SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. *PROLEGOMENA*

1. Once again before this Court, the question of inherent powers of international tribunals has been the object of particular attention in the course of the proceedings in the present case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia)*. The two Contending Parties have aptly presented their distinct outlooks of the issue of inherent powers or *facultés*: in their submissions before the Court, they have seen it fit to refer to the relevant case law of contemporary international tribunals (in particular international human rights tribunals) in respect, in particular, of the issue of their inherent powers or *facultés*. The issue pertains directly to the fourth preliminary objection raised by Colombia.

2. In the present Judgment, the International Court of Justice (ICJ), having found that it has jurisdiction under the Pact of Bogotá, dismissing Colombia's first preliminary objection, could and should have shed some light on the points made by the Contending Parties — Nicaragua's claim of "inherent jurisdiction" and Colombia's fourth preliminary objection — even if for dismissing this latter as well, rather than, in a minimalist posture, elliptically saying that "there is no ground" for it to deal with the issue (Judgment, para. 104).

3. Given the importance that I attach to this particular issue, recurrent in the practice of international tribunals, and given the fact that it was brought to the attention of the ICJ in the *cas d'espèce*, not only in the written phase of the proceedings, but also in the course of the hearings before it, I feel obliged to leave on the records, first, the positions of the Parties and the treatment dispensed to it, and, secondly, the foundations of my own personal position on it, in its interrelated aspects.

4. It is, after all, an issue of relevance to the operation of contemporary international tribunals, in their common mission of the realization of justice. In my perception, this is an issue which cannot simply be eluded. The aspects which I deem it fit to cover, in the present separate opinion, refer to the following successive points: *(a)* inherent powers beyond State consent; *(b)* the teleological interpretation *(ut res magis valeat quam pereat)* beyond State consent; *(c) compétence de la compétence*/*Kompetenz Kompetenz* beyond State consent; *(d) recta ratio* above *voluntas*, human conscience above the "will"; *(e)* inherent powers overcoming *lacunae*, and the relevance of general principles; *(f)* inherent powers and *juris dictio*, beyond transactional justice; and *(g)* inherent powers and supervision of compliance with judgments. I shall at last come to my brief epilogue.

II. Submissions of the Parties and Questions from the Bench

5. In the course of the proceedings (written and oral phases) in the present case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, both Contending Parties, in their submissions, when addressing the issue of inherent powers or *facultés*, referred to the relevant case law of the Inter-American Court of Human Rights (IACtHR) and of the European Court of Human Rights (ECHR). In the written phase of the proceedings in the *cas d'espèce*, both Nicaragua and Colombia referred to the IACtHR's judgment (of 28 November 2003) in the case of *Baena-Ricardo and Others* v. *Panama*, as well as the ECHR's (Grand Chamber) judgment (of 7 February 2003) in the case of *Fabris* v. *France*[1]. Nicaragua further referred to the ECHR's (Grand Chamber) judgments (of 30 June 2009 and 5 February 2015, respectively) in the cases of *Verein gegen Tierfabriken Schweiz (VgT)* v. *Switzerland*, and of *Bochan* v. *Ukraine*[2].

6. Subsequently, towards the end of the oral phase of the proceedings in the *cas d'espèce*, in the public sitting of 2 October 2015 before the Court, I deemed it fit to put the three following questions to the two Contending Parties, Nicaragua and Colombia:

> "In the course of the proceedings along this week, both Contending Parties referred to the relevant case law of contemporary international tribunals, in particular in respect of the question of their inherent powers or *facultés*. Having listened attentively to their oral arguments, I have three questions to address to both Parties, so as to obtain further precisions, at conceptual level, from both of them, in the context of the *cas d'espèce*.
>
> First: Do the inherent powers or *facultés* of contemporary international tribunals ensue from the exercise itself, by each of them, of their international judicial function?
>
> Second: Do the distinct bases of jurisdiction of contemporary international tribunals have an incidence on the extent of their *compétence de la compétence*?
>
> Third: Do the distinct bases of jurisdiction of contemporary international tribunals condition the operation of the corresponding mechanisms of supervision of compliance with their respective judgments and decisions?"[3]

[1] Memorial of the Republic of Nicaragua [hereinafter "Memorial", para. 1.27; and Preliminary Objections of the Republic of Colombia, paras. 5.22-5.23.

[2] Written Statement of the Republic of Nicaragua to the Preliminary Objections of the Republic of Colombia, of 20 April 2015, para. 5.35.

[3] Cf. CR 2015/25, of 2 October 2015, p. 47.

III. Responses from the Contending Parties

1. Response from Nicaragua

7. One week later, on 9 October 2015, both Parties provided the Court with their written answers to the questions I had put to them at the end of the Court's hearings in the *cas d'espèce*. In its written reply, Nicaragua stated, in response to my *first question*, that, in its view, the inherent powers of international tribunals ensue, "more widely than from the *exercise* of their judicial function", from "their very *existence* and nature as judicial organs"[4].

8. As to my *second question*, Nicaragua contended that "in all cases", the basis for jurisdiction (statute) of an international tribunal "includes the power or *faculté* to decide on the existence and scope of an inherent power"[5]. The *compétence de la compétence (Kompetenz Kompetenz)*, even if leading to distinct conclusions according to the various Statutes, "can be said to be inherent", it is "a well-established legal principle of general application"[6]. This is so, in its view, irrespective of "whether or not it is expressly granted" by the Statute of the international tribunal concerned[7].

9. And as to my *third question*, Nicaragua was of the view that "all tribunals have the same right to determine the scope of their own (. . . inherent) powers", it being "indispensable" for them "to exercise some kind of jurisdiction on the implementation of their own judgments"[8]. Even if it may vary from one tribunal to another, international tribunals have here an "inherent power" as well, in respect of the implementation of their own judgments (whether they can count or not on the assistance of another organ with supervisory powers)[9].

2. Response from Colombia

10. For its part, Colombia, in its written reply, stated, in response to my *first question*, that the ICJ "has such 'inherent powers' as are necessary in the interests of the good administration of justice for the proper conduct of cases over which it has jurisdiction"[10]. It then added that, yet, there is "no such thing as an 'inherent jurisdiction' enabling the

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[4] Written Reply of Nicaragua to the Questions Put by Judge Cançado Trindade at the Public Sitting Held on the Morning of 2 October 2015, doc. NICOLC 2015/32, p. 2.

[5] *Ibid.*, p. 3.

[6] *Ibid.*, p. 2.

[7] *Ibid.*

[8] *Ibid.*, p. 3.

[9] Cf. *ibid.*, pp. 3-4.

[10] Written Reply of Colombia to the Questions Put by Judge Cançado Trindade at the Public Sitting Held on the Morning of 2 October 2015, doc. NICOLC 2015/33, of 9 October 2015, p. 2, para. 3.

Court to take jurisdiction over new cases, as urged upon the Court by Nicaragua"[11].

11. As to my *second question*, Colombia asserted, as to *compétence de la compétence*, that the Court's deciding as to jurisdiction amounts to "an express power, and in and of itself in no way gives rise to an inherent power or jurisdiction"[12]. Colombia added, in this connection, that no such considerations can give rise to "an inherent power or jurisdiction over *the merits* of a case" that an international tribunal "does not otherwise have"[13].

