SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

TABLE OF CONTENTS

I. *Prolegomena*

1. I have concurred, with my vote, for the adoption today, 19 April 2017, by the International Court of Justice (ICJ), of the present Order indicating provisional measures of protection in the case of the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation)*. As I attribute great importance to some related issues that come to my mind in the *cas d'espèce*, in my perception underlying the present decision of the ICJ but left out of the Court's reasoning, I feel obliged to leave on the records, in the present separate opinion, the identification of such issues and the foundations of my own personal position thereon. I do so moved by a sense of duty in the exercise of the international judicial function, even more so as some of the lessons I extract from the matter forming the object of the present decision of the Court are not explicitly dealt with in the Court's reasoning in the present Order.

2. This being so, I shall develop my reflections in the following sequence: *(a)* conceptual development of provisional measures of protection; *(b)* the test of vulnerability of segments of the population (human vulnerability in international case law, and in the *cas d'espèce*); *(c)* utmost vulnerability of victims, further irreparable harm, and urgency of the situation; *(d)* the decisive test: human vulnerability over "plausibility" of rights; *(e)* the necessity and importance of provisional measures of protection in the *cas d'espèce*; *(f)* the concern of the international community with the living conditions of the population everywhere; *(g)* provisional measures, and the protection of the human person, beyond the strict inter-State dimension; *(h)* chronic violence and the tragedy of human vulnerability; *(i)* provisional measures, and the protection of people in territory; and *(j)* the autonomous legal regime of provisional measures of protection: duty of compliance with them, non-compliance and State responsibility, prompt determination of their breaches, and duty of reparation. I shall then move to my final considerations in the epilogue.

II. Conceptual Development of Provisional Measures of Protection

3. Provisional measures of protection already have a long history, which originally flourished in comparative domestic law; as from their early conceptualization, there followed their gradual transposition, over the first half of the twentieth century, from domestic into international (procedural) law[1], in international arbitral and judicial practice. In recent decades, there has occurred the clarification of their juridical preventive character, of their legal effects, as well as their progressive development[2].

4. As from the times of the transposition of provisional measures into the international legal order, in the era of the old Permanent Court of International Justice (PCIJ), their relevance to the progressive development of international law itself was detected[3]. Provisional measures of protection have indeed evolved historically, in my perception, from *precautionary* legal measures in domestic procedural law into jurisdictional guarantees of a preventive character in international procedural law, endowed with a truly *tutelary* character[4].

5. Furthermore, provisional measures of protection have paved the way for *continuous monitoring*, in prolonged situations of "extreme gravity and urgency", seeking to "avoid irreparable damage to persons", in particular those in a situation of great vulnerability, if not defencelessness. In effect, as I pointed out elsewhere, almost two decades ago, where situations of "vulnerability of the fundamental rights of the human person are prolonged pathologically in time", the adopted "provisional measures of protection have had likewise to be maintained

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[1] Cf., on the case law of national tribunals, e.g., E. García de Enterria, *La Batalla por las Medidas Cautelares*, 2nd rev. ed., Madrid, Civitas, 1995, pp. 25-385; and cf., on the case law of international tribunals, e.g., R. Bernhardt (ed.), *Interim Measures Indicated by International Courts*, Berlin/Heidelberg, Springer-Verlag, 1994, pp. 1-152.

[2] As I pointed out in another international jurisdiction: cf. A. A. Cançado Trindade, "Preface by the President of the Inter-American Court of Human Rights", in *Compendium of Provisional Measures* (June 1996-June 2000), Vol. 2, Series E, San José of Costa Rica, Inter-American Court of Human Rights (IACtHR), 2000, pp. VII-XVIII, and sources referred to therein.

[3] Cf. P. Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, Paris, Libr. Rec. Sirey, 1931, pp. 14-15 and 62. Already in its time, the PCIJ admitted its prerogative to indicate or modify *ex officio* provisional measures of protection, in terms other than the ones requested by either of the contending parties; cf. G. Guyomar, *Commentaire du Règlement de la Cour internationale de justice — Interprétation et pratique*, Paris, Pedone, 1973, p. 348. And, as to the earlier ICJ era, cf. for jurisdictional aspects, *inter alia*, L. Daniele, *Le Misure Cautelari nel Processo dinanzi alla Corte Internazionale di Giustizia*, Milan, Giuffrè, 1993, pp. 5-183; S. Rosenne, *Provisional Measures in International Law*, Oxford University Press, 2005, pp. 85-187.

[4] A. A. Cançado Trindade, "Preface by the President of the Inter-American Court of Human Rights", *op. cit. supra* note 2, p. X.

in time, in order to face up to the chronic threats to those fundamental rights"[5].

6. Provisional measures of protection have been evolving, with the growing awareness of their importance in the realization of justice; yet, there remains a long way to go to that effect. It has not passed unnoticed in expert writing that the first contemporary international tribunal "which explicitly held that its provisional measures are binding, was the Inter-American Court of Human Rights [IACtHR], which stated that the relevant provision of the Convention 'makes it mandatory for the State to adopt the provisional measures ordered by this Tribunal'[6]"[7].

7. This was made clear by the IACtHR in 1999-2000, in the period when it achieved a remarkable jurisprudential construction on the matter[8]; *afterwards*, the International Court of Justice [ICJ] did the same, in the *LaGrand* case (Judgment of 27 June 2001), in the proceedings of which the IACtHR's pioneering jurisprudential construction was brought to its attention by the contending parties[9]. Within the ICJ, I have drawn attention to this development in my separate opinion (paras. 167-172) in the *Diallo* case (Merits, Judgment of 30 November 2010), to which I deem

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[5] *Op. cit. supra* note 4, p. XVII.

[6] IACtHR, case of the *Constitutional Tribunal* v. *Peru*, provisional measures of protection, resolution of 14 August 2000; and cf. note 10, *infra*.

[7] K. Oellers-Frahm, "Expanding the Competence to Issue Provisional Measures — Strengthening the International Judicial Function", in *International Judicial Law-Making* (eds. A. von Bogdandy and I. Venzke), Heidelberg, Springer, [2011], p. 398.

[8] This is examined in detail (particularly in the period 1999-2004) in my book of memories of the IACtHR: A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, 4th ed., Belo Horizonte/Brazil, Edit. Del Rey, 2017, pp. 47-52, 199-208 and 277-278.

[9] The IACtHR was also the first international tribunal to affirm the existence of an *individual* right to information on consular assistance in the framework of the guarantees of the due process of law, in its Advisory Opinion No. 16 on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of 1 October 1999, paras. 1-141). The IACtHR, disclosing the impact of the international law of human rights in the evolution of public international law itself, held therein that non-compliance with Article 36 (1) *(b)* of the Vienna Convention on Consular Relations of 1963 took place to the detriment not only of a State party but also of the human beings at issue (as the ICJ *subsequently* also admitted, in the *LaGrand* case, Judgment of 27 June 2001). This pioneering contribution by the IACtHR in 1999 was acknowledged by expert writing on the subject; cf., e.g., G. Cohen-Jonathan, "Cour européenne des droits de l'homme et droit international général (2000)", 46 *Annuaire français de droit international* (2000), p. 642; Ph. Weckel, M. S. E. Helali and M. Sastre, "Chronique de jurisprudence internationale", 104 *Revue générale de droit international public* (2000), pp. 794 and 791; and, on the impact of aforementioned IACtHR's Advisory Opinion No. 16 of 1999, cf. A. A. Cançado Trindade, "The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case Law and Practice", 6 *Chinese Journal of International Law* (2007), No. 1, p. 1-16.

it sufficient to refer here. I have likewise drawn attention to this in my writings on the matter[10].

8. In effect, even before the turn of the century (from 1999 onwards), I have had occasions, in another international jurisdiction (the IACtHR, wherein provisional measures of protection are also endowed with a *conventional* basis), to dwell further upon the *legal nature* of provisional measures of protection and their binding character[11], and to keep on devoting my attention, over the years, to the conceptual development of the *autonomous legal regime* of those measures[12]. I have identified obligations emanating from provisional measures of protection *per se*, entirely distinct from obligations eventually ensuing from a Judgment as to the merits (and reparations) on the *cas d'espèce*; I have further pointed out that non-compliance with the former — as well as the latter — generates the responsibility of the State, with legal consequences[13].

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[10] Cf. note 8, *supra*, and cf. also: A. A. Cançado Trindade, "The Evolution of Provisional Measures of Protection under the Case Law of the Inter-American Court of Human Rights (1987-2002)", 24 *Human Rights Law Journal*,Strasbourg/Kehl (2003), Nos. 5-8, pp. 162-168; A. A. Cançado Trindade, "Les mesures provisoires de protection dans la jurisprudence de la Cour interaméricaine des droits de l'homme", in *Mesures conservatoires et droits fondamentaux* (eds. G. Cohen-Jonathan and J.-F. Flauss), Brussels, Bruylant/Nemesis, 2005, pp. 145-163; A. A. Cançado Trindade, "Une ère d'avancées jurisprudentielles et institutionnelles: souvenirs de la Cour interaméricaine des droits de l'homme", in *Le particularisme interaméricain des droits de l'homme* (eds. L. Hennebel and H. Tigroudja), Paris, Pedone, 2009, pp. 65-66; A. A. Cançado Trindade, "La Expansión y la Consolidación de las Medidas Provisionales de Protección en la Jurisdicción Internacional Contemporánea", in *Retos de la Jurisdicción Internacional* (eds. S. Sanz Caballero and R. Abril Stoffels), Cizur Menor/Navarra, Cedri/CEU/Thomson Reuters, 2012, pp. 99-117.

