1. Prologue: An overview of the contribution of international tribunals to the rule of law

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I. INTRODUCTION

The gradual realization – that we witness, and have the privilege to contribute to, nowadays – of the old ideal of justice at international level\(^1\) has been revitalizing itself, in recent years, with the reassuring creation and operation of the multiple contemporary international tribunals. This is a theme, proper of our times, which has definitively assumed a prominent place in the international agenda of this second decade of the twenty-first century.\(^2\) Since the visionary ideas and early writings of some decades ago,\(^3\) it was necessary to wait for some further decades for


\(^3\) Such as the writings of BCJ Loder, André Mandelstam, Nicolas Politis, Jean Spiropoulos, Alejandro Álvarez, Raul Fernandes, Édouard Descamps, Albert de La Pradelle, René Cassin, James Brown Scott, Georges Scelle, Max Huber, Hersch Lauterpacht, John Humphrey, among others; cf AA Cançado Trindade,
the current developments in the realization of international justice to take place, not without difficulties, now enriching and enhancing international law.

It is a source of satisfaction to me to contribute, with this brief Prologue, to the present book The Contribution of International and Supranational Courts to the Rule of Law (eds Geert De Baere and Jan Wouters), a timely initiative of the Centre for Global Governance Studies of the Catholic University of Leuven. May I start by recalling that contemporary international tribunals have been contributing decisively to the consolidation of the expanded international jurisdiction, as well as to the assertion and consolidation of the international juridical personality and capacity of the human person, as subject, both active (before international human rights tribunals) and passive (before international criminal tribunals), of international law. They have, accordingly, granted access to international justice to a considerably greater number of justiciables, in the most distinct circumstances, all over the world.

II. THE EXPANSION OF INTERNATIONAL JURISDICTION

Nowadays, the international community fortunately counts on a wide range of international tribunals, adjudicating cases that take place not only at inter-State level, but also at intra-State level. This invites us to approach their work from the correct perspective of the justiciables themselves and brings us closer to their common mission of securing the realization of international justice, either at inter-State or at intra-State level. From the standpoint of the needs of protection of the justiciables, each international tribunal has its importance, in a wider framework encompassing the most distinct situations to be adjudicated, in each respective domain of operation.

The present day multiplicity of international tribunals has widened the scope of judicial settlement, particularly when those tribunals, in

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resolving disputes lodged with them, also care to say what the Law is (juris dictio). Each international tribunal operates in the ambit of its own jurisdiction, but all undertake in harmony their common mission of imparting justice. Nowadays, even the settlement of disputes by the International Court of Justice (ICJ) itself, requires it at times to go beyond the inter-State dimension, as that settlement also comprises issues which pertain ultimately to the condition of individuals in international law.

Thus, in respect of situations concerning individuals or groups of individuals, reference can be made, eg to the Nottebohm case (1955) pertaining to double nationality; to the cases of the Trial of Pakistani Prisoners of War (1973), and of the Hostages (US Diplomatic and Consular Staff) in Teheran case (1980); to the case of the Application of the Convention against Genocide (1996 and 2007); to the case of the Frontier Dispute between Burkina Faso and Mali (1998); to the triad of cases concerning consular assistance – namely, the cases Breard (1998), the case LaGrand (Germany versus United States, 2001), the case Avena and Others (Mexico versus United States, 2004).

In respect of those cases, one cannot fail to reckon that one of their predominant elements has been precisely the concrete situation of the individuals directly affected, and not merely abstract issues of exclusive interest of the litigating States in their relations inter se. Moreover, one may further recall that, in the case of Armed Activities in the Territory of Congo (DR Congo versus Uganda, 2000), the ICJ was concerned with grave violations of human rights and of international humanitarian law; and the Land and Maritime Boundary between Cameroon and Nigeria (1996) was likewise concerned with the victims of armed clashes.

More recently, examples wherein the Court’s concerns have had to go beyond the inter-State outlook have further increased in frequency. They include, the case on Questions Relating to the Obligation to Prosecute or Extradite (2009–13) pertaining to the principle of universal jurisdiction under the UN Convention against Torture, the case of AS Diallo (Guinea versus DR Congo, 2010) on detention and expulsion of a foreigner, the case of the Jurisdictional Immunities of the State (2010–12), the case of the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (2011), and the case of the Temple of Preah Vihear (provisional measures, 2011).