12. And as to my *third question*, Colombia was of the view that a mechanism of supervision of compliance with judgments "must be found in the instrument which created" the international tribunal and "established its jurisdiction"[14] (statutory provisions). In the case of the ICJ, such a mechanism is provided not by its Statute, but by the UN Charter ("of which the Statute is an integral part"), which "assigns such competence to the Security Council"; and, in its view, the "Pact of Bogotá (in particular, Article L), reflects the States parties' understanding that the Court is not the venue for matters of supervision of compliance"[15].

3. General Assessment

13. As just seen, Nicaragua sustains a broader scope of inherent powers: irrespective from what is provided distinctly in statutes of international tribunals, they ensue from their very existence, and they are all endowed with the *compétence de la compétence*; inherent powers, in its view, are indispensable also for them "to exercise some kind of jurisdiction" on the implementation of their own judgments, whether assisted or not by other supervisory organs.

14. For its part, Colombia, rather distinctly, takes the view that inherent powers are exercised when necessary in the interests of the sound administration of justice; it ascribes a stricter scope to them, sustaining that they do not amount to *compétence de la compétence*, that there is no "inherent jurisdiction", and that supervision of compliance with judgments is not expressly provided in the Statute or constitutive Charter (of the UN, in the case of the ICJ).

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[11] Written Reply of Colombia to the Questions Put by Judge Cançado Trindade at the Public Sitting Held on the Morning of 2 October 2015, doc. NICOLC 2015/33, of 9 October 2015, p. 2, para. 4.

[12] *Ibid.*, p. 3, para. 6.

[13] *Ibid.*, p. 4, para. 6.

[14] *Ibid.*, para. 7.

[15] *Ibid.*

15. It is not surprising to see these two distinct conceptions of the scope of inherent powers or *facultés* of international tribunals. I see no reason for the Court not having pronounced upon this issue. Having abstained from doing so, reflects a rather minimalist outlook, which I do not share, of the exercise of the international judicial function. After all, in matters of both admissibility and jurisdiction, as well as of substance, judgments are expected to contain reason and persuasion. In dwelling upon this issue, I propose to address, in the following paragraphs, the interrelated points that I have identified (*supra*, para. 4).

IV. Inherent Powers beyond State Consent

16. The issue of inherent powers or *facultés* has, in effect, been raised time and time again before international tribunals. For some years, I have been dealing with it, in distinct jurisdictions[16]; within the ICJ, I have recently addressed it, *inter alia*, e.g., in my separate opinions in other Latin American cases, namely, those of *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* (*Joinder of Proceedings, Orders of 17 April 2013, I.C.J. Reports 2013*, pp. 166 and 184), as well as that of *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 592).

17. It is not my intention to reiterate here all that I have already stated in those separate opinions, but rather only to summarize it, and then focus briefly on other and related aspects of the matter, of relevance to the present Judgment of the ICJ. In my previous separate opinions in the two aforementioned joined cases of *Certain Activities* and *Construction of a Road* (Orders of 2013), I revisited the conceptualization of "implied" and "inherent powers", and pointed out that

> "While the doctrinal construction of 'implied powers' was intended to set up limits to powers transcending the letter of constitutive charters — limits found in the purposes and functions of the international organization at issue — the doctrinal construction of 'inherent powers', quite distinctly, was intended to assert the powers of the juridical person at issue for the accomplishment of its goals, as provided for in its constitutive charter. The point I wish here to make is that the same expression — 'inherent powers' — has at times been invoked in

[16] For example, almost two decades ago, I addressed it in the IACtHR, in my dissenting opinion in the case of *Genie Lacayo* v. *Nicaragua* (Appeal of Revision of Judgment, resolution of 13 September 1997), paras. 1-28, esp. para. 7.

> respect of the operation of international judicial entities; yet, though the expression is the same, its rationale and connotation are different, when it comes to be employed by reference to international tribunals. Another precision is here called for, for a proper understanding of the operation of these latter. Understanding and operation go hand in hand: *ad intelligendum et ad agendum*" (*I.C.J. Reports 2013*, pp. 174 and 191, para. 6)[17].

18. I then sought to demonstrate the relevance of *Kompetenz Kompetenz (compétence de la compétence)* to the exercise of the international judicial function (*ibid.*, pp. 174-175 and 191-192, paras. 7-9), and how inherent powers contribute to the sound administration of justice *(la bonne administration de la justice)* (*ibid.*, pp. 175-182 and 192-198, paras. 10-27). Thus, for example, both the PCIJ and the ICJ have "effected joinders *avant la lettre*, even in the absence (before 1978) of a provision to that effect in their *interna corporis*" (*ibid.*, pp. 181 and 198, para. 25).

19. In effect, most international tribunals have an express power[18] to adopt their own rules of procedure. It may so happen that at times a given situation may not be sufficiently covered by the rules. The application of their rules, and the resolution of issues not sufficiently addressed by them, with recourse to their inherent powers, are likewise beyond the "will" or consent of States. Even in the absence of an express provision thereon, international tribunals are entitled to exercise their inherent powers in order to secure the sound administration of justice.

20. In my subsequent separate opinion, in the very recent Judgment (as to the merits, of 16 December 2015) in the same two joined cases of *Certain Activities* and *Construction of a Road*, I have retaken my consideration of the matter, expressing my understanding that, if any unforeseeable circumstance should arise, the ICJ is "endowed with inherent powers or *facultés* to take the decision that ensures compliance with the provisional measures it has ordered, and thus the safeguard of the rights at stake" (*I.C.J. Reports 2015 (II)*, p. 773, para. 45). And I added:

> "In such circumstances, an international tribunal cannot abstain from exercising its inherent power or *faculté* of supervision of compliance with its own Orders, in the interests of the sound administration of justice *(la bonne administration de la justice)*. Non-compliance with provisional measures of protection amounts to a breach of international obligations deriving from such measures.
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> . . . . . .

[17] For a study of the conceptualization of "implied powers" of international organizations (distinctly from "inherent powers" of international tribunals), cf. A. A. Cançado Trindade, *Direito das Organizações Internacionais*, 6th ed., Belo Horizonte/Brazil, Edit. Del Rey, 2014, pp. 7-135 and 645-646.

[18] Like the ICJ, in Article 30 of its Statute.

> The Court is fully entitled to order *motu proprio* provisional measures which are totally or partially different from those requested by the contending parties. (. . .) The Court is fully entitled to order further provisional measures *motu proprio*; it does not need to wait for a request by a party to do so. (. . .) The Court has inherent powers or *facultés* to supervise *ex officio* compliance with provisional measures of protection and thus to enhance their preventive dimension" (*I.C.J. Reports 2015 (II)*, pp. 779-780, paras. 63 and 70).

21. In another recent separate opinion, in the aforementioned case concerning the *Obligation to Negotiate Access to the Pacific Ocean*, opposing Bolivia to Chile, I deemed it fit to stress that

> "the principle of the sound administration of justice *(la bonne administration de la justice)* permeates the considerations of all the (. . .) incidental proceedings before the Court, namely, preliminary objections, provisional measures of protection, counter-claims and intervention. As expected, general principles mark their presence, and guide, all Court proceedings" (*Judgment, I.C.J. Reports 2015 (II)*, p. 627, para. 30).

The principle of the sound administration of justice *(la bonne administration de la justice)* is always to be kept in mind by an international tribunal (cf. *ibid.*, p. 642, para. 67).

