SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

TABLE OF CONTENTS

*

I. *Prolegomena*

1. I have voted in support of the adoption today, 18 May 2017, of the present Order of the International Court of Justice (ICJ) in the case *Jadhav (India* v. *Pakistan)* — shortly after the holding of the public hearings before the Court of 15 May 2017 — indicating provisional measures of protection. Given the great importance that I attach to certain aspects pertaining to the matter dealt with in the present Order, I feel obliged to append this separate opinion thereto, under the merciless pressure of time (*ars longa, vita brevis*, anyway), so as to leave on the records the foundations of my own personal position thereon.

2. I shall thus consider, in the sequence next, the following points: *(a)* rights of States and of individuals as subjects of international law; *(b)* presence of rights of States and of individuals together; *(c)* the right to information on consular assistance in the framework of the guarantees of the due process of law; *(d)* the fundamental (rather than "plausible") human right to be protected: provisional measures as jurisdictional guarantees of a preventive character; *(e)* the autonomous legal regime of provisional measures of protection; and *(f)* the humanization of international law as manifested in the domain of consular law.

II. Rights of States and of Individuals as Subjects of International Law

3. The present *Jadhav* case concerns alleged violations of the 1963 Vienna Convention on Consular Relations with regard to the detention and trial of an Indian national (Mr. K. S. Jadhav), sentenced to death (on 10 April 2017) by a court martial in Pakistan. It is not my intention in the present separate opinion to dwell upon the arguments advanced by the Contending Parties themselves, India and Pakistan, during the public hearings before the Court of 15 May 2017, as this has already been done in the Court's Order itself, of today, 18 May 2017[1]. I have carefully taken note of such arguments, advancing distinct views of the interrelated issues of prima facie jurisdiction, the grounds for provisional measures of protection, the requirements of urgency and imminence of irreparable harm[2].

4. On one sole point their respective views initially appeared not being so distinct, when Pakistan, referring at first to a point raised originally by India in its Application instituting proceedings (of 8 May 2017), — whereby Article 36 of the 1963 Vienna Convention on Consular Relations (henceforth, the "1963 Vienna Convention") was adopted to set up "standards of conduct", particularly concerning "communication and contact with nationals of the sending State, which would contribute to the development of friendly relations amongst nations" (Application instituting proceedings, p. 16, para. 34), then added that "this is unlikely to apply in the context of a spy/terrorist sent by a State to engage in acts of terror"[3]. This is a point, however, that could be considered by the Court only at a subsequent stage of the proceedings in the *cas d'espèce* (preliminary objections, or merits), as the ICJ itself has rightly pointed out in its Order just adopted today[4]. At the present stage of provisional

[1] Cf. paragraphs 19-25, 29, 37, 40-41, 43-44 and 51-52 of the present Order.
[2] Cf. CR 2017/5, of 15 May 2017, pp. 11-43 (India); and CR 2017/6, of 15 May 2017, pp. 8-23 (Pakistan).
[3] CR 2017/6, of 15 May 2017, p. 19.
[4] Paragraph 43, and cf. also paragraphs 32-33, of the present Order.

measures of protection, the distinct views of the Contending Parties are thus found all over their respective arguments.

5. In the present separate opinion, I purport to concentrate attention on the aforementioned points (Part I, *supra*) bringing them into the realm of juridical epistemology. May I begin by observing that, in my perception, the present case *Jadhav (India* v. *Pakistan)* brings to the fore rights of States and of individuals emanating directly from international law. In effect, in its Application instituting proceedings as well as in its Request for provisional measures of protection, both of 8 May 2017, India has deemed it fit to single out that the 1963 Vienna Convention confers rights upon States (under Article 36 (1) *(a)* and *(c)*) as well as individuals (nationals of States arrested or detained or put on trial in other States, under Article 36 (1) *(b)*)[5].

