

DISSENTING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I regret that I am unable to share the decision taken by the majority of the Inter-American Court of Human Rights in the second operative paragraph, and the approach adopted on this point in considering paragraphs 66 to 79 of the judgment on preliminary objections in *the Serrano Cruz Sisters v. El Salvador*, because the Court has admitted the first preliminary objection *ratione temporis* filed by the defendant State, which was intended to exclude the Court from considering facts or acts that commenced prior to the date on which the State recognized the Court's contentious jurisdiction (June 6, 1995), and that continue after the date of recognition. I will now explain the legal grounds for my dissenting position on this issue.

2. In doing so, I will also explain my position on a question of capital importance relating to compulsory international jurisdiction (based on the acceptance of the optional clause on compulsory jurisdiction) of an international human rights tribunal such as the Inter-American Court. The reflections that I will develop in this dissenting opinion will cover the following points: first, an evaluation *lex lata* of compulsory international jurisdiction; second, the juridical effect of the specific formulation of the optional clause in Article 62 of the American Convention on Human Rights (*numerus clausus*); third, my considerations *de lege ferenda* on compulsory international jurisdiction within the framework of the American Convention on Human Rights; fourth, *jus cogens* in the convergence between international humanitarian law and international human rights law; and, fifth, the recurring search for automatic compulsory international jurisdiction as a necessity of our times.

I. Preliminary considerations

3. I do not believe that it is necessary to repeat here what I have stated in my concurring opinions in previous judgments on preliminary objections in the *Hilaire, Benjamin* and *Constantine* cases (2001), in relation to Trinidad and Tobago, on the preceding question of the *compétence de la compétence* (*Kompetenz Kompetenz*) of the Inter-American Court in the matter under discussion, because my reflections have long been accepted by the Court and today form part of its consistent case law in this regard. Additionally, I do not consider it necessary to go into the origin and evolution of the establishment of the optional clause on compulsory jurisdiction, and examine international practice in this regard; this has already been explained in detail in my abovementioned concurring opinions in the said *Hilaire, Benjamin* and *Constantine* case.

4. On this specific point, I will restrict myself to recalling that the original purpose of the establishment of the optional clause on compulsory jurisdiction (created in 1920) – a clause that has survived in Article 62 of the American Convention – was to attract acceptance of the compulsory jurisdiction of the Permanent Court of International Justice (PCIJ) and subsequently of the International Court of Justice (ICJ), and also of the European Court of Human Rights (prior to Protocol No. 11 to the European Convention on Human Rights), by the greatest possible number of States parties to the respective multilateral treaties. Currently, this question is only posed in relation to the European Court, which today (with Protocol No. 11) is endowed with automatic compulsory jurisdiction – a

situation that is appropriate and that I have been advocating for the Inter-American Court in recent years.¹

5. As regards the Court in The Hague, however, the optional clause on compulsory jurisdiction, which continues to exist, has been stratified over time and, nowadays, no longer responds to the necessities of international contentious cases, even purely inter-State cases. This is due to a permissive stance taken by the ICJ, reflecting a voluntarist conception of international law, which has allowed and accepted all types of limitations imposed by the States when recognizing the international Court's jurisdiction, on their own terms.

6. It would be unfortunate if Article 62 of the American Convention was, ultimately, as ill-fated as Article 36(2) of the ICJ Statute. Indeed, the invalid and incongruent State practice under Article 36(2) of the ICJ Statute cannot serve as an example or model to follow for the States Parties to treaties for the protection of human rights, such as the American Convention on Human Rights, as regards the scope of the jurisdictional basis for the actions of the Inter-American Court of Human Rights. Here we are confronted with superior values shared by our community of nations that cannot be left to the mercy of the vicissitudes of the individual "will" of each State Party to the American Convention.

II. Compulsory international jurisdiction: new reflections *Lex Lata*.

7. By protecting fundamental values shared by the international community as a whole, contemporary international law has overcome the anachronic voluntarist conception belonging to a distant past. Contrary to what some rare, nostalgic survivors of the apogee of positivism-voluntarism presume, the methodology of interpreting human rights treaties developed on the basis of rules of interpretation embodied in international law (such as those stipulated in Articles 31 to 33 of the 1969 and 1986 Vienna Conventions on the Law of Treaties) applies to both the substantive provisions (on the protected rights) and the clauses that regulate international protection mechanisms – based on the principle *ut res magis valeat quam pereat*, which corresponds to the so-called *effet utile* (sometimes called the principle of effectiveness), amply supported by international case law.