V. The Teleological Interpretation *(Ut Res Magis Valeat Quam Pereat)* beyond State Consent

22. This brings me to the question of the teleological interpretation, pursuant to the principle of *effet utile*, or *ut res magis valeat quam pereat*. In my understanding, the teleological interpretation, which I support, covers not only material or substantive law (e.g., the rights vindicated and to be protected) but also jurisdictional issues and procedural law as well. May I briefly recall a couple of points I made, in this respect, in my dissenting opinion in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, Judgment on preliminary objections of 1 April 2011, I pondered therein that, by virtue of the principle of *effet utile*,

> "widely supported by case law, States parties to human rights treaties ought to secure to the conventional provisions *the appropriate effects* at the level of their respective domestic legal orders. Such principle (. . .) applies not only in relation to *substantive* norms of human rights treaties (that is, those which provide for the protected rights), but also in relation to *procedural* norms, in particular those relating to the right of individual petition and to the acceptance of the compulsory jurisdiction in contentious matters of the international judicial organs of protection. Such conventional norms, essential to the efficacy of

> the system of international protection, ought to be interpreted and applied in such a way as to render their safeguards truly practical and effective (. . .). Such has been, as I have already indicated (. . .), the approach pursued in practice by the ECHR and the IACtHR." (*I.C.J. Reports 2011 (I)*, pp. 276-277, para. 79.)

23. I then recalled a couple of relevant examples from the case law of both international tribunals. For example, I singled out that in the case of *Loizidou* v. *Turkey* (judgment on preliminary objections of 23 March 1995), the ECHR warned that

> "in the light of the letter and the spirit of the European Convention [of Human Rights] the possibility cannot be inferred of restrictions to the optional clause relating to the recognition of the contentious jurisdiction of the ECHR[19]. In the domain of the international protection of human rights, there are no 'implicit' limitations to the exercise of the protected rights; and the limitations set forth in the treaties of protection ought to be restrictively interpreted. The optional clause of compulsory jurisdiction of the international tribunals of human rights does not admit limitations other than those expressly contained in the human rights treaties at issue." (*Ibid.*, p. 277, para. 80.)

24. I further recalled that, in the case of *Castillo Petruzzi and Others* v. *Peru* (judgment on preliminary objections of 4 September 1998), the IACtHR also stated that it could not be at the mercy of limitations not foreseen in the American Convention on Human Rights and invoked by the States parties for reasons or vicissitudes of domestic order *(ibid.)*[20]. And I added, in the same dissenting opinion in the aforementioned case concerning the *Application of the CERD Convention* (2011):

> "The clause pertaining to the compulsory jurisdiction of international human rights tribunals constitutes, in my view, a fundamental clause *(cláusula pétrea)* of the international protection of the human being, which does not admit any restrictions other than those expressly provided for in the human rights treaties at issue. This has been so established by the IACtHR in its judgments on competence in the cases of the *Constitutional Tribunal* and *Ivcher Bronstein* v. *Peru* (of 24 September 1999)[21]. The permissiveness of the insertion of lim-

[19] Cf. ECHR, *Loizidou* v. *Turkey* (preliminary objections), Strasbourg, C.E., judgment of 23 March 1995, p. 25, para. 82, and cf. p. 22, para. 68. On the prevalence of the conventional obligations of the States parties, cf. also the Court's *obiter dicta* in its previous decision, in the *Belilos* v. *Switzerland* case (1988).

[20] As also upheld in the concurring opinion of Judge Cançado Trindade (paras. 36 and 38) appended thereto.

[21] IACtHR, case of the *Constitutional Tribunal* (competence), judgment of 24 September 1999, p. 44, para. 35; IACtHR, case of *Ivcher Bronstein* (competence), judgment of 24 September 1999, p. 39, para. 36.

itations, not foreseen in the human rights treaties, in an instrument of acceptance of an optional clause of compulsory jurisdiction, represents a regrettable historical distortion of the original conception of such clause, in my view unacceptable in the field of the international protection of the rights of the human person.

Any understanding to the contrary would fail to ensure that the human rights treaty at issue has the appropiate effects *(effet utile)* in the domestic law of each State party. The IACtHR's decision in the case of *Hilaire* v. *Trinidad and Tobago* (preliminary objections, judgment of 1 September 2001) was clear: the modalities of acceptance, by a State party to the American Convention on Human Rights, of the contentious jurisdiction of the IACtHR, are expressly stipulated in Article 62 (1) and (2), and are not simply illustrative, but quite *precise*, not authorizing States parties to interpose any other conditions or restrictions *(numerus clausus)*.

In my concurring opinion in the (. . .) *Hilaire* v. *Trinidad and Tobago* case, I saw it fit to ponder that:

> '(. . .) we cannot abide by an international practice which has been subservient to State voluntarism, which has betrayed the spirit and purpose of the optional clause of compulsory jurisdiction, to the point of entirely denaturalizing it, and which has led to the perpetuation of a world fragmented into State units which regard themselves as final arbiters of the extent of the contracted international obligations, at the same time that they do not seem truly to believe in what they have accepted: the international justice.'" (*I.C.J. Reports 2011 (I)*, pp. 277-279, paras. 81-83.)

25. In concluding my dissenting opinion in the case concerning the *Application of the CERD Convention*, I warned that

> "This Court cannot keep on privileging State consent above everything, time and time again, even after such consent has already been given by States at the time of ratification of those treaties.
>
> The Court cannot keep on embarking on a literal or grammatical and static interpretation of the terms of compromissory clauses enshrined in those treaties, drawing 'preconditions' therefrom for the exercise of its jurisdiction, in an attitude remindful of traditional international arbitral practice." (*Ibid.*, p. 320, paras. 205-206.)

26. I further warned that the goal of the realization of justice "can hardly be attained from a strict State-centred voluntarist perspective, and a recurring search for State consent. This Court cannot, in my view, keep

on paying lip service to what it assumes as representing the State's 'intentions' or 'will'" (*I.C.J. Reports 2011 (I)*, p. 321, para. 209). And I finally stated that:

> "The position and the thesis I sustain in the present dissenting opinion is that, when the ICJ is called upon to settle an inter-State dispute on the basis of a human rights treaty, (. . .) [t]he proper interpretation of human rights treaties (in the light of the canons of treaty interpretation of Articles 31-33 of the two Vienna Conventions on the Law of Treaties, of 1969 and 1986) covers, in my understanding, their *substantive as well as procedural provisions*, thus including a provision of the kind of the compromissory clause set forth in Article 22 of the CERD Convention. This is to the ultimate benefit of human beings, for whose protection human rights treaties have been celebrated, and adopted, by States. The *raison d'humanité* prevails over the old *raison d'Etat*.
>
> In the present Judgment, the Court entirely missed this point: it rather embarked on the usual exaltation of State consent, labelled, in paragraph 110, as 'the fundamental principle of consent'. I do not at all subscribe to its view, as, in my understanding, consent is not 'fundamental', it is not even a 'principle'. What is 'fundamental', i.e., what lays in the *foundations* of this Court, since its creation, is the imperative of the *realization of justice*, by means of compulsory jurisdiction. State consent is but a rule to be observed (. . .). It is a means, not an end, it is a procedural requirement, not an element of treaty interpretation; it surely does not belong to the domain of the *prima principia*. This is what I have been endeavouring to demonstrate in the present dissenting opinion." (*Ibid.*, pp. 321-322, paras. 210-211.)