6. As subjects of international law, individuals and States are, in the circumstances of the *cas d'espèce*, *titulaires* of the rights of seeking and of having, respectively, consular access and assistance[6]. The Request for provisional measures of protection further invokes, in addition to the aforementioned 1963 Vienna Convention (Article 36), the 1966 UN Covenant on Civil and Political Rights (right to a fair trial, Article 14), so as to safeguard ultimately the inherent fundamental right to life (Article 6), as "[i]nternational law recognizes the sanctity of human

---

[5] Cf. Application instituting proceedings, of 8 May 2017, p. 17, para. 34, and cf. also p. 3, para. 1; Request for the indication of provisional measures of protection, of 8 May 2017, pp. 3-4, paras. 5 and 9.

[6] Article 36 of the 1963 Vienna Convention concerns "Communication and contact with nationals of the sending State", and paragraph 1 provides that:

> "With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> *(a)* Consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> *(b)* If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
>
> *(c)* Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

life"[7]. In effect, public international law has, in this context as well, benefited from the impact of the emergence and consolidation of the international law of human rights (ILHR).

7. In contemporary international law, rights of States and of individuals are indeed to be considered altogether, they cannot be dissociated from each other. Before the turn of the century, the Inter-American Court of Human Rights [IACtHR] delivered its pioneering 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), advancing the proper hermeneutics of Article 36 (1) *(b)* of the 1963 Vienna Convention, reflecting the impact thereon of the *corpus juris* of the ILHR.

8. I drew attention to this important point in my concurring opinion (para. 1) appended to that Advisory Opinion No. 16, wherein I pointed out that:

> "The profound transformations undergone by international law, in the last five decades, under the impact of the recognition of universal human rights, are widely known and acknowledged. The old monopoly of the State of the condition of being subject of rights is no longer sustainable, nor are the excesses of a degenerated legal positivism, which excluded from the international legal order the final addressee of juridical norms: the human being. (. . .) [T]his occurred with the indulgence of legal positivism, in its typical subservience to State authoritarianism.
>
> The dynamics of contemporary international life has cared to deauthorize the traditional understanding that international relations are governed by rules derived entirely from the free will of States themselves. [Contemporary international law] (. . .) has for years withdrawn support to the idea, proper of an already distant past, that the formation of the norms of international law would emanate only from the free will of each State.
>
> With the demystification of the postulates of voluntarist positivism, it became evident that one can only find an answer to the problem of the foundations and the validity of general international law in the *universal juridical conscience*, starting with the assertion of the idea of an objective justice. As a manifestation of this latter, the rights of the human being have been affirmed, emanating directly from interna-

[7] Request for provisional measures of protection, *op. cit. supra* note 5, p. 8, para. 17.

tional law, and not subjected, thereby, to the vicissitudes of domestic law." (*Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, paras. 2-14.)

9. I added that the constraints of legal positivism had wrongly been indifferent to other areas of human knowledge, as well as to the existential time of human beings, reducing this latter to an external factor in the framework of which one was to apply positive law (*ibid.*, para. 3). The positivist-voluntarist trend, with its obsession with the autonomy of the "will" of the States, came to the extreme of conceiving (positive) law *independently of time*. It so happens that the very emergence and consolidation of the *corpus juris* of the ILHR are due to the reaction of the universal juridical conscience to the recurrent abuses committed against human beings, often warranted by positive law: with that, the law came to the encounter of human beings, the ultimate *titulaires* of their inherent rights protected by its norms (*ibid.*, para. 4).

10. In the framework of this new *corpus juris*, one cannot remain indifferent to the contribution of other areas of human knowledge, nor to the existential time of human beings. And I added that the right to information on consular assistance (to refer to one example), "cannot nowadays be appreciated in the framework of exclusively inter-State relations", as contemporary legal science has come to admit that "the contents and effectiveness of juridical norms accompany the evolution of time, not being independent of this latter" (*ibid.*, para. 5). I then recalled, in the same concurring opinion, that, despite the fact that the 1963 Vienna Convention had been celebrated three years before the adoption of the two Covenants on Human Rights (Civil and Political Rights, and Economic, Social and Cultural Rights) of the United Nations, the IACtHR was aware that its *travaux préparatoires* already disclosed "the attention dispensed to the central position occupied by the individual" in the elaboration and adoption of its Article 36 (*ibid.*, para. 16).