[11] Cf. IACtHR, case of *James* et al. *regarding Trinidad and Tobago* (resolution of 25 May 1999), concurring opinion of Judge Cançado Trindade, paras. 9-10 (where I asserted the binding character of provisional measures of protection as a "jurisdictional guarantee of preventive character"); IACtHR, case of the *Haitians and Dominicans of Haitian Origin regarding the Dominican Republic* (resolution of 18 August 2000), concurring opinion of Judge Cançado Trindade, paras. 13-25; cf. IACtHR, case of the *Peace Community of San José of Apartadó regarding Colombia* (resolution of 18 June 2002, pursuant to its previous resolution, in the same case, of 20 November 2000), concurring opinion of Judge Cançado Trindade, paras. 14-17 and 19-20.

[12] Cf. IACtHR, case of *Eloísa Barrios* et al. *regarding Venezuela* (resolution of 29 June 2005), concurring opinion of Judge Cançado Trindade, paras. 4-11; IACtHR, *ibid.* (resolution of 22 September 2005), concurring opinion of Judge Cançado Trindade, paras. 2-9; IACtHR, case of the *Children Deprived of Liberty in the "Complexo do Tatuapé" of Fundação CASA regarding Brazil* (resolution of 17 November 2005), concurring opinion of Judge Cançado Trindade, paras. 2-10; IACtHR, *ibid.* (resolution of 29 November 2005), concurring opinion of Judge Cançado Trindade, paras. 13-36.

[13] IACtHR, case of the *Peace Community of San José of Apartadó regarding Colombia* (resolution of 2 February 2006), concurring opinion of Judge Cançado Trindade, paras. 6-7, and cf. also paras. 4 and 8-10; and cf., to the same effect, IACtHR, case of the *Communities of the Jiguamiandó and Curvaradó regarding Colombia* (resolution of 7 February 2006), concurring opinion of Judge Cançado Trindade, paras. 6-7, and cf. also paras. 4 and 8-11.

9. I have thus made the point that the "injured party" or victim may, in my perception, appear promptly in the realm of provisional measures of protection[14], in case of non-compliance with them. Accordingly, non-compliance with, or breach of, such measures, engages autonomously the international responsibility of the State at issue, within the domain of provisional measures of protection[15], irrespective of the subsequent Judgments as to the merits of the concrete cases (cf. *infra*).

10. Hence, the utmost importance of compliance with those measures[16], for the realization of justice itself. Over a decade ago I deemed it fit to warn that one is not to take for granted advances in interim measures of protection (in distinct international jurisdictions), as such advances still appear threatened by the increasing violence in the world today, everywhere; attention is thus to be kept so as to avoid steps backwards and to keep on enhancing the institute of provisional measures of protection[17].

11. In effect, for the last eight years (2009 onwards), I have been devoting myself to the conceptual development of the autonomous legal regime of those measures, this time in the case law of the ICJ (cf. *infra*). In the recent case of *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 22 April 2015*, I have pointed out, in my separate opinion, that, in our days, the progressive development of international law, by means of provisional measures of protection, "requires an awareness of the autonomous legal regime of provisional measures of protection, as well as

[14] Cf. IACtHR, case of *Eloísa Barrios* et al. *regarding Venezuela* (resolution of 29 June 2005). concurring opinion of Judge Cançado Trindade, para. 5; case of the *Peace Community of San José of Apartadó regarding Colombia* (resolution of 2 February 2006), concurring opinion of Judge Cançado Trindade, para. 5; case of the *Communities of the Jiguamiandó and Curvaradó regarding Colombia* (resolution of 7 February 2006), concurring opinion of Judge Cançado Trindade, para. 5. And, on "potential victims" in the realm of provisional measures of protection, cf. IACtHR, case of the *Members of the Group of Community Studies and Psychosocial Action — ECAP* (case of the *Plan de Sánchez Massacre* v. *Guatemala*) (resolution of 29 November 2006), separate opinion of Judge Cançado Trindade, paras. 10 and 12.

[15] Cf. IACtHR, *Matter of the Mendoza Prisons regarding Argentina* (resolution of 30 March 2006), concurring opinion of Judge Cançado Trindade, paras. 11-12; IACtHR, case of the *Matter of the Persons Imprisoned in the "Dr. Sebastião Martins Silveira" Penitentiary in Araraquara, São Paulo regarding Brazil* (resolution of 30 September 2006), concurring opinion of Judge Cançado Trindade, paras. 24-25.

[16] Cf. IACtHR, *Communities of the Jiguamiandó and Curvaradó regarding Colombia* (resolution of 15 March 2005), concurring opinion of Judge Cançado Trindade, paras. 4 and 10; case of the *Peace Community of San José of Apartadó regarding Colombia* (resolution of 15 March 2005), concurring opinion of Judge Cançado Trindade, paras. 4 and 10; *Matter of Pueblo indígena de Sarayaku regarding Ecuador* (resolution of 6 July 2004), concurring opinion of Judge Cançado Trindade, paras. 2 and 30.

[17] Cf. IACtHR, case of the *Members of the Group of Community Studies and Psychosocial Action — ECAP* (case of the *Massacre of Plan de Sánchez* (resolution of 29 November 2006)), separate opinion of Judge Cançado Trindade, paras. 1, 5, 10 and 14-15.

judicial decisions which reflect it accordingly, with all its implications" (*I.C.J. Reports 2015 (II)*, p. 565, para. 10).

III. Provisional Measures: Test of Vulnerability of Segments of the Population

1. Human Vulnerability in International Case Law

12. The present case is not the first one wherein the alleged *vulnerability* of segments of the population concerned is brought to the Court's attention, in its consideration of provisional measures of protection. Suffice it here to recall a couple of examples to this effect. In the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, e.g., where it was not disputed that there had already occurred "grave and repeated violations of human rights and international humanitarian law", the ICJ found (*Order of 1 July 2000, I.C.J. Reports 2000*, p. 128, paras. 42-43) that persons in the area of the armed conflict (in the Democratic Republic of the Congo) remained "extremely vulnerable", undergoing "a serious risk that the rights at issue" in the *cas d'espèce* might suffer further "irreparable prejudice"; this being so, the ICJ, accordingly, decided to indicate provisional measures "as a matter of urgency in order to protect those rights" (*ibid.*, para. 43).

13. Subsequently, in the case of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, the ICJ again found (*Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 143) that, given "the ongoing tension and the absence of an overall settlement to the conflict in the region" of South Ossetia, Abkhazia and adjacent areas, the segments of the population concerned "remain[ed] vulnerable" *(ibid.)*. The ICJ pondered that "the problems of refugees and internally displaced persons" in the region at issue had "not yet been resolved in their entirety"; the persons concerned ran a "serious risk of irreparable prejudice", which could involve "potential loss of life or bodily injury", in breach of rights under the CERD Convention (*ibid.*, paras. 142-143). The Court, accordingly, decided likewise to indicate provisional measures of protection (*ibid.*, p. 398, para. 149).

14. In the ICJ's Advisory Opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (of 22 July 2010), I addressed in my separate opinion the overcoming of the inter-State paradigm in contemporary international law (*I.C.J. Reports 2010 (II)*, pp. 596-598, paras. 182-188), and the growing care of the United Nations and other international organizations in

respect of the needs and values of peoples (*I.C.J. Reports 2010 (II)*, pp. 545-550, paras. 53-66). I focused on the people-centered outlook in contemporary international law (*ibid.*, pp. 591-593, paras. 169-176), and the increasing attention to the centrality of the sufferings of peoples (*ibid.*, pp. 585-591, paras. 161-168).

15. In the same separate opinion, I then gave an account of the attention of the UN main organs — in particular the General Assembly (*ibid.*, pp. 563-569, paras. 103-114) and the Secretary-General (*ibid.*, pp. 571-576, paras. 119-129) — to the needs of people, "especially of the most vulnerable groups affected by the conflict" (*ibid.*, p. 565, para. 105). Furthermore, I recalled the humane ends of the State (*ibid.*, pp. 594-595, paras. 177-181), and dwelt upon the fundamental principle of humanity in the framework of the law of the United Nations (*ibid.*, pp. 602-607, paras. 196-211). I then underlined the special attention required to those in "situation of greater vulnerability and standing thus in greater need of protection" (*ibid.*, p. 597, para. 185), keeping always in mind the humane ends of the State.

16. Later on, in my dissenting opinion in the case of the *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* (*Judgment, I.C.J. Reports 2012 (I)*, p. 99), I deemed it fit to warn that there is greater need of protection and justice not only to potential or actual victims, "increasingly vulnerable, if not defenceless", but also to "the social milieu as a whole" (*ibid.*, p. 243, para. 175). And, shortly afterwards, in my separate opinion in the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* (*Compensation, Judgment, ibid.*, p. 324), I deemed it necessary to draw attention to the needed measures "intended to overcome the extreme vulnerability of victims" (*ibid.*, p. 379, para. 84).

17. It is significant that, in our times, cases pertaining to situations of extreme adversity or vulnerability of human beings have been brought to the attention of the ICJ as well as other international tribunals. This is, in my perception, a sign of the new paradigm of the *humanized* international law, the new *jus gentium*[18] of our times, sensitive and attentive to the needs of protection of the human person in any circumstances of vulnerability. The case law of international human rights tribunals is particularly illustrative in this respect.