27. May I here again stress that, in my understanding, unlike what the ICJ has usually assumed, State consent is not at all a "fundamental principle", it is not even a "principle"; it is at most a rule (embodying a prerogative or concession to States) to be observed as the *initial* act of undertaking an international obligation. It is surely not an element of treaty interpretation. Once that initial act is performed, it does not condition the exercise of a tribunal's compulsory jurisdiction, which preexisted it and continues to operate unaffected by it.

VI. *Recta Ratio* above *Voluntas*, Human Conscience above the "Will"

28. *Recta ratio* surely stands above *voluntas*, human conscience above the "will". May I here further recall, in historical perspective, that the new *jus gentium*, as conceived by the "founding fathers" of the law of

nations (as from the sixteenth-century lessons of Francisco de Vitoria), was based on a *lex praeceptiva*, apprehended by human reason, and thus could not possibly derive from the "will" of subjects of law themselves (States and others). The way was thus paved for the apprehension of a true *jus necessarium*, transcending the limitations of the *jus voluntarium*. The lessons of the "founding fathers" of our discipline are perennial, are endowed with an impressive topicality.

29. Contrariwise, the voluntarist conception, obsessed with State consent or "will", has proven flawed, not only in the domain of law, but also in the realms of other branches of human knowledge. The attachment to power, oblivious of values, leads nowhere. As to international law, if, as voluntarist positivists argue, it is by the "will" of States that obligations are created, it is also by their "will" that they are violated, and one ends up revolving in vicious circles which are unable to explain the nature of international obligations. As to social sciences, so-called relativists cannot explain anything which does not fit into their *petitio principii*. And as to international relations and political science, so-called realists focus on the present (here and now), and cannot explain — nor forecast anything that suddenly changes in the international scenario; they thus have to readjust their minds to the new "reality". Definitively, it is inescapable that conscience stands above the "will".

30. Turning for a while to international legal doctrine, there were jurists who, throughout the last century, supported the primacy of human conscience over the "will" in the foundations of the law of nations, in the line of jusnaturalist thinking (going back to the lessons of Francisco de Vitoria, Francisco Suárez and Hugo Grotius, in the sixteenth-seventeenth centuries). Thus, for example, in his posthumous book *La morale internationale* (1944), Nicolas Politis sustained that legality cannot prescind from justice, they both go together, so as to foster the progressive development of international law[22].

31. Earlier on, in the same line of thinking, in his course delivered at the *Institut des Hautes Etudes Internationales* in Paris (1932-1933), Albert de La Pradelle (who had been a member of the Advisory Committee of Jurists which drafted the original Statute of the Permanent Court of International Justice [PCIJ] in 1920), warned that the strictly inter-State dimension is dangerous to the progressive development of international law; one ought to keep in mind also the human person, the peoples and humankind[23].

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[22] Nicolas Politis, *La morale internationale*, N.Y., Brentano's, 1944, pp. 157-158, 161 and 165. In invoking the ancient Greeks, in particular Euripides, he pondered that whoever commits an injustice, "est plus malheureux que ne l'est sa victime" [is more unhappy than the victim]; *ibid.*, p. 102.

[23] Albert de La Pradelle, *Droit international public* [Cours sténographié], Paris, Institut des hautes études internationales, 1932-1933, pp. 25, 33, 37 and 40-41.

32. In Albert de La Pradelle's outlook, the *droit des gens* transcends the inter-State dimension, it is a *"droit de la communauté humaine"*, a true *"droit de l'humanité"*[24]. Hence the utmost importance of the general principles of law, which ultimately guide the progressive development of international law[25]. The learned jurist added that there is "surely a natural law", which, nowadays,

> "must be regarded as a rational law which expresses the dictates of the juridical conscience of the times. However, the juridical conscience of humankind is becoming increasingly complex and precise, it is increasingly nuanced, its requirements becoming increasingly demanding with time. This is an effect of general culture, civilization and the progress of ideas; natural or rational law must not therefore be regarded as an immutable law that is fixed from the outset and does not change. It does change, but those changes are not capricious, they constitute a development, one that goes hand in hand with the development of humankind."[26]

33. In the same perspective, Max Huber (a former judge of the PCIJ), in his book *La pensée et l'action de la Croix Rouge* (1954), wrote that international law is also turned to basic human values, which it ought to protect: this is the true *jus gentium*, from a jusnaturalist, rather than positivist, conception[27]. It thus represents the *"droit de l'humanité"*[28]. This outlook goes well beyond inter-State interests, beholding humankind as a whole.

34. The idea of *civitas maxima gentium*, as conceived by the classic international legal philosophers, Huber proceeded, is projected into the UN Charter itself, which is, on ethical grounds, attentive to peoples and the human person (proper of the *droit des gens*). The international juridical conscience, to his mind, has acknowledged the need to pursue the "humanization" of international law[29], a historical process which is, in my own perception, gradually advancing in our times[30].

35. Likewise, Alejandro Alvarez (a former judge of the ICJ), in his book *El Nuevo Derecho Internacional en Sus Relaciones con la Vida Actual*

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[24] Cf. note 23 *supra*, pp. 49, 149 and 264.

[25] *Ibid.*, pp. 222 and 413.

[26] *Ibid.*, p. 412. *[Translation by the Registry.]*

[27] M. Huber, *La pensée et l'action de la Croix-Rouge*, Geneva, CICR, 1954, pp. 26 and 247.

[28] *Ibid.*, p. 270.

[29] *Ibid.*, pp. 286, 291-293 and 304.

[30] Cf. A. A. Cançado Trindade, *A Humanização do Direito Internacional*, 2nd ed., Belo Horizonte/Brazil, Edit. Del Rey, 2015, pp. 3-789; A. A. Cançado Trindade, *La Humanización del Derecho Internacional Contemporáneo*, Mexico, Edit. Porrúa, 2014, pp. 1-324; A. A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 7-185.

de los Pueblos (1962), also wrote that "the universal juridical conscience" plays a very important role in the evolution of international law[31]; it is therefrom that international norms and precepts emanate[32]. In his view, general principles of law much contribute to the formation of a universal international law[33].

36. Earlier on, in his dissenting opinion in the *Anglo-Iranian Oil Co. (United Kingdom* v. *Iran)* case (preliminary objections, Judgment of 22 July 1952), Judge Alvarez expressed his opposition to a restrictive interpretation of Article 36 of the Statute of the ICJ (*I.C.J. Reports 1952*, pp. 131 and 134) and to the voluntarist conception of international law (*ibid.*, pp. 127 and 133). To him, rights under international law "do not result from the will of States", but from human conscience (*ibid.*, p. 130).

37. Still in the same line of thinking, in his course delivered at the Hague Academy of International Law in 1960, Stefan Glaser likewise sustained that the norms of the law of nations emanate from human conscience *(recta ratio)*, conforming natural justice, independently of the "will" of States. There is an assimilation of moral duties to legal duties, and general principles of law *(pacta sunt servanda, bona fides)* are endowed with the utmost importance; the foundation of international law is essentially ethical[34]. In effect, may I here add, *pacta sunt servanda* and *bona fides* are precepts which ensue from natural reason, and are deeply-rooted in natural law thinking.

