

I. The Perception and Awareness of Common and Superior Interests of Humankind as Such

It is not suggested here that, at the present stage of evolution of International Law, humankind is replacing States as a subject of International Law. What is here asserted is that States are no longer the sole subjects of International Law; they nowadays coexist, in that condition, with international organizations and individuals and groups of individuals; and, moreover, humankind as such has also emerged as a subject of International Law. As a result, humankind coexists with States, without replacing them; and States can no longer regard the pursuance of their own interests as the sole motivation for the shaping of International Law. In fact, the pursuance of State interests has an impact on the effectiveness of International Law; but the interests of each individual State cannot make abstraction of, or prevail upon, the pursuance of the fulfilment of the general and superior interests of the international community in matters of direct concern to this latter (such as, e.g., disarmament, human rights and environmental protection, eradication of poverty, among others).¹

Experience shows that it is when such general interests are duly taken into account, and are made to prevail, by States as well as by other subjects of International Law, that this latter has progressed. It could hardly be denied that the advances of International Law in the last decades have been achieved when the general, superior interests of humankind have been properly acknowledged and given expression to (such as, e.g., in International Human Rights Law, in International Environmental Law, in the Law of the Sea, in the Law of Outer Space). States themselves have contributed to those advances, whenever they have placed basic considerations of humanity and the general interests of the international community as a whole above their own individual interests.

In this connection, the ultimate aim of *jus cogens* is precisely that of securing the prevalence of the interests and most fundamental values of the interna-

¹ A.A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Ed. Renovar, 2002, pp. 1068, 1083 and 1094-1095.

tional community as a whole.² The absolute prohibitions of grave violations of human rights indicate, for example, as recalled by M. Lachs, how

“mankind, or the international community, on its journey through history, found it necessary to outlaw once and for all certain actions (...). On this, the deniers and doubters have to agree, if they accept the basic premises of law and the imperative of its progress”.³

There are, in fact, international obligations pertaining to the safeguard of fundamental values of the international community itself, which are distinct from other international obligations; hence the emergence of concepts such as that of obligations *erga omnes*, ensuing from *jus cogens*, in contemporary International Law.⁴

The examination of humankind as a subject of International Law does not exhaust itself in the identification and assertion of its common and superior interests. It calls for the consideration of the fundamental principle of humanity and the basic considerations of humanity which nowadays mark presence in the whole *corpus juris* of International Law⁵ (with a conceptual precision), of the legal consequences of the emergence of humankind as a subject of International Law, of the relevance of the human rights framework, and, last but not least, of the question of humankind’s capacity to act and its legal representation.

II. The Fundamental Principle of Humanity

The treatment dispensed to human beings, in any circumstances, ought to abide by the *principle of humanity*, which permeates the whole *corpus juris* of International Law in general, and International Humanitarian Law in particular, conventional as well as customary. Acts which, – under certain international treaties or conventions, – were regarded as amounting to genocide, or as grave violations of International Humanitarian Law, were already prohibited even before the en-

2 B. Simma, “From Bilateralism to Community Interest in International Law”, 250 *Recueil des Cours de l’Académie de Droit International de La Haye [RCADI]* (1994) p. 289.

3 M. Lachs, “The Development and General Trends of International Law in Our Time”, 169 *RCADI* (1980) p. 205.

4 Cf. chapter XII, *infra*. – The classic vision of a sole and indifferentiated regime of international responsibility no longer corresponds to the present stage of evolution of the matter in contemporary International Law; V. Starace, “La responsabilité résultant de la violation des obligations à l’égard de la communauté internationale”, 153 *RCADI* (1976) pp. 272-275, and cf. pp. 289, 297 and 308. International crimes and violations of *jus cogens* (entailing *aggravated* international responsibility), given their particular gravity, affect the basic values of the international community as a whole. C. Tomuschat, “Obligations Arising for States without or against Their Will”, 241 *RCADI* (1993) p. 224, and cf. p. 307.