18. For example, there have been cases where the IACtHR was faced

[18] Cf. A. A. Cançado Trindade, *A Humanização do Direito Internacional*, 1st ed., Belo Horizonte/Brazil, Edit. Del Rey, 2006, pp. 3-409; 2nd rev. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2015, pp. 3-782; A. A. Cançado Trindade, *La Humanización del Derecho Internacional Contemporáneo*, México, Edit. Porrúa/IMDPC, 2013, pp. 1-324; A. A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 7-185.

with the extreme vulnerability of the victims amidst the decomposition of the public power and the social tissue[19], or else in the context of forced displacement of members of (indigenous) communities amidst chronic poverty[20]. In such situations, the social exclusion of the victimized renders the international jurisdiction their "last hope", given their situation of extreme vulnerability and defencelessness[21].

19. For its part, the ECHR has likewise been attentive to the alleged *"vulnerabilité"* and *"frustration"* of some of the applicants in general[22]. Over the years, the ECHR acknowledged the vulnerability of children and disabled persons, among other victimized individuals[23]. In the case of *Mubilanzila Mayeka and Kaniki Mitunga* v. *Belgium* (2006), the ECHR outlined the "position of extreme vulnerability" of young and unaccompanied, undocumented migrants[24]. And in the *M.S.S.* v. *Belgium and Greece* case (2011), the ECHR focused on the particular "vulnerability inherent" in the situation of homeless asylum-seekers[25].

20. Furthermore, in the *Tanrikulu* v. *Turkey* case (1999), e.g., the ECHR drew attention to the situation of vulnerability of the complainant, like that of applicant villagers in previous cases, under intimidation and "unacceptable pressure", in breach of the right of individual petition under the ECHR[26]. And in the *Cyprus* v. *Turkey* case (2001), the ECHR took into account the testimony of witnesses on "vulnerability and fear of the enclaved population"[27].

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[19] E.g., IACtHR, case of *Servellón Garcia* et al. v. *Honduras* (judgment of 21 September 2006), para. 99; and separate opinion of Judge Cançado Trindade, singling out the extreme vulnerability of the victimized (paras. 7, 17, 24, 26 and 32).

[20] E.g., IACtHR, case of the *Case of the Sawhoyamaxa Indigenous Community* v. *Paraguay* (judgment of 29 March 2006), separate opinion of Judge Cançado Trindade, paras. 14, and cf. paras. 16, 18-19, 24, 29 and 37 (on the situation of flagrant and extreme vulnerability and abandonment).

[21] *Ibid.*, paras. 58, 67 and 73.

[22] E.g., ECHR/3rd Section, case *Varnava and Others* v. *Turkey* (judgment of 10 January 2008), para. 137. The case was then referred to the ECHR/Grand Chamber, which was likewise attentive to the circumstances surrounding the victims case *Varnava and Others* v. *Turkey* (judgment of 18 September 2009), paras. 147-149.

[23] Cf., *inter alia*, e.g., ECHR, case *A.* v. *United Kingdom* (judgment of 23 September 1998), para. 22; ECHR/1st Section, case *Dordević* v. *Croatia* (judgment of 24 July 2012), para. 138, and cf. paras. 131 and 133.

[24] Cf. ECHR/1st Section (judgment of 12 October 2006, para. 103, and cf. para. 55), in breach of Article 3 of the European Convention on Human Rights (paras. 59, 61 and 63).

[25] Cf. ECHR/Grand Chamber (judgment of 21 January 2011, paras. 232-233 and 258-259), in breach of Article 3 of the European Convention on Human Rights (paras. 233-234 and 264).

[26] Cf. ECHR (judgment of 8 July 1999), paras. 130 and 142 (7).

[27] Cf. ECHR (judgment of 10 May 2001), para. 224.

2. Human Vulnerability in the Cas d'Espèce

(a) *Ukraine's Request for provisional measures of protection*

21. In the present case, in its Request for provisional measures of protection, of 16 January 2017, Ukraine began by stating that it was seeking to prevent further aggravation of the conflict with the respondent State "ongoing for almost three years", with alleged "continuing violations of international law" (paras. 1, 4 and 9). It singled out that the requested provisional measures aimed at the protection of "the lives and basic human rights" of its people (para. 1, and cf. paras. 11 and 16-17), as "the fundamental rights of civilians in Ukraine remain under constant threat" (para. 4, and cf. para. 11).

22. In its Request, the complainant State repeatedly drew attention to the extreme *vulnerability* of segments of the civilian population in eastern Ukraine and Crimea (paras. 4, 10, 13-14, 18-19 and 21). Ukraine stressed that it was seeking the protection of "its rights, and those of its people" (paras. 6-17). In effect, the present case, opposing Ukraine to the Russian Federation, is not the first one wherein, in its consideration of provisional measures of protection, the ICJ is called upon to take into account people and territory together, and, more particularly, the protection of people in territory.

(b) *Arguments of the Contending Parties on human vulnerability*

23. In the oral phase of the present proceedings, there was not one single round of public hearings before the Court (of 6-9 March 2017) when the Contending Parties did not expressly address the test of vulnerability of segments of the population. Ukraine did so to a larger extent than the Russian Federation. Although the object of their arguments was the test of the vulnerability of segments of the population, they pointed, as expected, to distinct directions.

24. In the first round of public hearings before the ICJ (6-7 March 2017), Ukraine contended that, given the very large number of displaced persons, "any population could be called 'vulnerable' and in need of protection"[28]. It added that the populations, in both eastern Ukraine and Crimea, "are vulnerable"[29], and that, by and large, the "ethnic Ukrainian community has been vulnerable"[30]. The Russian Federation, for its part, challenged the accuracy of Ukraine's claim that "Crimean Tatars are particularly vulnerable"[31].

[28] CR 2017/1, of 6 March 2017, p. 32, para. 25 (Koh).
[29] *Ibid.*, p. 70, para. 51 (Gimblett).
[30] *Ibid.*, p. 67, para. 43 (Gimblett).
[31] CR 2017/2, of 7 March 2017, p. 55, paras. 7-8 (Lukiyantsev).

25. In the second round of public hearings before the ICJ (8-9 March 2017), Ukraine retook its argument, referring to "the displacement of some 1.7 million Ukrainian citizens", and to the "fatalities and other injuries to Ukraine's vulnerable civilian population"[32]. Such violations were suffered by "a vulnerable population, stripped of (. . .) protections"[33]; it added that the "civilian populations of Ukraine, including in particular eastern Ukraine and Crimea, are extremely vulnerable and require the Court's immediate protection"[34].

26. The Russian Federation, in turn, referred to Ukraine's claim "to protect the vulnerable population", in particular "in the east of Ukraine"[35], and added that, to that effect (of protection), it was necessary to secure the implementation of the Minsk Agreements[36]. This is how far the Contending Parties have gone in their arguments on the vulnerability of segments of the population. It is significant that both of them deemed it fit to address the issue, each one in its own way.

IV. Provisional Measures: Utmost Vulnerability of Victims, Further Irreparable Harm, and Urgency of the Situation

27. Human vulnerability was thus addressed, in distinct ways, by both Contending Parties in their pleadings before the ICJ *(supra)*. Also in the documents submitted to the ICJ by both Parties, shortly before the public hearings, evidence was produced of the utmost vulnerability of segments of the local population (e.g., in eastern Ukraine). In effect, in the course of the present proceedings on provisional measures of protection, the two Contending Parties have shown procedural co-operation in providing relevant evidence to the Court. They both brought to the attention of the Court, in their documents lodged with it, e.g., several reports on the human rights situation in Ukraine (mainly of the Office of the United Nations High Commissioner for Human Rights (OHCHR)), containing accounts of *indiscriminate shelling* of the civilian population from all sides.

28. The accounts of such shelling are numerous, going beyond the specific passages referred to by each of the two Contending Parties in their arguments before the ICJ. The OHCHR reports address indiscriminate

[32] CR 2017/3, of 8 March 2017, p. 12, para. 2 (Koh).
[33] *Ibid.*, p. 60, para. 31 (Gimblett).
[34] *Ibid.*, p. 61, para. 5 (Zerkal).
[35] CR 2017/4, of 9 March 2017, p. 68, para. 20 (Kolodkin).
[36] *Ibid.*, p. 69, para. 23 (Kolodkin).

shelling of civilians — in breach of the human rights and international humanitarian law — from all sides, in densely populated areas, both government-controlled areas[37] and towns and villages controlled by armed groups[38]. Artillery and military weaponry have been kept within or near those densely populated areas, so as to keep on conducting indiscriminate shelling of their civilian residents.

29. Some specific examples may here be pointed out. According to OHCHR reports on the ongoing conflict in eastern Ukraine, all parties, including Ukrainian forces and non-State armed groups, have carried out indiscriminate shelling and used explosive weapons, with wide-area effects, in densely populated areas[39]. Intense shelling remains a daily occurrence in many locations[40] (including government-controlled areas as well as towns controlled by non-State armed groups)[41]. These widespread attacks have resulted in heavy damages to civilians (injuries and casualties)[42].

30. For instance, indiscriminate shelling has struck and damaged resi-

[37] Such as Avdiivka, Debaltseve, Popasna, Shchastia and Stanychno Luhanske.

[38] Including Donetsk city, Luhansk and Horlivka.

[39] OHCHR, *Report on the Human Rights Situation in Ukraine* (16 November 2016 to 15 February 2017), paras. 18 and 22-24; OHCHR, *ibid.* (1 December 2014 to 15 February 2015), para. 5; OHCHR, *ibid.* (17 August 2014), paras. 4 and 26.

[40] OHCHR, *ibid.* (16 November 2016 to 15 February 2017), para. 18.