11. Thus, I proceeded, Article 36 (1) *(b)* of the aforementioned 1963 Vienna Convention, in spite of having preceded in time the provisions of the two UN Covenants on Human Rights (of 1966), could no longer be dissociated from the international norms of protection of human rights concerning the guarantees of the due process of law and their evolutive interpretation (para. 15). The action of protection thereunder, "in the ambit of the international law of human rights, does not seek to govern the relations between equals, but rather to protect those ostensibly weaker and more vulnerable"; it is this "condition of particular vulnerability" that the right to information on consular assistance "seeks to remedy" (*ibid.*, para. 23).

III. Presence of Rights of States and of Individuals Together

12. States and individuals are subjects of contemporary international law[8]; the crystallization of the subjective individual right to information on consular assistance bears witness of such evolution. Still in my aforementioned concurring opinion in the IACtHR's Advisory Opinion No. 16 on the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), I recalled (para. 25) that the ICJ itself, in the case of *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 7), had pondered that the proper conduct of consular relations, established since ancient times *"between peoples"*, is no less important in the context of contemporary international law, "in promoting the development of friendly relations *among nations*, and *ensuring protection and assistance for aliens resident in the territories of other States*"; this being so, — the Court added, — no State can fail to recognize "the imperative obligations" codified in the 1961 and 1963 Vienna Conventions[9] on Diplomatic and Consular Relations, respectively.

13. Shortly afterwards, in the same case of *Hostages in Tehran* (Merits, Judgment of 24 May 1980), the ICJ, in referring again to the provisions of the Vienna Conventions on Diplomatic Relations (of 1961) and on Consular Relations (of 1963), pointed out the great importance and the imperative character of their obligations, and invoked expressly, in rela-

[8] Cf., in this sense, e.g., A. A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* — General Course on Public International Law — Part I", 316 *Recueil des cours de l'Académie de droit international de La Haye* (2005), Chaps. XII and IX-X, pp. 203-219 and 252-317; A. A. Cançado Trindade, *Le droit international pour la personne humaine*, Paris, Pedone, 2012, pp. 45-368; A. A. Cançado Trindade, "The Human Person and International Justice" (W. Friedmann Memorial Award Lecture 2008), 47 *Columbia Journal of Transnational Law* (2008), pp. 16-30; A. A. Cançado Trindade, "La Persona Humana como Sujeto del Derecho Internacional: Consolidación de Su Posición al Inicio del Siglo XXI", in *Democracia y Libertades en el Derecho Internacional Contemporáneo* (Libro Conmemorativo de la XXXIII Sesión del Programa Externo de la Academia de Derecho Internacional de La Haya, Lima, 2005), Lima, the Hague Academy of International Law/IDEI (PUC/Peru), 2006, pp. 27-76; A. A. Cançado Trindade, "A Consolidação da Personalidade e da Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", in 16 *Anuario del Instituto Hispano-Luso-Americano de Derecho Internacional*, Madrid (2003), pp. 237-288; A. A. Cançado Trindade, "A Personalidade e Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", in *Jornadas de Derecho Internacional* (Mexico, Dec. 2001), Washington D.C., OAS Sub-Secretariat of Legal Affairs, pp. 311-347.

[9] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, pp. 19-20, paras. 40-41.

tion to them, the contents of the 1948 Universal Declaration of Human Rights[10] (*I.C.J. Reports 1980*, para. 26).

14. The presence of rights of States and of individuals together was, subsequently, acknowledged in express terms by ICJ in the case of *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, where it stated that "violations of the rights of the individual under Article 36 [of the 1963 Vienna Convention] may entail a violation of the rights of the sending State, and that violations of the rights of the latter may entail a violation of the rights of the individual" (*Judgment, I.C.J. Reports 2004 (I)*, p. 36, para. 40).

