THE INTERNATIONAL COURT OF JUSTICE IN THE NEW GLOBAL CONTEXT

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I. PREAMBLE

The 20th century offered the world an extremely interesting spectacle; a period of huge evolution in the technical field and an increased degree of sensibility towards international common interests; a period of impressing conquests of humanity, a period when people ended by being able to do things that their parents wouldn't have even dreamt to do.

We must not forget that at the same time, the 20th century brought to the humanity the atomic bomb and chemical weapons. It brought Holocaust and Apartheid. It brought terrorism and massive consumption of drugs. And it didn't change too much about poverty and hunger in the developing countries.

The 20th century brought the Declaration of Human Rights. Unfortunately, it allowed and still allows existence of situations that totally disconsider human rights.

In this respect, one of the most important challenges we have to face is the attack against human rights, even in the case of a single individual, and the ways the international community can intervene in order to preserve the fundamental rights we have won at least declaratively.

International peace has to be understood in a much broader sense than that related to the classical war. Human rights and self-determination should also be subjects for the international peace matter.

An analysis over the international law in the 20th century shows that there have appeared deep changes in this field. The international society has developed in parallel with the international law and this way we got to the point where traditional approaches of international law came to be replaced by new orientations. Bilateral contacts' importance seems to fade in front of multilateral contacts within regional or world organisations. Still, the system does not move towards a centralised structure but a decentralised form of international organisation, within the limits established by general regulations.

The importance of human rights, freedom and human dignity rose in the eyes of most of the people of the world and this way, defending these values has become more and more important. This led to an evolution of all the international organisations towards a more active role. The trend here went *from being re-active to being **pro-active***.

International security organisations started to intervene **not only for *keeping* peace** (by preventing parties to fight each other) **but also for *ensuring* peace or even making peace** (by developing military operations within the conflict area). NATO assumed extended responsibilities during its interventions against Serbian army. The present situation in Macedonia shows that international fora are no longer going to accept violence and massive human rights violation. The concept of threatening peace extended to actions that consist of grassed and massive human rights violation, genocide, ethnic

cleansing or disrespect for the right to self-determination.

In this context, the international law comes to get a higher importance as the present contact between states and non-states entities involves the interests of larger communities. In this respect, the international law institutions are facing a very important challenge: adaptation to the new situation, a lot more different than the existing situation at their creation date.

The lines below concentrate on the issue connected with international justice, and first of all with the activity of the International Court of Justice. Despite the appearance of subsidiary international Tribunals, specialized in different matters, the ICJ remains the most important legal institution of the world community. The adaptive challenge it has to face could find a solution by increasing the advisory role of the Court. This could also take into consideration the general reluctant attitude of states towards accepting compulsory jurisdiction and the trend of international cooperation rather than conflict.

Globalisation is a process that cannot be stopped and the increased advisory role of the International Court of Justice would provide a better approach for a world constitution, necessary in such a context, where borders dramatically fade in almost any field.

II. INTERNATIONAL LAW WITHIN THE DYNAMICS OF THE INTERNATIONAL SOCIETY

The international society is completing the transition from the Westphalian order to the global characteristics of the 21st century. The major changes appearing in this process are incentives for decentralized organization of the society. Basically, the need to ensure human freedom, dignity and welfare highlights the role of individuals and diminishes that of superstructures in the emerging society. The driving force of regionalism has resulted in centralized action only being possible when supported by effective regional cooperation and based on the principle of "subsidiarity" already enshrined in the activity of the European Union. The multi-centric and multi-cultural bases of society, the enforcement of international law, technological innovations and the dispersion of economic power are all elements reinforcing a decentralized international society.

The changes of the international society have significantly influenced the structure of international law, which has evolved from relatively simple mechanisms for law-making to the highly complex contemporary arrangements. State and non-state entities participate in the formation of contemporary international law. The interactions between international and domestic law are significantly increasing and the borderline is progressively fading.

Within this decentralised framework, law-making bodies have proliferated and this led to a fragmentation of the law and even lack of coherence in many occasions. The role of basic international law principles is to keep this structure together and to create conditions for a uniformed interpretation in order to provide universality of the international legal system.

The efforts undertaken along the 21st century to ensure peaceful settlement of disputes represented a key element in the dynamics of the international law. The various methods that have been used in the international practice always offered occasion for controversial attitudes.

We have to underline in this context, that some methods pose no threats to state sovereignty, but to the extent that third parties intervene in the procedure, there is a growing perception of restriction on such sovereignty and a proportional reluctance on the part of the states to use them.

While negotiation will present no threatening aspect (and it is the most frequently used method), good offices, mediation, inquiry and conciliation require the intervention of a third party.

The case of arbitration and judicial settlement is different. While originally conceived as a more flexible method that might attend to elements other than the strict

application of the law, arbitration has increasingly been organised in the image of judicial settlement. A number of institutional rules point in this direction. Although arbitration is favoured when the disputants have comparable legal cultures and technical resources and when they share roughly the same economical and political influences, this method may not have the same efficiency when there is a substantial difference between the disputants.