38. For my part, the present Judgment in the case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* is not the first time when, within the ICJ, I express my concerns as to its undue reliance on State voluntarism. I have likewise done so on earlier occasions as well. Thus, in my extensive dissenting opinion in the case of the *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* (Judgment of 3 February 2012), I cared to rescue some forgotten doctrinal trends nowadays, which, in the mid-twentieth century, focused on *fundamental human values*, so as to make the *droit des gens* evolve well beyond the strict inter-State dimension, into a *droit de l'humanité* (*I.C.J. Reports 2012 (I)*, pp. 191-194, paras. 32-40). *Recta ratio* stands above *voluntas*, human conscience stands above the "will".

39. In the same line of thinking, in my lengthy dissenting opinion in the aforementioned case concerning the *Application of the CERD Convention* (Judgment of 1 April 2011), I examined the historical development of the professed ideal of compulsory jurisdiction, which originally inspired the optional clause (of Article 36 (2) of the ICJ Statute), and the follow-

[31] Alejandro Alvarez, *El Nuevo Derecho Internacional en Sus Relaciones con la Vida Actual de los Pueblos [The New International Law in Its Relations with the Life of the Peoples]*, Santiago de Chile, Editorial Jurídica de Chile, 1962, pp. 49, 57 and 77.

[32] *Ibid.*, pp. 155-156 and 356-357.

[33] *Ibid.*, pp. 163 and 292.

[34] S. Glaser, "Culpabilité en droit international pénal", 99 *Recueil des cours de l'Académie de droit international de La Haye* (1960), pp. 561-563, 566-567, 582-583 and 585.

ing distorted State practice of inserting, in declarations of its acceptance, restrictions of all kinds, militating against its *rationale*, and, in a display of sheer voluntarism, denaturalizing that clause and depriving it of all efficacy (*I.C.J. Reports 2011 (I)*, pp. 254-265, paras. 37-43 and 45-63).

40. Before moving into compromissory clauses (*ibid.*, paras. 64ss.), I then added that, with this distorted practice, and the opportunity missed in the elaboration of the Statute of the new ICJ in 1945 to put an end to it and thus to enhance compulsory jurisdiction,

> "One abandoned the very basis of the compulsory jurisdiction of the ICJ to an outdated voluntarist conception of international law, which had prevailed at the beginning of the last century, despite the warnings of lucid jurists of succeeding generations as to its harmful consequences to the conduction of international relations. Yet, a considerable part of the legal profession continued to stress the overall importance of individual State *consent*, regrettably putting it well above the imperatives of the realization of justice at international level." (*Ibid.*, p. 257, para. 44.)

41. It seems most regrettable that, still in our days, the obsession with reliance on State consent remains present in legal practice and international adjudication, apparently by force of mental inertia. In my perception, it is hard to avoid the impression that, if one still keeps on giving pride of place to State voluntarism, we will not move beyond the prehistory of judicial settlement of disputes between States, in which we still live. May I here reiterate that *recta ratio* stands above *voluntas*, human conscience stands above the "will".

VII. *Compétence de la Compétence*/*Kompetenz Kompetenz* beyond State Consent

42. In the same line of thinking (beholding conscience above the "will"), in my address delivered on 1 November 2000 at the Rome Conference on the Cinquentenary of the European Convention of Human Rights, in recalling the aforementioned decisions of the ECHR in the case of *Loizidou* v. *Turkey* (1995), and of the IACtHR in the cases of the *Constitutional Tribunal* and of *Ivcher Bronstein* (1999), I pondered that:

> "Both the European and Inter-American courts have rightly set limits to State voluntarism, have safeguarded the integrity of the respective human rights conventions and the primacy of considera-

> tions of *ordre public* over the will of individual States, have set higher standards of State behaviour and established some degree of control over the interposition of undue restrictions by States, and have reassuringly enhanced the position of individuals as subjects of the international law of human rights, with full procedural capacity."[35]

43. International tribunals have the power to determine their own jurisdiction[36]. And international human rights tribunals (like the IACtHR and the ECHR), in particular — the case law of which has been invoked by the Contending Parties in the course of the proceedings before the ICJ in the present case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (cf. *supra*) — have succeeded in liberating themselves from the chains of State consent, and have thereby succeeded in preserving the integrity of their respective jurisdictions. They have consistently pursued a teleological interpretation, have asserted their *compétence de la compétence*, and have exercised their inherent powers.

44. Had they not taken the decisions they took, in the aforementioned cases of *Loizidou* v. *Turkey*, of the *Constitutional Tribunal* and of *Ivcher Bronstein*, the consequences would have been disastrous for their respective jurisdictions, and they would have deprived the respective conventions of their *effet utile*. They rightly understood that their *compétence de la compétence*, and their inherent powers, are not constrained by State consent; otherwise, they would simply not be able to impart justice. In the *Loizidou* v. *Turkey* case, the ECHR discarded the possibility of inferring restrictions to its jurisdiction. In the *Constitutional Tribunal* and *Ivcher Bronstein* cases[37], the IACtHR exercised its inherent power to uphold its own jurisdiction, and discarded the respondent State's attempt to "withdraw" unilaterally from it.

45. Those two international tribunals opposed the voluntarist posture, and insisted on their *compétence de la compétence*, as guardians and masters of their respective jurisdictions. The ECHR and the IACtHR contributed to the primacy of considerations of *ordre public* over the subjective voluntarism of States. They did not hesitate to exercise their inherent powers, and thereby decidedly preserved the integrity of the bases of their respective jurisdictions.

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[35] A. A. Cançado Trindade, "The Contribution of the Work of the International Human Rights Tribunals to the Development of Public International Law", Council of Europe, *The European Convention of Human Rights at 50* (50 *Human Rights Information Bulletin* (2000), pp. 8-9).

[36] For a general study, cf., e.g., I. F. I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction — Compétence de la Compétence*, The Hague, Nijhoff, 1965, pp. 1-304.

[37] And also in the *Hilaire, Benjamin and Constantine* case (preliminary objections, 2001).

In sum, for taking such position of principle, the IACtHR and the ECHR rightly found that conscience stands above the will.

46. As to international criminal tribunals, it may be recalled that, in the *Tadić* case, the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY — Appeals Chamber) held (decision of 2 October 1995) that jurisdiction

> "is basically — as is visible from the Latin origin of the word itself, *jurisdiction* — a legal power, hence necessarily a legitimate power, 'to state the law' *(dire le droit)* within this ambit, in an authoritative and final manner. This is the meaning which it carries in all legal systems" (para. 10).

47. The ICTY (Appeals Chamber) added that in international law a narrow concept of jurisdiction is unwarranted; it warned that limitations to an international tribunal cannot be presumed and, "in any case, they cannot be deduced from the concept of jurisdiction itself" (para. 11). In upholding its jurisdiction in a broad sense, it understood that the ICTY's jurisdiction was not limited to those powers the Security Council intended to entrust it with, but it also encompassed the Tribunal's own inherent powers (cf. paras. 14-15). The ICTY relied on its own *compétence de la compétence* in order to assert its power even to review the validity of its own establishment by the Security Council (cf. paras. 18-22).