8. The case law of the Inter-American Court contains clear examples in this regard. Thus, in its judgment on competence in the *Constitutional Court* and *Ivcher Bronstein* cases (1999), with regard to Peru, the Inter-American Court maintained that:

"Acceptance of the Court's compulsory jurisdiction is an ironclad clause 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 internal reasons."²

¹. Cf. A.A. Cançado Trindade, "Las Cláusulas Pétreas de la Protección Internacional del Ser Humano: El Acceso Directo de los Individuos a la Justicia a Nivel Internacional y la Intangibilidad de la Jurisdicción Obligatoria de los Tribunales Internacionales de Derechos Humanos", in *El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI - Memoria del Seminario* (Nov. 1999), vol. I, 2a. ed., San José, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 3-68.

². IACtHR, *Case of the Constitutional Court (Competence)*, Judgment of September 24, 1999, Series C, No. 55, para. 35; IACtHR, *Case of Ivcher Bronstein (Competence)*, Judgment of September 24, 1999, Series C, No. 54, para. 36.

9. It would be unacceptable to subordinate the implementation of the treaty-based protection mechanism to restrictions filed by the States Parties in their instruments recognizing the optional clause on compulsory jurisdiction of the Inter-American Court (Article 62 of the American Convention) that were not expressly authorized by the American Convention. This would not only immediately affect the effectiveness of the implementation of the treaty-based protection mechanism, but would also have a fatal effect on its future development possibilities. In both cases, the Inter-American Court had the opportunity of underscoring its obligation to preserve the integrity of the treaty-based regional system for the protection of human rights as a whole.³

10. In the acknowledged absence of “implicit” limitations to the exercise of the rights embodied in human rights treaties, the constant limitations to these protection treaties must be interpreted restrictively. The optional clause on compulsory jurisdiction is not an exception to this: it does not allow limitations, other than those *expressly* included in those treaties and, given its capital importance, it cannot be at the mercy of limitations that are not established in them and that are invoked by the States Parties owing to reasons or vicissitudes of a domestic nature.⁴

III. The specific formulation of the optional clause of Article 62 of the American Convention on Human Rights (*Numerus Clausus*): New reflections

11. Paragraphs 1 and 2 of Article 62 of the American Convention on Human Rights establish that:

“1. 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 compulsory, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention.

2. 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.”⁵

12. These are the terms and conditions for the recognition of the contentious jurisdiction of the Inter-American Court by a State Party to the Convention. These terms and conditions of recognition are expressly stipulated in Article 62, and their formulation is not merely illustrative, but clearly *specific*. No State is obliged to accept an optional clause, as the name itself indicates; however, if it decides to do

³. Likewise, the European Court of Human Rights, in its judgment on preliminary objections (of March 23, 1995) in *Loizidou versus Turquia*, noted that, in light of the letter and spirit of the European Convention, it is not possible to infer the possibility of restrictions to the optional clause when recognizing the contentious jurisdiction of the European Court (former Article 46 of the European Court, prior to Protocol No. 11); also, contrary to the permissive State practice under Article 36 of the ICJ Statute, under the European Convention, State practice was exactly *a contrario sensu*, accepting the said clause without restrictions.

⁴. Cf. Inter-American Court of Human Rights, *Castillo Petruzzi et al. v. Peru* (Preliminary objections), Judgment of September 4, 1998, Series C, No. 41, Concurring opinion of Judge A.A. Cançado Trindade, paras. 36 and 38.

⁵. 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.”

so, it must do so in the terms expressly stipulated in that clause. There are four conditions for this recognition according to Article 62(2): a) unconditionally; b) on the condition of reciprocity; c) for a specified period; and d) for specific cases. These are the only terms and conditions of recognition of the contentious jurisdiction of the Inter-American Court established and authorized by Article 62(2) of the Convention, which does not authorize the States Parties to file any other conditions or restrictions (*numerus clausus*).

13. In the instant case of the *Serrano Cruz Sisters v. El Salvador*, the limitation allegedly *ratione temporis* filed by the defendant State, and invoked in its first preliminary objection with regard to facts or acts which commenced before the date on which the State recognized the Court's jurisdiction in contentious matters, and which continued after that date and up until the present (the second operative paragraph), does not, in my opinion, fall within the framework of any of the abovementioned unvarying conditions for accepting the optional clause on compulsory jurisdiction of the Inter-American Court included in Article 62 of the American Convention.

14. It is not a question of unconditional recognition; or recognition on the condition of reciprocity.⁶ Contrary to the opinion of the majority of the members of the Court in this judgment, neither is it recognition for a specified time,⁷ because the object of the limitation filed by the State is a completely indeterminate period that continues indefinitely in time. Nor is it an issue of specific cases, but rather of any situation that falls within the framework of the broad and indefinite terms of the State's limitation.

15. I am not trying to cast doubts on the clarity and good faith with which the defendant State set out its arguments throughout this contentious proceeding. The purpose of the limitation is extremely clear, as the State indicates with procedural openness and fairness: to exclude consideration of any human rights violation that occurred during the internal armed conflict that afflicted the country for more than a decade from 1980 to 1991 from the Inter-American Court's jurisdiction. I consider that the recognition of the Court's jurisdiction by the State of El Salvador clearly exceeded the limitations established in Article 62 of the American Convention, by unduly excluding from the Court's possible consideration facts and acts subsequent to this recognition, which had commenced before it.

