CHAPTER 2

The Contribution of Judge Antônio Augusto Cançado Trindade to the Adjudication of International Human Rights at the International Court of Justice

*Robert P. Barnidge, Jr.**

1 Introduction

Christopher Waters, in the Introduction to this book, pays tribute to the considerable contribution that Professor Sandy Ghandhi made to legal scholarship, teaching and advocacy, particularly, though not exclusively, in the area of human rights law. The present author fully agrees with this assessment and has himself drawn upon Ghandhi's insights in his own writing.[1] He would be remiss, however, not to also express his personal gratitude to Ghandhi for mentoring him when he began his academic career as a lecturer in the School of Law at the University of Reading (2007–12). Intellectually, of course, Ghandhi was first class, but what most remains with the present author after over five years as one of Ghandhi's mentees is his modesty, as well as his gentle nature and kindness. Perhaps this was because Ghandhi sensed that a commitment to human rights, understood holistically, is not simply about challenging the powerful to "humanise" their rule, though it is surely this, but also extends to caring for specific men and women as one encounters them in one's daily life, at a personal level. It is a privilege to be able to contribute to this collection of essays in honour of Ghandhi.

In line with the theme of this *festschrift*, this chapter examines Brazilian Judge Antônio Augusto Cançado Trindade's contribution to the adjudication of international human rights at the International Court of Justice (ICJ). Since

* The author is grateful to Dr Reuven (Ruvi) Ziegler for his comments on an earlier draft of this chapter. All errors remain those of the author, as do the views expressed.

1 See, for example, Robert P. Barnidge, Jr., "The International Law of Negotiation as a Means of Dispute Settlement," *Fordham International Law Journal* 36, 3 (2013): 554, at note 46.

beginning his term of office in February 2009, Judge Cançado Trindade has distinguished himself as one of the most progressive, indeed, radical, voices on the bench. Consistent with his previous work at the Inter-American Court of Human Rights, Judge Cançado Trindade's jurisprudence at the ICJ has shown a reflexive hostility to the *raison d'État* and an impatience with procedural and substantive norms and practices that reify anything other than what he describes as the "human conscience, the universal juridical conscience, [...] the ultimate material 'source' of all Law, and of the new *jus gentium* of our times."[2] His is a jurisprudence that critiques the idea of the State as international legal subject *par excellence*, a jurisprudence that seeks to "speak truth to power" on behalf of individuals often at their most vulnerable. This chapter focuses on two aspects of Judge Cançado Trindade's ICJ jurisprudence in particular, namely the manner in which it aims to reorient international law away from State consent to the service of universal values and Judge Cançado Trindade's understanding of the law of diplomatic protection.

2 Reorienting International Law away from State Consent to the Service of Universal Values

A consistent theme in Judge Cançado Trindade's jurisprudence at the ICJ has been its concern with the proper role of the State. Inevitably, this has led to questions of the State's legitimacy *as an institution* and, more specifically, the basis upon which it can legitimately wield its coercive authority and benefit from the rights and obligations that adhere to it as an international legal person. This jurisprudence instinctively sees in the State a historiography of hysteria, a history of oppression and misdeeds, and for this reason, it inclines toward ethical and moral justifications for law.[3] In the cosmic "opposition of natural law – emanating from the *recta ratio* – to positive law (*jus positum*), in

2 *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), 2010 I.C.J. 14, 161 (20 Apr.) (Cançado Trindade, J., separate).

3 In particular, see Judge Cançado Trindade's thoughts on the role of the State in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 403 (22 July) (Cançado Trindade, J., separate).

the longing for justice,"[4] it is clear that Judge Cançado Trindade sides decidedly in favour of the former.[5]

For legal positivists, of course, the crux of any legitimacy that international law can command, and any concomitant obligation to obey, lies in the concept of "consent," the "metaprinciple of sovereign liberty."[6] The idea here is that States have consented to, and continue to consent to, international law as such, the *idea* of international law, *an* international law, and also that they have consented to, and continue to consent to, specific international legal obligations. Although never quite explaining why consent, once given, should somehow be irrevocable,[7] positivists contend that consent, once demonstrated, justifies fealty to particular legal norms. For them, the *tabula rasa* of law was swept

4 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russia), Preliminary Objections, 2011 I.C.J. 70, 306 (1 Apr.) (Cançado Trindade, J., dissenting). For some of international law's other methodological possibilities, see Anne-Marie Slaughter and Steven R. Ratner, "Appraising the Methods of International Law: A Prospectus for Readers," *American Journal of International Law* 93, 2 (1999): 293–295 (relating, *inter alia*, the policy-oriented jurisprudence of the New Haven School, international legal process, critical legal studies, international law/international relations, feminist jurisprudence and law and economics).

