THE CONCEPT OF INTERNATIONAL JUDICIAL JURISDICTION: A REAPPRAISAL

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I. INTRODUCTION

International courts and tribunals are the product of the sovereign will of States, as the decentralised nature of international legal order presupposes that an international court or tribunal can only operate on the basis of an agreement between States, which serves as a constitutive instrument of a given tribunal. It is therefore common to speak of the consensual principle on which international judicial jurisdiction is based. This article attempts to examine implications of the consensual principle in the process of judicial decision-making, and to do so in the context of other principles which may influence, or adversely affect, the practical implications of the principle of consent. For, apart from being based on consensual instruments, international tribunals are often expected to contribute to international justice and maintenance of the basic values of the international community, and the jurisdictional objections may indeed operate as a factor preventing them from accomplishing this task, thereby causing serious concerns for those safeguarded and protected by international law.

Most conceptual principles, assumptions or doctrines about the nature, basis and scope of international judicial jurisdiction – still widely adhered to in doctrine and practice – have emerged in a context substantially different from the current context of international adjudication. Subsequent changes, including the emergence of more international tribunals, as well as the increasing relevance of human rights and humanitarian norms in international adjudication, may require a reappraisal of the relevant concepts in the light of later developments. International jurisprudence is familiar with a trend indicating that a traditional approach to international judicial jurisdiction, which emphasises the principle of consent as an emanation of the sovereign freedom and equality of States, is no longer the only decisive factor. To illustrate, the International Court of Justice in the LaGrand case dismissed the pleas based on the principle of consent which

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dismissal enabled it to hold that the provisional measures it had indicated were binding and that it was empowered to award a hitherto unprecedented judicial remedy of the guarantees of non-repetition. In Chrysostomos and Loizidou, the European Commission of Human Rights and the European Court of Human Rights have also overruled the pleas based on the principle of consent by holding that the reservations attached to the declarations of the respondent State accepting the compulsory jurisdiction of these organs were invalid and did not affect the validity of entire declarations. In the cases of Ivcher Bronstein and Constitutional Court, the Inter-American Court of Human Rights decided to adjudicate even in the face of an attempted withdrawal of the respondent State from the jurisdiction of the Court.

The steps taken by different tribunals about the severance of jurisdictional reservations, the binding force of provisional measures, or remedial competence are hardly compatible with the traditional consensual understanding of judicial jurisdiction. Therefore, it is necessary to ask why international tribunals feel entitled to proceed in such a manner. This can perhaps be explained by some developments in recent decades, which might have qualified the otherwise absolute role of the principle of consent. At the same time, it is convenient to ask whether the policies of the above-mentioned tribunals are justified in terms of the inherent nature and characteristics of international judicial jurisdiction. In other words, it is worth enquiring into whether the nature of international judicial jurisdiction itself warrants the balancing of different relevant factors, of which the consensual principle could be only one. These issues are at the heart of the present article.

At the same time, some necessary caveats should be made. This article is not about the jurisdiction of a specific international tribunal; it is rather about the general concept of international judicial jurisdiction and constitutes an attempt to reappraise this concept in terms of the changing nature of international legal order. To the author’s knowledge, this article

