822 and 832. And cf. R.St.J. MacDonald, "The New Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice", 8 *Canadian Yearbook of International Law* (1970) pp. 21, 33 and 37. In support of the need for "a system of general compulsory and binding dispute settlement procedures", cf. further M.M.T.A. Brus, *Third Party Dispute Settlement in an Interdependent World*, Dordrecht, Nijhoff, 1995, p. 182.

<sup>100</sup>. L. Caflisch, "Cent ans de règlement pacifique des différends interétatiques", 288 *Recueil des Cours de l'Académie de Droit International de La Haye* (2001) pp. 365-366 and 448-449; J. Allain, "The Continued Evolution...", *op. cit. supra* n. (3), pp. 61-62.

<sup>101</sup>. One such example is found in the Proposals for a Draft Protocol to the American Convention on Human Rights, which I prepared as *rapporteur* of the IACtHR, which *inter alia* advocates an amendment to Article 62 of the American Convention so as to render the jurisdiction of the IACtHR in contentious matters automatically compulsory upon ratification of the Convention. Cf. A.A. Cançado Trindade, *Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección*, vol. II, 2nd. ed., San José of Costa Rica, Inter-American Court of Human Rights, 2003, pp. 1-64.

contributed to this hermeneutic exercise. Advances, to the benefit of human beings, have here been achieved due to the impact of the International Law of Human Rights upon Public International Law.

65. Despite the undeniable advances experienced or attained by the ideal of compulsory jurisdiction in the domain of the International Law of Human Rights, the picture appears somewhat distinct in the sphere of purely inter-State relations: it is hard to escape the assessment that, herein, compulsory jurisdiction has made a rather modest progress in recent decades. Contemporary International Law itself has slowly, but gradually evolved, at least putting limits to the manifestations of a State voluntarism, which revealed itself as belonging to another era<sup>102</sup>. The point cannot pass unnoticed here, as the present case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, opposing Georgia to the Russian Federation before this Court, concerns the compromissory clause enshrined in a human rights treaty.

66. The methodology of interpretation of human rights treaties<sup>103</sup>, which will be addressed to in the following paragraphs, bears in mind, and is guided by, the rules of treaty interpretation enunciated in Articles 31-33 of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986). The general rule of treaty interpretation (Article 31(1)) comprises the elements of good faith, the text, the context, and the object and purpose of the treaty at issue. Whenever the interpretation - pursuant to Article 31 - leads to a manifestly unreasonable result, leaving the meaning ambiguous or obscure, Article 32 provides that resort can be made to supplementary means of interpretation, such as recourse to the *travaux préparatoires*.<sup>104</sup>

67. In addressing the interpretation of human rights treaties, in my Separate Opinion in the Judgment (of 31.01.2006) of the Inter-American Court of Human Rights (IACtHR) in the case of the *Massacre of Pueblo Bello*, concerning Colombia, I deemed it fit to ponder that:

“The organs of international supervision of human rights, without departing from the canons of the general rule of interpretation of treaties (Article 31(1) of the two Vienna Conventions on the Law of Treaties, 1969 and 1986), have developed a teleological interpretation, with emphasis on the fulfillment of the object and purpose of human rights treaties, as the most appropriate to secure an effective protection of those rights. Ultimately, underlying the aforementioned general rule of interpretation set forth in the two Vienna Conventions (Article 31(1)), is the principle, which counts on wide jurisprudential support, whereby one ought to secure to the conventional provisions their appropriate effects (the so-called *effet utile*). This principle - *ut res magis valeat quam pereat*, - whereby the interpretation is to secure appropriate effects

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<sup>102</sup>. When this outlook still prevailed to some extent, in a classic book published in 1934, Georges Scelle, questioning it, pointed out that the self-attribution of discretionary competence to the rulers, and the exercise of functions according to the criteria of the power-holders themselves, were characteristics of a not much evolved, imperfect, and still almost anarchical international society; G. Scelle, *Précis de droit des gens - Principes et systématique*, part II, Paris, Rec. Sirey, 1934 (reed. 1984), pp. 547-548. And cf., earlier on, to the same effect, L. Duguit, *L'État, le Droit objectif et la loi positive*, vol. I, Paris, A. Fontemoing Ed., 1901, pp. 122-131 and 614.

<sup>103</sup>. As can be inferred from the vast international case-law in this respect, analysed in detail in: A.A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, 2<sup>nd</sup> rev. ed., Santiago/Mexico/Buenos Aires/Barcelona, Editorial Jurídica de Chile, 2006, pp. 17-60.

<sup>104</sup>. Article 33 adds directives as to the interpretation of treaties concluded in two or more idioms.

to a treaty, has, in the domain of human rights, assumed particular importance in the determination of the wide scope of the conventional obligations of protection<sup>105</sup>.

Such interpretation is, in effect, that which most faithfully reflects the special nature of human rights treaties, the objective character of the obligations which they stipulate, and the autonomous meaning of the concepts enshrined therein (distinct from the corresponding concepts in the framework of the national legal systems). As human rights treaties incorporate concepts with an autonomous meaning, ensuing from jurisprudential evolution, and as the object and purpose of human rights treaties are distinct from the classic treaties (as they pertain to the relations between the State and the persons under its jurisdiction), the classic postulates of interpretation of treaties in general adjust themselves to this new reality<sup>106</sup>, (paras. 50-51).

68. Accordingly, the interpretation of human rights treaties, - *victim-oriented* as such treaties are, - tends, quite understandably and correctly in my perception, to place greater weight on the realization of their object and purpose, so as to secure protection to human beings (cf. *infra*), the ostensibly weaker party. Significantly, and in the same line of reasoning, the methodology of interpretation of human rights treaties encompasses, in my understanding, all the provisions of those treaties, taken as a whole, comprising not only the *substantive ones* (on the protected rights) but *also the procedural ones*, those that *regulate the mechanisms of international protection*, including - in historical perspective - the compromissory clauses conferring jurisdiction upon international human rights tribunals.

69. Thus, to refer to notorious examples, the original optional clauses of acceptance of the contentious jurisdiction of both the European Court of Human Rights (prior to Protocol n. 11 to the European Convention)<sup>107</sup> and the Inter-American Court of Human Rights in contentious matters, found inspiration initially in the model of the old optional clause of compulsory jurisdiction of the Statute of the Hague Court (PCIJ and ICJ, Article 36(2)). Despite the common origin, in search of the realization of the ideal of international justice, the *rationale* of the application of the optional clause has been interpreted in distinct ways, on the one hand in inter-State litigation, and on the other hand in that of human rights, at intra-State level.

70. In the former, considerations of contractual equilibrium between the Parties, of reciprocity, of procedural balance in the light of the juridical equality of the sovereign States have prevailed to date; in the latter, there has been a primacy of considerations of *ordre public*, of the collective guarantee exercised by all the States Parties, of the accomplishment of a common goal, superior to

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<sup>105</sup>. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 32-33 and 192.

<sup>106</sup>. *Ibid.*, pp. 32-34; and cf. also R. Bernhardt, "Thoughts on the Interpretation of Human Rights Treaties", in *Protecting Human Rights: The European Dimension - Studies in Honour of G.J. Wiarda* (eds. F. Matscher and H. Petzold), Köln, C. Heymanns, 1988, pp. 66-67 and 70-71; Erik Suy, "Droit des traités et droits de l'homme", in *Völkerrecht als Rechtsordnung Internationale Gerichtsbarkeit Menschenrechte - Festschrift für H. Mosler* (eds. R. Bernhardt et alii), Berlin, Springer-Verlag, 1983, pp. 935-947; J. Velu and R. Ergéc, *La Convention européenne des droits de l'homme*, Bruxelles, Bruylant, 1990, p. 51.

<sup>107</sup>. Protocol n. 11 to the European Convention of Human Rights entered into force on 01.11.1998. On the original optional clause (Article 46) of the European Convention, cf. Council of Europe/Conseil de l'Europe, *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights/Recueil des Travaux Préparatoires de la Convention Européenne des Droits de l'Homme*, vol. IV, The Hague, Nijhoff, 1977, pp. 200-201 and 266-267; and vol. V, The Hague, Nijhoff, 1979, pp. 58-59.

the individual interests of each Contracting Party<sup>108</sup>. One can hardly make abstraction of the nature and substance of a treaty when considering the optional clause, or else the compromissory clause, enshrined therein.

71. The present case before this Court concerns the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, one of the pioneering general human rights treaties of the United Nations era, which preceded in time even the two U.N. Covenants on Human Rights of 1966. Adopted on 21.12.1965 and opened for signature on 07.03.1966, the CERD Convention promptly entered into force on 04.01.1969. The *punctum pruriens iudicii*, at this stage of the present case, is the proper understanding of the compromissory clause (Article 22) of the CERD Convention. I thus deem it fit to recall that, in my Separate Opinion in the recent *A.S. Diallo* case (Guinea *versus* D.R. Congo, Judgment of 30.11.2010), I had the occasion to dwell upon the hermeneutics of human rights treaties (paras. 82-92), given that the parties had invoked two other treaties of the kind, namely, the 1996 U.N. Covenant on Civil and Political Rights and the 1981 African Charter on Human and Peoples' Rights.

72. My reflections developed therein are likewise pertinent for the consideration of the point at issue in the present case. In my Separate Opinion in the *A.S. Diallo* case, I pondered in that respect that human rights treaties:

“go beyond the realm of purely inter-State relations. When one comes to the interpretation of treaties, one is inclined to resort, at first, to the general provisions enshrined in Articles 31-33 of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986, respectively), and in particular to the combination under Article 31 of the elements of the ordinary meaning of the terms, the context, and the object and purpose of the treaties at issue.

One then promptly finds that, in practice, while in traditional International Law there has been a marked tendency to pursue a rather restrictive interpretation which gives as much precision as possible to the obligations of States Parties, in the International Law of Human Rights, somewhat distinctly, there has been a clear and special emphasis on the element of the object and purpose of the treaty, so as to ensure an effective protection (*effet utile*) of the guaranteed rights, without detracting from the general rule of Article 31 of the two Vienna Conventions on the Law of Treaties. In effect, whilst in general International Law the elements for the interpretation of treaties evolved primarily as guidelines for the process of interpretation by States Parties themselves, human rights treaties, in their turn, have called for an interpretation of their provisions bearing in mind the essentially *objective* character of the obligations entered into by States Parties: such obligations aim at the protection of human rights and not at the establishment of subjective and reciprocal rights for the States Parties.

(...) The interpretation and application of human rights treaties have indeed been guided by considerations of a superior general interest or *ordre public* which transcend the individual interests of Contracting Parties. (...) [T]hose treaties are distinct from treaties of the classic type which incorporate restrictively reciprocal concessions and

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<sup>108</sup>. The two aforementioned international human rights Tribunals have found themselves under the duty to preserve the integrity of the regional conventional systems of protection of human rights as a whole. In their common understanding, it would be inadmissible to subordinate the operation of the respective conventional mechanisms of protection to restrictions not expressly authorized by the European and American Conventions, interposed by the States Parties in their instruments of acceptance of the optional clauses of compulsory jurisdiction of the two Courts (Article 62 of the American Convention, and Article 46 of the European Convention before Protocol n. 11). This would not only immediately affect the efficacy of the operation of the conventional mechanism of protection at issue, but, furthermore, it would fatally impede its possibilities of future development.



compromises; human rights treaties, in turn, prescribe obligations of an essentially objective character, implemented collectively, and are endowed with mechanisms of supervision of their own. (...)

The converging case-law [of the ECtHR and the IACtHR] to this effect has generated the common understanding (...) that human rights treaties, moreover, are endowed with a special nature (as distinguished from multilateral treaties of the traditional type); that human rights treaties have a normative character and that their terms are to be autonomously interpreted; that in their application one ought to ensure an effective protection (*effet utile*) of the guaranteed rights; and that permissible restrictions (limitations and derogations) to the exercise of guaranteed rights are to be restrictively interpreted. (...)

Furthermore, [it has] propounded the *autonomous* interpretation of provisions of human rights treaties, by reference to the respective domestic legal systems. (...) Moreover, the dynamic or *evolutive* interpretation of the respective human rights Conventions (the temporal dimension) has been followed by both the European and the Inter-American Courts, so as to fulfill the evolving needs of protection of the human being.

(...) There is (...) a converging case-law of the Inter-American and European Courts of Human Rights - and indeed of other human rights international supervisory organs - on the fundamental issue of the proper interpretation of human rights treaties, naturally ensuing from the overriding identity of the object and purpose of those treaties.

General international law itself bears witness of the principle (subsumed under the general rule of interpretation of Article 31 of the two Vienna Conventions on the Law of Treaties) whereby the interpretation is to enable a treaty to have appropriate effects. In the present domain of protection, International Law has been made use of in order to improve and strengthen - and never to weaken or undermine - the safeguard of recognized human rights (in pursuance of the *principle pro persona humana, pro victima*). The specificity of the International Law of Human Rights finds expression not only in the interpretation of human rights treaties in general but also in the interpretation of specific provisions of those treaties.

Both the European and the Inter-American Courts of Human Rights have rightly set limits to State voluntarism, have safeguarded the integrity of the respective human rights Conventions and the primacy of considerations of *ordre public* over the 'will' of individual States, have set higher standards of State behaviour and established some degree of control over the interposition of undue restrictions by States, and have reassuringly enhanced the position of individuals as subjects of the International Law of Human Rights, with full procedural capacity. In so far as the basis of their jurisdiction in contentious matters is concerned, eloquent illustrations can be found of their firm stand in support of the integrity of the mechanisms of protection of the two respective regional Conventions" (paras. 82-86 and 88-90).

73. The relationship between the *nature* of human rights treaties such as the CERD Convention and the interpretation and application of corresponding compromissory clauses (such as that of Article 22 of the CERD Convention) were object of attention in the course of the proceedings in the present case concerning the the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, opposing Georgia to Russia before this Court. Thus, at the end of the public sitting held on 17 September 2010, I deemed it fit to put to the two contending parties the following question:

“À votre avis, la nature des traités relatifs aux droits de l’homme tels que la Convention CERD (régissant des relations au niveau *intra*-étatique) a-t-elle des conséquences ou une incidence sur l’interprétation et l’application des clauses compromissaires qu’ils contiennent?

Pour préserver l’équilibre linguistique de la Cour, je pose ma question aux deux Parties aussi en anglais, l’autre langue officielle de la Cour.

In your understanding, does the nature of human rights treaties such as the CERD Convention (regulating relations at *intra*-State level) have a bearing or incidence on the interpretation and application of a compromissory clause contained therein?”<sup>109</sup>.

74. The contending parties, in a commendable spirit of procedural cooperation, promptly provided the Court with their respective answers to my question. The claimant State, Georgia, presented the following written response to my question:

“Georgia recognizes that – like many international human rights instruments – the CERD Convention regulates relations between the State and the citizen at the intra-State level, *i.e.*, the relations between a State and its own citizens, as with *apartheid*. (It also regulates actions taken by a State with respect to those located in other States.) In this respect, the international human rights movement from the Universal Declaration on Human Rights onwards reflected a genuinely new development in international law, and one that has since taken root. The purpose of multilateral treaties of this kind, of which the CERD was the first, was to build upon earlier declarations and make human rights scrutiny and enforcement effective at the international level, including by means of dispute settlement.

As the Court has recognized, this new development was capable of affecting the interpretation of a compromissory clause. In its 1996 judgment on Preliminary Objections in the *Bosnia Genocide* case the Court referred no less than three times to the special nature of the Genocide Convention as a universal human rights instrument in order to found its jurisdiction *ratione personae*, *ratione materiae*, *ratione temporis* under Article IX of that Convention. More recently, in relation to other cases, it has been noted that the Court has ‘looked beyond the strictly inter-State dimension’, indicating – correctly in Georgia’s view – an expansive approach to jurisdictional matters in order to safeguard the underlying values of the treaty at issue. Thus, because human rights treaties regulate the relations between the State and its own citizens, a compromissory clause should not be limited to matters covered by traditional international law, *e.g.*, in the field of diplomatic protection. It would likewise be incorrect to treat the interpretation and application of a human rights treaty as a matter confined exclusively to the advisory function of the supervisory body in question – as the Court in *South West Africa, Second Phase*, made clear in relation to the Mandate and the role of the Permanent Mandates Commission. Relatedly, human rights-type protections may survive change of sovereignty or change of supervisory regime which merely bilateral interstate provisions may not survive.

Georgia’s approach to the interpretation of Article 22 is further reinforced by the Court’s established jurisprudence on *erga omnes* rights and obligations, in the *Barcelona Traction* case. It is noteworthy that the Court gave as an example of *erga omnes* norms the basic rights of the human person, including explicitly the protection against racial discrimination, along with the prohibition of slavery and genocide. The legal consequences of breaches of *erga omnes* norms has since been further clarified

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<sup>109</sup>. CII, *Compte rendu* CR.2010/11, of 17.09.2010, pp. 35-36.

by the Court and incorporated by the International Law Commission in its Articles on the Responsibility of States for Internationally Wrongful Acts, particularly in Articles 48 and 54, acknowledging the standing of all members of the international community to invoke the responsibility of the State for breach of *erga omnes* norms.

The character of human rights treaties - in particular their non-synallagmatic character - provides a reason for the broad interpretation of compromissory clauses, and not for their narrow or restrictive interpretation. In the present case this provides a further reason for rejecting the Russian Federation's view that Article 22 is subordinated to Article 11<sup>110</sup>.

