# SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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## I. *Prolegomena*

1. I have concurred, with my vote, for the adoption today, 23 July 2018, 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 on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)* [hereafter *Application of the CERD Convention (Qatar* v. *United Arab Emirates)*]. The ICJ has rightly ordered today, with my support, provisional measures of protection, under the CERD Convention. Additionally, as I attribute great importance to some related issues in the *cas d'espèce*, that in my perception underlie the present decision of the ICJ but are 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.

2. I do so, under the merciless pressure of time, 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. This grows in importance in a case, like the present one (and two other cases before — cf. *infra*), lodged with the ICJ under a core human rights treaty like the CERD Convention.

3. This being so, I shall develop my reflections, initially, in the following sequence: *(a)* a new era of international adjudication of human rights cases by the ICJ; *(b)* the relevance of the fundamental principle of equality and non-discrimination; and *(c)* non-discrimination and the prohibition of arbitrariness. I shall then examine the arguments made by the contending Parties in the public hearings before the ICJ, and the written responses they presented to the questions that I have deemed it fit to put to them; following that, I shall provide my general assessment as to the rationale of the local remedies rule in international human rights protection, and as to implications of a continuing situation.

4. Following that, I shall develop my further reflections on the remaining points to consider, namely: *(a)* the correct understanding of compromissory clauses under human rights conventions; *(b)* vulnerability of segments of the population; *(c)* the consolidation of the autonomous legal regime of provisional measures of protection; *(d)* international law and the temporal dimension; and *(e)* provisional measures of protection in continuing situations. Last but not least, in an epilogue, I shall conclude with a recapitulation of the key points of the position I sustain in the present separate opinion.

5. To start with, may I recall that, in a relatively brief period of time (2011-2018), the *cas d'espèce* on *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates)* is the third case lodged with the ICJ under the United Nations CERD Convention. The present Order follows chronologically the Court's decisions in the cases of *Georgia* v. *Russian Federa-*

*tion* (preliminary objections, 2011)[1] and of *Ukraine* v. *Russian Federation* (provisional measures of protection, 2017)[2].

6. In addition to those three cases under the CERD Convention, there have been other cases brought before the ICJ, and decided by it, along the last eight years, concerning also other human rights treaties. May I recall, in this respect, the case on *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (merits, 2012), under the UN Convention against Torture. Another example is provided by the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* (merits, 2010, and reparations, 2012), in respect of, *inter alia*, the UN Covenant on Civil and Political Rights (cf. *infra*).

## II. A New Era of International Adjudication of Human Rights Cases by the ICJ

7. To the ICJ's Judgment on the merits (of 30 November 2010) in the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, I appended a separate opinion, wherein, *inter alia*, I deemed it fit to draw attention to the advent of a new era of international adjudication of human rights cases by the ICJ (*I.C.J. Reports 2010 (II)*, pp. 807-811, paras. 232-245). In particular, I singled out, that it was the first time in its history that "the World Court has expressly taken into account the contribution of the case law of two international human rights tribunals, the European and the Inter-American Courts, to the perennial struggle of human beings against *arbitrariness*". In effect, I added, paragraph 65 of its Judgment referred to "the protection of the human person against arbitrary treatment, encompassing the prohibition of arbitrary expulsion[3]" (*ibid.*, p. 809, para. 237). I then concluded that

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[1] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 70, preceded by the ICJ's Order of provisional measures of protection, *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. 353, wherein the Court acknowledged that there was an ongoing unresolved problem in the conflict in the region, and the persons affected remained vulnerable (*I.C.J. Reports 2008*, p. 396, paras. 142-143).

[2] *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*, p. 104, to which I appended a separate opinion; earlier, to the ICJ's Judgment of 1 April 2011, I appended a dissenting opinion (*I.C.J. Reports 2011 (I)*, p. 70).

[3] Particularly relevant, for a study of the right to freedom of movement and residence under Article 22 of the American Convention on Human Rights, are the judgment of the Inter-American Court of Human Rights (IACtHR) of 15 June 2005, in the case of the *Moiwana Community* v. *Suriname* (paras. 107-121), as well as the IACtHR's order (on provisional measures of protection), of 18 August 2000, in the case of *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (paras. 9-11), and concurring opinion of Judge A. A. Cançado Trindade (paras. 2-25).

"It is indeed reassuring that the ICJ has disclosed a new vision of this particular issue, in so far as international human rights tribunals are concerned. This is particularly important at a time when States rely, in their submissions to this Court, on relevant provisions of human rights conventions, as both Guinea and the DRC have done in the present case, in their arguments centred on the UN Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights (in addition to the relevant provision of the Vienna Convention on Consular Relations, in the framework of the international protection of human rights).

This is not the only example wherein this has occurred. On 29 May 2009, the ICJ delivered its Order (on provisional measures) in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, wherein Belgium and Senegal presented their submissions concerning the interpretation and application of the relevant provisions of the 1984 UN Convention against Torture. And, very recently, a few days ago, in the public sittings before this Court of 13 to 17 September 2010, Georgia and the Russian Federation submitted their oral arguments in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, another UN human rights treaty. It is reassuring that States begin to rely on human rights treaties before this Court, heralding a move towards an era of possible adjudication of human rights cases by the ICJ itself. The international juridical conscience has at last awakened to the fulfillment of this need.

The ICJ, in the exercise of its contentious as well as advisory functions in recent years, has referred either to relevant provisions of a human rights treaty such as the Covenant on Civil and Political Rights, or to the work of its supervisory organ, the Human Rights Committee. These antecedents are not to pass unnoticed, in acknowledging the turning point which has just occurred in the present *Diallo* case: the Court, in the Judgment being delivered today, 30 November 2010, has gone much further, beyond the United Nations system, in acknowledging the contribution of the jurisprudential construction of two other international tribunals, the Inter-American [IACtHR] and the European [ECtHR] Courts of Human Rights. It has also dwelt upon the contribution of an international human rights supervisory organ, the African Commission on Human and Peoples' Rights. The three regional human rights systems operate within the framework of the universality of human rights.

. . . . . .

By cultivating this dialogue, attentive to each other's work in pursuance of a common mission, contemporary international tribunals

> will provide avenues not only for States, but also for human beings, everywhere, and in respect of distinct domains of international law, to recover their faith in human justice. They will thus be enlarging and strengthening the aptitude of contemporary international law to resolve disputes occurred not only at *inter*-State level, but also at *intra*-State level. And they will thus be striving towards securing to States as well as to human beings what they are after: the realization of justice." (*I.C.J. Reports 2010 (II)*, pp. 809-811, paras. 241-243 and 245.)

8. In the light of the aforementioned, and bearing in mind all that has been happening here at the Grande Salle de Justice in the Peace Palace at The Hague in the last nine years, one is to acknowledge that we are already *within* the new era of international adjudication of human rights cases by the ICJ. The present case of *Application of the CERD Convention (Qatar* v. *United Arab Emirates)* bears witness of that. Having pointed this out, I can now move to the next point to consider in this separate opinion, namely, the relevance of the fundamental principle of equality and non-discrimination.

## III. The Relevance of the Fundamental Principle of Equality and Non-Discrimination

9. In the *cas d'espèce*, Qatar's Request for the indication of provisional measures of protection (of 11 June 2018) identifies the rights it seeks to protect against discriminatory measures that "violate the customary international law principle of non-discrimination as well as the specific obligations enumerated in CERD [Convention] Articles 2, 4, 5, 6, 7" (p. 8, para. 12)[4]. The principle of equality and non-discrimination lies indeed in the foundations of the protected rights under the CERD Convention. This is a point which should have been attentively addressed by the contending Parties in the course of the current proceedings[5], which were largely consumed by diverting attention to points with no bearing at all on the consideration of provisional measures of protection under a human rights convention.

10. This being so, I feel obliged to fill the gap, as I nourish the hope that this unfortunate diversion does not happen again in cases of the kind before the ICJ, where the applicable law is a human rights convention, and not at all diplomatic protection rules. It is the principle of equality and non-discrimination which here calls for attention, there being no place for devising or imagining new "preconditions" for the consideration

[4] Cf. likewise Qatar's Application instituting proceedings (of 11 June 2018) p. 50, para. 58; and cf. pp. 58-59, para. 65.

[5] There are three brief references, in the oral pleadings of Qatar, to the principle of respect for the "dignity and equality inherent in all human beings"; cf. CR 2018/12, of 27 June 2018, pp. 32, 35 and 59.

of provisional measures of protection under a human rights convention; it makes no sense to intermingle at this stage the consideration of provisional measures with so-called "plausible admissibility" (cf. Section VI, *infra*).

11. In focusing attention, thus, on the principle of equality and non-discrimination, it should not pass unnoticed, to start with, that the idea of human equality marked presence already in the origins of the law of nations *(droit des gens)*, well before finding expression in the international instruments which conform its *corpus juris gentium*, as known in our times. The idea of *human equality* was underlying the original conception of the *unity of human kind* (present, for example, in the pioneering thinking of Francisco de Vitoria and Bartolomé de Las Casas in the sixteenth century).