Judicial settlement in the context of the International Court of Justice, the International Tribunals for the former Yugoslavia and Rwanda, the initiatives for the establishment of the International Criminal Court are discussed in the light of their experience and likely contribution to the development of this method of settlement. Regional courts are also brought into consideration in this context.

III. THE TRANSITION TO THE GLOBAL SOCIETY OF THE 21ST CENTURY

The many changes that international society has experienced since 1899 mark the transition from the Westphalian model that emerged with the establishment of the modern sovereign State and the Groatioan legal order that gradually came into being, to the global society of the 21st century. As the 21st century is the bridge between these two important historical periods, many features of the traditional order have still been largely predominant while at the same time new elements of change have begun to emerge, especially in the past three decades.

The trends of change have prompted a variety of theories about the obsolescence of conflict, the absence of war and the decline of empires, but regrettably it does not appear realistic to exclude such elements from the discussion of future prospects of world society.

What we can see is that when major developments and changes which begin to shape the international society are examined in the context of the prospects for 21st century, they lead to the conclusion that the main trend is towards decentralisation of the structure of society and the international legal order.

The most important arguments for this conclusion consist in the growing importance of the individual and his/her rights and the permanently increasing role of regionalism. Besides these elements, we also have to mention that the role of non-state organisations has become so prominent that in some occasions it even threats the very existence of States and certainly its traditional exclusivity.

At last but not the least, enforcement of the law in international society continues to be highly decentralised and based more on solidarity than in a central enforcement mechanism, a trend that it is most likely to continue and to increasingly rely on mutual convenience rather on commands, as it is already evident in environmental and trade matters.

IV. THE INTERNATIONAL COURT OF JUSTICE – A CHANGING AND VITAL ROLE

A new role for the International Court of Justice is proposed in the context of the changing structures of both international societies and international law. Such a role is associated more with a constitutional function and the need to identify and improve the basic principles of international law than with the traditional approaches of an ordinary court of law solving routine conflicts among States. Reluctance of States to accept compulsory jurisdiction continues unabated, while voluntary submission does not usually include cases of great significance. Furthermore, there is clearly a preference to establish other international tribunals of a more specialized nature.

The new role envisaged for the Court concerns the need to develop its guiding role in respect of the basic principles of international law in order to establish a structured legal order of international society. Such a role reaches beyond mere dispute settlement and makes of the Court the central judicial body of the

international community, a capability that has been only occasionally exercised by the ICJ. Although the attitude of states towards compulsory jurisdiction will not change in respect of ordinary disputes to be brought before a court of general nature under international law, the situation might be totally different if looked upon from the perspective of the new role suggested.

A first step in this direction is to expand the advisory functions of the International Court of Justice, including the authorisation to the United Nations Secretary-General to request advisory opinions connected with the discharge of its responsibilities and a similar authorisation to other United Nations organs and specialized agencies as well as inter-governmental and nongovernmental organizations and even individual states. A special committee attached to the International Court of Justice would clear the requests for advisory opinions in order to ascertain that they meet the requirements of relating to issues of substance in the development of basic treaties or other significant rights and questions.

The central judicial role of the ICJ could be enhanced by a greater participation in institutional dispute settlement arrangements. This is particularly so in the context of the United Nations procedures for the maintenance of international peace and security.

Another important step would be to broaden the access to the contentious jurisdiction of the International Court of Justice, including international organisations and eventually non-governmental organizations member states, corporations and individuals. Also important improvement proposals have been made for establishing a reference procedure to the ICJ by other international courts and tribunals and by domestic courts, a procedure which should also be subject to the clearance of the special committee mentioned above.

The role of the International Court of Justice is also discussed in the light of a comparison with the powers and functions of other major international tribunals. The consideration of a power of judicial review, such as that exercised by the Court of Justice of the European Union has become particularly relevant in the case of the ICJ and its interactions with the United Nations system mentioned above. Although there are some opinions giving favourable consideration to such questions, the United Nations is much too complex an organisation to be considered a "community" or for the UN Charter to be considered a State constitution, while the poor delineation of functions does not allow to consider that there is an executive function subject to judicial review.

In this context, the development of the advisory functions of the ICJ might provide an appropriate answer to this point, without prejudice to the views gradually being expressed by the Court itself, or by other Tribunals on the question of the legality of actions of the Security Council.

V. NEW MEANINGS FOR THE INTERNATIONAL COURT OF JUSTICE AS *"PRINCIPAL JUDICIAL ORGAN"* OF THE UNITED NATIONS

The new global context and the new approaches in international law problems raise the question of new meanings for the International Court of Justice as ***Principal Judicial Organ*** of the United Nations, as stated in the Charter.

The term ***principal*** must be juxtaposed to the term ***exclusive*** judicial organ, which the Court is not. This leads us to raise the issue of the relationship between the Court and the other tribunals within the UN system. In this respect, it is obvious that the concept of litispendence – which in domestic legal systems normally prevents conflicting decisions between different tribunals seized of the same case – it is not applicable in this context, in the absence of any formal hierarchy.