16. For reasons I fail to understand, most members of the Court admitted the part of the first preliminary objection filed by the State in this regard (a nebulous and hybrid type of objection that is both *ratione temporis* and *ratione materiae*), for an indefinite time and with a broad, general and indefinite scope when, in my opinion, they should have declared it inadmissible and invalid. By proceeding in this way, accepting the terms of this preliminary objection, the majority of the members of the Court accepted State voluntarism, leaving unprotected those who consider themselves the victims of the continuing human rights violations of a particular gravity that occurred during the Salvadoran armed conflict, as a result of the

⁶. This is mentioned in another part of the instrument by which the State recognizes the Court's jurisdiction on contentious matters.

⁷. In another part of its instrument recognizing the Court's jurisdiction on contentious matters, the State even refers to "indefinite period." However, the limitation it imposes is described as for an unspecified time, which seems to me to be a *contradictio in terminis*.

documented practice of the forced disappearance of children and the elimination of their identity and name during this armed conflict.⁸

17. This decision of the Inter-American Court does not conform to its own recent case law in this regard and, in my opinion, is regressive. In the instant case, the will of the State has unfortunately prevailed over the imperatives of human rights protection. The time has come for the States Parties to the American Convention to refrain from formulating limitations of this nature, and to modify or withdraw those that they may have formulated in the past, in order to make them compatible with the precise scope of Article 62 of the Convention.

18. With its well-known and reputable juridical tradition, El Salvador could very well do this, giving a good example to some other countries. It is always worthwhile recalling the writings of the great Salvadoran international jurist Gustavo Guerrero, more than 70 years' ago, who devoted himself particularly to writing on the State's international responsibility and the codification of international law. He upheld the unity and universality of law, and invoked repeatedly the ideal of international justice as the best guarantee of peace.⁹

19. In this regard, in the *Trujillo Oroza* case heard by the Court, Bolivia gave a good example of acknowledging its international responsibility for the facts described in the application of the Inter-American Commission on Human Rights, including those that occurred before the date on which it recognized the Court's contentious jurisdiction (July 27, 1993) or ratified the American Convention on Human Rights (July 19, 1979). This enabled this Court to consider and decide on the continuing crime of the forced disappearance of José Carlos Trujillo Oroza (which commenced in 1971) and its juridical consequence (Judgment of February 27, 2002, para. 72).

20. The Court considered this continuing crime *integrally*, as a whole, as it should be. This means, as I indicated in my separate opinion in that case, that it is possible to overcome the contingencies of the classic postulates of the law of treaties, when there is awareness of this necessity; *boni iudicis est ampliare jurisdictionem* (paras. 2 to 9). In *Trujillo Oroza v. Bolivia*, a favorable confluence of factors allowed the Court to take a notable step forward in its case law in its judgment of February 27, 2002.

⁸. For reports which reveal that human cruelty has no limits, or even borders (since this practice also occurred in internal armed conflicts in other countries), cf. *Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos, El Día Más Esperado - Buscando a los Niños Desaparecidos de El Salvador*, San Salvador, UCA Editores, 2001, pp. 11-324; *Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos (APBNND), La Problemática de Niños y Niñas Desaparecidos como Consecuencia del Conflicto Armado Interno en El Salvador*, San Salvador, APBNND, 1999, pp. 4-80; *Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos (APBNND), La Paz en Construcción - Un Estudio sobre la Problemática de la Niñez Desaparecida por el Conflicto Armado en El Salvador*, San Salvador, APBNND, [2002], pp. 3-75; *Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos, "En Búsqueda: Identidad - Justicia - Memoria"*, 4 *Época* - San Salvador (2003), pp. 3-15; and cf. Amnesty International, *El Salvador - ¿Dónde Están las Niñas y los Niños Desaparecidos?*, London/San Salvador, A.I., 2003, pp. 1-10. Cf. also: *Procuraduría para la Defensa de los Derechos Humanos, Caso Ernestina y Erlinda Serrano Cruz* [the report of the Ombudsman on the forced disappearance of the children, Ernestina and Erlinda Serrano Cruz, its current impunity and the pattern of violence in which such disappearances occurred], San Salvador, PDDH, 2004, pp. 1 to 169 (internal circulation only).

⁹. G. Guerrero, *La Codification du Droit International*, Paris, Pédone, 1930, pp. 9-10, 13, 24, 27 and 150. And cf. A.A. Cançado Trindade and A. Martínez Moreno, *Doctrina Latinoamericana del Derecho Internacional*, vol. I, San José, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 5-64.