75. For its part, the respondent State, the Russian Federation, presented the following written response to my question:

“As a multi-ethnic State, the Russian Federation acknowledges and values the specific character of the CERD Convention as a treaty imposing upon member States obligations primarily to be performed at the intra-State level.

This specific character is, in many respects, reflected in the CERD's unique implementation and enforcement mechanism to which Article 22 specifically makes reference. This mechanism provides for reporting obligations on the part of the States Parties, which allows the Committee to supervise the domestic practices of the Contracting Parties.

It equally establishes, through the Articles 11 to 13 procedure, a form of collective guarantee of respect for the Convention by the States Parties, to be ensured by an inter-State complaint and conciliation procedure under the auspices of the Committee. No special acceptance of this procedure is needed; the ratification by a State of the Convention makes this procedure automatically applicable, and the procedure is mandatory so far as concerns any respondent State. Thus the Contracting Parties, alongside the Committee, become guarantors of the enforcement of the Convention.

Most notably, the Individual Complaint Procedure of Article 14 of CERD (which the Russian Federation has accepted since 1<sup>st</sup> October 1991) underlines the intra-State character of the CERD Convention in that it enables individuals themselves to take action *vis-à-vis* Contracting Parties when the individual believes that there has been a violation of rights protected by CERD.

The specific importance of individual intra-State rights guaranteed by CERD is also reflected in the practice of the CERD Committee, *i.e.*, in its development of an urgent procedure to provide for the protection of individual rights guaranteed by CERD when these are most endangered.

The Convention also contains implementation procedures of a more traditional character (when compared with general international law) in the form of inter-State dispute settlement before the International Court of Justice under Article 22 CERD, which necessarily falls to be interpreted and applied in the context of CERD's other implementation procedures. Hence, and as also follows from the express language used in the provision, the rights under Article 22 only come into play once a matter arising under CERD has crystallized into an inter-State dispute and when, moreover, the disputant parties have not been able to settle the dispute by inter-state negotiations and by the procedures provided for in Articles 11-13 CERD.

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<sup>110</sup>. ICJ, document GR.2010/19, of 24.09.2010, pp. 3-4.

Further, as follows from the combination of the subject-matter, as well as the intra- and inter-State features of CERD, the obligations under the Convention are of an *erga omnes* nature. This also has a bearing on the interpretation and application of Article 22 of the Convention and of the procedures expressly provided for in this Convention to which Article 22 refers. As the Russian Federation stated in its Preliminary Objections, '[t]he *erga omnes* character of the obligations instituted therein [in CERD] is reflected in the procedures established by the Convention to deal with the inter-State complaints, which involve the other Parties to the Convention'.

This interpretation of Article 22 CERD takes full account of the specific intra-State character of the CERD convention aimed at protecting human rights of individuals"<sup>111</sup>.

76. These responses were followed by another round of written comments by the two contending parties. Thus, in its comments on the Russian Federation's written response to my question, Georgia stated:

"Georgia notes that Russia's Written Response does not directly address the question raised by Judge Cançado Trindade. Georgia observes that there is nothing in Russia's response to contradict or undermine Georgia's response to the question put, namely, that '[t]he character of human rights treaties - in particular their non-synallagmatic character - provides a reason for the broad interpretation of compromissory clauses, and not for their narrow or restrictive interpretation'.

To the contrary, Russia's response recognizes that the obligations under the Convention are not to be performed exclusively at the intra-State level; that the Convention adopts 'a form of collective guarantee of respect' for its provisions; and that 'the obligations under the Convention are of an *erga omnes* nature'. These statements by Russia acknowledge that the Convention was intended to serve as an effective instrument for eliminating the scourge of racial (including ethnic) discrimination in all its forms. In that regard, they support Georgia's position on the interpretation of Article 22. Recourse to the Court under that Article is a principle means by which States may enforce the Convention's provisions against other States, and thereby make the Convention more effective. To read *preconditions* on the seisin of the Court into Article 22, in a manner that contradicts the plain meaning of the text, as Russia proposes, would frustrate the object and purpose of the Convention: it would render access to the Court impossible for all practical purposes, and diminish the Court's role as a means for timely enforcement of the Convention's *erga omnes* obligations"<sup>112</sup>.

77. For its part, the Russian Federation presented the following comment on Georgia's written response to my question:

"As set out in further detail in its own answer to the question asked by Judge Cançado Trindade, the Russian Federation fully accepts the *erga omnes* nature of the rights protected by human rights treaties, including CERD.

With respect to the interpretation of compromissory clauses contained in such treaties, the Russian Federation likewise accepts that these are special in nature in that any State Party thereto may bring a dispute concerning a breach of those obligations by

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<sup>111</sup>. ICJ, document GR.2010/20, of 24.09.2010, pp. 4-5.

<sup>112</sup>. ICJ, document GR.2010/21, of 01.10.2010, pp. 2-3.

another State Party before the Court. However, that does not mean that the specific pre-conditions to jurisdiction in the given compromissory clause may be bypassed, or that the compromissory clause should be interpreted entirely in isolation from the relevant context, which may (and, in this case, does) comprise inter-related dispute settlement mechanisms within the treaty itself.

As the Court has already had occasion to emphasize,

“(...) ‘the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things’ (*East Timor (Portugal v. Australia)*, *Judgment*, *I.C.J. Reports 1995*, p. 102, para. 29), and (...) the mere fact that rights and obligations *erga omnes* may be at issue in a dispute would not give the Court jurisdiction to entertain that dispute.

The same applies to the relationship between peremptory norms of general international law (*jus cogens*) and the establishment of the Court’s jurisdiction: the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court’s Statute that jurisdiction is always based on the consent of the parties.

As it recalled in its Order of 10 July 2002, the Court has jurisdiction in respect of States only to the extent that they have consented thereto (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, *Provisional Measures, Order of 10 July 2002*, *I.C.J. Reports 2002*, p. 241, para. 57). When a compromissory clause in a treaty provides for the Court’s jurisdiction, that jurisdiction exists only in respect of the parties to the treaty who are bound by that clause and within the limits set out therein (*ibid.*, p. 245, para. 71)’’.

This is also true in respect of CERD. And neither the interest in the protection of the rights protected by CERD nor, more generally, the interests of international justice would be served by violation of this fundamental principle.

In the present case, Article 22 of CERD strikes a deliberate and fair balance between the (compulsory) jurisdiction of the Court on the one hand and the (preliminary) mandatory inter-State conciliation by the CERD Committee deliberately instituted by the Convention on the other. This in turn reflects the balance to be achieved between the breadth of the category of potential claimant States under Article 22 (given the *erga omnes* nature of obligations under CERD) and the interests of respondent States in only appearing before the Court once disputes have been crystallised and the requisite attempts at settlement have failed.

The CERD Committee has the primary role as to the implementation and supervision of CERD including through the settlement of eventual disputes between States Parties. The fact that the Convention provides for a possibility of seizing the Court should not be interpreted to the detriment of the Committee’s vital functions.

Lessening the role of the CERD Committee would certainly neither be in line with the intentions of the drafters of CERD, nor would it contribute to preserving the special nature of human rights treaties in general, nor that of CERD in particular”<sup>113</sup>.

78. As can be seen from the above, in the present case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the contending parties themselves have duly taken into account the nature of the human rights treaty at issue, the CERD Convention, though deriving distinct consequences from their respective arguments. One can simply not make abstraction of the nature and substance of a human rights treaty in addressing a compromissory clause contained therein. The general rule of interpretation of treaties (Article 31 of the two Vienna Conventions on the Law of Treaties, of 1969 and 1986) contains elements that are to be taken into account by the Court (cf. *infra*), giving proper weight to the one - that of the object and purpose of the treaty - which will secure the *proper effects* to the treaty at issue, i.e., that will render it truly effective (cf. *infra*), keeping in mind that superior values and fundamental human rights are at stake.

## VI. The Principle *Ut Res Magis Valeat Quam Pereat*

79. Underlying the aforementioned general rule of treaty interpretation (cf. para. 66, *supra*), contained in Article 31(1) of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986), is the principle *ut res magis valeat quam pereat*, which corresponds to the so-called *effet utile* (sometimes called the principle of effectiveness). By virtue of this principle, widely supported by case-law, States Parties to human rights treaties ought to secure to the conventional provisions *the appropriate effects* at the level of their respective domestic legal orders. Such principle, as I have already pointed out (para. 68, *supra*), applies not only in relation to *substantive* norms of human rights treaties (that is, those which provide for the protected rights), but also in relation to *procedural* norms, in particular those relating to the right of individual petition and to the acceptance of the compulsory jurisdiction in contentious matters of the international judicial organs of protection. Such conventional norms, essential to the efficacy of the system of international protection, ought to be interpreted and applied in such a way as to render their safeguards truly practical and effective, bearing in mind the special character or nature of the human rights treaties and their collective implementation. Such has been, as I have already indicated (para. 72, *supra*), the approach pursued in practice by the ECtHR and the IACtHR.

80. May I, at this stage, recall a couple of examples of concrete cases wherein both the ECtHR and the IACtHR had the occasion to pronounce themselves to this effect. In its Judgment on Preliminary Objections (of 23.03.1995) in the case of *Loizidou versus Turkey*, for example, the ECtHR warned that, in the light of the letter and the spirit of the European Convention the possibility cannot be inferred of restrictions to the optional clause relating to the recognition of the contentious jurisdiction of the ECtHR<sup>114</sup>. In the domain of the international protection of human rights, there are no "implicit" limitations to the exercise of the protected rights; and the limitations set forth in the treaties of protection ought to be restrictively interpreted. The optional clause of compulsory jurisdiction of the international tribunals of human rights does not admit limitations

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<sup>113</sup>. ICJ, document GR.2010/22, of 01.10.2010, pp. 3-4.

<sup>114</sup>. Article 46 of the European Convention, prior to the entry into force, on 01.11.1998, of Protocol n. 11 to the European Convention. Moreover, the ECtHR referred to the fundamentally distinct context in which international tribunals operate, the ICJ being "a free-standing international tribunal which has no links to a standard-setting treaty such as the Convention"; cf. European Court of Human Rights (ECtHR), *Case of Loizidou versus Turkey* (Preliminary Objections), Strasbourg, C.E., Judgment of 23.03.1995, p. 25, par. 82, and cf. p. 22, par. 68. On the prevalence of the conventional obligations of the States Parties, cf. also the Court's *obiter dicta* in its previous decision, in the *Belilos versus Switzerland* case (1988).

other than those expressly contained in the human rights treaties at issue. And, as the IACtHR has also stated, it could not be at the mercy of limitations not foreseen therein and invoked by the States Parties for reasons or vicissitudes of domestic order<sup>115</sup>.

81. The clause pertaining to the compulsory jurisdiction of international human rights tribunals constitutes, in my view, a fundamental clause (*cláusula pétrea*) of the international protection of the human being, which does not admit any restrictions other than those expressly provided for in the human rights treaties at issue. This has been so established by the IACtHR in its Judgments on Competence in the cases of the *Constitutional Tribunal* and *Ivcher Bronstein versus Peru* (of 24.09.1999)<sup>116</sup>. The permissiveness of the insertion of limitations, not foreseen in the human rights treaties, in an instrument of acceptance of an optional clause of compulsory jurisdiction<sup>117</sup>, represents a regrettable historical distortion of the original conception of such clause, in my view unacceptable in the field of the international protection of the rights of the human person.

82. Any understanding to the contrary would fail to ensure that the human rights treaty at issue has the appropriate effects (*effet utile*) in the domestic law of each State Party. The IACtHR's decision in the case of *Hilaire versus Trinidad and Tobago* (Preliminary Objections, Judgment of 01.09.2001) was clear: the modalities of acceptance, by a State Party to the American Convention on Human Rights, of the contentious jurisdiction of the IACtHR, are expressly stipulated in Article 62(1) and (2)<sup>118</sup>, and are not simply illustrative, but quite *precise*<sup>119</sup>, not authorizing States Parties to interpose any other conditions or restrictions (*numerus clausus*).

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

"(...) In this matter, it cannot be sustained that what is not prohibited, is permitted. This posture would amount to the traditional - and surpassed - attitude of the *laissez-faire*, *laissez-passer*, proper to an international legal order fragmented by the voluntarist State subjectivism, which in the history of Law has ineluctably favoured the more powerful ones. *Ubi societas, ibi jus*... At this beginning of the

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<sup>115</sup>. Cf. IACtHR, case of *Castillo Petruzzi and Others versus Peru* (Preliminary Objections), Judgment of 04.09.1998, Series C, n. 41, Concurring Opinion of Judge A.A. Cançado Trindade, pars. 36 and 38.

<sup>116</sup>. IACtHR, case of the *Constitutional Tribunal* (Competence), Judgment of 24.09.1999, Series C, n. 55, p. 44, par. 35; CtADH, case of *Ivcher Bronstein* (Competence), Judgment of 24.09.1999, Series C, n. 54, p. 39, par. 36.

<sup>117</sup>. Exemplified by State practice under Article 36(2) of the ICJ Statute (*supra*).

<sup>118</sup>. Article 62(1) and (2) of the American Convention on Human Rights provides that:

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

Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member States of the Organization and to the Secretary of the Court".

Thus, according to Article 62(2) of the Convention, the acceptance, by a State Party, of the contentious jurisdiction of the IACtHR, can be made in four modalities, namely: a) unconditionally; b) on the condition of reciprocity; c) for a specified period; and d) for specific cases. Those, and only those, are the modalities of acceptance of the contentious jurisdiction of the IACtHR foreseen and authorized by Article 62(2) of the Convention.

<sup>119</sup>. According to Article 62(2) of the Convention, the acceptance, by a State Party, of the contentious jurisdiction of the IACtHR, can be made in four modalities, namely: a) unconditionally; b) on the condition of reciprocity; c) for a specified period; and d) for specific cases. Those, and only those, are the modalities of acceptance of the contentious jurisdiction of the IACtHR foreseen and authorized by Article 62(2) of the Convention, which does not authorize the States Parties to interpose any other conditions or restrictions (*numerus clausus*).

XXIst century, in an international legal order wherein one seeks to affirm superior common values, among considerations of international *ordre public*, as in the domain of the International Law of Human Rights, it is precisely the opposite logic which ought to apply: *what is not permitted, is prohibited*.

If we are really prepared to extract the lessons of the evolution of International Law in a turbulent world throughout the XXth century, (...) we cannot abide by an international practice which has been subservient to State voluntarism, which has betrayed the spirit and purpose of the optional clause of compulsory jurisdiction, - to the point of entirely denaturalizing it, - and which has led to the perpetuation of a world fragmented into State units which regard themselves as final arbiters of the extent of the contracted international obligations, at the same time that they do not seem truly to believe in what they have accepted: the international justice" (paras. 24-25).

84. To bear in mind the three component elements of the general rule of interpretation *bona fides* of treaties - text in the current meaning, context, and object and purpose of the treaty - set forth in Article 31(1) of the two Vienna Conventions on the Law of Treaties (of 1969 and 1986), requires also to keep in mind the *nature* of the treaty wherein that clause (optional or compromissory) for compulsory jurisdiction appears. This corresponds to the "context", precisely the second component element of the general rule of interpretation of treaties set forth in Article 31 of the two Vienna Conventions on the Law of Treaties<sup>120</sup>.

85. The IACtHR, by means of the Judgments on Preliminary Objections in the cases of *Hilaire, Benjamin*, and *Constantine*, as well as its earlier Judgments on Competence in the cases of the *Constitutional Tribunal* and *Ivcher Bronstein*, safeguarded the integrity of the American Convention on Human Rights, remained master of its own jurisdiction and acted in accordance with the high responsibilities accorded to it by the American Convention on Human Rights<sup>121</sup>. The same can be said of the ECtHR, by means of its aforementioned Judgment on Preliminary

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<sup>120</sup>. In the *Hilaire versus Trinidad and Tobago* case (*supra*), the IACtHR had duly done so, in stressing the special character of the human rights treaties (paras. 94-97). Likewise, the IACtHR has kept constantly in mind the third component element of that general rule of interpretation, namely, the "object and purpose" of the treaty at issue, the American Convention on Human Rights (paras. 82-83 and 88). As I saw it fit to point out, in this respect, in my Separate Opinion in the case *Blake versus Guatemala* (Reparations, 1999) before the IACtHR :

"(...) In so far as human rights treaties are concerned, one is to bear always in mind the objective character of the obligations enshrined therein, the autonomous meaning (in relation to the domestic law of the States) of the terms of such treaties, the collective guarantee underlying them, the wide scope of the obligations of protection and the restrictive interpretation of permissible restrictions. These elements converge in sustaining the integrity of human rights treaties, in seeking the fulfillment of their object and purpose, and, accordingly, in establishing limits to State voluntarism" (paras. 32-33).

<sup>121</sup>. In its Judgment in the case of *Hilaire versus Trinidad and Tobago*, the IACtHR rightly observed that, if restrictions interposed in the instrument of acceptance of its contentious jurisdiction were accepted, in the terms proposed by the respondent State in the *cas d'espèce*, not expressly foreseen in Article 62 of the American Convention, this would lead to a situation in which it would have "as first parameter of reference the Constitution of the State and only subsidiarily the American Convention", a situation which would "bring about a fragmentation of the international legal order of protection of human rights and would render illusory the object and purpose of the American Convention" (para. 93).

