

# Some reflections on the justiciability of the peoples' right to peace<sup>1</sup>

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*Summary:* I. Introduction: Two Significant Antecedents. II. Some Disquieting Interrogations. III. The Time Dimension: The Long-Term Outlook. IV. The Assertion of the Peoples' Right to Peace before Contemporary International Courts and Tribunals. 1. Advances of the Case-Law of the Inter-American Court of Human Rights. 2. Pleadings before the International Court of Justice. 3. Contribution of the Case-Law and Practice in Other International Jurisdictions. V. The Peoples' Right to Peace and the Lessons of History.

## I. Introduction: Two Significant Antecedents

May I start my address by conveying to the organizers of this event the expression of my satisfaction to join you in this journey today, 16 December 2010, here at the United Nations in Geneva. Two decades have already passed since I addressed, in this same U.N. headquarters here in Geneva, the *U.N. Global Consultation on the Right to Development as a Human Right*. On that occasion, on the basis of the 1986 U.N. Declaration on the Right to Development, I dwelt upon such conceptual aspects as the subjects, legal basis and contents of the right; its obstacles and possible means of implementation; and its relationship to other human rights. Although I think that much of what I said here in 1990<sup>3</sup> would have a direct bearing on the peoples' right to peace, it is not my intention to go through that again in the current exercise on the peoples' right to peace.

Reference made to this antecedent, may I only recall that the 1990 U.N. Global Consultation proved to be a worthwhile exercise<sup>4</sup> following the 1986 U.N. Declaration: in fact, in the decade following the formulation of this latter and

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<sup>3</sup> A.A. Cançado Trindade, *Legal Dimensions of the Right to Development as a Human Right: Some Conceptual Aspects*, U.N. doc. HR/RD/1990/CONF.36, of 1990 (U.N. Global Consultations on the Right to Development as a Human Right), pp. 1-17, esp. p. 13. And, for a detailed account of the aforementioned U.N. Global Consultation, cf. A.A. Cançado Trindade, *Direito das Organizações Internacionais*, 4th. ed., Belo Horizonte/Brazil, Ed. Del Rey, 2009, pp. 289-312.

<sup>4</sup> Cf. U.N. Centre for Human Rights, *The Realization of the Right to Development*, N.Y., U.N., 1991, pp. 3-53.

the 1990 U.N. Global Consultation, the right to development found significant endorsements in the final documents adopted by the U.N. World Conferences of the nineties, which have brought it into the conceptual universe of International Human Rights Law. This seemed to have been the understanding of the U.N. General Assembly decision 48/141 (of 20.12.1993, on the creation of the post of U.N. High Commissioner for Human Rights.), which, in its preamble, reaffirmed *inter alia* that “the right to development is a universal and inalienable right which is a fundamental part of the rights of the human person”.

Before turning to the peoples' right to peace, may I briefly refer to a second significant antecedent of our exercise today, which promptly also comes to my memory. While the recent cycle of U.N. World Conferences was taking its course, I was privileged to integrate, in 1997, the UNESCO Group of Legal Experts entrusted with the preparation of the *Draft Declaration on the Human Right to Peace* (meetings of Las Palmas Island, February 1997; and of Oslo, June 1997). We duly inserted the right to peace into the framework of International Human Rights Law<sup>5</sup>, asserting peace as a right and a duty<sup>6</sup>. After the Las Palmas and Oslo meetings, UNESCO launched consultations with 117 member States (Paris, March 1998), at the end of which three main positions of the governmental experts became discernible: those fully in support of the recognition of the right to peace as a human right, those who regarded it rather as a “moral right”, and those to whom it was an “aspiration” of human beings<sup>7</sup>; the main difficulty, as acknowledged by the *Report* of the Paris meeting, was its official recognition as a legal right<sup>8</sup>.

It had become clear that that exercise as to the right to peace did not have the same outcome as the one pertaining to the right to development. In other words, the 1984 U.N. Declaration on the Right of Peoples to Peace<sup>9</sup> has not yet generated a significant projection as the 1986 U.N. Declaration on the Right to Development. And this, ironically, despite the fact that, in a historical perspective, the right to peace has been deeply-rooted in human conscience for a much longer period than the right to development (*infra*). The initiative by UNESCO was not the only exercise to that effect.

Outside the framework of international organizations there have been initiatives, on the part of persons of good-will, to conceptualize both the right to peace<sup>10</sup> and the rights of peoples<sup>11</sup>. This brings me to invoke another element to be recalled in the present exercise, namely, the renewed attention dedicated, in the recent decades, to the rights of peoples. It is, however, beyond the purposes of my intervention today to review the extensive expert writing, the numerous books and monographs on distinct idioms, that have elaborated on the rights of peoples.

<sup>5</sup> A.A. Cançado Trindade, “The Right to Peace and the Conditions for Peace”, 21 *Diálogo - The Human Right to Peace: Seed for a Possible Future* - UNESCO/Paris (June 1997) pp. 20-21.

<sup>6</sup> The document was prepared as a contribution of UNESCO to the 50th anniversary (in 1998) of the Universal Declaration of Human Rights.

<sup>7</sup> UNESCO/Executive Board, *Report by the Director-General on the Results of the International Consultation of Governmental Experts on the Human Right to Peace (Final Report)*, document 154 EX/40, of 17.04.1998, p. 10.

<sup>8</sup> Cf. *ibid.*, pp. 2 and 10.

<sup>9</sup> Annex to the U.N. General Assembly resolution 39/11, of 12 November 1984.

<sup>10</sup> E.g., the 2006 Luarca Declaration on the Human Right to Peace, among others.

<sup>11</sup> E.g., the 1976 Algiers Declaration on the Rights of Peoples, among others.

Each one speaks for his own experience, and so do I: my intention, in these preliminary remarks, is to recall pertinent exercises in which I was engaged in the last two decades, concerning the formulation of the rights to peace and to development (*supra*), including the recent cycle of U.N. World Conferences. I have registered and summarized my recollections in this respect in my *General Course on Public International Law* delivered at The Hague Academy of International Law in 2005, and published in volumes 316 and 317 of its *Recueil des Cours*<sup>12</sup>. May I now pass on to the points I wish to make for the current exercise, which gathers us here today.

## II. Some Disquieting Interrogations

In approaching the right of peoples' to peace, we are first confronted, in my perception, with some rather disquieting interrogations. To start with, it is well-known that the U.N. Charter, adopted in one of the rare moments - if not glimpses - of lucidity in the XXth century, proclaimed, in its preamble, the determination of "the peoples of the United Nations" to "save succeeding generations from the scourge of war", and, to that end, to "live together in peace with each other as good neighbours".

This phraseology is quite clear: in disclosing the constitutional vocation of the U.N. Charter, its draftsmen referred to the peoples, rather than the States, of the United Nations. Why, then, has it taken so much time for the legal profession to acknowledge such constitutional conception of the U.N. Charter (further evidenced by some key provisions as Articles 2(6) and 103 of the Charter), as it has increasingly been doing lately, in recent years? Why has it approached the Charter, for a long time, from a strictly reductionist - if not surpassed - inter-State perspective?

Why have the debates with the U.N. system as a whole, on the human right to peace, proved inconclusive to date? Why has it been so difficult to reach consensus in relation to something which looks *prima facie* so evident? Is it possible that States remain so oversensitive - perhaps more than human beings - when it comes to what they regard as presumably touching on their so-called vital interests? Why so many years have lapsed since the adoption of the 1984 Declaration on the Right of Peoples to Peace till the subject has now seemingly been rescued by the Human Rights Council earlier this year<sup>13</sup> for reconsideration in the present workshop?