15. In the present *Jadhav* case, in its oral arguments in the very recent public hearings before the Court of 15 May 2017, India referred to this dictum, and added that

> "[w]here the rights of an individual are violated, consequences must follow. The [1963] Vienna Convention recognizes the right of a State to seek redress on behalf of its national in this Court, where the rights of its national, and concomitantly its own rights under the Vienna Convention, are violated by another State"[11].

And it further pointed out that "[t]he rights of consular access are a significant step in the evolution and recognition of the human rights in international law", specifically referring to provisions of the UN Covenant on Civil and Political Rights (art. 6, 9 and 14)[12].

IV. The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law

16. The insertion of the matter under examination into the domain of the international protection of human rights, counted early on judicial recognition (cf. Part III, *supra*), "there being no longer any ground at all for any doubts to subsist as to an *opinio juris* to this effect"; in effect — as I further pondered in my aforementioned concurring opinion in the IACtHR's Advisory Opinion No. 16 of 1999 — the subjective element of international custom is the *opinion juris communis*, and "in no way the *voluntas* of each State individually[13]" (para. 27);

---

[10] *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, pp. 30-31, para. 62, and pp. 41-43, paras. 88 and 91-92.

[11] CR 2017/5, of 15 May 2017, pp. 39-40, para. 89.

[12] Pertaining to the right to life, the right to liberty and security of person, and the right to a fair trial, respectively; *ibid.*, pp. 38-39, para. 86.

[13] A. A. Cançado Trindade, "Contemporary International Law-Making: Customary International Law and the Systematization of the Practice of States", *Thesaurus Acroasium*

> "it is no longer possible to consider the right to information on consular assistance (under Article 36 (1) *(b)* of the 1963 Vienna Convention on Consular Relations) without directly linking it to the *corpus juris* of the ILHR" (IACtHR's Advisory Opinion No. 16 of 1999, para. 29).

17. In the framework of this latter, the international juridical personality of the human being, emancipated from the domination of the State — as foreseen by the so-called "founding fathers" of international law (the *droit des gens*) — has been established nowadays. (. . .) A "normative" Convention of codification of international law, such as the 1963 Vienna Convention, acquires a life of its own being clearly independent from the "will" of individual States parties. That Convention represents much more than the sum of the individual "wills" of the States parties, and fosters the progressive development of international law (*ibid.*, paras. 30-31).

18. The intermingling between public international law and the international law of human rights gives testimony of the recognition of "the centrality, in this new *corpus juris*, of the universal human rights — what corresponds to a new *ethos* of our times" (*ibid.*, para. 34). It has thus become indispensable to link, for the purpose of protection, "the right to information on consular assistance with the guarantees of the due process of law set forth in the instruments of international protection of human rights" *(ibid.)*. This, in turn, bears witness of "the process of *humanization* of international law" (*ibid.*, para. 35), as manifested in particular also in the domain of consular law nowadays (cf. Part VII, *infra*).

V. The Fundamental (Rather than "Plausible") Human Right to Be Protected: Provisional Measures as Jurisdictional Guarantees of a Preventive Character

19. The right to information on consular assistance is, in the circumstances of the *cas d'espèce*, inextricably linked to the right to life itself, a fundamental and non-derogable right, rather than a simply "plausible" one. This is true not only for the stage of the merits of the case at issue, but also for the stage of provisional measures of protection, endowed with a juridical autonomy of their own (cf. *infra*). Fundamental rights are duly safeguarded by provisional measures of protection endowed with a conventional basis (such as those of the ICJ and of the IACtHR, as truly fundamental (not only "plausible") rights are at risk[14].

Sources of International Law (XVI Session, 1988), Thessaloniki/Greece, Institute of Public International Law and International Relations, 1992, pp. 77-79.

[14] Article 41 of the ICJ Statute, and Article 63 (2) of the American Convention on Human Rights, respectively.