5 Cf. chapters XVI-XXIII, *infra*.

try into force of such treaties or conventions, by *general* international law. One may here invoke, in the framework of this latter, e.g., the universal recognition of the aforementioned principle of humanity.⁶ In the perennial lesson of a learned jusphilosopher, “if not the laws themselves, at least their content was already in force” before the perpetration of the atrocities of the XXth century, in distinct latitudes; in other words, added G. Radbruch,

“those laws respond, by their content, to a Law superior to the laws (...). Whereby we see how, by the turn of a century of legal positivism, that old idea of a Law superior to the laws is reborn (...). The way to reach the settlement of these problems is already implicit in the name that the philosophy of Law used to have in the old Universities and which, after many years of not being used, comes to reemerge today: in the name and in the concept of *natural law*”.⁷

It is not to pass unnoticed that the *ad hoc* International Criminal Tribunal for Rwanda [ICTR] rightly pondered, in the case of *J.-P. Akayesu* (Judgment of 02.09.1998), that the concept of crimes against humanity had already been recognized well before the Nuremberg Tribunal itself (1945-1946). The Martens clause contributed to that effect (cf. *infra*); in fact, expressions similar to that of those crimes, invoking victimized humanity, appeared much earlier in human history.⁸ The same ICTR pointed out, in the case *J. Kambanda* (Judgment of 04.09.1998), that in all periods of human history genocide has inflicted great losses to humankind, the victims being not only the persons slaughtered but humanity itself (in acts of genocide as well as in crimes against humanity).⁹

It can hardly be doubted the content of the condemnation of grave violations of human rights, of acts of genocide, of crimes against humanity, and of other atrocities, was already engraved in human conscience, well before their tipification or codification at international level, be it in the 1948 Convention against Genocide, or in other treaties of human rights or of International Humanitarian Law. Nowadays, international crimes are condemned by general as well as conventional International Law. This development has been fostered by

6 In this respect, it has already been pointed out that “it is increasingly believed that the role of International Law is to ensure a minimum of guarantees and of humanity for all, whether in time of peace or in time of war”; J. Pictet, *The Principles of International Humanitarian Law*, Geneva, ICRC, 1966, pp. 29-30.

7 G. Radbruch, *Introducción a la Filosofía del Derecho [Vorschule der Rechtsphilosophie]*, 3rd. Spanish edition, Mexico, Fondo de Cultura Económica, 1965, p. 180.

8 Paragraphs 565-566 of that Judgment.

9 Paragraphs 15-16 of that Judgment. An equal reasoning is found in the Judgments of the same Tribunal in the aforementioned case *J.P. Akayesu*, as well as in the case *O. Serushago* (Judgment of 05.02.1999, par. 15).

the universal juridical conscience, which, in my understanding, is the ultimate material source of all Law.¹⁰

Contemporary (conventional and general) international law has been characterized to a large extent by the emergence and evolution of its peremptory norms (the *jus cogens*), and a greater consciousness, in a virtually universal scale, of the principle of humanity.¹¹ Grave violations of human rights, acts of genocide, crimes against humanity, among other atrocities, are in breach of absolute prohibitions of *jus cogens*.¹² The feeling of *humaneness* – proper of a new *jus gentium*, of the XXIst century, – comes to permeate the whole *corpus juris* of contemporary International Law. I have called this development, – *inter alia* in my Concurring Opinion in the Advisory Opinion n. 16 (of 01.10.1999), of the Inter-American Court of Human Rights [IACtHR], on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, – a historical process of a true *humanization* of International Law.¹³

In its 1951 Advisory Opinion on the *Reservations to the Convention against Genocide*, the International Court of Justice [ICJ] sustained the recognition of the principles underlying that Convention as principles which are “binding on States, even without any conventional obligation”.¹⁴ In its *jurisprudence constante*, the IACtHR, in interpreting and applying the American Convention on Human Rights, has consistently invoked the general principles of law.¹⁵ The same has done the European Court of Human Rights [ECtHR], in its interpretation and

10 Cf., e.g., Inter-American Court of Human Rights [IACtHR], case of the *Massacre of Plan de Sánchez versus Guatemala* (merits, Judgment of 29.04.2004), Separate Opinion of Judge A.A. Cançado Trindade, par. 13; IACtHR, Advisory Opinion n. 18 (of 17.09.2003), on the *Juridical Condition and Rights of Undocumented Migrants*, Concurring Opinion of Judge A.A. Cançado Trindade, pars. 21-30.

