SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I vote in favour of the adoption by the Inter-American Court of Human Rights of the present Judgment on Preliminary Objections in the case of *Hilaire versus Trinidad and Tobago*, which, in my view, represents a significant contribution of the International Law of Human Rights to the evolution of a specific aspect of contemporary International Law, namely, that pertaining to the international compulsory jurisdiction (based on the acceptance of the optional clause of compulsory jurisdiction) of an international tribunal of human rights. Given the transcendental importance of this matter, I feel obliged to present, as the juridical foundation of my position on the matter, the thoughts that I allow myself to develop in this Separate Opinion, concerning the following points: first, the prior question of the *compétence de la compétence* (*Kompetenz Kompetenz*) of the Inter-American Court; second, the origin and the evolution of the institute of the optional clause of compulsory jurisdiction, and the examination of the international practice on the matter; third, an evaluation *lex lata* of the international compulsory jurisdiction; fourth, the legal effect of the precise formulation of the optional clause in Article 62 of the American Convention on Human Rights (*numerus clausus*); and fourth, my considerations *de lege ferenda* on the international compulsory jurisdiction in the framework of the American Convention.

I. The Prior Question: The *Compétence de la Compétence* of the Inter-American Court of Human Rights.

2. The starting-point of my personal reading of the meaning and extent of the present Judgment of the Inter-American Court in the case of *Hilaire versus Trinidad and Tobago* lies in the prior question of the inherent faculty of the Court to determine the extent of its own competence. In fact, the instruments of acceptance of the optional clause of compulsory jurisdiction of international tribunals presuppose the admission, on the part of the States which present them, of the competence of the international tribunal at issue to resolve any controversy pertaining to its own jurisdiction, - this being a basic principle of international procedural law[1]. That is a competence which is inherent to every international tribunal, which fulfils an imperative of juridical security, as the determination of the extent of its own jurisdiction cannot be in the hands of the States Parties[2].

3. A reservation or objection or any other act interposed by the State aiming at safeguarding to itself the last word in relation to any aspect of the competence of the Court is not only innocuous, but also invalid, as in any circumstances the Court retains the *compétence de la compétence*. This is what is inferred from the Judgments on Preliminary Objections which the Court has just adopted in the cases of *Hilaire*, *Benjamin* and *Constantine*, concerning Trinidad and Tobago, as well as the previous Judgments on Competence in the cases of the *Constitucional Tribunal* and *Ivcher*

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1. Inter-American Court of Human Rights (IACtHR), Advisory Opinion Consultiva n. 15, of 14.11.1997, on the *Reports of the Inter-American Commission on Human Rights* (1997), Series A, n. 15, Concurring Opinion of Judge A.A. Cançado Trindade, pp. 87 and 97-98, pars. 7 and 37.

2. It is as guardian and master of its own jurisdiction (*jurisdictio*, *jus dicere*, the power to declare the Law) that, to the Inter-American Court, as judicial organ of supervision of the American Convention, is reserved the role of establishing the juridical bases for the construction of an international *ordre public* of observance and safeguard of human right, in the ambit of the application of the Convention. IACtHR, Resolution on Provisional Measures of Protection (of 25.05.1999), case *James et all versus Trinidad and Tobago*, Concurring Opinion of Judge A.A. Cançado Trindade, pars. 7-8.

Bronstein (1999), concerning Peru. This important case-law of protection of the Inter-American Court has, thus, discarded an analogy with the permissive practice of the States under the optional clause of compulsory jurisdiction of the International Court of Justice (Article 36(2) of the Statute of this latter). May I pass on to the examination of this specific point in historical perspective, so as to disclose the meaning and extent of what has been decided by the Inter-American Court.

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

4. The optional clauses of recognition of the contentious jurisdiction of the European Court (prior to Protocol n. 11)[3] and the Inter-American Court of Human Rights found inspiration in the model of the optional clause of compulsory jurisdiction of the ICJ, - a formula originally conceived more than 80 years ago. Despite the common origin, in search of the realization of the ideal of international justice, the *rationale* of the application of the optional clause has been interpreted in a fundamentally distinct way, on the one hand in inter-State litigation, and on the other hand in that of human rights. In the former, considerations of contractual equilibrium between the Parties, of reciprocity, in the light of the juridical equality of the sovereign States have prevailed to date; in the latter, there has been a primacy of considerations of *ordre public*, of the collective guarantee exercised by all the States Parties, of the accomplishment of a common goal, superior to the individual interests of each Contracting Party (cf. *infra*).