The same can be said of the two last Advisory Opinions of the Court, on the Declaration of Independence of Kosovo (2010), and on a Judgment of the ILO Administrative Tribunal upon a Complaint Filed against the IFAD (2012), respectively. The artificiality of the exclusively inter-State outlook has thus often been made manifest, and increasingly so;
that outlook rests on a longstanding dogma of the past which has survived to date as a result of mental lethargy. Those more recent contentious cases, and requests for Advisory Opinions, lodged with the Court, have asked the latter, by reason of their subject-matter, to overcome that outlook.

Even if the mechanism of dispute settlement by the ICJ remains strictly or exclusively inter-State, the substance of those disputes or issues brought before the Court pertains also to the human person as the aforementioned cases and opinions clearly show. The truth is that the strictly inter-State outlook has an ideological content, is a product of its time, a time long past. In these more recent decisions (1999–2013), the ICJ has at times rightly endeavoured to overcome that outlook, so as to face the new challenges of our times, brought before it in the contentious cases and requests of Advisory Opinions it has been seized of.

The United Nations era has in effect been marked by the rise of multiple international tribunals. This is, in my perception, a reassuring phenomenon which has filled a gap which persisted in the international legal order. It has contributed to the access to justice at international level. The international procedural capacity of individuals has been exercised before international human rights tribunals, thanks to the system of international individual petitions: the European Court of Human Rights (ECtHR), which celebrated its 60th anniversary in 2010, and the Inter-American Court of Human Rights (IACtHR), which celebrated its 30th anniversary in 2009, have more recently (in 2006) been followed by the African Court of Human and Peoples’ Rights (AfCHPR).

Their contribution to the historical recovery of the position of the human person as subject of the law of nations (droit des gens) constitutes, in my understanding, the most important legacy of the international

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legal thinking of the last six and a half decades. In their operation in the last decades, the ECtHR and the IACtHR have in effect set higher standards of State behaviour and have established some degree of control over the interposition of undue restrictions by States; they have thereby reassuringly enhanced the position of individuals as subjects of international law with full procedural capacity.

By correctly resolving basic procedural issues raised in some landmark cases, both international tribunals have aptly made use of the techniques of public international law in order to strengthen their respective jurisdictions of protection of the human person, emancipated vis-à-vis her own State. International human rights tribunals have drawn attention to the position of centrality of the victims, the justiciables. It should be kept in mind that the corpus juris gentium of the International Law of Human Rights is clearly victim-oriented. In this respect, it should not pass unnoticed that distinct trends of protection of the human person (International Law of Human Rights, International Humanitarian Law, International Law of Refugees, International Criminal Law) converge, rather than conflict with each other, at normative, hermeneutic and operational levels.

Contemporary international criminal tribunals, for their part, saw the light of day in the 90s, bearing in mind the precedents of the Nuremberg and the Tokyo Tribunals of the post-World War II era. Ad hoc international criminal tribunals (for the Former Yugoslavia and for Rwanda)

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9 Eg the ECtHR’s decisions in the cases of Belilos (1988), of Loizidou (preliminary objections, 1995), and of Ilascu, Lesco, Ivantoc and Petrov-Popa (2001), as well as, eg the IACtHR’s decisions in the cases of the Constitutional Tribunal and of Ivtcher Bronstein (jurisdiction, 1999), as well as of Hilaire, Benjamin and Constantine (preliminary objection, 2001).


were established (in 1993 and 1994) by decision of the UN Security Council in the light of chapter VII of the UN Charter. They were followed by the permanent International Criminal Court (ICC) (Rome Statute of 1998) and by the so-called ‘internationalized’ or ‘hybrid’ or mixed international tribunals (for Sierra Leone, East Timor, Kosovo, Bosnia-Herzegovina, Cambodia and Lebanon).

Each of these tribunals has contributed, in its own way, to the determination of the accountability of those responsible for grave violations of human rights and of international humanitarian law. They afford yet another illustration of the rescue of the international legal personality (and responsibility) of individuals, but, ironically, first as passive subjects of international law (international criminal tribunals), and, only afterwards, as active subjects of international law (international human rights tribunals).