11 T.O. Elias, “New Trends in Contemporary International Law”, in *Contemporary Issues in International Law* (eds. D. Freestone, S. Subedi y S. Davidson), The Hague, Kluwer, 2002, pp. 11-12.

12 Cf. M.C. Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd. ed. rev., The Hague, Kluwer, 1999, pp. 210-211 (with regard to crimes against humanity).

13 Paragraph 35 of the Concurring Opinion.

14 ICJ, *ICJ Reports* (1951) p. 23.

15 Cf., *inter alia*, e.g., IACtHR, case of the *Five Pensioners versus Peru* (Judgment of 28.02.2003), par. 156; IACtHR, Advisory Opinion n. 17, on the *Juridical Condition and Human Rights of the Child* (of 28.08.2002), pars. 66 and 87; IACtHR, Advisory Opinion n. 16, on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of 01.10.1999), pars. 58, 113 and 128. For a study, cf. A.A. Cançado Trindade, “La Convention Américaine relative aux Droits de l’Homme et le droit international général”, in *Droit international, droits de l’homme et juridictions internationales* (eds. G. Cohen-Jonathan and J.-F. Flauss), Bruxelles, Bruylant, 2004, pp. 59-71.

application of the European Convention on Human Rights.¹⁶ Among such principles, those endowed with a truly fundamental character form the *substratum* of the legal order itself, disclosing the *right to the Law* of which are *titulaires* all human beings.¹⁷ In the domain of the International Law of Human Rights, the fundamental principles of the *dignity of the human person* and of the *inalienability of the rights which are inherent to her* fall under this category. In its Advisory Opinion n. 18, on the *Juridical Condition of Undocumented Migrants* (2003), the IACtHR expressly referred to both principles.¹⁸

The prevalence of the principle of respect of the dignity of the human person is identified with the ultimate aim itself of Law, of the legal order, both national and international. By virtue of this fundamental principle, every person ought to be respected (in her honour and in her beliefs) by the simple fact of belonging to humankind, irrespective of any circumstance.¹⁹ The principle of the inalienability of the rights inherent to the human being, in its turn, is identified with a basic assumption of the construction of the whole *corpus juris* of the International Law of Human Rights. As to the principles of International Humanitarian Law, it has been convincingly argued that one should consider Humanitarian Law treaties as a whole as constituting the expression – and the development – of such general principles, applicable in any circumstances, so as to secure a better protection to those victimized.²⁰

In the *Mucic et alii* case (Judgment of 20.02.2001), the *ad hoc* International Criminal Tribunal for the Former Yugoslavia [ICTFY] (Appeals Chamber) pondered that both International Humanitarian Law and the International Law of Human Rights take as a “starting point” their common concern to safeguard human dignity, which forms the basis of their minimum standards of humanity.²¹ In fact, the principle of humanity can be understood in distinct ways. Firstly, it can be conceived as a principle underlying the prohibition of inhuman treatment, established by Article 3 common to the four Geneva Conventions of 1949. Secondly, the principle referred to can be invoked by reference to humankind as

16 Cf. L. Caflich and A.A. Cançado Trindade, “Les Conventions Américaine et Européenne des Droits de l’Homme et le droit international général”, 108 *Revue générale de Droit international public* (2004) pp. 5-62.

17 A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 524-525.

18 Par. 157 of that Advisory Opinion. In my own Concurring Opinion (pars. 1-89) in that Advisory Opinion, I made a detailed and extensive account of my own conception of the fundamental role and central position of the general principles of law in every legal system (national or international); cf. also chapter III, *supra*.

19 B. Maurer, *Le principe de respect de la dignité humaine et la Convention Européenne des Droits de l’Homme*, Paris, CERIC/Univ. d’Aix-Marseille, 1999, p. 18.

20 R. Abi-Saab, “Les ‘principes généraux’ du Droit humanitaire selon la Cour Internationale de Justice”, 766 *Revue internationale de la Croix-Rouge* (1987) pp. 386 and 389; and cf. Chapter III, *supra*.

21 Paragraph 149 of that Judgment.

a whole, in relation to matters of common, general and direct interest to it. And thirdly, the same principle can be employed to qualify a given quality of human behaviour (humaneness).