And as I concluded in my own Concurring Opinion in the *Hilaire versus Trinidad and Tobago* before the IACtHR, "The time has come to consider, in particular, in a future Protocol of amendments to the procedural part of the American Convention on Human Rights, aiming at strengthening its mechanism of protection, the possibility of an amendment to Article 62 of the American Convention, in order to render such clause also *mandatory*, in conformity with its character of fundamental clause (*cláusula pétrea*), thus establishing the *automatism* of the jurisdiction of the Inter-American Court of Human Rights. There is pressing need for the old ideal of the permanent international compulsory jurisdiction to become reality also in the American continent, in the present domain of protection, with the necessary adjustments in order to face its reality of human rights and to fulfil the growing needs of effective protection of the human being" (para. 39).



Objections in the case *Loizidou versus Turkey*, in so far as the European Convention on Human Rights is concerned. Thus, those two Tribunals, in their converging case-law on the question at issue, have given a worthy contribution to the strengthening of the international jurisdiction and to the realization of the old ideal of international justice<sup>122</sup>. Moreover, they have contributed to the creation of an international *ordre public* based upon the respect for human rights in all circumstances.

86. The two aforementioned international human rights Tribunals, by correctly resolving basic jurisdictional issues raised in the cases referred to above, have aptly made use of the techniques of Public International Law in order to strengthen their respective jurisdictions of protection of the rights of the human person. They have decisively safeguarded the integrity of the mechanisms of protection of the American and European Conventions on Human Rights. The two Tribunals at issue have helped to develop and achieve the aptitude of International Law to regulate efficiently relations which have specificity of their own - at *intra-State*, rather than *inter-State*, level. The unity and effectiveness of Public International Law itself can be measured precisely by its aptitude to regulate legal relations in distinct contexts with equal adequacy.

87. When one comes to human rights treaties, the required attention to the observance of the principle *ut res magis valeat quam pereat*, appears particularly compelling, so as to secure the effective protection of the guaranteed rights enshrined in the treaty at issue. This applies to the CERD Convention, as in the *cas d'espèce* before the ICJ, and to all other human rights treaties. If it were not so, their object and purpose would not be fulfilled, with harmful consequences in the present domain of protection of the human person, where considerations of a superior order (international *ordre public*) have primacy over State voluntarism. When we enter into the *terra nova* of the settlement of human rights disputes in the framework of the classic inter-State *contentieux*, we cannot lose sight of the fact that we are here also moving resolutely from *jus dispositivum* to *jus cogens*<sup>123</sup>.

## **VII. The Compromissory Clause (Article 22) of the U.N. Convention on the Elimination of All Forms of Racial Discrimination (CERD): Elements for Its Proper Interpretation and Application**

88. Keeping the above considerations in mind, the way is paved for turning attention now to the compromissory clause of the CERD Convention. Article 22 of that Convention provides that:

“Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement”.

89. The view advanced by the Court's majority in the present Judgment (para. 140), whereby Article 22 of the CERD Convention would subordinate the jurisdiction of this Court to the procedures set out in the CERD Convention itself (Part II, Articles 11-12), in addition to

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<sup>122</sup>. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, ch. XV-XVI, pp. 60-83 and 147-168.

<sup>123</sup>. Cf., to this effect, my intervention in the debates of 12.03.1986 of the Vienna Conference on the Law of Treaties between States and International Organizations or between International Organizations: U.N., *United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations* (Vienna, 1986) - *Official Records*, volume I, N.Y., U.N., 1995, pp. 187-188 (intervention by A.A. Cançado Trindade).

engagement in prior negotiations, as “preconditions” to be fulfilled by a State Party before it may have recourse to this Court, - is a particularly strict and rigorous one. It purports to establish rigid “preconditions”, rendering access to this Court particularly difficult. This view, contrary to what the Court’s majority tries to argue, in my understanding finds no support in the Court’s own *jurisprudence constante*, nor in the legislative history of the CERD Convention, and is in conflict with the approach recently espoused by the Court itself in its Order of 15 October 2008 in the present case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (cf. *infra*).

90. Six decades ago, in its Advisory Opinion on the *Competence of the General Assembly for the Admission of a State to the United Nations* (of 03.03.1950), this Court deemed it necessary to recall that :

“the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is *to endeavour to give effect to them* in their natural and ordinary meaning in the context in which they occur”<sup>124</sup>.

Only when the words, in their natural and ordinary meaning, were “ambiguous” or were to “lead to an unreasonable result”, - the ICJ added, - *only then* the Court was to resort to “other methods of interpretation”, seeking to ascertain “what the parties really did mean when they used these words”<sup>125</sup>.

91. Although the circumstances of the present case do not in my view require such an exercise, given the importance of the principle *ut res magis valeat quam pereat* (section VI, *supra*) as well as the relationship of the compromissory clause of Article 22 with the nature and substance of the CERD Convention (section V, *supra*), I shall in any case undertake it, in order to substantiate further my dissenting position, as, in my understanding, neither the ordinary meaning of Article 22 nor its *travaux préparatoires* support the Court’s majority position in the present Judgment.

## 1. Ordinary Meaning of Article 22 of the CERD Convention

92. The Court’s majority position as to the ordinary meaning of Article 22 of the CERD Convention, advanced in the earlier Order of 15.10.2008 in the present case, and relied upon in this respect on the general rule of interpretation of Article 31(1) of the 1969 Vienna Convention on the Law of the Treaties, was quite clear. The Court then stated that:

“The phrase ‘any dispute (...) which is not settled by negotiation or by the procedure expressly provided for in this Convention’ does not, on its plain meaning, suggest that formal negotiations in the framework of the Convention or recourse to the procedure referred to in Article 22 thereof constitute preconditions to be fulfilled before the seisin of the Court” (para. 114).

Such plain meaning of the text of Article 22 of the CERD Convention, as acknowledged by the Court itself, is further confirmed by the context, as well as the object and purpose of the CERD Convention. It is, furthermore, in harmony with the Court’s *jurisprudence constante* on the matter.

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<sup>124</sup>. *ICJ Reports* (1950) p. 8 (emphasis added).

<sup>125</sup>. *Ibid.*, p. 8.

For reasons which escape my comprehension, the Court's majority reverted its position in the present Judgment, into a diametrically opposed one (cf. item 3 *infra*, paras. 110-118).

93. In effect, Article 22 is located in Part III of the CERD Convention, dealing with the settlement of disputes concerning the interpretation and application of the Convention as a whole. Article 11, located in Part II of the CERD Convention, establishes a special complaints procedure, which is not mandatory. The location of Article 22 in a part of the Convention distinct from that which governs the functioning of the Committee (Part II) is thus not without relevance, and should not pass unnoticed. A brief analysis of the special complaints procedure contained in Article 11 of the CERD Convention indicates that Article 22 of the CERD Convention is not to be read as requiring prior "exhaustion" of the procedures set forth in Articles 11 and 12 of the CERD Convention, as an alleged "precondition" to the Court's jurisdiction.

94. It may be recalled that Article 11(1) of the CERD Convention establishes a distinct procedure that allows a State Party to bring to the attention of the CERD Committee its concerns as to acts or omissions of another State Party. The language provides that a State Party "may" (not "shall") invoke this procedure if it wishes to do so; this makes it clear that it is not required to refer to this procedure for any further purpose. The language is clearly not mandatory, and this is not the only indication to this effect.

95. It is noteworthy, moreover, that Article 11(2) of the CERD Convention, which deals with the right to return to the CERD Committee "if the matter is not adjusted", is subject to two procedural conditions, namely: a) the right must be exercised within six months from the receipt by the receiving State of the initial communication to the Committee; and (b) the Committee must have determined that the matter has not been adjusted to the satisfaction of both Parties, either by bilateral negotiations or by any other procedure open to them. In case these two conditions were not met, the State concerned could not go back to the CERD Committee.

96. This confirms that, when the draftsmen of the CERD Convention considered it necessary to establish a procedural condition, they clearly did so, leaving no margin or room for further interpretation or doubts. If no such condition was clearly set forth, it could not at all be simply inferred, as that would not be in conformity with the nature and substance of the CERD Convention, a *victim-oriented* human rights treaty, and would clearly militate against the fulfillment of its object and purpose. This discloses the ordinary meaning of Article 22 of the CERD Convention.

## **2. Travaux Préparatoires of Article 22 of the CERD Convention**

97. The drafting of the CERD Convention was accomplished, in a relatively short time (1964-1965), as a result of the collaboration between the [former] Sub-Commission on Prevention of Discrimination and Protection of Minorities, the [former] Commission on Human Rights, and the III Committee of the General Assembly. At an early stage of the debates in the Sub-Commission, the key issue of implementation was the provision for a reporting mechanism by the Draft Convention, as the main measure envisaged by the draftsmen. As a supplementary choice for States Parties, the Draft Convention contemplated the establishment of a Fact-Finding and Conciliation Committee to assist interested States Parties in seeking friendly settlement of disputes

concerning the interpretation or application of the Convention<sup>126</sup>. These other means for States Parties to reach friendly settlement were additional measures of implementation which would help to render the Draft Convention “more effective”<sup>127</sup>.

98. No discussion took place on measures of implementation at the Commission on Human Rights<sup>128</sup>. In turn, discussions were held at the III Committee of the General Assembly, focusing on the innovative measures of implementation, and more particularly on the right of individual petition, one of the most debated issues of the entire CERD Convention. No reference to the conditions of exercise of jurisdiction by the ICJ or the eventual relationship between the latter and the CERD Convention’s special procedures can be inferred from the records of the III Committee. Solely the question of whether States could access unilaterally to the ICJ (Philippine proposal<sup>129</sup>, as well as interventions by the Canadian<sup>130</sup>, Italian<sup>131</sup> and Belgian<sup>132</sup> Delegates) or whether common consent of the relevant States was needed to bring disputes arising out of the CERD Convention (Ghana’s proposal<sup>133</sup>, and Polish amendment<sup>134</sup> supported by Ukraine<sup>135</sup>, USSR<sup>136</sup> and Tanzania<sup>137</sup>) was discussed.

99. The Officers of the III Committee submitted a draft clause VIII on settlement of disputes (among the final clauses of the Draft Convention) on 15.10.1965<sup>138</sup>, and, at last, the III Committee also considered a “three-power amendment” submitted by Ghana, Mauritania and the Philippines, pertaining to the procedures referred to in the Draft Convention<sup>139</sup> (as presented by Ghana<sup>140</sup>). The

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<sup>126</sup>. This resulted from the proposal of the Delegate of the Philippines (Mr. Inglés), at the 427<sup>th</sup> meeting of the Sub-Commission. He considered that the settlement of disputes involving human rights did not always lend itself to strictly judicial procedure (reporting mechanism), and, aiming at the facilitation of the implementation of the Convention, the possibility of friendly settlement of disputes was proposed (Conciliation Committee), as an alternative means of implementation; cf. U.N. doc. E/CN.4/Sub.2/SR.427, pp. 11-17; U.N. Economic and Social Council [ECOSOC], *Draft International Convention on the Elimination of All Forms of Racial Discrimination - Proposed Measures of Implementation* (Mr. Inglés), U.N. doc. E/CN.4/Sub.2/L.321, of 17.01.1964, p. 1.

<sup>127</sup>. U.N./Commission on Human Rights, *Report on the 20<sup>th</sup> Session* (17.02-18.03.1964), *ECOSOC Official Records - 37<sup>th</sup> session*, Supplement n. 8, doc. E/3873, p. 10, para. 18; U.N./Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the 16<sup>th</sup> Session* (13-31.01.1964), U.N. doc. E/CN.4/873, pp. 51-57.

<sup>128</sup> Cf. U.N./Commission on Human Rights, *Report on the 20<sup>th</sup> Session*, (17.02-18.03.1964), *ECOSOC Official Records - 37<sup>th</sup> Session*, Supplement n. 8, doc. E/3873, pp. 66-67.

<sup>129</sup>. U.N./G.A., *Proposal by the Philippines: Proposed Articles Relating to Measures of Implementation*, U.N. doc. A/C.3/L.1221, of 11.10.1965, pp. 1ss.

<sup>130</sup>. U.N./G.A. III Committee, *Summary Record of the 1367<sup>th</sup> Meeting*, p. 453, para. 25.

<sup>131</sup>. *Ibid.*, p. 454, para. 39.

<sup>132</sup>. *Ibid.*, p. 454, para. 40.

<sup>133</sup>. U.N./G.A., *Proposal by Ghana: Revised Amendments to document A/C.3/L. 1221*, of 12.11.1965, pp. 1ss.

<sup>134</sup>. U.N./G.A., *Poland: Amendments to the Suggestions for Final Clauses Submitted by the Officers of the III Committee*, U.N. doc. A/C.3/L.1237, of 01.11.1965, pp. 1ss..

<sup>135</sup>. U.N./G.A. III Committee, *Summary Record of the 1367<sup>th</sup> Meeting*, p. 453, para. 27.

<sup>136</sup>. *Ibid.*, p. 454, para. 33.

<sup>137</sup>. *Ibid.*, p. 454, para. 36.

<sup>138</sup>. U.N./G.A., *Suggestions for Final Clauses Submitted by the Officers of the III Committee*, U.N. doc. A/C.3/L.1237, of 15.10.1965, pp. 1ss..

<sup>139</sup>. U.N. doc. A/C.3/L.1313, in U.N./G.A., *XXth Session - Official Records*, Annexes: *Report of the III Committee*, U.N. doc. A/6181, of 18.12.1965, pp. 1ss..

<sup>140</sup>. U.N./G.A. III Committee, *Summary Record of the 1367<sup>th</sup> Meeting*, U.N. doc. A/C.3/SR.1367, p. 453, para. 29.

focus of the Delegates and draftsmen seemed to be on the implementation measures already contained in the Draft Convention, rather than on the role of the ICJ and the circumstances of its seizure. Those last proposals were adopted without in-depth discussions on this subject.

100. States did not devote to these last proposals the attention they required (in so far as the issue of the seizure of the ICJ is concerned), before they became Article 22 of the CERD Convention, as it stands now. The Court's majority itself concedes, in the present Judgment (para. 142) in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, that there was very little and unsatisfactory discussion of what was to become Article 22 of the CERD Convention. Its recorded legislative history contains no indication of a *mens legis* to the effect of subordinating the ICJ jurisdiction to the satisfaction of mandatory "preconditions".

101. I find it surprising, if not extraordinary, that the Court's majority, having admitted this, then moved on to its "conclusion" (para. 142), - looking rather like a *prêt-à-porter*, - that Article 22 of the CERD Convention "imposes preconditions" to be complied with (para. 148), before a State could refer a dispute to the ICJ thereunder. The fact is that there is no conclusive indication to that effect in the *travaux préparatoires* of the CERD Convention, nor is there any statement as to the existence of a resolutive obligation incumbent upon States Parties, to do all they can to settle their disputes previously by negotiation, before they can seize the ICJ. Resort to negotiation was generally referred to as a factual *effort* or *attempt* only, rather than as an resolutive obligation.

102. The very fact that proceedings were instituted before the ICJ militates strongly against the assumption or conclusion that the dispute could have been resolved by prior negotiations between the contending parties. In the aforementioned discussions of the III Committee on the last proposals for the draft final clause VIII of the Draft Convention (which led to Article 22 of CERD Convention), the Delegate of Canada (R.St. Macdonald), for example, stated that :

"Any party to a dispute over the interpretation or application of the Convention should be able to bring the matter before the Court, for the Convention was being prepared under United Nations auspices and the Court was the Organization's principal juridical organ. Moreover, clause VIII allowed parties to a dispute considerable latitude"<sup>141</sup>.

Drawing attention to "the flexibility of the Article's terms", he added that his Delegation "hoped" that :

"it would be possible to to confer in advance on the Court a measure of jurisdiction in regard to matters connected with the Convention"<sup>142</sup>.

103. On his turn, the Representative of Italy (F. Capotorti) began by observing that international law allowed for consent to be given for submission of a dispute to the Court either "by any or by all the parties", and either "upon ratification of the Convention" or "when a particular dispute arose". He warned that "[c]onsent of States would be much more difficult to obtain when a dispute already existed than when the Convention was opened for signature". His position was, thus, that :

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<sup>141</sup>. *Ibid.*, p. 453, para. 25.

<sup>142</sup>. *Ibid.*, p. 453, paras. 25 and 28.

“The Committee should adopt a practical approach and decide which method was more in accord with the spirit of the Convention and would ensure the most satisfactory settlement of disputes relating to the Convention”<sup>143</sup>.

104. The issue of State consent, in sum, could be raised, in his view, at the appropriate moment, namely, upon ratification of the Convention, and not subsequently, when a particular dispute arose. In the same discussions, the Delegate of Trinidad and Tobago (Mr. Ince) remarked, in respect of the draft final clause VIII, that the Draft CERD Convention was “being drawn in a spirit of goodwill”, and one should thus “facilitate reference of cases to the Court”<sup>144</sup>. To the same effect, the Delegate of Belgium (Mr. Cochaux) stated that :

“The Court was an important international organ whose role in settling disputes connected with the present Draft Convention - an instrument created by the United Nations - should not be belittled”<sup>145</sup>.