5. One may initially recall the legislative history of the provision of Article 36(2) of the Statute of the International Court of Justice (ICJ), which is essentially the same as the corresponding provision of the Statute of its predecessor, the old Permanent Court of International Justice (PCIJ). The aforementioned Article 36(2) establishes that

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

Article 36(3) adds that "the declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time"[4].

6. The origin of the provision quoted above is found in the *travaux préparatoires* of the original Statute of the PCIJ. This latter was drafted in 1920 by an Advisory Committee of Jurists (of 10 members)[5], appointed by the Council of the League of

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[3]. 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.

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

[5]. Namely: Mr. Adatci (Japan), Altamira (Spain), Fernandes (Brazil), Baron Descamps (Belgium),

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

7. 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[8]. This principle was firmly supported by the Latin-American States, and, in bearing it in mind, the formula of Raul Fernandes[9], incorporated into the Statute of the PCIJ, was acclaimed as a Latin-American contribution to the establishment of the international jurisdiction[10]. Such formula served its purpose in the following two decades.

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

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Hagerup (Norway), De La Pradelle (France), Loder (The Netherlands), Lord Phillimore (Great Britain), Ricci Busatti (Italy) and Elihu Root (United States).

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

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

8. 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, en 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 State forms an organic whole with the United Nations Charter itself).

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

10. 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. M. Bourquin, "Règles générales du droit de la paix", 35 *Recueil des Cours de l'Académie de Droit International de La Haye* (1931) pp. 195-196.

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[11].

9. 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[12]. It may be singled out that all this took place at the level of purely inter-State relations. The formula of the optional clause of compulsory jurisdiction (of the ICJ) which exists today, is nothing more than a scheme of the twenties, stratified in time[13], and which, rigorously speaking, no longer corresponds to the needs of the international *contentieux* not even of a purely inter-State dimension[14].

10. Such is the case that, in 1997, for example, of the 185 member States of the United Nations, no more than 60 States were subject to the compulsory jurisdiction of the ICJ by acceptance of the optional clause of Article 36(2) of its Statute[15], - that is, less than a third of the international community of our days. And several of the States which have utilized it, have made a distorted use of it, denaturalizing it, in introducing restrictions which militate against its *rationale* and which 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"[16].

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[11]. Cf. the account of R.P. Anand, *op. cit. supra* n. (6), 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*, 4th. ed., Oxford, Clarendon Press, 1995 (reprint), pp. 715-716; O.J. Lissitzyn, *The International Court of Justice*, N.Y., Carnegie Endowment for International Peace, 1951, pp. 61-64.

[12]. As human unreasonableness seems to have no limits, the chapter of international law pertaining to the peaceful settlement of international disputes continued to suffer from the old ambivalence - a true *vexata quaestio* - which has always characterized it, also in our days, namely, the ineluctable tension between the general duty of peaceful settlement and the free choice by the States of the methods of settlement of the dispute.

[13]. 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.

[14]. In a recent article, a former President of the ICJ, after pointing out that "nowadays a very considerable part of international law directly affects individuals, corporations and legal entities other than States", and of recalling that, nevertheless, the Statute of the ICJ still sustains - according to a conception of international law proper of the twenties - that only the States can be parties in cases before the Court (Article 34(1)), admitted and regretted that this outdated position has insulated the Hague Court from the great *corpus* of contemporary international law. R.Y. Jennings, "The International Court of Justice after Fifty Years", 89 *American Journal of International Law* (1995) p. 504.

[15]. International Court of Justice, *Yearbook 1996-1997*, vol. 51, The Hague, ICJ, 1997, p. 84, and cf. pp. 84-125.

[16]. 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.

11. One may, thus, seriously question whether the optional clause keeps on serving the same purpose which inspired it at the epoch of the PCIJ[17]. The rate of its acceptance in the era of the ICJ is proportionally inferior to that of the epoch of its predecessor, the PCIJ. Furthermore, throughout the years, the possibility opened by the optional clause of acceptance of the jurisdiction of the international tribunal became, in fact, object of excesses on the part of some States, which only accepted the compulsory jurisdiction of the ICJ in their own terms, with all kinds of limitations[18]. 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[19].