5 Indeed, in his 2005 General Course on Public International Law at The Hague Academy of International Law, Judge Cançado Trindade, then Judge of the Inter-American Court of Human Rights and not yet at the International Court of Justice (ICJ), put forward one of the most sustained and cogent critiques of positivism in the context of international law. See Antônio Augusto Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* (I): General Course on Public International Law," in 316 *Collected Courses of The Hague Academy of International Law* (Leiden: Martinus Nijhoff Publishers, 2005), 9–440; Antônio Augusto Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* (II): General Course on Public International Law," in 317 *Collected Courses of The Hague Academy of International Law* (Leiden: Martinus Nijhoff Publishers, 2005), 9–312. A revised second edition of Judge Cançado Trindade's General Course was published as: Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New* Jus Gentium (Leiden: Martinus Nijhoff Publishers, 2013).

6 Martti Koskenniemi, "The Politics of International Law," *European Journal of International Law* 1 (1990): 13. See Prosper Weil, "Towards Relative Normativity in International Law?," *American Journal of International Law* 77, 3 (1983): 420–421 (discussing this idea within the context of, as he describes them, voluntarism, neutrality and positivism). See Slaughter and Ratner, *supra* note 4, at 293.

7 See Robert P. Barnidge, Jr., "Neocolonialism and International Law, With Specific Reference to Customary Counterterrorism Obligations and the Principle of Self-Defence," *Indian Journal of International Law* 49, 1 (2009): 28–29.

clean at international law's inception. As the Permanent Court of International Justice (PCIJ) put it in the *Case of the ss Lotus* (*Lotus*), the presumption lies very much against restrictions on the freedom of States, with "[t]he rules of law binding upon States […] emanat[ing] from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims."[8]

Let us consider the two sources of law that the PCIJ referred to in *Lotus*, international treaty law and customary international law. The foundation of the modern law of treaties, the 1969 Vienna Convention on the Law of Treaties (VCLT), very much reflects positivist concerns and understandings of law.[9] According to it, not only do States possess an international legal personality sufficient to conclude treaties,[10] the principle of "free consent" is said to be "universally recognized."[11] Consent appears both positively, tying together States and obligations through the *pacta sunt servanda* principle,[12] and negatively, as a defence to such encumbrances.[13] Although treaties have no terminal date as such according to general international law, the VCLT preserves the centrality of consent through such provisions as those that govern a "fundamental change of circumstances"[14]: original intent is reinforced as a reference point for legal obligation. The VCLT's codification of the concept of peremptory norms of general international law, or *jus cogens*, also, at least in part, reflects a consent-centric notion of international legal obligation, though the focus here is not with determining consent as regards a single State but, rather, with assessing whether a particular norm enjoys sufficient acceptance and recognition "by the international community of States as a whole."[15] The will of States undergirds an understanding of international legal obligation.

8 *Case of the SS Lotus* (France v. Turkey), 1927 P.C.I.J., Ser. A, No. 10, at 18 (7 Sept.). For a critique of *Lotus*, see *Kosovo*, *supra* note 3 (Simma, J., declaration).

9 Compare Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Vienna, 21 Mar. 1986.

10 See Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, art. 6.

11 *Ibid.* at pmbl.

12 See *ibid.* at art. 26.

13 See, for example, the VCLT's rules in articles 34–38 regarding rights and obligations for third States.

14 See *ibid.* at art. 62.

15 *Ibid.* at art. 53. Of course, there are also very clear natural law dimensions to *jus cogens*. Judge Cançado Trindade, for example, has argued that obligations *erga omnes*, and the

Customary international law, the second source of law that the PCIJ referred to in *Lotus*, appears in article 38(1)(b) of the Statute of the ICJ as "evidence of a general practice accepted as law."[16] As with international treaty law, here, too, notions of consent underlie the basis for legal obligation, with article 38(1)(b) stressing that the relevant practice must be "*accepted* as law." To be sustainable, a customary norm must satisfy both a State practice element and a psychological, mental element, the latter of these being the sense that States feel that they are acting or refraining from acting out of a sense of legal obligation. It is this second element that most clearly reflects the positivist streak, though this is reinforced by the need for "constant and uniform usage practised by the States in question."[17] As the ICJ put it in *North Sea Continental Shelf*, the acts at issue must "be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*."[18] It was precisely by engaging with this methodology of State practice and *opinio juris* that the ICJ, in methodological fashion, discerned the customary contours of Germany's immunity as a State in *Jurisdictional Immunities of the State* (*Jurisdictional Immunities*).[19]

Where positivism places a premium on consent and presumes a State's freedom to act as it wishes absent a demonstration that it has agreed otherwise, natural law theorists such as Judge Cançado Trindade refuse to perceive of an

---

related concept of *jus cogens* norms, "clearly transcend the individual consent of States, heralding the advent of the international legal order of our times, committed to the prevalence of superior common values, in the ongoing construction of the international law for humankind." *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Provisional Measures, Order, 2009 I.C.J. 139, 190 (28 May) (Cançado Trindade, J., dissenting).

16 Statute of the International Court of Justice, art. 38(1)(b).

17 *Colombian-Peruvian Asylum Case* (Colombia v. Peru), 1950 I.C.J. 266, 276 (20 Nov).