105. The (amended) draft final clause VIII, which was to become Article 22 of the CERD Convention, was then adopted, as a whole, by the III Committee, by 70 votes to 9, with 8 abstentions<sup>146</sup>. The language used by some Delegates, in the debates preceding its adoption, does not at all imply or suggest that recourse to this Court was regarded as subordinated to the other settlement procedures of the CERD Convention, or to any “preconditions”. Shortly after that voting took place, the Delegate of Ghana (Mr. Lamptey), further to his previous statement (which the Court’s majority saw it fit to single out in the present Judgment, para. 142), added an interpretative declaration as to his position, to the effect that his Delegation had “accepted the compulsory jurisdiction of the Court in the case of certain specific Conventions”, and that it attached “much importance” to the CERD Convention<sup>147</sup>.

106. I cannot thus detect on what basis did the Court’s majority, in the present Judgment in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, reached its decision as to the ordinary meaning and scope of Article 22 of the CERD Convention. The view of the Court’s majority that the *travaux préparatoires* of the CERD Convention “do not suggest a different conclusion from that at which the Court has already arrived through the main method of ordinary meaning interpretation” (para. 147, *in fine*) simply begs the question, and does not resist closer examination.

107. Moreover, as we have just seen, there were clearly those, in the drafting history of the CERD Convention, who were sensitive to the regulation of social relations under the CERD Convention, and who favoured possible recourse to the ICJ<sup>148</sup> without “preconditions”. In my perception, in the

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<sup>143</sup>. *Ibid.*, p. 454, para. 39.

<sup>144</sup>. *Ibid.* pp. 454-455, para. 41.

<sup>145</sup>. *Ibid.*, p. 454, para. 40.

<sup>146</sup>. *Ibid.*, p. 455, para. 41.

<sup>147</sup>. *Ibid.*, p. 455, para. 42.

<sup>148</sup>. Suffice it to recall here the positions taken by two learned jurists, Ronald St. Macdonald and Francesco Capotorti (cf. *supra*). Years later, the former drew attention to the evolving teleological interpretation of the U.N. Charter itself, whilst the latter singled out judicial settlement (including recourse to the ICJ) as the best means to resolve disputes pertaining to the safeguard of human rights. Cf., respectively: R.St.J. Macdonald, “A Short Note on the Interpretation of the Charter of the United Nations by the International Court of Justice”, in *Liber Amicorum Judge S. Oda* (eds. N. Ando *et alii*), The Hague, Kluwer, 2002, p. 182; F. Capotorti, “Cours général de Droit international public”, 248 *Recueil des Cours de l’Académie de Droit International de La Haye* (1994) p. 107.

present Judgment on Preliminary Objections, the position of the Court's majority as to Article 22 of the CERD Convention does not stand.

108. The "conclusion" drawn by the Court's majority is not, in my perception, supported or "confirmed" by an attentive analysis of the *travaux préparatoires* of the CERD Convention. The so-called "preconditions" in Article 22, allegedly to be fulfilled prior to the recourse to the ICJ, are rather, in my perception, newly-proposed - if not imposed - obstacles to the fulfillment of the object and purpose of the CERD Convention, which, furthermore, fail to take in due account the nature and substance of the CERD Convention, a core human rights treaty of considerable importance in the history of the United Nations itself. In my understanding they are, in sum, unwarranted obstacles to access to justice at international level.

109. The whole construction of the present Judgment of the Court in respect of the second preliminary objection does not seem to rest on a sound reasoning, and appears to me without foundation. Article 22 does not use any conditional language ("if") in its wording. It limits itself to stating that a dispute which is not settled by negotiation or by the procedures expressly provided for in CERD, *shall* be referred to the ICJ for decision. It is a statement of pure verification of facts, and nowhere is there a "precondition" implied or suggested in its wording, and certainly not in its spirit.

### **3. The Previous Pronouncement by the Court on Article 22 of the CERD Convention: *Venire Contra Factum/Dictum Proprium Non Valet***

110. We have seen that Article 22 of the CERD Convention stipulates that a State Party may unilaterally refer a dispute to the Court if that dispute "is not settled by negotiation", but this does not establish any express obligation, in the form of a "precondition", to engage in such negotiation. As already noted *by the ICJ itself*, in its recent Order on Provisional measures (of 15.10.2008), these words describe a state of fact, so that the function of the Court is limited to determining whether the dispute is not settled. In the same paragraph where the Court stated that no precondition was needed, the Court added that "Article 22 does suggest that some attempt should have been made by the claimant party to initiate, with the respondent party, discussions on issues that would fall under CERD" (para. 114).

111. However, these negotiations do not constitute a formal requirement for the Court to exercise its jurisdiction. This approach can also be inferred from the Court's longstanding practice, and there is no reason to depart from it, as that would create juridical uncertainty, in the understanding of States, as to the circumstances in which the Court would exercise its jurisdiction. Of particular importance is the Court's judgment in the case of *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *versus* United States, Judgment of jurisdiction and admissibility, of 26.11.1984), where the Court ruled that since there had in fact been no settlement of the dispute between the parties, the requirements of the compromissory clause (Article XXXIV(2) of the 1956 Treaty of Friendship, Commerce and Navigation) were satisfied, since the dispute was clearly one which was not satisfactorily adjusted by diplomatic means (cf. *infra*).

112. In sum, and as the Court held in its Order on Provisional Measures of 15.10.2008 in the present case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, Article 22 of the CERD Convention does not, on its plain meaning, suggest that formal negotiations in the framework of the CERD Convention or recourse to the procedure referred to in Article 22 thereof constitute "preconditions" to be fulfilled before the

seisin of the Court (para. 114). This was the timely clarification made by the Court in its Order of 15.10.2008, which now, in the present Judgment, was incomprehensibly made dead letter by the Court itself (para. 129), which thus ran against and deconstructed its own *res interpretata*.

113. It is widely known that, in international legal procedure, once a contending party has asserted a position as to a given issue before an international tribunal, it can no longer attempt to avail itself of an orientation to the opposite sense (as warned by international case-law itself<sup>149</sup>): *allegans contraria non audiendus est*. This basic principle of procedural law is valid for countries of *droit civil* (by virtue of the doctrine going back to classic Roman law, *venire contra factum proprium non valet*, developed on the basis of considerations of equity, *aequitas*) as well as for countries of *common law* (by virtue of the institution of *estoppel*,<sup>150</sup> proper of the Anglo-Saxon juridical tradition). In any case, it could not be otherwise, so as to preserve the confidence and the principle of *bona fides* which ought always to prevail in the international legal procedure.

114. With all the more reason, the same reasoning would apply as to positions already taken by an international tribunal *as to the Law*, - quite a distinct issue from its *prima facie* findings *as to the facts*. Positions *as to the law* cannot be simply changed at the tribunal's free will, shortly afterwards, to the diametrically opposite direction! This would generate a sense of juridical insecurity, that would surely undermine the credibility of the work of an international tribunal, and even more so when its jurisdiction is exercised on the basis of a human rights treaty. *Venire contra factum proprium non valet*, and, perhaps even more forcefully, *venire contra dictum proprium non valet*. In my perception, the Court's considerations in paragraph 129 of the present Judgment do not at all stand: they clash with a basic principle of international procedural law, deeply rooted in legal thinking.

115. There is no *requirement* that the negotiations between Georgia and the Russian Federation include an *express reference* to the CERD Convention. It is sufficient for the subject-matter of the dispute at issue to have been discussed, brought to the attention of each other. In light of the evidence put to the Court, Georgia has sought to discuss with Russia matters falling within the scope of the CERD Convention, in the conflicts affecting ethnic Georgians in South Ossetia and Abkhazia.

116. Finally, with regard to the question whether the previous engagement in negotiations and recourse to the procedures expressly provided for in the CERD Convention (referred to in Article 22) are cumulative or alternative, the conjunction "or" indicates that the draftsmen of the CERD Convention clearly considered "negotiation" or "the procedures expressly provided for in this Convention" as *alternatives*. The Court could well - and should - have discarded any doubts that could persist on this point; instead, it deliberately preferred to abstain from pronouncing (para. 183) on this aspect of the controversy raised before it. Instead of clarifying the point, of saying what the law is (*juris dictio*), it felt there was "no need" to do so.

117. The purpose of multilateral treaties like the CERD Convention, of human rights treaties, is to render human rights scrutiny and enforcement effective at the international level, including by means of dispute settlement. In its *jurisprudence constante*, for example, the ECtHR has stressed

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<sup>149</sup>. Cf., e.g., Ch. de Visscher, *De l'équité dans le règlement arbitral ou judiciaire des litiges de Droit international public*, Paris, Pédone, 1972, pp. 49-52.

<sup>150</sup>. Cf., *inter alia*, e.g., Ian Sinclair, "Estoppel and Acquiescence", in *Fifty Years of the International Court of Justice - Essays in Honour of R.T. Jennings* (eds. V. Lowe and M. Fitzmaurice), Cambridge, University Press, 1996, pp. 104-120; Ch. Vallée, "Quelques observations sur l'estoppel en droit des gens", 77 *Revue générale de Droit international public* (1973) pp. 949-999.



that the object and purpose of human rights treaties (such as the European Convention) requires that their provisions be interpreted and applied so as to make their safeguards “practical and effective”<sup>151</sup>. The same applies to the CERD Convention, as a core human rights treaty of the United Nations.

118. In the present case, due weight should have been given to the consideration, in the preamble of the CERD Convention (para. 1), that all Member States of the United Nations have pledged themselves to take action, in cooperation with the Organization, for the achievement of one of the purposes of the United Nations, which is “to promote and encourage universal respect for and observance of human rights” for all, without distinction of any kind, keeping in mind the proclamation, by the 1948 Universal Declaration of Human Rights, that all human beings are born free and equal in dignity and rights (Article 1).

## **VIII. Towards Peaceful Settlement and Realization of Justice: Verification of Prior Attempts or Efforts of Negotiation**

### **1. Permanent Court of International Justice**

119. The Permanent Court of International Justice (PCIJ), in its *jurisprudence constante*, approached prior attempts or efforts of negotiation as a factual element to be taken into account in the process of judicial settlement of disputes submitted to its cognizance. It has never ascribed to this factual element the character of a “precondition” that would have to be fully satisfied, for the exercise of its jurisdiction. Thus, in a celebrated passage of its Judgment (of 30.08.1924), in the case of the *Mavrommatis Concessions in Palestine* case (Judgment n. 2), the PCIJ stated that:

“Une négociation ne suppose pas toujours et nécessairement une série plus ou moins longue de notes et de dépêches; ce peut être assez qu’une conversation ait été entamée; cette conversation a pu être très courte: tel est le cas si elle a rencontré un point mort, si elle s’est heurtée finalement à un *non possumus* ou à un *non volumus* péremptoire de l’une des Parties et qu’ainsi il est apparu avec évidence que *le différend n’est pas susceptible d’être réglé par une négociation diplomatique*” (p. 13)<sup>152</sup>.

120. The PCIJ added, in the same *Mavrommatis Concessions in Palestine* case (1924), that “it would be incompatible with the flexibility which should characterize international relations to require the two Governments to reopen a discussion which has in fact already taken place” (p. 15). In case of an eventual objection *in limine litis* to its jurisdiction, the PCIJ further stated that the Court:

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<sup>151</sup>. Cf., to this effect, e.g., ECtHR, case *Artico versus Italy*, Judgment of 13.05.1980, para. 33; ECtHR, case *Soering versus United Kingdom*, Judgment of 07.07.1989, para. 87; ECtHR, case *Rantsev versus Cyprus and Russia*, Judgment of 07.01.2010, para. 275.

<sup>152</sup>. Or, as stated by the PCIJ in the other official language of the Court,

“Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a dead lock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can therefore be no doubt that *the dispute cannot be settled by diplomatic negotiation*” (p. 13).

“is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law” (p. 16).

121. Shortly afterwards, in its Judgment (of 25.08.1925), in the case concerning *Certain German Interests in Polish Upper Silesia* (Judgment n. 6), the PCIJ again rejected any formalistic approach, in pointing out that: “the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned” (p. 14).

The PCIJ added, in the same case, that “the Court’s jurisdiction cannot depend solely on the wording of the Application” (p. 15).

122. In the same line of thinking, in its Judgment (of 26.07.1927), in the *Chorzów Factory* case (Jurisdiction, Judgment n. 9), the PCIJ again dismissed a self-restrained outlook of the compromissory clause, which would unduly reduce its scope. The PCIJ warned:

“To say (...) that the *clause compromissoire* (...) must now be restrictively interpreted (...), would be contrary to the fundamental conceptions by which the movement in favour of general arbitration has been characterized” (p. 22).

The PCIJ refused to infer “a contrary intention” of the parties limiting its jurisdiction; such a reliance on “a difference of opinion” between the parties as to “the interpretation or application of a Convention, - it concluded, - “instead of settling a dispute once and for all, would leave open the possibility of further disputes” (p. 25).

123. The position taken by the PCIJ, to the effect that recourse to negotiations has never been a “precondition” to seize it, had prompt repercussions in the juridical circles of those days. Shortly after the aforementioned decisions of the PCIJ, even those who kept on favouring prior negotiations and beholding judicial settlement as an *ultimum remedium*, were led to agree that by “negotiations” one had in mind, more specifically, “attempts” of friendly settlement by diplomatic negotiations<sup>153</sup> as a matter of *courtoisie internationale*<sup>154</sup>. By no means was it meant to be a “precondition”; it sufficed that one party had attempted – unsuccessfully – to negotiate. They were led to concede that the PCIJ was master of its own jurisdiction, and was entitled to decide the way it did (above the thesis sustained by the contending parties), “nullifying” that “precondition”, despite the fact that international jurisdiction was “subsidiary”<sup>155</sup>.

124. To the nostalgics of the past, who kept on privileging diplomatic negotiations and resisted the advent of judicialization, Maurice Bourquin lucidly retorted that Article 36 of the Hague Court’s Statute has never subordinated a legal action to a prior attempt of diplomatic settlement. How to prove that negotiations were “sufficiently utilized”? This notion was imprecise and relative, and any rigid formula would be “unacceptable”, as each case had its own circumstances.

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<sup>153</sup>. “[...] une *tentative* de solution amiable para la voie diplomatique”; or else, “les moyens de règlement amiables ont été *tentés*”; and still, “un moyen préalable qui doit être *tenté*...”; *cit. in*

N. Kaasik, *op. cit. infra* n. (108), pp. 67 and 69 (emphasis added).

<sup>154</sup>. N. Kaasik, “La clause de négociations diplomatiques dans le droit international positif et dans la jurisprudence de la Cour Permanente de Justice Internationale”, 14 *Revue de Droit international et de législation comparée* (1933) p. 94.

<sup>155</sup>. Cf. *ibid.*, pp. 90-92 and 94-95.

In his view, diplomatic negotiations may be useful, but it is wiser to have a “nuancée” approach to them; the “negative attitude” of one of the parties would suffice to allow the other to lodge the case with the Hague Court, even if the exchange of views had a very short duration. It so happened, - pondered M. Bourquin, - that: “des controverses diplomatiques se situent en dehors du droit; (...) les prétentions qui s’y font jour s’inspirent uniquement de considérations d’opportunité”<sup>156</sup>.

## 2. International Court of Justice

125. For its part, the International Court of Justice (ICJ), in its Judgment on Preliminary Objections (of 21.12.1962) in the *South West Africa* cases (Ethiopia and Liberia vs. South Africa), in dismissing the [third] preliminary objection, drew attention to the importance of “the well-being and development of the inhabitants of the mandated territory” (p. 344), and dismissed the argument that “any broad interpretation of the compulsory jurisdiction in question would be incompatible with Article 22 of the Covenant” (p. 343). The ICJ added that:

“It is immaterial and unnecessary to enquire what the different and opposing views were which brought about the deadlock in the past negotiations in the United Nations, since the present phase calls for determination of only the question of jurisdiction. The fact that a deadlock was reached in the collective negotiations in the past and the further fact that both the written pleadings and oral arguments of the parties in the present proceedings have clearly confirmed the continuance of this deadlock, compel a conclusion that no reasonable probability exists that further negotiations would lead to a settlement” (p. 345).

126. And the ICJ, having invoked the *obiter dictum* of the PCIJ in the *Mavrommatis Palestine Concessions* case (*supra*), concluded likewise, on this particular issue, that “there is no reason” why each of the parties “should go through the formality and pretence of direct negotiation with the common adversary State after they have already fully participated in the collective negotiations with the same State in opposition” (p. 346). In the Court’s view,

“it is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved. So long as both sides remain adamant, (...) there is no reason to think that the dispute can be settled by further negotiations between the Parties” (p. 346).

127. One decade later, in the case of the *Appeal Relating to the Jurisdiction of the ICAO Council* (India versus Pakistan, Judgment of 18.08.1972), the ICJ, faced with the question of lawful action, yet “prejudicial”, causing “injustice or hardship” to another party under the treaties at issue (para. 20), found that the various objections raised to its own competence could not be sustained (paras. 25-26). Subsequently, in the *Fisheries Jurisdiction* case (F.R. Germany versus Iceland, Judgment of 02.02.1973), the ICJ pondered that:

“in the present case, the object and purpose of the 1961 Exchange of Notes, and therefore the circumstances which constituted an essential basis of the consent of both parties to be bound by the agreement embodied therein, had a much wider scope. That object and purpose was not merely to decide upon the Icelandic claim to fisheries

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<sup>156</sup> M. Bourquin, “Dans quelle mesure le recours à des négociations diplomatiques est-il nécessaire avant qu’un différend puisse être soumis à la juridiction internationale?”, in *Hommage d’une génération de juristes au Président Basdevant*, Paris, Pédone, 1960, p. 52, and cf. pp. 45, 47-48, 52 and 54-55.

jurisdiction up to 12 miles, but also to provide a means whereby the parties might resolve the question of the validity of any further claims” (para. 32).