Such developments, due to a reaction of the conscience of humankind against acts of genocide, crimes against humanity, crimes against peace, grave violations of human rights and of international humanitarian law, give testimony of the expansion not only of international personality (and capacity) but also of international jurisdiction and of international responsibility. This is a notable feature of our times in this present era of international tribunals.

Due to the work of those international tribunals, the international community no longer accepts impunity for international crimes, for grave violations of human rights and of international humanitarian law. The determination of the international criminal responsibility of individuals by those tribunals is a reaction of contemporary international law to grave violations guided by fundamental principles and values shared by the international community as a whole. There is no more room for impunity, with the present-day configuration of a true droit au Droit, of the persons victimized in any circumstances, including amid the most complete adversity.

Their jurisprudential advances in recent years were unforeseeable, and even unthinkable, some decades ago. International human rights tribunals have helped to awaken public conscience in respect of situations of

utmost adversity or even defencelessness affecting individuals and of widespread violence victimizing vulnerable segments of the population.\textsuperscript{15} They have, in effect, brought justice to those victimized, even in situations of systematic and generalized violence and mass atrocities. They have thus contributed, considerably and decisively, to the primacy of the rule of law at national and international levels, demonstrating that no one is above the law – neither the rulers, nor the ruled, nor the States themselves. International law applies directly to States, to international organizations, and to individuals.

III. THE CONTRIBUTION OF EXPANDED ADVISORY JURISDICTION TO THE RULE OF LAW

It was with the Permanent Court of International Justice (PCIJ) that, for the first time, an international tribunal was attributed the advisory function – surrounded as it was by much discussion. It was originally conceived to assist the Assembly and the Council of the League of Nations, but the PCIJ, making good use of this, ended up by assisting not only those organs but States as well. The advisory jurisdiction, as exercised by the PCIJ, contributed also to the progressive development of international law. While the PCIJ Statute enabled only the League Council and Assembly to request Advisory Opinions, the ICJ Statute enabled other United Nations organs (besides the General Assembly, the Security Council and ECOSOC) and specialized agencies and others to do so.

Advisory Opinions of the ICJ, for their part, have also contributed to the prevalence of the rule of law at national and international levels. Some of them have, likewise, contributed to the progressive development of international law (eg the ones on Reparation for Injuries, 1949; on Namibia, 1970; on Immunity from Legal Process of a Special Rapporteur of the UN Commission on Human Rights, 1999; among others). The same can be said of some of the Advisory Opinions of the IACtHR (eg the ones on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, 1999; on the

With the operation of international tribunals (in the exercise of their advisory function and in the adjudication of contentious cases), there have gradually emerged two basic distinct conceptions of the exercise of the international judicial function: one – a strict one – whereby the tribunal has to limit itself to settle the dispute at issue and to handle its resolution of it to the contending parties (a form of transactional justice), addressing only what the parties had put before it; the other, a larger one – the one I sustain – whereby the tribunal has to go beyond that, and say what the Law is (juris dictio), thus contributing to the settlement of other like situations as well, and to the progressive development of international law. In the interpretation itself – or even in the search – of the applicable law, there is space for judicial creativity; each international tribunal is free to find the applicable law, independently of the arguments of the contending parties16 (juria novit curia).

IV. THE RELEVANCE OF GENERAL PRINCIPLES OF LAW

May I move on to my next point: general principles of law, enlisted among the formal sources of international law (Article 38 of the ICJ Statute), encompass those found in all national legal systems (being thus ineluctably linked with the very foundations of Law) and likewise the general principles of international law. Such principles, in my own conception, inform and conform the norms and rules of international law, being a manifestation of the universal juridical conscience, the ultimate material source of all Law; in the evolving jus gentium of our times, basic considerations of humanity play a role of the utmost importance.17

International human rights tribunals and international criminal tribunals have ascribed great importance to general principles of law. Those principles have been reaffirmed time and once again and retain full


validity in our time. Legal positivism has always attempted, in vain, to minimize their role, but the truth is that, without those principles, there is no legal system at all, be it national or international. They give expression to the idea of an objective justice, paving the way to the application of the universal international law.