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

III. The International Compulsory Jurisdiction: Reflections *Lex Lata*.

13. Contemporary international law has gradually evolved, putting limits to the manifestations of a State voluntarism which revealed itself as belonging to another era[20]. The methodology of interpretation of human rights treaties[21], developed as from

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17. Cf. statistic data *in* G. Weissberg, *op. cit. supra* n. (16), pp. 160-161; however, one ought to recall the *clauses compromissoires* pertaining to the contentious jurisdiction of the ICJ, which, in the mid-seventies, appeared in about 180 treaties and conventions (more than two thirds of which of a bilateral character, and concerning more than 50 States - *ibid*., p. 164).

18. 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.

19. 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 06.07.1857), *ICJ Reports* (1957) pp. 69-70.

20. 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.

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

the rules of interpretation set forth in international law (such as those formulated in Articles 31-33 of the two Vienna Conventions on the Law of Treaties, of 1969 and 1986), comprise not only the substantive norms (on the protected rights) but also the clauses that regulate the mechanisms of international protection.

14. The Inter-American Court of Human Rights has the duty to preserve the integrity of the regional conventional system of protection of human rights as a whole. It would be inadmissible to subordinate the operation of the conventional mechanism of protection to restrictions not expressly authorized by the American Convention, interposed by the States Parties in their instruments of acceptance of the optional clause of compulsory jurisdiction of the Inter-American Court (Article 62 of the American Convention). This would not only immediately affect the efficacy of the operation of the conventional mechanism of protection, but, furthermore, it would fatally impede its possibilities of future development.

15. By virtue of the principle *ut res magis valeat quam pereat*, which corresponds to the so-called *effet utile* (sometimes called principle of effectiveness), widely supported by case-law, the States Parties to human rights treaties ought to secure to the conventional provisions the proper effects at the level of their respective domestic legal orders. Such principle applies not only in relation to the substantive norms of human rights treaties (that is, those which provide for the protected rights), but also in relation to the procedural norms, in particular those relating to the right of individual petition and to the acceptance of the contentious jurisdiction of the international judicial organ of protection[22]. Such conventional norms, essential to the efficacy of the system of international protection, ought to be interpreted and applied in such a way as to render their safeguards truly practical and effective, bearing in mind the special character of the human rights treaties and their collective implementation.

16. The European Court of Human Rights had the occasion to pronounce in this respect. Thus, in its Judgment on Preliminary Objections (of 23.03.1995) in the case of *Loizidou versus Turkey*, it warned that, in the light of the letter and the spirit of the European Convention the possibility cannot be inferred of restrictions to the optional clause relating to the recognition of the contentious jurisdiction of the European Court[23], by analogy with the permissive State practice under Article 36 of the Statute of the ICJ; under the European Convention, a practice of the States Parties was formed precisely *a contrario sensu*, accepting such clause without restrictions[24].

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

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

[24]. To that it added, moreover, 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 anterior, in the case *Belilos versus Switzerland* (1988). - The Hague Court, in its turn, in its Judgment of 04.12.1998 in the *Fisheries Jurisdiction* case (Spain *versus* Canada), yielded to the voluntarist subjectivism of the contending States (cf. *ICJ Reports* (1998) pp. 438-468), the antithesis of the very notion of international compulsory jurisdiction, - provoking Dissenting Opinions of five of its Judges, to whom the ICJ put at risk the future itself of the mechanism of the optional clause under Article 36(2) of its Statute, paving the way to an eventual desertion from it (cf. *ibid*., pp. 496-515, 516-552, 553-569, 570-581 and

17. 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 the compulsory jurisdiction of the international tribunals of human rights makes no exception to that: it does not admit limitations other than those expressly contained in the human rights treaties at issue, and, given its capital importance, it could not be at the mercy of limitations not foreseen therein and invoked by the States Parties for reasons or vicissitudes of domestic order[25].

18. In their classic studies on the basis of the international jurisdiction, two distinguished scholars, 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)[26]. Although those limitations had never been foreseen in the formulation of the optional clause, the States, in the face of such legal vacuum, have felt, nevertheless, "free" to insert them. Such excesses have undermined, in a contradictory way, the basis itself of the system of international compulsory jurisdiction. As well pointed out in a classic study on the matter, the instruments of acceptance of the contentious jurisdiction of an international tribunal should be undertaken "on terms which ensure a reasonable measure of stability in the acceptance of the jurisdiction of the Court"[27], - that is, in the terms expressly provided for in the international treaty itself (cf. *infra*).