128. The ICJ then found that the jurisdictional obligation imposed in the 1961 Exchange of Notes remained applicable, and concluded that:

“The compromissory clause enabled either of the parties to submit to the Court any dispute between them relating to an extension of Icelandic fisheries jurisdiction in the waters above its continental shelf beyond the 12-mile limit. The present dispute is exactly of the character anticipated in the compromissory clause of the Exchange of Notes. Not only has the jurisdictional obligation not been radically transformed in its extent; it has remained precisely what it was in 1961” (para. 43).

129. Over a decade later, in the case of the *U.S. Diplomatic and Consular Staff in Tehran* (Judgment of 24.05.1980), the ICJ pointed out that:

“when the United States filed its Application on 29 November 1979, its attempts to negotiate with Iran in regard to the overrunning of its Embassy and detention of its nationals as hostages had reached a deadlock, owing to the refusal of the Iranian Government to enter into any discussion of the matter. In consequence, there existed at that date not only a dispute but, beyond any doubt, a ‘dispute (...) not satisfactorily adjusted by diplomacy’ within the meaning of Article XXI, paragraph 2, of the 1955 Treaty; and this dispute comprised, *inter alia*, the matters that are the subject of the United States’ claims under that Treaty” (para. 51).

130. Shortly afterwards, in its Judgment on Jurisdiction and Admissibility (of 26.11.1984) in the case of *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua *versus* United States), the ICJ upheld the view that it did “not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of that other State, it is debarred from invoking a compromissory clause in that treaty”, namely, the 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States (para. 83). Having invoked the aforementioned *obiter dictum* of the PCIJ in the case of *Certain German Interests in Polish Upper Silesia*, the ICJ concluded on this particular issue that:

“Accordingly, the Court finds that, to the extent that the claims in Nicaragua’s Application constitute a dispute as to the interpretation or the application of the Articles of the Treaty of 1956 (...), the Court has jurisdiction under that Treaty to entertain such claims” (para. 83).

131. In the same 1984 Judgment in the *Nicaragua versus United States* case, the ICJ, in asserting its own jurisdiction, discarded any pretence of erecting a “rule” of “prior exhaustion of international remedies” (in the form of regional negotiations), by an inadequate and groundless analogy with the rule of exhaustion of local or domestic remedies<sup>157</sup>. In the Court’s words,

“the Court is unable to accept either that there is any requirement of prior exhaustion of regional negotiating processes as a precondition to seizing the Court; or that the existence of the Contadora process constitutes in this case an obstacle to the

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<sup>157</sup> For a criticism of that pretence of unwarranted analogy, in support of the Court’s decision on jurisdiction and admissibility in that case, cf. A.A. Cançado Trindade, “Nicarágua *versus* Estados Unidos (1984): Os Limites da Jurisdição ‘Obrigatória’ da Corte Internacional de Justiça e as Perspectivas de Solução Judicial de Controvérsias Internacionais”, 37-38 *Boletim da Sociedade Brasileira de Direito Internacional* (1983-1986) pp. 71-96.

examination by the Court of the Nicaraguan Application and judicial determination in due course of the submissions of the Parties in the case. The Court is therefore unable to declare the Application inadmissible, as requested by the United States, on any of the grounds it has advanced as requiring such a finding” (para. 108).

132. In thus determining the existence of a dispute between Nicaragua and the United States as to the interpretation and application of specific Articles of the 1956 Treaty, and that it had jurisdiction to entertain the dispute at issue under Article XXIV, paragraph 2, of the Treaty, the Court kept in mind the frequency of compromissory clauses in bilateral treaties of the kind, and the fact that those clauses were intended to enable the parties to resort unilaterally to the Court if they failed to agree on another peaceful means of settlement. Two years later, in its Judgment as to the Merits (of 27.06.1986) in the same *Nicaragua versus United States* case, the ICJ, reiterating its position, added that “it would therefore be excessively formalistic to require Nicaragua first to exhaust the procedure of Article XXIV, paragraph 1, before bringing the matter to the Court” (para. 274).

133. Over a decade later, in its Judgment on Preliminary Objections (of 11.06.1998) in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the ICJ categorically stated that:

“Neither in the Charter [of the United Nations] nor otherwise in international law is any general rule to be found to the effect that the exhaustion of diplomatic negotiations constitutes a precondition for a matter to be referred to the Court. No such precondition was embodied in the Statute of the Permanent Court of International Justice (...). Nor is it to be found in Article 36 of the Statute of this Court” (para. 56).

134. More recently, the point at issue again came to the fore in the *Oil Platforms* case (*Iran versus United States*, Judgment of 06.11.2003). The Court held that it had

“to take note that the dispute has not been satisfactorily adjusted by diplomacy. Whether the fact that diplomatic negotiations have not been pursued is to be regarded as attributable to the conduct of the one Party or the other is irrelevant for present purposes, as is the question whether it is the Applicant or the Respondent that has asserted a *fin de non-recevoir* on this ground. As in previous cases involving virtually identical treaty provisions [cf. *U.S. Diplomatic and Consular Staff in Tehran* (*United States vs. Iran*), *ICJ Reports* 1980, pp. 26-28; *Nicaragua versus United States*, *ICJ Reports* 1984, pp. 427-429], it is sufficient for the Court to satisfy itself that the dispute was not satisfactorily adjusted by diplomacy before being submitted to the Court” (para. 107).

135. Nowhere, from the survey above, can an inclination be inferred, on the part either of the PCIJ or the ICJ, to set up an excessive prerequisite of prior negotiations for the exercise of jurisdiction. Quite on the contrary, both the PCIJ and the ICJ have been quite clear in holding that an *attempt* of negotiation is sufficient, there being no mandatory “precondition” at all of *resolutive* negotiations for either of them to exercise jurisdiction in a case they had been seized of. The Hague Court has, in effect, throughout its history, refrained from any excessive requirement as to prior negotiations between the contending parties.

## IX. Towards Peaceful Settlement with the Realization of Justice under Human Rights Treaties

136. In the present case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, the Court's majority seems to overlook this *jurisprudence constante* of the Court itself, in order to set up a strict "precondition" of prior negotiation (paras. 157-159), with a very high threshold, for the exercise of jurisdiction on the basis of that human rights treaty, the CERD Convention. In trying to find support for its position, the Court's majority recalls an *obiter dictum* (p. 116) of the PCIJ in the Advisory Opinion on the *Railway Traffic between Lithuania and Poland* (1931). But, a *contrario sensu*, the *jurisprudence constante* of the Hague Court, on the point at issue, contented itself with noting that the parties had been unable to find common ground before the application was filed with it.

137. Throughout the last decades, studies undertaken on the position of the Hague Court (PCIJ and ICJ), on the verification of attempts or efforts of negotiation prior to recourse to the Court itself, have come to the conclusion that the established case-law (*jurisprudence constante*) of the Court does *not* at all lend support to the view that those prior attempts or efforts of negotiation amount to a mandatory "precondition" to the exercise of the Court's jurisdiction<sup>158</sup>. Quite on the contrary, compromissory clauses have been a relevant source of the Court's jurisdiction<sup>159</sup>, and even more cogently so under some human rights treaties containing them (cf. *infra*), and pointing towards the goal of the realization of justice.

138. Notwithstanding the Court's *jurisprudence constante* (*supra*), the Court's majority regrettably set a very high threshold in the present case as to the requirement of prior negotiations. In my perception, the position of this Court along its history, on this particular issue, has favoured the access to justice *lato sensu* (i.e., including the realization of justice); the change of approach of the Court's majority in the present case opposing Georgia to the Russian Federation, not only operates to the contrary, but, furthermore, can generate a sense of judicial insecurity and can have an adverse impact on the future acceptance of the Court's compulsory jurisdiction under international treaties.

139. This is even more regrettable bearing in mind the *nature* of the treaty at issue, one of the core U.N. Conventions on human rights, the CERD Convention. One cannot lose sight of the rights and values that are at stake. Reliance on formalistic formulas, focus on State "interests" or intentions, or its "will", or other related notions, or State strategies of negotiations, should not make one lose sight of the fact that claimants of justice, and their beneficiaries, are, ultimately, human beings<sup>160</sup>, - as disclosed by the present case brought to the cognizance of the Court.

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<sup>158</sup>. Cf., e.g., G. Abi-Saab, *Les exceptions préliminaires dans la procédure de la Cour internationale*, Paris, Pédone, 1967, pp. 124-125; J.I. Charney, "Compromissory Clauses and the Jurisdiction of the International Court of Justice", 81 *American Journal of International Law* (1987) pp. 870-883, and cf. pp. 859-864; S. Torres Bernárdez, "Are Prior Negotiations a General Condition for Judicial Settlement by the International Court of Justice?", in *Liber Amicorum in Memoriam of Judge J.M. Ruda* (eds. C.A. Armas Barea, J.A. Barderis *et alii*), The Hague, Kluwer, 2000, pp. 507-525.

<sup>159</sup>. Cf., e.g., C.J. Tams, "The Continued Relevance of Compromissory Clauses as a Source of ICJ Jurisdiction", in *A Wiser Century? Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years after the II Hague Peace Conference* (eds. Th. Giegerich and U.E. Heinz), Berlin, Duncker & Humblot, 2009, pp. 471, 476, 480-481, 487-489 and 492.

<sup>160</sup>. Cf., to this effect, e.g., Julius Stone, *Approaches to the Notion of International Justice*, Princeton, University Press, 1970, p. 55.

140. There seems to be general awareness at present that the expansion of international jurisdiction, - illustrated, e.g., by the concomitant operation, with this Court, of international human rights tribunals, - responds and corresponds to a need of the international community nowadays, going beyond the framework of methods of peaceful settlement of international disputes (used in inter-State disputes), and giving expression to the idea of a *prééminence* of International Law<sup>161</sup>. This Court has to remain attentive to that, it cannot overlook the *rationale* of human rights treaties. A mechanical and reiterated search for State consent, placed above the fundamental values underlying those treaties, will lead it nowhere.

141. This Court has, on occasions, expressly acknowledged that the idea of an international *rule of law* has indeed gained ground in recent years. Suffice it here to evoke, for example, the contribution of its Advisory Opinions on *Namibia* (of 21.06.1971 - cf. *infra*), and on the *Obligation to Arbitrate by Virtue of Section 21 of the 1947 U.N. Headquarters Agreement* (of 26.04.1988). This *idée-force* has fostered the search for the realization of justice under the *rule of law* at international level, and is to be kept in mind whenever this Court is called upon to adjudicate a case on the basis of a human rights treaty.

142. May it be recalled that, in the late eighties (1988-1989), e.g., the then Soviet Union (succeeded by the Russian Federation), and some other Eastern European States, withdrew declarations they had previously made to exclude compulsory settlement of disputes in some human rights conventions celebrated during the cold-war period. This was a reassuring initiative to foster the compulsory jurisdiction of the ICJ in respect of six core human rights treaties (including the CERD Convention). In his address to the U.N. General Assembly, of 07.12.1988, the President of the (then) Presidium of the Supreme Soviet of the USSR (Mr. Mikhail Gorbachev), after invoking “the primacy of universal human values”, stated that :

“We believe that the jurisdiction of the International Court of Justice at The Hague as regards the interpretation and implementation of agreements on human rights should be binding on all States”<sup>162</sup>.

143. Shortly afterwards, on 10.02.1989, the (then) Presidium of the Supreme Soviet of the USSR adopted, upon the suggestion of the Council of Ministers of the USSR, a decree (*ukaz*), whereby it withdrew the reservations the USSR had previously made in relevant provisions of six human rights treaties, namely: Article 22 of the CERD Convention (of central importance in the present case), Article 29(1) of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention), Article 30(1) of the 1984 U.N. Convention against Torture (the CAT Convention), Article IX of the 1948 Convention against Genocide, Article IX of the 1953

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<sup>161</sup> J.-Y. Morin, “L’état de Droit: émergence d’un principe du Droit international”, 254 *Recueil des Cours de l’Académie de Droit International de La Haye [RCADI]* (1995) pp. 199, 451 and 462.

<sup>162</sup> U.N., doc. A/43/PV.72, of 08.12.1988, p. 26, and cf. p. 8. Shortly afterwards, a USSR memorandum, of 29.09.1989, on “Enhancing the Role of International Law”, circulated in the U.N. General Assembly on 02.10.1989 (in the framework of the United Nations Decade of International Law), referred to the strengthening of the role of the ICJ as the principal judicial organ of the United Nations. Cf. U.N. doc. A/44/585, of 02.10.1989, p. 5. - On this new outlook of the primacy of the rule of law in international relations, cf. comments in, e.g., A. Gorin and P. Mishchenko, “New Political Thinking as a Philosophy and a Tool of Soviet Foreign Policy”, 17 *Journal of Legislation* (1990) pp. 17-18. On the professed “priority of universal human values” in this new outlook, cf. comments in, e.g., V.S. Vereshchetin and R.A. Mullerson, “International Law in and Interdependent World”, 28 *Columbia Journal of Transnational Law* (1990) pp. 292-293 and 300.

Convention on the Political Rights of Women, and Article 22 of the 1950 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others<sup>163</sup>.

144. Moreover, the realization of justice under human rights treaties (such as the CERD Convention) can hardly be attained by a valuation of the evidence produced before the Court pursuant to a strictly inter-State outlook, singling out the strategies of international litigation of the contending parties, and overlooking the *basic rationale* of those treaties of protection of the rights of the human person. Under those treaties, peaceful settlement is coupled with the realization of justice, and this latter can hardly be achieved in a case, such as the present one, without turning attention to the sufferings and needs of protection of the population.

#### **X. The Law and the Sufferings and Needs of Protection of the Population: *Summum Jus, Summa Injuria***

145. Regrettably, this was not done by the Court in the present case. The Court could, and should, have been particularly attentive to the sufferings and needs of protection of the population, on the basis of an assessment of the whole evidence produced before it by the contending parties themselves. Thus, in its consideration of the first and second preliminary objections in the present Judgment, the Court referred to several pieces of the vast documentation submitted to its cognizance by the Russian Federation and Georgia. Yet, it did so in the course of a reasoning which pursued an essentially inter-State, and mostly bilateral, outlook, centred on the (diplomatic) relations between the two States concerned.

146. Accordingly, one does not find, in the reasoning of the Court's majority, an in-depth examination of the pieces of the aforementioned documentation which disclose an aspect of the utmost importance to me: that of the vulnerability, if not defencelessness, of the victimized population, directly affected by the long-standing dispute<sup>164</sup>, aggravated into an armed conflict in early August 2008, between Georgia and the Russian Federation. The present Judgment contains only *in passim* references to the sufferings endured by the victimized population, such as the reference to an agreement concluded by Georgia and the Russian Federation, as early as on 24.06.1992, which stated in the preamble that the Parties were striving for "the immediate cessation of the bloodshed" (para. 38).

147. It is beyond the purpose of my Dissenting Opinion to embark on an exhaustive analysis of that extensive documentation, as a whole, produced before the Court. Suffice it here to refer to those documents, submitted to this Court, in a commendable way, either by the Russian Federation or by Georgia, which are clearly illustrative of the aspect I single out herein, namely, that of the pain and sufferings, and the pressing needs of protection, of the silent victims of the dispute and armed conflict between Georgia and the Russian Federation. The point I here wish to make is that this aspect of the present case could not have been overlooked, especially in a case lodging with this Court on the basis of a human rights treaty like the CERD Convention.

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<sup>163</sup>. Cf. comments in, e.g., T. Schweisfurth, "The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for Six Human Rights Conventions", 2 *European Journal of International Law* (1990) pp. 110-117.

<sup>164</sup>. As it ensues from, e.g., the resolutions of the Georgian Parliament of 20.03.2002 (concerning the situation in Abkhazia), and of 11.10.2005 (concerning alleged "ethnic cleansing by third parties" in Abkhazia and South Ossetia); Georgia's letters of 27.10.2005 to the U.N. Security Council (U.N. doc. S/2005/678), and of 10.11.2005 to the U.N. Secretary General (U.N. doc. A/60/552-S/2005/718); Georgia's statement at the U.N. Security Council of 26.01.2006, and address at the U.N. General Assembly of 23.09.2006, followed by other manifestations of the kind, ranging from September-November 2006 to August 2008.



148. In the documentation presented to the Court by the Russian Federation, appended to its Preliminary Objections of 01.12.2009<sup>165</sup>, are the *Concluding Observations* of the CERD Committee in respect of reports lodged with it by Russia as well as by Georgia. Thus, already in its *Concluding Observations*, of 22.03.2001, on the initial report of Georgia under the CERD Convention, the Committee *inter alia* found that:

“Georgia has been confronted with ethnic and political conflicts in Abkhazia and South Ossetia since independence. (...) [T]he conflicts in South Ossetia and Abkhazia have resulted in discrimination against people of different ethnic origins, including a large number of internally displaced persons and refugees”<sup>166</sup>.

149. The point was reiterated by the CERD Committee in its *Concluding Observations*, of 15.08.2005, on the second to third periodic reports of Georgia under the CERD Convention<sup>167</sup>. And, in its more recent *Concluding Observations*, of 13.08.2008, on the 18th and 19th periodic reports of the Russian Federation, the Committee recommended *inter alia* that:

“the State Party undertake a thorough investigation, through an independent body, into all allegations of unlawful police conduct against Georgian nationals and ethnic Georgians in 2006 and adopt measures to prevent the recurrence of such acts in the future”<sup>168</sup>.

