

**ANTÔNIO AUGUSTO CANÇADO TRINDADE**

**O REGIME JURÍDICO AUTÔNOMO DAS  
MEDIDAS PROVISÓRIAS DE PROTEÇÃO**

**IBDH – IIDH  
Haia/Fortaleza  
2017**



**ANTÔNIO AUGUSTO CANÇADO TRINDADE**

**O REGIME JURÍDICO AUTÔNOMO DAS  
MEDIDAS PROVISÓRIAS DE PROTEÇÃO**

*Catálogo na Publicação*

*Bibliotecária: Perpétua Socorro Tavares Guimarães C.R.B. 3 801/98*

---

T 832 p Trindade, Antônio Augusto Caçado  
O regime jurídico autônomo das medidas provisórias de proteção  
/Antônio Augusto Caçado Trindade.- Fortaleza:  
Expressão Gráfica e Editora, 2017.

356 p.

ISBN: 978-85-420-1071-8

1. Direito      2. Medidas protetivas      I. Título

CDD: 340

---

# ÍNDICE

PREFÁCIO .....	13
----------------	----

## CAPÍTULO I

<b>DIREITOS HUMANOS E MEIO AMBIENTE: A PROTEÇÃO DE GRUPOS VULNERÁVEIS .....</b>	<b>17</b>
I. Introdução.....	17
II. A Proteção de Grupos Vulneráveis na Confluência do Direito Internacional dos Direitos Humanos e do Direito Ambiental Internacional.....	18
III. A Proteção de Grupos Vulneráveis e o Atendimento das Necessidades Humanas Básicas .....	26

## CAPÍTULO II

<b>A DIMENSÃO PREVENTIVA DAS MEDIDAS PROVISÓRIAS DE PROTEÇÃO: VOTOS NA CORTE INTERAMERICANA DE DIREITOS HUMANOS.....</b>	<b>41</b>
1. VOTO CONCURRENTES DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO DE LOS HAITIANOS Y DOMINICANOS DE ORIGEN HAITIANO EN LA REPÚBLICA DOMINICANA <i>versus</i> REPÚBLICA DOMINICANA (Resolución del 18.08.2000) .....	41
I. Desarraigo y Derechos Humanos: La Dimensión Global.....	41
II. Desarraigo y Derechos Humanos: La Responsabilidad Estatal .....	43
III. Desarraigo y Derechos Humanos: La Naturaleza Jurídica de las Medidas Provisionales de Protección .....	46
2. VOTO CONCURRENTES DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO DE LAS COMUNIDADES DEL JIGUAMIANDÓ Y DEL CURBARADÓ <i>versus</i> COLOMBIA (Resolución del 15.03.2005).....	51
3. VOTO CONCURRENTES DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO DE LA COMUNIDAD DE PAZ DE SAN JOSÉ DE APARTADÓ <i>versus</i> COLOMBIA (Resolución del 15.03.2005) .....	57

4.	VOTO CONCURRENTENTE DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO <i>ELOÍSA BARRIOS Y OTROS versus VENEZUELA</i> (Resolución del 29.06.2005) .....	62
5.	VOTO CONCURRENTENTE DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO <i>ELOÍSA BARRIOS Y OTROS versus VENEZUELA</i> (Resolución del 22.09.2005) .....	66
6.	VOTO CONCORDANTE DO JUIZ A.A. CANÇADO TRINDADE NO CASO DAS CRIANÇAS E ADOLESCENTES PRIVADOS DE LIBERDADE NO ‘COMPLEXO DO TATUAPÉ’ DA FEBEM <i>versus BRASIL</i> (Resolução de 17.11.2005).....	70
7.	VOTO CONCORDANTE DO JUIZ A.A. CANÇADO TRINDADE NO CASO DAS CRIANÇAS E ADOLESCENTES PRIVADOS DE LIBERDADE NO ‘COMPLEXO DO TATUAPÉ’ DA FEBEM <i>versus BRASIL</i> (Resolução de 29.11.2005).....	73
	I. Os Direitos da Criança e do Adolescente na Jurisprudência da Corte em Matéria Contenciosa e Consultiva .....	74
	II. O Caráter Tutelar, Mais que Cautelar, das Medidas Provisórias de Proteção da Corte .....	79
	III. As Medidas Provisórias da Corte e as Obrigações <i>Erga Omnes</i> de Proteção.....	81
	IV. O Amplo Alcance das Obrigações <i>Erga Omnes</i> de Proteção: Suas Dimensões Vertical e Horizontal. ....	84
	V. O Regime Jurídico Autônomo das Medidas Provisórias da Corte .....	88
8.	VOTO CONCURRENTENTE DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO DE LA COMUNIDAD DE PAZ DE SAN JOSÉ DE APARTADÓ <i>versus COLOMBIA</i> (Resolución del 02.02.2006) .....	91
9.	VOTO CONCURRENTENTE DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO DE LAS COMUNIDADES DEL JIGUAMIANDÓ Y DEL CURBARADÓ <i>versus COLOMBIA</i> (Resolución del 07.02.2006).....	95
10.	VOTO RAZONADO DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO DE LAS PENITENCIARIÁS DE MENDOZA <i>versus ARGENTINA</i> (Resolución del 30.03.2006) .....	100
	I. Las Obligaciones <i>Erga Omnes</i> de Protección bajo la Convención Americana y el <i>Drittwirkung</i> .....	101

II.	La Responsabilidad Internacional <i>Autónoma</i> en Materia de Medidas Provisionales de Protección bajo la Convención Americana .....	103
III.	Lecciones de la Audiencia Pública de Brasília ante la Corte Interamericana del 30 de marzo de 2006.....	106
IV.	Conclusión.....	108
11.	VOTO FUNDAMENTADO DO JUIZ A.A. CANÇADO TRINDADE NO CASO DA <i>PENITENCIÁRIA DE ARARAQUARA versus BRASIL</i> (Resolução de 30.09.2006) .....	109
I.	O Caráter Tutelar, Mais que Cautelar, das Medidas Provisórias de Proteção da Corte .....	109
II.	A Responsabilidade Internacional <i>Autônoma</i> em Matéria de Medidas Provisórias de Proteção sob a Convenção Americana.....	111
III.	A Interrelação entre os Deveres Gerais de Proteção dos Artigos 1(1) e 2 da Convenção Americana .....	113
IV.	As Medidas Provisórias da Corte Interamericana e as Obrigações <i>Erga Omnes</i> de Proteção .....	115
V.	O Amplo Alcance das Obrigações <i>Erga Omnes</i> de Proteção: Suas Dimensões Vertical e Horizontal. ....	118
VI.	O Regime Jurídico <i>Autônomo</i> das Medidas Provisórias da Corte Interamericana .....	123
VII.	Problemas Derivados da Coexistência de Medidas Cautelares e Medidas Provisórias de Proteção à Luz do Imperativo do Acesso Direto do Indivíduo à Justiça Internacional.....	126
12.	VOTO RAZONADO DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO DE LOS <i>INTEGRANTES DEL EQUIPO DE ESTUDIOS COMUNITARIOS Y ACCIÓN PSICOSOCIAL - ECAP</i> (CASO DE LA MASACRE DE PLAN DE SÁNCHEZ) <i>versus GUATEMALA</i> (Resolución del 29.11.2006) .....	133
I.	Breves Reflexiones <i>Lex Lata</i> .....	133
II.	Breves Reflexiones <i>De Lege Ferenda</i> .....	137
	<b>CAPÍTULO III</b>	
	<b>A DIMENSÃO PREVENTIVA DAS MEDIDAS PROVISÓRIAS DE PROTEÇÃO: VOTOS NA CORTE INTERNACIONAL DE JUSTIÇA .....</b>	<b>141</b>

1.	DISSENTING OPINION OF JUDGE A.A. CANÇADO TRINDADE IN THE CASE CONCERNING <i>QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR TO EXTRADITE</i> (Belgium <i>versus</i> Senegal, Order of 28.05.2009)....	141
	I. Preliminary Observations.....	141
	II. Provisional Measures: Their Transposition onto the International Legal Procedure.....	142
	III. The Juridical Nature and Effects of Provisional Measures of the ICJ.....	143
	IV. The Overcoming of the Strictly Inter-State Dimension in the Acknowledgement of the Rights to be Preserved.....	147
	V. The Rationale of the Purported Aims of Provisional Measures of the ICJ.....	151
	VI. The Saga of the Victims of the Habré Regime in their Persistent Struggle against Impunity .....	153
	1. The Historical Record of the Case .....	153
	2. The Issue of Justiciability in the Long Search for Justice....	155
	VII. The Time of Human Beings and the Time of Human Justice.....	159
	1. The <i>Décalage</i> to be bridged .....	159
	2. The Determination of Urgency .....	161
	3. The Determination of the Probability of Irreparable Damage .....	165
	VIII. Legal Nature, Content and Effects of the Right to be Preserved .....	166
	IX. Provisional Measures to be Indicated.....	170
	1. Time and the Imperativeness of the Realization of Justice .....	170
	2. The Required Indication of Provisional Measures in the Present Case .....	171
	X. The Lesson of the Present Case at This Stage: Provisional Measures for the Realization of Justice .....	175
	XI. Concluding Observations.....	176
2.	SEPARATE OPINION OF JUDGE CANÇADO TRINDADE IN THE CASE OF THE TEMPLE OF PRÉAH VIHÉAR (Cambodia <i>versus</i> Thailand, Order of 18.07.2011).....	180
	I. Introduction.....	180
	II. The Passing of Time: The <i>Chiaroscuro</i> of Law .....	181
	III. The Density of Time .....	183