VIII. Inherent Powers overcoming *Lacunae*, and the Relevance of General Principles

48. International tribunals have made use of their inherent powers or *facultés* in distinct situations. An example, of almost two decades ago, can be found in the decision of the IACtHR in the case of *Genie Lacayo* v. *Nicaragua* (resolution of 13 September 1997), in respect of an appeal for revision of a judgment. In my dissenting opinion appended thereto, I pondered that

> "The present appeal before the Inter-American Court [IACtHR] is unprecedented in its history: (. . .) in the present *Genie Lacayo* case the Court is for the first time called upon to pronounce on an appeal of *revision of a judgment*, (. . .) for which there is no provision either in the American Convention [on Human Rights — ACHR], or in its Statute or Regulations. The silence of these instruments on the question is not to be interpreted as amounting to *vacatio legis*, with the consequence of the inadmissibility of that appeal. (. . .) The fact that no provision is made for it in the ACHR or in its Statute or Regulations does not prevent the IACtHR from declaring *admissible* an appeal of revision of a judgment: the apparent *vacatio legis* ought in this particular [case] to give way to an imperative of natural justice." (Paras. 2 and 6.)

49. Drawing attention to the importance of general principles of law also in the present context, I then added that

> "The Court ought thus to decide (. . .) on the basis — in application of the principle *jura novit curia* — of general principles of procedural law, and making use of the *powers inherent* to its judicial function. Human beings, and the institutions they integrate, are not infallible, and there is no jurisdiction worthy of this name which does not admit the possibility — albeit exceptional — of revision of a judgment, be it at international law level, or at domestic law level." (Para. 7.)

50. The IACtHR itself acknowledged, in its aforementioned decision in the *Genie Lacayo* case, that its inherent power to consider, in special cases, an appeal for revision of a judgment, is in line with "the general principles of procedural law, both domestic and international" (para. 9). This is just one of the possible situations of recourse to inherent powers; there are several others, pertaining, e.g., *inter alia*, to the due process of law, or else to the award of reparations. The relevant case law of international criminal tribunals provides illustrations of it.

51. As to the due process of law, the *ad hoc* International Criminal Tribunal for Rwanda (ICTR — Trial Chamber III), for example, in the *Rwamakuba* case, upheld (decision of 31 January 2007) the Tribunal's

> "inherent power to provide an accused or former accused with an effective remedy for violations of his or her human rights while being prosecuted or tried before this Tribunal. Such power (. . .) is essential both for the carrying out of its judicial functions and for complying with its obligation to respect generally accepted international human rights norms." (Para. 49.)

In the same *Rwamakuba* case, the ICTR (Appeals Chamber) added (decision of 13 September 2007) that its inherent power extends, in appropriate circumstances, to ordering compensation, "proportional to the gravity of the harm" suffered (para. 27).

52. For its part, the International Criminal Court (ICC Trial Chamber V-A), in the case of *The Prosecutor* v. *William Samoei Ruto and Joshua Arap Sang* (*Situation in the Republic of Kenya*, decision of 17 April 2014), observed that it may use such power[38] so as "to preserve its judicial integrity" (para. 80); that power is "essential for the exercise of its primary jurisdiction or the performance of its essential duties and functions" (para. 81). The ICC (Trial Chamber) added that it can make use of that power, e.g., to order the attendance of witnesses[39].

[38] Meaning "inherent" power, though using the term "implied" power.
[39] Cf. paras. 87-89, 91, 100, 104 and 110-111.

53. On its turn, in the *Bobetko* case, the ICTY (Appeals Chamber) held (decision of 29 November 2002) that the ICTY "has an inherent power to stay proceedings which are an abuse of process", so as to fulfil the Tribunal's need "to exercise effectively the jurisdiction which it has to dispose of the proceedings" (para. 15). Subsequently, the ICTY (Appeals Chamber) further stated, in its decision (of 1 September 2005) in the *Stanković* case, that the Tribunal's inherent powers encompass the rendering of orders "reasonably related" to the task before it, deriving from the exercise itself of the judicial function (para. 51).

54. More recently, in the *Hartmann* case, a specially appointed Chamber of the ICTY recalled (judgment of 14 September 2009) that the ICTY has the "inherent power" to "hold in contempt those who knowingly and wilfully interfere with its administration of justice" (para. 19). Such inherent power, it added, is firmly established in the *jurisprudence constante* of the ICTY, so as to ensure that a "conduct which obstructs, prejudices or abuses the administration of justice" is punished (para. 18).

55. For its part, the Special Tribunal for Lebanon (STL Appeals Chamber), likewise, in its decision (of 10 November 2010) in the matter of *El-Sayed*, extensively dwelt upon the exercise of inherent powers[40], so as to secure the fairness of proceedings (paras. 15, 48 and 52), the equality of arms (para. 17), and, in sum, the due process of law (paras. 49 and 52). As it can be seen, such pronouncements of distinct international criminal tribunals all point to the same direction, in so far as inherent powers are concerned.

56. The relevant international case law on the matter has lately drawn the attention, also of expert writing, to the use of inherent powers by international tribunals in order to fill *lacunae* of their *interna corporis*[41]. There seems, in effect, to be general acknowledgment nowadays of the multiplicity of possible situations of the use of inherent powers by international tribunals, keeping in mind in particular the distinct functions proper to each international tribunal.

57. Although the International Tribunal for the Law of the Sea (ITLOS), for its part, has not explicitly addressed to date the issue of its inherent powers, it goes without saying that, as an international tribunal, it is vested with them, for the exercise of its judicial function pertaining to the UN Convention on the Law of the Sea. In effect, some of its judges have expressly referred to the inherent powers of ITLOS, in their separate opinions appended to its judgments in two successive cases (namely, the cases of *M/V "SAIGA" (No. 2) (Saint Vincent and Grenadines* v. *Guinea)*,

[40] Cf. paras. 2, 15, 17, 43, 45-49, 52, 54 and 56.

[41] Cf., *inter alia*, e.g., P. Gaeta, "Inherent Powers of International Courts and Tribunals", *Man's Inhumanity to Man — Essays on International Law in Honour of Antonio Cassese* (eds. L. C. Vohrah, F. Pocar *et al.*), The Hague, Kluwer, 2003, pp. 359 and 364-367; C. Brown, "The Inherent Powers of International Courts and Tribunals", 76 *British Yearbook of International Law* (2005), pp. 203, 215, 221, 224 and 244.

judgment of 1 July 1999; and of *M/V "Louisa" (Saint Vincent and Grenadines* v. *Kingdom of Spain)*, judgment of 28 May 2013).

58. In short, contemporary international tribunals have resorted to the inherent powers which appear to them necessary to the proper exercise of their respective judicial functions. They have shown their preparedness to make use of their inherent powers (in deciding on matters of jurisdiction, or handling of evidence, or else merits and reparations), and have not seldom made use of them, in distinct situations, in order to secure a proper and sound administration of justice.

IX. Inherent Powers and *Juris Dictio*, beyond Transactional Justice

59. Ultimately, the concern of international tribunals is to endow their own respective judicial functions with the inherent powers needed to ensure the proper and sound administration of justice. Thus, in the case of *Mucić, Delić and Landžo*, the ICTY (Appeals Chamber, judgment of 8 April 2003) stated that, besides its express powers, it has also inherent powers, "deriving from its judicial function", so as "to control its proceedings in such a way as to ensure that justice is done" (para. 16). They include the inherent power to reconsider any of its own decisions, so as "to prevent an injustice" (para. 49). In its administration of justice, it has an inherent power "to ensure that its proceedings do not lead to injustice" (para. 50)[42].