150. In the documentation presented by Georgia to the Court, appended to its Memorial of 02.09.2009, and to its Written Statement (on Preliminary Objections) of 01.04.2010, there are several reports of international organizations (United Nations, Council of Europe, Organization of Security and Cooperation in Europe [OSCE], European Union)<sup>169</sup>, as well as non-governmental organizations (Human Rights Watch, Amnesty International)<sup>170</sup>. The latter provide accounts of the occurrence, in the armed conflict that broke out on 07 August 2008, of deliberate and indiscriminate use of force and violence against civilians, ethnic attacks, intentional burning of homes and villages, forced displacement of persons, and other human rights and humanitarian law violations. But it is the former, - particularly the successive reports of the Monitoring Commission<sup>171</sup> of the Parliamentary Assembly of the Council of Europe - that provide an over-all account of the features and the pattern of violence that generated the sufferings of the population in the regions affected by the armed conflict, and the pressing needs of protection of the numerous victims.

151. Even if this particular aspect of the *cas d'espèce* goes beyond the framework of bilateral (diplomatic) inter-State relations, this Court, in my view, could not have overlooked it, at the present stage of Preliminary Objections, - even more so after its recent decision to indicate provisional measures of protection (Order of 15.10.2008) in the present case, having found that it had jurisdiction *prima facie* over the dispute at issue (para. 117). And, above all, one has to go

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<sup>165</sup>. Annexes 50, 63 and 70.

<sup>166</sup>. U.N. doc. CERD/C/304/Add.120, of 27.04.2001, paras. 3-4. It added that, “[o]n repeated occasions, attention has been drawn to the obstruction by the Abkhaz authorities of the voluntary return of displaced populations” (*ibid.*, para. 4).

<sup>167</sup>. Cf. U.N. doc. CERD/C/GEO/CO/3, of 27.03.2007, paras. 4-5.

<sup>168</sup>. U.N. doc. CERD/C/RUS/CO/19, of 20.08.2008, para. 13.

<sup>169</sup>. Annexes (to the Memorial) 56, 59, 60, 62, 71.

<sup>170</sup>. Annexes (to the Memorial) 150, 152, 156, 158.

<sup>171</sup>. I.e., the Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe.

beyond the strict inter-State (diplomatic) outlook of traditional international law, for it is generally recognized that contemporary *jus gentium* is not at all insensitive to the fate of the populations.

152. Thus, it should not pass unnoticed that the aforementioned reports of the Monitoring Commission of the Parliamentary Assembly of the Council of Europe took the care to draw attention to the living conditions of the population affected. One of them, of late April 2009, asserted :

“the rule of customary international law that the well-being of the population in occupied areas has to be a basic concern for those involved in a conflict. (...) [T]he well-being of the population in occupied areas has to be a basic concern for those involved in a conflict (...)”<sup>172</sup>..

This was of great importance, - the report added, - in the light of the claims of “violations of human rights and international humanitarian Law” in the course of the war and during its aftermath<sup>173</sup>.

153. In a previous report, of late January 2009, the Monitoring Commission reiterated this warning (paras. 1, 46, 49, 50), in face of the originally recorded - by the UNHCR<sup>174</sup> - 133.000 internally displaced persons in Georgia<sup>175</sup>. Looking back in time, to the early nineties (the conflict of 1992, which also generated forced displacement), the estimated total of displaced persons in the area, throughout the nineties, raises to 222.000 persons, according to another report, of early October 2008, of the Monitoring Committee; this report estimates that, out of the war of August 2008 in particular, of the more than 30.000 displaced persons, 25.000 from South Ossetia and 6.000 from Abkhazia “are considered to be ‘permanently’ unable to return to their original place of residence”<sup>176</sup>.

154. This report, furthermore, deplores “the human suffering” caused by the war between Georgia and Russia, and resulting in particular from alleged “patterns of ethnic cleansing” in South Ossetia<sup>177</sup>, and other “human rights and humanitarian law violations committed by both sides in the context of the war, such as the intentional or avoidable killing or wounding of civilians, as well as destruction of property”<sup>178</sup>. In the course of 2009, two Committees of the Parliamentary Assembly of the Council of Europe issued reports, also focusing on the suffering of the population, ensuing from the humanitarian *consequences* of the war between Russia and Georgia.

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<sup>172</sup>. C.E./Parliamentary Assembly, *Follow-up Given by Georgia and Russia to Resolution 1647(2009)*, doc. 11.876, of 28.04.2009, p. 7, paras. 29-30.

<sup>173</sup>. *Ibid.*, p. 6, para. 23.

<sup>174</sup>. That is, the United Nations High Commissioner for Refugees. In addition to the UNHCR, also the International Committee of the Red Cross (ICRC) received requests members of families of those displaced or missing.

<sup>175</sup>. C.E./Parliamentary Assembly, *Implementation of Resolution 1633 (2008) on the Consequences of the War between Georgia and Russia*, doc. 11.800, of 26.01.2009, p. 15, para. 58, and cf. pp. 2, 14-15 and 22, paras. 1, 46, 49-50 and 104.

<sup>176</sup>. C.E./Parliamentary Assembly, *The Consequences of the War between Georgia and Russia*, doc. 11.724, of 01.10.2008, p. 3, para. 15, and cf. also p. 13, para. 36.

<sup>177</sup>. *Ibid.*, pp. 1 (summary) and 14-15, para. 42 and 54. In this respect, the Monitoring Committee’s report refers to “credible reports of acts of ethnic cleansing committed in Georgian villages in South Ossetia and the ‘buffer zone’ by irregular militia and gangs which the Russian troops failed to stop”; *ibid.*, p. 1 (summary).

<sup>178</sup>. *Ibid.*, p. 3, para. 11, and cf. also p. 16, para. 60.

155. The Monitoring Committee, in a new report, of mid-September 2009, regretted that “little tangible progress” had been achieved to address the consequences of that “tragic war”: there had not been a serious investigation of the alleged “ethnic cleansing of ethnic Georgians” and perpetrators had not been brought to justice<sup>179</sup>. The tensions in the whole region had not been reduced, - the report added, - negatively affecting its stability and “the security of all its inhabitants”; a pressing need remained of “urgent protection of human rights and humanitarian security”<sup>180</sup>.

156. For its part, the Committee on Migration, Refugees and Population, of the Parliamentary Assembly of the Council of Europe, in its report of early April 2009, also addressed the continuation of problems that kept on inflicting suffering on the population concerned, and its “ongoing fear” of a “renewal of hostilities” (para. 95), namely: a) detained and missing persons (paras. 39-46); b) forced displacement (para. 2); c) family reunification (paras. 25 and 45); and d) destruction of property and looting (para. 30)<sup>181</sup>.

157. These reports were accompanied by resolutions (related to the fact-finding work of the Monitoring Committee) of the Parliamentary Assembly of the Council of Europe<sup>182</sup>, which also referred to the sufferings of the victimized population. One of those resolutions (namely, resolution 1683 (2009), of 29.09.2009), after referring to the “tragic war” at issue (para. 1), made a cross-reference to the *Report* of the “Independent International Fact-Finding Mission on the Conflict in Georgia” (of September 2009), established by the European Union, into the origins and course of the conflict at issue (para. 2).

158. The aforementioned *Report* was also included in the documentation which Georgia presented to this Court in the course of the proceedings on the consideration of the preliminary objections interposed by the Russian Federation<sup>183</sup>. The *Report* began by stressing that, as a result of a decision taken by the Council of the European Union, this was “the first time in its history that the European Union has decided to intervene actively in a serious armed conflict”, setting up a Fact-Finding Mission as a follow-up to the conflict (p. 2). And it went on:

“(…) [M]ost people directly involved in the conflict remember human fates and human suffering first and foremost. The August 2008 armed conflict unfortunately saw many crimes committed in violation of International Humanitarian Law and Human Rights Law. (...)”

As for the conflict in South Ossetia and adjacent parts of the territory of Georgia, the Mission established that all sides to the conflict - Georgian forces, Russian forces and South Ossetian forces - committed violations of International Humanitarian Law and Human Rights Law. (...)” (paras. 25-26).

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<sup>179</sup>. C.E./Parliamentary Assembly, *The War between Georgia and Russia: One Year After*, doc. 12.010, of 14.09.2009, pp. 3 and 5, paras. 1 and 9-10, and cf. also p. 2, para. 6.

<sup>180</sup>. *Ibid.*, pp. 9 and 12, paras. 27 and 49. The report added that there was “a serious risk of a new exodus of ethnic Georgians from the Gali and Akhagori districts”; *ibid.*, p. 14, para. 64.

<sup>181</sup>. C.E./Parliamentary Assembly, *Humanitarian Consequences of the War between Georgia and Russia: Follow-Up Given to Resolution 1648(2009)*, doc. 11.859, of 09.04.2009, pp. 2, 8-11 and 16, paras. 2, 25, 30, 39-46 and 95.

<sup>182</sup>. E.g., resolution 1647 of 28.01.2009; resolution 1633 of 02.10.2008 (forced displacement, paras. 15 and 24(3)); resolution 1683 of 29.09.2009 (alleged “ethnic cleansing”, para. 9).

<sup>183</sup>. Cf. Annexes (to Georgia’s Written Statement on Preliminary Objections, of 01.04.2010) 120 and 121.

159. The *Report* added that the Mission had found “patterns of forced displacements of ethnic Georgians who had remained in their homes after the onset of hostilities” (para. 27). The violations of the rights of the human person mainly concerned “indiscriminate attacks” and “ill-treatment of persons”, forced displacement and destruction of property. As a result,

“Adding to the severity of the situation, there was a considerable flow of internally displaced persons (IDPs) and refugees. Reportedly about 135.000 persons fled their homes, most of them from regions in and near South Ossetia. While most persons fled to other parts of Georgia, a significant number also sought refuge in Russia. The majority fled because of the dangers and the insecurity connected to the conflict situation. But also numerous cases of forced displacements in violation of International Humanitarian and Human Rights Law were noted” (para. 28).

160. As we have seen, the fact-finding reports reviewed above characterized the armed conflict of 2008 between Georgia and Russia as a “tragic war”, marked, by all those who can remember it, by “human fates and human suffering” (cf. *supra*). Even earlier occurrences, well before the 2008 armed conflict, have been characterized as “tragic”. Very brief references to such characterization, by Georgia, can be found in the present Judgment, in paragraph 51 (“tragic events” of 1993), paragraph 57 (“tragic events” of 1998), and paragraph 65 (“tragic results” of occurrences of 2001). Yet, this dimension - the human factor - is not at all reflected in the present Judgment of the Court, in its own assessment of the facts for the consideration of the preliminary objections raised before it.

161. As to the first preliminary objection, for example, the Court spent 92 paragraphs to concede that, in its view, a legal dispute at last crystallized, on 10 August 2008 (para. 93), only *after* the outbreak of an open and declared war between Georgia and Russia! I find that truly extraordinary: the emergence of a legal dispute only *after* the outbreak of widespread violence and war! Are there disputes which are quintessentially and ontologically *legal*, devoid of any political ingredients or considerations? I do not think so. The same formalistic reasoning leads the Court, in 70 paragraphs, to uphold the second preliminary objection, on the basis of alleged (unfulfilled) “preconditions” of its own construction, - in my view at variance with its own *jurisprudence constante* and with the more lucid international legal doctrine.

162. Under human rights treaties, the individuals concerned, in situations of great vulnerability or adversity, need a higher standard of protection; the ICJ, in the *cas d’espèce*, lodged with it on the basis of the CERD Convention, applied, contrariwise, a higher standard of State consent for the exercise of its jurisdiction. The result was the remittance by the Court of the present dispute back to the contending parties. The cries of suffering of the victims (from all sides) of the conflict between the Russian Federation and Georgia of August 2008 seemed to have echoed in the *Palais des Droits de l’Homme* in Strasbourg, on the occasion of the decision on the admissibility of the case *Georgia versus Russia*<sup>184</sup>: not so in the Peace Palace here at The Hague.

163. This point can be added, in my perception, to the characterization of the present case as indeed a tragic one, above all from the perspective of the victimized families and individuals. Tragedy accompanies human existence; no one can be sure to be free from it, till passing the final threshold of his or her own life secure from pain and injustice, as Sophocles (497-405 b.C.) warned in one of his plays. It is not at all surprising that his masterpieces, like those of Aeschylus (525-

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<sup>184</sup>. Cf. ECtHR (Fifth Section), case *Georgia versus Russia* (application n. 13255/07, decision of 30.06.2009, paras. 1-51: the ECtHR, by a majority, declared the application admissible (without prejudging the merits of the case), and joined to the merits the [quite distinct] preliminary objections raised before it.

456 b.C.) shortly before him, and of his contemporary Euripides (484-406 b.C.), keep on being represented throughout the centuries, time and time again, from the Vth. century b.C. until our days, in distinct parts of the world, and in several idioms. Their messages are endowed with contemporaneity, - duly grasped by succeeding generations along the centuries everywhere, - as they touch on the unhappiness and sufferings proper of the human condition.

164. Amidst the violence portrayed in the representations of the perennial Greek tragedies of the Vth. century b.C., there emerged a timely warning as to destiny (as in Sophocles' *Oedipus Rex*, on in his *Ajax*), as to the unforeseeable along human existence, up to its end. Rationalism and so-called "realism" attempted to put an end to tragedy, and did not succeed at all, as human existence has been accompanied, since time immemorial, by irrationality and brutality. It is not surprising to find that, from the tragedies of ancient Greece, there also emerged a yearning and search for justice (as in Euripides' *Hecuba*, or in Aeschylus' *Oresteian Trilogy*, particularly *The Eumenides*), never abandoned until our days. Ever since, attention has been turned to the dictates of human conscience, even when they clashed with the rules of the law of the *polis* (as in Sophocles' *Antigone*); this tension led, in a language gradually crystallized throughout the subsequent centuries, to the opposition of natural law - emanating from the *recta ratio* - to positive law (*jus positum*), in the longing for justice.

165. The reckoned need for justice emanates, e.g., from the rituals of tribute to the dead and the victimized. Tragedy has, furthermore, evoked the process of learning through suffering (as, once again, in Aeschylus' *Oresteian Trilogy*, particularly *Agamemnon*). Tragedy has survived rationalism and so-called "realism", and, in regretting cruel, inhuman and degrading treatment (by all means unnecessary and abominable), - unfortunately inflicted until our days, - remains endowed with manifest contemporaneity. The victims of the "tragic war" of 2008 opposing Georgia to the Russian Federation, the fatal ones and their surviving relatives, and those forcefully displaced from their homes and incapable to return freely thereto ever since, have not yet found justice... As a Member of the International Court of Justice (seized of the case of their concern), I cannot but deeply regret this. *Summum jus, summa injuria*.

166. In this connection, may I further recall, also in temporal perspective, that, in the tragic inter-war period of the first half of the XXth. century, one of the forerunners of the international protection of human rights (almost forgotten in our hectic days), the Russian jurist André Nicolayévitch Mandelstam, deeply regretted that the international legal order of his time accorded "une complète impunité à l'État violant les droits les plus sacrés de l'individu", and longed for a new legal order which "obligerait l'État à reconnaître" to each human being a certain "minimum of rights". In his somehow premonitory warning of 1931, he further stated:

"L'horrible expérience de notre temps a démontré que les abus éventuels, qui pourraient naître de cette imprécision et de l'absence de sanctions, sont beaucoup moins à redouter que ceux qui résultent de la reconnaissance à l'État d'un pouvoir illimité sur la vie et la liberté de ses sujets"<sup>185</sup>.

## **XI. Human Rights Treaties as Living Instruments**

167. In the present Judgment on preliminary objections, the Court upholds the second preliminary objection relying upon its own strictly textual or grammatical reasoning relating to the compromissory clause (Article 22) of the CERD Convention (para. 135). Nowhere does one find considerations of a contextual nature, or else a reasoning that at least attempts to link such

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<sup>185</sup>. A.N. Mandelstam, *Les droits internationaux de l'homme*, Paris, Éds. Internationales, 1931, p. 138.

compromissory clause to the object and purpose of the CERD Convention, taking into account the substance and nature of the Convention *as a whole*. Nowhere does the Court consider the historical importance of the CERD Convention as a pioneering human rights treaty, and its continuing contemporaneity for responding to new challenges that are of legitimate concern of humankind, for the purpose of interpreting the compromissory clause contained therein.

168. Moreover, the reasoning of the Court appears to me as a static one, attempting to project into our days what the Court's majority *imagines* were the intentions of the draftsmen of the Convention (or of some of them) almost half a century ago, on the basis of a textual or grammatical argument. The Court notes that, "at the time" when the CERD Convention "was being elaborated, the idea of submitting to the compulsory settlement of disputes by the Court was not readily acceptable to a number of States" (para. 147). The Court then attempts to extract consequences therefrom, so as to advance today, in 2011, a reasoning that freezes or ossifies international law in the present domain of protection of the human person, that hinders its progressive development, and - ununderstandably - that limits its own jurisdiction!