19. The clause pertaining to the compulsory jurisdiction of the international tribunals of human rights 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 foreseen in the human rights treaties. This has been so established by the Inter-American Court in its Judgments on Competence in the cases of the *Constitutional Tribunal and Ivcher Bronstein*:

582-738, respectively). - On more than one occasion the undue emphasis on the consent of States led the ICJ to incongruous decisions, as its Judgment of 1995 in the case of *East Timor*; cf. criticisms *in*, e.g., J. Dugard, "1966 and All That: the *South West African* Judgment Revisited in the *East Timor* Case", 8 *African Journal of International and Comparative Law* (1996) pp. 549-563; A.A. Cançado Trindade, "O Caso do Timor-Leste (1999): O Direito de Autodeterminação do Povo Timorense", 1 *Revista de Derecho de la Universidad Católica del Uruguay* (2000) pp. 68-75. As well pointed out by Shabtai Rosenne, the international judicial procedure of the Hague Court unfortunately continues to follow nowadays the model of bilateralism in international litigation, proper of the XIXth century; S. Rosenne, "Decolonisation in the International Court of Justice", 8 *African Journal of International and Comparative Law* (1996) p. 576.

[25]. Cf. Inter-American Court of Human Rights, 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.

[26]. Examples of such excesses have been the objetions of domestic jurisdiction (*domestic jurisdiction/compétence nationale exclusive*) to the States (criticized in my essay "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), 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. (19), p. 270.

[27]. C.W. Jenks, *op. cit. supra* n. (26), pp. 760-761.

> - "Recognition of the Court's compulsory jurisdiction is a fundamental clause (*cláusula pétrea*) to which there can be no limitations except those expressly provided for in Article 62(1) of the American Convention. Because the clause is so fundamental to the operation of the Convention's system of protection, it cannot be at the mercy of limitations not already stipulated but invoked by States Parties for reasons of domestic order"[28].

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[29], represents a regrettable historical deformation 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.

20. It is the duty of an international tribunal of human rights to look after the due application of the human rights treaty at issue in the framework of the domestic law of each State Party, so as to secure the effective protection in the ambit of this latter of the human rights set forth in such treaty[30]. Any understanding to the contrary would deprive the international tribunal of human rights of the exercise of the function and of the duty of protection inherent to its jurisdiction, failing to ensure that the human rights treaty has the appropriate effects (*effet utile*) in the domestic law of each State Party. It is for this reason that I sustain that the optional clause of compulsory jurisdiction of the international tribunal of human rights constitutes a fundamental clause (a *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 treaty at issue itself.

IV. The Precise Formulation of the Optional Clause of Article 62 of the American Convention on Human Rights (*Numerus Clausus*).

21. The present case of *Hilaire versus Trinidad and Tobago* leads one to a more detailed examination of this specific point. Paragraphs 1 and 2 of Article 62 of the American Convention on Human Rights provide 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"[31].

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

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

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

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

22. In fact, the modalities of acceptance, by a State Party to the Convention, of the contentious jurisdiction of the Inter-American Court, are expressly stipulated in the aforementioned provisions; the formulation of the optional clause of compulsory jurisdiction of the Inter-American Court, in Article 62 of the American Convention, is not simply illustrative, but clearly *precise*. No State is obliged to accept an optional clause, as its own name indicates. Thus, a "reservation" to the optional clause of compulsory jurisdiction of the Inter-American Court of Article 62 of the American Convention would amount simply to the non-acceptance of that clause, what is foreseen in the Convention. But if a State Party decides to accept it, it ought to do so in the terms expressly stipulated in such clause.

23. According to Article 62(2) of the Convention, the acceptance, by a State Party, of the contentious jurisdiction of the Inter-American Court, 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 Inter-American Court 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*).