18 *North Sea Continental Shelf* (Federal Republic of Germany/Denmark) (Federal Republic of Germany/the Netherlands), 1969 I.C.J. 3, 44 (20 Feb.).

19 See *Jurisdictional Immunities of the State* (Germany v. Italy; Greece intervening), 2012 I.C.J., at ¶ 55 (3 Feb.) (putting forth the black letter law of the methodology of customary international law in this context). See also *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, 2011 STL-11-01/I, at ¶ 102 (16 Feb.). The International Law Commission (ILC), under the special rapporteurship of Sir Michael Wood, is currently studying the topic identification of customary international law. See First Report on Formation and Evidence of Customary International Law, International Law Commission, 65th Sess., 6 May-7 June and 8 July-9 August 2013, U.N. Doc. A/CN.4/663 (2013).

international legal order with purely voluntarist moorings. According to them, the new paradigm that the United Nations Charter ushered into being cannot sustain itself on a purely contractual basis. The fear here is that the "higher values" of the post-war era, the values of human rights, peace and security, sustainable development and economic concern, will inevitably have to be sacrificed in a world order understood in purely horizontal terms and that a vertical "reference point" is needed to "check" the "egoistic impulses" of States. Judge Cançado Trindade captured this idea well in the final passages of his dissenting opinion in the preliminary objections phase of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (*Georgia*): "consent is not 'fundamental', it is not even a 'principle'";[20] furthermore, "*conscience stands above the will*."[21] In this vision, consent acts, or at least *can* act, as but an encumbrance to the great project of international law.

Judge Cançado Trindade's particular vision of natural law arose very clearly in *Jurisdictional Immunities* with respect to the "right of access to justice."[22] It will be recalled that the primary issue in that case was the customary contours of Germany's immunity as a State. After recognising that Germany and Italy had "basic and opposing positions,"[23] Judge Cançado Trindade found against Germany. He did so, however, not after having meticulously engaged with State practice and *opinio juris* on the matter, as the ICJ did, but, rather, by reaching his sought-after conclusion and then patching together an *ad hoc* methodological justification for it.[24] It seemed that established sources of law could be, indeed, *should* be, transcended and jettisoned,[25] which is to say, the sources of

20 *Georgia*, *supra* note 4, at 321 (Cançado Trindade, J., dissenting).

21 *Ibid.* at 322 (Cançado Trindade, J., dissenting).

22 *Jurisdictional Immunities*, *supra* note 19, at ¶ 221 (Cançado Trindade, J., dissenting) (stating that the "right of access to justice *lato sensu* comprises not only the formal access to justice (the right to institute legal proceedings), by means of an effective remedy, but also the guarantees of the due process of law (with equality of arms, conforming the *procès équitable*), up to the judgment (as the *prestation juridictionnelle*), with its faithful execution, with the provision of the reparation due"). See G.A. Res. 67/1, at ¶¶ 11, 14–16, U.N. Doc. A/RES/67/1 (2012) (also stressing the importance of the right of access to justice).

23 *Jurisdictional Immunities*, *supra* note 19, at ¶ 79 (Cançado Trindade, J., dissenting).

24 This is not altogether surprising given that, in an article published in the *Cambridge Journal of International and Comparative Law* in 2012, Judge Cançado Trindade claimed that the State-centric nature of customary international law was no longer controlling as a methodological framework. See Antônio Augusto Cançado Trindade, "The Historical Recovery of the Human Person as Subject of the Law of Nations," *Cambridge Journal of International and Comparative Law* 1, 3 (2012): 16–19.

25 See *Jurisdictional Immunities*, *supra* note 19, at ¶ 148 (Cançado Trindade, J., dissenting).

law that States had agreed to be bound by in litigation before the ICJ were seen as being in and of themselves neither dispositive nor controlling.[26] As Judge Cançado Trindade's dissenting opinion in *Georgia* put it, "issues of principle" are more important than "evidence,"[27] and State consent can act as an obstacle to the adjudication of international human rights.[28]

If, for Judge Cançado Trindade, the right of access to justice is to be the lodestar in the adjudication of international human rights, then certain obvious questions arise. Whose "justice" is to be preferred, and on what basis? If what is "just" is to replace (rigid) adherence to established sources of law, then how are States to know what the law *is?* Will this mean that the sought-after ends of law will have effectively replaced its means, that is, its methodological processes? If so, what will the effects of this be for the principle of legality? Koskenniemi has expressed the liberal scepticism that "[a]ppealing to principles which would pre-exist man and be discoverable only through faith or *recta ratio* was to appeal to abstract and unverifiable maximums which only camouflaged the subjective preferences of the speaker. It was premised on utopian ideals which were constantly used as apologies for tyranny."[29] If a vague recourse to "human conscience [that] stands above the will of States"[30] is to be determinative, if States are to be "civilised" by "taming" their consent, then how does this differ from a perhaps all too easy recourse to that "brooding omnipresence in the sky,"[31] the dictates of which would hardly seem to be justiciable? Cannot this concern with natural law be said to be but subterfuge, merely a "religion which has changed its supreme beings?"[32]

---

26 Methodological rigidity was also suspect. See *ibid.* at ¶¶ 288–299 (Cançado Trindade, J., dissenting).

27 *Georgia*, *supra* note 4, at 314 (Cançado Trindade, J., dissenting).