12. The fundamental principle of equality and non-discrimination is nowadays a basic pillar of the UN CERD Convention, and of the whole *corpus juris* of the international law of human rights. The expression of such principle emanated from human conscience, and projected itself in the evolving law of nations from the seventeenth to the twenty-first centuries. The principle of equality and non-discrimination has a long history, accompanying the historical formation and evolution of the law of nations itself.

13. By the mid-twentieth century, the 1948 Universal Declaration of Human Rights proclaimed that "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (Art. 1). It added that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination" (Art. 7).

14. And the 1945 Charter of the United Nations began by asserting the determination of "the peoples of the United Nations" to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small" (second preambular paragraph). Nowadays, the fundamental principle of equality and non-discrimination lies also in the foundations of the law of the United Nations itself.

15. The gradual consolidation of the mechanisms of international protection of human rights, moreover, has much contributed to a growing awareness of the importance of the prevalence of the basic principle of equality and non-discrimination. Certain expressions were to emerge (e.g., "equality before the law" and "equal protection of the law"), on the basis of human values, and associated to the corresponding obligations of States parties to human rights treaties.

16. Supervisory organs of such treaties have been giving their constant contribution — of growing importance — to the prohibition of the discrimination *de facto* or *de jure*, in their faithful exercise of their functions

of protection of the human person[6]. The obligation of non-discrimination as related to the substantive rights protected under those treaties draws attention to the *positive obligations* of the States parties to secure the protection of the human beings under their jurisdiction against the discrimination in all ambits of human relations[7].

17. For its part, the Committee on the Elimination of Racial Discrimination, for example, has in this respect issued General Recommendations orienting its own interpretation of the relevant provisions of the CERD Convention. Among them, there are those which have an incidence in the consideration of the present case of *Application of the CERD Convention (Qatar* v. *United Arab Emirates)*, namely: General Recommendation No. 30 (of 19 August 2004), on discrimination against non-citizens; General Recommendation No. 35 (of 26 September 2013), on combatting racist hate speech; General Recommendation No. 25 (of 20 March 2000), on gender-related dimensions of racial discrimination; General Recommendation No. 22 (of 23 August 1996), on Article 5 of the CERD Convention in relation to refugees and displaced persons.

18. The advances in respect of the basic principle of equality and non-discrimination at normative and jurisprudential levels[8], have not, however, been accompanied by the international legal doctrine, which so far has not dedicated sufficient attention to that fundamental principle; it stands far from guarding proportion to its importance both in theory and practice of law. This is one of the rare examples of international case law preceding international legal doctrine, and requiring from it due and greater attention.

19. A significant jurisprudential advance is found in the groundbreaking Advisory Opinion No. 18 (of 17 September 2003) of the IACtHR, on the *Juridical Condition and Rights of Undocumented Migrants*, upholding the view that the fundamental principle of equality and non-discrimination had entered the realm of *jus cogens*, thus enlarging its material content (paras. 97-101 and 110-111)[9]. In the IACtHR's understanding, States cannot discriminate, nor tolerate discriminatory situations to the detriment of those persons; they had a duty to guarantee

[6] Cf., e.g., A. A. Cançado Trindade, "Address to the UN Human Rights Committee on the Occasion of the Commemoration of Its 100th Session", 29 *Netherlands Quarterly of Human Rights* (2011), pp. 131-137.

[7] Including at inter-individual level; cf. W. Vandenhole, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, Antwerp/Oxford, Intersentia, 2005, pp. 23 and 215.

[8] To the study of which I have dedicated my extensive book: A. A. Cançado Trindade, *El Principio Básico de Igualdad y No-Discriminación: Construcción Jurisprudencial*, 1st ed., Santiago de Chile, Ed. Librotecnia, 2013, pp. 39-748.

[9] The IACtHR upheld that, accordingly, any discriminatory treatment of undocumented migrants or aliens would generate the international responsibility of States.

them the due process of law, irrespective of their migratory status. States can no longer subordinate or condition the observance of the principle of equality before the law and non-discrimination to the objectives of their migratory or other policies.

20. For my part, I focused on this significant jurisprudential advance in my concurring opinion appended to the aforementioned Advisory Opinion No. 18 of the IACtHR, wherein I stressed, in support of the Court's position, the relevance of the basic principle of equality and non-discrimination, enlarging the material content of *jus cogens*, and permeating, together with other general principles of law, the whole juridical order itself, conforming its substratum (paras. 44-46, 52-58, 65 and 72)[10]. Without such principles, there is ultimately no legal order at all. I developed my whole reasoning in the line of jusnaturalist thinking, which marked the origins and historical evolution of the law of nations *(droit des gens)*, in the framework of the *civitas maxima gentium* and of the universality of humankind.

21. The path was then paved for jurisprudential developments also in the international adjudication of contentious cases pertaining to the basic principle of equality and non-discrimination[11]. In effect, this fundamental principle has been addressed — in Judgments on contentious cases as well as in Advisory Opinions — in face of *social marginalization* (IACtHR, cases of *Servellón-García et al.*, 2006, and of *Sawhoyamaxa Indigenous Community*, 2006); of *prohibition of arbitrariness* (*Ahmadou Sadio Diallo*, merits, 2010, and reparations, 2012; Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010; and the case concerning the *CERD Convention (Georgia* v. *Russian Federation)*, 2011), as well as in face of *procedural equality* (IACtHR, case *Loayza Tamayo*, 1997; and the Advisory Opinion on *Judgment No. 2867 of the Administrative Tribunal of the International*

[10] For a study of the matter, cf., e.g., A. A. Cançado Trindade, "Le déracinement et la protection des migrants dans le droit international des droits de l'homme", 19 *Revue trimestrielle des droits de l'homme*, Brussels (2008), No. 74, pp. 289-328.

[11] Ever since the IACtHR upheld, in its Advisory Opinion No. 18 (of 17 September 2003), that the fundamental principle of equality and non-discrimination entered into the domain of *jus cogens (supra)*, in the adjudication of successive contentious cases I stressed the need to enlarge further the material content of *jus cogens*, so as to encompass likewise the right of access to justice, and fulfil the pressing needs of protection of the human person. I did so, *inter alia*, in my separate opinion (dedicated on the right of access to justice *lato sensu*) in the Court's Judgment (of 31 January 2006) in the case of the *Massacre of Pueblo Bello* v. *Colombia*, drawing attention to the utmost importance of the right of access to justice *lato sensu,* encompassing its full realisation (para. 64). I further stressed, on successive occasions, the special needs of protection of victims in situations of vulnerability; cf. A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, 5th rev. ed., Belo Horizonte, Edit. Del Rey, 2018, Chap. XXIV, pp. 219-226.

*Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, 2012).

## IV. Non-Discrimination and the Prohibition of Arbitrariness

22. The protection being sought before the ICJ in the *cas d'espèce*, under the CERD Convention, is furthermore against arbitrary measures, against arbitrariness. Brief references were made to this in the course of the present oral pleadings before the ICJ[12]. This point has not escaped the attention of other international tribunals, under other human rights conventions: for example, *inter alia*, in its Judgment (merits, of 3 July 2014) on the case of *Georgia* v. *Russia*, the European Court of Human Rights (ECtHR) singled out the duty under the European Convention on Human Rights (ECHR) "to protect the individual from arbitrariness", and found that the arrests and detentions that preceded "collective" expulsions (of nationals of the applicant State) amounted to "an administrative practice" in breach of Article 5 (1) and (4) of the ECHR (paras. 182 and 186-188).

23. Subsequently, in its Judgment (merits, of 23 August 2016) on the case of *J. K. and Others* v. *Sweden*, concerning expulsion of non-citizens (the applicants being Iraqi nationals), the ECtHR held that, if deported, they would face a risk of being subjected to treatment in breach of Article 3 of the ECHR (para. 123) in the destination country. In effect, non-discrimination and the prohibition of arbitrariness are a point which cannot be overlooked, also in a wider framework, in time and space. After all, in the relations between human beings and public power, arbitrariness is an issue which has marked presence everywhere along the history of humankind. It has been a source of concern over the centuries. This is why the tragedies written and performed in ancient Greece remain so contemporary in our days, after so many centuries.

24. Suffice it here to recall, e.g., in Sophocles's *Antigone* (441 BC), the arbitrariness of the ruler Creon's decree prohibiting Antigone to bury the corpse of one of her deceased brothers (Polynices), and her determination nevertheless to do so in pursuance of justice; or else further to recall, some years later, e.g., in Euripides's *Suppliant Women* (424-419 BC), the arbitrariness that led to the grief and lamentation of the women whose

[12] Cf., on the part of the applicant State, CR 2018/12, of 27 June 2018, pp. 22-23; CR 2018/14, of 29 June 2018, p. 30.

deceased children had been separated from them, and their corpses then needed to be buried.