169. Nowhere does the Court refer to the actual application that the CERD Convention has had in practice, throughout the last decades, so as to fulfill its object and purpose to the benefit of millions of human beings. Nowhere does the Court recognize that the CERD Convention, - like other human rights treaties, - is a *living* instrument, which has acquired a life of its own, independently from the assumed "intentions" of its draftsmen almost half a century ago. Even within the static outlook of the Court, already at the time the CERD Convention was being elaborated, there were those - as I have already indicated (cf. *supra*) - who supported the compulsory settlement of disputes by this Court, and even more so today, in 2011, in respect of obligations under the CERD Convention, and other human rights treaties.

170. May I here recall that, one and a half decades before the adoption of the CERD Convention, in his Dissenting Opinion in the *Anglo-Iranian Oil Company* case before the ICJ (Preliminary Objections, Judgment of 22.07.1952), Judge Alejandro Álvarez criticized traditional methods of treaty interpretation based on strict adherence to the letter of treaties (seen with an assumed "everlasting and fixed character") and too much reliance on "rules of grammar" without regard to the convention "as a whole" (p. 125). In his view,

"it is necessary to avoid slavish adherence to the literal meaning of legal or conventional texts (...). The important point is (...) to have regard above all to the *spirit* of such documents, to the intention of the parties in the case of a treaty, as they emerge from the institution or convention as a whole, and indeed from the new requirements of international life. (...) [A] convention, once established, acquires a life of its own and evolves not in accordance with the ideas or the will of those who drafted its provisions, but in accordance with the changing conditions of the life of peoples" (p. 126).

171. In addition, Judge A. Álvarez warned that, in his view, it was also:

"necessary to have recourse to the *spirit* of the Charter of the United Nations, of which the Statute of the Court forms an integral part (...), and to the general principles of the law of nations. (...)

(...) [T]he present Court is, according to its Statute, a Court of *justice* and, as such, and by virtue of the dynamism of international life, it has a double task: to *declare* the law and to *develop* the law" (pp. 131-132).

172. This applies even more forcefully in respect of human rights treaties, which are living instruments, and accompany the evolution of times and of the social *milieu* wherein are exercised the protected rights, so as to respond to new needs of protection of the human person. Their dynamic or evolutive interpretation finds expression in international case-law. A *locus classicus* in this respect can be found in the Advisory Opinion of the ICJ on *Namibia* (1971), wherein it is asserted that the mandates system (territories under mandate), and in particular the concepts incorporated into Article 22 of the Covenant of the League of Nations, "were not static, but were by definition evolutionary". And the ICJ significantly added that :

"its interpretation cannot remain unaffected by the subsequent development of the law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In this domain, as elsewhere, the *corpus juris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore" (para. 53).

173. In the same line of reasoning, in the domain of the international protection of human rights, in the case *Tyrer versus United Kingdom* (Judgment of 25.04.1978), the ECtHR asserted that the European Convention of Human Rights is "a living instrument" to be interpreted in the light of current living conditions (para. 31). The ECtHR pursued the same approach in other Judgments in leading cases, such as those of *Airey versus Irlanda* (of 09.10.1979), of *Marckx versus Belgium* (of 13.06.1979), of *Dudgeon versus United Kingdom* (of 22.10.1981).

174. The ECtHR has been pursuing this approach until the present time. Such evolutive interpretation bears witness of the incidence of the *temporal dimension* in the work of legal interpretation. In its Judgment of 28.07.1999, in the *Selmouni versus France* case, - to evoke another example, - after reiterating that the Convention is "a living instrument", that ought to be interpreted "in the light of present-day conditions", the European Court added that :

"the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" (para. 101).

175. More recently, to the same effect, the ECtHR has reiterated its approach, *ipsis literis*, in its Judgment of 07.01.2010 in the case of *Rantsev versus Cyprus and Russia* (para. 277). Already years earlier, the ECtHR duly clarified that its evolutive interpretation is not limited to the substantive norms of the Convention, but that it extends likewise to operational provisions such as the optional clauses (as existing prior to the entry into force of Protocol n. 11 to the Convention, on 01.11.1998).

176. Thus, in the case *célèbre* of *Loizidou versus Turkey* (Preliminary Objections, 1995), the ECtHR again pointed out that the European Convention, as "a constitutional instrument of European public order" (para. 75), is "a living instrument" to be interpreted in the light of contemporary conditions. It added that not even the (then) optional clauses - on the acceptance of the right of individual petition (Article 25) and the Court's compulsory jurisdiction (Article 46) -

could be interpreted only in the light of what could have been the intentions of their draftsmen more than forty years earlier<sup>186</sup>.

177. The same understanding has been advanced, in the American continent, by the IACtHR, which espoused, likewise, this evolutive interpretation, of the American Convention on Human Rights, in, e.g., its Judgment (of 18.08.2000) in the case of *Cantoral Benavides versus Peru* (para. 99). And, in its pioneering 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), after evoking (para. 113) the Advisory Opinion of the ICJ on *Namibia* of 1971, as well as the relevant case-law of the ECtHR, the IACtHR stated that :

“(...) human rights treaties are living instruments whose interpretation ought to accompany the evolution of times and the current living conditions.

The *corpus juris* of international human rights law comprises a set of international instruments of varied contents and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has exercised a positive impact on international law, in the sense of affirming and developing the aptitude of this latter to regulate the relations between States and the human beings under their respective jurisdictions. Accordingly, this Court ought to adopt an adequate approach to consider the question under examination in the framework of the evolution of the fundamental rights of the human person in contemporary international law” (paras. 114-115).

178. Earlier on, in its Advisory Opinion n. 10 (of 14.07.1989), the IACtHR pointed out that it would proceed to interpret the 1948 American Declaration on the Rights and Duties of Man not in the light of what was thought of it in 1948, at the time of its adoption, but "in the present moment, in face of what is today the inter-American system" of protection, taking into account the "evolution experienced since the adoption of the Declaration" (para. 37). Thus, the interpretation pursued by the ECtHR and the IACtHR of the respective human rights treaties is not a static one, clinging to State consent expressed at the time of their adoption, but rather evolutive, taking into consideration the advances achieved in the *corpus* of human society in the protection of human rights throughout the years.

179. The present case before the ICJ concerns the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*. The CERD Convention is, likewise, a living instrument. It is a truly pioneering human rights treaty, having preceded in time the two 1966 U.N. Covenants on Human Rights. Historical accounts give notice of the “enthusiasm” and high expectations with which the CERD Convention’s coming into being “was greeted”<sup>187</sup>. Its draftsmen kept in mind, *inter alia*, the ground-breaking provisions of the 1948 Universal Declaration of Human Rights, to the point of making them part of the law of the CERD Convention

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<sup>186</sup>. The ECtHR pondered that even if their intentions had been in the sense of permitting restrictions (other than those *ratione temporis*) under those optional clauses - what in the case was not demonstrated, - this element would not have been decisive (para. 71); on the contrary, the practice of the States Parties along the years pointed in the sense of the acceptance without restrictions of the aforementioned optional clauses of the Convention.

<sup>187</sup>. Egon Schwelb, “The International Convention on the Elimination of All Forms of Racial Discrimination”, 15 *International and Comparative Law Quarterly* (1966) p. 997.



itself, thus conceived as a “maximalist” human rights treaty<sup>188</sup>. The CERD Convention, endowed with universality<sup>189</sup>, was soon to occupy a prominent place in the *law of the United Nations* itself.

180. Ever since its adoption, the CERD Convention faced and opposed a grave violation of an obligation of *jus cogens* (the absolute prohibition of racial discrimination), generating obligations *erga omnes*, and it exerted influence on subsequent international instruments at universal (U.N.) level<sup>190</sup>. Throughout the years, its international supervisory organ, the CERD Committee, has given its contribution to the contemporary *corpus juris gentium* on equality and non-discrimination<sup>191</sup>. The fundamental principle of equality and non-discrimination was propounded, in one of the rare moments or glimpses of lucidity of the XXth. century, by the 1948 Universal Declaration of Human Rights, and echoed in all quarters of the world:

“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” (Article 1).

This principle lies in the foundations, is one of the pillars, not only of the CERD Convention, but of the whole International Law of Human Rights<sup>192</sup>; it belongs, in my view, to the realm of international *jus cogens*.<sup>193</sup>

181. As a result of the present Judgment of the Court in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, wherein it upheld the second preliminary objection, the Court deprived itself of the determination whether the present dispute, - which has victimized so many people, - falls or not under the CERD Convention. I firmly disagree with the whole reasoning of the Court, and its conclusions as to the second preliminary objection, and as to its jurisdiction, on the basis of the arguments and elements set forth in the present Dissenting Opinion. The unfortunate outcome of the present case discloses that, despite all the advances achieved for human dignity under the CERD Convention, there is still a long way to go: the struggle for the prevalence of human rights is never-ending, like in the myth of Sisyphus.

182. This, in turn, endows the CERD Convention, as a living instrument, adopted four and a half decades ago, with an all-enduring contemporaneity. Ever since the adoption of the CERD Convention on 21.12.1965, and its opening to signature on 07.03.1966, two World Conferences to Combat Racism and Racial Discrimination were held, in Geneva, in 1978 and 1983. One decade later, the final documents of the II World Conference on Human Rights (1993), - the Vienna Declaration and Programme of Action, - stated that:

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<sup>188</sup>. *Ibid.*, pp. 1024 and 1057, and cf. pp. 998, 1003, 1025-1026 and 1028.

<sup>189</sup>. N. Lerner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination*, Alphen aan den Rijn, Sijthoff & Noordhoff, 1980, pp. IX and 11.

<sup>190</sup>. Cf. N. Lerner, *Group Rights and Discrimination in International Law*, 2nd. ed., The Hague, Nijhoff, 2003, pp. 59, 71 and 177.

<sup>191</sup>. Cf., *inter alia*, e.g., W. Vandenhoe, *Non-Discrimination and Equality in the View of the U.N. Human Rights Treaty Bodies*, Antwerpen, Intersentia, 2005, pp. 1-293; and, as to the normative level, cf., e.g., J. Symonides (ed.), *The Struggle against Discrimination*, Paris, UNESCO, 1996, pp. 3-313.

<sup>192</sup>. Cf., to this effect, *inter alia*, T. Opsahl, *Law and Equality*, Oslo, Ad Notam Gyldendal, 1996, pp. 167-176.

<sup>193</sup>. IACtHR, Advisory Opinion n. 18 (of 17.09.2003), on the *Juridical Condition and Rights of Undocumented Migrants*, paras. 97-101, and Concurring Opinion of Judge A.A. Cançado Trindade, paras. 65-89.

“ (...) The speedy and comprehensive elimination of all forms of racism and racial discrimination, xenophobia and related intolerance is a priority task for the international community. (...)

(...) The World Conference on Human Rights emphasizes the importance of giving special attention, including through intergovernmental and humanitarian organizations, and finding lasting solutions, to questions related to internally displaced persons including their voluntary and safe return and rehabilitation. (...)

(...) The World Conference on Human Rights calls on all States to take immediate measures, individually and collectively, to combat the practice of ethnic cleansing to bring it quickly to an end. Victims of the abhorrent practice of ethnic cleansing are entitled to appropriate and effective remedies”,<sup>194</sup>.

183. The CERD Convention seems to grow in importance if we consider that it applies to distinct kinds of relations, not only to those of individuals *vis-à-vis* the public power of the State, but also to inter-individual or inter-group relations. Also significant is the fact that it addresses situations affecting individuals or groups living – or surviving – in considerable vulnerability or adversity. In any case, the relations it purports to regulate go well beyond the strictly inter-State dimension, - a point which this Court appears to experience much difficulty to grasp. This Court has to accompany the evolving international law in this domain of protection, when called upon to adjudicate cases under human rights treaties, like the present one.

184. Eight years after the adoption of the 1993 Vienna Declaration and Programme of Action by the II U.N. World Conference on Human Rights (so present in my personal memories), it was then the turn of the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 2001) to urge States, in its adopted Declaration, to accede to the CERD Convention “as a matter of urgency, with a view to universal ratification by the year 2005” (para. 75)<sup>195</sup>. This call promptly repercutated in the U.N. General Assembly itself<sup>196</sup>, and in the work of the CERD Committee<sup>197</sup>.

185. The Durban Declaration and Programme of Action underlined the urgency of “addressing the root causes of displacement” and of finding durable solutions to it (para. 54), and called for access to justice – on a basis of equality – for “victims of discrimination” and “the most vulnerable groups” (paras. 42 and 164(f)). Furthermore, it reiteratedly evoked the human “tragedies of the past” (paras. 98-101 and 106), and some “appalling tragedies in the history of humanity” (para. 13), so as to extract lessons therefrom in order “to avert future tragedies” (para. 57). The work of the 2001 U.N. World Conference seems to have been undertaken under the shadows and fears of the everlasting human tragedy, proper of the human condition itself.

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<sup>194</sup>. Paras. I.15, I.23 and II.24, respectively, and cf. also para. I.28 (part I corresponds to the Vienna Declaration, and part II to the Programme of Action).

<sup>195</sup>. May it be recalled that the Russian Federation [then the USSR] became Party to the CERD Convention on 04.02.1969, whilst Georgia did so three decades later, on 02.06.1999.

<sup>196</sup>. Cf., e.g., General Assembly resolutions 61/149, of 19.12.2006, and 62/220, of 22.12.2007, on the comprehensive implementation of, and follow-up to, the Durban Declaration and Programme of Action, in the endeavours towards the elimination of all (including new) forms of racial discrimination and related intolerance, including *de facto* segregation.

<sup>197</sup>. The CERD Committee’s “general recommendation” XXVIII, of 19.03.2002, for example, pointed out that the Durban Declaration and Programme of Action reaffirmed the “fundamental values” underlying the CERD Convention, and was directly related to the implementation of this latter.

## **XII. A Recapitulation: Concluding Observations**

186. From all the preceding considerations, it is crystal clear that my own position, in respect of all the points which form the object of the present Judgment on the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, stands in clear opposition to the view espoused by the Court's majority. And it does not squarely fit into the conceptual framework of the dissenting minority group either, it goes beyond it. My dissenting position is grounded not only on the assessment of the evidence produced before the Court, to which I of course attribute importance, but above all on issues of principle, to which I attach even greater importance. I have thus felt obliged, in the faithful exercise of the international judicial function, to lay the foundations of my dissenting position in the *cas d'espèce* in the present Dissenting Opinion. I deem it fit, at this stage, to recapitulate all the points of my dissenting position, expressed herein, for the sake of clarity, and in order to stress their interrelatedness.

187. *Primus*: Consideration of compromissory clauses, such as the one of Article 22 of the CERD Convention, cannot be dissociated from the larger framework of the compulsory jurisdiction of the Hague Court (PCIJ and ICJ). *Secundus*: As to the genesis of the matter, the 1920 Advisory Committee of Jurists was clearly in favour of compulsory jurisdiction, which found an obstacle in the distinct position taken by the political organs of the League of Nations: hence the amended jurisdictional clause, and the following co-existence of the optional clause and the compromissory clauses of various kinds as basis for the exercise of compulsory jurisdiction by the Hague Court.

188. *Tertius*: Such co-existence of compromissory clauses with the mechanism of the optional clause was maintained by the 1945 San Francisco Conference, despite the acknowledgement of the 1945 Commission of Jurists's preference for the establishment of the ICJ's compulsory jurisdiction; the force of inertia then prevailed. *Quartus*: The ensuing State practice disclosed the dissatisfaction of international legal doctrine with the States' reliance on their own terms of consent in approaching the optional clause, accompanied by greater hope that compromissory clauses would contribute more effectively to the realization of international justice.

189. *Quintus*: From the fifties to the eighties international legal doctrine endeavoured to overcome the vicissitudes of the "will" of States and to secure broader acceptance of the World Court's compulsory jurisdiction, on the basis of compromissory clauses. *Sextus*: Subsequently (from the late eighties onwards), a more lucid trend of international legal doctrine continued to pursue the same old ideal, relating the compromissory clauses at issue to the *nature* and *substance* of the corresponding treaties; such legal thinking benefitted from the gradual accumulation of experience in the interpretation and application of human rights treaties, such as the CERD Convention in the present case.

190. *Septimus*: The advent of human rights treaties contributed to enrich the contemporary *jus gentium*, in enlarging its aptitude to regulate relations not only at inter-State level, but also at *intra*-State level, as acknowledged in the present case by the contending parties themselves (Georgia and the Russian Federation), in the responses they provided to a question I deemed it fit to put to both of them at the end of the public sitting before this Court of 17 September 2010. *Octavus*: In the present case, the contending parties themselves have thus duly taken into account the *nature* of the human rights treaty at issue, the CERD Convention; only the Court has not.

191. *Nonus*: The hermeneutics of human rights treaties, faithful to the general rule of interpretation *bona fides* of treaties (Article 31(1) of the two Vienna Conventions on the Law of

Treaties, of 1969 and 1986), bears in mind the three component elements of the text in the current meaning, the context, and the object and purpose of the treaty at issue, *as well as* the *nature* of the treaty wherein that clause (optional or compromissory) for compulsory jurisdiction appears. *Decimus*: Underlying the general rule of treaty interpretation is the principle *ut res magis valeat quam pereat* (the so-called *effet utile*) whereby States Parties to human rights treaties ought to secure to the conventional provisions *the appropriate effects* at domestic law level; this principle applies not only in relation to *substantive* norms of those treaties, but also in relation to *procedural* norms, such as the one pertaining to the acceptance of the compulsory jurisdiction in contentious matters of the international judicial organs of protection.