V. THE MOVE TOWARDS COMPULSORY JURISDICTION

In the present era of international tribunals there have been advances towards compulsory international jurisdiction, seeking to secure the primacy of the jus necessarium over the jus voluntarium. The present-day phenomenon of the multiplicity of international tribunals is indeed related to the move towards international compulsory jurisdiction. As to the ICJ, the original purpose of the optional clause (Article 36(2) of the Statute) was to attract general acceptance so as to establish compulsory international jurisdiction, in the light of the principle of juridical equality of States; the subsequent practice of adding restrictions – at each State’s free will – to the acceptance of the optional clause distorted the purpose originally propounded. But there is today renewed hope in the growing use of compromissory clauses, as jurisdictional basis in the contentieux before the ICJ; for their consideration one is, in my view, to take into

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account the respective conventions as a whole (including their object and purpose) in the path towards international compulsory jurisdiction.

The International Tribunal for the Law of the Sea (UNTLOS) counts on a *sui generis* mechanism (*supra*), opening four alternatives for dispute-settlement: if there is no agreement as to which one to select, arbitration applies. This provides another illustration that State discretion is not unlimited as in times past. The Court of Justice of the European Union (CJEU) provides yet another illustration of the move towards international compulsory jurisdiction, in the domain of regional or subregional integration, a domain in which there is a multiplicity of international tribunals nowadays (eg in Latin America and in Africa).

An international tribunal such as the CJEU has contributed considerably to the consolidation of the *autonomous* nature of EU law, to its effectiveness and to the specificity of Union Treaties, and to the identification of the essential characteristics of the EU legal order.²¹ Among such characteristics stand its primacy over the law of member States, and the direct effect of several of its provisions, applicable alike to their nationals and to member States themselves.

VI. INTERNATIONAL TRIBUNALS, JURISPRUDENTIAL CROSS-FERTILIZATION AND THE RULE OF LAW

In our time, the more lucid international legal doctrine has at last discarded the empty euphemistic expressions used some years ago – such as so-called ‘proliferation’ of international tribunals, so-called ‘fragmentation’ of international law, so-called ‘forum-shopping’. Such euphemisms sought in vain to divert attention to false issues of delimitation of competences, oblivious of the need to focus it on the imperative of an enlarged access to justice.

It has become clear today that contemporary international tribunals, rather than threatening the cohesion of international law, enrich and

strengthen it, in asserting its aptitude to resolve disputes in distinct domains of international law, at both inter-State and intra-State levels. Contemporary international law has thereby become more responsive to the fulfilment of the basic needs of the international community, of human beings and of humankind as a whole, among which is that of the realization of justice. The expansion of international jurisdiction by the establishment of contemporary international tribunals is but a reflection of the way contemporary international law has evolved, no longer indifferent to human suffering, and of the current search for, and construction of, a corpus juris gentium for the international community guided by the rule of law in democratic societies and committed to the realization of justice.

In the performance of their common mission of imparting justice, contemporary international tribunals have begun to take into account each other’s case law, and nowadays contribute to jurisprudential cross-fertilization. Jurisprudential cross-fertilization, ensuing therefrom, exerts a constructive function in the safeguard of the rights of the justiciables. It is thus to be expected that contemporary international tribunals remain increasingly aware of the case law of each other, in their continuing performance of their common mission of imparting justice in distinct domains of international law, thus preserving its basic unity. This is to the benefit of the international community as a whole and of all the justiciables, all subjects of law around the world – States, international organizations and individuals alike.

VII. EFFECTS OF THE WORK OF INTERNATIONAL TRIBUNALS AND THE RULE OF LAW

In the present era of multiple international tribunals, the effects of their joint work can already be perceived. These effects have been, in my perception, first, their law-making endeavours, not only applying but also creating an objective law, beyond the will or consent of individual States, on the basis of the consciousness of human values; secondly, the acknowledgment of the fundamental importance of general principles of law; thirdly, the development of international legal procedure (with a blend of traditions of national legal systems around the world, and the acknowledgment of the importance for the justiciables of the holding of

oral hearings); fourthly, the fostering of the unity of law, with the interactions between international law and domestic law; and fifthly, the aforementioned fostering of respect for the rule of law at national and international levels.