24. In my understanding, in this matter, it cannot be sustained that what is not prohibited, is permitted. This posture would amount to the traditional - and surpassed - attitude of the *laisser-faire, laisser-passer*, proper to an international legal order fragmented by the voluntarist State subjectivism, which in the history of Law has ineluctably favoured the more powerful ones. *Ubi societas, ibi jus*... At this beginning of the XXIst century, in an international legal order wherein one seeks to affirm superior common values, among considerations of international *ordre public*, as in the domain of the International Law of Human Rights, it is precisely the opposite logic which ought to apply: *what is not permitted, is prohibited*.

25. If we are really prepared to extract the lessons of the evolution of International Law in a turbulent world throughout the XXth century, if we intend to keep in mind the endeavours of past generations to construct a more equitable and just world, if we believe that the same norms, principles and criteria ought to apply to all States (juridically equal despite factual disparities), and if we are really prepared to advance the ideals of the true international jurists who preceded us, - 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.

26. Not every practice consubstantiates into custom so as to conform general international law, as a given practice may not be in conformity with Law (*ex injuria jus non oritur*). Thus, it is not the function of the jurist simply to take note of the practice of States, but rather to say what the Law is. Since the classic work of H. Grotius in the XVIIth century, there is a whole trend of international law thinking which conceives international law as a legal order endowed with an intrinsic value of its own (and thereby superior to a simply "voluntary" law), - as well recalled by H. Accioly[32], - as it

[32]. H. Accioly, *Tratado de Derecho Internacional Público*, volume I, Rio de Janeiro, Imprensa Nacional, 1945, p. 5.

derives its authority from certain principles of sound reason (*est dictatum rectae rationis*).

27. In the present Judgment in the case of *Hilaire versus Trinidad and Tobago*, the Court has rightly pondered 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 the Court would have as first parameter of reference the Constitution of the State and only subsidiarily the American Convention, situation which would bring about a fragmentation of the international legal order of protection of human rights and would render illusory the object and purpose of the American Convention" (par. 93).

28. And the Court has, furthermore, in the present Judgment, correctly observed that

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

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

30. In the theory and practice of international law one has sought to distinguish a "reservation" from an "interpretative declaration"[33], in conformity with the legal effects which are intended to be attributed to one and the other[34]: thus, if one intends to clarify the meaning and scope of a given conventional provision, it is an interpretative declaration, while if one intends to modify a given conventional provision or to exclude its application, it is a reservation. In practice, it is not always easy to draw the dividing line between one and the other[35], as illustrated by the controversy which has

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[33]. Cf. U.N./International Law Commission, "Draft Guidelines on Reservations to Treaties", *in*: U.N., *Report of the International Law Commission on the Work of Its 51st Session* (May/July 1999), *G.A.O.R.* - Suppl. n. 10 (A/54/10/Corr.1-2), 1999, pp. 18-24, item 1.3; and *in*: *Report of the International Law Commission on the Work of Its 52nd Session* (May/June and July/August 2000), *G.A.O.R.* - Suppl. n. 10 (A/55/10), 2000, pp. 229-272, item 1.7; and cf. also, more recently, A. Pellet (special *rapporteur*), *Sixth Report on Reservations to Treaties* (*Addendum*), U.N./I.L.C. doc. A/CN.4/518/Add.1, of 21.05.2001, pp. 3-31, pars. 38-133.

[34]. For an examination of the question, cf., e.g., F. Horn, *Reservations and Interpretative Declarations to Multilateral Treaties*, The Hague/Uppsala, T.M.C. Asser Institut/Swedish Institute of International Law, 1988, pp. 98-110 and 229-337, and cf. pp. 184-222; D.M. McRae, "The Legal Effect of Interpretative Declarations", 49 *British Year Book of International Law* (1978) pp. 155-173.

[35]. Itg may be recalled that in the well-known case of *Belilos versus Switzerland* (1988), the European Court of Human Rights considered that a declaration interposed by Switzerland amounted to a reservation -

surrounded, in the last decades, the question of the legal effects of declarations inserted into the instruments of acceptance of the optional clause of compulsory jurisdiction, given the *sui generis* character of such clause.

31. In any way, in considering the meaning and scope of a declaration of acceptance of an optional clause of compulsory jurisdiction, - such as the one presented by Trinidad and Tobago under Article 62 of the American Convention and interposed as preliminary objection in the present case *Hilaire*, - one has to bear in mind the *nature* of the treaty in which that clause appears. This corresponds to the "context", precisely the second component element of the general rule of interpretation of treaties set forth in Article 31 of the two Vienna Conventions on the Law of Treaties. In the present Judgment, the Court has duly done so, in stressing the special character of the human rights treaties (pars. 94-97).