21. As I observed in my said separate opinion in that case, this judgment avoided and overcame an undue fragmentation and distortion of a complex, grave and continuing crime (the forced disappearance of persons), taking into account that, nowadays, the concept of a *continuing situation* has widespread support in international case law (paras. 10 to 19). Hence, the Court emphasized that the superior values that underlie the norms of protection shared by the international community as a whole, have primacy over the sword of Damocles of the dates on which State acceptance is manifested (para. 20, and *cf.* paras. 21 and 22).

22. Conversely and ironically, in the second operative paragraph of this judgment in the *Serrano Cruz Sisters v. El Salvador*, what has been transformed into a “continuing situation” by a decision of the majority of the members of the Court, is not the *situation* allegedly violating human rights that was submitted to the Court’s consideration and decision, but rather the continuing situation imposed by the State on the Court that prevents it from exercising its jurisdiction; namely, to examine and rule on the matter – which, in my opinion, is almost a juridical absurdity. It is well known that the history of juridical thought, and even human thought in general, does not make linear progress, but I sincerely hope that, in a temporal dimension, the second operative paragraph of this judgment of the Court is only a stumbling block that has to be overcome, a mishap on the long road that has to be traveled.

23. In keeping with the Court’s recent case law, its judgment in the *Trujillo Oroza* case (*supra*), its abovementioned judgments on competence in the *Constitutional Court* and *Ivcher Bronstein* cases, and on preliminary objections in the *Hilaire, Benjamin* and *Constantine* cases, are also notable international advances in international case law in general and its legal grounds. The last two cases are today part of the history of human rights in Latin America, with widespread positive repercussions on other continents; moreover, they have created expectations of continued progress in the Court’s case law in the same direction.¹⁰

24. In contrast to these advances, this judgment of the Court on preliminary objections in the *Serrano Cruz Sisters v. El Salvador* is, *data venia*, particularly with regard to the second operative paragraph, and the corresponding considering paragraphs Nos. 66 to 79; a regrettable step backwards. Consequently, I dissent firmly from what I deem to be an unacceptable capitulation to State voluntarism which is no longer sustainable today, and which also militates against the actual process of jurisdictionalization of international law itself, revealed by recent advances in the ancient ideal of the realization of justice at the international level also (*cf. infra*).

25. The terms of the defendant State’s recognition of the jurisdiction of the Inter-American Court on contentious matters are also inadmissible and invalid as regards another specific aspect; namely, when the State reserves the faculty to terminate the recognition of this jurisdiction “when it considers this opportune.” This *caveat* conflicts with the ruling of the Court in the abovementioned judgments on competence in the *Constitutional Court* and *Ivcher Bronstein* cases.

26. In another line of thought still relating to this case, the only limitation filed by the defendant State referred to in the first operative paragraph of this judgment – regarding which little or nothing could be done, owing to the degree of stagnation of

¹⁰. Cf., for example, A. Salado Osuna, *Los Casos Peruanos ante la Corte Interamericana de Derechos Humanos*, Lima, Edit. Normas Legales, 2004, pp. 94-131.

the classic postulates of the law of treaties, which have not accompanied either the normative evolution of international human rights law, or the emergence of fundamental values shared by the international community as a whole – has unfortunately led, once more, to the undue fragmentation of the complex, grave and continuing crime of the alleged forced disappearance of persons of the children, Ernestina and Erlinda Serrano Cruz.

27. It is not my intention to repeat in this dissenting opinion my extended arguments against this fragmentation, expressed in detail in my three separate opinions in the Court's judgments in *Blake v. Guatemala* (preliminary objections, 1996; merits, 1998; and reparations, 1999). However, what I do find unacceptable is the broad scope of the State limitation referred to in the second operative paragraph of this judgment on preliminary objections in the *Serrano Cruz Sisters v. El Salvador*. In this regard, as I mentioned in my abovementioned concurring opinion in the *Hilaire* case (and also in the *Benjamin* and *Constantine* cases), with regard to Trinidad and Tobago:

"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 *laissez-faire*, *laissez-passer*, proper to an international legal order fragmented by the voluntarist State subjectivism, which in the history of law has ineluctably favored the most powerful ones. *Ubi societas, ibi jus*... At this beginning of the twenty-first 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 international human right law, it is precisely the opposite logic which should apply: *what is not permitted, is prohibited*.

(...) 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 seventeenth century, there has been 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 merely "voluntary" law), - as well recalled by H. Accioly¹¹ - as it derives its authority from certain principles of sound reason (*est dictatum rectae rationis*)" (paras. 24 and 26).

28. In its judgment on preliminary objections in the *Hilaire* case – and also in the *Benjamin* and *Constantine* cases (2001) - the Inter-American Court considered correctly that, if it accepted the restrictions imposed by States in the instruments recognizing its contentious jurisdiction in their terms, this would deprive it of its powers and render illusory the rights protected by the American Convention (para. 93, and *cf.* para. 88). This position taken by the State is clearly supported by the specific and very clear formulation of Article 62(2) of the American Convention.