The assertion of an objective law, beyond the will of individual States, is a revival of jusnaturalist thinking. Judicial settlement of international disputes is needed as a guarantee against unilateral interpretation by a State of conventional obligations. After all, the basic foundations of international law emanate ultimately from the human conscience, from the universal juridical conscience, and not from the ‘will’ of individual States. The assertion of the unity of the law is intertwined with the rule of law at national and international levels, as access to justice takes place, and ought to be preserved, at both levels.

VIII. INTERACTIONS BETWEEN INTERNATIONAL AND DOMESTIC LAW: THE UNITY OF THE LAW

The work of contemporary international tribunals bears witness to the interactions between international and domestic law in their respective domains of operation. The realization of justice becomes a common goal, and a converging one, at the domestic and international legal orders. They both testify to the unity of the Law in the realization of justice, a sign of our times. It should not pass unnoticed that there have been occasions when international jurisdiction has come to the support of national jurisdiction so as to secure also within this latter the primacy of law (préréminence du droit, rule of law). In effect, the expansion of international jurisdiction (cf supra) has counted on the co-participation of national jurisdictions.23

After all, international law attributes international functions also to national tribunals.24 These latter have a role to play also in the search of the primacy of the international rule of law.25 Among international criminal tribunals, the ICC shows, inter alia, that the principle of

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24 Cf AA Cançado Trindade, The Access of Individuals to International Justice, above n3 at 76–112 (on the interaction between international law and domestic law in human rights protection).

complementarity, for example, signals the call for a greater approximation, if not interaction, between the international and national jurisdictions. And it could not be otherwise, particularly in our times, when, with growing frequency, the most diverse matters are brought before judicial control at international level.\textsuperscript{26}

There are significant illustrations, in certain situations of extreme adversity to human beings, of the international jurisdiction having even preceded national jurisdiction in the protection of the rights of the victimized and in the reparations due to them. For example, the determination, by the IACtHR, of the international responsibility of the respondent State for grave violations of human rights in the cases of the massacres of Barrios Altos and La Cantuta (Judgments of 2001\textsuperscript{27} and 2006,\textsuperscript{28} respectively), preceded the condemnation, by the Special Penal Chamber of the Peruvian Supreme Court (in 2007–10) of the former President of the Republic (A Fujimori).\textsuperscript{29}

In those two cases, in addition to the paradigmatic case of the Constitutional Tribunal (IACtHR’s Judgment of 2001) – pertaining to the destitution of three magistrates, later reincorporated into the Tribunal – the international jurisdiction effectively intervened in defence of the national one, decisively contributing to the restoration of the \textit{État de Droit} (rule of law) – as it occurred – besides having safeguarded the rights of the victimized.\textsuperscript{30} In the history of the relations – and


\textsuperscript{27} Judgments of 14.03.2001 (merits), 03.09.2001 (interpretation) and 30.11.2001 (reparations).

\textsuperscript{28} Judgment of 29.11.2006 (merits and reparations).

\textsuperscript{29} For a historical account, cf AA Cançado Trindade, \textit{El Ejercicio de la Función Judicial Internacional – Memorias de la Corte Interamericana de Derechos Humanos} (3rd ed, Belo Horizonte/Brazil, Edit Del Rey, 2013) 42–5.

\textsuperscript{30} Almost three years after the IACtHR’s Judgment (of 31.01.2001) in the case of the Constitutional Tribunal, I sent a letter to this latter [tribunal?] (on 04.12.2003), as then President of the IACtHH, in which I expressed, inter alia, that:

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we can appreciate this Judgment of the IACtHR in historical perspective …, as a landmark one not only … [in the] inter-American system of protection of human rights. … [It] constitutes an unprecedented judicial decision also at world level. It has had repercussions not only in our region but also in other continents. It has marked a starting point of a remarkable and reassuring
interactions – between national and international jurisdictions, this trilogy of cases will surely keep on being studied by the present and future generations of internationalists and constitutionalists.

IX. THE UNITED NATIONS AND THE RULE OF LAW

The importance assumed by international tribunals in contemporary international law has been accompanied by a growing attention dispensed in recent years to the rule of law (état de Droit/Estado de Derecho) in the international agenda of the United Nations. In effect, by the time of the adoption of the document World Summit Outcome, at the end of the UN World Summit of 2005, there was a general awareness that the international and national dimensions of the rule of law were firmly intertwined, and that, accordingly, the enhancement of the rule of law at international level had a direct impact on the rule of law at national level.