Unfortunately, recourse to armed force seems to have pervaded large segments of public opinion, and even - and most regrettably - of the legal doctrine and profession itself (particularly those coopted by the power-holders). Why, - it can further be asked, - has it taken so much time to come to a universally acceptable definition of aggression? Why so, despite the fact that since the twenties, in the old League of Nations, there were endeavours to that effect? Why the tipification of the crime of aggression has not yet been achieved, despite the fact that one

<sup>12</sup> Cf., as to the rights to peace and to development, A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law - Part I", 316 *Recueil des Cours de l'Académie de Droit International de la Haye* (2005), chapter XIV, pp. 397-411; and cf., as to the recent cycle of U.N. World Conferences, A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law - Part II", 317 *Recueil des Cours de l'Académie de Droit International de la Haye* (2005), chapter XXVI, pp. 247-268.

<sup>13</sup> U.N. Human Rights Council, doc. A/HRC/11/L.7, of 12.06.2009, pp. 1-5.

could have built on the 1974 U.D. Definition of Aggression, itself adopted after years of debates?

Why does the proclamation of the peoples' right to peace remains an unfinished business in the United Nations system, after so many years, and despite some relevant provisions of the U.N. Charter itself? Why has humanitarian law not yet evolved to the point of banning war altogether? Why has the topic of international trade in weapons never occupied a more prominent or conspicuous place in the agenda of the U.N. competent organs? I am afraid there are no easy answers to these apparently simple, but disquieting questions. There are to be kept constantly in mind. They have probably more to do with the inscrutable human nature itself. It so seems that States experience an unsurmountable difficulty to speak a common language, when it comes to reach an understanding as to the fundamentals to secure the very survival of humankind. With this warning in mind, I move on to the next point of consideration, namely, the time dimension.

### III. The Time Dimension: The Long-Term Outlook

Despite the difficulties experienced so far, the renewal of interest in, and the insistence upon, the right of peoples' to peace, by the U.N. Human Rights Council, are most commendable. That right can, in effect, be appropriately approached, bearing in mind the time dimension. Its roots can be traced back to the search for peace, antedating for a long time the adoption of the U.N. Charter. In fact, the search for peace, and the construction of the right to peace, have historical roots that were to become notorious with the projects of perpetual peace of the XVIIIth century, such as those of Saint-Pierre (1712) and of I. Kant (1795). Yet, such projects proved incapable to date to accomplish their common ideal, precisely for laying too heavy an emphasis, in their endeavours to restrict and abolish wars, specifically on *inter-State* relations, overlooking the bases for peace *within* each State<sup>14</sup> and the role of non-State entities.

It may appear somewhat surprising that the search for peace has not yet sufficiently related domestic and international levels, this latter going beyond a strictly inter-State dimension. Recent attempts to elaborate on the right to peace have, however, displayed a growing awareness that its realization is ineluctably linked to the achievement of social justice *within* and *between* nations<sup>15</sup>. Along the XXth century, the conceptual construction of the right to peace in International Law has antecedents in successive initiatives taken, in distinct contexts at international level<sup>16</sup>.

<sup>14</sup> The project of Kant (cf. I. Kant, *Sobre la Paz Perpetua* [1795], 4th. ed., Madrid, Tecnos, 1994, pp. 3-69) at least sought to establish a link between inter-State and the internal constitution of each State. On the insufficiencies of the classic endeavours to abolish wars *sic et simpliciter*, cf. G. del Vecchio, *El Derecho Internacional y el Problema de la Paz* (Spanish edition of the original *Il Diritto Internazionale e il Problema della Pace*), Barcelona, Bosch, 1959, pp. 51-52, 62-64, 67 and 121-123.

<sup>15</sup> Cf. *ibid.*, pp. 52, 63-64 and 151; A.A. Caçado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Ed. Renovar, 2002, p. 1062.

<sup>16</sup> Cf., generally, D. Uribe Vargas, *El Derecho a la Paz*, Bogotá, Universidad Nacional de Colombia, 1996, pp. 1-250; D. Uribe Vargas, "El Derecho a la Paz", in *Derecho Internacional y Derechos Humanos/Droit international et droits de l'homme* (eds. D. Bardonnnet and A.A. Caçado Trindade), The Hague/San José of Costa Rica, IIDH/Hague Academy of International Law (1995 External Session), 1996, pp. 177-195.

Reference can be made, in this connection, e.g., to the 1928 General Treaty for the Renunciation of War (the so-called Briand-Kellogg Pact)<sup>17</sup>; Articles 1 and 2(4) of the U.N. Charter<sup>18</sup>, complemented by the 1970 U.N. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States<sup>19</sup>; the 1970 Declaration on the Strengthening of International Security<sup>20</sup>; the 1974 Definition of Aggression<sup>21</sup>; the 1974 Charter on Economic Rights and Duties of States<sup>22</sup>; the Code of Offences against the Peace and Security of Mankind, drafted by the U.N. International Law Commission; successive resolutions of the U.N. General Assembly pertaining to the right to peace<sup>23</sup>, and relating it to disarmament; the 2000 U.N. Millenium Declaration followed by the 2005 World Summit Outcome<sup>24</sup>. Yet, the debates conducive to the adoption of those instruments were again conducted to a large extent from a horizontal, inter-State perspective.

Going well beyond that, in excerpts from the writings of a former recipient of the Nobel Prize in literature, written at the end of the first world war, and only published, posthumously, in the early 70s, and not so well-known as his literary writings, it was pondered that

“(…) La paix en tant que pensée et aspiration, en tant que but et idéal, est déjà très vieille. Cela fait déjà des millénaires qu’existe cette puissante parole, fondamentales pour des millénaires: ‘Tu ne tueras point’. (...) Il y a quelques milliers d’années la loi religieuse d’un peuple de haute culture a édicté le principe fondamental du ‘Tu ne tueras pas’. (...) La loi que Moïse a formulée sur le mont Sinai est reprise quelques milliers d’années plus tard (...) avec des restrictions (...). Nul pays de culture au monde n’a repris dans son code pénal l’interdiction de tuer des hommes sans la restreindre». (...)

<sup>17</sup> Endeavouring to overcome the dangerous system of the equilibrium of forces by condemning war as an means of settlement of disputes and an instrument of foreign policy, and heralding the new system of collective security and the emergence of the right to peace; J. Zourek, *L’interdiction de l’emploi de la force en Droit international*, Leiden/Genève, Sijthoff/Inst. H.-Dunant, 1974, pp. 39-48.

<sup>18</sup> The relevant U.N. provisions, together with the 1928 General Treaty for the Renunciation of War, became major sources - the legal nature of which was unchallenged by States - of limitations of resort to force by States; I. Brownlie, *International Law and the Use of Force by States*, Oxford, Clarendon Press, 1963 (reprint 1981), pp. 83 and 91.

<sup>19</sup> U.N. General Assembly resolution 2625 (XXV), of 24.10.1970.

<sup>20</sup> U.N. General Assembly resolution 2374 (XXV), of 16.12.1970.

<sup>21</sup> U.N. General Assembly resolution 3314 (XXIX), of 14.12.1974.

<sup>22</sup> Which acknowledged the States’ duty to coexist in peace and to achieve disarmament (Articles 26 and 15, respectively). Other international instruments have done the same (e.g., the 1982 World Charter for Nature, preamble, par. 4(c), and Principles 5 and 20). It has often been argued that the right to peace entails as a corollary the right to disarmament.

<sup>23</sup> U.N. General Assembly resolution 33/73, “Declaration on the Preparation of Society to Live in Peace”, of 15.12.1978; U.N. General Assembly resolution 39/11, “Declaration on the Right of Peoples to Peace”, of 12.11.1984; cf. also U.N. General Assembly resolution 34/88, of 1979.

<sup>24</sup> Cf., on these latter, A.A. Cançado Trindade, *Direito das Organizações Internacionais*, 4th ed., Belo Horizonte/Brazil, Edit. Del Rey, 2009, pp. 545-555.