29. As I indicated in my separate opinion in *Blake v. 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, insofar as human rights treaties are concerned, one should always bear in mind the objective character of the obligation 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

¹¹. H. Accioly, *Tratado de Derecho Internacional Público*, tome I, Rio de Janeiro, Imprensa Nacional, 1945, p. 5.

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."¹²

IV. Compulsory international jurisdiction: new reflections *de lege ferenda*.

30. Despite the unfortunate decision of the Inter-American Court, in the second operative paragraph of this judgment on preliminary objections in *the Serrano Cruz Sisters v. El Salvador*, it should be recalled that, in its abovementioned judgments on preliminary objections in the *Hilaire, Benjamin*, and *Constantine* cases, and also in its previous judgments on competence in the *Constitutional Court* and *Ivcher Bronstein* cases, the Court safeguarded the integrity of the provisions of Article 62 of the American Convention on Human Rights, and thus made a valuable contribution to strengthening the international jurisdiction and achieving the ancient ideal of international justice.

31. On the positive side, it should be noted that, despite all the difficulties, this ideal has been revitalized and has gained ground nowadays, with the encouraging significant expansion of the international judicial function, reflected by the creation of new international tribunals. For some time, I have been insisting that the time has come to finally overcome the regrettable lack of automatism of the international jurisdiction and, in particular, of the inter-American system for the protection of human rights.

32. Owing to the distortions resulting from their practice in this area, the States are now faced with a dilemma that should have been overcome long ago: or they continue adhering to the anachronistic voluntarist conception of international law, abandoning the prospect of the primacy of law over political interests, or they return to and achieve determinedly the ideal of constructing a more cohesive and institutionalized international community in light of the primacy of law and the search for justice, moving resolutely from *jus dispositivum* to *jus cogens*,¹³ convinced that, ultimately, the international juridical system is a *necessary* rather than a voluntary system.

33. I will now repeat what I stated in my concurring opinion in the judgment on preliminary objections of September 1, 2001, of the Inter-American Court in the *Hilaire* case (and also in the *Benjamin* and *Constantine* cases):

"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 mechanisms of protection, the possibility of an amendment to Article 62 of the American Convention, in order to render this clause also *mandatory*, in conformity with its character of fundamental clause (*cláusula pétrea*), thus establishing the *automatism* of the

¹². IACtHR, *Blake v. Guatemala* (Reparations), Judgment of January 22, 1999, Series C, No. 48, Separate opinion of Judge A.A. Cançado Trindade, paras. 32-34.

¹³. And always bearing mind that the protection of fundamental rights places us firmly in the domain of *jus cogens*. In this regard, when intervening in the discussions of March 12, 1986, of the Vienna Conference on the Law of Treaties between States and International Organizations or between International Organizations, I referred to the evident incompatibility between the concept of *jus cogens* and the voluntarist conception of international law, which is not even able to explain the establishment of rules of general international law; cf. UN, *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).

jurisdiction of the Inter-American Court of Human Rights.¹⁴ There is a pressing need for the old ideal of the permanent international compulsory jurisdiction¹⁵ to become reality also on the American continent, in the present domain of protection, with the necessary adjustments in order to face its reality of human rights to fulfill the growing needs of effective protection of the human being" (para. 39).

V. The recurring search for automatic compulsory international jurisdiction as a necessity of our times

34. The recurring search for compulsory international jurisdiction appears to relate to the myth of Sisyphus. Already in 1959, the Institute of International Law (Neufchatel session), of which I am honored to be a member, adopted unanimously a resolution supporting the compulsory jurisdiction of international tribunals, as "an essential complement to the relinquishment of the use of force in international relations."¹⁶ Since then, the idea has had a long and involved history that still continues, above all, in the case of contentious matters solely between States. However, progress has been made in contentious matters opposing States and individuals (as active or passive subjects of international law).

35. I have already referred to the fact that the European Court of Human Rights (with Protocol No. 11) is today endowed with automatic compulsory jurisdiction (*cf. supra*). Other contemporary international courts also have it. This is the case of the International Criminal Court. Even though other mechanisms had been considered during the *travaux préparatoires* of the 1998 Rome Statute (including such truculent procedures as "opting in" and "opting out"), the compulsory jurisdiction prevailed finally, obviating the need for an additional manifestation of consent by the States Parties to the Rome Statute.¹⁷ This was a significant decision that strengthened the international jurisdiction.

36. The Court of Justice of the European Communities provides an example of the supranational compulsory jurisdiction, even though it is limited to community law or to the law on integration (of the European Union). In its own way, the system of the 1982 United Nations Convention on the Law of the Sea goes beyond the traditional regime of the optional clause of the ICJ Statute¹⁸ (which, unfortunately, served as a model for the Inter-American Court): it opens to the States Parties to that Convention the option of going before the International Tribunal for the Law of the Sea, or the ICJ itself, or to arbitration (Article 287). Despite the exclusive nature of

¹⁴. With the necessary amendment – by a protocol – in this regard, of Article 62 of the American Convention, ending the restrictions that it establishes and expressly rejecting the possibility of any other restrictions and also ending the reciprocity and optional nature of the recognition of the Court's contentious jurisdiction, which would make it compulsory for all States Parties.