[41] OHCHR, *ibid.* (16 August to 15 November 2016), para. 23; *ibid.* (16 February to 15 May 2016), para. 19; OHCHR, *ibid.* (16 August to 15 November 2016), para. 23; OHCHR, *ibid.* (16 May to 15 August 2015), para. 4; OHCHR, *ibid.* (1 December 2014 to 15 February 2015), paras. 6, 23 and 44; OHCHR, *ibid.* (17 August 2014), para. 26.

[42] OHCHR, *Accountability for Killings in Ukraine from January 2014 to May 2016*, para. 32:

> "The OHCHR estimates that up to 2,000 civilians may have been killed during the armed conflict period (. . .). About 85 to 90 per cent of these deaths, recorded by OHCHR both in the territories controlled by the Government and in the areas controlled by armed groups, are as a result of shelling of populated areas with mortars, canons, howitzers, tanks and multiple launch rocket systems."

And cf., likewise: OHCHR, *Report on the Human Rights Situation in Ukraine* (16 August to 15 November 2016), para. 23; OHCHR, *ibid.* (16 May to 15 August 2016), para. 40; OHCHR, *ibid.* (16 February to 15 May 2016), paras. 11, 19 and 25; OHCHR, *ibid.* (16 August to 15 November 2015), para. 26; OHCHR, *ibid.* (16 May to 15 August 2015), paras. 23 and 25-26; OHCHR, *ibid.* (1 December 2014 to 15 February 2015), paras. 5 and 7; OHCHR, *ibid.* (15 December 2014), paras. 5 and 38. And cf. also, more recently, OHCHR, *ibid.* (16 November 2016 to 15 February 2017), paras. 28-31.

dential buildings[43], hospitals[44], ambulances[45], schools[46], kindergartens[47], and a school football pitch[48]. In addition to the attacks on schools (encompassing the military use of them[49]), the OHCHR also reports attacks on churches (including on priests and parishioners)[50]. In some towns, up to 80 per cent of residential buildings and public facilities have been destroyed[51]. Those injured and killed as a result of indiscriminate shelling have included women[52], children[53], and elderly people[54], among others[55].

31. In such indiscriminate shelling — which, as warned by the OHCHR in late 2014 and early 2015, "must cease immediately"[56] — there has been an increasing and continuing flow of heavy and sophisticated weaponry[57]. In the same period, the OHCHR also recorded "a considerable number of alleged summary executions and killings of civilians who were not taking part in hostilities", and also singled out the "vast majority of civilian

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[43] OHCHR, *Report on the Human Rights Situation in Ukraine* (1 December 2014 to 15 February 2015), para. 44; OHCHR, *ibid.* (15 June 2014), para. 259.

[44] OHCHR, *ibid.* (16 November 2016 to 15 February 2017), para. 24; OHCHR, *ibid.* (16 May to 15 August 2016), para. 36; OHCHR, *ibid.* (16 May to 15 August 2015), para. 104; OHCHR, *ibid.* (1 December 2014 to 15 February 2015), paras. 7 and 44; OHCHR, *ibid.* (15 June 2014), para. 172.

[45] OHCHR, *ibid.* (16 May to 15 August 2015), para. 104.

[46] OHCHR, *ibid.* (16 August to 15 November 2016), para. 19; OHCHR, *ibid.* (16 May to 15 August 2016), para. 35; OHCHR, *ibid.* (1 December 2014 to 15 February 2015), paras. 7 and 44.

[47] OHCHR, *ibid.* (16 November 2016 to 15 February 2017), para. 24; OHCHR, *ibid.* (1 December 2014 to 15 February 2015), paras. 7 and 44.

[48] OHCHR, *ibid.* (15 December 2014), para. 38.

[49] Cf. also, on this particular point, Human Rights Watch, *Studying under Fire — Attacks on Schools, Military Use of Schools during the Armed Conflict in Eastern Ukraine*, 11 February 2016 (https://www.hrw.org/report/2016/02/11/studying-under-fire/attacks-schools-military-use-schools-during-armed-conflict) [HRW Report]; *Ukraine: Attacks, Military Use of Schools*, 11 February 2016 (https://www.hrw.org/news/2016/02/11/ukraine-attacks-military-use-schools).

[50] Cf. OHCHR, *Report on the Human Rights Situation in Ukraine* (15 June 2014), para. 315 (in the village of Perevalnoe, Crimea); OHCHR, *ibid.* (17 August 2014), para. 163 (Ukrainian Orthodox Church of the Kyiv Patriarchate, village of Mramornoye, near Simferopol); OHCHR, *ibid.* (15 December 2014), para. 84 (same church in same patriarchate, again in Simferopol area); OHCHR, *Accountability for Killings in Ukraine from January 2014 to May 2016*, Annex I, paras. 39-40 (evangelical church "Transfiguration of Christ", town of Sloviansk).

[51] OHCHR, *Report on the Human Rights Situation in Ukraine* (16 February to 15 May 2015), para. 83.

[52] OHCHR, *ibid.* (1 December 2014 to 15 February 2015), para. 5.

[53] *Ibid.*

[54] *Ibid.*

[55] Cf. OHCHR, *ibid.* (15 June 2014), para. 172; OHCHR, *ibid.* (16 February to 15 May 2015), para. 65.

[56] OHCHR, *ibid.* (1 December 2014 to 15 February 2015), para. 2.

[57] *Ibid.*, para. 3.

casualties" as a result of "the indiscriminate shelling of residential areas, in violation of the international humanitarian law principle of distinction"[58]. The OHCHR further warned, in mid-2016, that both sides (Government forces and armed groups)

> "continue to disregard the protections afforded under international humanitarian law to schools as civilian objects used for educational purposes. (. . .) Hospitals used for medical purposes have also been frequently hit by artillery fire, in violation of their protected status under international humanitarian law. (. . .) In some cases, Government forces and armed groups have used educational and health facilities for military purposes."[59]

32. Furthermore, indiscriminate shelling has had a serious impact on civilian infrastructure, such as water pipes and filtration systems, gas pipelines and power stations. As a result, thousands of people have been deprived of life-saving services (including heating, water and electricity), thus triggering additional humanitarian needs[60]. In some of the worst affected areas, there has been an "almost total economic and infrastructure breakdown"[61].

33. Moreover, civilian populations attempting to flee from such precarious situations have been attacked at checkpoints, apparently by both Government armed forces[62] and non-State armed groups[63]. Such limitations on freedom of movement have compelled civilians to spend prolonged periods exposed to the violence and risks of ongoing hostilities[64]. Despite the ever-growing civilian death toll, on no occasion have armed groups or Government authorities taken responsibility for any civilian victims of the conflict. As a result, civilian victims of indiscriminate shelling have suffered both the effects of their physical injuries (in addition to casualties), and of the denial of social and legal protection[65].

34. There were other reports brought to the Court's attention, in addition to those of the OHCHR. A report of the Organization for Security

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[58] OHCHR, *Accountability for Killings in Ukraine from January 2014 to May 2016*, p. 3 (Executive Summary).

[59] OHCHR, *Report on the Human Rights Situation in Ukraine* (16 May to 15 August 2016), paras. 35-37.

[60] OHCHR, *ibid.* (16 November 2016 to 15 February 2017), paras. 18 and 25-27; OHCHR, *ibid.* (16 August to 15 November 2016), para. 18; OHCHR, *ibid.* (16 May to 15 August 2016), para. 125; OHCHR, *ibid.* (16 February to 15 May 2016), para. 15; OHCHR, *ibid.* (1 December 2014 to 15 February 2015), paras. 7 and 44.

[61] OHCHR, *ibid.* (1 December 2014 to 15 February 2015), para. 44.

[62] OHCHR, *ibid.* (16 February to 15 May 2016), para. 20.

[63] OHCHR, *ibid.* (17 August 2014), para. 4.

[64] OHCHR, *ibid.* (16 February to 15 May 2016), para. 20.

[65] OHCHR, *ibid.* (16 August to 15 November 2016), para. 136.

and Cooperation in Europe (OSCE — Special Monitoring Mission to Ukraine, of July 2016) referred to "ongoing hostilities, shelling and general insecurity", and "serious human rights violations", as the main reason for the massive internal displacement of persons in the areas affected[66].

35. A report of the UN special *rapporteur* on the "Human Rights of Internally Displaced Persons" (of April 2015) stated likewise that ongoing hostilities have caused "massive internal displacement" in the eastern regions of Ukraine; it urged "all parties to the hostilities to bring the fighting to an end without delay", and "to protect civilians", as well as to ensure the voluntary and safe return of internally displaced persons to their homes[67].

V. The Decisive Test: Human Vulnerability over "Plausibility" of Rights

36. The aforementioned indiscriminate shelling of civilians brings to the fore the high probability of further irreparable damage, and the urgency of the situation. The test of *human vulnerability* paves the way, in my perception, even more cogently than the one of "plausibility" of rights, for the indication of provisional measures of protection, whose ultimate beneficiaries, in the present circumstances, are human beings. Attention is, in my perception, to be focused, above all, on the *vulnerability of human beings*.

37. The so-called "plausibility" test is a recent invention of the Court: it was introduced in the case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Provisional Measures* (*Order of 28 May 2009, I.C.J. Reports 2009*, p. 139), and the ICJ has ever since been trying to clarify it. Sometimes its invocation of the term "plausible" appears to be related to *rights*, sometimes to *facts*, or else to *arguments* of the parties, as can be seen in the erratic use of the term in paragraphs 63-64, 66-71, 74-75, 79 and 82-83 of the present Order.