(...) La forme la plus grave de `combat´ est la forme organisée par l'État (...) et son corollaire: la philosophie de l'État, du capital, de l'industrie et de l'homme faustien (...). J'ai toujours été pour les opprimés contre les oppresseurs»<sup>25</sup>.

In the profession of his pacifist ideals, Hermann Hesse added lucidly that

“Ce principe du `Tu ne tueras point´, à l'époque où il fut énoncé, représentait une exigence d'une portée inouïe. Cette parole signifiait pratiquement la même chose que `Tu ne respireras pas!´. Apparemment c'était impossible, apparemment c'était dément (...). Toutefois, cette parole s'est maintenue au cours de nombreux siècles et aujourd'hui encore elle est valide, elle a fondé des lois, des opinions, des morales, elle a porté ses fruits, a secoué et labouré la vie des hommes comme peu d'autres paroles. (...) Il y a eu des progrès et des régressions. Il y eu des pensées lumineuses à partir desquelles nous avons construit des lois sombres et des cavernes de la conscience. (...)

Le précepte `Tu ne tueras pas´ a été fidèlement honoré et suivi depuis des milliers d'années par des milliers d'individus. (...) Il y a toujours eu une minorité des gens bien intentionnées, de croyants de l'avenir qui ont suivi des lois qui ne se trouvaient dans aucun code pénal profane. (...) Des milliers d'individus se sont réclamés de lois supérieures non écrites (...), et se sont courageusement levés contre l'obligation de tuer et de haïr, acceptant d'aller en prison et d'être persécutés pour cela»<sup>26</sup>.

The exercise to which we devote ourselves today, here at the United Nations in Geneva, in retaking for examination the right of peoples to peace, is thus nothing new. There is nothing new under the sun. The purpose of our debate corresponds to an ancient human aspiration, which has been present in human conscience along the centuries. As observed by another remarkable writer of the XXth century, each war, however brief, with the unethical recourse to unlimited force and violence, with the «hypothetical justification of its necessity», with the hypocrisy of alleged preoccupation with those fallen in combat, with its prayers to the flag and the homeland (*patria*), with its waging of uncontrolled violence and extermination, destroys in a short while what was supposed to be achievements of social organization, if not civilization, along centuries<sup>27</sup>.

Fortresses, castles, temples and cathedrals, built in the course of decades, were destroyed in hours, if not minutes, - but not the idiom, not the oral history, not the religious beliefs, not the secular human aspiration to peace; these latter seem to emerge like phoenix, rising from the ashes with renewed youth. This can hardly be surprising, as “the spirit is stronger than the matter”<sup>28</sup>. The more we go back in

<sup>25</sup>Hermann Hesse, *Guerre et paix*, Paris, L'Arche Éd., 2003 [reed.], pp. 35, 49, 127 and 115.

<sup>26</sup>*Ibid.*, pp. 35-36 and 50.

<sup>27</sup>Stefan Zweig, *Tiempo y Mundo - Impresiones y Ensayos (1904-1940)*, Barcelona, Edit. Juventud, 1998 [reed.], pp. 60-61.

<sup>28</sup>*Ibid.*, p. 247.

time, the more this appears to be confirmed. Yet, in our days, the awareness of the imperatives of peace does not seem to have evolved *pari passu* with the impressive development of specialized knowledge and technological advances.

In the mid-XXth century, the learned historian Arnold Toynbee warned that the then growing expenditures with militarism fatally lead to the “ruin of the civilizations”<sup>29</sup>; likewise, the improvement of military technique is symptomatic of the “decline of a civilization”<sup>30</sup>. Such growing expenditures of his time keep on going on, in our days, six decades later, amidst apparent inconstancy. Another distinguished writer of the XXth century, Stefan Zweig, in referring to the “old barbarism of war”, likewise warned against the *décalage* between technical progress and moral ascension, in face of “a catastrophe which with one sole blow made us regress a thousand years in our humanitarian efforts”<sup>31</sup>.

Has the previous generation really grasped the lessons learned with so much suffering by previous generations? It does not seem so. Another remarkable thinker of the last century, Bertrand Russell, pondered in 1959, in relation to the production of the atom bomb, that

“(…) The pursuit of knowledge may become harmful unless its combined with wisdom (…). There must be (…) a certain awareness of the ends of human life. (…)

(…) I do not think that knowledge and morals ought to be much separated. It is true that the kind of specialised knowledge which is required for various kinds of skill has little to do with wisdom. (…)

With every increase of knowledge and skill, wisdom becomes more necessary, for every such increase augments our capacity for realising our purposes, and therefore augments our capacity for evil, if our purposes are unwise. ;;the world needs wisdom as it has never needed it before; and if knowledge continues to increase, the world will need wisdom in the future even more than it does now”<sup>32</sup>.

Going further back in time, in the XVIth century, Francisco de Vitoria conceived the *jus gentium* of his days as the one which regulated the relations among all peoples (including the indigenous peoples of the New World), besides the individuals, in conditions of independence and juridical equality, pursuant to a truly universalist outlook (*totus orbis*). In a world marked by the diversification (of peoples and cultures) and by the pluralism (of ideas and cosmovisions), this new *jus gentium*<sup>33</sup>, emanated from a *lex praeceptiva* of natural law, ensuing from the *recta ratio*, secured the unity of the *societas gentium*, and provided the juridical

<sup>29</sup> A. Toynbee, *Guerra e Civilização*, Lisbon, Edit. Presença, 1963 [reed.], pp. 20 and 29.

<sup>30</sup> *Ibid.*, pp. 178-179. - And cf. J. de Romilly, *La Grèce antique contre la violence*, Paris, Éd. Fallois, 2000, pp. 18-19 and 129-130.

<sup>31</sup> S. Zweig, *O Mundo que Eu Vi*, Rio de Janeiro, Ed. Record, 1999 (reed.), p. 19, and cf. pp. 474 and 483, and cf. p. 160.

<sup>32</sup> Bertrand Russell, “Knowledge and Wisdom”, in *Essays in Philosophy* (ed. H. Peterson), N.Y. Pocket Library, 1960 [reed.], pp. 499 and 502.

<sup>33</sup> Defined by Francisco de Vitoria himself as “*quod naturalis ratio inter omnes gentes constituit, vocatur jus gentium*”.

foundation for the *totus orbis*. In his well-known *Relectio De Indis Prior*, Vitoria clarified his understanding of the *jus gentium* as a law regulating the relations among all peoples, with the due respect to their rights, to the territories where they lived, to their contacts and freedom of movement (*jus communicationis*)<sup>34</sup>.

Going still further back in time, already the ancient Greeks were aware of the devastating effects of war over winners and losers, revealing the great evil of the substitution of the ends by the means: since the epoch of the *Illiad* of Homer until nowadays, all the “belligerents” were transformed into means, in things, in the insensitive struggle for power, incapable event to “submit their actions to their thoughts”. As Simone Weil observed so perspicaciously, the terms “oppressors and oppressed” almost lose meaning, in face of the impotence of all in confronting the machinery of war, converted into a machinery of destruction of any reasoning and of the fabrication of the in conscience<sup>35</sup>. Like in the *Illiad* of Homer, there are no winners and losers, all are taken and overwhelmed by force, possessed by war, degraded by brutalities and massacres<sup>36</sup>.

## IV. The Assertion of the Peoples' Right to Peace before Contemporary International Courts and Tribunals

Despite the fact that human knowledge has not been accompanied by wisdom in the handling of the matters of concern to the whole of humankind, there is no reason for despair. Some modest advances seem to have been achieved by human conscience, - or by the *universal juridical conscience*, as, in my own conception, the ultimate *material* source of International Law, the *jus gentium*<sup>37</sup>. In effect, nowadays, the rights of peoples are acknowledged and asserted before contemporary international tribunals. Here, once again, I will speak for my own experience, in referring first to the recent case-law of the tribunal I have served for many years, namely the Inter-American Court of Human Rights. I will then turn to the past practice before the tribunal I now serve, namely, the International Court of Justice.