32. Likewise, the Court has kept constantly in mind the third component element of that general rule of interpretation, namely, the "object and purpose" of the treaty at issue, the American Convention on Human Rights (pars. 82-83 and 88). Thus, the understanding advanced in the *cas d'espèce* by the respondent State of the scope of its own acceptance of the optional clause of compulsory jurisdiction of the Inter-American Court, does not resist the proper interpretation of Article 62 of the American Convention, developed in the light of the canons of interpretation of the law of treaties.

33. As I saw it fit to point out in my Separate Opinion in the case *Blake versus Guatemala* (Reparations, 1999),

> "(...) In contracting conventional obligations of protection, it is not reasonable, on the part of the State, to assume a discretion so unduly broad and conditioning of the extent itself of such obligations, which would militate against the integrity of the treaty.
>
> The principles and methods of interpretation of human rights treaties, developed in the case-law of conventional organs of protection, can much assist and foster this necessary evolution. Thus, 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. From all this one can detect a new vision of the relations between public power and the human being, which is summed up, ultimately, in the recognition that the State exists for the human being, and not vice-versa.
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> The juridical concepts and categories, inasmuch as they enshrine values, are a product of their time, and, as such, are in constant evolution. The protection of the human being in any circumstances, against all the manifestations of arbitrary power, corresponds to the new *ethos* of our times, which is to be reflected in the postulates of Public International Law. (...)"[36].

V. The International Compulsory Jurisdiction: Reflections *De Lege Ferenda*.

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of a general character - to the European Convention on Human Rights, incompatible with the object and purpose of this latter. European Court of Human Rights, *Belilos versus Switzerland* case, Judgment of 29.04.1988, Series A, n. 132, pp. 20-28, pars. 38-60.

[36]. IACtHR, case *Blake versus Guatemala* (Reparations), Judgment of 22.01.1999, Series C, n. 48, Separate Opinion of Judge A.A. Cançado Trindade, pp. 114-115, pars. 32-34.

34. I could not conclude this Separate Opinion in the present case of *Hilaire versus Trinidad and Tobago* without a last line of reflections, *de lege ferenda*, on the international compulsory jurisdiction. The "judicial decisions", referred to in the enumeration of the formal sources and evidences of International Law, set forth in Article 38(1)(d) of the Statute of the ICJ[37], certainly are *not* limited to the case-law of the ICJ itself[38]. They likewise comprise, nowadays, the judicial decisions of the international tribunals (Inter-American and European Courts) of human rights, of the *ad hoc* International Criminal Tribunals (for ex-Yugoslavia and for Rwanda), of the International Tribunal for the Law of the Sea, of other international and arbitral tribunals, as well as of national tribunals in matters of international law[39]. Throughout the last years the old ideal of international justice has been revitalized and has gained ground, with the considerable expansion of the international judicial function, reflected in the creation of new international tribunals; the work of these latter has been enriching contemporary international case-law, contributing to assert the aptitude of International Law to regulate adequately the juridical relations in distinct domains of human activity.

35. In this sense, in my aforementioned Separate Opinion in the case of *Blake versus Guatemala*, in warning as to the necessity to establish the juridical bases of a minimally institutionalized international community, I pointed out that

> "(...) With the evolution of the International Law of Human Rights, it is Public International Law itself which is justified and legitimized, in affirming juridical principles, concepts and categories proper to the present domain of protection, based on premises fundamentally distinct from those which have guided the application of its postulates at the level of purely inter-State relations.
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> (...) The norms of the law of treaties (...) can greatly enrich with the impact of the International Law of Human Rights, and develop their aptitude to regulate adequately the legal relations at inter-State as well as intra-State levels, under the respective treaties of protection. (...)"[40].