60. In the same line of thinking, in the case of *Sam Hinga Norman, Moinina Fofana and Allieu Kondewa*, the Special Court for Sierra Leone (SCSL — Appeals Chamber) explained (decision of 17 January 2005) that, although the inherent power of a court cannot be exercised against the express provisions of its Rules, it can be so when the Rules are silent (para. 41). A tribunal — as acknowledged in the jurisprudence of the ICTY — can have recourse to its inherent power "to reconsider *its own decision* to avoid injustice or miscarriage of justice" (para. 40)[43].

61. As it can be seen from the preceding paragraphs (Sections VII-VIII), contemporary international tribunals have made statements in support of their exercise of inherent powers for the proper performance of their international judicial function. This becomes even clearer in the understanding that their task goes beyond peaceful settlement of disputes, as they also *say what the law is (juris dictio)*. Contemporary international human rights tribunals as well as international criminal tribunals have espoused this outlook in the exercise of their respective judicial functions.

[42] And cf. also paras. 52-53.
[43] And cf. also para. 34.

62. In this connection, on the occasion of the commemoration by the ICJ of the centenary of the Peace Palace at The Hague (2013), I had the occasion, in my address, to point out that, parallel to the traditional conception (still prevailing in some circles at the Peace Palace) whereby an international tribunal is "to limit itself to settle the dispute at issue and to handle its resolution of it to the Contending Parties (a form of transactional justice), addressing only what the parties had put before it", there is another conception,

> "a larger one — the one I sustain — whereby the tribunal has to go beyond that, and say what the law is *(juris dictio)*, thus contributing to the settlement of other like situations as well, and to the progressive development of international law. In the interpretation itself — or even in the search — of the applicable law, there is space for judicial creativity; each international tribunal is free to find the applicable law, independently of the arguments of the Contending Parties *(juria novit curia)*."[44]

63. There is support for this larger conception in the relevant case law of international human rights tribunals and international criminal tribunals. Already in its judgment of 18 January 1978, in the landmark case of *Ireland* v. *United Kingdom*, the plenary of the ECHR stated that its functions were not only to decide or settle the cases lodged with it, but more generally also to apply, "elucidate" and "develop" the norms of the European Convention, thus contributing to the observance by States parties of the engagements undertaken by them (para. 154).

64. Two and a half decades later the ECHR (First Section) made the same point in its judgment of 24 July 2003, in the case of *Karner* v. *Austria*, adding that it could elucidate and develop the *corpus juris* of the European Convention, as its mission, besides settling individual cases, also comprised raising human rights standards of human rights protection and extending its own jurisprudence throughout the community of States parties to the Convention (para. 26).

65. The IACtHR, likewise going beyond dispute settlement only, has taken the same wide outlook of its *juris dictio*, in its *jurisprudence constante*. This is significant, considering that there have been circumstances wherein the judgments of international tribunals (particularly the ECHR and the IACtHR) have had repercussions beyond the States parties to a case, in other States parties to the respective Conventions[45].

[44] A. A. Cançado Trindade, "A Century of International Justice and Prospects for the Future", *A Century of International Justice and Prospects for the Future* (eds. A. A. Cançado Trindade and D. Spielmann), Oisterwijk, Wolf Publs., 2013, p. 16, para. 40.
[45] *Ibid.*, p. 16, para. 41.

66. This is, furthermore, implicit in the notion of "pilot judgments/*arrêts pilotes*" in the work of the ECHR[46]. This outlook (such as the one pursued by both the IACtHR and the ECHR) gives greater importance to the reasoning of the tribunals and the exercise of their inherent powers, well beyond the stricter traditional conception of transactional justice. In settling disputes and saying what the law is, international tribunals have exercised their inherent powers and endeavoured to secure the proper administration of justice, in facing new challenges. International tribunals have thus enabled themselves to contribute to the progressive development of international law[47].

X. Inherent Powers and Supervision of Compliance with Judgments

67. May I now turn to another point raised in the course of the proceedings of the present case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, namely, that of inherent powers in relation to compliance with judgments of the ICJ. The point was raised by the two Contending Parties, on distinct grounds[48], in relation of Colombia's fifth preliminary objection. The fact that an international tribunal can count on the assistance of another supervisory organ for seeking compliance with its own judgments and decisions, in my view does not mean that, once it renders its judgment or decision, it can remain indifferent as to its compliance. Not at all.

68. The fact, for example, that Article 94 (2) of the UN Charter entrusts the Security Council with the enforcement of ICJ judgments and decisions, does not mean that compliance with them ceases to be a concern of the Court. Not at all. Moreover, the Security Council has, in prac-

[46] As from the rendering of its judgment of 22 June 2004 in the case of *Broniowski* v. *Poland*.

[47] Cf., in this respect, the books by: H. Lauterpacht, *The Development of International Law by the International Court*, London, Stevens, 1958, pp. 3-400; A. A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, Rio de Janeiro, Edit. Renovar, 2015, pp. 1-507; J. G. Merrills, *The Development of International Law by the European Court of Human Rights*, 2nd ed., Manchester University Press, 1993, pp. 1-255; A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, 3rd ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013, pp. 1-409; L. J. van den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, Leiden, Nijhoff, 2005, pp. 1-284; [Various Authors,] *The Development of International Law by the International Court of Justice* (eds. C. J. Tams and J. Sloan), Oxford University Press, 2013, pp. 3-396; and cf. M. Lachs, "The Development and General Trends of International Law in Our Time", 169 *Recueil des cours de l'Académie de droit international de La Haye* (1980), pp. 245-246, 248-249 and 251.

[48] Cf. submissions in CR 2015/22, of 28 September 2015, pp. 60-62, paras. 1, 3 and 8 (Colombia); CR 2015/23, of 29 September 2015, pp. 46-50 and 54, paras. 4-5, 9, 12, 14-15 and 23 (Nicaragua); CR 2015/24, of 30 September 2015, p. 37, para. 23 (Colombia); CR 2015/25, of 2 October 2015, pp. 37-43, paras. 12-19 and 22 (Nicaragua).

tice, very seldom done anything at all in that respect, except in the *Nicaragua* v. *United States* case (1986)[49]. Pursuant to Article 94 (1) of the UN Charter, non-compliance amounts to an additional breach; hence the importance of avoiding that, and of securing compliance. In my view, compliance with their judgments and decisions remains a concern of the ICJ as well as of all other international tribunals.

69. In the case of the ICJ in particular, it has been mistakenly assumed that it is not the Court's business to secure compliance with its own judgments and decisions. Even if one invokes the silence of the Statute in this respect, or else Article 94 (2) of the UN Charter, this latter does *not* confer an *exclusive* authority to the Security Council to secure that compliance. On the contrary, a closer look at some provisions of the Statute[50] shows that the Court is entitled to occupy itself with compliance with its own judgments and decisions[51].

70. What is thus to be criticized, in my view, is not judicial law-making (as is often said without reflection), but rather judicial inactivism or absenteeism — in particular in respect of ensuring compliance with judgments and decisions. In this connection, before considering whether recourse could be made to domestic courts to seek such compliance, further attention should be devoted conceptually to the role of the ICJ itself, and of other international tribunals, in securing compliance with their own judgments and decisions.