### 1. Advances of the Case-Law of the Inter-American Court of Human Rights

In its Judgment of 31.08.2001, without precedents in international case-law, in the case of the *Community Mayagna (Sumo) Awas Tingni versus Nicaragua*, the Inter-American Court of Human Rights (IACtHR) extended protection to the right of all the members of an indigenous community (as the complaining party) to their

<sup>34</sup> From his work emerged the conception of a *jus gentium*, entirely emancipated from its origin of private law (in Roman law), vested with a humanistic vision, respectful of the freedoms of nations as well as of individuals, and of universal ambit. A.A. Cançado Trindade, “*Totus Orbis: A Visão Universalista e Pluralista do Jus Gentium: Sentido e Atualidade da Obra de Francisco de Vitoria*”, in *24 Revista da Academia Brasileira de Letras Jurídicas* - Rio de Janeiro (2008) n. 32, pp. 197-212.

<sup>35</sup> S. Weil, *Reflexiones sobre las Causas de la Libertad y de la Opresión Social*, Barcelona, Ed. Paidós/ Universidad Autónoma de Barcelona, 1995, pp. 81-82, 84 and 130-131.

<sup>36</sup> S. Weil, “*L'Iliade ou le Poème de la Guerre (1940-1941)*” in *Oeuvres*, Paris, Quarto Gallimard, 1999, pp. 527-552.

<sup>37</sup> A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, 1<sup>st</sup> ed., Leiden/The Hague, Nijhoff/The Hague Academy of International Law, 2010, pp. 1-726.



communal property of their historical lands<sup>38</sup>. The IACtHR determined that the respondent State should proceed<sup>39</sup> to the delimitation, demarcation and emission of the title to those lands of the community *Mayagna (Sumo) Awas Tingni* taking into account their customary law, their uses and customs<sup>40</sup>. This remarkable Judgment eloquently discloses the contemporaneity of the thought of Francisco de Vitoria.

Shortly after this leading case in the jurisprudence of the Inter-American Court, three other decisions had a direct bearing on the rights of peoples, their cultural identity and their very survival: its Judgments on the cases of the *Indigenous Community Yakye Axa versus Paraguay* (2005-2006), of the *Indigenous Community Sawhoyamaxa versus Paraguay* (2005-2006), and of the massacre of the *Moiwana Community versus Suriname* (2005-2006)<sup>41</sup>. The first two cases of this triad, those of the *Indigenous Communities Yakye Axa* and *Sawhoyamaxa*, pertained to the forced displacement of the members of two indigenous communities out of their lands (as a result of State-sponsored commercialization of such lands), and their survival at the border of a road in conditions of extreme poverty.

They in fact concerned their fundamental right to life *lato sensu*, comprising their cultural identity, as I pointed out in my Separate Opinion (par. 8) in the case of the *Indigenous Community Yakye Axa* (Interpretation of Judgment, of 06.02.2006), wherein I further warned:

“One cannot live in constant uprootedness and abandonment. The human being has the spiritual need of roots. The members of traditional communities value particularly their lands, that they consider that belongs to them, just as, in turn, they ‘belong’ to their lands. In the present case, the definitive return of the lands to the members of the Community Yakye Axa is a necessary form of reparation, which moreover protects and preserves their own cultural identity and, ultimately, their fundamental right to life *lato sensu*” (par. 14).

Shortly afterwards, in the other case of the *Indigenous Community Sawhoyamaxa* (Judgment of 29.03.2006), in my Separate Opinion I saw it fit to add:

“The concept of culture, - originated from the Roman ‘colere’, meaning to cultivate, to take into account, to care and preserve, - manifested itself,

<sup>38</sup> Against the exploitation of wood in their lands by a multinational which had obtained a licence to that end from the Nicaraguan Government.

<sup>39</sup> In the light of Article 21 of the American Convention on Human Rights.

<sup>40</sup> A.A. Cançado Trindade, “The Case-Law of the Inter-American Court of Human Rights: An Overview”, in *Studi di Diritto Internazionale in Onore di G. Arangio-Ruiz*, vol. III, Napoli, Edit. Scientifica, 2004, pp. 1881, and cf. pp. 1873-1898. The IACtHR pondered, *inter alia*, that “for the indigenous communities the relationship with the land is not merely a question of possession and production but rather a material and spiritual element that they ought to benefit fully from, so as to preserve their cultural legacy and transmit it to future generations” (par. 141).

<sup>41</sup> For a study, cf. A.A. Cançado Trindade, “The Right to Cultural Heritage in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights”, in *Multiculturalism and International Law - Essays in Honour of E. McWhinney* (eds. Sienho Yee and J.-Y. Morin), Leiden, Nijhoff, 2009, pp. 477-499.

originally, in agriculture (the care with the land). With Cicero, the concept came to be used for questions of the spirit and of the soul (*cultura animi*)<sup>42</sup>. With the passing of time, it came to be associated with humanism, with the attitude of preserving and taking care of the things of the world, including those of the past<sup>43</sup>. The peoples - the human beings in their social milieu - develop and preserve their cultures to understand, and to relate with, the outside world, in face of the mystery of life. Hence the importance of cultural identity, as a component or aggregate of the fundamental right to life itself” (par. 4.)<sup>44</sup>.

The Inter-American Court’s Judgment of 15.06.2005 in the case of the *Moiwana Community versus Suriname* (merits and reparations) addressed the massacre of the N’djukas of the Moiwana village and the drama of the forced displacement of the survivors. The Court duly valued the relationship of the N’djukas in Moiwana with their traditional land, having warned that “larger territorial land rights are vested in the entire people, according to N’djuka custom; community members consider such rights to exist in perpetuity and to be unalienable” (par. 86(6)). The Court’s Judgment ordered a series of measures of reparations<sup>45</sup>, including measures to foster the voluntary return of the displaced persons to their original lands and communities, in Suriname, respectively. The delimitation, demarcation and the issuing of title of the communal lands of the N’djukas in the Moiwana Community, as a form of non-pecuniary reparation, has much wider repercussions than one may *prima facie* assume.

In my extensive Separate Opinion (pars. 1-93) which accompanied that Judgment, I recalled what the surviving members of the Moiwana Community pointed out before the Court (in the public hearing of 09.09.2004), namely, that the massacre at issue perpetrated in Suriname in 1986, planned by the State, has “destroyed the cultural tradition (...) of the *Maroon* communities in Moiwana” (par. 80)<sup>46</sup>. Duties of respect for the relationships of the living with their dead, - I pointed out (pars. 60-61), - were present in the origins of the law of nations itself, as remarked, in the XVIIth century, by Hugo Grotius in chapter XIX of book II of his classic work *De Jure Belli ac Pacis* (1625), dedicated to the “right to burial”, inherent to all human beings, in conformity with a precept of “virtue

<sup>42</sup> H. Arendt, *Between Past and Future*, N.Y., Penguin, 1993 [reprint], pp. 211-213.

<sup>43</sup> *Ibid.*, pp. 225-226.

<sup>44</sup> Moreover, in the same Separate Opinion, I further stressed the “close and ineluctable relationship” between the right to life *lato sensu* and cultural identity (as one of its components). In so far as members of indigenous communities are concerned, - I added, “cultural identity is closely linked to their ancestral lands. If they are deprived of these latter, as a result of their forced displacement, their cultural identity is seriously affected, and so is, ultimately, their very right to life *lato sensu*, that is, the right to life of each one and of all the members of each community” (par. 28). When this occurs, they are driven into a situation of “great vulnerability”, of social marginalization and abandonment, as in the *cas d’espèce* (par. 29).

<sup>45</sup> Comprising indemnizations as well as non-pecuniary reparations of distinct kinds.

<sup>46</sup> Ever since this has tormented them; they were unable to give a proper burial to the mortal remains of their beloved ones, and underwent the strains of uprootedness, a human rights problem confronting the universal juridical conscience in our times (pars. 13-22). Their suffering projected itself in time, for almost two decades (pars. 24-33). In their culture, mortality had an inescapable relevance to the living, the survivors (pars. 41-46), who had duties towards their dead (pars. 47-59).

and humanity”<sup>47</sup>. And the *principle of humanity* itself, - as well recalled by the learned jurphilosopher Gustav Radbruch, - owes much to ancient cultures, having associated itself, with the *passing of time*, with the very spiritual formation of the human beings<sup>48</sup>.

In the present case of the *Moiwana Community*, beyond moral damage, I sustained in my aforementioned Separate Opinion the configuration of a true *spiritual damage* (elaborated in pars. 71-81), and, beyond the *right to a project of life*, I dared to identify and attempted to conceptualize what I termed the *right to a project of after-life* (pars. 67-70). I further observed, in my Separate Opinion, that the testimonial evidence produced before the Court in the *cas d’espèce* indicated that, in the N’djukas cosmovision, in circumstances like those of the present case, “the living and their dead suffer together, and this has an intergenerational projection”, and implications for the kinds of reparations due, also in the form of *satisfaction* (e.g., honouring the dead in the persons of the living) (par. 77).

In fact, the expert evidence produced before the Court indeed referred expressly to “spiritually-caused illnesses”<sup>49</sup>. I then concluded, in my Separate Opinion, on this particular point:

“All religions devote attention to human suffering, and attempt to provide the needed transcendental support to the faithful; all religions focus on the relations between life and death, and provide distinct interpretations and explanations of human destiny and after-life<sup>50</sup>. Undue interferences in human beliefs - whatever religion they may be attached to - cause harm to the faithful, and the International Law of Human Rights cannot remain indifferent to such harm. It is to be duly taken into account, like other injuries, for the purpose of redress. Spiritual damage, like the one undergone by the members of the *Moiwana Community*, is a serious harm, requiring corresponding reparation, of the (non-pecuniary) kind I have just indicated. (...)

The N’djukas had their right to the project of life, as well as their right to the project of after-life, violated, and continuously so, ever since the State-planned massacre perpetrated in the *Moiwana* village on 29.11.1986. They suffered material and immaterial damages, as well as spiritual damage. Some of the measures of reparations ordered by the Court in the present Judgment duly stand against oblivion, so that this atrocity never occurs again. (...)

In sum, the wide range of reparations ordered by the Court in the present Judgment in the *Moiwana Community* case (...) has concentrated on, and enhanced the centrality of, the position of the victims (...). In the *cas d’espèce*, the collective memory of the Maroon N’djukas is hereby duly preserved, against oblivion, honouring their dead, thus safeguarding their right to life *lato sensu*, encompassing the right to cultural identity, which finds expression in their acknowledged links of solidarity with their dead” (pars. 81 and 91-92).

<sup>47</sup> H. Grotius, *Del Derecho de la Guerra y de la Paz* [1625], vol. III (books II and III), Madrid, Edit. Reus, 1925, pp. 39, 43 and 45, and cf. p. 55.

<sup>48</sup> G. Radbruch, *Introducción a la Filosofía del Derecho*, 3rd. ed., Mexico/Buenos Aires, Fondo de Cultura Económica, 1965, pp. 153-154.

<sup>49</sup> Paragraphs 77(e) and 83(9) of the Court’s Judgment.

<sup>50</sup> Cf., e.g., [Various Authors.] *Life after Death in World Religions*, Maryknoll N.Y., Orbis, 1997, pp. 1-124.

It should not pass unnoticed that, in the case of the *Moiwana Community*, the Court indicated, in the section on proven facts of the present Judgment, that

“During the European colonization of present-day Suriname in the XVIIth century, Africans were forcefully taken to the region and used as slaves on the plantations. Many of these Africans, however, managed to escape to the rainforest areas in the eastern part of Suriname’s present national territory, where they established new and autonomous communities (...). Eventually, six distinct groups of Maroons emerged: the N’djuka, the Matawai, the Saramaka, the Kwinti, the Paamaka, and the Boni or Aluku.

These six communities individually negotiated peace treaties with the colonial authorities. The N’djuka treaty signed a treaty in 1760 that established their freedom from slavery<sup>51</sup>. In 1837, this treaty was renewed; the terms of the agreement permitted the N’djuka to continue to reside in their settled territory and determined the boundaries of that area. The Maroons generally - and the N’djuka in particular - consider these treaties still to be valid and authoritative with regard to their relationship with the State, despite the fact that Suriname secured its independence from the Netherlands in 1975<sup>52</sup>.

In my aforementioned Separate Opinion in the *cas d’espèce*, I dedicated a section to the legal subjectivity of peoples in international law (pars. 5-12), given the importance which I ascribed to the fact that the rights of a people preceded historically statehood itself. As I pondered, in this particular respect, in my Separate Opinion,

“more than two centuries before Suriname attained statehood, its Maroon peoples celebrated peace agreements with the colonial authorities, subsequently renewed, and thus obtained their freedom from slavery. And the Maroons, - the N’djuka in particular, - regard these treaties as still valid and authoritative in the relations with the successor State, Suriname. This means that those peoples exercised their attributes of legal persons in international law, well before the territory where they lived acquired statehood. This reinforces the thesis which I have always supported, namely, that the State are not, and have never been, the sole and exclusive subjects of international law.

This purely inter-State outlook was forged by positivism, as from the Vattelian reductionism in the mid-XVIIIth century<sup>53</sup>, and became en vogue in the late XIXth century and early XXth century<sup>54</sup>, with the well-known

<sup>51</sup>Slavery was not formally abolished in the region until 1863.

<sup>52</sup> Paragraph 83(1) and (2).

<sup>53</sup>Found in the work by E. de Vattel, *Le Droit des gens ou Principes de la loi naturelle appliquée à la conduite et aux affaires des nations et des souverains* (1758); cf., e.g., E. Jouannet, *Emer de Vattel et l’émergence doctrinale du Droit international classique*, Paris, Pédone, 1998, pp. 255, 311, 318-319, 344 and 347.

<sup>54</sup>For a criticism of State-consent theories, reflecting the dangerous voluntarist-positivist conception of international law, cf. A.A. Cançado Trindade, «The Voluntarist Conception of International Law: A Re-Assessment», 59 *Revue de droit international de sciences diplomatiques et politiques* - Geneva (1981) pp. 201-240.

disastrous consequences - the successive atrocities perpetrated in distinct regions of the world against human beings individually and collectively - that marked the tragic and abhorrent history of the XXth century. However, since its historical origins in the XVIth century, the law of nations (*droit des gens*, *derecho de gentes*, *direito das gentes*) encompassed not only States, but also peoples, and the human person, individually and in groups), and humankind as a whole<sup>55</sup>.

In this respect, reference can be made, for example, to the inspiring work by Francisco de Vitoria<sup>56</sup>, particularly his *De Indis - Relectio Prior* (1538-1539)<sup>57</sup>. In his well-known Salamanca lectures *De Indis* (chapters VI and VII), Vitoria clarified his understanding of *jus gentium* as a law for all, individuals and peoples as well as States, “every fraction of humanity”<sup>58</sup>. In the XVIIth century, in the days of Hugo Grotius (*De Jure Belli ac Pacis*, 1625), likewise, the *jus humanae societatis*, conceived as a universal one, comprised States as well as peoples and individuals<sup>59</sup>. It is important to rescue this universalist outlook, in the current process of humanization of international law and of construction of the new *jus gentium* of the XXIst century. (...)

Human beings, individually and collectively, have emerged as subjects of international law. The rights protected disclose an individual and a collective or social dimensions, but it is the human beings, members of such minorities or collectivities, who are, ultimately, the titulaires of those rights. This approach was espoused by the Inter-American Court of Human Rights in the unprecedented decision (the first pronouncement of the kind by an international tribunal) in the case of the Community Mayagna (Sumo) Awas Tingni versus Nicaragua (2001), which safeguarded the right to communal property of their lands (under Article 21 of the American Convention on Human Rights) of the members of a whole indigenous community<sup>60</sup>.

<sup>55</sup>A.A. Cançado Trindade, «La Humanización del Derecho Internacional y los Límites de la Razón de Estado», 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais - Belo Horizonte/Brazil* (2001) pp. 11-23; A.A. Cançado Trindade, «A Personalidade e Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional», in *Jornadas de Direito Internacional* (Ciudad de México, Dec. 2001), Washington D.C., OAS Subsecretariat of Legal Affairs, 2002, pp. 311-347; and cf. A.A. Cançado Trindade, «Vers la consolidation de la capacité juridique internationale des pétitionnaires dans le système interaméricain des droits de la personne», 14 *Revue québécoise de droit international* (2001) n. 2, pp. 207-239.

<sup>56</sup>Francisco de Vitoria, *Relecciones del Estado, de los Indios, y del Derecho de la Guerra* (with an Introduction by A. Gómez Robledo), 2nd. ed., Mexico, Ed. Porrúa, 1985, pp. XXX, XLIV-XLV, LXXVII and 61, and cf. pp. LXII-LXIII.

<sup>57</sup>Francisco de Vitoria, *De Indis - Relectio Prior* (1538-1539), in: *Obras de Francisco de Vitoria - Relecciones Teológicas* (ed. T. Urdanoz), Madrid, BAC, 1960, p. 675.

<sup>58</sup>J. Brown Scott, *The Spanish Origin of International Law - Francisco de Vitoria and his Law of Nations*, Oxford/London, Clarendon Press/H. Milford - Carnegie Endowment for International Peace, 1934, pp. 140 and 170.

<sup>59</sup>Cf. H. Grotius, *De Jure Belli ac Pacis* (1625), The Hague, Nijhoff, 1948, pp. 6, 10 and 84-85; and P.P. Remec, *The Position of the Individual in International Law according to Grotius and Vattel*, The Hague, Nijhoff, 1960, pp. 203, 216-217 and 219-220.

<sup>60</sup>The Court pondered, in paragraph 141 of its Judgment (merits), that to the members of the indigenous communities (such as the present one) “the relationship with the land is not merely a question of possession and production but rather a material and spiritual element that they ought to enjoy fully, so as to preserve their cultural legacy and transmit it to future generations”.

In this respect, the endeavours undertaken in both the United Nations and the Organization of American States (OAS), along the nineties, to reach the recognition of indigenous peoples' rights through their projected and respective Declarations, pursuant to certain basic principles (such as, e.g., that of equality and non-discrimination), have emanated from human conscience. (...)" (pars. 6-8 and 10-11).

In addition to those cases, another significant legal development can be found in the determination, by the Inter-American Court, of *grave* violations of human rights, and the corresponding reparations in various forms, under the American Convention, in a recent cycle of *cases of massacres* (of which the case of the *Moiwana Community*, *supra*, forms part). Some of the occurrences victimized likewise members of specific communities or human collectivities. In a recent lecture I delivered, last month, in an international symposium convened by the International Criminal Court (ICC) at The Hague (on 10.11.2009), I referred to the IACtHR's Judgments in the cases of the massacres of *Barrios Altos versus Peru* (of 14.03.2001), of *Caracazo versus Venezuela* (reparations, of 29.08.2002), of *Plan de Sánchez versus Guatemala* (of 29.04.2004), of *19 Tradersmen versus Colombia* (of 05.07.2004), of *Mapiripán versus Colombia* (of 17.09.2005), of *Moiwana Community versus Suriname* (of 15.06.2005), of *Pueblo Bello versus Colombia* (of 31.01.2006), of *Ituango versus Colombia* (of 01.07.2006), of *Montero Aranguren and Others (Retén de Catia) versus Venezuela* (of 05.07.2006), of *Prison of Castro Castro versus Peru* (of 25.11.2006), and of *La Cantuta versus Peru* (of 29.11.2006)<sup>61</sup>.

This late jurisprudential development would, in all likelihood, have been unthinkable of, four decades ago, by the draftsmen of the American Convention. Nowadays, massacres no longer fall into oblivion. Atrocities victimizing whole communities, or segments of the population, are being brought before contemporary international tribunals, for the establishment not only of the international criminal responsibility of individuals (in the case of international criminal tribunals), by also of the international responsibility of States (in the case of international human rights tribunals, such as the IACtHR). This indicates that there have been clear advances in the realization of international justice in recent years, in cases of factual and evidenciary complexities.

## 2. Pleadings before the International Court of Justice

May I now turn to the pertinent practice before the ICJ along the years, with special attention turned to the pleadings before the Court. In the first *Nuclear*

<sup>61</sup>As well as cases of planified murders at the highest level of State power, and perpetrated by order of this latter (such as the case of *Myrna Mack Chang versus Guatemala*, Judgment of 25.11.2003). Cf. A.A. Cançado Trindade, "Reminiscencias de la Corte Interamericana de Derechos Humanos en cuanto a Su Jurisprudencia en Materia de Reparaciones" [The Hague, ICC Symposium, 10.11.2009], 21 *Revista de Derecho Vox Juris* - Facultad de Derecho de la Universidad de San Martín de Porres - Peru (2011) pp. 53-72; and cf. also, *inter alia*, e.g., G. Citroni, "La Jurisprudencia de la Corte Interamericana de Derechos Humanos en Casos de Masacres", 21 *Anuario de Derecho Internacional* (2005) pp. 1-26. And cf., recently, A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, ch. X, pp. 179-191; A.A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice* (Inaugural Address, 10.11.2011), Utrecht, Universiteit Utrecht, 2011, pp. 1-71.

*Tests* cases (atmospheric testing, Australia and New Zealand *versus* France, 1973-1974), the right of peoples to live in peace was acknowledged and asserted before the International Court of Justice (ICJ). For the purposes of our exercise today, the arguments of the parties, in the written and oral phases of the proceedings, are particularly significant, even more than the actual outcome of the cases. In its application instituting proceedings (of 09.05.1973), for example, Australia contended that it purported to protect its people and the peoples of other nations, and their descendants, from the threat to life, health and well-being arising from potentially harmful radiation generated from radio-active fall-out generated by nuclear explosions<sup>62</sup>.

New Zealand, on its part, went even further in its own application instituting proceedings (also of 09.05.1973): it stated that

“In the period of 27 years in which nuclear tests have taken place there has been a progressive realization of the dangers which they present to life, to health and to the security of peoples and nations everywhere. (...) The attitude of the world community towards atmospheric nuclear testing has sprung from the hazards to the health of present and future generations involved in the dispersal over wide areas of the globe of radioactive fallout. (...) With regard to nuclear weapons tests that give rise to radioactive fallout, world opinion has repeatedly rejected the notion that any nation has the right to pursue its security in a manner that puts at risk the health and welfare of other people”<sup>63</sup>.

New Zealand made clear that it was pleading on behalf not only of its own people, but also of the peoples of the Cook Islands, Niue and the Tokelau Islands<sup>64</sup>. In its memorial on jurisdiction and admissibility (of 29.10.1973), New Zealand further argued that “the atmospheric testing of nuclear weapons inevitably arouses the keenest sense of alarm and antagonism among the peoples and governments of the region in which the tests are carried out”<sup>65</sup>. Moreover, in its request (of 14.05.1973) for the indication of provisional measures of protection, New Zealand recalled two precedents (in 1954 and 1961) of threats to peoples’ right to live in peace:

“(...) Although in 1954 the dangers associated with nuclear testing were less well understood than they are now, the damage caused by the hydrogen bomb tests conducted by the United States in the Marshall Islands in that year led to vigorous protest by and on behalf of the peoples of the Trust Territory and by Japan in respect of injuries suffered by her own citizens on the high seas. Similarly, in October 1961, the explosion by the Soviet Union in her own territory of a 50-megaton nuclear weapon was strongly condemned by the whole world,

<sup>62</sup>It further referred to the populations being subjected to mental stress and anxiety generated by fear; ICJ, *Nuclear Tests cases* (Australia *versus* France, vol. I) - *Pleadings, Oral Arguments, Documents*, pp. 11 and 14.

<sup>63</sup>ICJ, *Nuclear Tests cases* (New Zealand *versus* France, vol. II) - *Pleadings, Oral Arguments, Documents*, p. 7.

<sup>64</sup>*Ibid.*, pp. 4 and 8.

<sup>65</sup>*Ibid.*, p. 211.

but especially by northern hemisphere countries which were subjected to marked increases in radiation as a consequence of the tests<sup>66</sup>.

Thus, beyond the strict confines of the purely inter-State *contentieux* before the ICJ, both New Zealand and Australia looked beyond it, and vindicated to rights of peoples to health, to well-being, to be free from anxiety and fear, in sum, to live in peace. Two decades later, the matter was brought to the fore again, in the mid-nineties, in the second *Nuclear Tests* cases (underground testing, New Zealand *versus* France, 1995). Although this time only New Zealand was the applicant State (as from its request of 21.08.1995), five other States lodged with the ICJ applications for permission to intervene<sup>67</sup>: Australia, Solomon Islands, Micronesia, Samoa and Marshall Islands.

Australia argued (on 23.08.1995) that the dispute between New Zealand *versus* France raised the issue of the observance of obligations *erga omnes* (pars. 18-20, 24-25 and 33-34). On their part, Solomon Islands, Micronesia, Samoa and Marshall Islands contended (on 24.08.1995) that “the independent island States which are members of the South Pacific Forum have consistent opposed activity related to nuclear weapons and nuclear waste disposal in their Region, for example, by seeking to establish and guarantee the status of the Region as a nuclear-free zone” (par. 5). And, in referring to the need of fulfilment of rights and obligations *erga omnes* (pars. 20 and 25), they added that

“(...) The cultures, traditions and well-being of the peoples of the South Pacific States would be adversely affected by the resumption of French nuclear testing within the region in a manner incompatible with applicable legal norms” (par. 25).

As a matter of fact, so far there is not much in the ICJ Judgments themselves on the peoples' right to peace, though the subject has at times been brought to the Court's attention. This has a significance, which should not pass unnoticed in the present occasion. To recall yet another example, in its Judgment of 22.12.1986 in the case of the *Frontier Dispute* (Burkina Faso *versus* Republic of Mali), the ICJ Chamber, in drawing the frontier line as requested by the parties (par. 148), took note of their contentions, *inter alia*, concerning the *modus vivendi* of the people living in four villages in the region (farming, land cultivation, pasturage, fisheries<sup>68</sup>. Two Separate Opinions were appended to the aforementioned Judgment of the ICJ Chamber: one invoked considerations of equity *infra legem*, bearing in mind that the region concerned is “a nomadic one, subject to drought, so that access to water is vital”<sup>69</sup>; the other asserted that “it is the right of peoples to determine their own future which has received the blessing of international law”<sup>70</sup>.

<sup>66</sup> *Ibid.*, p. 54.

<sup>67</sup> Under the terms of Article 62 of the ICJ Statute.

<sup>68</sup> Pars. 114-116 and 124-125.

<sup>69</sup> Separate Opinion of Judge *ad hoc* Abi-Saab, par. 17.

<sup>70</sup> Separate Opinion of Judge *ad hoc* Luchaire, par. I.



Other pertinent examples of resort to peoples' rights before the ICJ could here be briefly recalled. In the course of the proceedings (of 1988-1990) in the case of *Phosphate Lands in Nauru* (*Nauru versus Australia*), for example, the ICJ took cognizance of successive contentions invoking peoples' rights<sup>71</sup> (e.g., over their natural resources<sup>72</sup>), and their *modus vivendi*<sup>73</sup>. Furthermore, in its *Advisory Opinion of 16.10.1975 on Western Sahara*, the ICJ itself utilized the expression "right of peoples" (par. 55), in the framework of the application of the "principle of self-determination" (pars. 55, 59, 138 and 162).

Two decades later, in the case concerning *East Timor* (*Portugal versus Australia*, Judgment of 30.06.1995), although the ICJ found that it had no jurisdiction to adjudicate upon the dispute (a decision much discussed in expert writing), yet it acknowledged the rights of peoples to self-determination (par. 29) and to permanent sovereignty over their natural resources (par. 33), and added that "the principle of self-determination of peoples" has been recognized by the U.N. Charter and in its own jurisprudence as "one of the essential principles of contemporary international law" (par. 29).

### 3. Contribution of the Case-Law and Practice in Other International Jurisdictions

In this key-note address, I have - as already indicated - deliberately concentrated myself on developments under the two international tribunals that I have had, and currently have, the privilege to serve, namely, the Inter-American Court of Human Rights, and now the International Court of Justice. This does not hinder me to referring very briefly to pertinent developments under the European Convention of Human Rights<sup>74</sup> and the African Charter on Human and Peoples' Rights. I limit myself to refer to them, as a closer examination of such developments is beyond the purposes of the present address.

On the African continent, the draftsmen of the 1981 African Charter on Human and Peoples' Rights opted - as well known - for the inclusion of a catalogue of civil and political rights, added to economic, social and cultural rights<sup>75</sup>, as well as peoples' rights (Articles 19-24), with a common mechanism of implementation (Articles 46-59). Until now (end of 2009), the African Commission on Human and Peoples' Rights has had the occasion to pronounce on peoples' rights (*infra*), but it is most likely that the recently-established African Court on Human and Peoples' Rights (AfComHPR) will also have the opportunity to give its own contribution to the matter in the foreseeable future.

<sup>71</sup>ICJ, *Case concerning Certain Phosphate Lands in Nauru* (*Nauru versus Australia*, vol. I) - *Pleadings, Oral Arguments, Documents*, pp. 14, 16, 21, 87, 113 and 185.

<sup>72</sup>*Ibid.*, pp. 183 and 196.

<sup>73</sup>*Ibid.*, pp. 113 and 117.

<sup>74</sup>Cf., *inter alia*, e.g., M.D. Goldhaber, *A People's History of the European Court of Human Rights*, New Brunswick/London, Rutgers University Press, 2009, pp. 1-185.

<sup>75</sup>Articles 3-14 and 15-18, respectively.

As for the African Commission, the decision taken in its 33rd ordinary session, in the inter-State case<sup>76</sup> of the *Democratic Republic of Congo versus Burundi, Rwanda of Uganda* (May 2003)<sup>77</sup>, is of relevance here. The complainant State alleged “grave and massive violations” of human and peoples’ rights, committed in its Eastern provinces by the armed forces of the respondent States, in the form of a “series of massacres, rapes, mutilations, mass transfers of populations and looting of the peoples’ possessions”<sup>78</sup>. The AfComHPR significantly based its decision on relevant and pertinent provisions of both International Human Rights Law and International Humanitarian Law<sup>79</sup>.

The AfComHPR held that there had occurred “flagrant violations” of the rights to life and the integrity of the person, in breach of Articles 2 and 4 of the African Charter on Human and Peoples’ Rights. Furthermore, the Commission found violations of Articles 18(1) and 12(1) and (2) of the Charter, resulting from the “mass transfer of persons from the Eastern provinces of the complainant State to camps in Rwanda”<sup>80</sup>. It further condemned the plunder and lootings of the natural resources of the Eastern provinces of the Congo<sup>81</sup>, and found that there had been a serious lack of respect for the mortal remains of the victims of massacres and for their gravesites, and that the “barbaric” and “reckless” dumping and mass burial of those mortal remains (following the massacres) - forbidden under Article 34 of Protocol I of 1977 to the Geneva Conventions of 1949 - were a violation of the Congolese people’s right to cultural development, in breach of Articles 60-61 of the African Charter<sup>82</sup>. The AfComHPR further asserted the peoples’ rights to self-determination<sup>83</sup>, to development (Article 22 of the African Charter) and to dispose freely of their wealth and natural resources<sup>84</sup>.

In so far as public arbitrations are concerned, reference can be made to the award of 18.02.1983 in the *Guinea/Guinea Bissau Maritime Delimitation* case, wherein the peoples’ right to development received judicial recognition. The Court of Arbitration found that the case pertained to “the legitimate claims” of the parties as developing States, and to “the right of the peoples involved to a level of economic and social development which fully preserves their dignity”<sup>85</sup>.

<sup>76</sup>This was the first inter-State communication decided by the African Commission.

<sup>77</sup> Reproduced *in*: African Union/Executive Council, *Report of the African Commission on Human and Peoples’ Rights* (2006), doc. EX.CL/279 (IX), of 25-29.06.2006, pp. 111-131.

<sup>78</sup>Par. 69; there was further complaint of “concentration camps” situated in Rwanda, where people were “simply massacred and incinerated in crematories (especially in Bugusera, Rwanda)” (*ibid.*, par. 6).

<sup>79</sup>It found that “the killings, massacres, rapes, mutilations and other grave human rights abuses committed while the respondent States’ armed forces were still in effective occupation of the Eastern provinces of the complainant State” (as from the beginning of August 1998) were “reprehensible”, as well as “inconsistent with their objections” under the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Part III) and Protocol I to the Convention (the precepts of which form part of “the general principles of law recognized by African States”; *ibid.*, pars. 78-79).

<sup>80</sup>As alleged by the complainant State and not refuted by the respondent State; *ibid.*, par. 81.

<sup>81</sup>In contravention of Articles 21-22 of the African Charter; *ibid.*, pars. 90-91 and 94-95.

<sup>82</sup>*Ibid.*, par. 87.

<sup>83</sup>*Ibid.*, pars. 68 and 77.

<sup>84</sup>*Ibid.*, par. 95.

<sup>85</sup>Ian Brownlie, *The Human Right to Development*, London, Commonwealth Secretariat (Occasional Paper Series), 1989, pp. 1-2, and cf. p. 13 n. 1.

## V. The Peoples' Right to Peace and the Lessons of History

Last by not least, it may here be pointed out that, for the consideration of peoples' rights, a wide perspective has been disclosed, over two decades ago, not only by the 1986 U.N. Declaration on the Right to Development, but also, e.g., by U.N. General Assembly resolutions 32/130, 39/145, 43/113, 43/114 and 43/125. All these instruments have contributed to focus on the promotion and protection of peoples' rights, and of rights pertaining to human collectivities, without losing sight to the search for the causes of their breaches, as much as for the settlement and solutions to gross and flagrant violations of human rights<sup>86</sup>. This is of much relevance to the vindication of the peoples' right to peace - among other peoples' rights - before international courts and tribunals.

The supporters of the peoples' right to peace, among whom I rank myself, ought ultimately to bear in mind the lessons learned by previous generations through suffering. The lessons of history ought to be passed on to the present and future generations. In this respect, may I here briefly recall a couple of recollections which do have a bearing on the consideration of the subject which gathers us here today at the United Nations headquarters in Geneva. On the eve of the outbreak of the II world war, one of the historians who witnessed the events of that time (J. Huizinga) pondered, in an outburst, that the return to barbarism seemed to enslave the human spirit, and that barbarism managed to associate itself to high technical progress<sup>87</sup>; to him, civilization required the preservation of the interior and spiritual life of each individual<sup>88</sup>.

Shortly after the II world war, another learned historian (A.J. Toynbee), whose penetrating writings defy the erosion of time, pondered:

“(...) The works of artists and men of letters outlive the deeds of businessmen, soldiers, and statesmen. (...) The ghosts of Agamemnon and Pericles haunt the living world of today by grace of the magic words of Homer and Thucydides (...). The experience that we were having in our world now had been experienced by Thucydides in his world already. (...) Thucydides, it now appeared, had been over this ground before. He and his generation had been ahead of me and mine in the stage of historical experience that we had respectively reached; in fact, his present had been my future. But this made nonsense of the chronological

<sup>86</sup>A.A. Cançado Trindade, “Environment and Development: Formulation and Implementation of the Right to Development as a Human Right”, 3 *Asian Yearbook of International Law* (1994) p. 36, and cf. pp. 15-40; and cf. also A.A. Cançado Trindade, “Relations between Sustainable Development and Economic, Social and Cultural Rights: Recent Developments Rights”, in *International Legal Issues Arising under the United Nations Decade of International Law* (eds. N. Al-Nauimi and R. Meese), The Hague, Kluwer, 1995, pp. 1051-077.

<sup>87</sup>J. Huizinga, *La Crisi della Civiltà*, 2nd. ed., Torino, G. Einaudi Ed., 1938, pp. 136-137.

<sup>88</sup>*Ibid.*, p. 147.

notation which registered my world as 'modern' and Thucydides' world as 'ancient'. Whatever chronology might say, Thucydides' world and my world had now proved to be philosophically contemporary. (...) The prophets, through their own experience, anticipated Aeschylus' discovery that learning comes through suffering - a discovery which we, in our time and circumstances, have been making too. (...) Civilizations rise and fall and, in falling, give rise to others, (...) and (...) the learning that comes through the suffering caused by the failures of civilizations may be the sovereign means of progress"<sup>89</sup>.

Regarding himself as an individual as a "trustee for all future generations", and warning that "the atom bomb and our many other new lethal weapons are capable, in another war, of wiping out not merely the belligerents but the whole of the human race"<sup>90</sup>, A.J. Toynbee added that

"(...) In each of (...) civilizations, mankind (...) is trying to rise above mere humanity (...) towards some higher kind of spiritual life. (...) The goal (...) has never been reached by any human society. It has, perhaps, been reached by individual men and women. (...) But if there have been a few transfigured men and women, there has never been such a thing as a civilized society. Civilization, as we know it, is a movement and not a condition, a voyage and not a harbour. No known civilization has ever reached the goal of civilization yet. (...) "<sup>91</sup>.

Toynbee then regretted that mankind had "unfortunately (...) discovered how to tap atomic energy before we have succeeded in abolishing the institution of war. Those contradictions and paradoxes in the life of the world in our time (...) look like symptoms of serious social and spiritual sickness"<sup>92</sup>. And he concluded that "man's only dangers (...) have come from man himself"; after all, we are faced with the truths that "in this world we do learn by suffering", and that "life in this world is not an end in itself and by itself"<sup>93</sup>.

A.A.C.T.

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<sup>89</sup>A.J. Toynbee, *Civilization on Trial*, Oxford, University Press, 1948, pp. 5, 7-8 and 15.

<sup>90</sup>*Ibid.*, pp. 27 and 25.

<sup>91</sup>*Ibid.*, p. 55.

<sup>92</sup>*Ibid.*, pp. 160-161.

<sup>93</sup>*Ibid.*, pp. 162 and 260.