20. In this respect, in my book of personal memories of the IACtHR I recalled, in connection with the importance of compliance with provisional measures of protection, *inter alia*, the case of *James and Others* v. *Trinidad and Tobago* (1998-2000), pertaining to the guarantees of the due process of law and the suspension of execution of death penalty:

> "[T]eníamos conciencia de que trabajábamos contra el reloj, y no podríamos retardar nuestra decisión, pues estaba amenazado, además del derecho a las garantías judiciales, el propio derecho fundamental a la vida. Nuestra acción eficaz [decisión de la suspensión de la ejecución de pena de muerte], acatada por el Estado, llevó a que las vidas de los condenados a la muerte en Trinidad y Tobago fueran salvadas, y las sentencias condenatorias de los tribunales nacionales fueran conmutadas." ["We were conscious that we worked against the clock, and could not delay our decision, as the right to judicial guarantees, in addition to the fundamental right to life itself, were threatened. Our effective action [decision of suspension of the execution of the death penalty], complied with by the State, saved the lives of those condemned to death in Trinidad and Tobago, and the condemnatory sentences of the national tribunals were commuted."] [My own translation.][15]

21. The IACtHR extended the protection afforded by successive provisional measures (adopted in 1998-1999) to a growing number of individuals that had been condemned to death (so-called "mandatory" death penalty). To the Order of 25 May 1999 in the *James and Others* case, e.g., I appended a concurring opinion wherein I observed that, also in relation to provisional measures of protection, the international Court (be it the IACtHR or the ICJ) has the inherent power to determine the extent of its own competence *(compétence de la compétence/Kompetenz-Kompetenz)*, it is the guardian and master of its own jurisdiction (*jurisdictio, jus dicere*, to say what the law is), as its jurisdiction cannot be at the mercy of facts (either at domestic or international level) other than its own actions (*James and Others*, paras. 7-8).

22. In cases of the kind, involving the fundamental human right to life, I proceeded, the Court, by means of provisional measures of protection, goes well beyond the simple search for a balance of the interests of the contending parties (which used to suffice in traditional international law); one is here safeguarding a fundamental human right, and this shows — I concluded — that "provisional measures cannot be restrictively interpreted", and they impose themselves, to the benefit of the persons con-

[15] 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, p. 48.

cerned, as "*true jurisdictional guarantees of a preventive character* that they are" (IACtHR, *James and Others*, paras. 13-14, 16 and 18).

23. I also pondered that they are transformed into such jurisdictional guarantees by the proper consideration of their constitutive elements of extreme gravity and urgency, and prevention of irreparable damage to persons (*ibid.*, para. 10), — even more cogently when the fundamental right to life is at stake. Provisional measures of protection have an important role to play when the rights of the human person are also at stake; developed mainly in contemporary international case law, they have, however, been insufficiently studied in international legal doctrine to date.

VI. The Autonomous Legal Regime of Provisional Measures of Protection

24. May I now reiterate, in the present separate opinion, my understanding that provisional measures of protection are endowed with a juridical autonomy of their own. I have sustained it in my individual opinions in successive cases within the ICJ[16] (and, earlier on, within the IACtHR), thus contributing to its conceptual elaboration in the jurisprudential construction on the matter. I soon identified the component elements of such autonomous legal regimes, namely: the rights to be protected, the obligations proper to provisional measures of protection;