38. In effect, in the present Order, the ICJ uses the term "plausible" not only in respect of rights (paras. 63-64, 69, 75, 79 and 82), but also more widely in respect of the application of international instruments (para. 70), thus disclosing two distinct forms of legal "plausibility". Like-

[66] OSCE — Special Monitoring Mission [SMM] to Ukraine, *Thematic Report — Conflict-Related Disappearances in Ukraine: Increased Vulnerabilities of Affected Populations and Triggers of Tension within Communities*, July 2016, pp. 19 and 24.

[67] UN/Human Rights Council, Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons (C. Beyani) — Addendum: Mission to Ukraine, UN doc. A/HRC/29/34/Add. 3, of 2 April 2015, p. 19, para. 75; and, cf. also, on refugees in general, United Nations High Commissioner for Refugees [UNHCR], *Profiling and Needs Assessment of Internally Displaced Persons (IDPs)*, of 17 October 2014, pp. 1-116.

wise, in the present Order, the ICJ uses the term "plausible" also in relation to facts (paras. 66, 68, 75 and 82-83), thus referring to another distinct form, this time of factual "plausibility". The term is used even by reference to "intent" and "purpose" (para. 66). And the ICJ, in the present Order, further uses the term "plausible" also in relation to arguments or allegations (para. 71).

39. Is it reasonable to use the "plausibility" test in this way, with an entire lack of precision and surrounded by uncertainties? And that is not all: in the present Order, the ICJ seeks to apply "plausibility" not only as a test *(supra)*, but also even as a "condition" (para. 83). This ends up creating a difficulty or obstacle for the consideration and adoption of provisional measures of protection in relation to the dispute as a whole before the Court, encompassing both the ICSFT and the CERD Conventions, and extending to both Crimea and eastern Ukraine.

40. This is not the first time within the ICJ that I deem it fit to warn against the uncertainties surrounding the so-called "plausibility" test. I have already highlighted this point, e.g., in my separate opinion in the case of *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*, where I pondered that "a right is a right, irrespective of its so-called 'plausibility' (whatever that might concretely mean)" (*I.C.J. Reports 2014*, p. 186, para. 48). Attention is to be kept on the needs of protection, rather than on strategies of litigation.

41. I find it regrettable that, in the present Order the ICJ distracts attention from the key test of the vulnerability of victims (to which it just briefly refers to, as in paragraphs 92 and 96) to the inconsistencies of so-called "plausibility", whatever that might concretely mean. The rights to be protected in the *cas d'espèce* are rights ultimately of human beings (individually or in groups), to a far greater extent than rights of States.

42. The Court is here faced with a situation where the fundamental rights to life (and of living) and to the security and integrity of the person are at stake, in the circumstances of the *cas d'espèce*. The individuals concerned live (or survive) in a situation of great vulnerability. In addition, there is here another related point to be kept in mind, namely, that the rights protected at the stage of provisional measures of protection are not necessarily identical to the rights vindicated later, at the stage of the merits of the case.

43. The requirements for the granting of provisional measures of protection are the gravity of the situation, the urgency of the need of such measures, and the probability of irreparable harm. They are met in a situation like that of the *cas d'espèce*, putting at stake, in eastern Ukraine, the fundamental rights to life and to the security and integrity of the person, among others. They are insufficiently dealt with, or even eluded to, in the present Order, which, on the other hand, abounds in the aforementioned inconsistencies of invocation of the "plausibility" test.

44. As I have been sustaining along the years, time and time again, provisional measures of protection have an *autonomous legal regime* of their own. This being so, it is clear to me that human vulnerability is a test even more compelling than "plausibility" of rights for the indication or ordering of provisional measures of protection. In so acknowledging and sustaining, one is contributing to the ongoing historical process of *humanization* of contemporary international law.

VI. The Necessity and Importance of Provisional Measures of Protection in the *Cas d'Espèce*

45. In the present case, in my understanding the Court is entitled and obliged, in view of the evidence produced before it, to indicate provisional measures of protection, on the basis of both the ICSFT Convention and of the CERD Convention. At this stage of the proceedings, it suffices to determine the Court's prima facie jurisdiction thereunder; an in-depth analysis of these two Conventions is not required, and should be kept for the merits stage[68]. The evidence already submitted to the Court is sufficient for the purposes of provisional measures.

46. To determine its prima facie jurisdiction at the present stage, the Court does not need to establish definitively breaches of the two Conventions at issue (Article 18 of the ICSFT Convention, and Articles 2 (1) and 5 *(b)* of the CERD Convention). At the stage of provisional measures, the Court cannot make definitive findings of fact nor findings of attribution of responsibility[69], issues to be determined later on, at the stage of the merits. At the present stage, the ICJ — as the International Court *of Justice* — is under the duty to focus, on the basis of the evidence produced, on the protection of the vulnerable civilian population living (or surviving) in the areas concerned.

47. On the basis of the documents and evidence submitted by the Parties, there appear to be ongoing attacks on civilians in eastern Ukraine (particularly in Avdiivka); this situation has been ongoing since 2014[70] and continues to result in fatalities, deaths and bodily injuries. There were and there continue to be armed incidents causing loss of life or bodily injuries, which by their nature and gravity are inherently

[68] Cf., in this sense *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 550, para. 53.

[69] Cf., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, pp. 395-396, para. 141.

[70] On the very recent escalation of hostilities in Avdiivka/Donetsk/Makiivka, cf. OHCHR, [Report on] *Conflict-Related Civilian Casualties in Ukraine* (6 March 2017), p. 1; OHCHR, *Escalation of Hostilities Has Exacerbated Civilian Suffering — UN Report* (4 March 2017), pp. 1-2.

irreparable[71]. There is urgency in the situation, and the Court is to protect the vulnerable segments of the population. The fact that after the two Minsk Agreements (of 5 September 2014 and 12 February 2015)[72] the situation remains unstable, and the tensions and indiscriminate shelling (from all sides) are still ongoing[73], stresses the ICJ's duty to order provisional measures of protection.

48. For its part, the CERD Convention is a core UN human rights convention intended to protect rights of the human person at intra-State level. Accordingly, concern for the protection of vulnerable segments of the population must inform the Court's finding that the test of human vulnerability here applies, requiring provisional measures of protection. To this end, there is prima facie jurisdiction under the CERD Convention (*inter alia* Articles 2 (1) and 5 *(b)*), as well as under the ICSFT Convention (Article 18, as related to Article 2), and undue and groundless obstacles to access to justice thereunder are to be discarded.

49. Where there is a risk to human life or health, the Court has duly considered the probability of a damage which would be *ipso facto* irreparable. Imminence of breaches of rights under the CERD Convention, insofar as they could involve privation, hardship, anguish and danger to life and health, can result in damages that can be properly qualified as irreparable; such risk of irreparable harm renders certain ethnic segments of local populations (in Crimean Tatar and ethnic Ukrainian communities) particularly vulnerable[74].

50. As the security of the vulnerable segments of the population remains at risk, provisional measures by the Court are necessary to protect them. Furthermore, the state of armed conflict and the application of international humanitarian law do not exclude the application of the ICSFT and CERD Conventions: they are not mutually-excluding, but rather, they reinforce each other in the factual context of the *cas d'espèce*,

[71] Cf., in this respect, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, para. 142.

[72] Both agreements contain very similar provisions, including specific commitments to, *inter alia*: an immediate bilateral ceasefire (with monitoring and verification by the OSCE); the withdrawal of illegal armed groups from Ukraine; the release of hostages and other unlawfully detained individuals; the unimpeded provision of humanitarian assistance.

[73] As reported, e.g., by the OSCE Special Monitoring Mission to Ukraine, based on information received up to 30 January 2017.

[74] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 396, paras. 142-143.

so as to secure the protection due to persons in situations of great vulnerability.

51. It is reassuring that the ICJ, as "the principal judicial organ of the United Nations" (Article 92 of the UN Charter), orders provisional measures of protection in face of the imminence of (new) breaches of human rights and of international humanitarian law. The circumstances of the *cas d'espèce* call for a *vue d'ensemble* of the relevant provisions of the ICSFT and CERD Conventions, and ILHR and IHL in the exercise of hermeneutics. Other main organs of the United Nations (like the General Assembly[75] and the Security Council[76]) have likewise expressed their concerns with the circumstances of the *cas d'espèce*.

VII. The Concern of the International Community with the Living Conditions of the Population Everywhere

52. This is not the first time that, in face of the victimization of vulnerable segments of the population in an ongoing armed conflict or hostilities, I upheld the "approximations and convergences", and the concomitant application, of international humanitarian law and other international conventions (of human rights and others), a situation which, as I pointed out 15 years ago in another international jurisdiction, clearly requires the recognition of the effects of the Convention at issue *vis-à-vis* others, *simples particuliers (Drittwirkung)*[77]. In the *cas d'espèce*, such is the case of the ICSFT and CERD Conventions: *Drittwirkung* has as incidence here, as both Conventions cover inter-individual relations as well, without thereby excluding the determination of State responsibility (even if by omission, a question for consideration at the subsequent stage of the merits).

53. As I have already pointed out in the present separate opinion, the vulnerability of victims, with its implications, are thus clearly acknowledged in contemporary international case law, of distinct international

[75] Cf. UN General Assembly resolution 68/262, of 27 March 2014 (paragraph 4, on the need of protection of human life in Ukraine); General Assembly resolution 71/205, of 19 December 2016 (paras. 1 and 2 *(b)*, concern with discriminatory measures and practices in Crimea).

[76] Cf. UN Security Council resolution 2202 (2015), of 17 February 2015 (paragraphs 1 and 3, on the needed implementation of the "Package of Measures for the Implementation of the Minsk Agreements" of 12 February 2015).