IV. The Temporal Dimension in International Law.....	185
V. The Search for Timelessness .....	187
VI. From Timelessness to Timeliness .....	188
VII. The Passing of Time: The <i>Chiaroscuro</i> of Existence .....	190
VIII. Time, Legal Interpretation, and the Nature of Legal Obligation .....	192
IX. From Time to Space: Territory and People Together .....	196
1. Cambodia's First Submissions.....	198
2. Thailand's First Submissions .....	200
3. Cambodia's Second Submissions .....	202
4. Thailand's Second Submissions .....	202
5. General Assessment .....	204
X. The Effects of Provisional Measures of Protection in the <i>Cas d'Espèce</i> .....	205
1. The Protection of People in Territory .....	206
2. The Prohibition of Use or Threat of Force.....	207
3. Space and Time, and the Protection of Cultural and Spiritual World Heritage .....	213
XI. Provisional Measures of Protection: Beyond the Strict Territorialist Approach.....	218
XII. Final Considerations, <i>Sub Specie Aeternitatis</i> .....	220
3. DISSENTING OPINION OF JUDGE A.A. CANÇADO TRINDADE IN THE CASES OF CONSTRUCTION OF A ROAD IN COSTA RICA ALONG THE SAN JUAN RIVER AND OF CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA ( <i>Nicaragua versus Costa Rica</i> , and <i>Costa Rica versus Nicaragua</i> , Order of 16.07.2013) .....	228
I. <i>Prolegomena</i> .....	228
II. Provisional Measures of Protection: The Concomitant New Requests by Costa Rica and Nicaragua .....	230
III. Technical Missions <i>in Loco</i> Pursuant to the Ramsar Convention .....	231
IV. The Position of the Parties as to the Purported Expansion of Provisional Measures: The Request of Costa Rica .....	234
V. Urgency, and Risk of Harm in the Form of Bodily Injury or Death.....	237
VI. The Position of the Parties as to the Purported Expansion of Provisional Measures: The Request of Nicaragua.....	239

VII. General Assessment of the Requests of Costa Rica and of Nicaragua .....	241
1. Costa Rica's Request.....	241
2. Nicaragua's Request.....	242
VIII. Effects of Provisional Measures of Protection beyond the Strict Territorialist Outlook .....	244
IX. The Beneficiaries of Provisional Measures of Protection, beyond the Traditional Inter-State Dimension.....	246
X. Effects of Provisional Measures of Protection beyond the Traditional Inter-State Dimension .....	249
XI. The Proper Exercise of the International Judicial Function: A Rebuttal of So-Called "Judicial Self-Restraint", or <i>L'Art de ne Rien Faire</i> .....	251
XII. Epilogue: Towards an Autonomous Legal Regime of Provisional Measures of Protection.....	255
4. SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE IN THE CASE OF CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (Costa Rica <i>versus</i> Nicaragua, Order of 22.11.2013) .....	259
I. Introduction.....	259
II. Submissions of the Parties in the Course of the Present Proceedings .....	260
1. Submissions in the Written Phase .....	260
2. First Round of Oral Arguments.....	261
3. Second Round of Oral Arguments.....	264
4. General Assessment .....	266
III. The Configuration of the Autonomous Legal Regime of Provisional Measures of Protection .....	268
1. The Task of International Tribunals.....	268
2. A Reassuring Jurisprudential Construction (2000-2013) ..	270
IV. The On-Going Construction of an Autonomous Legal Regime of Provisional Measures of Protection .....	272
V. Final Considerations.....	275
5. SEPARATE OPINION OF JUDGE CANÇADO TRINDADE IN THE JOINED CASES OF CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA AND OF CONSTRUCTION OF A ROAD IN COSTA RICA ALONG THE SAN JUAN RIVER (Costa Rica <i>versus</i> Nicaragua, and Nicaragua <i>versus</i> Costa Rica, Judgment of 16.12.2015) .....	278

I.	<i>Prolegomena</i> .....	278
II.	Manifestations of the Preventive Dimension in Contemporary International Law .....	279
III.	The Autonomous Legal Regime of Provisional Measures of Protection .....	280
	1. The Evolution of Provisional Measures of Protection.....	281
	2. The Conformation of Their Autonomous Legal Regime ...	283
IV.	Provisional Measures: The Enlargement of the Scope of Protection .....	285
V.	Breach of Provisional Measures of Protection as an Autonomous Breach, Engaging State Responsibility by Itself .....	287
VI.	The ICJ's Determination of Breaches of Obligations under Provisional Measures of Protection .....	288
VII.	A Plea for the Prompt Determination of Breaches of Provisional Measures of Protection: Some Reflections...	291
VIII.	Supervision of Compliance with Provisional Measures of Protection .....	295
IX.	Breach of Provisional Measures and Reparation for Damages.....	295
X.	Due Diligence, and the Interrelatedness between the Principle of Prevention and the Precautionary Principle ....	298
XI.	The Path towards the Progressive Development of Provisional Measures of Protection .....	299
XII.	Epilogue: A Recapitulation .....	303
6.	SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE IN THE CASE OF APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESION OF THE FINANCING OF TERRORISM [ICSFT] AND OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION [CERD] (Ukraine <i>versus</i> Russian Federation, Provisional Measures, Order of 19.04.2017).....	305
	1. Prolegomena.....	305
	II. Conceptual Development of Provisional Measures of Protection .....	306
III.	Provisional Measures: Test of Vulnerability of Segments of the Population .....	310
	1. Human Vulnerability in International Case-Law .....	310
	2. Human Vulnerability in the <i>Cas d'Espèce</i> .....	314

a) Ukraine’s Request for Provisional Measures of Protection .....	314
IV. Provisional Measures: Utmost Vulnerability of Victims, Further Irreparable Harm, and Urgency of the Situation....	315
V. The Decisive Test: Human Vulnerability over “Plausibility” of Rights .....	321
VI. The Necessity and Importance of Provisional Measures of Protection in the <i>Cas d’Espèce</i> .....	322
VII. The Concern of the International Community with the Living Conditions of the Population Everywhere .....	325
VIII. Provisional Measures: Protection of the Human Person, Beyond the Strict Inter-State Dimension.....	326
IX. Chronic Violence and the Tragedy of Human Vulnerability.....	329
X. Provisional Measures: Protection of People in Territory .....	331
XI. The Autonomous Legal Regime of Provisional Measures of Protection: Duty of Compliance with Them .....	333
1. Non-Compliance and State Responsibility .....	334
2. Prompt Determination of Breaches of Provisional Measures: An Anti-Voluntarist Posture.....	335
3. Breaches of Provisional Measures and the Duty of Reparation.....	336
XII. Epilogue .....	337

#### CAPÍTULO IV

<b>DIREITOS HUMANOS E MEIO AMBIENTE: A DIMENSÃO PREVENTIVA NO DIREITO INTERNACIONAL, NAS MEDIDAS PROVISÓRIAS DE PROTEÇÃO.....</b>	<b>341</b>
<b>ANEXO BIBLIOGRÁFICO - LIVROS DO MESMO AUTOR.....</b>	<b>349</b>

## PREFÁCIO

Desde os primórdios do ciclo das Conferências Mundiais das Nações Unidas (no início da década de noventa) até o presente (abril de 2017), tenho dedicado especial atenção ao paralelo dos dois sistemas de proteção internacional, dos direitos humanos e do meio-ambiente, em seus múltiplos aspectos, e inclusive em suas convergências. No presente tomo, voltarei minha atenção à sua dimensão preventiva, tal como refletido nas medidas provisórias de proteção. É este um ponto que, ao longo dos anos, tem sido tratado na jurisprudência internacional, mas não suficientemente na doutrina jusinternacionalista. Espero, com este livro *O Regime Jurídico Autônomo das Medidas Provisórias de Proteção*, contribuir a preencher esta lacuna.

Passei a ocupar-me desta matéria por ocasião da Conferência das Nações Unidas sobre Meio-Ambiente e Desenvolvimento (UNCED - Rio de Janeiro, 1992), e da II Conferência Mundial de Direitos Humanos das Nações Unidas (Viena, 1993), das quais participei: em ambas, em seus *travaux préparatoires* e eventos a ambas relacionados<sup>1</sup>, e, na segunda, em todo o seu processo, inclusive, quando de sua realização, no próprio Comitê de Redação da Conferência Mundial de Viena de 1993. Desta última emanou meu *Tratado de Direito Internacional de*

---

1 Permito-me aqui recordar, *inter alia*, as duas reuniões de peritos do PNUMA de que participei, como *co-rapporteur* em ambas, na Ilha de Malta (dezembro de 1990) e em Beijing, China (em agosto de 1991), para redigir o que serviu de base aos Anteprojetos das duas Convenções (sobre biodiversidade e clima) adotadas na Conferência Mundial do Rio de Janeiro (UNCED, 1992). Aí conceitualizamos o “interesse comum [*common concern*] da humanidade”, mais além do “patrimônio comum [*common heritage*] da humanidade”. Para os tomos de atas destas duas inesquecíveis reuniões, cf. UNEP, *The Meeting of the Group of Legal Experts to Examine the Concept of The Common Concern of Mankind in Relation to Global Environmental Issues* (Malta, 1990), Nairobi, UNEP, 1991, pp. 5-83; UNEP, *Beijing Symposium on Developing Countries and International Environmental Law* (Beijing, 1991), Nairobi, UNEP, 1992, pp. 1-41. E, para um relato das mesmas e de seus resultados, cf. A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, 2<sup>a</sup>. ed. rev., The Hague, Nijhoff/The Hague Academy of International Law, 2013, cap. XIII, pp. 327-352.