[16] Such as: in my dissenting opinion in the case concerning *Questions relating to the Obligation to Prosecute or to Extradite (Belgium* v. *Senegal), Order of 28 May 2009, I.C.J. Reports 2009*; in my separate opinion in the case of the *Temple of Préah Vihéar (Cambodia* v. *Thailand), Order of 18 July 2011, I.C.J. Reports 2011 (II)*; in my dissenting opinion 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), Order of 16 July 2013, I.C.J. Reports 2013*; in my separate opinion in the same case in the Order of 22 November 2013; in my separate opinion in the Judgment of 16 December 2015 in the joined cases *(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), Judgment, I.C.J. Reports 2015 (II))*; in my separate opinion in the case of *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), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017.* With the exception of this last one, all other individual opinions of mine, referred to in the present separate opinion (which I have presented both within the ICJ and, earlier on, the IACtHR), are reproduced in the three-volume collection (Series *"The Judges"): Judge A. A. Cançado Trindade — The Construction of a Humanized International Law — A Collection of Individual Opinions* (1991-2013), Vol. I (Inter-American Court of Human Rights), Leiden, Brill/Nijhoff, 2014, pp. 9-852; Vol. II (International Court of Justice), Leiden, Brill/Nijhoff, 2014, pp. 853-1876; Vol. III (International Court of Justice, 2013-2016), Leiden, Brill/Nijhoff, 2017, pp. 9-764.

the prompt determination of responsibility (in case of non-compliance) with its legal consequences; the presence of the victim (or potential victim, already at this stage), and the duty of reparations for damages.

25. The present ICJ Order of today, 18 May 2017, in the *Jadhav* case *(India* v. *Pakistan)*, affords yet another illustration to the same effect, contributing to that jurisprudential construction. In the present separate opinion, I have already drawn attention to the presence of rights of States and of individuals together (Part III, *supra*). In effect, as to the ICJ, even though the proceedings in contentious case keeps on being a strictly inter-State one (by attachment to an outdated dogma of the past), this in no way impedes that the beneficiaries of protection in given circumstances are the human beings themselves, individually or in groups, — as I pointed out, e.g., in my dissenting opinion in the case concerning *Questions relating to the Obligation to Prosecute or to Extradite (Belgium* v. *Senegal)* (Order of 28 May 2009), and in my separate opinion in the case of *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)* (Order of 19 April 2017)[17].

VII. Final Considerations: The Humanization of International Law as Manifested in the Domain of Consular Law

26. Last but not least, I could not conclude the present separate opinion without addressing a point which has been grabbing my attention since the nineties, successively in two international jurisdictions (IACtHR and ICJ): I refer to the ongoing historical process of the *humanization* of international law, manifesting itself, as in the present *Jadhav* case, in particular also in the domain of consular law. In the present separate opinion, in focusing attention on the rights of States and of individuals as subjects of international law, I recalled the reflections I made in my concurring opinion in the IACtHR's Advisory Opinion No. 16 on the *Right*

[17] Cf. also, on the same jurisprudential construction, my separate opinion in the case *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*; and cf. also my reflections in, *inter alia*: 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; 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.

to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (of 1 October 1999).

27. I pondered therein that, in spite of the fact that the 1963 Vienna Convention on Consular Relations precedes chronologically the two 1966 UN Covenants on Human Rights, Article 36 (1) of the former was soon to be interpreted under the impact of the ILHR (cf. Part II, *supra*). One could no longer dissociate the rights enshrined in that provision from the evolutive interpretation of the relevant norms of protection of human rights. States and individuals, as subjects of international law, and their corresponding rights, came to be taken together, as they should have been, in the new humanized *jus gentium*.

28. Shortly afterwards, in my following concurring opinion in the IACtHR's complementary Advisory Opinion No. 18 on the *Juridical Condition and Rights of Undocumented Migrants* (of 17 September 2003), I retook the point that, by the turn of the century, the humanization of international law was manifested, with judicial recognition, in new developments in the domain of consular law (paras. 1-2). I singled out the relevance, in this evolution, of fundamental principles, laying on the foundations themselves of the law of nations (*le droit des gens*, as foreseen by the "founding fathers" of the discipline), as well as of the emergence of *jus cogens* and the corresponding obligations *erga omnes* of protection, in their horizontal and vertical dimensions (*ibid.*, paras. 3 and 44-85).