[77] Cf. IACtHR, case of the *Peace Community of San José of Apartadó regarding Colombia* (resolution of 18 June 2002), concurring opinion of Judge Cançado Trindade, para. 14; IACtHR, *Matter of the Mendoza Prisons regarding Argentina* (resolution of 30 March 2006), concurring opinion of Judge Cançado Trindade, para. 5.

tribunals (cf. Part III, *supra*). In a still wider framework, may I just add, in this connection, that the cycle of world conferences of the United Nations[78] (during the 1990s and the beginning of the last decade), came significantly to disclose a common denominator, giving cohesion to the final documents they adopted, namely, the recognition of the legitimacy of the concern of the international community as a whole with the *conditions of living* of the population everywhere[79].

54. The UN World Conference of Vienna (1993), in particular, added an important element to this common denominator, namely, the special attention devoted to the *vulnerable segments* of the population everywhere. The protection of the vulnerable constitutes the great legacy of the II World Conference of Human Rights (Vienna, 1993)[80]: more than any other of the world conferences of that cycle, it presented, given its wide theme, a systemic vision of all segments of the population affected by vulnerability or extreme adversity.

55. The Declaration and Programme of Action of Vienna, final document adopted by the 1993 Vienna Conference, sought to concentrate special attention on persons suffering from discrimination and vulnerable groups, on the socially excluded, in greater need of protection[81]. The aforementioned document much contributed to the recognition of the *centrality* of victims in the present domain of protection, with special attention to their living conditions amidst vulnerability. In its legacy, such centrality of the victims is projected until current times, and underlined in

[78] World Conferences on Environment and Development, Rio de Janeiro, 1992; on Human Rights, Vienna, 1993; on Population and Development, Cairo, 1994; on Social Development, Copenhagen, 1995; on Rights of Women, Beijing, 1995; on Human Settlements — Habitat-II, Istanbul, 1996; and World Conference against Racism, Durban, South Africa, 2001.

[79] Cf. A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. I, 2nd ed., Porto Alegre/Brazil, S. A. Fabris Ed., 2003, Chaps. III-VII, pp. 165-338; and cf. A. A. Cançado Trindade, "Sustainable Human Development and Conditions of Life as a Matter of Legitimate International Concern: The Legacy of the UN World Conferences", in *Japan and International Law — Past, Present and Future* (Symposium of the Centennial of the Japanese Association of International Law), The Hague, Kluwer, 1999, pp. 285-309.

[80] Cf. A. A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)*, Fortaleza, Brazil, IBDH/IIDH/SLADI, 2014, pp. 13-363.

[81] A. A. Cançado Trindade, "Nouvelles réflexions sur l'interdépendence ou l'indivisibilité de tous les droits de l'homme, une décennie après la Conférence mondiale de Vienne", in *El Derecho Internacional: Normas, Hechos y Valores — Liber Amicorum J. A. Pastor Ridruejo* (eds. L. Caflisch *et al.*), Madrid, Universidad Complutense, 2005, pp. 59-73.

cases of systematic violation of their fundamental rights, amidst particularly *aggravating* circumstances[82].

VIII. Provisional Measures: Protection of the Human Person, beyond the Strict Inter-State Dimension

56. Eight years ago, in the case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, the ICJ decided, in its Order of 28 May 2009, not to indicate provisional measures of protection. I appended a dissenting opinion to that Order, recalling the saga of the victims of the Hissène Habré regime (1982-1990) in Chad (*I.C.J. Reports 2009*, pp. 176-182, paras. 30-45) in their search for justice; and, after drawing attention to the preventive juridical nature of such provisional measures, granted without prejudice to the Court's final decision on the merits of the case at issue (*ibid.*, p. 169, para. 12), as well as to their truly tutelary character (*ibid.*, p. 170, para. 13), I deemed it fit to point out that, during recent decades, there have been occasions when the ICJ, in deciding on provisional measures of protection, has endeavoured gradually to overcome the strictly inter-State outlook, in acknowledging the need of preservation of "human life and personal integrity", fundamental rights of individuals (*ibid.*, p. 174, paras. 20-21).

57. Whenever alleged grave violations of the international law of human rights (ILHR) and international humanitarian law (IHL) are at the origin of the inter-State *contentieux* before the ICJ, this has not been controverted by the contending parties themselves (*ibid.*, p. 180, para. 40); requesting States themselves have, in their arguments before the ICJ, "gone beyond the strictly inter-State outlook of the past", in vindicating the protection, by means of provisional measures, of "the fundamental rights of the human person" (*ibid.*, p. 175, para. 23). In effect, I added in my aforementioned dissenting opinion, in recent decades,

> "provisional measures indicated in successive Orders of the ICJ have transcended the artificial inter-State dimension of the past, and have come to preserve also rights whose ultimate subjects *(titulaires)* are the human beings. This reassuring development admits no steps backwards, as it has taken place to fulfil a basic need and aspiration not only of States, but of the contemporary international community as a whole." (*Ibid.*, p. 175, para. 25.)

[82] Cf. A. A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice*, Universiteit Utrecht, 2011, pp. 1-71; A. A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford University Press, 2011, Chap. X, pp. 179-191; A. A. Cançado Trindade, "Die Entwicklung des interamerikanischen Systems zum Schutz der Menschenrechte", 70 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2010), pp. 629-699.

58. I singled out the importance and time dimension of provisional measures of protection, particularly in face of the briefness and vulnerability of human life (*I.C.J. Reports 2009*, p. 182, paras. 46-47), and warned that prolonged delays in a situation of adversity or even defencelessness may amount to an aggravating circumstance (*ibid.*, p. 186, para. 59). Subsequently, in the same case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (*Merits, Judgment, I.C.J. Reports 2012 (II)*, p. 422), I pondered that the central position is of the human person, of the victims (and not of the States), and attention to their situation of great vulnerability requires further development in the treatment of the matter (*ibid.*, p. 555, para. 174).

59. And, in my separate opinion in the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* (*Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 639), I pointed out that "*humaneness* is to condition human behaviour in all circumstances, in times of peace as well as of disturbances and armed conflict" (*ibid.*, p. 762, para. 102), particularly in face of a "situation of vulnerability, or even defencelessness" (*ibid.*, para. 105). More recently, in my dissenting opinion in the Court's Order of 16 July 2013 in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* (*Provisional Measures, Order of 16 July 2013, I.C.J. Reports 2013*, p. 230), I pointed out that

> "After all, the beneficiaries of the compliance with, and due performance of, obligations under ordered provisional measures of protection, are not only States, but also human beings. A strictly inter-State outlook does not reflect this important point. The strictly inter-State dimension has long been surpassed, and seems insufficient, if not inadequate, to address obligations under provisional measures of protection." (*Ibid.*, p. 263, para. 56.)

60. May I, at this stage, briefly recall the two cases *Ukraine* v. *Russian Federation*, pending before the European Court of Human Rights (ECHR), illustrative of the protection of the human person, beyond the strict inter-State dimension. The ECHR applied provisional measures of protection in those (inter-State) cases, in addition to over 150 individual cases (out of a total of more than 1400 individual cases) lodged by individuals against Ukraine, or the Russian Federation or both[83].

[83] In a third *Ukraine* v. *Russia* case (application No. 49537/14), provisional measures were promptly adopted by the ECHR, in a case concerning security of the person of a Ukrainian national of the Crimean Tatars ethnic group, a case which was then struck off its list of cases; cf. ECHR, Press Release 286 (2015), of 24 September 2015, p. 1. In the

61. In the first case, *Ukraine* v. *Russian Federation*, for example, the ECHR, in applying provisional measures of protection, called upon both contending parties to refrain from taking any measures (in particular military action) which might entail breaches of the ECHR rights of the civilian population (including putting their life and health at risk), as well as to comply with their engagements under the ECHR, notably in respect of the fundamental right to life (Art. 2) and the prohibition of inhuman or degrading treatment (Art. 3)[84].

IX. Chronic Violence and the Tragedy of Human Vulnerability

62. The briefness and vulnerability of human life have attracted the attention of philosophers over the centuries, as widely known. The point assumes a dramatic dimension in face of persisting and chronic violence, and even of policies leading to it. Humanist thinking has always stood against that, and in defence of human life, and dignified conditions of living. May I here recall one example, the reflections of the universal writer Leo Tolstoy, which remain as topical nowadays, even in changed and entirely new circumstances, as at the time he wrote them.

63. Already in his earlier writings (of 1854-1856), on the conflict of Sevastópol (the *Sevastópol Sketches*) during the War of Crimea (from December 1854 to August 1856), Tolstoy gave expression to his humanist and pacifist outlook, supporting non-violent resistance to injustice and oppression, and warning against the irrationality and cruelty of war. To Tolstoy, it was unjustifiable to prepare people to slaughter each other in war, to send people into the battlefield to inflict sufferings, wounds and death to each other. In face of this fostering of hatred, either war was a madness, or those who produced such madness were not rational creatures. War was a tragedy of the human condition, leaving survivors surrounded by corpses; it was an evil to be avoided[85], he concluded.

64. Years later, Tolstoy permeated also his epic masterpiece novel *War and Peace* (1869) with philosophical humanist considerations. Over the

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second pending case *Ukraine* v. *Russia* (application No. 43800/14, concerning abducted persons, then returned to Ukraine), provisional measures were promptly adopted and then lifted by the ECHR; cf. ECHR, Press Release 345 (2014), of 26 November 2014, p. 2. As to the more than 150 individual cases, cf. ECHR, Press Release 296 (2015), 1 October 2015, p. 2; and ECHR, Press Release 122 (2015), of 13 April 2015, p. 1.