¹⁵. In a monograph published in 1924, four years after the adoption of the Statute of the former PICJ, Nicolas Politis, when recalling the historic evolution from private justice to public justice, also advocated the evolution, at the 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.

¹⁶. *Annuaire de l'Institut de Droit International* (1959), *cit. in* C.W. Jenks, *The Prospects of International Adjudication*, London, Stevens/Oceana, 1964, pp. 113-114.

¹⁷. H. Corell, *Evaluating the ICC Regime: The Likely Impact on States and International Law*, The Hague, T.M.C. Asser Institute, 2000, p. 8 (internal circulation).

¹⁸. In reality, the optional clause (of the ICJ Statute) is not the only source of the compulsory jurisdiction of the ICJ; another source is precisely the jurisdictional clauses inserted in treaties attributing jurisdiction to international tribunals to resolve conflicts relating to their interpretation and application.

specific matters, the Montego Bay Convention managed to establish a compulsory procedure with coercive elements; the choice of specific procedures at least ensures the resolution of conflicts in accordance with the law under the said Convention.¹⁹

37. These examples are sufficient to reveal that compulsory jurisdiction is a reality today – at least in specific circumscribed domains of international law, as I have just indicated. Compulsory international jurisdiction is, ultimately, a real juridical possibility. If it has still not been generally attained at the universal level, this should not be attributed to an absence of juridical viability, but rather to an erroneous perception of its role, or simply to a lack of willingness to expand its scope. Compulsory jurisdiction is a manifestation of the recognition that international law is, more than voluntary, really necessary.

38. In addition to the progress already achieved to this end, reference should be made to similar initiatives and efforts. One example is the proposal for a draft protocol to the American Convention on Human Rights that I prepared as Rapporteur of the Inter-American Court of Human Rights, which, *inter alia*, supports an amendment to Article 62 of the American Convention in order to make the Inter-American Court's jurisdiction on contentious matters automatically compulsory when the American Convention is ratified.²⁰ I hope that these proposals will prosper when our community of nations attains a greater level of awareness of the need to improve the protection mechanisms of the American Convention.

VI. *Jus Cogens* in the convergence between international humanitarian law and international human rights law.

39. In addition to my previous observations on the second and first operative paragraphs of this judgment on preliminary objections in *the Serrano Cruz Sisters v. El Salvador*, and the other operative paragraphs (the third to the seventh), which I have voted in favor of, I would like to add some brief considerations on the fifth operative paragraph, in which the Court has correctly rejected the second preliminary objection, entitled objection owing to lack of jurisdiction *ratione materiae*. In the considering paragraphs on this preliminary objection (paras. 111 to 119), which it correctly rejects (para. 120), the Court refers pertinently to the convergence and complementarities between international humanitarian law and international human rights law. It also refers to relevant provisions of the norms on both aspects of the protection of human rights. I would reason differently, and go further than the Court, to reach the same conclusion as that reached by the Court, rejecting the said objection.

¹⁹. 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 Future of International Dispute Resolution - The Continued Evolution of International Adjudication", in *Looking Ahead: International Law in the 21st Century / Tournés vers l'avenir: Le droit international au 21ème siècle* (Proceedings of the 29th Annual Conference of the Canadian Council of International Law, Ottawa, October 2000), The Hague, Kluwer, 2002, pp. 61-62; S. Karagiannis, "La multiplication des juridictions internationales: un système anarchique?", in Société française pour le Droit international, in *La juridictionnalisation du Droit international* (Colloque de Lille), Paris, Pédone, 2003, p. 34; M. Kamto, "Les interactions des jurisprudences internationales et des jurisprudences nationales", in *ibid.*, p. 424.

²⁰. A.A. Cançado Trindade, *Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección*, tomo II, 2a. ed., San José, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 1-64.

40. The peremptory nature of Article 3 common to the four 1949 Geneva Conventions on international humanitarian law has been judicially recognized.²¹ In my opinion, this provision, together with the references to the fundamental guarantees of the 1977 Protocols I (Article 75) and II (Articles 4 to 6) additional to the four 1949 Geneva Conventions on international humanitarian law, and the provisions regarding non-derogable rights in human rights treaties such as the American Convention, belong to the domain of international *jus cogens*. This is, *per se*, sufficient to reject the said objection of “lack of jurisdiction *ratione materiae*” as being manifestly inadmissible.