29. Among general principles of law (in both comparative domestic law and international law), those which are endowed with a true fundamental character, I went on, do indeed form the *substratum* of the legal order itself, revealing the *right to the law (droit au droit)*, of which are *titulaires*, all human beings, irrespective of their statute of citizenship or any other circumstance (*ibid.*, para. 55). Without such principles, — which are truly *prima principia*, — wherefrom norms and rules emanate and wherein they find their meaning, the "legal order" simply "is not accomplished, and ceases to exist as such" (*ibid.*, para. 46).

30. I further made a point of underlying, in the same concurring opinion, that the "great legacy of the juridical thinking of the second half of the twentieth century, in my view, has been, by means of the emergence and evolution of ILHR, the rescue of the human being as subject" of the law of nations, endowed with international legal personality and capacity (*ibid.*, para. 10). This was due to the awakening of the *universal juridical conscience* (*ibid.*, paras. 25 and 28), — the *recta ratio* inherent to humanity, — as the ultimate *material source* of the law of nations[18], standing well above the "will" of individual States. It was necessary, in our days, — I added, — "to stimulate this awakening of the *universal juridical conscience*

[18] Cf., in this respect, A. A. Cançado Trindade, "International Law for Humankind . . .", *op. cit. supra* note 8, Chap. VI, pp. 177-202.

to intensify the process of humanization of contemporary international law" (IACtHR's complementary Advisory Opinion No. 18 of 17 September 2003, para. 25)[19].

31. This outlook was to have prompt repercussions in the region of the world I originally come from, though it in effect looked well beyond it: in acknowledging the expansion of international legal personality and capacity of individuals (along with of States), this development kept in mind the *universality* of the law of nations, as originally propounded by its "founding fathers" (*totus orbis* and *civitas maxima gentium*), and re-emerged in our times.

32. That outlook has decisively contributed to the formation, *inter alia* and in particular, of an *opinio juris communis* as to the right of individuals, under Article 36 (1) *(b)* of the 1963 Vienna Convention, reflecting the ongoing process of humanization of international law, encompassing relevant aspects of consular relations[20]. Always faithful to this humanist universal outlook, I deem it fit to advance it, once again, in the present separate opinion in the Order that the ICJ has just adopted today, 18 May 2017, in the *Jadhav* case.

33. The ICJ has, after all, shown awareness that the provisional measures of protection rightly indicated by it in the present Order (resolutory point I of the *dispositif*) are aimed at preserving the rights of *both* the State and the individual concerned (para. 48) under Article 36 (1) of the 1963 Vienna Convention. The jurisprudential construction to this effect, thus, to my satisfaction, keeps on moving forward. Contemporary international tribunals have a key role to play in their common mission of the realization of justice.

(Signed) Antônio Augusto CANÇADO TRINDADE.

---

[19] As I had earlier asserted also, e.g., in my concurring opinion (para. 12) in the IACtHR's Order on provisional measures of protection in the case of *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (of 18 August 2000).

[20] 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", in 6 *Chinese Journal of International Law* (2007), No. 1, pp. 1-3, 5 and 15. I further pointed out the impact of that outlook was also acknowledged in expert writing, as from the IACtHR's Advisory Opinion No. 19, of 1 October 1999, followed by the subsequent decision of the ICJ of 27 June 2001 in the *LaGrand* case *(Germany* v. *United States of America)*; I further recalled that the then UN Sub-Commission on the Promotion and Protection of Human Rights, in a statement issued on 8 August 2002 (and made public in a press release of the UN High Commissioner for Human Rights of the same date), urged the respondent State in the *LaGrand* case to stay the execution of a Mexican national (Mr. J. S. Medina), "on the basis of the Advisory Opinion No. 16 of the IACtHR and the subsequent Judgment of the ICJ in the *LaGrand* case (27 June 2001)"; *ibid.*, p. 10. And, on the pioneering character of the aforementioned IACtHR's Advisory Opinion No. 16 of 1999, in addition to that of its case law of that time asserting the binding character of provisional measures of protection, cf. also G. Cohen-Jonathan, "Cour européenne des droits de l'homme et droit international général (2000)", 46 *Annuaire français de droit international* (2000), p. 642.