25. Sophocles's *Antigone*, in particular, has been rewritten, in successive centuries, by several other authors, bearing in mind their respective contemporary manifestations of arbitrariness. Although the ancient Greeks had eyes mainly for justice rather than law (and only later on, Romans of the ancient Empire began to distinguish between law and justice), there are those who seek to associate the tragedy of Sophocles with the seeds or origins of the distinction between natural law and positive law.

26. In any case, arbitrariness, as history shows, is unfortunately part of human nature, and the discrimination that ensues therefrom is both *de facto* and *de jure*. If we look at the world nowadays, marked by a serious crisis of values, we can see, on all continents, the inhumane split of families in frontiers, in particular those of migrants or non-citizens. Positive law alone cannot solve the problems created at times by itself, to the detriment of human beings in situations of vulnerability (cf. *infra*). Law and justice go together, they are indissociable, in the line of the more lucid jusnaturalist thinking.

27. It is important to keep those ancient Greek tragedies in mind to also face so-called "globalization", a misleading and false neologism *en vogue* in the twenty-first century. Such neologism hides the marginalization and social exclusion of increasingly greater segments of the population (including migrants). Frontiers have been opened to capital and goods, but are sadly being closed down to human beings (with the split of families, new walls, fences and detention centres, on distinct continents).

28. The material progress of some has been accompanied by the exploitation of many (including undocumented migrants). Some human beings (especially powerholders) have placed most fellow human beings on a scale of priority inferior to that attributed to capital and goods. Nothing has been learned from the sufferings of past generations; hence the need to remain attached to the goal of the realization of justice, bearing in mind that law and justice go indissociably together. The ICJ has a mission to keep on endeavouring to contribute to a *humanized* law of nations, in the dehumanized world of our days.

29. In my aforementioned separate opinion appended to the ICJ's Judgment on the case of *Ahmadou Sadio Diallo* (merits, of 30 November 2010), concerning the arbitrary detentions followed by expulsion of a foreigner from his country of residence, I devoted an entire section (VI) to "The prohibition of *arbitrariness* in the international law of human rights" (paras. 107-142), wherein I examined the doctrinal development and the jurisprudential construction on the matter. I pondered, *inter alia*, that, as human rights treaties

> "conform a *law of protection* (a *droit de protection*), oriented towards the safeguard of the ostensibly weaker party, the victim, it is not at

> all surprising that the prohibition of *arbitrariness* (. . .) covers arrests and detentions, as well as other acts of the public power, such as expulsions" (*I.C.J. Reports 2010 (II)*, p. 763, para. 109).

30. Such has in fact been the understanding of international tribunals entrusted with the interpretation and application of human rights treaties, like the ICJ in the present case of the *Application of the CERD Convention (Qatar* v. *United Arab Emirates)*. As I pointed out in that separate opinion in the case of *Ahmadou Sadio Diallo*, the case law of international human rights tribunals is quite clear in this respect. No one can be deprived of liberty in an arbitrary way (cf. e.g., ECtHR, case of *Amuur* v. *France*, judgment of 25 June 1996). No one can be detained or arrested, even when this is considered as "legal", when it is incompatible with the provisions of human rights treaties and carried out with arbitrariness (e.g., IACtHR, case of the *"Street Children" Villagrán Morales and Others* v. *Guatemala,* merits, judgment of 19 November 1999; cases of *Bámaca Velásquez* and of *Maritza Urrutia* v. *Guatemala*, judgments of 25 November 2000 and 27 November 2003, respectively).

31. The prohibition of arbitrariness, I proceeded, stands not only in respect of the right to personal liberty, but also in relation to all other rights protected under human rights treaties[13], so as to secure the prevalence of the rule of law *(la prééminence du droit)*. Epistemologically, this is the correct posture in this respect, given the universally acknowledged interrelatedness and indivisibility of all human rights. Arbitrariness amounts, in effect, to an *abus de pouvoir* on the part of the State agents. Accordingly, a domestic law or an administrative act, concerning migrants or non-citizens, cannot be applied when incompatible with the provisions of human rights treaties.

32. And in that separate opinion, I concluded, on the extent of the prohibition of arbitrariness, that

> "Human nature being what it is, everyone needs to guard protection against arbitrariness on the part of State authorities. In a wider horizon, human beings need protection ultimately against themselves, in their relations with each other. There is hardly any need to require an express provision to the effect of prohibiting arbitrariness in respect of distinct rights, or else to require the insertion of the adjective 'arbitrary' in distinct provisions, in order to enable the exercise of protection against arbitrariness, in any circumstances, under human rights treaties. The letter together with the spirit of those provisions under human rights treaties, converge in pointing to the same direction: the

[13] Such as, e.g. the right not to be expelled arbitrarily from a country, the right to a fair trial, the right to respect for private and family life, the right to an effective remedy, or any other protected right.

absolute prohibition of arbitrariness, under the international law of human rights as a whole. Underlying this whole matter is the imperative of access to justice *lato sensu*, the *right to the law (le droit au droit*, *el derecho al derecho)*, the right to the realization of justice in a democratic society." (*I.C.J. Reports 2010 (II)*, p. 777, para. 142.)

## V. Arguments of the Parties in the Public Hearings before the Court

33. The prohibition of arbitrariness brings to the fore the issue of the *vulnerability* of those affected by discriminatory measures. Before examining this point (cf. Section VII, *infra*), may I now turn to the arguments of the Parties during the oral pleadings which have just taken place before the ICJ. In the course of the public hearings (first round) before the Court, the applicant State presented (on 27 June 2018) its own understanding of the factual context of the *cas d'espèce* within a temporal dimension.

34. Qatar argued that the "collective expulsion" of Qataris from the UAE as a discriminatory measure was ongoing, affecting continuously some of their rights under the CERD Convention (e.g., with the separation of families and loss of work); this was leading to the prolongation and indefinite duration[14] of harm or damage, in the human tragedy[15] of the numerous and vulnerable victims[16]. There was need for urgent regard to human suffering; the *continuing vulnerability* of segments of the population required urgently, in its view, provisional measures of protection.

35. In the following public hearings before the Court (still first round, on 28 June 2018), the respondent State did not address such issue of a *continuing situation* raised by Qatar; the UAE focused instead on other aspects, attempting to minimize and dismiss the Request for provisional measures of protection[17]. It consumed much of the time of those public hearings raising the point (responded by the applicant State — *infra*), *inter alia*, of the rule of exhaustion of local remedies[18].

36. In the second and last round of public hearings before the Court (on 29 June 2018) the local remedies rule continued to be addressed, this

[14] CR 2018/12, of 27 June 2018, pp. 16-19, 22, 29-30, 38-40, 42, 46, 50, 52-58 and 62-64 (on the continuity of violations).

[15] *Ibid.*, pp. 59-60 (on the "tragedy of the victims").

[16] *Ibid.*, pp. 61-62 (on the "vulnerability of the population").

[17] CR 2018/13, of 28 June 2018, p. 15 (on "uncertainty of facts"), p. 31 (on "prima facie determination on the admissibility of the claims" and so-called plausibility of admissibility), and pp. 22-35 (on pre-conditions of admissibility).

[18] *Ibid.*, pp. 28-35.

time by both the applicant State, in response to the argument of the respondent State, and by this latter once again[19]. The applicant State, furthermore, consistently reiterated its understanding of a *continuing situation* of ongoing alleged violations of human rights requiring "humanitarian considerations"[20].

## VI. Questions Put to the Parties in the Public Hearings before the Court

### *1. Questions and Answers*

37. Those arguments advanced by the contending Parties led me to address the following questions to both of them, at the end of the public hearings (on 29 June 2018):

> "1. Does the local remedies rule have the same rationale in diplomatic protection and in international human rights protection? Does the *effectiveness* of local remedies have an incidence under the United Nations Convention on the Elimination of All Forms of Racial Discrimination and other human rights treaties?
>
> 2. Is it necessary to address the so-called plausibility of rights in face of a *continuing situation* allegedly affecting the rights protected under a human rights treaty like the United Nations Convention on the Elimination of All Forms of Racial Discrimination?
>
> 3. What are the implications or effects, if any, of the existence of a *continuing situation* allegedly affecting rights protected under a human rights convention, for requests of provisional measures of protection?"[21]

38. In the course of the following week, the contending Parties provided the Court with their respective written answers (of 3 July 2018) to my questions, first, as to the rationale of the local remedies rule in diplomatic protection and in international human rights protection, and then, on the implications of a continuing situation. In respect of the *first question*, the applicant State, in its detailed written answer, first recalled that international human rights supervisory organs have stressed that the local remedies rule here requires "actual redress" for victims of human rights violations, determining the obligation of States parties to

[19] Cf., on the part of Qatar, CR 2018/14, of 29 June 2018, pp. 17-20; and cf., on the part of the UAE, CR 2018/15, of 29 June 2018, pp. 17-18.