41. Furthermore, every time that an attempt has been made to disassociate the provisions of these two aspects of the protection of human rights (international human rights law and international humanitarian law), the results have been disastrous – as illustrated, today, by the attempt being made by the State (which is not a party to the American Convention) responsible for those detained in Guantánamo Bay.²² The convergence between international human rights law, international humanitarian law and international refugee law – which, as I have been maintaining for many years, is expressed at both the normative, and the hermeneutic and operational levels – ensures the maximum protection of the individual in any and every circumstance,²³ and even more since the norms belong to the domain of *jus cogens*.

VII. Epilogue: The expansion of the international jurisdiction

42. Above and beyond the solution of international disputes, the compulsory jurisdiction testifies to the rule of law in the international sphere, leading to a more cohesive and inspired international legal system, guided by the imperative of the realization of justice. Also, the multiplicity of international tribunals nowadays (for example, in addition to the ICJ, the International Tribunal for the Law of the Sea, the International Criminal Court, the international (inter-American and European) human rights courts, the *ad hoc* international criminal tribunals – for Rwanda and for the Former Yugoslavia, and the Court of Justice of the European Communities) constitute an encouraging development of the growing recourse to judicial channels to resolve disputes, and the formation of the embryo of a future international judiciary.

43. This development reveals that the ancient ideal of international justice has been revitalized and is gaining ground nowadays. It has also affirmed and developed the ability of international law to adequately resolve international disputes in different domains of human activity (*cf. supra*). Today, such disputes no longer reveal a strictly inter-State dimension as in the past. International human rights

²¹. Cf. ICJ, *Nicaragua v. The United States of America*, ICJ Reports (1986) pp. 114-115, para. 220.

²². For this ominous, fragmenting and erroneous attempt, and also an equally erroneous and reductionist vision of the scope of the third and fourth 1949 Geneva Conventions on International Humanitarian Law, cf. U.S., *Additional Response of the United States to Request for Precautionary Measures of the Inter-American Commission on Human Rights - Detainees in Guantanamo Bay, Cuba*, of July 15, 2002, pp. 1-35. Contrary to that State's allegations, there is no juridical vacuum or limbo, and every individual is protected by law, in any circumstances whatsoever (even those detained and sentenced), applying the provisions of international humanitarian law and international human rights law *concomitantly*.

²³. A.A. Cançado Trindade, “Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Humanitario Internacional: Aproximaciones y Convergencias”, in *10 Años de la Declaración de Cartagena sobre Refugiados - Memoria del Coloquio Internacional* (San José, Costa Rica, December 1994), San José, IIDH/ACNUR/Gob. Costa Rica, 1995, pp. 77-168.

tribunals, for example (the Inter-American and the European Courts of Human Rights), have expanded access to justice to subjects of international law other than the States.²⁴ They have done what the ICJ has been unable to do (owing to the anachronistic limitations of its Statute). The many contemporary international tribunals are responding to an urgent need of the international community as a whole. And the individual has finally been given access to justice, at the international as well as the national level.

44. Specialized international tribunals, such as the European and Inter-American Courts of Human Rights, and the international criminal tribunals *ad hoc* for the Former Yugoslavia and for Rwanda have affirmed universal principles, and the primacy of humanitarianism over traditional mechanisms of the inter-State contentious sphere.²⁵ Their work has been complementary to that of the ICJ (which has also referred to elementary considerations of humanity), and has contributed to raising contemporary international contentious matters to a new universalist dimension, over and above the peaceful solution of international disputes on a strictly inter-State basis. In this way, they have enriched contemporary public international law.

45. The multiplicity of international tribunals is, consequently, an encouraging phenomenon, offering additional forums for access to justice, and also providing justice at an international level. Attention should be focused on this healthy substantive development, which is a reflection of the expansion of the application of international law in general and of judicial solutions in particular,²⁶ instead of trying – as some doctrinaires have attempted – to create an artificial “problem” based on the traditional concern with the delimitation of jurisdictions. The questions posed by the co-existence of the international tribunals can be adequately examined in the dialogue between international judges, and not on the basis of puerile self-assertions of alleged primacy (of one court over the others).

46. As I stated recently, in my address, as guest speaker, on the occasion of the opening of the 2004 judicial year of the European Court of Human Rights (on January 22, 2004) in the *Palais des Droits de l'Homme* in Strasbourg):

"This is a point which deserves to be stressed on the present occasion, as in some international legal circles attention has been diverted in recent years from this fundamental achievement to the false problem of the so-called 'proliferation of international tribunals'. This narrow-minded, inelegant and derogatory expression simply misses the key point of the considerable advances of the old ideal of international justice in the contemporary world. The establishment of new international tribunals is but a reflection of the way contemporary international law has evolved, and of the current search for, and construction of, an international community guided by the rule of law and

²⁴. A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104; and cf. H. Ascensio, "La notion de juridiction internationale en question", in *La juridictionnalisation du Droit international* (Colloque de Lille), Paris, Pédone, 2003, p. 198; J.-P. Cot, "Le monde de la justice internationale", in *ibid.*, pp. 517 y 521; M. Bedjaoui, "La multiplication des tribunaux internationaux ou la bonne fortune du droit des gens", in *ibid.*, pp. 541-544.