In the *Celebici* case (Judgment of 16.11.1998), the aforementioned ICTFY (Trial Chamber) qualified as *inhuman treatment* an intentional or deliberate act or omission which causes serious suffering (or mental or physical damage), or constitutes a serious attack on human dignity; thus, the Tribunal added,

“inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed ‘grave breaches’ in the Conventions fall”.²²

Subsequently, in the *T. Blaskic* case (Judgment of 03.03.2000), the same Tribunal (Trial Chamber) reiterated this position.²³ Reference has already been made to the relevance of the *Martens clause*,²⁴ which can here be reasserted.

III. Humankind and Considerations of Humanity: A Conceptual Precision

From the preceding considerations it can be promptly perceived that distinct meanings have been attributed to the term “humanity” in contemporary International Law, such as those found in the jurisprudential construction of the *ad hoc* ICTFY and the ICTR (*supra*). This construction is clear in associating “humanity” with the universal principle of respect for the dignity of the human person, or the sense of *humaneness*. The ECtHR and the IACtHR have expressed the same concern by extensively resorting to general principles of law in their converging *jurisprudence constante*. The ICJ has likewise resorted to “elementary considerations of humanity”, in a similar line of thinking.²⁵ The sense of humaneness and the concern with the needed respect for human dignity have thus marked their presence in the case-law of contemporary international tribunals.

When one comes, however, to consider the expansion of international legal personality, that is, the emergence of new subjects of today’s universal International Law, a conceptual precision is here rendered necessary. The expanded International Law of our days encompasses, as its subjects, apart from the States, also international organizations, and human beings, either individually or collectively, – disclosing a basic feature of what I see it fit to denominate the historical process of *humanization* of International Law. In the framework of this latter

22 Paragraph 543 of that Judgment.

23 Paragraph 154 of that Judgment.

24 Cf. chapter VI, *supra*.

25 A.A. Cançado Trindade, “La jurisprudence de la Cour Internationale de Justice sur les droits intangibles” in *Droits intangibles et états d’exception* (eds. D. Prémont, C. Stenersen and I. Oseredczuk), Bruxelles, Bruylant, 1996, pp. 53-71, and cf. pp. 73-88; and cf. chapter XVI, *infra*.

and in addition to those subjects, *humankind* has in my view also emerged as a subject of International Law.

The term “humankind” appears not as a synonym of “humanity” (*supra*), but endowed with a distinct and very concrete meaning: humankind encompasses all the members of the human species as a whole (including, in a temporal dimension,²⁶ present as well as future generations). In fact, there is nowadays a growing body of international instruments (treaties, declaratory and other resolutions, among others) containing express references to “mankind” or “humankind”, and attributing rights to it. There are nowadays some conceptual constructions in course to give concrete expression, with juridical consequences, to rights attributed to humankind.²⁷ It is likely that this conceptual development will intensify in the years to come. Up to the present, all this results from the aforementioned growing perception and awareness of common and superior interests, and of fundamental values shared by the international community as a whole.

IV. The Emergence of Humankind as a Subject of International Law

Along the evolution of contemporary International Law, the international legal personality, as already pointed out, became no longer the monopoly of the States. These latter, as well as international organizations and human beings (taken individually and collectively) became *titulaires* of rights and bearers of duties emanating directly from International Law.²⁸ And humankind has gradually come also to appear as a subject of contemporary International Law, of the new *jus gentium* of the XXIst century. Although this is a recent development, its roots go back to the legal thinking of the beginning of the second half of the XXth century, or even earlier.

It may be recalled that the “conscience of mankind” received judicial recognition already in the Advisory Opinion of 1951 of the ICJ on *Reservations to the Convention against Genocide*,²⁹ reappearing in the Draft Articles on the International Responsibility of States (of 1976) of the U.N. International Law Commission [ILC].³⁰ In doctrine, some of the first formulations of the common law of mankind were undertaken in the early XXth century, from the twenties³¹ onwards. In

26 Cf. chapter II, *supra*.

27 Cf. chapters XII-XV, *infra*. – And cf. [Various Authors,] *Crimes internationaux et juridictions internationales* (eds. A. Cassese and M. Delmas-Marty), Paris, PUF, 2002, pp. 71, 198 and 256, and cf. pp. 24, 26 and 259-261.

28 Cf. chapters VII-X, *supra*.

29 *ICJ Reports* (1951) p. 23.