This leads us to add that the term ***principal*** can also be seen in juxtaposition to the term ***subsidiary*** organ. The Court is not dependent on the political organs either for its creation or for amendment of its Statute, which significantly

bolsters its independence. There is no need for it to seek further legal grounds in order to assert its independence from the political organs, as the other tribunals have had to do by reference either to the decision-making powers embedded in their Statute (UN Administrative Tribunal) or to their inherent judicial powers (The International Tribunal for the Former Yugoslavia). As subsidiary organs, these, however, remain vulnerable to the amendment of their Statute.

However, while on the one hand the ICJ's separate amendment procedure laid in its Statute renders difficult formal institutional reform, the Court, on the other hand, lacks the flexibility of the political organs in adapting to changing circumstances. *As a result, the Court's structure and process have remained far more rigidly embedded in the international society than it was originally set up to service.* The increase in the number of cases brought before the ICJ is creating, together with the financial problems, the danger of blocking its operation.

The term ***principal*** organ has also to be viewed in the context of the international system as a whole, for the Court is no longer the exclusive judicial tribunal. In this new free-market climate, the Court's future strength will lie, therefore, in carving a niche for itself, in other words in strengthening its specificity. This specificity lies in the fact that it does not offer States merely another choice of means of settlement, but that it is a Court of the United Nations and, as such, a Court of the world community.

VI. THE COURT AS AN ORGAN OF THE UN

The statute of the Court is an integral part of the United Nations Charter. This means that the Court is bound by the purposes and principles of the UN, even when acting as an autonomous judicial organ. At the same time it is servicing states in the settlement of their disputes and it is also servicing the United Nations and through it, the international community.

In the past, the Court has been well aware of its specificity in this sense. In both its contentious and advisory capacity, it promoted the expansion of the powers of the Organisation. It affirmed the UN's international personality and it promoted the normative activity of its organs.

At the moment, when important changes have appeared in the international environment, with deep changes for the international law and relations, the Court faces one of its most important challenges: adaptation to this new global context.

The Charter's purposes and principles are not static – they have come to reflect the global values of the international community. These represent a move away from the traditional bilateralism and voluntarism which characterised traditional international law, to a more fluid system. One of the most significant developments of contemporary international law has been the development of a core of norms deemed fundamental, in the sense that they are directed to the protection of certain overriding universal values.

There has been a reconceptualization of the notion of threat to the peace. In several recent cases, the Security Council has gone beyond the traditional framework of interstate relations determining under article 39 of the Charter that ethnic cleansing, genocide and other gross violation of human rights, including the right to self-determination, as well as grave breaches of humanitarian law – in other words serious violations of fundamental norms of international law – constitute today the main threats to international peace and security.

On the other hand, some basic principles of international law, as the principle of non-interference in internal affaires are evolving. More and more the idea of the obligation to interfere in cases of massive human rights violations (le devoir d'ingerence pour des raisons humanitaires) is considered a normal development in international law.

The Court has not remained on the periphery of these changes and it is clearly enlisted in the process of shaping a constitutional law of the international community. A consistent proof for this is the quantity and the quality of

the Court's current docket. The recent cases before the court are evidence that States and international organisations are bringing the kinds of cases which directly or indirectly involve fundamental community values or interests: international terrorism (Lockerbie), self-determination and use of force (East Timor), genocide and self-defense (Application of the Genocide Convention), environment (Gabcikovo-Nagy Maros), legality of nuclear weapons.

Nevertheless, the jurisprudence of the Court has consistently shown that is does acknowledge these recent developments in international law. Certain of its pronouncements have shed light, not only on the *content* (self-determination, human rights, use of force) but on the *assumptions* underlying such fundamental norms. On a number of occasions, the Court has juxtaposed the traditional bilateralist structure of international law with the "collective" interest.

This way, it has underlined the non-syllagmatic nature of human rights treaties, from which it has drawn a number of implications. The Court has made reference to the concept of international community, as well as to that of the organised international community, personified by the United Nations. It has referred to the underlying ethical and moral values of the international community, as well as to the universality of certain general and well-recognized principles, such as considerations of humanity, general principles of humanitarian norms, notions of justice or of equity.

VII. CONCLUSIONS

Out of all these considerations we can only stand for the important role of the International Court of Justice and for its need to better adapt to the challenges of the present global context. We also have to mention that this is not only a desire, but also it comes to be a fact. This is a problem that the UN experts are seriously taking into account.

This way, the efforts for peace and stability ensuring around the globe will find the necessary support within an institution that supported the increased role of the international principle of common interest.

From the recognition of a common interest, the Court has been led to affirm not only that every State had a legal interest in the protection of certain obligations, but that they also had not only a right, but an *erga omnes* ***duty*** to react to certain situations of objective illegality. And this is the trend that the international community is following, so the Court proves to be able to maintain itself as a necessary institution of the 21st century.

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