[84] Cf. ECHR, Press Release 73 (2014), 13 March 2014, p. 1; and cf. also ECHR, Press Release 345 (2014), of 26 November 2014, pp. 1-2.

[85] L. Tolstoy, *Contos de Guerra* [1855-1856], Lisbon, Relógio d'Agua Edit., 2015 [reed.], pp. 21, 26, 32 and 74.

centuries, he wrote, "millions of men perpetrated so great a mass of crime[s]" with the utmost wickedness, not looking at them as crimes[86]. Often with patriotism they prepared themselves for murder, the "object of warfare"; they met together to murder the others, glorifying victories, "supposing that the more men have been slaughtered the greater the achievement"[87].

65. Tolstoy warned that, against "all humanity", "[g]reatness would appear to exclude all possibility of right and wrong", even in face of atrocities; nothing was esteemed as wrong, in face "of *glory* and of *greatness*"[88]. To him, quite to the contrary, he concluded in *War and Peace*, "there can be no free will", as human action is to be controlled, and knowledge is to bring "the essence of life under the laws of reason", and man can only know himself "through consciousness"[89].

66. Tolstoy kept his concerns in mind along the years. Much later on in his life, after writing his acclaimed literary novels *War and Peace* and *Anna Karenina*, he devoted himself to his writings on religious thinking, focusing attention more on non-violence and passive resistance. Thus, in a subsequent book *(The Slavery of Our Times)*, he again warned (in 1900) against organized and extreme violence, criticizing the recruitment of personnel to be sent to war and to kill vulnerable and defenseless persons[90].

67. In the remaining years of his life, in his book *The Kingdom of God Is Within You* (1894-1897), Tolstoy positioned himself against war and armamentism[91], invoking the "conscience of mankind"[92]. In particular, he condemned the compulsory military recruitment of persons to be sent to war[93] as a form of State violence, depriving those persons of their private and family life[94]. This, he added, was an inversion of the humane ends of the State[95], it was a form of "military slavery"[96], sending the recruited persons to the slaughtering of others and to their own death[97]. This amounted to inflicting evil on others and on themselves[98].

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[86] L. Tolstoy, *War and Peace* [1869], N.Y., Ed. Modern Library/Random House, 2002 [reed.], p. 687.

[87] *Ibid.*, pp. 885-886.

[88] *Ibid.*, pp. 1218 and 1291.

[89] *Ibid.*, pp. 1370 and 1382.

[90] L. Tolstoy, *La Esclavitud de Nuestro Tiempo* [*The Slavery of Our Times*, 1900], Barcelona, Littera, 2000 [reed.], pp. 86-87, 89, 91, 97, 101, 103-104 and 121.

[91] L. Tolstoy, *El Reino de Dios Está en Vosotros [Tsarstvo Bozhie Vnutrí Vas]*, 7th ed., Barcelona, Edit. Kairós, 2016, pp. 21, 152-153, 157 and 170.

[92] *Ibid.*, pp. 24 and 229, and cf. pp. 412 and 414.

[93] *Ibid.*, pp. 186-189, 209 and 353.

[94] *Ibid.*, pp. 211-212 and 230-231.

[95] *Ibid.*, p. 213.

[96] *Ibid.*, p. 216, and cf. p. 364.

[97] *Ibid.*, pp. 371-372.

[98] *Ibid.*, pp. 387 and 393.

X. Provisional Measures: Protection of People in Territory

68. I have already made the point that, amidst generalized violence, the ultimate beneficiaries of obligations under ordered provisional measures of protection are human beings. A strictly inter-State outlook is, in my perception, insufficient and surpassed, to address adequately obligations under provisional measures (cf. Part VIII, *supra*). Thus, over half a decade ago, in my separate opinion in the case of *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), (Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II))*, for example, I deemed it fit to draw attention to this point (in my separate opinion, (*ibid.*, pp. 588-590, 592-593 and 606, paras. 66, 70, 77 and 113)), wherein I pondered that

> "International law in a way endeavours to be *anticipatory* in the regulation of social facts, so as to avoid disorder and chaos, as well as irreparable harm. (. . .) We are here before the *raison d'être* of provisional measures of protection, to prevent and avoid irreparable harm in situations of gravity and urgency. They are endowed with a preventive character, being anticipatory in nature, looking forward in time. They disclose the preventive dimension of the safeguard of rights. Here, again, the time factor marks its presence in a notorious way." (*Ibid.*, p. 588, para. 64.)

69. I added that provisional measures, intended to protect human life, call for a humanist outlook, as they encompass, besides territory, *people*, "the most precious constituent element of statehood" (*ibid.*, pp. 589-590, paras. 70 and 81). People and territory are to be brought together, giving "proper weight to the *human factor*" (*ibid.*, p. 599, para. 97). After all, I concluded on this point,

> "Not everything can be subsumed under territorial sovereignty. The fundamental human right to life is not at all subsumed under State sovereignty. The human right not to be forcefully displaced or evacuated from one's home is not to be equated with territorial sovereignty. The Court needs to adjust its conceptual framework and its language to the new needs of protection, when it decides to indicate or order the provisional measures requested from it." (*Ibid.*, pp. 599-600, para. 99.)

70. Shortly afterwards, I had the occasion to elaborate further on this issue, in the consideration of the matter in the joined cases of *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, and of the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*: in its Order of 16 July 2013, as the ICJ decided not to order provisional measures, I appended a dis-

senting opinion thereto; and in its subsequent Order of 22 November 2013, where the Court indicated provisional measures, I appended a separate opinion thereto.

71. In my dissenting opinion of 16 July 2013, I underlined the fact that the Court was once again faced with the requested protection of people in territory (*I.C.J. Reports 2013*, pp. 257 and 260, paras. 39 and 46-47), drawing attention to the preventive dimension of the safeguard of the rights at issue (*ibid.*, p. 258, para. 41). After recalling other situations of the kind, I added that

> "along the last three decades, the ICJ has gradually overcome the strictly inter-State outlook in the acknowledgement of the rights to be preserved by means of its Orders of provisional measures of protection.
>
> . . . . . .
>
> Facts tend to come before the norms, requiring of these latter the aptitude to cover new situations they are meant to regulate, with due attention to superior values[99]. Before this Court, States keep on holding the monopoly of *jus standi*, as well as *locus standi in judicio*, in so far as requests for provisional measures are concerned, but this has not proved incompatible with the preservation of the rights of the human person, together with those of States. The ultimate beneficiaries of the rights to be thereby preserved have been, not seldom and ultimately, human beings, alongside the States wherein they live. Provisional measures indicated in successive Orders of the ICJ have transcended the artificial inter-State dimension of the past, and have come to preserve also rights whose ultimate subjects *(titulaires)* are human beings." (*Ibid.*, p. 261, paras. 49-50.)

72. I then observed that provisional measures are "truly *tutelary*", as States are bound "to protect all persons under their respective jurisdictions", thus avoiding "harm in the form of bodily injury or death" (*ibid.*, p. 263, para. 56). Provisional measures have an autonomous legal regime of their own, which needs conceptual refinement, focusing attention on the legal consequences of non-compliance with them, generating State responsibility and entailing legal consequences (*ibid.*, pp. 267-268, paras. 69-72).

73. The obligations which the ordering of those measures generates "are distinct from the obligations" ensuing from the Court's judgments as

[99] Cf., *inter alia*, G. Morin, *La révolte du droit contre le code — La révision nécessaire des concepts juridiques*, Paris, Libr. Rec. Sirey, 1945, pp. 2, 6-7 and 109-115.

to the merits (*I.C.J. Reports 2013*, p. 269, para. 75). I concluded that this calls for "a more pro-active posture" on the part of the Court, so as

> "to contribute effectively to the avoidance or prevention of irreparable harm in situations of urgency, to the ultimate benefit of *all* subjects of international law, States as well as groups of individuals, and *simples particuliers*. After all, the human person (living in harmony in her natural habitat) occupies a central place in the new *jus gentium* of our times." (*Ibid.*, p. 270, para. 76.)

XI. The Autonomous Legal Regime of Provisional Measures of Protection: Duty of Compliance with Them

74. Now, in the present case, we again find ourselves within the realm of the autonomous legal regime of provisional measures of protection, which I have already referred to in the present separate opinion. Such legal regime is configured by the *rights* to be protected (not necessarily identical to those vindicated later in the merits stage), by the *obligations* emanating from the provisional measures of protection, generating autonomously State *responsibility*, with its legal consequences, and by the presence of (potential) victims already at the stage of provisional measures of protection.

75. As the *cas d'espèce* shows, the claimed rights to be protected encompass the fundamental rights of human beings, such as the right to life, the right to personal security and integrity, the right not to be forcefully displaced or evacuated from one's home. The duty of compliance with provisional measures of protection brings to the fore another element configuring their autonomous legal regime, to which I now turn attention, in its component elements, namely: non-compliance and the prompt engagement of State responsibility; prompt determination by the Court of breaches of provisional measures of protection; and the ensuing duty of reparation for damages resulting from those breaches.

76. Shortly after my aforementioned dissenting opinion in the Court's Order of 16 July 2013, in my separate opinion in the Court's following Order of 22 November 2013 in the same joined cases opposing Costa Rica and Nicaragua, I began by observing that, much as provisional measures of protection have expanded in our times, the configuration of the autonomous legal regime of their own[100] keeps on calling for further elaboration, for example, in respect of the necessary *compliance* with

[100] Cf. note 10, *supra*.

them (*I.C.J. Reports 2013*, pp. 378-381, paras. 20-26). Given that provisional measures generate *per se* obligations, non-compliance with them generates State responsibility and entails legal consequences (*ibid.*, pp. 382-383, para. 29).