30 With the inclusion of Article 19, on “international crimes” and “international delicts”; cf. United Nations, *Yearbook of the International Law Commission [YILC]* (1976)-II, part II, pp. 120-122 and 108-110. And cf., subsequently, provisions of the Draft Code of Offences against the Peace and Security of Mankind, of the same Commission; U.N., *YILC* (1986)-II, part I, pp. 56-57, and Draft Articles of 1991.

31 Cf. chapters I, III and VI, *supra*.

the late forties, Alejandro Álvarez stated that the population (as a constitutive element of statehood) had at last entered into international life, and what mattered most was the identification of the common interests of the international community as a whole; to the Chilean jurist, it was the international juridical conscience and the sentiment of justice that were to achieve the reconstruction of International Law.³²

This line of thinking was to be retaken, in a systematized way, by C.W. Jenks, in 1958,³³ and R.-J. Dupuy, in 1986,³⁴ among others; and in 1966, D. Evrigenis called for a new “universal law”.³⁵ On his turn, in a visionary article published in 1950, M. Bourquin called for the attribution to the international community of the function of “guardian of objective law”, above all in face of the threat of a “massified” civilization. The State itself acted – distinctly from the traditional conception – not solely in the pursuance of its own interest, but also as a member of such international community. The traditional voluntarist conception of International Law,

“en faisant de la volonté de l’État la seule force génératrice du droit, (...) déforme le phénomène juridique; (...) elle oublie que le droit est inhérent a toute société, qu’il existe là-même où aucune organisation étatique ne participe à son élaboration”.³⁶

The human problems which conform the contemporary international agenda have inevitably drawn increasing attention to the conditions of living of human beings everywhere, with a direct bearing in the construction of Law itself. Human beings were again to occupy a central place in the law of nations, – which led Bourquin to conclude that

“ni au point de vue de son objet, ni même au point de vue de sa structure, le droit des gens ne peut se définir comme un droit inter-étatique”.³⁷

32 A. Álvarez, “Méthodes de la codification du Droit international public – Rapport”, in *Annuaire de l’Institut de Droit International – Session de Lausanne (1947)* pp. 45-47, 50-51, 54, 63-64 and 68-70.

33 C.W. Jenks, *The Common Law of Mankind*, London, Stevens, 1958, pp. 1-442; and cf. C.W. Jenks, “The New Science and the Law of Nations”, in *Évolution et perspectives du droit international – Livre du centenaire de l’Institut de Droit International 1873-1973*, Bâle, Éd. S. Karger, 1973, pp. 330-346.

34 R.-J. Dupuy, *La communauté internationale entre le mythe et l’histoire*, Paris, Economica/UNESCO, 1986, pp. 11-182.

35 D. Evrigenis, “Institutionnalisation des droits de l’homme et droit universel”, *Internationales Colloquium über Menschenrechte* (Berlin, Oktober 1966), Berlin, Deutsche Gesellschaft für die Vereinten Nationen, 1966, pp. 26-34.

36 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. 35 and 45, and cf. pp. 21-54.

37 *Ibid.*, p. 54, and cf. p. 38.

Two decades later, in face of the developments in the law of outer space, there was support in expert writing for the view that the *comunitas humani generis* (which reflected the “moral unity of the human kind” in the line of the thinking of Francisco de Vitoria) already presented a juridical profile, rendering “humanity” itself a “subject of Law”, because “its existence as a moral and political unity” is an idea which “is progressively becoming reality with all the juridical implications that it entails”.³⁸ Ever since, this line of thinking has been attracting growing attention, at least on the part of the more lucid doctrine. To S. Sucharitkul, e.g., there is no reason to impede humanity to be subject of International Law, it being possible to that effect to be represented by the international community itself; this is a conception which is to prevail, through the *humanization* of international law, so as “to strengthen the juridical statute of the human being as subject of law” and to save humanity from an “imminent disaster” (the nuclear threat).³⁹

In the lucid observation of Nagendra Singh, the fact that, as time went on, concepts and norms of International Law have attained universal acceptance (in such domains as International Humanitarian Law, the law of treaties, diplomatic and consular law), independently of the multicultural composition of the international community, reveals the evolution of International Law towards universalization.⁴⁰ The need to research into the *status conscientiae* of the States was stressed by R. Quadri, who insisted on the international juridical conscience as the material source of the international legal order wherein pluralism prevailed.⁴¹ In Italian international legal doctrine, addressing the “unity of the juridical world”, a warning is found to the effect that