[20] Cf., on the part of Qatar, CR 2018/14, of 29 June 2018, pp. 36-37 and 39-41.

[21] CR 2018/15, of 29 June 2018, p. 45.

human rights treaties to provide them with effective remedies[22]. And it proceeded:

> "This added element of 'actual redress' finally echoes the differences in the function of the local remedies rule in both systems, illustrated by Judge Cançado Trindade's seminal 1983 monograph on the subject[23]. In diplomatic protection, the local remedies rule ensures that disputes are not elevated onto the international plane before the authorities of the offending State have had an adequate opportunity to address them by their own means. It can thus be said that in diplomatic protection, the local remedies rule operates *preemptively*.
>
> In international human rights protection, the focus of the rule is different. As explained above, under most major international human rights instruments, States have bound themselves to international obligations to respect and ensure human rights, including by subjecting those obligations to the scrutiny of national tribunals and other State institutions. By asking that such tribunals and other State institutions be resorted to before the violations are entrusted to the international machinery for their implementation, the rule thus operates *protectively*.[24]"[25]

39. And the applicant State added that, under the CERD Convention and all other major human rights treaties, the local remedies rule only applies if remedies are effective, this being in accordance with general international law; the "principle of effectiveness" is here "fully applicable"[26]. In view of the foregoing, it submitted that

> "although there is a certain degree of overlap in the rationale of the local remedies rule in the fields of diplomatic protection and international human rights protection, in the latter, the rule is also underscored by an element of 'actual redress'. Such redress must, furthermore, be effective"[27].

40. For its part, the respondent State, in its brief written answer to the first question, also of 3 July 2018, argued that the rule of exhaustion of local remedies has the "same rationale" underlying it in the two contexts of "broadened" diplomatic protection and in international human rights

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[22] ICJ doc. 2018/24, of 3 July 2018, response in letter of Qatar, pp. 1-2, paras. 3-4.

[23] See A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law* (1983), pp. 39, 51-52, 56.

[24] This added purpose for the local remedies rule necessarily informs its application under the Convention and other human rights treaties, as Qatar will explain at the appropriate stage of these proceedings.

[25] ICJ doc. 2018/24, of 3 July 2018, response in letter of Qatar, p. 3, paras. 5-6.

[26] *Ibid.*, pp. 4-6, paras. 7-8 and 11.

[27] *Ibid.*, pp. 6-7, para. 12.

protection[28]. Yet, it added, under the CERD Convention and other human rights treaties, and under general international law, the effectiveness of local remedies is a component of that rule, which, e.g., determines that such remedies cannot be "unreasonably prolonged"[29].

41. As to the *second question*, the applicant State contended that the purpose of the inquiry on "plausibility" of rights, as found in the Court's recent case law, is a "limited one", not engaging "in any extensive evidentiary inquiry" and not undertaking any "in-depth factual assessment" at the stage of provisional measures; it can only be "a very low threshold"[30]. It added that such very low threshold applies, whether the Court puts the requisite "in terms of 'plausibility of rights' or 'vulnerability of populations'" to be protected under a human rights treaty like the CERD Convention[31].

42. The respondent State, for its part, accepted that "violations of human rights" in a "continuing situation" have to be "of concern to the Court". However, it added, the issue would "have to be placed within the vision of the Court", i.e., in its view,

> "Only States can be parties before the Court in contentious proceedings and the Court when called upon to adjudicate upon a matter has to do so in the light of the rights and duties of those States that are before the Court seeking a legal determination"[32].

43. The respondent State added that, as part of ensuring the balance between, on the one hand, vulnerable individuals and groups, and, on the other hand, the "adjudication between States in the light of their rights and obligations under international law" has made the Court to have "recourse *inter alia* to the doctrine of plausibility". This is, in its view, "a necessary hurdle to be surmounted before tackling substantive issues of protection" of the "rights or interests of individuals, groups or States under perceived threat"; in sum, the consideration of the "plausibility of the rights" at issue is "an indispensable preliminary step needed in order to address claimed violations of rights, whatever their origin"[33].

44. As to the *third question*, the applicant State upheld the view that, when there is a *continuing situation* alleged affecting rights protected under a human rights convention, "the requirement of a real and immi-

[28] ICJ doc. 2018/24, of 3 July 2018, response in letter of the UAE, p. 1.
[29] *Ibid.*, p. 2.
[30] *Ibid.*, response in letter of Qatar, pp. 10-16, paras. 19, 21, 23 and 28.
[31] *Ibid.*, pp. 13-16, paras. 26-29.
[32] *Ibid.*, response in letter of the UAE, p. 3.
[33] *Ibid.*

nent risk is necessarily satisfied", and "irreparable prejudice is the natural consequence of restrictions on those rights"[34]. In such circumstances, "any assessment of risk of harm is necessarily met", and the evidence provided (reports "showing continuing harm throughout the past thirteen months", as from 5 June 2017) has been, in its view, "more than sufficient" for the Court "to make a finding of urgency", given the "imminent risk of irreparable harm"[35].

45. For its part, the respondent State argued that, even in case of a continuing situation, the ICJ is to exercise its own functions which are "different from those" of international human rights tribunals at regional levels. Provisional measures, it added cannot be indicated if the Court is not persuaded that the rights invoked are "at least plausible". In its view, "the existence of a continuing situation allegedly affecting rights protected under a human rights treaty does not as such change or modify the conditions required for the indication of provisional measures of protection"[36].

46. Still in the same week, the contending Parties provided the Court, two days later, with their additional written comments (of 5 July 2018) to each other's respective answers (cf. *supra*) to my questions. The applicant State recalled the components of effectiveness of local remedies and redress in the rationale of the local remedies rule under human rights treaties, and welcomed the UAE's acceptance of it as well as of the Court's need to be "sensitive and attentive" to a continuing situation in breach of human rights, wherein the harm is "not merely imminent by *presently occurring*", requiring attention also to "the vulnerability of the affected individuals"[37].

47. The respondent State, for its part, insisted on the requirement of exhaustion of local remedies, and on its position that "doctrine of plausibility" constitutes a "balance" between the claimed violation of rights and the "procedural requirements" to adjudicate inter-State cases[38]. Besides questioning the evidence produced, it did not accept the "low threshold" advanced by Qatar, asserting that there "has to be a tangible or plausible basis" for the claims at issue. And it concluded that, in its view, there is no "different approach" to the grant of provisional measures of protection in cases under human rights treaties[39].

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[34] ICJ doc. 2018/24, of 3 July 2018, response in letter of Qatar, p. 17, paras. 31-32.

[35] *Ibid.*, pp. 19-20, paras. 35-36.

[36] And it added that "[t]he UAE is focused upon the importance of the implementation of binding treaties and the fight against terrorism". *Ibid.*, response in letter of the UAE, p. 5.

[37] ICJ doc. 2018/25, of 5 July 2018, comment in letter of Qatar, pp. 1-4, paras. 2-5 and 7-8.

[38] *Ibid.*, comment in letter of the UAE, pp. 1-3.

[39] *Ibid.*, pp. 4-8.

*2. General Assessment: Rationale of the Local Remedies Rule in International Human Rights Protection*

48. May I now proceed to my own assessment of the arguments surveyed above, presented by the contending Parties in their written responses to my questions *(supra)*. To start with, in my understanding, the raising of the rule of exhaustion of local remedies at this early stage is surprising, besides regrettable, due to the fact that the present proceedings are on a request for provisional measures of protection, not on admissibility. The local remedies rule is a condition of admissibility of international claims; it cannot be invoked as a precondition for the consideration of urgent requests of provisional measures of protection.

49. The incidence of the local remedies rule in human rights protection is certainly distinct from its application in the practice of diplomatic protection of nationals abroad; the rule at issue is far from having the dimensions of an immutable or sacrosanct principle of international law. Moreover, the two domains — human rights protection and diplomatic protection — are also distinct, and there is nothing to hinder the application of that rule with greater or lesser rigour in such different domains.

50. Its rationale is quite distinct in the two contexts. In the domain of the safeguard of the rights of the human person, attention is focused on the need to secure the faithful realization of the object and purpose of human rights treaties, and on the need of effectiveness of local remedies; attention is focused, in sum, on the needs of protection. The rationale of the local remedies rule in the context of diplomatic protection is entirely distinct, focusing on the process of exhaustion of such remedies.

51. Local remedies, in turn, form an integral part of the very system of international human rights protection, the emphasis falling on the element of *redress* rather than on the process of exhaustion. The local remedies rule bears witness of the interaction between international law and domestic law in the present context of protection[40]. We are here before a *droit de protection*, with a specificity of its own, fundamentally victim-oriented, concerned with the rights of individual human beings rather than of States. Such rights are accompanied by obligations of States.

[40] Cf. A. A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge University Press, 1983, pp. 1-445; A. A. Cançado Trindade, *O Esgotamento de Recursos Internos no Direito Internacional*, 2nd ed., Brasília, Edit. University of Brasília, 1997, pp. 1-327; A. A. Cançado Trindade, "Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law", 12 *Revue belge de droit international/Belgisch Tijdschrift voor international Recht*, Brussels (1976), pp. 499-527.

52. Generally recognized rules of international law (which the formulation of the local remedies rule in human rights treaties refers to), besides following an evolution of their own in the distinct contexts in which they apply, necessarily undergo, when inserted in human rights treaties, a certain degree of adjustment or adaptation, dictated by the special character of the object and purpose of those treaties and by the widely recognized specificity of the international protection of human rights.

53. In the handling of successive cases under the CERD Convention, for example, the Committee on the Elimination of Racial Discrimination (CERD Committee) has deemed it necessary to single out that petitioners are only required to exhaust "remedies that are *effective* in the circumstances" of the *cas d'espèce* (cases of *M. Lacko* v. *Slovakia*, decision of 9 August 2001, para. 6.2; and of *Zentralrat Deutscher Sinti und Roma et al.* v. *Germany*, decision of 22 February 2008, para 7.3).

54. In another case (of *Dragan Durmic* v. *Serbia and Montenegro*), the CERD Committee pointed out that local remedies need not be exhausted if their application "is unreasonably prolonged" (decision of 6 March 2006, para. 6.5). And, in yet another case (of *D. R.* v. *Australia*), the CERD Committee considered that none of the proposed local remedies could be effective, and reiterated (decision of 14 August 2009) that

> "domestic remedies need not be exhausted if they objectively have no prospect of success. This is the case where under applicable domestic law, the claim would inevitably be dismissed, or where established jurisprudence of the highest domestic tribunals would preclude a positive result" (paras. 6.4-6.5).

55. The local remedies rule has a rationale of its own under human rights treaties; this cannot be distorted by the invocation of the handling of inter-State cases in the exercise of diplomatic protection, where the local remedies rule has an entirely distinct rationale. The former stresses *redress*, the latter outlines *exhaustion*. One cannot deprive a human rights convention of its *effet utile* by using the distinct rationale of the rule in diplomatic protection.

56. Contemporary international tribunals share the common mission of realization of justice. There is here a fundamental unity of conception and mission. International human rights tribunals, created by conventions at regional levels, operate within the conceptual framework of the *universality* of human rights. International human rights tribunals have been faithful to the rationale of effectiveness of local remedies and

redress[41]. There is in this respect a *complementarity* in outlook between mechanisms of dispute-settlement at UN and regional levels, all operating under the conceptualized universality of the rights inherent to the human person.

### *3. General Assessment: Implications of a Continuing Situation*

57. In my understanding, the attempt to create another precondition for provisional measures, as from the so-called "plausibility" of rights, is regrettable. The test of so-called "plausibility" of rights is, in my perception, an unfortunate invention — a recent one — of the majority of the ICJ. In the present proceedings, the so-called "plausibility" of admissibility[42] is a new and additional unfortunate attempt, this time by the respondent State, to invent an additional "precondition" for provisional measures of protection. In a *continuing situation*, the rights requiring protection are clearly known, their being no sense to wonder whether they are "plausible".

58. In the consideration of the present Request for provisional measures of protection in the case of *Application of the CERD Convention (Qatar* v. *United Arab Emirates)*, the question of a *continuing situation* allegedly affecting the rights of vulnerable persons has deserved particular attention, mainly on the part of the applicant State (which dwelt upon it), but also on the part of the respondent State. Yet, the handling of the matter consumed much time in addressing points which have nothing to do with provisional measures of protection, — such as the undue invocation of the rule of exhaustion of local remedies at this stage of provisional measures, as well as the undue attempt to link the so-called "plausibility" of rights to the so-called "plausibility" of admissibility, as presumed interrelated requirements.

59. It appears that each one feels free to interpret so-called "plausibility" of rights in the way one feels like; this may be due to the fact that the Court's majority itself has not elaborated on what such "plausibility" means. To invoke "plausibility" as a new "precondition", creating undue

[41] To this effect, cf., for an analysis of the vast case law of the ECtHR on the matter, e.g., P. van Dijk, F. van Hoof, A. van Rijn and Leo Zwaak, *Theory and Practice of the European Convention on Human Rights*, 4th ed., Antwerp/Oxford, Intersentia, 2006, pp. 125-161 and 560-563; D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Law of the European Convention on Human Rights*, 2nd ed., Oxford University Press, 2009, pp. 759-776; as to the case law of the IACtHR, cf. A. A. Cançado Trindade, *El Agotamiento de los Recursos Internos en el Sistema Interamericano de Protección de los Derechos Humanos,* San José/C.R., IIDH, 1991, pp. 1-60; and as to the case law of the African Court on Human and Peoples' Rights (AfCtHPR), cf. M. Löffelmann, *Recent Jurisprudence of the African Court on Human and Peoples' Rights — Developments 2014 to 2016*, Arusha, Tanzania/Eschborn, Germany, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), 2016, pp. 1-63, esp. pp. 5-8, 22, 24-26 and 29-30.

[42] Cf., on the part of the UAE, CR 2018/15, of 29 June 2018, p. 16.

difficulties for the granting of provisional measures of protection in relation to a *continuing situation*, is misleading, it renders a disservice to the realization of justice. I shall develop further reflections on provisional measures of protection in continuing situations subsequently in the present separate opinion (cf. Section XI, *infra*).

60. The rights to be protected in the *cas d'espèce* are clearly those invoked under the CERD Convention (Arts. 2, 4, 5, 6 and 7). The so-called "plausibility" of rights is surrounded by uncertainties, which are much increased in trying to add to it the so-called "plausibility" of admissibility, undermining provisional measures of protection as jurisdictional guarantees of a preventive character. It is time to awaken and to concentrate attention on the nature of provisional measures of protection, particularly under human rights treaties, to the benefit of human beings experiencing a *continuing situation* of vulnerability affecting their rights.

61. In the present case we are not in face of rights of States; the rights under the CERD Convention are *rights of individuals* (accompanied by obligations of States), irrespective of the matter having been brought to the ICJ by a State party to the Convention. In doing so, the State party exercises a collective guarantee under the CERD Convention, making use of its compromissory clause in Article 22, which is not amenable to interpretation raising "preconditions". The compromissory clause in Article 22 is to be interpreted bearing in mind the object and purpose of the CERD Convention.

## VII. The Correct Understanding of Compromissory Clauses under Human Rights Conventions

62. I have dwelt upon this particular point in depth in my lengthy dissenting opinion in the earlier case on *Application of the CERD Convention (Georgia* v. *Russian Federation)* (Judgment of 1 April 2011), where the Court upheld the second preliminary objection and found itself without jurisdiction to examine the case. In my dissenting opinion (paras. 1-214), I warned at first that the *punctum pruriens judicii* was the proper understanding of the compromissory clause (Art. 22) of the CERD Convention, for which it is necessary to be attentive to the nature and substance of a human rights treaty like the CERD Convention.

63. Regrettably, in that Judgment of 2011, the Court's majority set a very high threshold (as to the requirement of prior negotiations) for the exercise of jurisdiction on the basis of that human rights treaty, the CERD Convention, losing sight of the *nature* of this important UN human rights treaty, endowed with universality. It advanced the view that

Article 22 of the CERD Convention establishes "preconditions" to be fulfilled by a State party before it may have recourse to this Court, thus rendering access to the ICJ particularly difficult. I added, in my dissenting opinion, that this was not in accordance with the Court's (PCIJ and ICJ) own earlier *jurisprudence constante*, which had never ascribed to that factual element the character of a "precondition" that would have to be fully satisfied, for the exercise of its jurisdiction[43].

64. It was necessary, — I proceeded, — to turn attention to the sufferings and needs of protection of the affected segments of the population; yet, the Court's majority pursued unfortunately an essentially inter-State, and mostly bilateral, outlook, on the basis of allegedly unfulfilled "preconditions" of its own construction; instead of setting up a higher standard of protection, under the CERD Convention, of individuals in a continuing situation of great vulnerability, it applied, contrariwise, a higher standard of State consent for the exercise of its jurisdiction.

65. One cannot erect, in pursuance of a strictly textual or grammatical reasoning relating to the compromissory clause (Art. 22) of the CERD Convention, a mandatory "precondition" for the exercise of the Court's jurisdiction (such as that of prior negotiations), as this amounts to erecting a groundless and most regrettable obstacle to justice. This "precondition", I proceeded, finds no support in the Court's own earlier *jurisprudence constante*, nor in the legislative history of the CERD Convention.

66. I then pointed out, in my aforementioned dissenting opinion, that, already at the time that the CERD Convention was being elaborated there were those who supported the compulsory settlement of disputes by the Court. Underlying the general rule of treaty interpretation is the principle *ut res magis valeat quam pereat* (the so-called *effet utile*), of much importance in respect of human rights treaties, amongst which the CERD Convention. This latter is a pioneering human rights convention, endowed with universality, occupying a prominent place in the law of the United Nations itself. It cannot be a hostage of State consent or discretion (as in the entirely distinct domain of diplomatic protection), in its interpretation and application.

67. Before moving to the next point, may I here add that all obligations under the CERD Convention (including those of providing redress by means of effective local remedies, and of dispute-settlement in inter-State cases thereunder) have a rationale of their own, proper of human rights treaties. There was awareness of that since the time of the *travaux*

[43] Both the PCIJ and the ICJ have been quite clear in holding that an *attempt* of negotiation is sufficient, there being no mandatory "precondition" at all of *resolutory* negotiations for either of them to exercise jurisdiction in a case they had been seized of.

*préparatoires* of the CERD Convention[44], so as to secure its effectiveness, and safeguard it from attempts at conceptual deconstruction (such as the devising of additional so-called "preconditions")[45].

## VIII. Vulnerability of Segments of the Population

68. In the present Order that the ICJ has just adopted today, in the case of *Application of the CERD Convention (Qatar* v. *United Arab Emirates)*, the Court has correctly granted provisional measures of protection under the CERD Convention, to ensure that families including a Qatari, separated by the measures adopted by the UAE on 5 June 2017, are reunited; that Qatari students, affected by the same measures, complete their education in the UAE, or, if they wish, obtain their educational records to continue their studies elsewhere; and that Qataris, affected by the same measures, have access to national tribunals in the UAE. The CERD Convention itself determines that States parties are to assure to everyone within their jurisdiction "effective protection and remedies" before national tribunals against any acts of discrimination (Art. 6). The provisional measures, as requested in the *cas d'espèce*, become necessary for the protection of persons in a situation of vulnerability.

69. I have already addressed the principle of non-discrimination and the prohibition of arbitrariness (Section III, *supra*), and my reflections thereon lead me to the next related point to be here considered. Cases as the present one of *Application of the CERD Convention (Qatar* v. *United Arab Emirates)*, like the aforementioned previous cases before the ICJ also under the CERD Convention (as well as under other human rights treaties), disclose the centrality of the position of the human person in the overcoming of the inter-State paradigm in contemporary international law. The Request of provisional measures of protection is here intended to put an end to the alleged vulnerability of the affected persons (potential victims).

70. Human beings in vulnerability are the ultimate beneficiaries of compliance with the ordered provisional measures of protection. However vulnerable, they are subjects of international law. We are here before the new paradigm of the *humanized* international law, the new *jus gentium* of our times, sensitive and attentive to the needs of protection of the

[44] Cf., on this particular point, e.g., N. Lerner, *The UN Convention on the Elimination of All Forms of Racial Discrimination* (reprint revised), Leiden, Brill/Nijhoff, 2014, pp. 81 and 98; A. A. Cançado Trindade, "Exhaustion of Local Remedies under the United Nations Convention on the Elimination of All Forms of Racial Discrimination", 22 *German Yearbook of International Law/Jahrbuch für internationales Recht*, Kiel (1979), pp. 374-383.

[45] Cf. recent assessments by, e.g., M. Dubuy, "Application de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires: Un formalisme excessif au service du classicisme?", 57 *Annuaire français de droit international* (2011), pp. 183-212; P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination — A Commentary*, Oxford University Press, 2016, pp. 472-483 (on Article 22).

human person in any circumstances of vulnerability. This is a point which I have been making in successive individual opinions in previous decisions of the ICJ; I feel it sufficient only to refer to them now, with no need to extend further thereon in the present separate opinion.

71. To summarize, in my previous separate opinion appended to the ICJ's recent Order (of 19 April 2017) on provisional measures of protection — also under the CERD Convention — in the case of *Ukraine* v. *Russian Federation*, I pondered:

> "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." (*I.C.J. Reports 2017*, p. 171, para. 44.)

72. Anticipatory in nature, provisional measures of protection are intended to prevent and avoid irreparable harm in situations of gravity (probability of irreparable harm) and urgency. The extreme vulnerability of the affected persons is an aggravating circumstance, rendering such provisional measures imperative. These latter, in my perception, are not *"mesures conservatoires"* (as in traditional, old-fashioned and unsatisfactory language), as they do require *change*, as in the *cas d'espèce*, so as to put an end to a *continuing situation* (cf. *infra*) affecting the rights of persons in utter vulnerability, if not defencelessness.

73. For years I have been sustaining that provisional measures of protection, needed by human beings (under human rights treaties, like the CERD Convention in the *cas d'espèce*), may become even more than *precautionary*, being in effect *tutelary*, particularly for vulnerable persons (potential victims), and directly related to realization of justice itself. Obligations emanating from such ordered measures are not necessarily the same as those ensuing from a Judgment as to the merits (and reparations), they may be entirely distinct (cf. *infra*). Particularly attentive to human beings in situations of vulnerability, provisional measures of protection, endowed with a tutelary character, appear as true jurisdictional guarantees with a preventive dimension.

## IX. Towards the Consolidation of the Autonomous Legal Regime of Provisional Measures of Protection

74. This is one of the aspects, and a significant one, of what I have been calling, — in several (more than twenty) of my individual opinions,

successively within two international jurisdictions, in the period 2000-2018[46], the needed conformation of the *autonomous legal regime of provisional measures of protection*[47]. As I pointed out in my dissenting opinion in an ICJ Order (of 16 July 2013), at an early stage of the handling of two merged cases opposing two Central American States, even "the notion of victim (or of *potential* victim[48]), or injured party, can (. . .) emerge also in the context proper to provisional measures of protection, parallel to the merits (and reparations) of the *cas d'espèce*"[49] (*I.C.J. Reports 2013*, p. 269, para. 75).

75. I am confident that we are at last moving towards the consolidation of the autonomous legal regime of provisional measures of protection, thus enhancing the preventive dimension of international law. After all, contemporary international tribunals have an important contribution to give to the avoidance or prevention of irreparable harm in situations of urgency, to the ultimate benefit of human beings, and to secure due compliance with the ordered provisional measures of protection[50].

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[46] Such individual opinions on the matter are reproduced in the collections: *(a) Judge A. A. Cançado Trindade — The Construction of a Humanized International Law — A Collection of Individual Opinions (1991-2013)*, Vol. I (IACtHR), Leiden, Brill/Nijhoff, 2014, pp. 799-852; Vol. II (ICJ), Leiden, Brill/Nijhoff, 2014, pp. 1815-1864; Vol. III (ICJ), Leiden, Brill/Nijhoff, 2017, pp. 733-764; and *(b) Vers un nouveau* jus gentium *humanisé — Recueil des opinions individuelles du Juge A. A. Cançado Trindade [CIJ]*, Paris, L'Harmattan, 2018, pp. 143-224 and 884-886; and *(c) Esencia y Transcendencia del Derecho Internacional de los Derechos Humanos (Votos [del Juez A. A. Cançado Trindade] en la Corte Interamericana de Derechos Humanos, 1991-2008)*, Vols. I-III, 2nd rev. ed., Mexico D.F., Ed. Cám. Dips., 2015, Vol. III, pp. 77-399.

[47] Cf. A. A. Cançado Trindade, *O Regime Jurídico Autônomo das Medidas Provisórias de Proteção*, The Hague/Fortaleza, IBDH/IIDH, 2017, pp. 13-348.

[48] 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 protection 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.

[49] Cf. *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*, dissenting opinion of Judge Cançado Trindade, p. 269, para. 75.

[50] Cf., to this effect, (merged) cases of *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 22 November 2013, I.C.J. Reports 2013*, separate opinion of Judge Cançado Trindade, pp. 378-385, paras. 20-31 and p. 387, para. 40. The right of access to justice, also in the present domain (cf. para. 68, *supra*), is to be understood *lato sensu*, encompassing not only the formal access to a competent tribunal, but also the due process of law (equality of arms), and the faithful compliance with the decision; for a general study, cf. A. A. Cançado Trindade, *El Derecho de Acceso a la Justicia en Su Amplia Dimensión*, 2nd ed., Santiago de Chile, Ed. Librotecnia, 2012, pp. 79-574; A. A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford University Press, 2011, pp. 1-236.

76. The component elements of this autonomous legal regime are: the rights to be protected; the corresponding obligations; the prompt determination of responsibility (in case of non-compliance), with its legal consequences, encompassing the duty of reparation for damages. Rights and obligations concerning provisional measures of protection are not the same as those pertaining to the merits of the cases, and the configuration of responsibility with all its legal consequences is prompt, without waiting for the decision on the merits. The notion of victim (or potential victim) itself — may I stress this point — marks presence already at this stage, irrespective of the decision as to the merits (cf. *supra*).

77. Provisional measures have, in recent years, been protecting growing numbers of persons in situations of vulnerability, transformed into a true jurisdictional *guarantee* of preventive character[51]. Hence the autonomy of the international responsibility that non-compliance with them promptly generates. A study of the matter encompasses the general principles of law, always of great relevance[52]. Attention is to be focused on the common mission of contemporary international tribunals of realization of justice[53] as from an essentially humanist outlook[54].

## X. International Law and the Temporal Dimension

78. A consideration of the aforementioned preventive dimension, furthermore, brings to the fore the time factor, and in particular the relation-

[51] Cf. A. A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, Vol. III, Porto Alegre, S.A. Fabris Ed., 2003, pp. 80-83; 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, "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), No. 5-8, pp. 162-168; 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.

[52] Cf., e.g., *inter alia*, A. A. Cançado Trindade, *Princípios do Direito Internacional Contemporâneo*, 2nd rev. ed., Brasília, FUNAG, 2017, pp. 25-454; A. A. Cançado Trindade, "Foundations of International Law: The Role and Importance of Its Basic Principles", in *XXX Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano*, OAS (2003), pp. 359-415.

[53] A. A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça,* 2nd ed., Belo Horizonte, Edit. Del Rey, 2017, pp. 29-468.

[54] Cf. A. A. Cançado Trindade, *A Visão Humanista da Missão dos Tribunais Internacionais Contemporâneos*, The Hague/Fortaleza, IBDH/IIDH, 2016, pp. 11-283; A. A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 7-185.

ship between international law and the temporal dimension. Such relationship is an ineluctable one, requiring far more attention than the one dispensed to it by international legal doctrine so far. In effect, the temporal dimension underlies the whole domain of international law, being interpreted and applied within time.

79. It ineluctably encompasses provisional measures of protection. In my dissenting opinion appended to the ICJ's Order of 28 May 2009 in the case of the *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, I warned *inter alia* that "[i]t is imperative to reduce or bridge the *décalage* between the time of victimized human beings and the time of human justice" (*I.C.J. Reports 2009*, p. 183, para. 49). Subsequently, I devote the whole of my separate opinion (*I.C.J. Reports 2011 (II)*, p. 566-607, paras. 1-117) appended to the ICJ's Order of 18 July 2011 in the case of the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cam-bodia *v.* Thailand) *(Cambodia* v. *Thailand)* to distinct aspects of the temporal dimension in international law and its incidence on the granting of provisional measures of protection[55].

80. After all, it is in the nature of law to accompany the regulatory function in society undergoing changes, contrary to what legal positivists assume in their static view of the legal order. The evolution of international law — acknowledged by the ICJ in an *obiter dictum* of its *célèbre* Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (of 21 June 1971, para. 53) — responds to the changing needs of all subjects of international law (including individuals) and of the international community as a whole.

81. The evolving international law is permeated by a major enigma, which, for its part, also permeates the existence of all subjects of law (including individuals): the passage of time. International law, emerging ultimately from human conscience, the universal juridical conscience, also has a *protective* function endowed with a preventive dimension, as illustrated by the significant expansion of provisional measures of protection in recent years[56]. Keeping the passage of time in mind, it is important to prevent or avoid harm that may occur in the future (hence the acknowledgment of *potential* or *prospective* victims), as well as to put an end to *continuing situations* already affecting individual rights. Past, present and future come and go together.

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[55] I pondered *inter alia* that, when the protection by means of provisional measures is intended to extend to "the *spiritual* needs of human beings", bringing to the fore, as in the *cas d'espèce*, "the safeguard of cultural and spiritual world heritage", the time dimension is even wider, bringing back "timelessness" (*I.C.J. Reports 2011 (II)*, p. 600, para. 101).

[56] Cf. A. A. Cançado Trindade, *International Law for Humankind — Towards a New* Jus Gentium, 2nd rev. ed., Leiden/The Hague, Nijhoff/ Hague Academy of International Law, 2013, pp. 31-34, 38-47 and 50-51.

## XI. Provisional Measures of Protection in Continuing Situations

82. In the present case of *Application of the CERD Convention (Qatar* v. *United Arab Emirates)*, at this stage of request of provisional measures of protection, there are some other considerations that I deem it fit to present, in this separate opinion, with regard to the alleged *continuing situation* in breach of human rights, in addition to those I have already made (cf. Section VI (3) *supra*). Even if the evidence already presented to the ICJ so far may appear insufficient, there are sources of it that may be regarded relevant to the consideration of such a *continuing situation* at this stage.

83. In this respect, for example, the Report of the United Nations Office of the High Commissioner for Human Rights (OHCHR) of December 2017[57], brought to the attention of the ICJ in the present proceedings, gave an account of a *continuing situation* (an "ongoing crisis on human rights", with "continuing implications", and "cases of temporary or potentially durable separation of families", among other "long-standing human rights issues", to the detriment, e.g., of "migrant workers")[58].

84. The OHCHR, having decided to monitor *in loco* the consequences on human rights of the UAE's decision or announcement of 5 June 2017, reported, one semester later, on the suspension and "considerable restrictions" on freedom of movement "to and from Qatar" (paras. 23 and 26), with "continuing implications to date"; such restrictions disrupted family life, affected the right to education, as Qatari students were prevented from pursuing their studies where they were (paras. 26 and 50). The aforementioned OHCHR Report (of December 2017) referred to "cases of temporary or potentially durable separation of families", with all their consequences (para. 32).

85. There was also an impact on the right to health, with humanitarian consequences (para. 43), as some people had to travel abroad to receive their medical treatment or to undergo surgery (para. 44). As to the restrictions on freedom of expression, the OHCHR reported that the unilateral measures have been accompanied by a "widespread defamation and hatred campaign against Qatar and Qataris in various media" (paras. 14 and 19). The Report, furthermore, addressed another long-standing human rights issue, affecting the rights of migrant workers and non-

[57] The OHCHR Technical Mission visited Qatar on 17-24 November 2017, where it conducted its research on documents provided by distinct entities, besides interviews with "about 40 individuals" (paras. 4-6).

[58] Paragraphs 4 (i), 26, 32-33 and 54, respectively. The Report reiteratedly referred to the problem of continuing separations of families (paras. 32-33, 37 and 64). It warned that "measures targeting individuals on the basis of their Qatari nationality or their links with Qatar can be qualified as non-disproportionate and discriminatory" (para. 61). It further warned that such unilateral measures were "premeditated" and "accompanied by a widespread defamation and hatred campaign" (paras. 14-15).

citizens (paras. 54-58). The Report at last considered the restrictive unilateral measures as arbitrary (para. 60).

86. Likewise, a Joint Communication from the UN Special Procedures Mandate Holders of the UN Human Rights Council to the UAE[59], of 18 August 2017, the Special Rapporteurs warned that the decision announced by the UAE on 5 June 2017 "has threatened the most vulnerable groups, including women, children, persons with disabilities and older persons" (p. 1). It has, furthermore, it continued, led to the separation of families, the interruption of studies in schools or universities, and has also affected the right to health (pp. 2-3 and 5), among others. The Special Rapporteurs then drew attention to "the urgency of the matter" and the "extreme gravity" of the situation, and urged that "all necessary interim measures be taken to halt the alleged violations and prevent their reoccurrence" (p. 7).

87. Among other reports referred to in the course of the present proceedings before the ICJ, were those of non-governmental organizations (NGOs) with much experience at international level, such as, *inter alia*, Amnesty International and Human Rights Watch. In its very recent Report (of 5 June 2018), Amnesty International referred to the situation of continuity harming separated families, and individuals (among whom migrant workers, children and students)[60]. Accordingly, it called upon the States concerned[61] to "immediately lift all arbitrary restrictions" imposed on Qatari nationals, and to respect human rights[62].

88. For its part, Human Rights Watch, in its earlier Report (of 12 July 2017), likewise warned against "human rights violations" in the separation of families, the deprivation of migrant workers, the discrimination against women, the interruption of medical treatment, and the interruption of education[63]. Both Human Rights Watch and Amnesty Interna-

[59] Namely: Special Rapporteur on the human rights of migrants; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on the promotion and protection of human rights while countering terrorism; and Special Rapporteur on the right to education (pursuant to UN Human Rights Council resolutions 34/18, 33/9, 34/21, 34/35, 31/3, and 26/17).

[60] Amnesty International, [Report:] "One Year Since the Gulf Crisis, Families Are Left Facing an Uncertain Future", of 5 June 2018, p. 1.

[61] The UAE, Saudi Arabia and Bahrain.

[62] Amnesty International, *op. cit. supra* note 60, p. 3.

[63] Human Rights Watch, [Report:] "Qatar: Isolation Causing Rights Abuses", dated 12 July 2017, pp. 1, 3-4 and 6-10 (Application instituting proceedings, Annex 10).

tional have provided accounts, in their respective reports, of information obtained from interviews with those victimized *in loco*.

89. In effect, the *continuing situation* in breach of human rights is a point which has had an incidence in other cases before the ICJ as well, at distinct stages of the proceedings. May I briefly recall here three examples, along the last decade. In the case concerning the *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, as the ICJ in its Order of 28 May 2009 decided not to indicate provisional measures, I appended thereto a dissenting opinion, wherein — as already pointed out (para. 79, *supra*) — I drew attention to the *décalage* to be bridged between the time of human beings and the time of human justice (paras. 35-64).

90. Urgency and probability of irreparable damage, I proceeded, were quite clear, in the *continuing situation* of lack of access to justice of the victims of the Hissène Habré regime (1982-1990) in Chad. This right of access to justice assumed a "paramount importance" (paras. 29 and 74-77), I added, in the *cas d'espèce*, under the UN Convention against Torture; furthermore, I dwelt upon the component elements of the autonomous legal regime of provisional measures of protection (paras. 8-14, 26-29 and 65-73). Such measures were necessary for the safeguard of the right to the realization of justice (paras. 78-96 and 101).

91. In the case on *Jurisdictional Immunities of the State (Germany* v. *Italy)*, as the ICJ, in its Order of 6 July 2010 found the counter-claim of Italy inadmissible, once again I appended thereto a dissenting opinion, wherein I examined at depth the notion of *"continuing situation"* in the factual context of the *cas d'espèce*, as debated between the contending Parties (paras. 55-59 and 92-100). My dissenting opinion encompassed the origins of a "continuing situation" in international legal doctrine (paras. 60-64); the configuration of a "continuing situation" in international litigation and case law (paras. 65-83); the configuration of a "continuing situation" in international legal conceptualization at normative level (paras. 84-91).

92. And, once again, I warned against the pitfalls of State voluntarism (paras. 101-123). Suffice it here only to refer to my lengthy reflections on the notion of "continuing situation" in the case on *Jurisdictional Immunities of the State (Germany* v. *Italy)*, as I see no need to reiterate them *expressis verbis* herein. What cannot pass unnoticed is that a *continuing situation* in breach of human rights has had an incidence at distinct stages of the proceedings before the ICJ: in addition to decisions — as just seen — on provisional measures and counter-claim *(supra)*, it has also been addressed in decision as to the merits.

93. This is illustrated by the aforementioned case of *Ahmadou Sadio Diallo* (*(Republic of Guinea* v. *Democratic Republic of the Congo)*, merits,

Judgment of 30 November 2010). Its factual context disclosed a *continuing situation* of breaches of Mr. Ahmadou Sadio Diallo's individual rights in the period extending from 1988 to 1996. The griefs suffered by the victim *extended in time* (the arrests and detentions of 1988-1989 followed by those of 1995-1996, prior to his expulsion from the country of residence), in breach of the relevant provisions of human rights treaties (the UN Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights) as well as Article 36 (1) *(b)* of the Vienna Convention on Consular Relations). His griefs were surrounded by arbitrariness on the part of State authorities[64], and amounted to a wrongful *continuing situation*, marked by the prolonged lack of access to justice.

## XII. Epilogue: A Recapitulation

94. This is, as seen, the third case under the CERD Convention in which provisional measures of protection have been rightly ordered by the ICJ, in this new era of its international adjudication of human rights cases. The fact that a case is an inter-State one, characteristic of the *contentieux* before the ICJ, does not mean that the Court is to reason likewise on a strictly inter-State basis. Not at all. It is the nature of a case that will call for a reasoning, so as to reach a solution. The present case of *Application of the CERD Convention (Qatar* v. *United Arab Emirates)* concerns the rights protected thereunder, which are the rights of human beings, and not rights of States.

95. This has a direct bearing on the consideration of a request for provisional measures of protection under a human rights convention. Provisional measures, with a preventive dimension, have been undergoing a significant evolution, moving further towards the consolidation of the autonomous legal regime of their own, to the benefit of the *titulaires* of rights. In another endeavour to keep paving this path, may I, last but not least, proceed to a brief recapitulation of the main points I deemed it fit to make, particularly in respect of such provisional measures, under the CERD Convention, in the course of the present separate opinion.

[64] At the time of his arrests and detention. Mr. Ahmadou Sadio Diallo was not informed of the charges against him, nor could he have availed himself without delay of his right to information on consular assistance. For its part, the CERD Committee, in its practice, has also been particularly attentive to the prohibition of discriminatory measures against members of vulnerable groups (such as, e.g., migrants); cf. R. de Gouttes, "Regards comparatifs sur deux organes internationaux chargés de la lutte contre le racisme : le Comité des Nations Unies pour l'Elimination de la Discrimination Raciale (CERD) et la Commission Européenne contre le Racisme et l'Intolérance (ECRI)", in *Réciprocité et universalité : Sources et regimes du droit international des droits de l'homme — Mélanges en l'honneur du Prof. E. Decaux*, Paris, Pedone, 2017, pp. 1015-1022, esp. pp. 1017 and 1020.

96. *Primus*: The principle of equality and non-discrimination lies in the foundations of the rights protected under the CERD Convention also by means of provisional measures. The historical formation of the *corpus juris* of international protection of human rights has much contributed to a growing awareness of the importance of the prevalence of the basic principle of equality and non-discrimination. *Secundus*: The work of UN supervisory organs — among which the CERD Committee — bears witness of such growing awareness.

97. *Tertius*: It is necessary nowadays that the advances in respect of the basic principle of equality and non-discrimination, at normative and jurisprudential levels, are also accompanied by the international legal doctrine, which so far has not dedicated sufficient attention to that fundamental principle. *Quartus*: The protection sought under the CERD Convention is also against arbitrariness, as in the *cas d'espèce*. This point has not escaped the attention of other international tribunals, entrusted with the interpretation and application of distinct human rights conventions.

98. *Quintus*: Human rights treaties, including the CERD Convention, conform a *law of protection* (a *droit de protection*), oriented towards the safeguard of the ostensibly weaker party (the real or potential victim), and the prohibition of arbitrary measures, so as also to secure the prevalence of the rule of law *(la prééminence du droit)*. *Sextus*: As to the points discussed in the present proceedings of the *cas d'espèce*, there are two of them that require clarification: the rationale of the local remedies rule in the international protection of human rights, and the implications of a continuing situation affecting or breaching human rights.

99. *Septimus*: The local remedies rule, as a condition of admissibility of international claims, cannot be invoked as a "precondition" for the consideration of urgent requests of provisional measures of protection. *Octavus*: The rationale of the local remedies rule in human rights protection is entirely distinct from that of its application in the practice of diplomatic protection of nationals abroad: in human rights protection the rule is focused on effectiveness of local remedies and *redress*, while in diplomatic protection it is focused on the process of *exhaustion* of such remedies.

100. *Nonus*: The CERD Committee itself has underlined the components of effectiveness of local remedies and redress. Human rights protection is victim-oriented, it is a law of protection of the weaker party *(droit de protection)*, as upheld by international human rights tribunals; discretionary diplomatic protection, for its part, remains State-oriented. *Decimus*: There is no ground for attempting to add, to the so-called "plausibility" of rights, the so-called "plausibility" of admissibility, as an additional "precondition" for provisional measures of protection.

101. *Undecimus*: In a *continuing situation*, the rights requiring protection are clearly known, there being no sense to wonder whether they are "plausible". *Duodecimus*: The proper understanding of compromissory clauses under human rights conventions is necessarily attentive to the nature and substance of those conventions, as well as to their object and purpose; such clauses cannot be interpreted attempting to find "preconditions", rendering access to justice under human rights conventions particularly difficult.

102. *Tertius decimus*: The aforementioned prohibition of arbitrariness brings to the fore the issue of the *vulnerability* of those affected by discriminatory measures; requests of provisional measures of protection, in cases like the present, are intended to put an end to a continuing situation of vulnerability of the affected persons (potential victims). *Quartus decimus*: Human vulnerability is a test more compelling than so-called 'plausibility' of rights for the ordering of provisional measures of protection under human rights treaties.

103. *Quintus decimus*: There has been an advance towards the consolidation of what I have been calling, along the years, the *autonomous legal regime* of provisional measures of protection. *Sextus decimus*: Provisional measures of protection have, in recent years, been protecting growing numbers of persons in situations of vulnerability; they have thus been transformed into a true jurisdictional *guarantee* of preventive character. *Septimus decimus*: Such preventive character brings to the fore the temporal dimension in the application of the provisional measures of protection, e.g., when they are intended, as in the present case, to put an end to a continuing situation affecting individual rights.

104. *Duodevicesimus*: In respect of the present case, there have been UN reports and other documents giving accounts of a *continuing situation* affecting human rights under the CERD Convention. *Undevicesimus:* The *continuing situation* in breach of human rights is a point which has had an incidence in earlier cases before the ICJ as well, at distinct stages of the proceedings. *Vicesimus*: The determination and ordering of provisional measures of protection under human rights conventions can only be properly undertaken from a humanist perspective, necessarily avoiding the pitfalls of an outdated and impertinent State voluntarism.

*(Signed)* Antônio Augusto CANÇADO TRINDADE.