192. *Undecimus*: International human rights case-law has constantly stressed that provisions of human rights treaties be interpreted in a way to render the safeguard of those rights *effective*; in this connection, Article 22 of the CERD Convention does not set forth any mandatory “preconditions” for recourse to the ICJ. *Duodecimus*: To set forth such “preconditions” where they do not exist, amounts to erecting an undue and groundless obstacle to access to justice under a human rights treaty. *Tertius decimus*: In its own *jurisprudence constante* (of both the PCIJ and the ICJ), the Court has clarified that prior negotiations are not a mandatory precondition for the exercise of its jurisdiction.

193. *Quartus decimus*: In the present case, the Court diverted from its own *jurisprudence constante*, in erecting a precondition of the kind, unduly limiting its own jurisdiction. *Quintus decimus*: Moreover, in the present case, in its earlier Order on Provisional Measures of 15.10.2008, the ICJ had reiterated its prior understanding to the effect that previous negotiations did not amount to a mandatory precondition for the exercise of its jurisdiction; it could not thus proceed now to review entirely its own *res interpretata* (keeping in mind the principle *venire contra factum/dictum proprium non valet*).

194. *Sextus decimus*: The Court has to remain attentive to the *basic rationale* of human rights treaties, since to place State consent above the fundamental values those treaties embody will lead it nowhere. *Septimus decimus*: The realization of justice under a human rights treaty, in a case like the present one, can only be achieved taking due account and valuing the sufferings and needs of protection of the population. *Duodevicesimus*: State consent plays its role when a State becomes a party to a treaty; it is not, however, an element of treaty interpretation.

195. *Undevicesimus*: Human rights treaties are *living* instruments to be interpreted in the light of current living conditions, so as to respond to new needs of protection of human beings. *Vicesimus*: This applies even more forcefully in respect of a treaty like the CERD Convention, centered on the fundamental principle of equality and non-discrimination, which belongs, in my view, to the realm of international *jus cogens*. *Vicesimus primus*: In contemporary *jus gentium*, the conditions of living of the population has become a matter of legitimate concern of the international community as a whole, and contemporary *jus gentium* is not indifferent to the sufferings of the population. *Vicesimus secundus*: Given the truly irreparable damages inflicted upon human beings by means of grave violations of human rights and of International Humanitarian Law, judicial recognition of their victimization is an imperative of justice, which comes at least to *alleviate* their sufferings.

196. This is not the end of the matter. All this brings to the fore an old dilemma, with a direct bearing on the present and future of international justice. This old dilemma cannot here be revisited on the basis of old dogmas, erected in times past which no longer exist, on the basis of notions of the “will” of the State, or its “interests” or intentions. To insist on such dogmas would present no dilemma, as it would lead to the freezing or ossification of International Law. There is

nothing more alien or antithetical to human rights protection than such dogmas. The dilemma we still face today can only be revisited, in my perception, in the framework of contemporary *jus gentium*.

### **XIII. Epilogue: An Old Dilemma Revisited, in the Framework of Contemporary *Jus Gentium***

197. As a result of the present Judgment on Preliminary Objections in the *cas d'espèce*, the Court ends up by remitting the present dispute back to the contending parties, for its settlement by whatever other means, political or otherwise, they may wish to take or use. The Court has thereby deprived itself, *inter alia*<sup>198</sup>, of the determination, at a possible subsequent merits stage, of whether or not the occurrences referred to in the complaint lodged with it, which caused so many victims, fall or not under the provisions of the relevant provisions of the CERD Convention. The present decision undermines the appropriate effects of the CERD Convention (including its compromissory clause in Article 22) and the compulsory jurisdiction of the Court itself thereunder.

198. The Court cannot remain hostage of State consent. It cannot keep displaying an instinctive and continuing search for State consent, - as it so ostensibly did in its decisions, e.g., in the *East Timor* case (Portugal *versus* Australia, Judgment of 30.06.1995), and in the case of *Armed Activities on the Territory of the Congo* (Congo *versus* Rwanda, Judgment of 03.02.2006), - to the point of losing sight of the imperative of realization of justice. The moment State consent is manifested is when the State concerned decides to become a party to a treaty, - such as the human rights treaty in the present case, the CERD Convention. The hermeneutics and proper application of that treaty cannot be continuously subjected to a recurring search for State consent. This would unduly render the letter of the treaty dead, and human rights treaties are meant to be living instruments, let alone their spirit.

199. It is widely known that the founding fathers of the law of nations (the *droit des gens*) never visualized the individual consent of the emerging States as the *ultimate* source of their legal obligations. This point was aptly grasped, e.g., by James L. Brierly, in his thematic course delivered at The Hague Academy of International Law in 1928. He recalled, in his sharp criticism of positivist dogmas, that Hugo Grotius, for example, acknowledged that mere consent could never be the *ultimate* source of legal obligations; a contract or a treaty (at domestic or international law levels), had binding effects on the parties by virtue of the underlying general rule of law of *pacta sunt servanda*<sup>199</sup>.

200. Three decades later his course was republished, in book form, of the kind of "collected papers", wherein J.-L. Brierly's view appeared reiterated. He first reviewed the understanding of the basis of obligation in international law in the distinct theories of some of his main predecessors and contemporaries (e.g., L. Duguit's *notion of solidarity*, H. Krabbe's *sense of right*, H. Kelsen's (hypothetical) *fundamental norm*, A. Verdross's idea of *objective justice*), before expounding his own. To J.-L. Brierly, more fundamental than the distinction between law and ethics is their interrelationship: obligation in general belongs to the realm of ethics, it has to do with an objective legal order, and the search for its basis takes us onto a metajuridical plane. He ended up by

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<sup>198</sup>. The Court further deprived itself, as a result of its decision in the *cas d'espèce*, of addressing the relevant question, also raised before it (in another preliminary objection), of the extra-territorial application of human rights treaties, on which there is already a growing and significant international case-law, proper of our times, heralding the advent of the new *jus gentium*, centered on the protection of the human person.

<sup>199</sup>. J.-L. Brierly, "Le fondement du caractère obligatoire du Droit international", 23 *Recueil des Cours de l'Académie de Droit International de La Haye* (1928) pp. 478-479.

expressing his belief that the “resurgence” of natural law thinking “seems to open a vista full of hope for legal science”<sup>200</sup>.

201. James Brierly and his predecessors and contemporaries (such as L. Duguit, H. Krabbe, H. Kelsen, A. Verdross, among others) lived in a time when a respectful segment of international legal doctrine was still attentive to the issue of the *foundations* of our discipline and the *validity* of international legal obligations. International legal scholars in those days had more time to devote themselves to the fulfillment of the needs of the spirit; their energies were not yet diverted to, or consumed by, the distractions of the ages of television and internet. Modernity and post-modernity, with their characteristic pragmatism, seem to have obscured the goal of fulfillment of those needs, and to have left most people today apparently looking far too busy all the time, doing nothing substantial, certainly not thinking.

202. The outcome of the present case before the ICJ, concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, is the ineluctable consequence of inaptly and wrongfully giving pride of place to State consent, even above the fundamental values at stake, underlying the CERD Convention, which call for the realization of justice. In effect, the faith in the realization of international justice has been restated time and time again, along the history of this Court. In concluding this Dissenting Opinion, I allow myself to recall, in this connection, statements made, in the Hague Court, on three historical occasions. At the inaugural sitting of the PCIJ, on 15.02.1922, the Court’s President, Judge B.C.J. Loder, declared that the Hague Court just established:

“occupe dans la Société des Nations une place analogue à celle du pouvoir judiciaire dans beaucoup d’États. (...) ”

(...) La création de la Cour Permanente marque, en effet, l’avènement d’une ère nouvelle dans la civilisation mondiale. Il est de première importance de se rendre parfaitement compte de la valeur de ce fait. (...) ”

(...) L’égalité des États devant le droit et la justice est maintenant reconnue et franchement enregistrée dans le Pacte de la Société des Nations. (...) Le premier acte de cette Société a été de créer une Cour de Justice, une Cour appelée à faire droit, droit entre des États”<sup>201</sup>.

203. Over two decades later, at the inaugural sitting of the ICJ, on 18.04.1946, the Court’s President, Judge J.G. Guerrero, recalling the period of the II world war, declared:

“(...) I shall never forget that day - July 16th, 1940 - when, in the early hours of a morning veiled with a mist of sadness and grief, we slowly left the station of this martyred city, with tears in our eyes and our hearts full of anguish. (...) ”

(...) The place of this Permanent Court of International Justice, which left The Hague in 1940, is now taken by the International Court of Justice. But between the old and the new Courts the bonds have remained so close that it is hard to believe that there has really been a change. (...) ”

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<sup>200</sup>. J.-L. Brierly, *The Basis of Obligation in International Law and Other Papers*, Oxford, Clarendon Press, 1958, p. 67, and cf. pp. 10, 16, 18, and 64.

<sup>201</sup>. CPJI, *Discours présidentiel prononcé à l’occasion de l’ouverture solennelle de la Cour Permanente de Justice Internationale par M. le Dr. B.C.J. Loder, Président de la CPJI*, La Haye, 15.02.1922, pp. 7, 16 and 18 (from the ICJ archives).

For this reason, though the International Court of Justice is one of the principal organs of the United Nations Organization, its Statute is based on that of the Permanent Court of International Justice. (...) We shall preserve its continuity (...). The activities of the Court (...) will be dependent on the readiness of governments to refer to the international jurisdiction disputes capable of judicial settlement (...)”<sup>202</sup>.

204. On the occasion of the 50th anniversary of the inauguration of the international judicial system, over two and a half decades later, at a special sitting of the ICJ, on 27.04.1972, the Court’s President, Judge M. Zafrulla Khan, observed that the optional clause of acceptance of compulsory jurisdiction had

“achieved a reconciliation between the desires of those who sought to achieve a full system of compulsory jurisdiction at the international level, and the scruples and hesitations of those who were afraid that compulsory submission to the Tribunal might involve infringement of sovereignty or injury to the vital interests of a State. (...)

(...) [T]he conditions of international life today render indispensable the existence and operation of an international tribunal or tribunals for the maintenance of peace. (...)

(...) The Court must apply the law and cannot change it; but in applying the law the Court must interpret it and also take note of changes and developments in the law. This process is a powerful factor of progress. (...)

(...) The lesson to be drawn from 50 years experience of the international judicial system is that at the present stage of development of the international community, recourse to a tribunal for the settlement of international disputes is essential (...). The International Court of Justice lays no claim to a monopoly of international judicial settlement; Article 95 of the United Nations Charter expressly preserves the right of Members of the United Nations to entrust a solution of their differences to other tribunals.

(...) The Court is the judge for and over sovereign States only in so far as they choose; but States which choose not to submit to its jurisdiction must face the judgment none of us can avoid: the judgment of history”<sup>203</sup>.

205. It is high time for the World Court to give concrete expression, - keeping in mind those statements of faith in the realization of international justice, - of commitment to its mission, as I perceive it, when resolving cases, like the present one concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, in the exercise of its jurisdiction on the basis of human rights treaties, bearing in mind the *rationale*, the nature and substance of those treaties, with all the juridical consequences that ensue therefrom. This Court cannot keep on privileging State consent above everything, time and time again, even after such consent has already been given by States at the time of ratification of those treaties.

206. The Court cannot keep on embarking on a literal or grammatical and static interpretation of the terms of compromissory clauses enshrined in those treaties, drawing “preconditions” therefrom

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<sup>202</sup>. ICJ, *Inaugural Sitting of the International Court of Justice* (Speech by H.E. Mr. J.G. Guerrero, President of the Court), The Hague, 18.04.1946, pp. 16-17 (from the ICJ archives).

<sup>203</sup>. ICJ, *Address by the President of the International Court of Justice [ Judge M. Zafrulla Khan,] at a Special Sitting of the Court to Mark the 50th Anniversary of the Inauguration of the International Judicial System*, The Hague, 27.04.1972, pp. 5, 7, 10 and 12-13 (from the ICJ archives).

for the exercise of its jurisdiction, in an attitude remindful of traditional international arbitral practice. When human rights treaties are at stake, there is need, in my perception, to overcome the force of inertia, and to assert and develop the compulsory jurisdiction of the ICJ on the basis of the compromissory clauses contained in those treaties.

207. After all, it is human beings who are ultimately being protected thereunder, and such compromissory clauses are to be approached in their ineluctable relationship with the *nature* and *substance* of the human rights treaties at issue, in their entirety. From the standpoint of the *justiciables*, the subjects (*titulaires*) of the protected rights, compromissory clauses such as that of Article 22 of the CERD Convention are directly related to their *access to justice*, even if the complaints thereunder are lodged with the ICJ by States Parties to those human rights treaties.

208. The *justiciables* are, ultimately, the human beings concerned. From this humanist optics, which is well in keeping with the creation itself of the Hague Court (PCIJ and ICJ), to erect a mandatory “precondition” of prior negotiations for the exercise of the Court’s jurisdiction amounts to erecting, in my view, a groundless and most regrettable obstacle to justice. I have already pointed out, in respect of the victims of the “tragic war” of 2008 opposing Georgia to the Russian Federation - the fatal victims and their close relatives as well as those forcefully displaced from their homes and incapable of freely and safely returning thereto, - that tragedy has kept its contemporaneity throughout the centuries (paras. 160-162).

209. Despite the extraordinary advances in scientific knowledge, no antidote has yet been discovered to protect man against himself, against his limitless capacity to inflict injustice and suffering upon his fellow human beings. The ICJ cannot remain indifferent to such injustice of “human fates”, and to human suffering. It cannot keep on overlooking tragedy. As this latter persists, being seemingly proper to the human condition, the need also persists to *alleviate* human suffering, by means of the *realization of justice*. This latter is an imperative which the World Court is to keep in mind. This goal - the realization of justice - can hardly be attained from a strict State-centered voluntarist perspective, and a recurring search for State consent. This Court cannot, in my view, keep on paying lip service to what it assumes as representing the State’s “intentions” or “will”.

210. The position and the thesis I sustain in the present Dissenting Opinion is that, when the ICJ is called upon to settle an inter-State dispute on the basis of a human rights treaty, it is bound to secure a proper interpretation and application of that treaty, bearing in mind its special nature and its substance, in its entirety, and the fact that it is intended to protect rights of the human person at *intra-State* level. The proper interpretation of human rights treaties (in the light of the canons of treaty interpretation of Articles 31-33 of the two Vienna Conventions on the Law of Treaties, of 1969 and 1986) covers, in my understanding, their *substantive as well as procedural provisions*, thus including a provision of the kind of the compromissory clause set forth in Article 22 of the CERD Convention. This is to the ultimate benefit of human beings, for whose protection human rights treaties have been celebrated, and adopted, by States. The *raison d’humanité* prevails over the old *raison d’État*.

211. In the present Judgment, the Court entirely missed this point: it rather embarked on the usual exaltation of State consent, labelled, in paragraph 110, as “the fundamental principle of consent”. I do not at all subscribe to its view, as, in my understanding, consent is not “fundamental”, it is not even a “principle”. What is “fundamental”, i.e., what lays in the *foundations* of this Court, since its creation, is the imperative of the *realization of justice*, by means of compulsory jurisdiction. State consent is but a rule to be observed in the exercise of compulsory jurisdiction for the realization of



justice . It is a means, not an end, it is a procedural requirement, not an element of treaty interpretation; it surely does not belong to the domain of the *prima principia*. This is what I have been endeavouring to demonstrate in the present Dissenting Opinion.

212. Fundamental principles are those of *pacta sunt servanda*, of equality and non-discrimination (at substantive law level), of equality of arms (*égalité des armes* – at procedural law level). Fundamental principle is, furthermore, that of humanity (permeating the whole *corpus juris* of International Human Rights Law, International Humanitarian Law, and International Refugee Law). Fundamental principle is, moreover, that of the dignity of the human person (laying a foundation of International Human Rights Law). Fundamental principles of international law are, in addition, those laid down in Article 2 in the Charter of the United Nations<sup>204</sup>.

213. These are some of the true *prima principia*, which confer to the international legal order its ineluctable axiological dimension. These are some of the true *prima principia*, which reveal the values which inspire the *corpus juris* of the international legal order, and which, ultimately, provide its foundations themselves. *Prima principia* conform the *substratum* of the international legal order, conveying the idea of an *objective* justice (proper of natural law). In turn, State consent does not belong to the realm of the *prima principia*; recourse to it is a concession of the *jus gentium* to States, is a rule to be observed (no one would deny it) so as to render judicial settlement of international disputes viable.

214. Such rule or procedural requirement will be reduced to its proper dimension the day one realizes that *conscience stands above the will*. This sums up an old dilemma (faced by the Court as well as by States appearing before it), revisited herein, in the framework of contemporary *jus gentium*. To this Court, conceived as an International Court of *Justice*, the *realization of justice* remains an ideal which, in the adjudication of human rights cases brought into its cognizance, has not yet been achieved, - as sadly disclosed by the present Judgment. The formalism and rituals of inter-State litigation (which in 2011 seem to keep on fascinating the legal profession) should definitively yield to the ascertainment of the imperative of the *realization of justice* at international level. After all, there is nothing so invincible as an ideal, - such as that of the realization of justice, - which has not yet been realized: it keeps on banging human conscience until it blossoms and sees the light of the day.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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<sup>204</sup>. And restated in the U.N. General Assembly resolution 2625(XXV) of 24.10.1970, containing the U.N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.