*Direitos Humanos*, que, em três tomos, é hoje o mais completo estudo existente sobre a matéria, não só no Brasil como também no exterior<sup>2</sup>.

Desde o início de meu tratamento dos dois sistemas de proteção, minhas reflexões se voltaram aos imperativos de proteção frente à vulnerabilidade humana e ambiental. A partir de meados dos anos noventa até o presente, tenho estado engajado na construção jurisprudencial - em duas jurisdições internacionais sucessivamente - do que conceitualizo como o *regime jurídico autônomo* das medidas provisórias de proteção, com incidência na proteção dos direitos humanos assim como na proteção ambiental.

O presente livro *O Regime Jurídico Autônomo das Medidas Provisórias de Proteção* compõe-se de quatro capítulos, a abordar, respectivamente, os seguintes aspectos: a) direitos humanos e meio ambiente: a proteção de grupos vulneráveis<sup>3</sup>; b) a dimensão preventiva das medidas provisórias de proteção: Votos na Corte Interamericana de Direitos Humanos; c) a dimensão preventiva das medidas provisórias de proteção: Votos na Corte Internacional de Justiça; e d) direitos humanos e meio ambiente: a dimensão preventiva no direito internacional, nas medidas provisórias de proteção.

Ao longo da obra, identifico e examino o que venho conceitualizando, ao longo dos anos, como o regime jurídico

---

2 A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, 2ª. ed., vol. I, Porto Alegre, S.A. Fabris Ed., 2003, pp. 1-640; vol. II, 1-440; e vol. III, pp. 1-663; como a obra se encontra esgotada já há alguns anos, preparo no momento sua 3ª. edição atualizada, a ser reeditada no próximo biênio pela Editora Del Rey.

3 Tema que tem estado sempre presente em meus escritos desde então, e já figurava em meu livro pioneiro sobre a matéria, a saber: A.A. Cançado Trindade, *Direitos Humanos e Meio-Ambiente: Paralelo dos Sistemas de Proteção Internacional*, Porto Alegre, S.A. Fabris Ed., 1993, cap. VI, pp. 99-112; e cf., em geral, A.A. Cançado Trindade (ed.), *Derechos Humanos, Desarrollo Sustentable y Medio Ambiente / Human Rights, Sustainable Development and the Environment / Direitos Humanos, Desenvolvimento Sustentável e Meio Ambiente* (ed.), 2ª. ed., San José de Costa Rica/Brasília, IIDH/BID, 1995, pp. 13-21, 39-70 e 153-158; e cf., recentemente, *inter alia*, e.g., A.A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)*, Fortaleza, IBDH/IIDH/SLADI, 2014, pp. 13-356; A.A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, 2ª. ed., Belo Horizonte, Edit. Del Rey, 2017, parte III (“A Proteção Internacional dos Direitos dos Vulneráveis e Indefesos”), pp. 345-390; A.A. Cançado Trindade, “Introduction: Le déracinement et le droit des migrants dans le droit international des droits de l’homme”, in *Migrations de populations et droits de l’homme*, Bruxelles, Bruylant/Nemesis, 2011, pp. 13-57

autônomo das medidas provisórias de proteção, em seus elementos componentes, a saber: seu caráter preventivo, os direitos a ser protegidos e as obrigações que lhe são próprias, a pronta determinação da responsabilidade (ante o descumprimento das medidas provisórias de proteção) e suas consequências jurídicas, a presença da vítima (ou vítima potencial, já nesta fase das medidas provisórias), e o dever de pronta reparação de danos.

É esta uma questão a requerer na atualidade um tratamento doutrinário mais aprofundado. Isto se reverteria em benefício da própria proteção internacional dos direitos humanos assim como do meio-ambiente. No presente tomo, examino a questão desde suas perspectivas tanto doutrinária como jurisprudencial (às quais venho contribuindo há vários anos), na esperança de que venham a ser cultivadas também em nosso país. Não poderia haver ocasião mais propícia para isto do que a realização do VI Curso Brasileiro Interdisciplinar em Direitos Humanos (2017) organizado pelo Instituto Brasileiro de Direitos Humanos.

Haia, 20 de abril de 2017.

Antônio Augusto CANÇADO TRINDADE



# CAPÍTULO I

## DIREITOS HUMANOS E MEIO AMBIENTE: A PROTEÇÃO DE GRUPOS VULNERÁVEIS

### I. Introdução

Em 1993 dei a público, ainda no início do ciclo de Conferências Mundiais das Nações Unidas da década de noventa e início da década passada, meu livro intitulado “*Direitos Humanos e Meio Ambiente: Paralelo dos Sistemas de Proteção Internacional*”. Tratou-se de uma obra pioneira, que prontamente se esgotou, e os afazeres do quotidiano, ao longo dos anos, jamais me deram tempo de atualizá-la, exceto em algumas partes<sup>1</sup>. O livro se compunha de uma introdução, 14 capítulos, e 15 anexos. Iniciei por assinalar a expansão da proteção dos direitos humanos e da proteção ambiental, e a incidência da dimensão temporal em ambas.

Examinei, em seguida, o direito fundamental à vida (e também à saúde), na base da *ratio legis* de ambas. Concentrei atenção nas aproximações normativas entre ambas, e na preocupação com a proteção do meio ambiente não só no Direito Internacional dos Direitos Humanos, mas também no Direito Internacional Humanitário e no Direito Internacional dos Refugiados. Voltei, em seguida, minhas atenções à questão da hermenêutica e implementação (*mise en oeuvre*) do direito a um meio ambiente sadio, - analisando também seus primórdios jurisprudenciais, - assim como do direito ao desenvolvimento como um direito humano.

Dediquei, enfim, o último capítulo (XIV) da obra, às conclusões e perspectivas, apontando rumo ao direito comum da humanidade no limiar do novo século. A este ponto, desde então (1993-2017) tenho dedicado minha obra, divulgada em distintos países<sup>2</sup>. É alentador que

1 Cf., e.g., A.A. Cançado Trindade, “A Proteção de Grupos Vulneráveis na Confluência do Direito Internacional dos Direitos Humanos e do Direito Ambiental Internacional”, in *Evaluación Medioambiental, Participación y Protección del Medio Ambiente* (ed. G. Aguilar Cavallo), Santiago de Chile, Librotecnia, 2013, pp. 267-277.

2 Cf. A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, 2a. ed. rev., The Hague, Nijhoff/The Hague Academy of International Law, 2013, pp. 1-726; A.A. Cançado Trindade, *A Humanização do Direito Internacional*, 2ª. ed. rev., Belo Horizonte, Edit. Del Rey, 2015, pp. 3-789; A.A. Cançado Trindade, *La Hu-*

o Instituto Brasileiro de Direitos Humanos (IBDH) tenha decidido reter a temática dos Direitos Humanos e Meio ambiente para o seu labor de 2017.

Para o propósito do presente livro, proponho-me resgatar dois outros capítulos de minha obra de 1993, que, por serem essencialmente conceituais, continuam a revestir-se de grande atualidade e crescente interesse em nossos dias, neste mundo tumultuado de 2017. Trata-se do capítulo V, “*A Proteção dos Grupos Vulneráveis na Confluência do Direito Internacional dos Direitos Humanos e do Direito Ambiental Internacional*”, e do capítulo VI, “*A Proteção de Grupos Vulneráveis e o Atendimento das Necessidades Humanas Básicas*”. Com isto, dou sequência ao livro que apresentei na sessão anterior, de 2014, do IBDH, intitulado “*A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)*”<sup>3</sup>.

## **II. A Proteção de Grupos Vulneráveis na Confluência do Direito Internacional dos Direitos Humanos e do Direito Ambiental Internacional<sup>4</sup>**

Os meios de proteção podem voltar-se à garantia tanto dos direitos humanos que são inerentes a todos os seres humanos em virtude de sua própria existência assim como dos direitos humanos atinentes às condições sociais - e sua melhoria - em que se encontram<sup>(5)</sup>. Assim como há direitos que são essencialmente “individuais”, i.e., que podem ser protegidos somente no próprio indivíduo, também há direitos que podem ser melhor protegidos através de um grupo, particularmente

---

*manización del Derecho Internacional Contemporáneo*, México, Edit. Porrúa, 2014, pp. -324; A.A. Cançado Trindade, *Évolution du Droit international au droit des gens - L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pédone, 2008, pp. 1-187; A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 7-185; A.A. Cançado Trindade, *Le Droit international pour la personne humaine*, Paris, Pédone, 2012, pp. 45-368; A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, pp. 1-236.

3 Cf. A.A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)*, Fortaleza/Brasil, IBDH/IIDH/SLADI, 2014, pp. 13-356.

4 A.A. Cançado Trindade, *Direitos Humanos e Meio-Ambiente: Paralelo dos Sistemas de Proteção Internacional*, Porto Alegre, S.A. Fabris Ed., 1993, capítulo V, pp. 89-97.

5 A. Berenstein, “Les droits économiques et sociaux garantis par la Charte Sociale Européenne”, in *Perspectives canadiennes et européennes des droits de la personne* (ed. D. Turp e G.A. Beaudoin), Cowansville/Québec, d. Y. Blais, 1986, p. 414, e cf. p. 433.

no caso de vir este grupo a ser vitimado. Há efetivamente grupos que se mostram propriamente qualificados para tratamento e proteção grupais, e o direito internacional tem concebido meios de proteção para determinadas categorias de grupos em infortúnio ou adversidade (e.g., trabalhadores em certas condições, minorias, refugiados, apátridas, prisioneiros de guerra). Trata-se essencialmente de uma questão de organização e gradual institucionalização da proteção <sup>(6)</sup> (como contemplada em nossos dias, e.g., em prol das populações indígenas). A dimensão temporal é marcante na proteção dos grupos humanos, que podem, a par dos Estados, “pretender a perpetuidade”; em última análise, “a organização grupal pode assegurar a continuidade ao longo das gerações” <sup>(7)</sup>.