The way was thus paved for the insertion of the matter in the agenda of the UN General Assembly, wherein it has been present ever since 2006 up to the present (mid-2014). It has counted on the interventions, year after year, of an increasing number of member States engaged in contributing to the UN endeavours in the present domain. This is reassuring as it discloses a new consciousness of the pressing need to secure the enhancement of the rule of law at both national and international levels.

The 2012 Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, echoing the successive GA resolutions on the matter, reiterated the key importance of the rule of law for the three main pillars of the United Nations, namely, international peace and security, human rights and development (preamble). It added that human rights, the rule of law and approximation between the judicial power at national and international levels ...


33 Cf above n31.
democracy are strongly interlinked and mutually reinforcing, belonging to ‘the universal and indivisible core values and principles of the United Nations’ (paras 5 and 7). It stressed ‘the right of equal access to justice for all, including members of vulnerable groups’ (para 14). It further acknowledged the value of the contribution of the work of the ICJ and other contemporary international tribunals for the promotion of the rule of law (paras 31–32).

X. CONCLUDING REMARKS

I have now come to my brief concluding remarks keeping in mind the lessons learned along a century of experience sedimented in the domain of international justice. It is high time, in my view, to turn and focus attention on the proper ways of achieving the realization of justice, rather than – as the legal profession is used to – being attentive only to strategies of litigation for the sake of it, making abstraction of human values. Likewise, it is high time to accompany consistently the ongoing expansion of international jurisdiction, and of international legal personality and capacity, as well as international responsibility, by drawing closer attention to all subjects of international law, not only States, but also international organizations, peoples and individuals.

Moving to another point, it is now time to accompany the expansion of international jurisdiction, also by fostering the dialogue and coordination between contemporary international tribunals. Endeavours of coordination already exist but have been far from sufficient to date. There is nowadays a pressing need for greater dialogue and coordination of contemporary international tribunals in their common mission of imparting justice. At conceptual level, there is a pressing need of further jurisprudential developments in the matter of reparations, as well as provisional measures of protection, both still in their infancy.

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34 Two meetings, open to all contemporary international tribunals, have taken place to date: the first one, on the occasion of the 50th anniversary of the Court of Justice of the European Communities (CJEC, now the Court of Justice of the European Union (CJEU)), was held in Luxembourg, on 03–04.12.2002; and the second meeting, to commemorate the centenary of the creation of the old Central-American Court of Justice, took place in Managua, on 04–05.10.2007; for an account of both meetings, in which I participated, cf AA Cançado Trindade, Direito das Organizações Internacionais, above n32 at 582–4 and 601–2.
The issue of compliance with judgments and decisions of international tribunals requires far greater attention and study on the part of international tribunals – some of them being currently engaged already in its careful consideration. Here, each international tribunal counts on a mechanism of its own; yet, all of them are susceptible to improvement. This issue pertains, as pointed out by the ECtHR in the case *Hornsby versus Greece* (Judgment of 19.03.1997) and by the IACtHR in the case of *Baena Ricardo and Others (270 Workers) versus Panama* (jurisdiction, Judgment of 28.11.2003) to the *rule of law* itself, so as to secure the proper administration of justice.

Only with the due compliance with the judgments of international tribunals will the rights at stake be effectively protected and will the realization of justice be achieved. Such faithful compliance with their judgments is a legitimate concern of all contemporary international tribunals. Access to justice *lato sensu* encompasses the full and faithful compliance with their Judgments. This is a position of principle, in relation to an issue which pertains to the international *ordre public* and to the *rule of law* (*prééminence du droit*) at international and national levels.

Last but not least, the reassuring coexistence of multiple international tribunals has considerably enlarged the number of *justiciables*, in all parts of the world, even in situations of great adversity or vulnerability, if not defencelessness. The operation of international tribunals, in a harmonious and coordinated way, is essential to the gradual realization of the old ideal of international justice as well as to the constant renewal of faith and hope in the construction of a world with prevailing justice.