“il faut voir dans la conscience commune des peuples, ou conscience universelle, la source des normes suprêmes du droit international. (...) Les principes qui s’inscrivent dans la conscience universelle (...) sont à considérer comme également présents dans les ordres juridiques internes (...)”.⁴²

38 L. Legaz y Lacambra, “La Humanidad, Sujeto de Derecho”, in *Estudios de Derecho Internacional Público y Privado – Homenaje al Profesor L. Sela Sampil*, vol. II, Oviedo, Universidad de Oviedo, 1970, p. 554, and cf. pp. 549-559.

39 S. Sucharitkul, “L’humanité en tant qu’élément contribuant au développement progressif du Droit international contemporain”, *L’avenir du Droit international dans un monde multiculturel* (Colloque de La Haye de 1983, ed. R.-J. Dupuy), La Haye, Nijhoff/Académie de Droit International de La Haye, 1984, pp. 419 e 425-427.

40 Nagendra Singh, “The Basic Concept of Universality and the Development of International Law”, *L’avenir du Droit international dans un monde multiculturel*, op. cit. supra n. (38), pp. 240-241, 246 and 256-257.

41 R. Quadri, “Cours général de Droit international public”, 113 *RCADI* (1964) pp. 326, 332, 336-337, 339 and 350-351.

42 G. Sperduti, “La souveraineté, le droit international et la sauvegarde des droits de la personne”, in *International Law at a Time of Perplexity – Essays in Honour of S. Rosenne*, Dordrecht, Nijhoff, 1989, pp. 884-885.

The rights of humanity transcend, by definition, reciprocity, proper of relations at the purely inter-State level.⁴³ It has been contended that the international community should guide itself in the sense of restructuring the international system so as to secure the survival and well-being of humankind as a whole.⁴⁴

The ILC, while elaborating its Draft Code of Offences against the Peace and Security of Mankind, advanced the understanding (in 1986) that it was possible to conceive a crime against humanity “in the threefold sense of cruelty directed against human existence, the degradation of human dignity and the destruction of human culture”. The individual being a guardian of basic ethical values and a custodian of human dignity, an attack that he suffered could amount to a crime against humanity to the extent that such attack came to shock “human conscience”; one could thus find, – in the outlook of the ILC, – a “natural link” between the human kind and the individual, one being “the expression of the other”, what led to the conclusion that the term “humanity” (in the expression “crime against humanity”) meant the human kind as a whole and “in its various individual and collective manifestations”.⁴⁵

In fact, already in the beginnings of International Law, recourse was made to “fundamental notions of humanity” which governed the conduct of States. What subsequently was denominated “crimes against humanity” emanated, originally, from customary International Law,⁴⁶ to develop conceptually, later on, in the ambit of International Humanitarian Law,⁴⁷ and, more recently, in that of International Criminal Law.⁴⁸ Crimes against humanity are today tipified in the Rome Statute of the permanent International Criminal Court (Article 7).⁴⁹ We

43 P.-M. Dupuy, “Humanité, communauté, et efficacité du Droit”, in *Humanité et Droit international – Mélanges René-Jean Dupuy*, Paris, Pédone, 1991, p. 137.

44 Ph. Allott, “Reconstituting Humanity – New International Law”, 3 *European Journal of International Law* (1992) pp. 219-252, esp. p. 251; and cf. Ph. Allott, *Eunomia – New Order for a New World*, Oxford, University Press, 1990, pp. 10 and 186.

45 U.N., *YILC* (1986)-II, part I, pp. 56-57.

46 S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law*, Oxford, Clarendon Press, 1997, pp. 45-48.

47 Cf. J. Pictet, *Développement et principes du Droit international humanitaire*, Genève/Paris, Inst. H.-Dunant/Pédone, 1983, pp. 107 and 77; C. Swinarski, *Principales Nociones e Institutos del Derecho Internacional Humanitario como Sistema Internacional de Protección de la Persona Humana*, San José of Costa Rica, IIDH, 1990, p. 20.

48 Cf. D. Robinson, “Defining ‘Crimes against Humanity’ at the Rome Conference”, 93 *American Journal of International Law* (1999) pp. 43-57; and, for the historical antecedents, cf., e.g., H. Fujita, “Le crime contre l’humanité dans les procès de Nuremberg et de Tokyo”, 34 *Kobe University Law Review* (2000) pp. 1-15.

49 Cf., e.g., R.S. Lee (ed.), *The International Criminal Court – The Making of the Rome Statute*, The Hague, Kluwer, 1999, pp. 30-31 and 90-102; M.C. Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd. rev. ed., The Hague, Kluwer, 1999, pp. 332 and 363-368.

are, here, in the domain of *jus cogens*.⁵⁰ In the occurrence of such crimes victimizing human beings, humanity itself is likewise victimized. This has in fact been expressly acknowledged by the ICTFY in the *Tadic* case (1997), wherein it held that a crime against humanity is perpetrated not only against the victims themselves, but against humanity as a whole. Again in the *Erdemovic* case (1996), the Tribunal sustained that crimes against humanity “shock the collective conscience”, harm human beings and transcend them, as humanity itself becomes a victim of them.⁵¹

Significant indications pointing towards a common law of mankind can be found in several treaties in force, in distinct domains of International Law. The notion of cultural heritage of mankind, for example, can be found, e.g., in the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage.⁵² In the ambit of International Environmental Law, ever since the 1972 Stockholm Declaration of the U.N. Conference on the Human Environment referred to the “common good of mankind” (Principle 18), examples in this same line have multiplied themselves, in numerous treaties whereby States Parties contracted obligations in the common superior interest of humankind.⁵³ It so happens that mankind gradually emerges, and is acknowledged, in contemporary International Law, and increasingly so, as a subject of rights in distinct domains (such as, e.g., International Human Rights Law, International Criminal Law, International Environmental Law, international regulation of spaces, among others). A distinct aspect, – the proper treatment of which remaining still to be undertaken, – is that of its capacity to act.

50 M.C. Bassiouni, “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*”, 59 *Law and Contemporary Problems: Accountability for International Crimes and Serious Violations of Fundamental Human Rights* (1996) pp. 67-74.

51 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. 111-112.

52 Preceded by, e.g., the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

53 E.g., examples in chapter XIII, *infra*. In addition, another example is found implicit in references to “human health” in some treaties of environmental law, such as, e.g., the Vienna Convention for the Protection of the Ozone Layer (of 1985), preamble and Article 2; the Montreal Protocol on Substances that Destroy the Ozone Layer (of 1987), preamble; and Article 1 of the three aforementioned Conventions on marine pollution.

V. Legal Consequences of the Acknowledgement of Humankind as Subject of International Law

1. The Relevance of the Human Rights Framework

Recourse to the very notion of humankind as subject of International Law promptly brings into the fore, or places the whole discussion within, the human rights framework, – and this should be properly emphasized, it should not be left implicit or neglected as allegedly redundant. Just as law, or the rule of law itself, does not operate in a vacuum, humankind is neither a social nor a legal abstraction: it is composed of human collectivities, of all human beings of flesh and bone, living in human societies and extended in time. Just as a couple of decades ago there were questions which were “withdrawn” from the domestic jurisdiction of States to become matters of *international* concern (essentially, in cases pertaining to human rights protection and self-determination of peoples),⁵⁴ there are nowadays global issues (such as climate change) which are being erected as *common* concern of mankind.

Here, again, the contribution of international human rights protection and environmental protection heralds the end of reciprocity and the emergence of *erga omnes* obligations. The human rights framework is ineluctably present in the consideration also of the system of protection of the human environment in all its aspects; we are here ultimately confronted with the crucial question of survival of the humankind, with the assertion – in face of threats to the human environment – of the fundamental human right to live.

2. The Question of the Capacity to Act and Legal Representation

A subject of law is generally regarded as a bearer of rights and duties conferred upon him, also endowed with the capacity to act. While it is clear today that humankind is the addressee of international norms and has emerged as a subject of International Law (the law of the *comunitas humani generis*), its capacity to act is still *in statu nascendi*; this raises the issue of its legal representation. In this connection, the most advanced form of representation achieved to date, despite its shortcomings and setbacks (*supra*), is that of the 1982 U.N. Convention on the Law of the Sea,⁵⁵ given the degree of institutionalization achieved (through the creation of the International Seabed Authority).

We are at the beginning of a conceptual construction which may still take a long time and considerable endeavours. The conception of humankind, in a time

54 Cf. chapter VII, *supra*.

55 Cf. A. Blanc Altemir, *El Patrimonio Común de la Humanidad – Hacia un Régimen Jurídico Internacional para Su Gestión*, Barcelona, Bosch, 1992, pp. 37-44 and 243-244; S. Paquerot, *Le statut des ressources vitales en Droit international – Essai sur le concept de patrimoine commun de l’humanité*, Bruxelles, Bruylant, 2002, pp. 91-92; and cf. chapter XIII, *infra*.

framework encompassing present and future generations, presents the double advantage of not neglecting the time factor⁵⁶ and not isolating one generation from the others. This would lead to the difficulty, already detected in expert writing, of asserting rights of future generations, which do not yet exist and may be rather remote in time; yet, it is quite conceivable to establish, among the living, legal representation on behalf of humankind, comprising its present and future segments.⁵⁷

The overriding principle of human solidarity holds the living, the present generation, accountable to the unborn (future generations, for the stewardship of the common heritage or concern of humankind, so as not to leave to those who are still to come the world in a worse condition than it found it. After all,

“We all live in time. The passing of time affects our juridical condition. The passing of time should strengthen the bonds of solidarity which link the living to their dead, bringing them closer together. The passing of time should strengthen the ties of solidarity which unite all human beings, young and old, who experience a greater or lesser degree of vulnerability in different moments along their existence. (...) In a general way, it is at the beginning and the end of the existential time that one experiences greater vulnerability, in face of the proximity of the unknown (...)”⁵⁸

We are here still in the first steps, and there remains of course a long way to go in order to attain a more perfected and improved system of legal representation of humankind in International Law, so that the rights recognized to it thus far can be properly vindicated on a widespread basis. In my understanding, the present limitations of the capacity to act on behalf of humankind itself at international level in no way affect its emerging legal personality, its condition of subject of International Law. As I saw it fit to state in my Concurring Opinion in the Advisory Opinion n. 17 of the IACtHR, on the *Juridical Condition and Human Rights of the Child* (2002), the international juridical personality of all human beings remains intact, irrespective of the existential condition⁵⁹ or limitations of the juridical capacity to exercise their rights for themselves; what ultimately matters is that they all have the right to a legal order (at domestic as well as international levels) which effectively protects the rights inherent to them (paragraph 71). And this applies to all human beings as well as to humankind as a whole.

56 Cf. chapter II, *supra*.

57 Cf. discussion and suggestions *in*: [Various Authors,] *Future Generations and International Law* (eds. E. Agius, S. Busuttill *et alii*), London, Earthscan Publs., 1998, pp. 3-165.

58 IACtHR, Advisory Opinion n. 17 (of 28.08.2002) on the *Juridical Condition and Human Rights of the Child*, Concurring Opinion of Judge A.A. Cançado Trindade, pars. 4-5.

59 E.g., children, elderly persons, persons with disability, stateless persons, or any other.

In any case, the modest and slow advances so far achieved towards a regime of legal representation of humankind, – which are bound to progress in the years to come, – added to the recognition of its condition as subject of International Law, constitute yet another manifestation of the current process of *humanization* of Public International Law. The original conception of *totus orbis* of Francisco de Vitoria in the XVth century has ever since paved the way for the formation and crystallization of the notions of an international community as a whole and of a true universal International Law,⁶⁰ having humankind as such among its subjects. That conception can and should be revived in our troubled times, in the context of the circumstances of the contemporary international scenario, if we really wish to leave a better world to our descendants.⁶¹ In my view, we have already entered into the *terra nova* of the new *jus gentium* of the early XXIst century, the International Law for humankind.

60 We have already reached a stage of evolution of our discipline which has surely transcended the fragmented *jus inter gentes* of the not too distant past.

61 Cf. F. de Vitoria, *Relecciones del Estado, de los Indios, y del Derecho de la Guerra* (with an Introduction by A. Gómez Robledo), Mexico, Ed. Porrúa, 1985, pp. XLV and LXXXIV.