71. The practice of the ECHR (which counts on the assistance of the Committee of Ministers) and of the IACtHR (which has resorted to post-adjudicative hearings, ever since its landmark judgment, of 28 November 2003, in the case of *Baena-Ricardo and Others* v. *Panama*) provides useful elements to this effect. In the course of the proceedings before the ICJ in the present case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, the IACtHR's decision in the case of *Blake* v. *Guatemala* (Order of 27 November 2003) was invoked, when it asserted the Court's inherent powers "to monitor compliance with its decisions" (para. 1)[52].

72. The powers of the Committee of Ministers to supervise the execution of the ECHR's judgments, in any case, are not exclusive; the Court itself can be concerned with it, as the ECHR (Grand Chamber) acknowledged in its judgments, e.g., in the cases of *Verein gegen Tierfabriken Schweiz (VgT)* v. *Switzerland* (of 30 June 2009), and of *Bochan* v. *Ukraine* (of 5 February 2015). In sum, in my understanding, no international tribunal can remain indifferent to non-compliance with its own judgments. The

[49] Cf. C. Schulte, *Compliance with Decisions of the International Court of Justice*, Oxford University Press, 2004, pp. 38-40, 42 and 63, and cf. p. 68 (as to the General Assembly), p. 70 (as to the Secretary-General), and pp. 77 and 79 (as to domestic courts).

[50] Articles 41, 57, 60 and 61 (3).

[51] Cf. M. Al-Qahtani, "The Role of the International Court of Justice in the Enforcement of Its Judicial Decisions", 15 *Leiden Journal of International Law* (2002), pp. 781-783, 786, 792, 796 and 803.

[52] CR 2015/23, of 29 September 2015, p. 54, para. 23 (Pellet).

inherent powers of international tribunals extend to this domain as well, so as to ensure that their judgments and decisions are duly complied with.

73. In doing so, international tribunals are preserving the integrity of their own respective jurisdictions. Surprisingly, international legal doctrine has not yet dedicated sufficient attention to this particular issue. This is regrettable, as compliance with judgments and decisions of international tribunals is a key factor to foster the rule of law in the international community[53]. And, from 2006 onwards, the topic of *"the rule of law at the national and international levels"* has remained present in the agenda of the UN General Assembly[54], and has been attracting increasing attention of Member States, year after year.

74. It appears, thus, paradoxical, that a greater general awareness has not yet awakened as to the relevance of compliance with judgments and decisions of international tribunals. The present case, before the ICJ, of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, has, in my perception, brought to the fore the need to dispense much greater attention to the issue of such compliance, as related to the inherent powers of international tribunals. Those jurists who are genuinely concerned with, and engaged in, the realization of justice (they are not so many), can contribute to it; the legal profession, distinctly, remains more interested in strategies of litigation and "winning cases" only.

75. The path to justice is a long one, and not much has been achieved to date as to the proper conceptualization of the supervision of compliance with judgments and decisions of international tribunals. Instead, the force of mental inertia has persisted throughout decades. It is time to overcome this absenteeism and passiveness. Supervision of such compliance is, after all, a jurisdictional issue. An international tribunal cannot at all remain indifferent as to compliance with its own judgments and decisions.

XI. Epilogue

76. Having addressed this point of inherent powers in relation to compliance with judgments of the ICJ, brought before the Court (on distinct grounds) by Nicaragua and Colombia, I come now to my last words in the present separate opinion. As pointed out in the preceding pages, the Court's handling of the question raised by the fourth preliminary objec-

[53] Cf., recently, e.g., A. A. Cançado Trindade, "Prologue: An Overview of the Contribution of International Tribunals to the Rule of Law", *The Contribution of International and Supranational Courts to the Rule of Law* (eds. G. De Baere and J. Wouters), Cheltenham/Northhampton, E. Elgar, 2015, pp. 3-18.

[54] Cf. General Assembly resolutions A/RES/61/39, of 4 December 2006; A/RES/62/70, of 6 December 2007; A/RES/63/128, of 11 December 2008; A/RES/64/116, of 16 December 2009; A/RES/65/32, of 6 December 2010; A/RES/66/102, of 9 December 2011; A/RES/67/97, of 14 December 2012; 68/116, of 16 December 2013; A/RES/69/123, of 10 December 2014; and A/RES/70/118, of 14 December 2015.

tion of Colombia does not reflect the richness of the proceedings in the *cas d'espèce*, and of the arguments presented before the ICJ (in the written and oral phases) by both Nicaragua and Colombia.

77. Their submissions should, in my view, have been fully taken into account expressly in the present Judgment, even if likewise to dismiss the fourth preliminary objection at the end. After all, the Parties' submissions in the present case of *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, raise an important question, recurrently put before the Court, which continues to require our reflection so as to endeavour to enhance the realization of justice at international level.

78. The fact that the Court has found, in the present Judgment, that it has jurisdiction under the Pact of Bogotá (dismissing Colombia's first preliminary objection) did not preclude it from having considered the arguments of the two Contending Parties on such an important issue as its inherent powers or *facultés* (to pronounce on the alleged non-compliance with its 2012 Judgment)[55]. I have felt obliged to do so, even if considering that the fourth preliminary objection is unsustainable and was thus to be likewise dismissed, rather than having simply said in an elusive way that "there is no ground" to pronounce upon it[56].

79. Contemporary international tribunals exercise inherent powers beyond State consent, thus contributing to the sound administration of justice *(la bonne administration de la justice)*. There are examples (cf. *supra*) of assertion of their *Kompetenz Kompetenz (compétence de la compétence)*; this latter has proven of relevance to the exercise of the international judicial function. There are illustrations of their pursuance of the teleological interpretation beyond State consent. The use of inherent powers by contemporary international tribunals beyond State consent, has also aimed at filling *lacunae* in their *interna corporis*, drawing attention to the relevance of general principles.

80. In upholding the exercise of inherent powers for the proper performance of their international judicial function, contemporary international tribunals have given support to the conception of their work — which I sustain — of going beyond dispute-settlement (transactional justice), further *to say what the law is (juris dictio)*. Moreover, the attention of contemporary international tribunals extends to the monitoring of compliance with their decisions, which is a jurisdictional issue.

81. The inherent powers of international tribunals extend to this particular domain as well, to the supervision of execution of their judgments. In doing so, they are preserving the integrity of their own respective jurisdictions; after all, as I have pointed out, no international tribunal can remain indifferent to non-compliance with its own judgments. This is

[55] Cf. paragraphs 16 and 101 of the present Judgment.

[56] Cf. paragraph 104 and resolutory point 1 *(e)* of the *dispositif* of the present Judgment.

essential, so as to foster the *rule of law* in the international community, — a topic which has remained present, with growing attention on the part of UN Member States, in the agenda of the UN General Assembly throughout the last decade.

82. Last but not least, the consideration, in the present separate opinion, of the exercise, in its distinct aspects, by contemporary international tribunals, of their inherent powers or *facultés*, has prompted me to bring to the fore my understanding that *recta ratio* stands above *voluntas*. There is need to overcome the voluntarist conception of international law. There is need of a greater awareness of the primacy of conscience above the "will", and of a constant attention to fundamental human values, so as to secure the progressive development of international law, and, ultimately, to foster the realization of justice at international level.

(Signed) Antônio Augusto CANÇADO TRINDADE.