A Organização Internacional do Trabalho (OIT) tem nos últimos anos voltado sua atenção ao meio-ambiente de trabalho, ao treinamento ambiental e aos vínculos entre o meio-ambiente, o desenvolvimento e o problema do desemprego e da pobreza. Duas das Convenções da OIT - a Convenção relativa à Proteção dos Trabalhadores contra os Riscos Profissionais devidos à Contaminação do Ar, a Ruídos e Vibrações (1977) e a Convenção sobre Segurança e Saúde dos Trabalhadores e Meio-Ambiente de Trabalho (1981) - realçam a íntima relação entre o meio-ambiente de trabalho e o meio-ambiente em geral. A estas se somam duas outras Convenções da OIT, a Convenção sobre os Serviços de Saúde no Trabalho (1985) e a Convenção sobre a Utilização do Asbesto (Amianto) em Condições de Segurança (1986). Em significativa declaração proferida nos debates da Conferência Ministerial sobre Meio-Ambiente e Desenvolvimento na Ásia e no Pacífico, promovida pela Comissão Econômica e Social para a Ásia e o Pacífico (ESCAP, Bangkok, 1990), a OIT identificou como suas duas principais preocupações correntes os danos ao meio-ambiente de trabalho e ao meio-ambiente em geral pelos acidentes industriais e os “problemas de natureza ecológica” gerados pelo desemprego e pela pobreza extrema<sup>(8)</sup>. Com efeito, a Conferência Internacional do

6 J.J. Lador-Lederer, *International Group Protection*, Leyden, Sijthoff, 1968, pp. 13, 15-17, 23-24 e 30.

7 *Ibid.*, pp. 27, 29 e 22-23.

8 ESCAP, Bangkok Ministerial Conference on Environment and Development in Asia and the Pacific (1990), *ILO Statement*, pp. 1-2 (mimeografado, circulação restrita). - Para os desdobramentos dos desastres ambientais de Bhopal, Chernobyl, Exxon Valdez, Sandoz Chemical Plant (Basel), e da queda do satélite “Soviet Cosmos 954” no Canadá, cf. W. Paul

Trabalho adotou em 1990 uma resolução instando a OIT a que venha a lidar “direta e eficazmente com questões ambientais relevantes” e a que venha a incorporar a dimensão ambiental e do desenvolvimento sustentável em seus principais programas e em atividades de cooperação técnica (9).

A necessidade de proteção de grupo mostra-se com clareza nos campos cultural e linguístico. Dificilmente se pode duvidar de que só se pode desfrutar de certos elementos essenciais da vida social mediante a “integração individual em um grupo”, através da educação, do intercâmbio de ideias ou do costume; “pode-se desfrutar da cultura individualmente em qualquer idioma, ao passo que só se pode participar da criação da cultura cada um em sua própria comunidade linguística e cultural”(10). Daí a necessidade de proteção dos direitos de grupo, em particular dos direitos de “grupos especialmente vulneráveis e desfavorecidos” (e.g., pessoas deficientes mental e fisicamente, a vulnerabilidade das crianças, a situação da mulher em muitos países, minorias étnicas e religiosas e linguísticas, populações indígenas); ultimamente tem-se dado atenção à necessidade de se estabelecer um “inventário” da proteção e assistência de que necessitam tais grupos e de se desenvolver “sistemas de notificação imediata para amortecer os choques em grupos especialmente vulneráveis em decorrência de mudanças nas políticas de desenvolvimento” (11).

As crianças, os deficientes e os idosos situam-se de fato entre os particularmente vulneráveis, e permanecem em necessidade especial de proteção. O Protocolo Adicional à Convenção Americana sobre Direitos Humanos em Matéria de Direitos Econômicos, Sociais e Culturais de 1988, por exemplo, singulariza precisamente os direitos

---

Gormley, “The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms”, 3 *Georgetown International Environmental Law Review* (1990) pp. 85-116. - Os desastres ambientais têm chamado a atenção para os deveres de notificação e informação imediatas, e de assistência emergencial e cooperação, para minimizar o dano ambiental, em aditamento ao dever de evitar ou impedir a ocorrência de tais desastres, abarcados pelo princípio da responsabilidade do Estado; E. Brown Weiss, “Environmental Disasters in International Law”, *Anuario Jurídico Interamericano* (1986) pp. 141-164.

9 ESCAP, *op. cit. supra* n. (8), p. 3.

10 J.J. Lador-Lederer, *op. cit. supra* n. (6), p. 19, e cf. p. 25.

11 D. Lack, “Human Rights and the Disadvantaged”, 10 *Human Rights Law Journal* (1989) pp. 56-59.

da criança (artigo 16), a proteção dos deficientes ou incapacitados como um “grupo” (social) (artigo 18), e a proteção dos idosos (artigo 17). A Carta Social Europeia de 1961, a seu turno, singulariza os direitos da mulher e da criança (artigos 7, 8 e 17), das pessoas deficientes (artigo 15), e dos trabalhadores migrantes (artigo 19). A dimensão temporal faz-se aqui presente, como evidenciado, e.g., pelo treinamento e educação apropriados das crianças. A própria Declaração Universal dos Direitos Humanos de 1948 dispõe que “a instrução será orientada no sentido do pleno desenvolvimento da personalidade humana” (artigo 26 (2)). A Convenção das Nações Unidas sobre os Direitos da Criança de 1989 adverte, em seu preâmbulo, que as crianças, precisamente em razão de sua vulnerabilidade, encontram-se em necessidade de proteção e cuidados especiais. A Convenção, assim, dispõe também sobre medidas preventivas relativas à proteção da criança contra abusos e o abandono (artigo 19 (2)); reconhece *inter alia* o direito da criança à educação (artigo 28) e o direito da criança a beneficiar-se de um padrão de vida adequado, necessário a seu desenvolvimento pessoal (artigo 27). A Convenção de 1989 dispõe ademais sobre o direito das crianças de comunidades minoritárias e populações indígenas de desfrutar de sua própria cultura e de praticar sua própria religião e idioma (artigo 30).

A questão dos direitos indígenas tem se revestido de interesse internacional, como refletido, e.g., nos trabalhos da OIT sobre a matéria, a exemplo de sua Convenção sobre a Proteção e a Integração de Populações Indígenas e Outras Populações Tribais e Semitribais em Países Independentes (1957); sua mais recente Convenção relativa aos Povos Indígenas e Tribais em Países Independentes (1989) assegura o direito dos “povos indígenas e tribais” à proteção do meio-ambiente onde vivem (artigo 7). O interesse internacional na questão reflete-se, ademais, e.g., no estabelecimento - em 1982 - pela Subcomissão sobre Prevenção de Discriminação e Proteção de Minorias das Nações Unidas do Grupo de Trabalho sobre Populações Indígenas das Nações Unidas, e seu trabalho subsequente<sup>(12)</sup>. Além disso, nos últimos anos, distintos órgãos de supervisão de direitos humanos têm-se ocupado de questões indígenas (e.g., o Comitê para a Eliminação da Discriminação Racial -

---

12 Cf. D. Sanders, “The U.N. Working Group on Indigenous Populations”, 11 *Human Rights Quarterly* (1989) pp. 406-433.

CERD, o Comitê de Direitos Humanos) (13). Um Projeto de Declaração Universal sobre Direitos dos Povos Indígenas, submetido em 1988 (por E. -I. Daes) ao Grupo de Trabalho sobre Populações Indígenas das Nações Unidas, conceitualiza o “direito coletivo” a proteção contra o genocídio e o etnocídio (sobrevivência e sobrevivência cultural), a um tempo um direito dos povos e de indivíduos, abarcando o direito “de preservar suas tradições e identidade culturais e de buscar seu próprio desenvolvimento cultural” (par. 3-6) (14).

O Projeto de Declaração dispõe *inter alia* sobre a preservação de áreas de assentamento, modos de vida e atividades econômicas das populações indígenas (par. 18), seu direito a autonomia em matérias relacionadas com o seu próprio *modus vivendi* (par. 23), seu direito de participação (na vida de seu Estado - par. 21-22), e programas de saúde, habitação e outros na área socioeconômica em seu benefício (par. 20). Em uma cláusula significativa (par. 16), o Projeto de Declaração de 1988 dispõe ademais sobre

The right to protection against any action or course of conduct which may result in the destruction, deterioration or pollution of their land, air, water, sea, ice, wildlife or other resources without free and informed consent of the indigenous peoples affected. The right to just and fair compensation for any such action or course of conduct (15).