28 See *ibid.* at 316 (Cançado Trindade, J., dissenting).

29 Koskenniemi, *supra* note 6, at 5. Compare Michael J. Glennon, "The Blank-Prose Crime of Aggression," *Yale Journal of International Law* 35, 1 (2010): 114 (questioning how "reasonable, well-intentioned jurists from different societies [can] identify the content of natural law in any culturally neutral, objectively useful sense").

30 *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), 2012 I.C.J., at ¶ 166 (20 July) (Cançado Trindade, J., separate).

31 *Southern Pacific Company v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

32 Georgii Plekhanov, "Anarchist Doctrine," in *Communism: Basic Writings*, edited by Anne Jackson Freemantle (New York: Mentor, 1970), 227.

3 The Law of Diplomatic Protection and the Adjudication of International Human Rights

Although there are numerous examples from Judge Cançado Trindade's ICJ jurisprudence of natural law thinking informing the adjudication of international human rights,[33] it is only possible here to focus on the law of diplomatic protection. The law in this area, it is well-known, has not (yet) been codified in treaty form. This means, of course, that one must turn to customary international law to ascertain its normative content.[34] The PCIJ's 1924 statement in *Mavrommatis Palestine Concessions* (*Mavrommatis*) remains the classic one: "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law."[35]

This language in *Mavrommatis* is striking in that it conceptualises a State's nationals as being its "subjects," a notion that clearly reinforces the idea of the State as being situated in a hierarchically superior position to its nationals. To be "in reality asserting its own rights" implies that the State's nationals have been stripped of their rights, if, indeed, international law recognised them as having had such rights in the first place. As traditionally understood, then, the law of diplomatic protection engages with the national as one might adjudicate a property dispute, and the rights and obligations that disputing parties might assert with respect to such property in an adversarial setting. It is certainly a dehumanising manoeuvre since it recognises no independent status as such for the individual.[36]

---

33 See, for example, *Ahmadou Sadio Diallo* (Guinea v. Democratic Republic of the Congo), 2010 I.C.J. 639, 755–759 (30 Nov.) (Cançado Trindade, J., separate) (articulating a "hermeneutics of human rights treaties"). For Ghandhi's thoughts on Judge Cançado Trindade's "hermeneutics of human rights treaties" in *Diallo*, see Sandy Ghandhi, "Human Rights and the International Court of Justice: The *Ahmadou Sadio Diallo* Case," *Human Rights Law Review* 11, 3 (2011): 549–551.

34 Article 44 of the ILC's 2001 Articles on Responsibility of States for Internationally Wrongful Acts codifies the two requirements of a claim for diplomatic protection, namely nationality and exhaustion of "available and effective" local remedies. See Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, in 2(2) Yearbook of the International Law Commission 20, 120, art. 44, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (2001).

35 *Mavrommatis Palestine Concessions* (Greece v. United Kingdom), 1924 P.C.I.J., Ser. A, No. 2, at 12 (30 Aug.). See Chittharanjan F. Amerasinghe, *Diplomatic Protection* (Oxford: Oxford University Press, 2008), 21–27; Ghandhi, *supra* note 33, at 553–555.

36 The ILC's 2006 Articles on Diplomatic Protection recognise various types of nationals, with natural persons being but one such type. Nationality is discussed in articles 3–13, in

In November 2010, the ICJ rendered its judgment in *Ahmadou Sadio Diallo* (*Diallo*).[37] Guinea had brought suit in this case against the Democratic Republic of the Congo (DRC), alleging that the DRC had violated its obligations with respect to the protection of Guinean national Ahmadou Sadio Diallo's rights as an individual and his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire. The ICJ rejected Guinea's allegations with respect to his direct rights as *associé* in Africom-Zaire and Africontainers-Zaire.[38] With respect to his rights as an individual, it held that between 1995 and 1996 the DRC had violated its obligations under articles 9(1)-(2) and 13 of the 1966 International Covenant on Civil and Political Rights, articles 6 and 12(4) of the 1981 African Charter on Human and Peoples' Rights and article 36(1)(b) of the 1963 Vienna Convention on Consular Relations,[39] though the ICJ found Guinea's allegations with respect to arrest and detention measures that the DRC had taken between 1988 and 1989 to be inadmissible on procedural grounds.[40] The ICJ saw its judgment as a form of satisfaction and ordered Guinea and the DRC to negotiate a precise amount of compensation within six months that the DRC would then have to pay to Guinea as reparation for the injury suffered.[41] In the event, the two States were unable to do this, and the ICJ ended up ordering the DRC in June 2012 to pay US$95,000 to Guinea, with annual interest of 6 percent to accrue from 1 September 2012 for any amount left unpaid by then.[42]

Ghandhi described Judge Cançado Trindade's separate opinion in *Diallo* as a "breath-takingly wide-ranging opinion on a number of both specific and broad-ranging issues, even outwith the strict confines of that necessitated by the case."[43] Certainly, Judge Cançado Trindade viewed the case as having a

---

Part II: Nationality. See Articles on Diplomatic Protection, With Commentaries, in Report of the International Law Commission, 58th Sess., 1 May-9 June and 3 July-11 August 2006, at 22, 30–70, U.N. Doc. A/61/10 (2006).