36. The Inter-American Court of Human Rights, by means of the Judgments on Preliminary Objections which it has just adopted 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*, has safeguarded the integrity of the American Convention on Human Rights, has been master of its own jurisdiction and has acted in accordance with the high responsibilities accorded to it by the American Convention. The same can be said of the European Court of Human Rights, by means of its Judgment on Preliminary Objections in the case *Loizidou versus Turkey*, in so far as the European Convention on Human Rights is concerned. Thus, the two existing

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

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

39. I. Brownlie, *Principles of Public International Law*, 4th. ed., Oxford, Clarendon Press, 1990, pp. 19-24; A.A. Cançado Trindade, *Princípios do Direito Internacional Contemporâneo*, Brasília, Editora Universidade de Brasília, 1981, pp. 19-20; R.A. Falk, *The Role of Domestic Courts in the International Legal Order*, Syracuse University Press, 1964, pp. 21-52 and 170; J.A. Barberis, "Les arrêts des tribunaux nationaux et la formation du droit international coutumier", 46 *Revue de droit international de sciences diplomatiques et politiques* (1968) pp. 247-253; F. Morgenstern, "Judicial Practice and the Supremacy of International Law", 27 *British Year Book of International Law* (1950) p. 90.

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

international tribunals of human rights to date, in their converging case-law on the question, have refused to yield to undue manifestations of State voluntarism, have fully performed the functions attributed to them by them by the human rights treaties which created them, and have given a worthy contribution to the strengthening of the international jurisdiction and to the realization of the old ideal of international justice.

37. There is pressing need for the States to be convinced that the international legal order is, more than voluntary, *necessary*. In the ambit of general international law, in my understanding, the time has come to advance decidedly in the improvement of the judicial settlement of international disputes. In the last 80 years, the advances in this field could have been much greater if State practice would not have betrayed the purpose which inspired the creation of the mechanism of the optional clause of compulsory jurisdiction (of the PCIJ and the ICJ), that is, the submission of political interests to Law by means of the development in the realization of justice at international level.

38. The time has come to overcome definitively the regrettable lack of automatism of the international jurisdiction. With the distortions of their practice on the matter, the States face today a dilemma which should have been overcome a long time ago: either they return to the voluntarist conception of international law, abandoning for good the hope in the primacy of Law over political interests[41], or they retake and achieve with determination the ideal of construction of an international community with greater cohesion and institutionalization in the light of Law and in search of Justice, moving resolutely from *jus dispositivum* to *jus cogens*[42].

39. 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*),

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41. In fact, more advances have not been achieved in the judicial settlement of international disputes precisely because States have shown themselves reluctant with regard to it, paying more attention to political factors; 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. - More recently, a former President of the ICJ criticized as unsatisfactory the 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; in his words, the States may consider that "there is some political advantage in remaining outside a system which permits States to join more or less on their own terms at an opportune moment". R.Y. Jennings, "The International Court of Justice after Fifty Years", *op. cit. supra* n. (14), p. 495. Cf. also the criticisms of another former President of the ICJ: 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. also the criticisms *in*: 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. also: P. Guggenheim, *Traité de Droit international public*, vol. I, Genève, Georg, 1967, p. 279; and, in general, J. Sicault, "Du caractère obligatoire des engagements unilatéraux en Droit international public", 83 *Revue générale de Droit international public* (1979) pp. 633-688. - Such distorted State practice cannot, definitively, serve as model to the operation of the judicial organs created by human rightgs treaties.

42. And always bearing in mind that the protection of fundamental rights places us precisely in the domain of *jus cogens*. In this respect, in an 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, I saw it fit to warn as to the manifest incompatibility with the concept of *jus cogens* of the voluntarist conception of international law, which is not able even to explain the formation of the rules of general international law; cf. 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 of A.A. Cançado Trindade).

thus establishing the *automatism*[43] of the jurisdiction of the Inter-American Court of Human Rights[44]. There is pressing need for the old ideal of the permanent international compulsory jurisdiction[45] 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 fulfill the growing needs of effective protection of the human being.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

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[43]. Which is already a reality, as to the European Court of Human Rights, as from the entry into force, on 01.11.1998, of Protocol n. 11 to the European Convention of Human Rights. Another example of compulsory jurisdiction is that of the Court of Justice of the European Communities; cf. H. Steiger, "Plaidoyer pour une juridiction internationale obligatoire", *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. 821-822 and 832.

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

[45]. In a monograph published in 1924, four years after the adoption of the Statute of the old PCIJ, Nicolas Politis, in recalling the historical evolution from private justice to public justice, advocated likewise for the evolution, at international level, from optional justice to compulsory justice; cf. N. Politis, *La justice internationale*, Paris, Libr. Hachette, 1924, pp. 7-255, esp. pp. 193-194 and 249-250.