A versão revista, de 1991, do referido Projeto de Declaração Universal sobre Direitos dos Povos Indígenas, consagra uma série de “direitos coletivos e individuais”, inclusive o de “reviver e praticar” a identidade e as tradições culturais (par. 7) e transmiti-las às gerações futuras (par. 9); o Projeto de Declaração dispõe sobre o direito à proteção do meio-ambiente dos povos indígenas (par. 17 e cf. par. 14), a melhoria de suas condições socioeconômicas (par. 19 e cf. par. 29),

13 Cf. *ibid.*, pp. 421-422 e 428.

14 Texto *in ibid.*, Appendix, p. 431.

15 O Projeto de Declaração acrescenta outro elemento (par. 17) em benefício das populações indígenas, a saber: -“The duty of States to seek and obtain their consent, through appropriate mechanisms, before undertaking or permitting any programmes for the exploration or exploitation of mineral and other subsoil resources pertaining to their traditional territories. Just and fair compensation should be provided for any such activities undertaken”. Texto *in ibid.*, pp. 432-433.

e o direito de participação (par. 21-22) <sup>(16)</sup>. Na última versão revista, de 1992, estes direitos são mantidos (em parágrafos reenumerados). O novo parágrafo 18 dispõe sobre o direito à proteção e, quando for o caso, de reabilitação do meio-ambiente dos povos indígenas <sup>(17)</sup>. Significativamente, a II Reunião de Cúpula dos Estados Ibero-Americanos (Madri, julho de 1992) vem de adotar, na presença de representantes de povos indígenas da região, o Acordo Constitutivo do Fundo para o Desenvolvimento dos Povos Indígenas da América Latina e do Caribe, que representa um passo inicial importante rumo ao reconhecimento da representatividade e do poder decisório dos povos indígenas da região.

A preocupação com a proteção de grupos vulneráveis pode-se verificar em nossos dias não só no domínio do direito internacional dos direitos humanos, mas do mesmo modo no do direito ambiental internacional. Com efeito, a proteção de grupos vulneráveis surge hoje na confluência da proteção dos direitos humanos e da proteção ambiental. Assim, a Comissão Mundial sobre Meio-Ambiente e Desenvolvimento (a chamada “Comissão Brundtland”), reportando-se à Assembleia Geral das Nações Unidas em 1987, voltou-se expressamente à necessidade de “fortalecer os grupos vulneráveis”. A Comissão Brundtland começou por recordar que os processos de desenvolvimento levaram de modo geral à integração gradual em uma estrutura socioeconômica mais ampla da maioria das comunidades locais, mas no de todas: os “povos indígenas ou tribais”, e.g., permaneceram isolados, preservando seu modo de vida tradicional “em harmonia íntima com o meio-ambiente natural”, mas tornando-se cada vez mais vulneráveis em seus contatos com o mundo mais vasto, já que foram deixados à margem dos processos de desenvolvimento econômico. A marginalização e a pobreza, a discriminação social e as barreiras culturais, tornaram estes grupos “vítimas do que se poderia chamar de extinção cultural” <sup>(18)</sup>.

A Comissão Brundtland abordou a questão com base em considerações tanto *humanas* quanto *ambientais*. Ponderou a Comissão:

---

16 Cf. também os pars. 4 (direito à vida), 5-6, 11 e 18 (direitos culturais), e 23 (direito à autonomia). ONU, doc. E/CN.4/Sub.2/1991/40, de 15/08/1991, pp. 30-37.

17 ONU, doc. E/CN.4/Sub.2/1992/33, p. 49, e cf. pp. 44-52.

18 World Commission on Environment and Development, *Our Common Future*, Oxford, University Press, 1987, p. 114.

Tais comunidades são depositárias de um vasto acervo de conhecimentos e experiências tradicionais, que liga a humanidade a suas origens ancestrais. Seu desaparecimento constitui uma perda para a sociedade, que teria muito a aprender com suas técnicas tradicionais de lidar de modo sustentável com sistemas ecológicos muito complexos.(...)

O ponto de partida para uma política justa e humana em relação a esses grupos é o reconhecimento e a proteção de seus direitos tradicionais à terra e a outros recursos nos quais se apoia seu modo de vida - direitos que eles podem definir em termos que não se enquadram nos sistemas legais regulares. As próprias instituições desses grupos para regulamentar direitos e obrigações são cruciais para a manutenção da harmonia com a natureza e da consciência ambiental característica do modo de vida tradicional.(...)

A proteção dos direitos tradicionais deveria ser acompanhada de medidas positivas para melhorar o bem-estar da comunidade de forma adequada ao estilo de vida do grupo (...)

Em números absolutos, esses grupos isolados e vulneráveis são pequenos. Mas sua marginalização é sintoma de um estilo de desenvolvimento que tende a negligenciar considerações tanto de ordem humana como ambiental. Por isso, um exame mais cuidadoso e sensível de seus interesses é a pedra de toque para uma política de desenvolvimento sustentável. <sup>(19)</sup>.

Mais recentemente, a Agenda 21 adotada pela Conferência das Nações Unidas sobre Meio Ambiente e Desenvolvimento (junho de 1992) refere-se expressamente aos *grupos vulneráveis* (exemplificando com os pobres urbanos e rurais, as populações indígenas, as crianças, as mulheres, os idosos, os desabrigados, os doentes terminais, os incapacitados - capítulo 6, par. 2, 5, 13 e 23, e capítulo 3, par. 4 e 8-9, e capítulo 7, par. 16, 26-27, 30, 36, 45, 51 e 76). A preocupação básica da Agenda 21 é com o atendimento das necessidades humanas básicas (*basic human needs*) (capítulo 4, par. 5, 8, e capítulo 6, par. 1, 18, 32, e capítulo 7, par. 4-5, 67-68), como a alimentação, a preservação da saúde, a moradia adequada, a instrução. A Agenda 21 faz referência

---

19 *Ibid.*, pp. 114-116.

expressa a dois instrumentos de direitos humanos - a Declaração Universal de 1948 e o Pacto de Direitos Econômicos, Sociais e Culturais das Nações Unidas - ao abordar o direito a uma moradia adequada: adverte que, muito embora este direito esteja consagrado naqueles dois instrumentos, estima-se que hoje pelo menos um bilhão de pessoas não têm acesso a uma moradia ou abrigo adequado e seguro, e, a perdurar a atual situação, este total aumentará dramaticamente na passagem do século (capítulo 7, par. 6).

A proteção de grupos vulneráveis é uma questão que se pode levantar em decorrência de mudanças de condições ambientais. O aquecimento global, por exemplo, poderia destruir o modo de vida tradicional dos povos nativos (e.g., os que habitam países próximos ao Ártico), levantando assim questões de direitos humanos à luz de disposições, e.g., dos Pactos das Nações Unidas (de Direitos Econômicos, Sociais e Culturais, artigos 1 (1), 2 e 3; e de Direitos Cíveis e Políticos, artigos 1 (2) e 27) <sup>(20)</sup>. Este é apenas um exemplo; como advertiu recentemente Brown Weiss, “no cenário projetado sob o aquecimento global, é improvável que possamos salvar as condições ambientais necessárias para que estes povos mantenham seu modo de vida. No entanto, a comunidade internacional pode assumir uma obrigação legal de assegurar a proteção dos direitos humanos dos povos nativos no Ártico na medida do possível. Isto pode requerer assistência especial para dar-lhes oportunidades para o desenvolvimento econômico sustentável, para assegurar tanto quanto possível a proteção de sua cultura, e para facilitar sua transição a uma sociedade distinta” <sup>(21)</sup>. O presente exemplo, tomado da projeção do aquecimento global, é suficiente para novamente ilustrar a interrelação entre os direitos humanos e os fatores ambientais.

Mas, a par dos grupos circunscritos acima referidos, um número considerável de pessoas encontra-se hoje em condições de extrema vulnerabilidade em razão do fenômeno do empobrecimento geral, que vem se agravando desde o início dos anos oitenta. Certamente não é mera casualidade que tenha o Comitê de Direitos Econômicos, Sociais e Culturais, nas diretrizes revistas referentes à forma e ao conteúdo dos relatórios dos Estados Partes sob o Pacto de Direitos

---

20 E. Brown Weiss, “Global Warming: Legal Implications for the Arctic”, 2 *Georgetown International Environmental Law Review* (1989) pp. 95-96.

21 *Ibid.*, p. 96.

Econômicos, Sociais e Culturais das Nações Unidas, insistido no fornecimento de informações sobre a vigência de determinados direitos com respeito à sociedade como um todo assim como a distintos grupos - socioeconômicos, culturais e outros - dentro da sociedade (22), particularmente os grupos vulneráveis (23). Este dado não há de passar despercebido. Face ao agravamento em nossos dias do triste fenômeno do empobrecimento generalizado, nosso exame da proteção de grupos vulneráveis (24) no contexto do presente estudo não poderia assim deixar de enfocar igualmente a situação destes vastos segmentos da população iniquamente excluídos dos benefícios de um processo desequilibrado e injusto de “crescimento” e “modernização”, e de voltar-se sobretudo à questão do atendimento das necessidades humanas básicas (cf. *infra*).

### III. A Proteção de Grupos Vulneráveis e o Atendimento das Necessidades Humanas Básicas<sup>25</sup>

Uma das principais preocupações correntes, e subjacentes aos dois domínios de proteção examinadas no presente estudo, reside na proteção a estender-se aos grupos vulneráveis, que situamos na confluência do direito internacional dos direitos humanos e do direito ambiental internacional (cf. *supra*). Além disso, as atenções se voltam crescentemente aos grupos vulneráveis por ressaltarem estes, de modo particularmente contundente, se não dramático, a premente necessidade do atendimento das necessidades humanas básicas. Esta preocupação básica se encontra presente nos últimos desenvolvimentos tanto da proteção ambiental quanto da proteção dos

---

22 U.N., *Committee on Economic, Social and Cultural Rights - Report on the Fifth Session* (1990), pp. 99 e 104.

23 *Ibid.*, p. 101.

24 Um destes grupos, cuja proteção tem sido muito pouco estudada até o presente, é o dos deficientes ou incapacitados (físicos e mentais), previstos no artigo 18 do Protocolo Adicional à Convenção Americana sobre Direitos Humanos em Matéria de Direitos Econômicos, Sociais e Culturais de 1988; somente na América Latina vivem hoje cerca de 40 milhões de pessoas incapacitadas. Para um exame recente deste grupo vulnerável, cf. L. González de Volio (ed.), *Discapacidad y Derechos Humanos*, San José de Costa Rica, IIDH/OMPI, 1992, pp. 9-161.

25 Cf. A.A. Cançado Trindade, A.A. Cançado Trindade, *Direitos Humanos e Meio-Ambiente: Paralelo dos Sistemas de Proteção Internacional*, Porto Alegre, S.A. Fabris Ed., 1993, capítulo VI, pp. 99-112.

direitos humanos, e certamente ocupará um espaço cada vez maior na agenda internacional dos anos que nos conduzem ao próximo século.

Com efeito, a formulação do conceito de necessidades básicas (*basic needs*) remonta à Conferência Mundial da OIT sobre Emprego, Distribuição de Renda e Progresso Social, realizada em Genebra em junho de 1976, com a participação de delegações tripartites (representantes de governos, empregadores e empregados) de 121 Estados membros. Ante o alarmante problema global do empobrecimento de vastos segmentos da humanidade (pobreza e desemprego), a Conferência desenvolveu a ideia central de que as políticas de desenvolvimento econômico e social devem redirecionar-se para o atendimento das necessidades básicas das populações. A Declaração de Princípios Gerais e o Programa de Ação adotados pela Conferência, contendo referências expressas aos direitos humanos, indicaram que as *necessidades básicas* comportam dois elementos, a saber:

(...) First, they include certain minimum requirements of a family for private consumption: adequate food, shelter and clothing, as well as certain household equipment and furniture. Second, they include essential services provided by and for the community at large, such as safe drinking water, sanitation, public transport and health, educational and cultural facilities.

A basic-needs-oriented policy implies the participation of the people in making the decisions which affect them through organisations of their own choice.

(...) The concept of basic needs should be placed within a context of a nation's over-all economic and social development. In no circumstances should it be taken to mean merely the minimum necessary for subsistence; it should be placed within a context of national independence, the dignity of individuals and peoples and their freedom to chart their destiny without hindrance. (...) <sup>(26)</sup>.

Pouco depois, na mesma linha de pensamento, a Conferência Mundial da FAO sobre Reforma Agrária e Desenvolvimento Rural de 1979 reafirmou a importância crucial do direito de participação

---

26 International Labour Office, *Meeting Basic Needs - Strategies for Eradicating Mass Poverty and Unemployment*, Geneva, ILO, 1977, pp. 24 e 20, e cf. pp. 1-2, 5, 10-11 e 13.

no contexto da satisfação das necessidades humanas básicas. Assim dispôs a Conferência, em resolução adotada a respeito:

(...) Participation of the people in the institutions and systems which govern their lives is a basic human right and also essential for realignment of political power in favour of disadvantaged groups and for social and economic development.(...) (27).

Subjacente a esta formulação encontra-se a ideia do “*empowerment*” dos grupos vulneráveis, para que eles próprios estejam em condições de fazer valer os seus legítimos interesses.

Decorrida uma década e meia desde a formulação do conceito das *necessidades básicas* no plano internacional, o problema básico que este tem visado enfrentar tem, no entanto, infelizmente agravado. Na América Latina, por exemplo, as duas Conferências Regionais sobre a Pobreza (Cartagena das Índias, agosto de 1988, e Quito, novembro de 1990), realizadas sob os auspícios do PNUD, estimaram que, enquanto em 1960 a população pobre da região era de 110 milhões (equivalente a 51% da população), a situação deteriorou-se rapidamente na década de oitenta: em 1986 verificou-se um total de 250 milhões de pessoas em condições de pobreza (correspondente a 61% da população da região), tendo-se elevado este número, em 1990, para 270 milhões de pobres (62% da população); ainda segundo os dados das referidas Conferências Regionais do PNUD, o país latino-americano com maior número de pobres é o Brasil (62.3 milhões, equivalentes a 36% do total regional), e as projeções indicam que a cifra absoluta de pobres na América Latina se aproximará dos 300 milhões de pessoas para o ano 2.000 (28).

Este quadro tão sombrio (29) chama ainda mais atenção para o conjunto das necessidades humanas básicas, que servirá de guia

27 Cit. in J.C.N. Paul, “International Development Agencies, Human Rights and Humane Development Projects”, 17 *Denver Journal of International Law and Policy* [1988] p. 82, e cf. p. 75.

28 Cf. PNUD, *Bases para una Estrategia y un Programa de Acción Regional - Declaración de la Conferencia Regional sobre la Pobreza en América Latina y el Caribe* (Cartagena, 1988), Bogotá, PNUD, pp. 15-16; PNUD, *Desarrollo sin Pobreza* (II Conferencia Regional, Quito, 1990), Bogotá, PNUD, 1990, pp. 59, 69 e 63.

29 Cf., e.g., Nicole Ball, *World Hunger - A Guide to the Economic and Political Dimensions*, Oxford/Santa Barbara (Cal.), ABC-Clio Press, 1981, pp. 1-344. - Para dados relativos à América Central, cf. *Pobreza, Conflicto y Esperanza: Un Momento Crítico para Centroamérica - Informe de la Comisión Internacional para la Recuperación y el Desarrollo de Centroamérica*,

para a própria definição da pobreza e identificação dos segmentos da população considerados pobres; em outras palavras, estes últimos podem ser tidos como aqueles a quem não são proporcionados meios para satisfazer uma ou mais necessidades humanas básicas e para participar plenamente na vida social <sup>(30)</sup>. Com o declínio das condições de vida da maior parte das populações, é provável que os sistemas internacionais de proteção - do meio-ambiente assim como dos direitos humanos - dediquem nos próximos anos cada vez mais atenção às necessidades humanas básicas, e no contexto destas especialmente aos grupos vulneráveis, na busca de soluções globais aos problemas globais. Há indicações nesse sentido nos últimos desenvolvimentos tanto na proteção ambiental quanto na proteção dos direitos humanos.

Assim, no âmbito da proteção ambiental, a Agenda 21, adotada pela Conferência das Nações Unidas sobre Meio Ambiente e Desenvolvimento (Rio de Janeiro, junho de 1992), é categórica ao afirmar que “a pobreza e a degradação ambiental estão intimamente interligadas”, e o padrão insustentável de consumo e produção agrava a pobreza e os desequilíbrios (capítulo 4 par. 3). No capítulo 3, dedicado precisamente ao combate à pobreza, a Agenda 21 da Conferência do Rio, após ponderar que a pobreza é um “problema multidimensional complexo”, sem solução uniforme de aplicação global, e a requerer por conseguinte programas específicos para cada país, advoga uma estratégia de erradicação da pobreza a enfocar os recursos, a produção, as questões demográficas, os cuidados de saúde e educação, os direitos da mulher, o papel dos jovens e das comunidades indígenas, e o processo de participação democrática juntamente com a governabilidade aprimorada (capítulo 3 par. 1-2).

A Agenda 21 enfatiza, em suma, o atendimento das *necessidades humanas básicas*, com atenção especial à proteção e educação dos

---

Durham/San José de Costa Rica, Duke University, 1989, pp. 1-139; W. Ascher e A. Hubbard (ed.), *Recuperación y Desarrollo de Centroamérica*, Durham/San José, 1989, pp. 1-460.

30 Cf. PNUD, *Desarrollo sin Pobreza*, cit. supra n. (28), pp. 33-34; e, sobre os métodos propostos de medição da pobreza (na América Latina), cf., e.g., J. Boltvinik, *Pobreza y Necesidades Básicas - Conceptos y Métodos de Medición*, Caracas, PNUD, 1990, pp. 5-60; CEPAL/PNUD, *Magnitud de la Pobreza en América Latina en los Años Ochenta* (CEPAL/Div. Estadística y Proyecciones; PNUD/Proyecto Regional para la Superación de la Pobreza, RLA/86/004), pp. 1-83. Para uma categorização das necessidades humanas e “satisfactores” dessas necessidades, cf. M. Max-Neef et alli, *Desarrollo a Escala Humana - Una Opción para el Futuro*, Santiago de Chile, CEPAL/Fund. D. Hammarskjold, 1986, pp. 7-94.

grupos vulneráveis e dos segmentos mais pobres da população, como pré-requisito para o desenvolvimento sustentável (capítulo 6 par. 18). A Agenda 21 manifesta a esperança de que, mediante a integração de considerações ambientais e desenvolvimentistas se logre a “parceria global” - baseada nas premissas da resolução 44/228, de 1989, da Assembleia Geral das Nações Unidas - de modo a atender as necessidades humanas básicas, melhor proteger e gerir os ecossistemas e aprimorar os padrões de vida para todos (capítulo 1 par. 1-2) <sup>(31)</sup>. E tanto a Convenção-Quadro sobre Mudança de Clima quanto a Convenção sobre Diversidade Biológica, ambas de 1992, referem-se expressamente em seus respectivos preâmbulos à meta fundamental e premente da *erradicação da pobreza*, tida pela primeira como necessidade “prioritária legítima” e pela segunda como - juntamente com o desenvolvimento econômico e social - a “primeira e primordial” prioridade dos países em desenvolvimento. Enfim, o outro instrumento adotado pela Conferência das Nações Unidas sobre Meio Ambiente e Desenvolvimento (Rio de Janeiro, 1992), a Declaração de Princípios sobre Florestas, também propugna pela erradicação da pobreza (par 7(a)) e pelo atendimento das “necessidades humanas sociais, econômicas, ecológicas, culturais e espirituais das gerações presentes e futuras” (par 2(b)) <sup>(32)</sup>.

No âmbito da proteção dos direitos humanos, no plano global, no seio do Comitê de Direitos Econômicos, Sociais e Culturais, órgão de supervisão do Pacto de Direitos Econômicos, Sociais e Culturais das Nações Unidas, tem-se expressado uma preocupação especial com os “setores mais vulneráveis” da população e acentuado o “conteúdo

---

31 A Agenda 21 recomenda que se situem as considerações ambientais e desenvolvimentistas no centro do processo decisório econômico e político, logrando uma “plena integração” dos fatores econômicos, sociais e ambientais a níveis de *policy*, planejamento e gerenciamento. *Doc. cit.*, capítulo 8, par. 2 e 4, e cf. p. 11 (sobre as contribuições de “diferentes grupos sociais”).

32 A referida Declaração enfatiza o dever de respeitar e apoiar a identidade, a capacidade, a cultura e os direitos das comunidades indígenas (par. 5(a) e 12(d)); ademais, pede a “plena participação das mulheres” no gerenciamento, conservação e desenvolvimento sustentável das florestas (par. 5(b)); e atenta para os problemas decorrentes da falta de opções às comunidades locais, particularmente “os pobres urbanos e as populações rurais pobres”, econômica e socialmente dependentes das florestas e dos recursos florestais (par. 9(b)). Cf. ONU, doc. A/CONF.151/6/Rev.1, de 13/06/1992, pp. 2-6.

mínimo” de cada um dos direitos consagrados no Pacto <sup>(33)</sup> (à luz da realidade de cada país), a ser tido em conta com ainda maior razão nos períodos de recessão econômica, e na aplicação em cada fase dos projetos de desenvolvimento e das medidas de ajuste estrutural, de modo a priorizar a proteção dos “direitos dos pobres e vulneráveis” <sup>(34)</sup> e dos “grupos desfavorecidos” <sup>(35)</sup>. Em seu significativo comentário geral n. 3 (1990), o Comitê expressou o ponto de vista de que

a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party <sup>(36)</sup>.

Em caso de não-cumprimento, subsiste a obrigação do Estado em questão de provar que “o máximo de seus recursos disponíveis” foi utilizado, ou tentou-se utilizá-lo, para cumprir tais *obrigações mínimas*. A expressão “máximo dos recursos disponíveis”, constante do artigo 2(1) do Pacto, cobre não só os recursos dentro do Estado, mas também, no entendimento do Comitê, os recursos disponíveis mediante a cooperação e assistência internacionais, para a realização dos direitos consagrados (artigos 11, 15, 22 e 23 do Pacto) <sup>(37)</sup>.

No plano regional, em seu *Relatório Anual* referente a 1989-1990, a Comissão Interamericana de Direitos Humanos instou os Estados membros da OEA a que ratificassem prontamente o Protocolo Adicional à Convenção Americana sobre Direitos Humanos em Matéria de Direitos Econômicos, Sociais e Culturais de 1988. O Protocolo volta-se expressamente a certos grupos vulneráveis, como os incapacitados físicos e mentais (artigo 18), os idosos (artigo 17), as crianças (artigo 16). Ao ressaltar a importância do Protocolo, a Comissão insistiu, como parte da luta pela erradicação da pobreza extrema, nos “direitos de sobrevivência”, com prioridade ao atendimento das “necessidades básicas de saúde, nutrição e educação”, como elemento essencial das

33 U.N., *Committee on Economic, Social and Cultural Rights - Report on the Fourth Session* (1990), pp. 66-67.

34 *Ibid.*, p. 88; e cf. *doc. cit. infra* n. (26), p. 86.

35 U.N., *Committee on Economic, Social and Cultural Rights - Report on the Sixth Session* (1991), pp. 116-118.

36 U.N., *Committee on Economic, Social and Cultural Rights - Report on the Fifth Session* (1990), p. 86, par. 10.

37 *Ibid.*, pp. 86-87, par. 13.

obrigações jurídicas assumidas pelos Estados <sup>(38)</sup>. A Comissão teve em mente as necessidades fundamentais de sobrevivência, às quais se podem, porém, agregar outras necessidades humanas que, embora transcendam a simples sobrevivência, nem por isso deixam de ser também básicas (condições dignas de trabalho, seguridade social, identidade cultural, liberdade e participação pública, dentre outras), voltadas que são igualmente à melhoria da qualidade de vida da população.

Com efeito, a ênfase nas obrigações mínimas subjacentes em relação aos direitos econômicos, sociais e culturais ressalta o dever do Estado de tomar medidas (legislativas e administrativas e outras) de imediato para assegurar a observância mínima de tais direitos (não só por órgãos do poder público como também por terceiros); ressalta, ademais, o dever dos Estados de tomar prontamente amplas medidas destinadas a criar condições para uma observância mais eficaz de tais direitos (obrigações de proteger e assegurar <sup>(39)</sup>). Este enfoque, além disso, abre caminho para avanços futuros na concepção de novos meios de implementação, consentâneos com cada obrigação, e propicia uma visão mais integrada dos direitos humanos, baseada na interrelação ou indivisibilidade entre todos eles (civis, políticos, econômicos, sociais, culturais) <sup>(40)</sup>, ao deslocar a ênfase para as obrigações (mínimas) subjacentes a cada um dos direitos consagrados.

Assim, a tão propalada “realização progressiva” dos direitos econômicos, sociais e culturais, excessivamente enfatizada no passado, corresponde a tão-somente uma das obrigações subjacentes, a de promover tais direitos. A obrigação de tomar medidas imediatas em prol da observância eficaz de tais direitos (*supra*) indica que os deveres atinentes aos direitos econômicos, sociais e culturais consagrados são obrigações tanto de comportamento quanto de resultado <sup>(41)</sup>. Esta visão da matéria em muito contribui para propiciar a plena vigência

---

38 OEA, *Informe Anual de la Comisión Interamericana de Derechos Humanos 1989-1990*, p. 195.

39 G.J.H. van Hoof, “The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views”, in *The Right to Food* (ed. Ph. Alston e K. Tomasevski), Dordrecht, Nijhoff, 1984, p. 106.

40 Cf., nesse sentido, *ibid.*, pp. 107-108, e cf. p. 106.

41 *Comentário geral n. 3* (1990) do Comitê de Direitos Econômicos, Sociais e Culturais das Nações Unidas, in *doc. cit. supra* n. (26), p. 83, par. 1.

dos direitos econômicos, sociais e culturais, de capital importância para o atendimento das necessidades humanas básicas.

Pode-se mesmo dizer que o atendimento dessas necessidades, e particularmente das de grupos e pessoas vulneráveis, corresponde a uma grande lacuna a ser preenchida pela proteção internacional dos direitos humanos contemporânea. A tônica, o denominador comum, de diversos projetos e propostas em exame nas Nações Unidas, seja na Assembleia Geral (e.g., sobre trabalhadores migrantes e suas famílias), seja na Comissão de Direitos Humanos (e.g., sobre doentes mentais, sobre minorias), seja na Subcomissão sobre Prevenção de Discriminação e Proteção de Minorias (e.g., sobre direitos indígenas, sobre direito à alimentação), é precisamente a proteção de grupos e pessoas especialmente vulneráveis (42).

Ante a acentuada deterioração no nível de vida das populações da maioria dos países durante a década de oitenta, o Fundo das Nações Unidas para a Infância (UNICEF) tem alertado para a tarefa premente de atendimento das “necessidades básicas da população”, e de modo especial dos “segmentos mais vulneráveis” desta, em termos de alimentação, saúde e educação (43). São estes segmentos os que mais têm sofrido com os ajustes econômicos, primeiro por não estarem economicamente “preparados” para absorver o impacto das medidas de ajuste, e segundo por não disporem de “força política” para evitar o impacto (44); assim, têm sido eles os mais afetados, e.g., pelos cortes nos serviços básicos e gastos públicos com a saúde e a educação (45), o que tem agravado consideravelmente os seus problemas. O UNICEF tem, por conseguinte, recomendado que a adoção de programas de ajuste econômico não venha a necessariamente prejudicar as “camadas

---

42 Theo van Boven, “The Future Codification of Human Rights: Status of Deliberations - A Critical Analysis”, 10 *Human Rights Law Journal* [1989] pp. 3-6.

43 UNICEF, *Ajuste com Dimensão Humana*, parte II, 1987, pp. 1-8.

44 UNICEF, *Política de Ajuste com Dimensão Humana*, 1990, p. 6. Segundo os dados do UNICEF, o número de pessoas vivendo em países com crescimento zero ou negativo, nos anos oitenta, ultrapassa os 700 milhões (cerca de 30% da população do mundo em desenvolvimento, que tem tido, além disso, que arcar com o gigantesco fardo da dívida externa; o próprio Banco Mundial reconhece hoje que, “o que persiste após os anos oitenta é que o crescimento foi inadequado, a pobreza continua a aumentar e o meio-ambiente está mal protegido”. *Ibid*, pp. 5 e 10.

45 Cf. dados estatísticos in UNICEF, *Ajuste...*, *op.cit. supra* n. (43), p. 7.

mais pobres da população”, e venha, ao contrário, a “proteger os mais vulneráveis” durante o processo (46).