37 For Ghandhi's commentary on the case, see Ghandhi, *supra* note 33, at 527–555.

38 See *Diallo*, *supra* note 33, at 673–691.

39 See *ibid.* at 659–673. The ICJ rejected Guinea's allegation with respect to the prohibition on subjecting Diallo to mistreatment on the grounds that Conakry had failed to meet its burden. See *ibid.* at 670–671.

40 See *ibid.* at 652–659.

41 See *ibid.* at 691–692. Ghandhi looked favourably on the ICJ's approach with respect to the negotiation of compensation. See Ghandhi, *supra* note 33, at 552–553.

42 See *Ahmadou Sadio Diallo* (Guinea v. Democratic Republic of the Congo), Compensation, 2012 I.C.J. (19 June). See also Geir Ulfstein, "Awarding Compensation in a Fragmented Legal System: The *Diallo* Case," *Journal of International Dispute Settlement* 4, 3 (2013): 477–485.

43 Ghandhi, *supra* note 33, at 549.

momentous constitutional significance, seeing it as spurring on a "new era of international adjudication of human rights cases by the ICJ."[44] Even though it was due to the fortuitousness of a State's decision to press a claim against another State that led to the finding against the DRC in *Diallo* and the uncontested fact that Diallo would clearly have had no standing before the ICJ had he attempted to make a case *proprio motu*, Judge Cançado Trindade hailed the "instrumental role"[45] that the "traditional instrument"[46] of diplomatic protection had played.[47] *Diallo* also seemed to be an "end of history" moment for Judge Cançado Trindade in that one could seemingly identify in it and previous ICJ jurisprudence the "irreversibility of the advance of humanization, in the present domain of international law [which…] leaves no room for steps backwards, or hesitations."[48] In effect, then, Judge Cançado Trindade saw in *Diallo* the upending of *Mavrommatis*, which, in any event, he dismissed as "not a principle, simply a largely surpassed fiction."[49] Diallo was the "ultimate beneficiary of the reparation[] due,"[50] the "*titulaire* of the right to reparation."[51]

While one can certainly admire Judge Cançado Trindade's optimism and idealism with respect to the law of diplomatic protection and the possibility that it might play a greater role in the adjudication of international human rights, there are a number of reasons for hesitation and caution. First, diplomatic protection, which the Commentaries to the International Law Commission's (ILC) 2006 Articles on Diplomatic Protection refer to as an "important remedy for the protection of persons whose human rights have been violated abroad"[52] and which might also be thought of as a process or procedure for the vindication of rights, remains entirely discretionary under international law.[53] This is clear from the language of article 2 of the Articles

44 *Diallo*, *supra* note 33, at 733 (Cançado Trindade, J., separate).

45 *Ibid.* at 736 (Cançado Trindade, J., separate) (italics omitted).

46 *Ibid.* at 807 (Cançado Trindade, J., separate).

47 Ghandhi correctly observed, if in somewhat understated fashion, that diplomatic protection's discretionary nature "rests uneasily with the principles underlying the international law of human rights, which create directly enforceable rights by the individual against his own State." Ghandhi, *supra* note 33, at 553.

48 *Diallo*, *supra* note 33, at 793 (Cançado Trindade, J., separate).

49 *Ibid.* at 798 (Cançado Trindade, J., separate).

50 *Ibid.* (Cançado Trindade, J., separate).

51 *Ibid.* (Cançado Trindade, J., separate).

52 Articles on Diplomatic Protection, With Commentaries, *supra* note 36, at 26.

53 See John Dugard, "Diplomatic Protection," in *Max Planck Encyclopedia of Public International Law*, at ¶¶ 13–16 (last updated May 2009). See also David J. Bederman, "State-to-State Espousal of Human Rights Claims," *Virginia Journal of International Law Online* 1

on Diplomatic Protection, which speaks of a State's "right," not obligation, to exercise diplomatic protection.[54] That Guinea used its discretion in *Diallo* and sought to exercise diplomatic protection does not in any way mean that it was required to do so as a matter of international law. As the ICJ put it in 1970, a State that may in principle be endowed with a right to exercise diplomatic protection remains the "sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease,"[55] and "States have, with regard to their nationals, a discretionary power to grant diplomatic protection or to refuse it."[56]

The ILC could have articulated a clear obligation for States to exercise diplomatic protection when it adopted the Articles on Diplomatic Protection in 2006, either in particular situations or *tout court*, but it chose not to do so, which is significant.[57] In its Comments and Observations to the ILC, Italy had suggested that exceptional circumstances might justify requiring the State of nationality to exercise diplomatic protection, though since Rome seemed to have confused the matter by referring to its suggestion in various parts of its submission to the ILC as being both "progressive development"[58] and "legal duty,"[59] it is difficult to see how precisely this (rejected) suggestion would have related to the traditional discretionary nature of diplomatic protection.[60] Apart from Italy, however, the Comments and Observations of other States to the ILC reaffirmed the traditional view.[61] Uzbekistan was quite frank when,

---

(2011): 3–11. Note that Ziegler has identified the "potential emergence of a qualified state *duty* to protect its nationals abroad." See Reuven (Ruvi) Ziegler, "Protecting Recognized Geneva Convention Refugees Outside Their States of Asylum," *International Journal of Refugee Law* 25, 2 (2013): 247–252.

54 "A State has the right to exercise diplomatic protection in accordance with the present draft articles." Articles on Diplomatic Protection, With Commentaries, *supra* note 36, at 28, art. 2. See *ibid.* at 28–30.

55 *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Second Phase, 1970 I.C.J. 3, 44 (5 Feb.).

56 *Ibid.* at 50.

57 On the ILC's work on the law of diplomatic protection, see Annemarieke Vermeer-Künzli, "As If: The Legal Fiction in Diplomatic Protection," *European Journal of International Law* 18, 1 (2007): 56–65.

58 U.N. GAOR, Diplomatic Protection: Comments and Observations Received from Governments: Addendum, at 3, U.N. Doc. A/CN.4/561/Add.2 (2006).

59 *Ibid.*

60 See *ibid.* at 2–3. See also Vermeer-Künzli, *supra* note 57, at 58–61.

61 See, for example, U.N. GAOR, Diplomatic Protection: Comments and Observations Received from Governments, at 10, U.N. Doc. A/CN.4/561 (2006) (Norway, on behalf of the

with no apparent sense of dissatisfaction or derision, it noted that the draft articles "legalize[d] the longstanding and rather widespread practice of 'political lobbying' for property and other interests under foreign jurisdiction."[62] This view corresponds with the ICJ's understanding of diplomatic protection in the second phase of *Barcelona Traction, Light and Power Company, Limited* (*Barcelona Traction*), in which the Court acknowledged that the State of nationality "retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case."[63]

If the very possibility of a State's decision to exercise diplomatic protection remains discretionary, so also does the State of nationality retain the power to distribute as it deems fit any reparation that it might receive from the respondent State. In this respect, it is rather surprising that Judge Cançado Trindade voted in favour of paragraphs 7 and 8 of the *dispositif* in *Diallo*, which gave Guinea and the DRC six months to negotiate a precise amount of compensation in light of the judgment that the DRC would then have to pay to Guinea as reparation for the injury suffered. His separate opinion did express a "concern that the provision of adequate reparation is still to wait further [...and noted that this] looks somewhat disquieting"[64] and "does not appear reasonable."[65] Still, the fact that Judge Cançado Trindade voted in favour of paragraphs

---

Nordic States (Denmark, Finland, Iceland, Norway and Sweden)) ("support[ing] the chosen approach, on the basis of the main premise that States have a right, not a duty, to exercise diplomatic protection"); *ibid.* at 16 (the Netherlands) (stressing the "discretionary authority of the State in respect of [the] exercise of diplomatic protection"); U.N. GAOR, Diplomatic Protection: Comments and Observations Received from Governments: Addendum, at 4–5, U.N. Doc. A/CN.4/561/Add.1 (2006) (United Kingdom) (stating that "[e]very State retains the discretion, subject to its internal laws, as to how this right of diplomatic protection is exercised, if at all").

62 U.N. GAOR, U.N. Doc. A/CN.4/561, *supra* note 61, at 11.

63 *Barcelona Traction*, Second Phase, *supra* note 55, at 44. Compare *Kaunda and Others v. President of the Republic of South Africa and Others*, 2004 S. Afr., at ¶¶ 23–29, Case CCT 23/04 (4 Aug.) (Chaskalson, J.), at ¶¶ 148–151 (Ngcobo, J., concurring), at ¶¶ 214–217, 236 (O'Regan, J., dissenting). Dugard suggests that relevant considerations include the gravity of the national's injury, the credibility of the respondent State's legal system, reputational concerns, the nature of the State of nationality's political and economic relationship with the respondent State and the degree of support that the injured national enjoys in the State of nationality. See Dugard, *supra* note 53, at ¶ 68.

64 *Diallo*, *supra* note 33, at 797 (Cançado Trindade, J., separate).

65 *Ibid.* at 798 (Cançado Trindade, J., separate).

7 and 8 effectively meant that he was, in a way, contributing to the solidification of a jurisprudence on diplomatic protection that deemphasised the temporal urgency of distributing reparation to the injured national, subjected the precise amount of reparation to the inter-State "horse trading" of negotiation and in no way required the State of nationality to distribute any reparation received to the injured national. Effectively, then, the traditional posture was reaffirmed and reinforced.[66]

The ICJ's unanimity on paragraphs 7 and 8 of the *dispositif* in *Diallo* and the absence of any suggestion, express or implied, that Guinea had an obligation to distribute reparation received to its injured national is somewhat at odds with the "Recommended Practice" in article 19 of the Articles on Diplomatic Protection,[67] though since the ILC itself acknowledged that this article does not reflect customary international law, this can be regarded as, at most, progressive development.[68] The Commentary to article 19(c), which notes that a State that is successful in a claim for diplomatic protection *should* "[t]ransfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions,"[69] is also, it should be said, rather imprecise and contradictory. Specifically, it asserts that limiting a State's right to withhold reparation to an injured national after a successful claim for diplomatic protection "does not constitute a settled practice,"[70] yet it

66 In his separate opinion appended to the Compensation phase of *Diallo*, which was handed down in June 2012, Judge Cançado Trindade admitted that the awarded compensation was "formally due [...] to Guinea" but stated that this was "determined by the Court to *his* [i.e., Diallo's] *benefit*. This is the proper meaning, as I perceive it, of resolutory points (1) and (2) of the *dispositif* of the present Judgment, in combination with paragraph 57 of the reasoning of the Court." *Diallo*, Compensation, *supra* note 42, at ¶ 100 (Cançado Trindade, J., separate). This seems to be a strained reading of what the ICJ actually stated in paragraph 57, which seems at most to but ambiguously point in Judge Cançado Trindade's direction: "The Court recalls that the sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter's injury."

67 "A State entitled to exercise diplomatic protection according to the present draft articles, should: (a) Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred; (b) Take into account, wherever feasible, the views of injured persons with regard to resort to diplomatic protection and the reparation to be sought; and (c) Transfer to the injured person any compensation obtained for the injury from the responsible State subject to any reasonable deductions." Articles on Diplomatic Protection, With Commentaries, *supra* note 36, at 94, art. 19.

68 See *ibid.* at 94–95. See also Vermeer-Künzli, *supra* note 57, at 61–62.

69 Articles on Diplomatic Protection, With Commentaries, *supra* note 36, at 94, art. 19(c).

70 *Ibid.* at 100.

continues in the same paragraph to suggest that this is "supported by State practice and equity."[71] Quite what the distinction is between "settled practice" and "State practice" is obviously unclear, and the suggestion that article 19(c) is supported by equitable considerations contradicts the ICJ's clear statement in *Barcelona Traction* that equity "cannot require more than the *possibility* for some protector State to intervene."[72] The ICJ in *Diallo* did nothing to challenge or in any way undermine this position.[73] Of course, it is difficult to see how a law of diplomatic protection that does not even require intervention might oblige the State of nationality to distribute any reparation received to the injured national.[74]

Judge Cançado Trindade's suggestion in *Diallo* that the "individual concerned is at the *beginning* and at the *end* of the present case"[75] is questionable given that the "beginning," the effective judicialisation of a claim for diplomatic protection, was predicated upon the fortuitous will of the State of nationality and that the "end" amounted to ordering the transfer of a particular sum of money as compensation to the same State, with no suggestion, much less obligation, that it had to distribute said sum to its injured national. Indeed, there is much in Judge Cançado Trindade's contribution in *Diallo* that seeks to *aspire* a new law of diplomatic protection into being without concerning itself with the actual methodology that is conventionally engaged with with respect to (putative) customary international law norms.[76]

For example, Judge Cançado Trindade's separate opinion in *Diallo* asserts that "we cannot at all remain in the strict and short-sighted confines of diplomatic protection, as a result of not only its ineluctable discretionary nature, but also its static inter-State dimension."[77] The law of diplomatic protection can, and will, does and should, indeed, *must*, remain so, however, if the State practice and *opinio juris* that undergird any change in the customary international law of diplomatic protection do not support a change, in whatever

71 *Ibid.*

72 *Barcelona Traction*, Second Phase, *supra* note 55, at 48 (emphasis added).

73 But see Annemarieke Vermeer-Künzli, "Diallo: Between Diplomatic Protection and Human Rights," *Journal of International Dispute Settlement* 4, 3 (2013): 497–498.

74 Compare Amerasinghe, *supra* note 35, at 79–90.

75 *Diallo*, *supra* note 33, at 798 (Cançado Trindade, J., separate).

76 See José A. Cabranes, "Customary International Law: What It Is and What It Is Not," *Duke Journal of Comparative and International Law* 22, 1 (2011): 143–152 (stressing the importance of methodological rigour when discerning the existence of (putative) customary international law norms). See also Anthony Clark Arend, *Legal Rules and International Society* (New York: Oxford University Press, 1999), 72–73.

77 *Diallo*, *supra* note 33, at 804 (Cançado Trindade, J., separate).

direction and to whatever degree. There is little evidence, and certainly not "evidence of a general practice accepted as law,"[78] to suggest that the requisite body of State practice and *opinio juris* has developed to overturn, or discernibly change, the traditional rule. Furthermore, as the ICJ put it in the second phase of *South West Africa*, interpretations of law that go beyond that which can be sustained as reasonable, even understanding reasonableness in its most generous sense, risk treading on revision or rectification, and "[r]ights cannot be presumed to exist merely because it might seem desirable that they should."[79]

Rather than *aspiring* into being a new law of diplomatic protection that seems to be insufficiently rooted in State practice and *opinio juris*, it would seem preferable to look *beyond* this body of law to alternative forms of human rights protection.[80] Indeed, the Articles on Diplomatic Protection contain a saving clause in article 16 that recognises that diplomatic protection and the law related to human rights protection are "complementary."[81] Diplomatic protection *can* be exercised in a way that furthers the protection of human rights, as, indeed, it was, at least to some extent, in *Diallo*, but as a process or procedure for the vindication of rights, it necessarily operates according to certain modalities that continue to privilege "inter-State optics."[82] As the ILC notes, alternative avenues for the protection of human rights exist when "the obligation breached is owed to the international community as a whole,"[83] as was the case in *Questions Relating to the Obligation to Prosecute or Extradite*,[84] and can include certain rights of recourse pursuant to treaty-based international

78 Statute of the International Court of Justice, art. 38(1)(b).

79 *South West Africa* (Ethiopia v. South Africa; Liberia v. South Africa), Second Phase, 1966 I.C.J. 6, 48 (18 July).

80 See Amerasinghe, *supra* note 35, at 32–36.

81 Articles on Diplomatic Protection, With Commentaries, *supra* note 36, at 86. "The rights of States, natural persons, legal persons or other entities to resort under international law to actions or procedures other than diplomatic protection to secure redress for injury suffered as a result of an internationally wrongful act, [sic] are not affected by the present draft articles." *Ibid.* at 86, art. 16.

82 *Diallo*, *supra* note 33, at 802 (Cançado Trindade, J., separate).

83 Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, *supra* note 34, at 126, art. 48(1)(b). See Dugard, *supra* note 53, at ¶ 52. On obligations *erga omnes* generally, see Yoshifumi Tanaka, "Obligations and Liability of Sponsoring States Concerning Activities in the Area: Reflections on the ITLOS Advisory Opinion of 1 February 2011," *Netherlands International Law Review* 60, 2 (2013): 223–225.

84 See *Prosecute or Extradite*, *supra* note 30, at ¶¶ 64–70. The subject matter in *Prosecute or Extradite* is now being litigated before the Extraordinary African Chambers in the Senegalese Courts. See Sarah Williams, "The Extraordinary African Chambers in the

human rights law and customary international human rights law.[85] Although these alternative avenues may not always be as effective in protecting human rights as diplomatic protection,[86] they may sometimes be more effective.[87] In any case, they are more convincingly rooted in the *lex lata*.[88]

4 Conclusion

In the closing passages of his dissenting opinion in *Jurisdictional Immunities*, Judge Cançado Trindade lamented the place of evil in the world.[89] He soberly predicted the likely continuation of evil, though he did hold out some hope, however hesitant, for the future: "even in this grim horizon, endeavours towards the primacy of the *recta ratio* also seem never to vanish, as if suggesting that there is still always hope, in the perennial quest for justice, never reaching an end, like in the myth of Sisyphus."[90] For him, international lawyers have a sacred role to play in the world, and they must strive ever onward to expand the right of access to justice for all, in all possible situations, against all obstacles.

Judge Cançado Trindade's jurisprudence at the ICJ shows how natural law thinking can animate the adjudication of international human rights. It could be argued, however, that the legal positivists with whom Judge Cançado Trindade quarrels are no less committed, certainly not in an ethical or moral sense, to the eradication of evil in the world. Rather, they (simply) contend that the adjudication of law should be sufficiently sensitive to the needs of those actors, primarily States, that international law charges with the creation and implementation of law. What does seem incontrovertible is that the adjudication of international human rights will continue to suffer as long as States continue to see the "cheap talk" of "justice" and "consent" as shields to their compliance with international human rights law.

Senegalese Courts: An African Solution to an African Problem?," *Journal of International Criminal Justice* 11, 5 (2013): 1139–1160.

85 See Articles on Diplomatic Protection, With Commentaries, *supra* note 36, at 86–89.

86 See Dugard, *supra* note 53, at ¶¶ 80–83.

87 See Sean D. Murphy, "What a Difference a Year Makes: The International Court of Justice's 2012 Jurisprudence," *Journal of International Dispute Settlement* 4, 3 (2013): 547–548.

88 Purely from the point of view of efficacy, Amerasinghe suggests that "[t]he acid test for the recognition of diplomatic protection as a useful and viable institution may be whether, where a human rights remedial procedure is also available, an injured alien would rather appeal to his national State for diplomatic protection." Amerasinghe, *supra* note 35, at 78.

89 See *Jurisdictional Immunities*, *supra* note 19, at ¶¶ 227–229 (Cançado Trindade, J., dissenting).

90 *Ibid*. at ¶ 228 (Cançado Trindade, J., dissenting).