²⁵. M. Koskeniemi and P. Leino, "Fragmentation of International Law? Postmodern Anxieties", 15 *Leiden Journal of International Law* (2002) pp. 576-578. – It may be recalled that, in the *M/V Saiga* case (1999), the International Tribunal for the Law of the Sea (ITLS) also evoked basic considerations of humanity; cf. ITLS, *M/V Saiga* case (No. 2) (*Saint Vincent and the Grenadines v. Guinea*), *Reports of Judgments, Advisory Opinions and Orders* (1999), paras. 155-156.

²⁶. Cf. J.I. Charney, "Is International Law Threatened by Multiple International Tribunals?", 271 *Recueil des Cours de l'Académie de Droit International de La Haye* (1998) pp. 116, 121, 125, 135, 347, 351 and 373.

committed to the realization of justice. It is, furthermore, an acknowledgement of the superiority of the judicial means of settlement of disputes, bearing witness of the prevalence of the rule of law in democratic societies, and discarding any surrender to State voluntarism.

Since the visionary writings and ideas of Nicolas Politis and Jean Spiropoulos in Greece, Alejandro Álvarez in Chile, André Mandelstam in Russia, Raul Fernandes in Brazil, René Cassin and Georges Scelle in France, Hersch Lauterpacht in the United Kingdom, John Humphrey in Canada, among others, it was necessary to wait for decades for the current developments in the realization of international justice to take place, nowadays enriching rather than threatening international law, strengthening rather than undermining international law. The reassuring growth of international tribunals is a sign of our new times, and we have to live up to it, to make sure that each of them gives its contribution to the continuing evolution of international law in the pursuit of international justice"²⁷.

47. In the sphere of the protection of fundamental human rights, the growth and consolidation of the international human rights jurisdictions on the American and the European continent testify to the notable progress made by the ancient ideal of international justice today. Both the European and the Inter-American Court have correctly established limits to State voluntarism; they have safeguarded the integrity of their respective human rights conventions, and the primacy of considerations of *ordre public* over the will of individual States; they have set very high standards of State conduct and a certain degree of control over the imposing of undue restrictions by States; and it is encouraging to see that they have strengthened the position of the individual as a subject of international human rights law, with full procedural capacity.

48. With regard to the foundation of their contentious jurisdiction, eloquent illustrations of their firm stance in support of the integrity of the protection mechanisms of the two conventions are to be found in recent decisions of the European Court²⁸ and the Inter-American Court, for example.²⁹ Both international human rights tribunals, when correctly deciding basic procedural questions posed in recent cases, have appropriately used the mechanisms of public international law to strengthen their respective jurisdictions for the protection of the individual.

49. The Inter-American and the European Courts of Human Rights have thus decisively safeguarded the integrity of the mechanisms of protection of the American and European Conventions on Human Rights, which ensure the juridical emancipation of the individual *vis-à-vis* his own State. This is a significant jurisprudential construct which, in my opinion, does not allow any going back. Therefore, in my opinion, it is necessary to revert, as soon as possible, the unfortunate decision of the majority of the members of the Court in relation to the second operative paragraph of this judgment in *the Serrano Cruz Sisters v. El*

²⁷. A.A. Cançado Trindade, *Speech on the Occasion of the Opening of the Judicial Year of the European Court of Human Rights (Thursday, 22 January 2004) / Discours dans l'audience solennelle à l'occasion de l'ouverture de l'année judiciaire de la Cour Européenne des Droits de l'Homme (le jeudi 22 janvier 2004)*, Strasbourg, Council of Europe/ECTHR doc. No. 926464, of January 22, 2004, p. 11, paras. 10-11. And cf. text also reproduced in *European Court of Human Rights/Cour européenne des droits de l'homme, Annual Report 2003/Rapport annuel 2003*, Strasbourg, C.E., 2004, p. 44, paras. 10-11. And cf. likewise, A.A. Cançado Trindade, "The Merits of Coordination of International Courts on Human Rights", 2 *Journal of International Criminal Justice* - Oxford (2004) pp. 309-312.

²⁸. In the *Belilos versus Switzerland* case (1988), in the *Loizidou versus Turkey* case (Preliminary Objections, 1995), and in the *I. Ilascu, A. Lesco, A. Ivantoc and T. Petrov-Popa versus Moldova and the Russian Federation* case (2001).

²⁹. In the *Constitutional Tribunal and Ivcher Bronstein vs Peru* cases, Competence (1999), and in the *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* (Preliminary objections, 2001).

Salvador, and return immediately to the progressive jurisprudential line of the Inter-American Court, to its important case law that emancipates the individual.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary