THE EMANCIPATION OF THE INDIVIDUAL FROM HIS OWN STATE: THE HISTORICAL RECOVERY OF THE HUMAN PERSON AS SUBJECT OF THE LAW OF NATIONS[1]

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I. PRELIMINARY OBSERVATIONS

The present study, which I have titled "*The Emancipation of the Individual from His Own State: The Historical Recovery of the Human Person as Subject of the Law of Nations*", integrates the series of four lectures that I have had the occasion to deliver in distinct Japanese centres in the course of the month of December 2004. This was the first time in its history that a Judge of the Inter-American Court of Human Rights had the honour of having been officially invited by both the Ministry of Foreign Affairs of Japan as well as by academic institutions of Japan (in Kyoto, Hiroshima and Tokyo), to deliver a series of lectures in Public International Law and Human Rights. My first lecture, on "*The International Standards of Protection of the Human Person in the Developing Case-Law of the Inter-American Court of Human Rights (1982-2004)*" was delivered in the 10th anniversary cerimony of the inauguration of the Kyoto Human Rights Research Institute, in Kyoto, on 18 December 2004.[1]

I delivered my second lecture, not without sad emotion, at the Law Faculty of the University of Hiroshima, on "*The Illegality under Contemporary International Law of All Weapons of Mass Destruction*" (including nuclear weapons, as I have been sustaining for a long time), on 20 December 2004.[2] My third lecture was delivered in Tokyo, at the Japan Federation of Bar Associations, on 22 December 2004, in the afternoon; I focused, upon request, on the topic "*The Question of the Determination of the Legal Status of All Detainees in Guantánamo Bay under the 1949 Geneva Conventions on International Humanitairian Law.*"[3] Last but not least, I delivered my fourth lecture in Keio University in Tokyo, also on 22 December 2004, in the evening, precisely on the topic "*The Emancipation of the Individual from His Own State: The Historical Recovery of the Human Person as Subject of the Law of Nations*".

As this subject has been very dear to me throughout so many years, I have saved the text of this fourth lecture of mine in Japan for publication in the present journal in commemoration of the 25th anniversary of the Inter-American Court of Human Rights. I regard the subject as being of direct interest to the readership in our American continent; in fact, I concentrate herein on its doctrinal aspects, since the procedural ones (concerning the individual's international juridical capacity) have already been properly addressed in many recent studies that I have prepared and published in distinct countries.[4]

There is one last aspect that I consider should not pass unnoticed in these brief preliminary observations. I regard the subject of my fourth lecture, in Keio University in Tokyo, here reproduced as one endowed with a truly universal dimension. It corresponds, in my view, to the most significant achievement of international legal doctrine in the second half of the XXth century and at this beginning of the XXIst century. Asia is nowadays the only continent in the world which does not yet have a regional human rights system, despite the fact that several Asian countries have become Parties to some U.N. human rights treaties. It is a continent that I have always felt attached to, and that for many years has been receptive to my studies and has disseminated them, – both South East Asia[5] and North East Asia.[6]

It is my impression, from my long-standing collaboration with Asian international juridico-academic circles in the cultivation of humanist themes, that they have reached nowadays a stage

in which they appear prepared to examine in greater depth the condition of the human person in the contemporary law of nations. This is what I could witness, in particular, in this recent academic visit to Japan at the end of 2004, preceded by my two earlier visits to continental China in the nineties (in 1992 and 1996) and my visit to India in the late eighties (in 1989), as well as in my contacts with Asian Delegations during my official participation in the II U.N. World Conference on Human Rights in 1993. The universal recognition of the international legal personality of the individual is certainly a most reassuring juridical development in our times, – to which I shall devote the present study.

The consolidation of the legal personality[7] and capacity[8] of the individual as subject of international law constitutes the most precious legacy of the international legal thinking of the second half of the XXth century, projecting itself into this beginning of the XXIst century. This reassuring development, as will be seen in the present study, is in accordance with the thinking of the founding fathers of the discipline. It had to overcome the exclusion of the individual from the international legal order by State legal positivism, as well as the rescue of the individual as subject of International Law in the legal doctrine of the XXth century. Other points deserving attention lie in the attribution of duties to the individual directly by International Law, and in the need of the international community of the *legitimatio ad causam* of individuals in International Law (active subjectivity). After the examination of these points (cf. *infra*), the way will be paved for the presentation of my final observations on the matter.

II. THE INDIVIDUAL AS SUBJECT OF THE EMERGING LAW OF NATIONS

In considering the position of individuals in international law, the thinking of the so-called fathers of the law of nations is not to pass unnoticed. The considerable importance, for the development of the theme, above all of the writings of the Spanish theologians as well as of the Grotian work is to be recalled. In the initial period of formation of international law the influence exercised by the teaching of the great masters was considerable, – what is understandable, given the necessity of articulation and systematization of the matter.[9] Even in our days, it is necessary to bear in mind those teachings.

The contribution of the Spanish theologians Francisco de Vitoria and Francisco Suárez to the formation of International Law is widely acknowledged. In the vision of Suárez (author of the treatise *De Legibus ac Deo Legislatore*, 1612), the law of nations reveals the unity and universality of the human kind; the States have necessity of a legal system which regulates their relations, as members of the universal society.[10] It was, however, the great master of Salamanca, Francisco de Vitoria, who gave a pioneering and decisive contribution to the notion of prevalence of the rule of law (*État de Droit*): it was him who sustained, with rare lucidity, in his acclaimed *Relecciones Teológicas* (1538-1539), that the legal order binds everyone – both the rulers and those ruled, – and, in this same line of thinking, the international community (*totus orbis*) has primacy over the free will of each individual State.[11]

In his celebrated *De Indis – Relectio Prior* (1538-1539), he warned:

> - "(...) Insofar as the human law is concerned, it is known that under positive human law the emperor is not the master of the world. This would only take place by the authority of a law, and there is none that confers upon him such power (...). Nor did the emperor have the domain of the world by legitimate succession, (...) nor by just war, nor by election, nor by any other legal title, as it is evident. Thus, the emperor has never been the master of the whole world(...)".[12]
>
> In the conception of Vitoria, the law of nations regulates an international community constituted by human beings organized socially in States and coextensive with humanity itself; the reparation of violations of (human) rights reflects an international necessity fulfilled by the law of nations, with the same principles of justice applying both to the States and to the individuals or peoples who form them.[13]

In his *De Indis* (chapters VI and VII), Vitoria clarifies his understanding of *jus gentium* as a law for all, individuals and peoples as well as States, "every fraction of humanity"; *jus gentium*, in his view, is conformed by the "common consensus of all peoples and nations".[14] 12. Earlier on, in his *De Lege*, Vitoria sustained the necessity of every law to pursue, above all, the common good; and he added that natural law is found not in the will, but rather in sound reason (*recta ratio*).[15] More than four and a half centuries later, his message retains a remarkable topicality.

The conception of *jus gentium* of Hugo Grotius – whose work, mainly his *De Jure Belli ac Pacis* (1625) lies in the origins of international law, as the discipline

came to be known, – was always attentive to the role of civil society. To Grotius, the State is not and end in itself, but a means to secure the legal order "consonant with human intelligence", so as to improve "common society which embraces all mankind".[16] The subjects have rights *vis-à-vis* the sovereign State, which cannot demand obedience from its citizens in an absolute way (imperative of the common good); thus, in the vision of Grotius, the *raison d'État* has limits, and the absolute conception of this latter is inapplicable in the international as well as internal relations of the State.[17]

In Grotian thinking, every legal norm – whether of domestic law or of the law of nations – creates rights and duties for the persons addressed to; the early work of Grotius, already in the first half of the XVIIth century, admits, thus, the possibility of the international protection of human rights against the State itself.[18] Even before Grotius, Alberico Gentili (author of *De Jure Belli*, 1598) sustained, by the end of the XVIth century, that it is Law that regulates the relationships among the members of the universal *societas gentium*.[19] In his *De Jure Belli Libri Tres* (1612), A. Gentili held that the law of nations was "established among all human beings", being "observed by all mankind".[20]

One is thus to bear always in mind the true legacy of the Grotian tradition of international law. The international community cannot pretend to base itself on the *voluntas* of each State individually. In face of the historical necessity to regulate the relations among the emerging States, Grotius sustained that international relations are subject to legal norms, and not to the "*raison d'État*", which is incompatible with the existence itself of the international community: this latter cannot exist without Law.[21] The human being and his well-being occupy a central position in the system of international relations.[22]

In this line of thinking, also Samuel Pufendorf (author of the *De Jure Naturae et Gentium*, 1672) sustained likewise "the subjection of the legislator to the higher law of human nature and of reason".[23] Pufendorf founded international law on natural law, envisaging it as a great system of universal law "embracing even private law".[24] On his turn, Christian Wolff (author of *Jus Gentium Methodo Scientifica Pertractatum*, 1749), pondered that, just as individuals ought to, in their association in the State, promote the common good, in its turn the State has the correlative duty to seek its perfection.[25] Wolff defined the law of nations – which he emphasized as being necessary rather than voluntary – as "the science of that law which nations or peoples use in their relations with each other and of the obligations corresponding thereto".[26] It "binds nations in conscience", in order to preserve society composed of individuals, and to promote the common good.[27]

Wolff stressed that, just as all individuals were free and equal, all nations likewise were "by nature equal the one to the other"; and he added that "since by nature all nations are equal, since moreover all men are equal in a moral sense whose rights and obligations are the same, the rights and obligations of all nations are also by nature the same."[28] Already in the presentation of his treatise, Wolff wrote with clarity:

> - "That eternal and unchangeable law, which nature herself has established, controls the acts of individual men as well as those of nations also, by prescribing duties both toward themselves and toward each other. And just as it has united individual men to each other by the closest bond and has established among them a certain society, so that man is necessary to man (...); so by no less close a bond has it united nations, (...) so that nation is necessary to nation (..). Indeed, just as it has provided for the happiness of individual men, so also has it provided for that of individual nations, which is promoted and preserved by mutual assistance. Therefore the entire human race is likened to a living body whose individual members are individual nations, and it retains unimpaired health so long as the individual members perform their functions properly."[29]

However, the illuminating thoughts and vision of the so-called founding fathers of International Law (set forth notably in the writings of the Spanish theologians and in the Grotian writings, as well as in Wolff's treatise, among others), which conceived it as a truly *universal* system,[30] regrettably came to be gradually surpassed by new doctrinal constructions, and mainly by the emergence of legal positivism.

The beginning of the personification of the State – in fact, of the modern theory of the State – in the domain of international law took place, in the mid-XVIII century, with the work of 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), which was to have much repercussion in the international legal practice of his times. The emphasis on State personality and sovereignty led to the conception of an international law applicable strictly to the relations among States (the *jus inter gentes*, rather than the *jus gentium*), that is, an inter-State legal order; this was a reductionist outlook of the subjects of the law of

nations, admitting only and exclusively the States as such.[31]

Subsequently (late XIXth century onwards), legal positivism wholly personified the State, endowing it with a "will of its own", and reducing the rights of human beings to those which the State "conceded" to them. The consent of the "will" of the States (according to the voluntarist positivism) was erected into the alleged predominant criterion in International Law, denying *jus standi* to the individuals, to the human beings.[32] This rendered difficult a proper understanding of the international community, and undermined International Law itself, reducing its dimension to that of a a strictly inter-State law, no more *above* but rather *among* sovereign States.[33] In fact, when the international legal order moved away from the universal vision of the so-called "founding fathers" of the law of nations (*droit des gens – supra*), successive atrocities were committed against human beings, against humankind. The disastrous consequences of this historical distortion are widely known.

III. THE ATTEMPTED EXCLUSION OF THE INDIVIDUAL FROM THE INTERNATIONAL LEGAL ORDER

The personification of the all-powerful State, inspired mainly in the philosophy of law of Hegel, had a harmful influence in the evolution of International Law by the end of the XIXth century and in the first decades of the XXth century. This doctrinal trend resisted as much as it could to the ideal of emancipation of the human being from the absolute control of the State, and to the recognition of the individual as subject of International Law. But the individual's submission to the will of the State was never convincing to all, and soon it became openly challenged by the more lucid doctrine.

Already in the late twenties, the negative outlook of individuals from the perspective of Hegelian legal philosophy, whereby the State was a supreme ideal and an end in itself, endowed with a power subject only to its own "will", was severely criticized as an obstacle to the achievement of the *civitas maxima gentium*.[34] Contrary to that reactionary position stood, among others, Jean Spiropoulos, in a luminous monograph titled *L'individu en Droit international*, published in Paris in 1928[35]: contrary to what ensued from the Hegelian doctrine, – pondered the author, – the State is not a supreme ideal subject only to its own will, is not an end in itself, but rather "a means of realization of the vital aspirations and necessities of the individuals", it being, thus, necessary to protect the human being against the violation of his rights by his own Stateo.[36]

In the past, positivists were particularly proud of the importance attributed by them to the method of *observation* (neglected by other trends of thought), what contrasted, however, with their total incapacity of presenting guidelines, basic lines of ana³ysis and, above all, guiding general *principles*.[37] At normative level, positivism appeared subservient to the established legal order, and endorsed the abuses praticed in the name of this latter. But already in the mid-XXth century, the most enlightened jusinternationalist doctrine was taking definitively a distance from the Hegelian and neo-Hegelian formulations of the State as a final repository of the freedom and responsibility of the individuals who composed it, and which entirely integrated themselves in it.[38]

The old polemics, sterile and pointless, between monists and dualists, erected upon false premises, not surprisingly failed to contribute to the doctrinal endeavours in favour of the emancipation of the human being *vis-à-vis* his own State. In fact, what both dualists and monists did, in this particular, was to "personify" the State as subject of International Law.[39] Monists discarded all anthropomorfism, affirming the international subjectivity of the State by an analysis of the juridical person;[40] and dualists[41] did not contain themselves in their excesses of characterization of the States as sole subjects of International Law.[42]

A whole doctrinal trend, – of traditional positivism, – formed, besides Triepel and Anzilotti, also by K. Strupp, E. Kaufmann, R. Redslob, among others, came to sustain that only the States were subjects of Public International Law. The same posture was adopted by the old Soviet doctrine of international law, with emphasis on the so-called inter-State "peaceful coexistence".[43] Against this vision emerged an opposite trend, as from the publication, in 1901, of the book by Léon Duguit *L'État, le droit objectif et la loi positive*, formed by G. Jèze, H. Krabbe, N. Politis and G. Scelle, among others, sustaining, *a contrario sensu*, that ultimately only the individuals, addressees of all juridical norms, were subjects of international law (cf. *infra*).

The idea of absolute State sovereignty, – which led to the irresponsibility and the alleged omnipotence of the State, not impeding the successive atrocities committed by it (or in its name) against human beings, – appeared with the passing of time entirely unfounded. The State – it is

nowadays acknowledged – is responsible for all its acts – both *jure gestionis* and *jure imperii* – as well as for all its omissions. Created by the human beings themselves, composed by them, it exists for them, for the realization of the common good. In case of violation of human rights, the *direct access* of the individual to the international jurisdiction is thus fully justified, to vindicate such rights, even against his own State.[44]

IV. THE INDIVIDUAL'S PRESENCE AND PARTICIPATION IN THE INTERNATIONAL LEGAL ORDER

The individual is, thus, subject of both domestic and international law.[45] In fact, he has always remained in contact, directly or indirectly, with the international legal order. In the inter-war period, the experiments of the *minorities*[46] and *mandates*[47] *systems* under the League of Nations, for example, bear witness of this reality.[48] They were followed, in that regard, by the *trusteeship system*[49] under the following United Nations era, parallel to the development under this latter, along the years, of the multiple mechanisms – conventional and extraconventional – of international protection of human rights. Those early experiments in the XXth century were of relevance for subsequent developments in the international safeguard of the rights of the human person.[50]

To that effect of evidencing and reasserting the constant contact of the individual with the international legal order, the considerable evolution in the last decades not only of the International Law of Human Rights but likewise of International Humanitarian Law, has contributed decisively. This latter likewise considers the protected persons not only as simple object of regulation that they establish, but rather as true subjects of international law. It is what ensues, e.g., from the position of the four Geneva Conventions on International Humanitarian Law of 1949, erected as from the rights of the protected persons (e.g., III Convention, Articles 14 and 78; IV Convention, Article 27); and that this is so, it clearly ensues from the fact that the four Geneva Conventions plainly prohibit to the States Parties to derrogate – by special agreements – from the rules enunciated in them and in particular to restrict the rights of the persons protected set forth in them (I, II and III Conventions, Article 6; and IV Convention, Article 7).[51]

In fact, the first Conventions on International Humanitarian Law (already in the passage from the XIXth to the XXth century) were pioneering in expressing the international concern for the fate of human beings in armed conflicts, recognizing the individual as direct beneficiary of the State conventional obligations.[52] In effect, the impact of the norms of the International Law of Human Rights has been having already for a long time repercussions in the *corpus juris* and application of International Humanitarian Law: the approximations and convergences between those two branches of Law, and also of the International Law of Refugees, at both normative as well as hermeneutic and operational levels, have contributed to overcome the artificial a compartmentalizations of the past, and to improve and strengthen the international protection of the human person – as *titulaire* of the rights which are inherent to him/her – in every and any circumstances.[53] Thus, International Humanitarian Law gradually frees itself from a purely inter-State obsolete outlook, giving an increasingly greater emphasis – in the light of the principles of humanity – to the protected persons and to the responsibility for the violation of their rights.[54]

The attempts of the past to deny to individuals the condition of subjects of international law, for not being recognized to them some of the capacities which States have (such as, e.g., that of treaty-making) are definitively devoid of any meaning. Nor at domestic law level, not all individuals participate, directly or indirectly, in the law-making process, and they do not thereby cease to be subjects of law. The international movement in favour of human rights, launched by the Universal Declaration of Human Rights of 1948, came to disauthorize these false analogies, and to overcome the traditional distinctions (e.g., on the basis of nationality): subjects of law are "all the human creatures", as members of the "universal society", it being "inconceivable" that the State comes to deny them this condition.[55]

Moreover, individuals and non-governmental organizations (NGOs) assume nowadays an increasingly relevant role in the formation itself of *opinio juris communis*. If, some decades ago, it was possible to approach the process of formation of the norms of general international law with attention turned only to the "inter-State" and "State sources" of the "written forms of international law",[56] in our days it is no longer possible not to recognize likewise "non-State sources", ensuing from the performance of the organized civil society at international level.

At global level, Article 71 of the U.N. Charter has served as basis to the advisory *status* of NGOs acting in the ambit of the U.N., and resolution

1996/31, of 26.07.1996, of the U.N. Economic and Social Council (ECOSOC), regulates in detail the relations between the U.N. and NGOs with advisory *status*[57] (providing the framework for accreditation of these latter). NGOs have gained considerable visibility throughout the recent cycle of U.N. World Conferences (1992-2001), by their presence and lobbying in the Conferences themselves[58] or by their articulation in their own forums parallel to such Conferences.[59] In recent years, they have been entitled to present on a regular basis their *amici curiae* before international tribunals such as the Inter-American and the European Courts of Human Rights, and the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and for Rwanda.

At regional level, the Permanent Council of the Organization of American States (OAS) has issued directives (on 15.12.1999) governing the participation of NGOs and other entities of civil society in OAS activities; ever since they have appeared regularly before the Council and other OAS organs. And the European Convention on Recognition of the Legal Personality of International Non-Governmental Organizations (of 24.04.1986), on its turn, provides for the constitutive elements of the NGOs (Article 1) and for the *ratio legis* of their legal personality and capacity (Article 2). In recent years, individuals and NGOs have effectively participated in the *travaux préparatoires* of certain international treaties, or influenced them (e.g., the 1984 U.N. Convention against Torture and its 2002 Optional Protocol,[60] the 1989 U.N. Convention on the Rights of the Child,[61] the 1991 Madrid Protocol (to the 1959 Antarctica Treaty) on Environmental Protection in the Antarctica,[62] the 1997 Ottawa Convention on the Prohibition of Anti-Personnel Mines and on Their Destruction,[63] and the 1998 Rome Statute of the International Criminal Court[64]), and subsequently in the monitoring of their implementation.

The growing performance, at international level, of NGOs and other entities of civil society has had an inevitable impact in the theory of the subjects of International Law, contributing to render the individuals direct beneficiaries (without intermediaries) of the international norms, and subject of international law, and to put an end to the purely inter-State anachronistic dimension of this latter; moreover, their activities have contributed to the prevalence of superior common values in the ambit of international law.[65] Individuals, NGOs and other entities of civil society come, thus, to act in the process of formation as well as application of international norms.[66]

This is symptomatic of the *democratization* of international relations,[67] parallel to a growing *conscientization* of the multiple subjects [of law – **actors?]** acting in the contemporary international scenario[68] in favour of universal values. Taking into account the presence in the contemporary international legal order not only of States and international organizations but also of individuals (however differentiated their legal *status* might be), Emmanuel Roucounas sustains that this is indicative of the rule of law in the international community, and rightly adds that

> "*la préséance du droit traverse* États, organisations et individus, et requiert ainsi l'action de toutes les composantes, identifiées aussi clairement que possible, de la communauté internationale."[69]

In sum, the very process of formation and application of the norms of international law ceases to be a monopoly of the States. Furthermore, beyond the individual's presence and participation in the international legal order, to the recognition of his rights, as subject of international law, ought to correspond the procedural capacity to vindicate them at international level. It is by means of the consolidation of the full international procedural capacity of individuals that the international protection of human rights becomes a reality.[70]

But even if, by the circumstances of life, certain individuals (e.g., children, the mentally ill, aged persons, among others) cannot fully exercise their capacity (e.g., in civil law), this does not mean that they cease to be *titulaires* of rights, opposable even to the State.[71] Irrespective of the circumstances, the individual is subject *jure suo* of international law, as sustained by the more lucid doctrine, since the writings of the so-called founding-fathers of the discipline.[72] Human rights were conceived as *inherent* to every human being, independently of any circumstances.

V. THE RESCUE OF THE INDIVIDUAL AS SUBJECT OF INTERNATIONAL LAW

It could be argued that the contemporary world is entirely distinct from that of the epoch of the so-called founding fathers of international law (*supra*), who called for a *civitas maxima* ruled by the law of nations (*droit des gens*). Even though one is before two different world scenarios (no one would deny it), the human aspiration remains, however, the same, that is, that of the construction of an international legal order applicable both to State (and international

organizations) and to individuals, pursuant to certain universal standards of justice.

One has constantly identified a continuous "rebirth" of natural law, even though this latter has never disappeared. This has taken place amidst the conservative outlook and degeneration of legal positivism, consubstantiating the *status quo*, with its typical subservience to power (also in authoritarian, dictatorial and totalitarian regimes). It is no longer a return to classic natural law, but rather the assertion or restoration of a pattern of justice, whereby positive law is evaluated.[73] The continuous "rebirth" of natural law reinforces the universality of human rights, as inherent to all human beings, – in contraposition to positive norms, which lack universality, for varying from one social milieu to another.[74] Hence the importance of the juridical personality of the *titulaire* of rights,[75] also as a limit to the arbitrary manifestations of State power.

Early in the XXth century, in the inter-war period, J. Spiropoulos lucidly argued that the gradual emancipation of the individual from the tutelage of the all-powerful State, anticipated Spiropoulos in 1928, is no longer a "question of time", for "imposing itself as a necessary consequence of the evolution of the international organization" of the new times.[76] N. Politis, likewise, was an early and eloquent supporter of the recognition of the international legal personality of individuals, who were the final addressees of all Law.[77]

The "eternal return" or "rebirth" of jusnaturalism has been reckoned by the jusinternationalists themselves,[78] much contributing to the assertion and the consolidation of the primacy, in the order of values,[79] of the State obligations as to human rights, and of the recognition of their necessary compliance *vis-à-vis* the international community as a whole.[80] This latter, witnessing the moralization of Law itself, assumes the vindication of common superior interests.[81] One has gradually turned to conceive a truly *universal* legal system.

Still under the impact of the II world war, international law experts acknowledged the need to reconstruct international law on the basis of the recognition of the condition of the individual as its subject and of his access to international justice. The human person was the reason and ultimate end of all law, and only thereby would it be possible to "régénérer le droit international sur une base à la fois morale et juridique".[82] In a report to the *Institut de Droit International* (Lausanne sesssion) in 1947, Charles de Visscher stressed the close connection between human rights and natural law in the framework of the historical evolution of *jus gentium*.[83]

The individual, as subject of international law on his own right, was certainly distinguishable from his own State, and a wrong done to him was a breach of classical *jus gentium*, as universal minimal law.[84] The early international experiments which for decades had been granting international procedural capacity to the individuals (such as the minorities, mandates and trusteeship systems, *supra*) reflect, in fact, the recognition of superior common values consubstantiated in the imperative of protection of the human being in any circumstances.

The whole new *corpus juris* of the International Law of Human Rights has been constructed on the basis of the imperatives of protection and the superior interests of the human being, irrespectively of his link of nationality or of his political statute, or any other situation or circumstance. Hence the importance assumed, in this new law of protection, by the legal personality of the individual, as subject of both domestic and international law.[85] The application and expansion of the International Law of Human Rights, in turn, has repercussions, not surprisingly, and with a sensible impact, in the trends of contemporary Public International Law.[86]

As contemporary Public International Law recognizes rights and duties to the individuals (as evidenced by the international instruments of human rights), one cannot deny them international personality, without which that recognition could not take place. International Law itself, in recognizing rights inherent to every human being, disauthorizes the archaic positivist dogma which pretended, in an authoritarian way, to reduce those rights to those "granted" by the State. The recognition of the individual as subject of both domestic and international law, endowed in both of full procedural capacity (cf. *infra*), represent a true juridical revolution, to which we have the duty to contribute. This revolution comes at last to give an ethical content to the norms of both domestic public law and international law.

In fact, already in the first decades of the XXth century one recognized the manifest inconveniences of the protection of the individuals by the intermediary of their respective States of nationality, that is, by the exercise of discretionary diplomatic protection, which rendered the "complaining" States at a time "judges and parties". One started, as a consequence, to overcome such inconveniences, to nourish the idea of the *direct*

access of the individuals to the international jurisdiction, under certain conditions, to vindicate their rights against the States, – a theme which came to be effectively considered by the *Institut de Droit International* in its sessions of 1927 and 1929.[87]

In a monograph published in 1931, the Russian jurist André Mandelstam warned as to the necessity of the recognition of a *juridical minimum* – with the primacy of international law and of human rights over the State legal order, – below which the international community should not allow the State to fall.[88] In his vision, the "horrible experience of our time" demonstrated the urgency of the necessary acknowledgement of this *juridical minimum*, to put an end to the "unlimited power" of the State over the life and the freedom of its citizens, and to the "complete impunity" of the State in brech of the "most sacred rights of the individual".[89]

In his celebrated *Précis du Droit des Gens* (1932-1934), Georges Scelle criticizes the fiction of the contraposition of an "inter-State society" to a (national) society of individuals: one and the other are formed by individuals, subjects of domestic law and of international law, whether they are individuals moved by private interests, or endowed with public functions (rulers and public officials), in charge of looking after the interests of national and international collectivities.[90] In a particularly significant passage of his work, Scelle, in identifying (already at the early thirties) "the movement of extension of the legal personality of individuals", pondered that

> "le seul fait que des recours super-étatiques sont institués au profit de certains individus, montre que ces individus sont désormais dotés d'une certaine compétence par le Droit international, et que la compétence des gouvernants et agents de cette société internationale est *liée* corrélativement. Les individus sont à la fois sujets de droit des collectivités nationales et de la collectivité internationale globale: ils sont *directement* sujets de droit des gens."[91]

The fact of States being composed of individual human beings – with all its consequences – did not pass unperceived by other authors, who singled out the importance of the attribution to individuals of remedies in the ambit of the international mechanisms of protection of their rights.[92] There were those to whom "the attribution of personality of international law to the individual" constitutes the domain in which "the branch of Law most progressed in the last decades".[93]

Very early in Latin America the international legal doctrine flourished on a humanist basis. Thus, already in the XIXth century, in his pioneering work on *Principles of International Law* (1832), Andrés Bello founded international law on natural law, which, applied to nations,

> "considered the human kind (...) as a great society of which each of them was member, and in which some in respect of others have the same duties than the individuals of the human species *inter se*."[94]

Also in the American continent, in the XXth century, even before the adoption of the American and Universal Declarations of Human Rights of 1948, doctrinal manifestations flourished in favour of the international juridical personality of the individuals, such as those which are found, for example, in the writings of Alejandro

Álvarez[95] and Hildebrando Accioly.[96]

Likewise, Levi Carneiro sustained that there did not subsist any doctrinal obstacle to the admission of individual complaints before international justice; international law was increasingly more attentive to the individual, as the State, "created in the interests of the individual, cannot superimpose itself to this latter".[97] And Philip Jessup, in 1948, pondered that the old conception of State sovereignty was not consistent with the higher interests of the international community and the *status* of the individual as subject of international.[98]

In Europe, Hersch Lauterpacht, in a substantial work published in 1950, did not hesitate to assert that "the individual is the final subject of all law", there being nothing inherent to international law impeding him to become subject of the law of nations and to become a party in proceedings before international tribunals.[99] The common good, at both national and international levels, is conditioned by the well-being of individual human beings who compose the collectivity at issue.[100] Such recognition of the individual as subject of rights also at international law level brings about a clear rejection of the old positivist dogmas, discredited and unsustainable, of the dualism of subjects in the domestic and international orders, and of the "will" of States as exclusive "source" of international law.[101] In a perspicatious essay, published also in 1950, Maurice Bourquin pondered that the growing concern of the international law of the epoch with the problems which affected directly the human being revealed the overcoming of the old exclusively inter-State vision of the international legal order.[102]

In his course delivered at the Hague Academy of International Law, three years later, in 1953, Constantin Eustathiades linked the international subjectivity of the individuals to the broad theme of the international responsibility (of them, parallel to that of the States). As a reaction of the universal juridical conscience, the recognition of the rights and duties of the individual at international level, and his capacity to act in order to defend his rights, are linked to his capacity to the international delict; international responsibility thus comprises, in his vision, both the protection of human rights as well as the punishment of war criminals (forming a whole).[103] This development heralded the emancipation of the individual from the tutelage of his State. Given, thus, the capacity of the individual, not only to lodge an international complaint against a State (which can be his own) in the protection of his own rights, but also to comit a delict at international level, – added Eustathiades, – one cannot deny his condition of subject of international law.[104]

To the same conclusion Paul Guggenheim arrived, in a course delivered also at the Hague Academy, one year earlier, in 1952: as the individual is "subject of duties" at international law level, one cannot deny his international legal personality, recognized also in fact by *customary* international law itself.[105] Still in the mid-XXth century, in the first years of application of the European Convention on Human Rights, Giuseppe Sperduti wrote that the individuals had become "*titulaires* of legitimate international interests", as in international law, a process of emancipation of the individuals from the "exclusive tutelage of the State agents" had already started.[106] The juridical experience itself of the epoch contradicted categorically the unfounded theory according to which the individuals were simple *objects* of the international legal order, and destructed other prejudices of State positivism.[107] In the legal doctrine of that time the recognition of the expansion of the protection of individuals at the international legal order became evident.[108]

To B.V.A. Röling, writing so lucidly in 1960, as from the reaction to the horrors of the II world war the individual emerged in international law as bearer of international rights as well as obligations; the new international law came to evolve "around the individual".[109] The human person was no longer left at the mercy of her own nation-State, as her rights emanated directly from international law. Such historical recovery of the human person as subject of international law could not, in his view, be dissociated from a phenomenon he referred to in eloquent terms: the revival of natural law after the II world war, on the basis of the general principles of law, and parallel to "the failure of the then prevailing method of legal positivism".[110] This was reassuring, he added, as

> "Humanity of today instinctively turns to this natural law, for the function of law is to serve the well-being of man, whereas present positive international law tends to his destruction."[111]

This view was in keeping with the posture upheld by the Japanese jurist Kotaro Tanaka, in his Opinions in cases before ICJ at The Hague in that epoch, that is, an international law transcending the limitations of legal positivism,[112] and thus capable of responding effectively to the needs and aspirations of the international community as a whole.[113] In the late sixties, the pressing need was pointed out of protecting internationally the human person both individually and *in groups* (cf. *infra*), for unless such international protection was secured to individuals and groups of them, "the fate of the individual" would be "at the mercy of some *Staatsrecht*".[114]

In an essay published in 1967, René Cassin, who had participated in the preparatory process of the elaboration of the Universal Declaration of Human Rights of 1948,[115] stressed with eloquence the advance represented by the access of the individuals to international instances of protection, secured by many human rights treaties:

> -"(...) If there still subsist on earth great zones where millions of men and women, resigned to their destiny, do not dare to utter the least complaint nor even to conceive that any remedy whatsoever is made possible, those territories diminish day after day. The awakening of conscience that an emancipation is possible, becomes increasingly more general. (...) The first condition of all justice, namely, the possibility of cornering the powerful so as to subject them to (...) public control, is nowadays fulfilled much more often than in the past. (...) The fact that the resignation without hope, that the wall of silence and that the absence of any remedy are in the process of reduction or disappearance, opens to moving humanity encouraging perspectives (...)."[116]

In the articulation of Paul Reuter, as from the moment in which two basic conditions are fulfilled, individuals become subjects of international law; those conditions are, firstly, "to be *titulaires* of rights and obligations established directly by international law", and, secondly, "to be *titulaires* of rights and obligations sanctioned directly by international law".[117] To the French jurist, as from the moment

when the individual is granted a remedy before an organ of international protection (access to international jurisdiction) and can, thus, initiate the procedure of protection, he becomes subject of international law.[118]

In the same line of thinking, "the true cornerstone of the international legal personality of the individual", in the view of Eduardo Jiménez de Aréchaga, lies in the attribution of rights and the means of action to secure them. As from the moment when this occurs, as it effectively occurred at international level, – added the Uruguayan jurist, – it becomes evident that "there is nothing inherent to the structure of the international legal order" which impedes the recognition to the individuals of rights that emanate directly from International Law, as well as international remedies for the protection of those rights.[119]

In a study published in 1983, J. Barberis pondered that, for individuals to be subjects of law, it is necessary that the legal order at issue attributes to them rights or obligations (as is the case of international law); the subjects of law are, thus, heterogeneous, – he added, – and the theoreticians who beheld only the States as such subjects simply distorted the reality, failing to take into account the transformations undergone by the international community, for coming to admit this latter that non-State actors also possess international legal personality.[120] In fact, successive studies of instruments of international protection came to emphasize precisely the historical importance of the recognition of the international legal personality of individuals as complaining party before international organs.[121]

In my own lectures delivered at the Hague Academy of International Law in 1987, I pondered that the continuous expansion of international law is also reflected in the multiple contemporary mechanisms of international protection of human rights, the operation of which cannot be dissociated from the new values acknowledged by the international community.[122] At last individuals were enabled "to exercise rights emanating directly from international law (*droit des gens*)". And I added:

> "In this connection, the insight and conception of Vitoria developed in his manuscripts of 1532 (made public in 1538-1539), can be properly recalled in 1987, four-and-a-half centuries later: it was a conception of a universal law of nations, of individuals socially organized in States and also composing humanity (...); redress of violations of (human) rights, in fulfilment of an international need, owed its existence to the law of nations, with the same principles of justice applying to both States and individuals or peoples forming them.
>
> (...) There is a growing and generalized acknowledgement that human rights, rather than deriving from the State (or from the will of individuals composing the State), all inhere in the human person, in whom they find their ultimate point of convergence. (...) The non-observance of human rights entails the international responsibility of States for treatment of the human person."[123]

VI. THE LEGAL PERSONALITY OF THE INDIVIDUAL AS A RESPONSE TO A NEED OF THE INTERNATIONAL COMMUNITY

International law itself, in recognizing rights inherent to every human being, has disauthorized the archaic positivist dogma which, in an authoritarian way, intended to reduce such rights to those "conceded" by the State. The recognition of the individual as subject of both domestic law and international law, represents a true juridical revolution, – to which we have the duty to contribute in the search for the prevalence of superior values, – which comes at last to give an ethical content to the norms of both public domestic law and international law. This transformation, proper of our time, corresponds, in its turn, to the recognition of the necessity that all States are made answerable for the way they treat all human beings who are under their jurisdiction, so as to avoid new violations of human rights.

This accountability would simply not have been possible without the crystallization of the right of individual petition, amidst the recognition of the objective character of the positive obligations of protection and the acceptance of the collective guarantee of the compliance with them. This is the real meaning of the *historical rescue* of the individual as subject of the International Law of Human Rights[124] (cf. *supra*). In fact, the recognition of the juridical personality of the individuals fulfils a true *necessity* of the international community,[125] which today seeks to guide itself by common superior values.[126] This expansion of the international legal personality, nowadays encompassing that of individuals, is a remarkable feature of the irreversible evolution of contemporary international law itself.[127]

The doctrinal trend which still insists in denying to the individuals the condition of subjects of International Law is based on a rigid definition of these latter, requiring from them not only to possess rights and obligations emanated from International Law, but also to participate in the process of creation of its norms and of the compliance with them. It so occurs that this rigid definition does not sustain itself, not even at the level of domestic law, in which it is not required – it has never been – from all individuals to participate in the creation and application of the legal norms in order to be subjects (*titulaires*) of rights, and to be bound by the duties, enmanated from such norms.

Besides unsustainable, that conception appears contaminated by an ominous ideological dogmatism, which had as the main consequence to alienate the individual from the international legal order. It is surprising – if not astonishing, – besides regrettable, to see that conception repeated mechanically and *ad nauseam* by a part of doctrine, apparently trying to make believe that the intermediary of the State, between the individuals and the international legal order, would be something inevitable and permanent. Nothing could be more fallacious. In the brief historical period in which that Statist conception prevailed, in the light – or, more precisely, in the darkness – of legal positivism, successive atrocities were committed against the human being, in a scale without precedents.

It results quite clear today that there is nothing intrinsic to International Law that impedes or renders it impossible to non-State actors to enjoy international legal personality. No one in sane conscience would today dare to deny that the individuals effectively possess rights and obligations which emananate directly from International Law, with which they find themselves, therefore, in direct contact. And it is perfectly possible to conceptualize – even with greater precision – as subject of International Law any person or entity, *titulaire* of rights and obligations, which emanate directly from norms of International Law. It is the case of the individuals, who thus have strengthened this direct contact – without intermediaries – with the international legal order.[128]

The international subjectivity of the human being (whether a child, an elderly person, a person with disability, a stateless person, or any other) erupted indeed with all vigour in the legal science of the XXth century, as a reaction of the universal juridical conscience against the successive atrocities committed against the human kind. An eloquent testimony of the erosion of the purely inter-State dimension of the international legal order is found in the historical and pioneering Advisory Opinion n. 16 of the Inter-American Court, on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of 01.10.1999),[129] which has served as orientation to other international tribunals and has inspired the evolution *in statu nascendi* of the international case-law on the matter.

The Inter-American Court recognized, in the light of the impact of the *corpus juris* of the International Law of Human Rights on the international legal order itself, the crystallization of a true individual subjective right to information on consular assistance,[130] of which is *titulaire* every human being deprived of his freedom in another country;[131] furthermore, it broke away from the traditional purely inter-State outlook of the matter,[132] bringing support to numerous individuals victimized by poverty, discrimination, and deprived of freedom abroad.

The subsequent Advisory Opinion n. 17 of the Inter-American Court, on the *Juridical Condition and Human Rights of the Child* (of 28.08.2002), fits into the same line of assertion of the juridical emancipation of the human being, in stressing the consolidation of the juridical personality of the child, as a true subject of law and not simple object of protection, and irrespective of the extent of his legal capacity to exercise his rights for himself (capacity of exercise). In this respect, the 1989 U.N. Convention on the Rights of the Child recognizes subjective rights to the child as a subject of law, and further reckons that, given his vulnerability or existential condition, the child needs special protection and legal representantion, while remaining a *titulaire* of rights; this is in accordance with the Kantian conception of every human person being ultimately an end in herself.[133]

The juridical category of the international legal personality has not shown itself insensible to the *necessities* of the international community, among which appears with prominence that of providing protection to the human beings who compose it, in particular those who find themselves in a situation of special vulnerability, as do the children. In fact, doctrine and international case-law on the matter sustain that the subjects of law themselves in a legal system are endowed with attributes that fulfil the needs of the international community.[134]

Hence, – as Paul de Visscher pointed out perspicaciously, – while "the concept of juridical person is unitary as concept", given the fundamental unity of the human person who "finds in herself the ultimate justification of her own

rights", the juridical capacity, on its turn, reveals a variety and multiplicity of scopes.[135] But such varieties of the extent of the juridical capacity, – including its limitations in relation to, e.g., the children, the elderly persons, the persons with mental disability, the stateless persons, among others, – in nothing affect the juridical personality of all human beings, as juridical expression of the dignity inherent to them.

VII. THE ATTRIBUTION OF DUTIES TO THE INDIVIDUAL DIRECTLY BY INTERNATIONAL LAW

As already indicated, to the legal doctrine of the XXth century it did not pass unnoticed that individuals, besides being *titulaires* of rights at international level, also have duties which are attributed to them by international law itself.[136] And, – what is more significant, – the grave violation of those duties, reflected in the crimes against humanity, engages the *international* individual penal responsibility, *independently* from what provides the *domestic* law on the matter.[137] Contemporary developments in international criminal law have, in fact, a direct incidence in the crystallization of both of the international individual penal responsibilidad (the individual subject, both active and passive, of internacional law, *titulaire* of rights as well as bearer of duties emanated directly from the law of nations (*droit des gens*), as well as the the principle of universal jurisdiction.

It may be added that the decisions of the U.N. Security Council to create the *ad hoc* International Criminal Tribunals for the former Yugoslavia[138] (1993) and for Rwanda[139] (1994), added to the establishment of the permanent International Criminal Court, for judging those responsible for grave violations of human rights and of International Humanitarian Law, gave a new impetus to the struggle of the international community against impunity, – as a violation *per se* of human rights,[140] – besides reaffirming the principle of the international penal responsibility of the individual[141] for such violations, and seeking thus to prevent future crimes.[142]

The process of *criminalization* of *grave* violations of human rights and of International Humanitarian Law[143] has, in fact, accompanied *pari passu* the evolution of contemporary international law itself: the establishment of an international criminal jurisdiction is regarded in our days as an element which strengthens the international law itself, overcoming basic insufficiencies of the past as to the incapacity to punish war criminals.[144] The *travaux préparatoires*[145] of the Statute of the permanent International Criminal Court, adopted at the Rome Conference of 1998, as it would be expected, parallel to the responsibility of the State, contributed to the prompt recognition, in the ambit of future application of the Statute, of the individual internacional criminal responsibility, – what represents a great doctrinal advance in the struggle against impunity for the gravest international crimes.[146] This advance, in our days, is due to the intensification of the clamour of all humankind against the atrocities which have victimized millions of human beings everywhere, – atrocities which can no longer be tolerated and which ought to be fought with determination.[147]

Attention ought to be drawn to the superior universal *values* which underlie the whole theme of the recent creation of an international criminal jurisdiction on a permanent basis. The crystallization of the international criminal responsibility of the individuals (parallel to the responsibility of the State), and the current process of criminalization of *grave* violations of human rights and of humanitarian law,[148] constitute elements of crucial importance to the struggle against impunity,[149] and to the treatment to be given to past violations, in the safeguard of human rights.

The consolidation of the international legal personality of individuals, as active as well as passive subjects of international law, enhances accountability in international law for abuses perpetrated against human beings. Thus, individuals are also bearers of duties under international law, and this reflects the consolidation of their international legal personality.[150] Developments in international legal personality and international accountability go hand in hand, and this whole evolution bears witness of the formation of the *opinio juris communis* to the effect that the gravity of certain violation of fundamental rights of the human person affects directly basic values of the international community as a whole.[151]

VIII. PERSONALITY AND CAPACITY: THE INDIVIDUAL'S ACCESS TO JUSTICE AT INTERNATIONAL LEVEL

Ultimately, all Law exists for the human being, and the law of nations is no exception to that, guaranteeing to the individual his rights and the respect for his personality.[152] The respect for the

individual's personality at international level is instrumentalized by the international right of individual petition. It is for this reason that, in my Concurring Opinion in the case of *Castillo Petruzzi and Others versus Peru* (Preliminary Objections, Judgment of 04.09.1998) before the Inter-American Court of Human Rights, urged by the circumstances of the *cas d'espèce*, I saw it fit to characterize such international right of individual petition as a *fundamental clause* (*cláusula pétrea*) of the human rights treaties which provide for it,[153] adding that

> - "The right of individual petition shelters, in fact, the last hope of those who did not find justice at national level. I would not refrain myself nor hesitate to add, – allowing myself the metaphor, – that the right of individual petition is undoubtedly the most luminous star in the universe of human rights."[154]

Human rights do assert themselves against all forms or domination or arbitrary power.[155] In the public hearings before the Inter-American Court of Human Rights (mainly those pertaining to reparations), a point which has particularly drawn my attention has been the remark, increasingly more frequent, on the part of the victims or their relatives, in the sense that, were it not for their access to the international instance, justice would never have been made in their concrete cases. Without the right of individual petition, and the consequent access to justice at international level, the rights set forth in human rights treaties would be reduced to a little more than dead letter.

The human being emerges, at last, even in the most adverse conditions, as ultimate subject of Law, domestic as well as international. The case of the *"Street Children"* (case *Villagrán Morales and Others versus Guatemala*, 1999-2001), decided by the Inter-American Court, the first one of the kind in which the cause of the children abandoned in the streets was brought before an international human rights tribunal,[156] and in which some of those marginalized and forgotten by this world succeeded to resort to an international tribunal to vindicate their rights as human beings, is truly paradigmatic, and gives a clear and unequivocal testimony that the International Law of Human Rights has nowadays achieved its maturity.

In fact, in that case of the killing of the "*Street Children"*, the mothers of the murdered children (and the grandmother of one of them), as poor and abandoned as their sons (and grandson), had access to the international jurisdiction, appeared before the Court (public hearings of 28/29.01.1999 and of 12.03.2001), and, due to the judgments of the Inter-American Court (as to the merits, of 19.11.1999, and reparations, of 26.05.2001), which brought them redress, could at least recover their faith in human justice. As it can be inferred from this historical case of the *"Street Children"*, the international juridical subjectivity of the individuals is nowadays an irreversible reality, and the violation of their fundamental rights, emanated directly from the international legal order, brings about juridical consequences.

As I have seen it fit to sum up in my Concurring Opinion in the aforementioned Advisory Opinion of the Inter-American Court on the *Juridical Condition and Human Rights of the Child* (2002),

> "every human person is endowed with juridical personality, which imposes limits to State power. The juridical capacity varies in virtue of the juridical condition of each one to undertake certain acts. Yet, although such capacity of exercise varies, all individuals are endowed with juridical personality. Human rights reinforce the universal attribute of the human person, given that to all human beings correspond likewise the juridical personality and the protection of the Law, independently of her existential or juridical condition" (par. 34).

The international legal personality of human beings has in recent years been forcefully asserted, envisaging them not only in isolation but also in groups. The issue of the protection of minorities, for example, which occupied much space in the international agenda of the inter-war period (cf. *supra*), has reemerged in the post-cold war period[157] (with the irruption of so many internal armed conflicts in different latitudes); the entry into force, in February 1998, of the 1994 Framework Convention for the Protection of National Minorities of the Council of Europe, exemplifies the renewal of concern with the theme at issue.

When one comes to minorities or human collectivities, it is, more precisely, the individuals who compose them that are subjects of international law; thus, the protection they are entitled to, as such, is in fact extended, through them, to the groups they belong to. In this sense, 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.[158] 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.[159]

In this respect, the endeavours undertaken in both the United Nations and the 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. Those endeavours, – it has been suggested, – recognize the debt that humankind owes to indigenous peoples, due to the "historical misdeeds against them", and a corresponding sense of duty to "undo the wrongs" done to them.[160] This particular development has, likewise, contributed to the expansion of the international legal personality of individuals (belonging to groups, minorities or human collectivities) as subjects of (contemporary) international law.

Still in respect of the human rights of individuals belonging to groups or human collectivities, reference is to be made to the recent and historical Advisory Opinion n. 18, on the *Juridical Condition and Rights of Undocumented Migrants* (of 17.09.2003), of the Inter-American Court of Human Rights. The Court stressed that the migratory *status* cannot serve as justification for depriving them of the enjoyment and exercised of their human rights, including labour rights. The Court added that States cannot discriminate, or tolerate discriminatory situations, to the detriment of migrants, and ought to guarantee the due process of law to any person, irrespective of her migratory *status*.

The Court further warned that States cannot subordinate or condition the observance of the fundamental principle of equality before the law and non-discrimination to the aims of their migratory or other policies. In my Concurring Opinion I sustained that this fundamental principle belonged to the domain of *jus cogens*, and stressed the importance of the *erga omnes* obligations (encompassing also inter-individual relations) *vis-à-vis* the rights of undocumented migrants. The Advisory Opinion of the Court thus benefitted a considerable number of persons, those belonging to numerous groups of undocumented migrants, exposed to all sorts of abuses in numerous countries nowadays.

IX. FINAL OBSERVATIONS: THE HISTORICAL SIGNIFICANCE OF THE INTERNATIONAL SUBJECTIVITY OF THE INDIVIDUAL

The international juridical subjectivity of the human being, as foreseen by the so-called founders of international law (the *droit des gens*), is nowadays a reality. At this beginning of the XXIst century, this highly significant conquest can be appreciated within the framework of the historical process of *humanization* of international law, – to which it is a privilege to be able to contribute, – which, always attentive to fundamental values, comes to occupy itself more directly of the realization of superior common goals. Furthermore, the international (active) subjectivity of the individuals fulfils a true necessity of their *legitimatio ad causam*, to vindicate their rights, emanated directly from international law.

In the ambit of the International Law of Human Rights, in the European and inter-American systems of protection – endowed with international tribunals in operation – parallel to the legal personality, also the international processual capacity (*locus standi in judicio*) of the individuals is acknowledged today. This is a logical development, as it does not seem reasonable to conceive rights at international level without the corresponding procedural capacity to vindicate them; the individuals are effectively the true complainant party in the international *contentieux* of human rights. On the basis of the right of individual petition is erected the juridical mechanism of emancipation of the human being *vis-à-vis* his own State for the protection of his rights in the ambit of the International Law of Human Rights,[161] – an emancipation which constitutes, in our days, a true juridical revolution, which comes at last to give an ethical content to the norms of both domestic public law and international law.

The recognition of the direct access of the individuals to the international justice reveals, at this beginning of the XXIst century, the new primacy of the *raison de l'humanité* over the *raison d'État*, inspiring the historical process of *humanization* of internacional law. Human conscience thus reaches in our days a degree of evolution which renders it possible to secure justice at international level by means of the safeguard of the rights of those who have been marginalized or excluded (cf. *supra*). The international legal

subjectivity of the individuals is nowadays an irreversible reality, and the human being emerges, at last, even in the most adverse conditions, as the ultimate subject of Law, both domestic and international, endowed with full juridico-procedural capacity.

Moreover, it should not pass unnoticed that individuals have already begun to participe effectively in the process of elaboration of norms of international law, which appears today much more complex than some decades ago. This phenomenon ensues from the democratization, which, in our days, comes to encompass also the international level. This is illustrated, as already pointed out, by the growing presence and participation of entities of the civil society (NGOs and others) in the international legal order, as verified in the *travaux préparatoires* of recent treaties as well as along the cycle of the great World Conferences of the United Nations during the nineties,[162] which addressed issues of concern to humankind as a whole.

There have been instances of such entities of civil society dedicating themselves also to monitor the observance of, and compliance with, the international norms, thus bringing to an end the States' monopoly of the past in this domain. It is certain that, in this as in so many other domains of the discipline, it is no longer possible to approach international law from a merely inter-State outlook. The subjects of international law have, already for a long time, ceased to be reduced to territorial entities; more than half a century ago, as acknowledged in the celebrated Advisory Opinion of the International Court of Justice on *Reparations for Damages* (1949), the advent of international organizations had put an end to the States' monopoly of the international legal personality and capacity, with all the juridical consequences which ensued therefrom.[163]

It appears quite clear nowadays that there is nothing intrinsic to international law that would impede, or renders it impossible, to non-State "actors" to be endowed with international legal personality and capacity. Yet, part of the contemporary legal doctrine keeps on referring to individuals as "actors" (rather than subjects) in the international legal order. This is not a juridical term, it is rather a term of art, to which no specific juridical contents and consequences are necessarily attached. To call the individuals "actors" in international law is nothing but a platitude. They are true subjects of international law, bearers of rights and duties which emanate from international law.

No one in sane conscience would deny that individuals effectively possess rights and have duties which derive directly from international law, with which they thus are in direct contact. And it is perfectly possible to conceptualize as subject of international law, precisely, any person or entity, *titulaire* of rights and bearer of obligations, which emanate directly from norms of international law. It is the case of individuals, who have their direct contacts – without intermediaries – with the international legal order thus fostered and strengthened.

This evolution is to be appreciated in a wider dimension. The expansion of international legal personality, nowadays encompassing that of individuals as active and passive subjects of international law, goes *pari passu* with the acknowledgment of accountability in international law. This contributes ultimately to the international rule of law, to the realization of justice also at international level, thus fulfilling a long-standing aspiration of humankind.

In reaction to the successive atrocities which, along the XXth century, have victimized millions and millions of human beings, in a scale until then unknown in the history of humankind, the universal juridical conscience – as the ultimate *material source* of all Law, – has restituted to the human being his condition of subject of both domestic and international law, and final addressee of all legal norms, of national as well as international origin. Human beings were to benefit from that, and international law itself was thereby enriched and justified. International law liberated itself from the chains of statism, and again met with the conception of a true *jus gentium* (*droit des gens*), which, in its early beginnings, inspired its historical formation and evolution.[164] In our days, the way is paved for the construction of a new *jus gentium* of the XXIst century, the international law for humankind.

NOTAS

1. And which is due to come out in the original English language in a forthcoming issue of a leading Japanese international legal periodical.

2. It will be published, in its Japanese translation version, in a forthcoming issue of the *Law Review* of the University of Hiroshima.

3. This third lecture is currently under consideration by the Japan Federation of Bar Associations for a position paper that it is planning to issue on the subject in the course of the year 2005.

4. Cf., e.g., *inter alia*, A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104; A.A. Cançado Trindade, *Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección* (*Rapporteur*: A.A. Cançado Trindade), vol. II, 2nd. ed., San José of Costa Rica, Inter-American Court of Human Rights, 2003, pp. 1-1015; A.A. Cançado Trindade, "Le nouveau Règlement de la Cour Interaméricaine des Droits de l'Homme: quelques réflexions sur la condition de l'individu comme sujet du Droit international", in *Libertés, justice, tolérance – Mélanges en hommage au Doyen G. Cohen-Jonathan*, vol. I, Bruxelles, Bruylant, 2004, pp. 351-365; A.A. Cançado Trindade, "A Consolidação da Personalidade e da Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional, 16 *Anuario del Instituto Hispano-Luso-Americano de Derecho Internacional* – Madrid (2003) pp. 237-288; 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.

5. A.A. Cançado Trindade, "Domestic Jurisdiction and Exhaustion of Local Remedies: A Comparative Analysis", 16 *Indian Journal of International Law* – New Delhi (1976), pp. 123-158; A.A. Cançado Trindade, "Exhaustion of Local Remedies in the Inter-American System", 18 *Indian Journal of International Law* – New Delhi (1978) pp. 345-351; A.A. Cançado Trindade, "Denial of Justice and Its Relationship to Exhaustion of Local Remedies in International Law, 53 *Philippine Law Journal* (1978) n. 4, pp. 404-420; A.A. Cançado Trindade, "Exhaustion of Local Remedies in Relation to Legislative Measures and Administrative Practices – the European Experience", 18 *Malaya Law Review* – Singapore (1976) pp. 257-280; 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), pp. 15-45.

6. A.A. Cançado Trindade, "The Right to a Fair Trial under the American Convention on Human Rights", in *The Right to Fair Trial in International and Comparative Perspective*, Hong Kong, University of Hong Kong, 1997, pp. 4-11; A.A. Cançado Trindade, "Aproximações ou Convergências entre o Direito Internacional Humanitário e o Direito Internacional dos Direitos Humanos", in *Cadernos de Direito Internacional Humanitário*, Macao/China, Red Cross of Macao/China, 1997, pp. 249-283; A.A. Cançado Trindade, "Sustainable Human Development and Conditions of Life as a Matter of Legitimate International Concern: The Legacy of the U.N. World Conferences", in *Japan and International Law – Past, Present and Future* (International Symposium to Mark the Centennial of the Japanese Association of International Law), The Hague, Kluwer, 1999, pp. 285-309; A.A. Cançado Trindade and D.J. Attard, "The Implications of the `Common Concern of Mankind' Concept on Global Environmental Issues", in *Policies and Laws on Global Warming: International and Comparative Analysis* (ed. T. Iwama), Tokyo, Environmental Research Centre, 1991, pp. 7-13; A.A. Cançado Trindade and A. Malhotra, *Report of the Beijing Symposium on Developing Countries and International Environmental Law*, UNEP publication, Beijing/Nairobi, 1991, pp. 1-8; and cf. A.A. Cançado Trindade, "[Interview:] Jurists Back Universal Standard for Human Rights", in *South China Sunday Morning Post*, Hong Kong, 10.11.1996, p. 7.

7. A.A. Cançado Trindade, "Las Cláusulas Pétreas de la Protección Internacional del Ser Humano: El Acceso Directo de los Individuos a la Justicia a Nivel Internacional y la Intangibilidad de la Jurisdicción Obligatoria de los Tribunales Internacionales de Derechos Humanos", in *El Sistema Interamericano de Protección de los Derechos Humanos en el Umbral del Siglo XXI – Memoria del Seminario*, vol. I, 2nd. ed., San

José of Costa Rica, Inter-American Court of Human Rights, 2003, pp. 3-68; A.A. Cançado Trindade, "A Emancipação do Ser Humano como Sujeito do Direito Internacional e os Limites da Razão de Estado", 6/7 *Revista da Faculdade de Direito da Universidade do Estado do Rio de Janeiro* (1998-1999), pp. 425-434; A.A. Cançado Trindade, "El Derecho de Petición Individual ante la Jurisdicción Internacional", 48 *Revista de la Facultad de Derecho de México* – UNAM (1998), pp. 131-151; A.A. Cançado Trindade, "El Nuevo Reglamento de la Corte Interamericana de Derechos Humanos (2000): La Emancipación del Ser Humano como Sujeto del Derecho Internacional de los Derechos Humanos", 30-31 *Revista del Instituto Interamericano de Derechos Humanos* (2001), pp. 45-71.

8. Cf. note (72), *infra*.

9. A.A. Cançado Trindade, *Princípios do Direito Internacional Contemporâneo*, Brasília, Edit. University of Brasília, 1981, pp. 20-21. For an account of the formation of the classic doctrine, cf., *inter alia*, e.g., P. Guggenheim, *Traité de droit international public*, vol. I, Geneva, Georg, 1967, pp. 13-32; A. Verdross, *Derecho Internacional Público*, 5th. ed., Madrid, Aguilar, 1969 (reimpr.), pp. 47-62; Ch. de Visscher, *Théories et réalités en Droit international public*, 4th. rev. ed., Paris, Pédone, 1970, pp. 18-32; L. Le Fur, "La théorie du droit naturel depuis le XVIIe. siècle et la doctrine moderne", 18 *Recueil des Cours de l'Académie de Droit International de La Haye* (1927), pp. 297-399.

10. Cf. Association Internationale Vitoria-Suarez, *Vitoria et Suarez – Contribution des Théologiens au Droit International Moderne*, Paris, Pédone, 1939, pp. 169-170.

11. Cf. Francisco de Vitoria, *Relecciones – del Estado, de los Indios, y del Derecho de la Guerra*, México, Porrúa, 1985, pp. 1-101; A. Gómez Robledo, op. cit., *infra* n. (21), pp. 30-39.

12. 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.

13. 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. 282-283, 140, 150, 163-165 and 172.

14. *Ibid*., pp. 140 and 170.

15. F. de Vitoria, *La Ley* (*De Lege – Commentarium in Primam Secundae*), Madrid, Tecnos, 1995, pp. 5, 23 and 77.

16. P.P. Remec, *The Position of the Individual in International Law according to Grotius and Vattel*, The Hague, Nijhoff, 1960, pp. 216 and 203.

17. *Ibid*., pp. 219-220 and 217.

18. *Ibid*., pp. 243 and 221. And cf., on his conception of *jus gentium*, H. Grotius, *De Jure Belli ac Pacis* (1625), The Hague, Nijhoff, 1948, pp. 6, 10 and 84-85.

19. A. Gómez Robledo, *Fundadores del Derecho Internacional*, México, UNAM, 1989, pp. 48-55.

20. A. Gentili, *De Jure Belli Libri Tres* (1612), vol. II, Oxford/London, Clarendon Press/H. Milford – Carnegie Endowment for International Peace, 1933, p. 8.

21. Cf., in this respect, the classic essay by Hersch Lauterpacht, "The Grotian Tradition in International Law", 23 *British Year Book of International Law* (1946), pp. 1-53.

22. Accordingly, the standards of justice applied *vis-à-vis* the States as well as the individuals; Hersch Lauterpacht, "The Law of Nations, the Law of Nature and the Rights of Man", 29 *Transactions of the Grotius Society* (1943), pp. 7 and 21-31.

23. *Ibid*., p. 26.

24. H. Wehberg, "Introduction", in S. Pufendorf, *Elementorum Jurisprudentiae Universalis Libri Duo* (1672), vol. II, Oxford/London, Clarendon Press/H. Milford – Carnegie Endowment for International Peace, 1931, pp. XIV, XVI and XXII.

25. C. Sepúlveda, *Derecho Internacional*, 13th. ed., Mexico, Ed. Porrúa, 1983, pp. 28-29. Wolff beheld nation-States as members of a *civitas maxima*, a concept which Emmerich de Vattel (author of *Le Droit des Gens*, 1758), subsequently, invoking the necessity of "realism", pretended to replace by a "society of nations" (a less advanced concept); cf. F.S. Ruddy, *International Law in the Enlightenment – The Background of Emmerich de Vattel's Le Droit des Gens*, Dobbs Ferry/N.Y., Oceana, 1975, p. 95; for a criticism to this step backwards (incapable of laying the foundation of the principple of *obligation* in international law), cf. J.L. Brierly, *The Law of Nations*, 6th. ed., Oxford, Clarendon Press, pp. 38-40.

26. C. Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (edition of 1764), vol. II, Oxford/London, Clarendon Press/H. Milford – Carnegie

Endowment for International Peace, 1934, pp. 9-10.

27. *Ibid.*, pp. 10-11 and 13.

28. *Ibid.*, pp. 15-16.

29. *Ibid.*, p. 3.

30. C.W. Jenks, *The Common Law of Mankind*, London, Stevens, 1958, pp. 66-69; and cf. also R.-J. Dupuy, *La communauté internationale entre le mythe et l'histoire*, Paris, Economica/UNESCO, 1986, pp. 164-165.

31. 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.

32. P.P. Remec, *The Position of the Individual...*, op. cit., supra n. (18), pp. 36-37.

33. *Ibid.*, p. 37.

34. J. Spiropoulos, "L'individu et le droit international", 30 *Recueil des Cours de l'Académie de Droit International de La Haye* (1929) pp. 258 and 266. And cf. also G. Salvioli, "Variazioni su una vecchia questione di sistematica nel Diritto Internazionale", 16 *Archiv für Rechts- und Wirtschaftsphilosophie* (1922-1923) pp. 445 and 447; J. de Soto, "L'individu comme sujet du droit des gens", in *La technique et les principes du Droit public – Études en l'honneur de G. Scelle*, vol. II, Paris, LGDJ, 1950, pp. 687-716.

35. J. Spiropoulos, *L'individu en Droit international*, Paris, LGDJ, 1928, pp. 66 and 33, and cf. p. 19.

36. *Ibid.*, p. 55; an evolution to this effect, he added, woudl have to bring us closer to the ideal of the *civitas maxima*.

37. Cf. L. Le Fur, "La théorie du droit naturel...", op. cit., supra n. (11), p. 263.

38. W. Friedmann, *The Changing Structure of International Law*, London, Stevens, 1964, p. 247.

39. Cf. C.Th. Eustathiades, "Les sujets du Droit international et la responsabilité internationale – Nouvelles tendances", 84 *Recueil des Cours de l'Académie de Droit International de La Haye* (1953), p. 405.

40. *Ibid.*, p. 406.

41. Such as H. Triepel and D. Anzilotti mainly.

42. For a criticism of the incapacity of the dualist theory to explain the access of individuals to international jurisdiction, cf. P. Reuter, "Quelques remarques sur la situation juridique des particuliers en Droit international public", in *La technique et les principes du Droit public – Études en l'honneur de G. Scelle*, vol. II, Paris, LGDJ, 1950, pp. 542-543 and 551.

43. Cf., e.g., Y.A. Korovin, S.B. Krylov, *et alii*, *International Law*, Moscow, Academy of Sciences of the USSR/Institute of State and Law, [undated], pp. 93-98 and 15-18; G.I. Tunkin, *Droit international public – problèmes théoriques*, Paris, Pédone, 1965, pp. 19-34.

44. S. Glaser, "Les droits de l'homme à la lumière du droit international positif", *Mélanges offerts à Henri Rolin – Problèmes de droit des gens*, Paris, Pédone, 1964, pp. 117-118, and cf. pp. 105-106 and 114-116. Hence the importance of the compulsory jurisdiction of the judidicial organs of the international protection of human rights; A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104.

45. On the historical evolution of the legal personality in the law of nations, cf. H. Mosler, "Réflexions sur la personnalité juridique en Droit international public", *Mélanges offerts à Henri Rolin – Problèmes de droit des gens*, Paris, Pédone, 1964, pp. 228-251; G. Arangio-Ruiz, *Diritto Internazionale e Personalità Giuridica*, Bologna, Coop. Libr. Univ., 1972, pp. 9-268; G. Scelle, "Some Reflections on Juridical Personality in International Law", in *Law and Politics in the World Community* (ed. G.A. Lipsky), Berkeley/L.A., University of California Press, 1953, pp. 49-58 and 336; J.A. Barberis, *Los Sujetos del Derecho Internacional Actual*, Madrid, Tecnos, 1984, pp. 17-35; J.A. Barberis, "Nouvelles questions concernant la personnalité juridique internationale", 179 *Recueil des Cours de l'Académie de Droit International de La Haye* (1983) pp. 157-238; A.A. Cançado Trindade, "The Interpretation of the International Law of Human Rights by the Two Regional Human Rights Courts", *Contemporary International Law Issues: Conflicts and Convergence* (Proceedings of the III Joint Conference ASIL/Asser Instituut, The Hague, July 1995), The Hague, Asser Instituut, 1996, pp. 157-162 and 166-167; C. Dominicé, "La personnalité juridique dans le système du droit des gens" *Theory of International Law at the Threshold of the 21st Century – Essays in Honour of Krzysztof Skubiszewski* (ed. J. Makarczyk), The Hague, Kluwer, 1996, pp. 147-171; M. Virally, "Droits de l'homme et théorie générale du Droit international", *René Cassin Amicorum Discipulorumque Liber*, vol. IV, Paris, Pédone, 1972, pp. 328-329.

46. Cf., e.g., P. de Azcárate, *League of Nations and National Minorities: An Experiment*, Washington, Carnegie Endowment for International Peace, 1945, pp. 123-130; J. Stone, *International Guarantees of Minorities Rights*, Oxford, University Press, 1932, p. 56; A.N. Mandelstam, "La protection des minorités", 1 *Recueil des Cours de l'Académie de Droit International de La Haye* (1923), pp. 363-519; M.St. Korowicz, *Une expérience de Droit international – La protection des minorités de Haute-Silésie*, Paris, Pédone, 1946, pp. 9-174; G. Kaeckenbeeck, *The International Experiment of Upper Silesia*, Oxford, University Press, 1942, pp. 359, 93 and 86.

47. Cf., e.g., G. Diena, "Les mandats internationaux", 5 Recueil des Cours de l'Académie de Droit International de La Haye (1924) pp. 246-261; N. Bentwich, *The Mandates System*, London, Longmans, 1930, p. 114; Quincy Wright, *Mandates under the League of Nations*, Chicago, University Press, 1930, pp. 169-172; D.F.W. van Ress, *Les mandats internationaux – le contrôle international de l'administration mandataire*, vol. I, Paris, Rousseau et Cie., 1927, p. 99.

48. C.A. Norgaard, *The Position of the Individual in International Law*, Copenhagen, Munksgaard, 1962, pp. 109-131; A.A. Cançado Trindade, "Exhaustion of Local Remedies in International Law Experiments Granting Procedural Status to Individuals in the First Half of the Twentieth Century, 24 *Netherlands International Law Review/Nederlands Tijdschrift voor international Recht* (1977), pp. 373-392.

49. Cf., e.g., C.E. Tousssaint, *The Trusteeship System of the United Nations*, London, Stevens, 1956, pp. 39, 47 and 249-250; J. Beauté, Le droit de pétition dans les territoires sous tutelle, Paris, LGDJ, 1962, pp. 48-136; G. Vedovato, "Les accords de tutelle", 76 *Recueil des Cours de l'Académie de Droit International de La Haye* (1950), pp. 613-694.

50. Cf., e.g., C.Th. Eustathiades, "Une nouvelle expérience en Droit international – Les recours individuels à la Commission des droits de l'homme", *in Grundprobleme des internationalen Rechts – Festschrift für J. Spiropoulos*, Bonn, Schimmlebusch, 1957, pp. 111-137, esp. pp. 77 and 121 n. 32.

51. S. Glaser, op. cit., supra n. (46), p. 123.

52. K.J. Partsch, "Individuals in International Law", *Encyclopedia of Public International Law* (ed. R. Bernhardt), vol. 2, Elsevier, Max Planck Institute/North-Holland Ed., 1995, p. 959.

53. A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos, Derecho Internacional de los Refugiados y Derecho Internacional Humanitario: Aproximaciones y Convergencias*, Geneva, ICRC, 1996, pp. 1-66; and cf. A.A. Cançado Trindade, G. Peytrignet and J. Ruiz de Santiago, *Las Tres Vertientes de la Protección Internacional de los Derechos de la Persona Humana: Derechos Humanos, Derecho Humanitario, Derecho de los Refugiados*, Mexico, Ed. Porrúa/Universidad Iberoamericana, 2003, pp. 1-169.

54. Th. Meron, "The Humanization of Humanitarian Law", 94 *American Journal of International Law* (2000), pp. 239-278.

55. R. Cassin, "L'homme, sujet de droit international et la protection des droits de l'homme dans la société universelle", in *La technique et les principes du Droit public – Études en l'honneur de Georges Scelle*, vol. I, Paris, LGDJ, 1950, pp. 81-82.

56. Cf. R. Pinto, "Tendances de l'élaboration des formes écrites du Droit international", in *L'élaboration du Droit international public* (Colloque de Toulouse, Société Française pour le Droit International), Paris, Pédone, 1975, pp. 13-30.

57. For a general study, cf., e.g., F. Hondius, "La reconnaissance et la protection des ONGs en Droit international", 1 *Associations Transnationales* (2000) pp. 2-4; M.H. Posner and C. Whittome, "The Status of Human Rights NGOs", 25 *Columbia Human Rights Law Review* (1994) pp. 269-290; J. Ebbesson, "The Notion of Public Participation in International Environmental Law", 8 *Yearbook of International Environmental Law* (1997), pp. 51-97.

58. The Rules of Procedure of the Preparatory Committee to the U.N. World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 2001), e.g., contained a provision (Rule 66) which regulated the participation of NGOs directly in its own work (as from May 2000).

59. For my personal recollections of the World NGO Forum parallel to the U.N. II World Conference on Human Rights (Vienna, 1993), cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. I, 2nd. ed., Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 220-231; and cf. also M. Nowak (ed.), *World Conference on Human Rights (Vienna, June*

1993) – The Contribution of NGOs, Reports and Documents, Wien, Manzsche Verlags- und Universitätsbuchhandlung, 1994, pp. 1-231.

60. N.S. Rodley, "Human Rights NGOs: Rights and Obligations (Present Status and Perspectives)", in *The Legitimacy of the United Nations: Towards an Enhanced Legal Status of Non-State Actors* (Proceedings of the 1995 Maastricht Symposium), Utrecht, SIM, 1997, p. 43, and cf. pp. 54 and 60.

61. For a general study, cf. S. Detrick (ed.), *The United Nations Convention on the Rights of the Child – 'A Guide to the Travaux Préparatoires'*, Dordrecht, Nijhoff, 1992, pp. 1-703.

62. G. Breton-Le Goff, *L'influence des organisations non gouvernementales (ONG) sur la négotiation de quelques instruments internationaux*, Bruxelles, Bruylant/Éd. Y. Blais, 2001, pp. 33, 58, 60, 143-144 and 191-192.

63. Cf. K. Anderson, "The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society", 11 *European Journal of International Law* (2000) pp. 91-120; and cf. B. Stern, "La société civile internationale et la mise-en-oeuvre du droit international: l'exemple de la Convention d'Ottawa sur l'élimination des mines antipersonnel", in *L'émergence de la société civile internationale: vers la privatisation du droit international?* (eds. H. Gherari and S. Szurek), Paris, Pédone, 2003, pp. 105-123.

64. R. Wedgwood, "Legal Personality and the Role of Non-Governmental Organizations and Non-State Political Entities in the United Nations System", in *Non-State Actors as New Subjects of International Law* (Proceedings of the Kiel Symposium of 1998, eds. R. Hofmann and N. Geissler), Berlin, Duncker & Humblot, 1999, pp. 25-26; P. Klein, "Les Nations Unies, les États et la société civile: la place et le rôle des organisations non gouvernementales au sein de l'ONU", in *La démocratisation du système des Nations Unies* (Colloque d'Aix-en-Provence de 2000, ed. R. Mehdi), Paris, Pédone, 2001, pp. 106-107.

65. R. Ranjeva, "Les organisations non-gouvernementales et la mise-en-oeuvre du Droit international", 270 *Recueil des Cours de l'Académie de Droit International de La Haye* (1997), pp. 22, 50, 67-68, 74 and 101-102.

66. M. Bettati and P.-M. Dupuy, *Les O.N.G. et le Droit international*, Paris, Economica, 1986, pp. 1, 16, 19-20, 252-261 and 263-265.

67. Cf., e.g., A.A. Cançado Trindade, "Democracia y Derechos Humanos: Desarrollos Recientes, con Atención Especial al Continente Americano", in *Federico Mayor Amicorum Liber – Solidarité, Égalité, Liberté – Livre d'Hommage offert au Directeur Général de l'UNESCO à l'occasion de son 60e. Anniversaire*, Bruxelles, Bruylant, 1995, pp. 371-390.

68. Ph. Sands, "Turtles and Torturers: The Transformation of International Law", 33 *New York University Journal of International Law and Politics* (2001), pp. 530, 543, 555 and 557-559.

69. E. Roucounas, "Facteurs privés et Droit international public", 299 *Recueil des Cours de l'Académie de Droit International de La Haye* (2002), p. 61, and cf., pp. 136-137 and 389-391.

70. Cf. A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales...*, op. cit., supra n. (46), pp. 17-96; A.A. Cançado Trindade, "The Procedural Capacity of the Individual as Subject of International Human Rights Law: Recent Developments", *Les droits de l'homme à l'aube du XXIe siècle – Liber Amicorum Karel Vasak*, Bruxelles, Bruylant, 1999, pp. 521-544; A.A. Cançado Trindade, "The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century", 30 *Columbia Human Rights Law Review* – New York (1998), pp. 1-27; 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; A.A. Cançado Trindade, "El Acceso Directo de los Individuos a los Tribunales Internacionales de Derechos Humanos", *XXVII Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* – OEA (2000), pp. 243-283.

71. P.N. Drost, *Human Rights as Legal Rights*, Leyden, Sijthoff, 1965, pp. 226-227.

72. Cf. *ibid*., pp. 223 and 215.

73. C.J. Friedrich, *Perspectiva Histórica da Filosofia do Direito*, Rio de Janeiro, Zahar Ed., 1965, pp. 196-197, 200-201 and 207. And cf., generally, e.g., Y.R. Simon, *The Tradition of Natural Law – A Philosopher's Reflections* (ed. V. Kuic), N.Y., Fordham Univ. Press, 2000 [reprint], pp. 3-189.

74. Vicente Ráo, *O Direito e a Vida dos Direitos*, 5th. ed., São Paulo, Ed. Rev. dos Tribs., 1999, pp. 85 and 101.

75. *Ibid*., p. 641.

76. J. Spiropoulos, *L'individu en Droit international*, Paris, LGDJ, 1928, pp. 42-43 and 65.

77. Cf. N. Politis, *Les nouvelles tendances du Droit international*, Paris, Libr. Hachette, 1927, pp. 76-77, 82-83 and 89-90.

78. A. Truyol y Serra, "Théorie du Droit international public – Cours général", 183 *Recueil des Cours de l'Académie de Droit International de La Haye* (1981) pp. 142-143; L. Le Fur, "La théorie du droit naturel...", op. cit., supra n. (11), pp. 297-399; J. Puente Egido, "Natural Law", *in Encyclopedia of Public International Law* (ed. R. Bernhardt/Max Planck Institute), vol. 7, Amsterdam, North-Holland Publ. Co., 1984, pp. 344-349. – And cf., generally, J. Maritain, *O Homem e o Estado*, 4th. ed., Rio de Janeiro, Ed. Agir, 1966, p. 84, and cf. pp. 97-98 and 102; A.P. d'Entrèves, *Natural Law*, London, Hutchinson Univ. Libr., 1970 [reprint], pp. 13-203.

79. Gustav Radbruch, particularly sensitive – above all in the mature age – to the value of justice, summed up the diverse conceptions of natural law as disclosing the following common fundamental features: first, they all provide certain "judgments of juridical value with a given content"; second, such judgments, which are universal ones, have always as source, nature, or revelation, or reason; third, such value judgments are "accessible to rational knowledge"; and fourth, such judgments have primacy over positive laws contrary to them; in sum, "natural law ought to prevail always over positive law". G. Radbruch, *Filosofia do Direito*, vol. I, Coimbra, A. Amado Ed., 1961, p. 70.

80. J.A. Carrillo Salcedo, "Derechos Humanos y Derecho Internacional", 22 *Isegoría – Revista de Filosofía Moral y Política* – Madrid (2000), p. 75.

81. R.-J. Dupuy, "Communauté internationale et disparités de développement – Cours général de Droit international public", 165 *Recueil des Cours de l'Académie de Droit International de La Haye* (1979), pp. 190, 193 and 202.

82. Ch. de Visscher, "Les droits fondamentaux de l'homme, base d'une restauration du Droit international – Rapport", in *Annuaire de l'Institut de Droit International* (1947) p. 9. And cf. M. Pilotti, "Le recours des particuliers devant les juridictions internationales", in *Grundprobleme des internationalen Rechts – Festschrift für J. Spiropoulos*, Bonn, Schimmelbusch, [1957], p. 351.

83. Ch. de Visscher, "Les droits fondamentaux de l'homme...", op. cit., supra n. (84), pp. 3-4.

84. C. Parry, "Some Considerations upon the Protection of Individuals in International Law", 90 *Recueil des Cours de l'Académie de Droit International de La Haye* (1956), pp. 686-688 and 697-698.

85. Cf. note (47), *supra*.

86. Cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. I, 2nd. ed., Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 33-50; A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 23-194; A.A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Ed. Renovar, 2002, pp. 1048-1109; A.A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Santiago, Editorial Jurídica de Chile, 2001, pp. 15-58 and 375-427.

87. S. Séfériadès, "Le problème de l'accès des particuliers à des juridictions internationales", 51 *Recueil des Cours de l'Académie de Droit International de La Haye* (1935), pp. 23-25 e 54-60.

88. A.N. Mandelstam, *Les droits internationaux de l'homme*, Paris, Éds. Internationales, 1931, pp. 95-96, e cf. p. 103.

89. *Ibid*., p. 138.

90. G. Scelle, *Précis de Droit des Gens – Principes et systématique*, parte I, Paris, Libr. Rec. Sirey, 1932 (reimpr. do CNRS, 1984), pp. 42-44.

91. *Ibid*., p. 48.

92. Lord McNair, *Selected Papers and Bibliography*, Leiden/N.Y., Sijthoff/Oceana, 1974, pp. 329 and 249.

93. A. Gonçalves Pereira and F. de Quadros, *Manual de Direito Internacional Público*, 3rd. rev. ed., Coimbra, Almedina, 1995, p. 405, and cf. pp. 381-408.

94. A. Bello, *Principios de Derecho Internacional* (1832), 3rd. ed., Paris, Libr. Garnier Hermanos, 1873, pp. 11-12.

95. A. Álvarez, *La Reconstrucción del Derecho de Gentes – El Nuevo Orden y la Renovación Social*, Santiago de Chile, Ed. Nascimento, 1944, pp. 46-47 and 457-463, and cf. pp. 81, 91 and 499-500.

96. H. Accioly, *Tratado de Direito Internacional Público*, vol. I, 1a. ed., Rio de Janeiro, Imprensa Nacional, 1933, pp. 71-75.

97. Levi Carneiro, *O Direito Internacional e a Democracia*, Rio de Janeiro, A. Coelho Branco

Fo. Ed., 1945, pp. 121 and 108, and cf. pp. 113, 35, 43, 126, 181 and 195.

98. Ph.C. Jessup, *A Modern Law of Nations – An Introduction*, New York, MacMillan Co., 1948, p. 41.

99. H. Lauterpacht, *International Law and Human Rights*, London, Stevens, 1950, pp. 69, 61 and 51.

100. *Ibid*., p. 70.

101. Cf. *ibid*., pp. 8-9. On the "natural right" of petition of individuals, exercised also in the general interest, cf. *ibid*., pp. 247-251, and cf., pp. 286-291 and 337.

102. M. Bourquin, "L'humanisation du droit des gens", *La technique et les principes du Droit public – Études en l'honneur de Georges Scelle*, vol. I, Paris, LGDJ, 1950, pp. 21-54.

103. C.Th. Eustathiades, "Les sujets du Droit international et la responsabilité internationale – nouvelles tendances", 84 *Recueil des Cours de l'Académie de Droit International de La Haye* (1953) pp. 402, 412-413, 424, 586-589, 601 and 612. Human beings should thus be protected not only against State arbitrariness, but also against abuses by individuals themselves; *ibid*., p. 614. Cf., no mesmo sentido, W. Friedmann, *The Changing Structure*..., op. cit., supra n. (40), pp. 234 and 248.

104. C.Th. Eustathiades, "Les sujets du Droit international...", op. cit., supra n. (105), pp. 426-427, 547, 586-587, 608 and 610-611. Although not endorsing the theory of Duguit and Scelle (of the individuals as the sole subjects of international law), – regarded as expression of the "sociological school" of international law in France, – Eustathiades recognized in it the great merit of reacting to the traditional doctrine which visualized States as the sole subjects of international law; the recognition of the international subjectivity of individuals, parallel to that of States, came to transform the structure of international law and to foster the spirit of international solidarity; *ibid*., pp. 604-610.

105. P. Guggenheim, "Les principes de Droit international public", 80 *Recueil des Cours de l'Académie de Droit International* (1952), pp. 116, and cf., pp. 117-118.

106. G. Sperduti, "L'individu et le droit international", 90 *Recueil des Cours de l'Académie de Droit International de La Haye* (1956), pp. 824, 821 e 764.

107. *Ibid*., pp. 821-822; e cf. também G. Sperduti, *L'Individuo nel Diritto Internazionale*, Milano, Giuffrè Ed., 1950, pp. 104-107.

108. C. Parry, "Some Considerations upon the Protection of Individuals in International Law", 90 *Recueil des Cours de l'Académie de Droit International de La Haye* (1956), p. 722.

109. B.V.A. Röling, *International Law in an Expanded World*, Amsterdam, Djambatan, 1960, p. XXII.

110. *Ibid*., pp. 1-2.

111. *Ibid*., p. 2.

112. Cf. Y. Saito, "Judge Tanaka, Natural Law and the Principle of Equality", in *The Living Law of Nations – Essays in Memory of A. Grahl-Madsen* (eds. G. Alfredsson and P. Macalister-Smith), Kehl/Strasbourg, N.P. Engel Publ., 1996, pp. 401-402 and 405-408; K. Tanaka wanted Law to be wholly liberated from both the State ("as asserted by Hegel and his followers") and from the nation (*Völk*, – as asserted by Savigny and Puchta, and other jurists of the "historical school"); *ibid*., p. 402.

113. Cf. V. Gowlland-Debbas, "Judicial Insights into Fundamental Values and Interests of the International Community", in *The International Court of Justice: Its Future Role after Fifty Years* (eds. A.S. Muller *et alii*), The Hague, Kluwer, 1997, pp. 344-346.

114. J.J. Lador-Lederer, *International Group Protection*, Leyden, Sijthoff, 1968, p. 19.

115. As *rapporteur* of the Working Group of the United Nations Commission on Human Rights, entrustred with the preparation of the Draft Declaration (May 1947 to June 1948).

116. R. Cassin, "Vingt ans après la Déclaration Universelle", 8 *Revue de la Commission Internationale de Juristes* (1967) n. 2, pp. 9-10.

117. P. Reuter, *Droit international public*, 7th. ed., Paris, PUF, 1993, p. 235, and cf., p. 106.

118. *Ibid*., p. 238.

119. E. Jiménez de Aréchaga, *El Derecho Internacional Contemporáneo*, Madrid, Tecnos, 1980, pp. 207-208; and cf. A. Cassese, *International Law*, Oxford, Oxford University Press, 2001, pp. 79-85.

120. J. Barberis, "Nouvelles questions concernant la personnalité juridique internationale", 179 *Recueil des Cours de l'Académie de Droit International de La Haye* (1983), pp. 161, 169, 171-172, 178 e 181.

121. Cf., e.g., R. Cassin, "Vingt ans après la Déclaration Universelle", 8 *Revue de la Commission internationale de juristes* (1967) n. 2, pp. 9-17; W.P. Gormley, *The Procedural Status of the Individual before International and Supranational Tribunals*, The Hague, Nijhoff, 1966, pp. 1-194; C.A. Norgaard, *The Position of the Individual in International Law*, Copenhagen, Munksgaard, 1962, pp. 26-33 y 82-172; A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, University Press, 1983, pp. 1-445; A.A. Cançado Trindade, *O Esgotamento de Recursos Internos no Direito Internacional*, 2nd. ed., Brasília, Edit. University of Brasília, 1997, pp. 1-327; A.Z. Drzemczewski, *European Human Rights Convention in Domestic Law*, Oxford, Clarendon Press, 1983, pp. 20-34 and 341; F. Matscher, "La Posizione Processuale dell'Individuo come Ricorrente dinanzi agli Organi della Convenzione Europea dei Diritti dell'Uomo", in *Studi in Onore di Giuseppe Sperduti*, Milano, Giuffrè, 1984, pp. 601-620; J.A. Carrillo Salcedo, *Dignidad frente a Barbarie – La Declaración Universal de Derechos Humanos, Cincuenta Años Después*, Madrid, Ed. Trotta, 1999, pp. 27-145; E.-I.A. Daes (rapporteur spécial), *La condition de l'individu et le Droit international contemporain*, U.N. doc. E/CN.4/Sub.2/1988/33, of 18.07.1988, pp. 1-92; J. Ruiz de Santiago, "Reflexiones sobre la Regulación Jurídica Internacional del Derecho de los Refugiados", in *Nuevas Dimensiones en la Protección del Individuo* (ed. J. Irigoin Barrenne), Santiago, University of Chile, 1991, pp. 124-125 and 131-132; R.A. Mullerson, "Human Rights and the Individual as Subject of International Law: A Soviet View", 1 *European Journal of International Law* (1990) pp. 33-43; A. Debricon, "L'exercice efficace du droit de recours individuel", in *The Birth of European Human Rights Law – Liber Amicorum Studies in Honour of C.A. Norgaard* (eds. M. de Salvia and M.E. Villiger), Baden-Baden, Nomos Verlagsgesellschaft, 1998, pp. 237-242.

122. A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels", 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987), pp. 32-33.

123. A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms...", op. cit., supra n. (124), pp. 411-412.

124. Cf. A.A. Cançado Trindade, "Las Cláusulas Pétreas de la Protección Internacional...", op. cit., supra n. (9), pp. 3-68. And cf. Inter-American Court of Human Rights, *Castillo Petruzzi and Others versus Peru* case (Preliminary Objections), Judgment of 04.09.1998, Series C, n. 41, Concurring Opinion of Judge A.A. Cançado Trindade, p. 62, par. 35.

125. As recognized decades ago; cf. A.N. Mandelstam, *Les droits internationaux de l'homme*, Paris, Éds. Internationales, 1931, pp. 95-96, 103 and 138; Ch. de Visscher, "Rapport – `Les droits fondamentaux de l'homme, base d'une restauration du Droit international'", *Annuaire de l'Institut de Droit International* (1947) pp. 3 and 9; G. Scelle, *Précis de Droit des Gens – Principes et systématique*, part I, Paris, Libr. Rec. Sirey, 1932 [CNRS reprint, 1984], p. 48; Lord McNair, *Selected Papers and Bibliography*, Leiden/N.Y., Sijthoff/Oceana, 1974, pp. 329 and 249.

126. As it can be inferred, e.g., from the historical case of the *"Street Children"* (case *Villagrán Morales and Others versus Guatemala*) before the Inter-American Court of Human Rights (1999-2001), the international juridical subjectivity of the individuals is nowadays an irreversible reality, and the violation of their fundamental rights, emanated directly from the international legal order, brings about juridical consequences.

127. C. Gutiérrez Espada, *Derecho Internacional Público*, Madrid, Ed. Trotta, 1995, pp. 32, 231 and 74-76.

128. A.A. Cançado Trindade, "A Personalidade e Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", in *Jornadas de Derecho Internacional* (Mexico City, December 2001), Washington D.C., OAS Under-Secretariat of Legal Affairs, 2002, pp. 311-347.

129. Inter-American Court of Human Rights, Advisory Opinion OC-16/99, Series A, n. 16, pp. 3-123, pars. 1-141, and resolutory points 1-8.

130. Set forth in Article 36 of the 1963 Vienna Convention on Consular Relations and linked to the guarantees of the due process of law under Article 8 of the American Convention on Human Rights.

131. In that Opinion, the Inter-American Court lucidly pointed out that the rights set forth in Article 36(1) of the Vienna Convention on Consular Relations of 1963 "have the

characteristic that their *titulaire is the individual*. In effect, this provision is unequivocal in stating that the rights to consular information and notification are `accorded' to the interested person. In this respect, Article 36 is a notable exception to the essentially Statist nature of the rights and obligations set forth elsewhere in the Vienna Convention on Consular Relations; as interpreted by this Court in the present Advisory Opinion, it represents a notable advance in respect of the traditional conceptions of International Law on the matter" (par. 82, emphasis added).

132. This Opinion, pioneering in international case-law, has had a remarkable impact in the countries of the region, which have sought to harmonize their practice with it, aiming at putting an end to abuses on the part of the police and to discrimination against poor and illiterate foreigners (mainly migrants), often victimized by all sorts of discrimination (also *de jure*) and injustice. The Inter-American Court thus gave a considerable contribution to the evolution itself of the Law in this respect.

133. D. Youf, *Penser les droits de l'enfant*, Paris, PUF, 2002, pp. 93-96, 100 and 118-119; and cf. F. Dekeuwer-Défossez, *Les droits de l'enfant*, 5th. ed., Paris, PUF, 2001, pp. 4-5, 22 and 74.

134. ICJ, Advisory Opinion on *Reparations for Damages*, *ICJ Reports* (1949), p. 178.

135. Paul de Visscher, "Cours Général de Droit international public", 136 *Recueil des Cours de l'Académie de Droit International* (1972) p. 56, and cf. pp. 45 and 55.

136. As previously seen, e.g., already half-a-century ago, C. Eustathiades, in linking the international subjectivity of individuals to the general theme of the international responsibility, was attentive to the dimension both active and passive of such subjectivity, this latter in view of the capacity of the individual for the international delict (passive subject of the legal relationship – cf. *supra*).

137. M.Ch. Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd. rev. ed., The Hague, Kluwer, 1999, pp. 106 and 118.

138. Cf. K. Lescure, *Le Tribunal Pénal International pour l'ex-Yougoslavie*, Paris, Montchrestien, 1994, pp. 15-133; Antonio Cassese, "The International Criminal Tribunal for the Former Yugoslavia and Human Rights", 2 *European Human Rights Law Review* (1997) pp. 329-352; J.J. Shestack, "A Review and Critique of the Statute of the International Tribunal", 24 *Israel Yearbook on Human Rights* (1994) pp. 149-161; K. Ambos, "Defensa Penal ante el Tribunal de la ONU para la Antigua Yugoslavia", 25 *Revista del Instituto Interamericano de Derechos Humanos* (1997), pp. 11-28.

139. Cf. R.S. Lee, "The Rwanda Tribunal", 9 *Leiden Journal of International Law* (1996) pp. 37-61; [Various Authors,], "The Rwanda Tribunal: Its Role in the African Context", 37 *International Review of the Red Cross* (1997) n. 321, pp. 665-715 (studies by F. Harhoff, C. Aptel, D. Wembou, C.M. Peter, and G. Erasmus and N. Fourie); L.S. Sunga, "The Commission of Experts on Rwanda and the Creation of the International Criminal Tribunal for Rwanda – A Note", 16 *Human Rights Law Journal* (1995) pp. 121-124; O. Dubois, "Rwanda's National Criminal Courts and the International Tribunal", 37 *International Review of the Red Cross* (1997) n. 321, pp. 717-731.

140. W.A. Schabas, "Sentencing by International Tribunals: A Human Rights Approach", 7 *Duke Journal of Comparative and International Law* (1997), pp. 461-517.

141. Cf., in this respect respect, e.g., D. Thiam, "Responsabilité internationale de l'individu en matière criminelle", in *International Law on the Eve of the Twenty-First Century – Views from the International Law Commission / Le droit international à l'aube du XXe siècle – Réflexions de codificateurs*, N.Y., U.N., 1997, pp. 329-337.

142. The antecedents of these recent endeavours of establishment of and international criminal jurisdiction go back to the old *ad hoc* international commissions of inquiry (as from 1919), and above all the *célèbres* Tribunals of Nuremberg (established in August 1945) and of Tokyo (established in January 1946). Cf. M.R. Marrus, *The Nuremberg War Crimes Trial 1945-1946 – A Documentary History*, Boston/N.Y., Bedford Books, 1997, pp. 1-268; T. Maga, *Judgment at Tokyo – The Japanese War Crimes Trials*, Lexington, University Press of Kentucky, 2001, pp. 1-171; M.C. Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court", 10 *Harvard Human Rights Journal* (1997), pp. 11-62.

143. Cf. G. Abi-Saab, "The Concept of `International Crimes' and Its Place in Contemporary International Law", in *International Crimes of State – A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (eds. J.H.H. Weiler, A. Cassese

and M. Spinedi), Berlin, W. de Gruyter, 1989, pp. 141-150; B. Graefrath, "International Crimes – A Specific Regime of International Responsibility of States and Its Legal Consequences", in *ibid.*, pp. 161-169; P.-M. Dupuy, "Implications of the Institutionalization of International Crimes of States", in *ibid.*, pp. 170-185; M. Gounelle, "Quelques remarques sur la notion de `crime international' et sur l'évolution de la responsabilité internationale de l'État", in *Mélanges offerts à P. Reuter – Le droit international: unité et diversité*, Paris, Pédone, 1981, pp. 315-326; L.C. Green, "Crimes under the I.L.C. 1991 Draft Code", 24 *Israel Yearbook on Human Rights* (1994), pp. 19-39.

144. B. Broms, "The Establishment of an International Criminal Court", 24 *Israel Yearbook on Human Rights* (1994), pp. 145-146.

145. Preceeded by the Draft Code of Offences against the Peace and Security of Mankind (first version, 1991), prepared by the U.N. International Law Commission, which, in 1994, concluded its (own) Draft Statute of a permanent International Criminal Court.

146. For a substantial and pioneering study, cf. C.Th. Eustathiades, "Les sujets du droit international...", op. cit., supra n. (105), pp. 401-614; and, on the individual responsibility for an illicit act (or omission) committed in compliance with a "superior (illegal) order", cf. L.C. Green, *Superior Orders in National and International Law*, Leyden, Sijthoff, 1976, pp. 250-251 and 218; Y. Dinstein, *The Defence of `Obedience to Superior Orders' in International Law*, Leyden, Sijthoff, 1965, pp. 93-253.

147. To this end, the adoption by the Statute of the International Criminal Court by the 1998 Rome Conference constitutes an achievement of the international community as a whole, in the struggle against impunity and in defence of dignity of the human person. Cf., generally, e.g., M.Ch. Bassiouni (ed.), *The Statute of the International Criminal Court – A Documentary History*, Ardsley/N.Y., Transnational Publs., 1998, pp. 1-793; R.S. Lee (ed.), *The International Criminal Court – The Making of the Rome Statute*, The Hague, Kluwer, 1999, pp. 1-639; W.A. Schabas, *An Introduction to the International Criminal Court*, Cambridge, University Press, 2001, pp. 1-164.

148. As an evidence of the greater space gained by the old ideal of the realization of international justice, the case-law is flourishing – among other international tribunals, – also of the *ad hoc* International Tribunals both (as from 1995) for the former Yugostavia (e.g., cases *Tadic*, *Drazen Erdemovic*, *Blaskic*, *Mucic, Delic, Delalic and Landzo*, *Karadzic, Mladic e Stanisic*, *Zeljko Meakic et alii* (19 members of the Servian forces), *Djukic*, *Lajic*, and case of the *Area of the Valley of the Rive Lasva* (27 Bosnian-Croat military and political leaders; 1995], – as well as (as from 1997) for Rwanda (cases *Ntakirutimana* and *Kanyabashi*). For a systematization of this case-law, cf. J.R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 2nd. ed., Ardsley/N.Y., Transnational Publs., 1999, pp. 3-643.

149. In its judgment (as to the merits, of 08.03.1998) in the case of *Paniagua Morales and Others versus Guatemala* (also known as che "*White Van*" case), the Inter-American Court of Human Righs (IACtHR) that the occasion to warn as to the State's duty to struggle against impunity. It therein conceptualized *impunity* as "the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defencelessness of victims and their relatives" (Series C, n. 37, par. 173). The Court further affirmed that the State's duty to fight impunity (under Article 1(1) of the American Convention on Human Rights) required the organization of "the public power to guarantee to the persons under their jurisdiction the free and full exercise of human rights", a duty which – the Court added significantly – "imposes itself irrespective of the fact that those resposible for the violations of those rights are agents of the public power, private persons, or groups of them" (*ibid.*, par. 174).

150. H.-H. Jescheck, "The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute", 2 *Journal of International Criminal Justice* (2004), p. 43.

151. Cf., e.g., A. Cassese, "Y a-t-il un conflit insurmontable entre souveraineté des États et justice pénale internationale?", in *Crimes internationaux et juridictions internationales* (eds. A. Cassese and M. Delmas-Marty), Paris, PUF, 2002, pp. 15-29; and cf., generally, [Various

Authors], *La Criminalización de la Barbarie: La Corte Penal Internacional* (ed. J.A. Carrillo Salcedo), Madrid, Consejo General del Poder Judicial, 2000, pp. 17-504.

152. F.A. von der Heydte, "L'individu et les tribunaux internationaux", 107 *Recueil des Cours de l'Académie de Droit International de La Haye* (1962) p. 301; cf. also, in this respect, e.g., E.M. Borchard, "The Access of Individuals to International Courts", 24 *American Journal of International Law* (1930), pp. 359-365.

153. To which one can add, – insofar as the American Convention on Human Rights is concerned, the other *fundamental clause* (*cláusula pétrea*) of the recognition of the competence of the Inter-American Court of Human Rights in contentious matters; for a study, cf. A.A. Cançado Trindade, "Las Cláusulas Pétreas de la Protección Internacional del Ser Humano...", op. cit., supra n. (9), pp. 3-68.

154. IACtHR, case *Castillo Petruzzi and Others versus Peru* (Preliminary Objections), Judgment of 04.09.1998, Series C, n. 41, Concurring Opinion of Judge A.A. Cançado Trindade, p. 62, par. 35.

155. A.A. Cançado Trindade, "The Future of the International Protection of Human Rights", *Boutros Boutros-Ghali Amicorum Discipulorumque Liber – Paix, Développement, Démocratie*, vol. II, Bruxelles, Bruylant, 1998, pp. 961-986. – On the need to overcome the current challenges and obstacles to the prevalence of human rights, cf. A.A. Cançado Trindade, "L'interdépendance de tous les droits de l'homme et leur mise-en-oeuvre: obstacles et enjeux", 158 *Revue internationale des sciences sociales* – Paris/UNESCO (1998), pp. 571-582.

156. IACtHR, case *Villagrán Morales and Others versus Guatemala*, Judgment (merits) of 19.11.1999, Series C, n. 63, pars. 1-253, and Joint Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu Burelli, pars. 1-11.

157. Cf., generally, P. Thornberry, *International Law and the Rights of Minorities*, Oxford, Clarendon Press, 1992 [reprint], pp. 38-54; F. Ermacora, "The Protection of Minorities before the United Nations", 182 *Recueil des Cours de l'Académie de Droit International de La Haye* (1983), pp. 257-347.

158. There are also international instruments, like the 1989 ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention n. 169, in force as from 05.09.1991), which appear to lay more emphasis, as far as duties are concerned, on the human collectivities as such.

159. 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".

160. A. Meijknecht, *Towards International Personality: The Position of Minorities and Indigenous Peoples in International Law*, Antwerpen/Groningen, Intersentia, 2001, pp. 228 and 233.

161. If the aforementioned right of petition had not been originally conceived and consistently understood in this way, very little would the international protection of human rights have advanced in this slightly over half a century of evolution. With the consolidation of the right of individual petition before international tribunals – the European and Inter-American Courts – of human rights, it is the international protection that attains its maturity.

162. Cf. A.A. Cançado Trindade, "Sustainable Human Development and Conditions of Life as a Matter of Legitimate International Concern: The Legacy of the U.N. World Conferences", in *Japan and International Law – Past, Present and Future* (International Symposium to Mark the Centennial of the Japanese Association of International Law), The Hague, Kluwer, 1999, pp. 285-309; A.A. Cançado Trindade, "Memória da Conferência Mundial de Direitos Humanos (Viena, 1993)", 87/90 *Boletim da Sociedade Brasileira de Direito Internacional* (1993-1994) pp. 9-57; A.A. Cançado Trindade, "Balance de los Resultados de la Conferencia Mundial de Derechos Humanos (Viena, 1993)", in *Estudios Básicos de Derechos Humanos*, vol. 3, San José of Costa Rica, Inter-American Institute of Human Rights, 1995, pp. 17-45.

163. Cf., for a general study on the matter, A.A. Cançado Trindade, *Direito das Organizações Internacionais*, 3rd. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2003, pp. 9-853.

164. A.A. Cançado Trindade, "A Emancipação do Ser Humano como Sujeito do Direito Internacional...", op. cit., supra n. (9), pp. 425-434.