1. Non-Compliance and State Responsibility

77. The beneficiaries of compliance with provisional measures, I proceeded, can be "States as well as groups of individuals, and *simples particuliers*" (*ibid.*, p. 384, para. 31). I then added that, had the ICJ, in its previous Order of 16 July 2013 in the aforementioned merged cases *(supra)*, indicated or ordered the provisional measures requested, "probably the present situation in the disputed territory (. . .) would not have arisen" (*ibid.*, p. 387, para. 38). And I concluded that non-compliance with provisional measures "entails an *additional* ground of responsibility; the task ahead of us is to extract the consequences ensuing therefrom" (*ibid.*, para. 40).

78. Two years later, in the same joined cases of *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, and of the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, in the Court's Order of 16 December 2015, I appended a new separate opinion, wherein I presented a plea for the prompt determination by the ICJ of breaches of provisional measures of protection (*I.C.J. Reports 2015 (II)*, p. 759, para. 3 and pp. 769-772, paras. 34-44) and sustained the duty of reparation (in its distinct forms) for damages resulting from those breaches (*ibid.*, p. 759, para. 3 and pp. 773-775, paras. 47-52).

2. Prompt Determination of Breaches of Provisional Measures: An Anti-Voluntarist Posture

79. The determination of breaches of provisional measures of protection, I stressed, does not need to wait until the end of proceedings as to the merits of the case at issue (*I.C.J. Reports 2015 (II)*, p. 767, para. 26 and p. 769, para. 33), as obligations of prevention are additional ones, in relation to those ensuing from the judgment on the merits; in order to serve better their anticipatory rationale, "the determination of a breach of provisional measures of protection is not — should not be — conditioned by the completion of subsequent proceedings as to the merits of the case at issue" (*ibid.*, p. 770, para. 35). And I added that "contemporary international tribunals have, in my understanding, an inherent power or *faculté* to order provisional measures of protection, whenever needed, and to determine, *ex officio*, the occurrence of a breach of provisional measures, with its legal consequences" (*ibid.*, para. 36).

80. In the realm of provisional measures of protection, I added,

"once again the constraints of voluntarist legal positivism are, in my view, overcome[101]. The Court is not limited to what the contending parties want (in the terms they express their wish), or so request. The Court is not an arbitral tribunal, it stands above the will of the contending parties. This is an important point that I have been making on successive occasions within the ICJ, in its work of international adjudication.

. . . . . .

[T]he Court is to assume the role of guarantor of compliance with conventional obligations, beyond the professed intention or will of the parties.

. . . . . .

The Court, may I reiterate, is not an arbitral tribunal, it stands above the will of the contending parties. (. . .). It has an inherent power or *faculté* to proceed promptly to the determination of a breach of provisional measures, in the interests of the sound administration of justice. And *recta ratio* guides the sound administration of justice *(la bonne administration de la justice)*. *Recta ratio* stands above the will." (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), I.C.J. Reports 2015 (II)*, p. 771, paras. 39-40 and p. 772, para. 42.)

3. Breaches of Provisional Measures and the Duty of Reparation

81. In case of a finding of breaches of provisional measures, I proceeded in the same separate opinion in the two joined cases, the Court is entitled to address reparations (in all its forms), irrespective of subsequent proceedings on the merits, as "breach and reparation come together" (*I.C.J. Reports 2015 (II)*, p. 773, paras. 47-48 and p. 774, para. 51). In the interests of the sound administration of justice *(la bonne administration de la justice)*, an international tribunal has the inherent power or *faculté* to supervise *motu proprio* compliance with its Orders of provisional measures, and, in case of non-compliance, to address the legal consequences ensuing therefrom and to determine the duty of reparation (*ibid.*, pp. 778-779, paras. 62-63).

[101] For my criticisms of the voluntarist conception of international law, cf. A. A. Cançado Trindade, "The Voluntarist Conception of International Law: A Re-Assessment", 59 *Revue de droit international de sciences diplomatiques et politiques*, Sottile (1981), pp. 201-240.

82. In this domain, I continued, international case law seems to be preceding legal doctrine, and it is a source of satisfaction to me to endeavour to keep on contributing to that (*I.C.J. Reports 2015 (II)*, p. 779, para. 66). This development portrays the relevance of the preventive dimension in contemporary international law (*ibid.*, pp. 775-776, paras. 53-56). After all, in their autonomous legal regime, provisional measures of protection guarantee rights and generate *per se* obligations, which are not necessarily the same as those dealt with in the subsequent proceedings as to the merits. I then concluded that a breach of provisional measures engages by itself State responsibility, with the duty to provide prompt reparation (*ibid.*, pp. 780-781, paras. 68-72). Contemporary international tribunals are to foster this progressive development, "to the benefit of all the *justiciables*" (*ibid.*, p. 781, para. 73).

83. As I further pointed out in my separate opinion in the case of *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia), Provisional Measures, Order of 22 April 2015 (I.C.J. Reports 2015 (II))*, such rights and obligations being proper to provisional measures, the ICJ is fully entitled to decide on the legal consequences of non-compliance with them (including the due reparations),

> "without waiting for the manifestations of the 'will' of a contending State party. It is human conscience, standing above the 'will', that accounts for the progressive development of international law. *Ex conscientia jus oritur.*" (*Ibid.*, p. 566, para. 13.)

XII. Epilogue

84. The matter brought to the Court's attention in the factual context of the request which led to the adoption of the present Order of provisional measures of protection in the case of the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation)*, requires, as I have endeavoured to demonstrate, much reflection, from a humanist outlook. This is ineluctable, given the central position occupied by the victims (including potential victims) in the consideration of requests of provisional measures of protection like the present one. We here find human beings in great need of protection, in situations of vulnerability or even defencelessness.

85. In these circumstances, the decisive test, in my understanding, is that of human vulnerability, rather than so-called "plausibility" of rights.

In face of the gravity of the situation, of urgency and risks of (further) irreparable damage, provisional measures of protection are required. Their indication is oriented by the principle *pro persona humana, pro victima*. Those measures bear witness to the current historical process of *humanization* of international law, which is irreversible. The protection of human beings in situations of great vulnerability has thus found expression at international law level in our times, as a sign of such historical process; yet, there remains a long way to go.

86. The pressing need to secure protection of human beings in situations of great vulnerability, in my perception, requires the ICJ to go beyond the strict inter-State dimension (the one it is used to, attached to a dogma of the past), and to concentrate attention on *victims* (including the potential ones[102]), be they individuals[103], groups of individuals[104], peoples or humankind[105], as subjects of international law, and not on inter-State susceptibilities. Human beings in vulnerability are the ultimate beneficiaries of provisional measures of protection, endowed nowadays with a truly *tutelary* character, as true jurisdictional guarantees of preventive character.

87. I have already pointed out that, in the course of the proceedings leading to the adoption of the present Order, the situation of utmost vulnerability of segments of the population — calling for provisional measures of protection — was brought to the attention of the Court (cf. Part III, *supra*). The two Contending Parties have provided the Court with extensive documentation on it, which I have examined in the present separate opinion (cf. Part IV, *supra*).

88. I find it regrettable that such human vulnerability is not duly dealt with in the reasoning of the Court, nor expressly reflected in the *dispositif* of the present Order, where, despite the constatation in that documentation of the situation of human vulnerability of segments of the population (e.g., under indiscriminate shelling), the protection of the fundamental

[102] On the notion of *potential* victims in the framework of the evolution of the notion of victim (or the condition of the complainant) in the domain of the international law of human rights, cf. A. A. Cançado Trindade, "Co-Existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des cours de l'Académie de droit international de La Haye* (1987), Chap. XI, pp. 243-299, esp. pp. 271-292.

[103] As I pointed out in my separate opinions of the *Ahmadou Sadio Diallo* case (Judgments of 30 November 2010, merits; and of 19 June 2012, reparations).

[104] As I sustained in my dissenting and separate opinions in the case of *Questions relating to the Obligation to Prosecute or Extradite* (Order of 28 May 2009, and Judgment of 20 July 2012, respectively), as well as in my dissenting opinion in the case of the *Application of the Genocide Convention* (Judgment of 3 February 2015).

[105] As I upheld in my three dissenting opinions in the three *Marshall Islands* cases (Judgments of 5 October 2016).

rights to life and to the security and integrity of the person is not even mentioned.

89. Even so, point (2) of the *dispositif*, addressed to both Contending Parties, and the only one covering the dispute as a whole before the Court (encompassing both the ICSFT and the CERD Conventions), in both Crimea and eastern Ukraine, in my understanding implicitly extends protection also to those fundamental rights, in ordering that "[b]oth Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve".

90. The principle of humanity comes to the fore. There are no restrictions *ratione personae* (e.g., attempting to focus exclusively on relations between States and individuals). International conventions, like the two invoked in the present case (the ICSFT and the CERD Conventions), as I have already pointed out, have a *Drittwirkung* effect, they cover likewise inter-individual relations, without thereby excluding the subsequent consideration of State responsibility (as to the merits), even if by omission.

91. After all, the principle of humanity permeates the whole *corpus juris* of contemporary international law (encompassing the converging trends of the international law of human rights, international humanitarian law, international law of refugees, international criminal law). The principle of humanity has a clear incidence on the protection of persons in situations of great vulnerability. The *raison d'humanité* prevails here over the *raison d'Etat*. Human beings stand in need, ultimately, of protection against evil, which lies within themselves.

(Signed) Antônio Augusto CANÇADO TRINDADE.