Nesta ótica, o UNICEF tem recomendado a estratégia alternativa do *ajuste com dimensão humana*, que situa como prioridade máxima precisamente a proteção dos segmentos mais pobres e vulneráveis da população, particularmente em períodos de ajuste da economia de um país às condições externas e internas novas e mais difíceis, se não adversas. A concepção avançada pelo UNICEF pode ser resumida nas passagens seguintes:

(...) Ajuste com dimensão humana significa a adoção consciente de políticas que protejam e melhorem as condições de vida da população mais vulnerável durante o processo de ajuste, tanto a curto como a médio prazo. A proteção das camadas mais vulneráveis não é apenas um imperativo humano. Faz sentido também em termos econômicos. Políticas que deterioram as condições de saúde e educação da infância também dilapidam os recursos mais valiosos de um país - seus recursos humanos - e, assim, comprometem sua capacidade econômica futura.

O ajuste com dimensão humana requer crescimento econômico, pelo menos a médio prazo. Sem crescimento é possível atender as necessidades humanas durante curto espaço de tempo, mas este esforço inevitavelmente fracassará. (...)

Ajuste com dimensão humana significa, portanto, políticas de ajuste orientadas para o crescimento econômico. Mas crescimento, apenas, não é suficiente. Ajuste com dimensão humana requer, também, políticas específicas voltadas para a proteção dos segmentos mais vulneráveis da população durante o processo de ajuste. (...)

(...) Se as políticas de proteção às camadas mais vulneráveis da população forem eficientemente concebidas e apoiadas por políticas econômicas que assegurem o crescimento do produto, do emprego e da renda a médio prazo, não é necessário que mulheres e crianças sofram, tal como ocorre atualmente.

---

46 *Ibid.*, p. 9.

Durante o processo de ajuste é essencial o acompanhamento sistemático do que está acontecendo com a população, principalmente com as camadas mais pobres. Isto é muito mais importante do que tomar por base apenas as estatísticas econômicas disponíveis, utilizadas na avaliação geral dos programas de ajuste. (...) <sup>(47)</sup>.

O Programa das Nações Unidas para o Desenvolvimento (PNUD), a seu turno, vem sustentando o conceito de *desenvolvimento humano*, o qual há de ser relacionado ao direito ao desenvolvimento como um direito humano <sup>(48)</sup>. É altamente significativo que, quatro anos após a formulação deste último na Declaração de 1986 das Nações Unidas, tenha o PNUD procedido a uma reavaliação das linhas orientadoras das três Décadas das Nações Unidas para o Desenvolvimento anteriores. O *turning point* é o primeiro *Relatório sobre o Desenvolvimento Humano*, de 1990, do PNUD, que, questionando a propriedade de indicadores estatísticos como o produto nacional bruto (PNB) para medir adequadamente o desenvolvimento, voltou a atenção a outros aspectos mediante a adoção de um novo índice de desenvolvimento humano (IDH), a combinar os indicadores correspondentes à esperança

---

47 *Ibid.*, pp. 9 e 12; e cf UNICEF, *Política de Ajuste...*, *op. cit. supra* n. (44), p. 9. - Segundo as cifras mais recentes do UNICEF, somente na América Latina e no Caribe vivem hoje 78 milhões de crianças pobres (com menos de 18 anos), o que corresponde a quase metade dos pobres latino-americanos e caribenhos; cf. UNICEF, *Los Niños de las Américas*, Bogotá, 1992, pp. 1-87; F. Espert e W. Myers, *Análisis de Situación - Menores en Circunstancias Especialmente Difíciles*, Bogotá, UNICEF, 1988, pp. 7-47.

48 Sobre este último, cf. A.A. Cançado Trindade, "As Consultas Mundiais das Nações Unidas sobre o Direito ao Desenvolvimento como um Direito Humano (1990)", 33 *Revista Brasileira de Política Internacional* (1990-1993) n. 129-130, pp. 107-125; A.A. Cançado Trindade, "Human Development and Human Rights in the International Agenda of the XXIst Century", in: *Compilation - Human Development and Human Rights Forum* (August 2000), San José de Costa Rica, UNDP/IACtHR, 2001, pp. 23-38; A.A. Cançado Trindade, "Relations between Sustainable Development and Economic, Social and Cultural Rights: Recent Developments", in *International Legal Issues Arising under the United Nations Decade of International Law* (eds. N. Al-Nauimi e R. Meese), Deventer, Kluwer, 1995, pp. 1051-1077; A.A. Cançado Trindade, "Las Relaciones entre el Desarrollo Sustentable y los Derechos Económicos, Sociales y Culturales: los Avances Recientes", in 3 *Revista de Política y Derecho Ambientales en América Latina y el Caribe - Buenos Aires* (1994) pp. 267-286; A.A. Cançado Trindade, "El Medio Ambiente en el Marco de los Derechos Humanos", in *Derechos Humanos, Desarrollo Sustentable y Medio Ambiente/ Human Rights, Sustainable Development and the Environment* (ed. A.A. Cançado Trindade), San José/Brasília, IIDH/BID, 1992, pp. 13-22.

de vida, à educação e à renda (nacional), de modo a proporcionar uma medição composta e mais global do progresso humano <sup>(49)</sup>.

Cedo se apercebeu que ao novo IDH havia que agregar outros indicadores de progresso humano, como a liberdade humana e os avanços no domínio cultural. Assim, o segundo *Relatório sobre o Desenvolvimento Humano*, de 1991, do PNUD, propôs um novo índice de liberdade política (ILP) para avaliar a situação desta à luz dos direitos humanos <sup>(50)</sup>. Assim, no entendimento dos dois primeiros *Relatórios sobre o Desenvolvimento Humano*, é prioritário o atendimento das necessidades humanas básicas, como a nutrição, a moradia, a atenção médica e a educação básicas, às quais se soma a liberdade de expressão e de ação. O desenvolvimento humano, assim entendido, equivale ao processo de ampliar as opções às pessoas, tendo em mente a soma total da vida humana. Nessa ótica, o desenvolvimento humano certamente não se reduz à simples busca tão só do crescimento econômico; este, embora importante, é somente uma das contribuições àquele.

Estes dois primeiros *Relatórios* examinaram o desenvolvimento humano no plano nacional, concentrando-se o segundo (o de 1991) no papel dos governos nos esforços de gerar recursos para a promoção do desenvolvimento humano. O terceiro *Relatório sobre o Desenvolvimento Humano*, de 1992, do PNUD, passou a examinar a matéria no plano internacional. Os dados divulgados revelam que o crescimento econômico per se não tem acarretado automaticamente melhoras na qualidade de vida das pessoas <sup>(51)</sup>, seja a nível nacional ou internacional. Persistem consideráveis disparidades sociais no interior dos países, cabendo a

---

49 Cf. UNDP, *Human Development Report 1990*, New York, UNDP, 1990, pp. 1-113. Parte o PNUD das premissas de que os seres humanos devem estar no centro de todo desenvolvimento, e de que o desenvolvimento humano é “um processo de ampliar as escolhas das pessoas”; o desenvolvimento humano, segundo o referido Relatório de 1990, ao focalizar as opções, volta-se ao “atendimento das necessidades básicas” em um “processo participatório e dinâmico”; *ibid.*, pp. III, 1, 6 e 11.

50 Cf. PNUD, *Desarrollo Humano: Informe 1991*, Bogotá, PNUD, 1991, pp. 51-57, e cf. pp. 17-235.

51 A esse respeito, o *Relatório* nacional da República Democrática de São Tomé e Príncipe à Conferência das Nações Unidas sobre Meio Ambiente e Desenvolvimento de 1992, por exemplo, pondera com lucidez que “constitui hoje doutrina assente que a qualidade de vida e o ambiente andam de mãos dadas, não sendo possível dissociar aquela deste. Nos nossos dias, já não é defensável que viver bem é viver em países com elevados índices econômicos. As variantes econômicas hoje não são tudo (...). O ambiente é fundamental. Só há qualidade de vida onde exista um ambiente equilibrado (...)”. CNUMAD, *Relatório*

pior disparidade nacional ao Brasil: “26 vezes entre os 20% mais ricos da população e os 20% mais pobres, de acordo com sua renda *per capita*”; no entanto, como se não bastasse, a disparidade internacional é ainda mais sombria, se não aterradora: é, atualmente, de não menos de 150 vezes, tendo-se dobrado no decorrer dos últimos 30 anos<sup>(52)</sup>. Assim, países ricos e pobres competem no mercado internacional em condições de gritante desigualdade; por não operarem livremente os mercados globais (e.g., restrições a bens e trabalho), tal desigualdade agravada custa aos países em desenvolvimento 10 vezes mais do que o que recebem em ajuda externa. Constatada esta realidade, o referido *Relatório* de 1992 do PNUD propugna pelo estabelecimento de uma rede de seguridade social às nações e populações pobres, e a concertação, mediante um processo de consultas mundiais, de “um novo pacto internacional sobre o desenvolvimento humano”, que coloque as pessoas no centro e em primeiro lugar tanto das políticas nacionais quanto da cooperação internacional para o desenvolvimento; segundo a mensagem básica do PNUD, o mundo tem hoje uma “oportunidade única” de utilizar o mercado internacional “para benefício de todos”<sup>(53)</sup>.

Na verdade, a nova postura do PNUD situa o conceito de *desenvolvimento humano* no universo dos direitos humanos, como o fizera em 1986 a Declaração das Nações Unidas sobre o Direito ao Desenvolvimento, e realça a interrelação entre os direitos políticos, econômicos e sociais<sup>(54)</sup>. Na elaboração do PNUD, o conceito de desenvolvimento humano se aplica a todos os países, “em todos os níveis de desenvolvimento”, e abarca toda a gama das necessidades e aspirações humanas; embora cada país tenha sua própria agenda humana, o critério básico é sempre o mesmo, a saber, situar as

---

da República Democrática de São Tomé e Príncipe, de novembro de 1991, São Tomé, Ministério do Equipamento Social e Ambiente, p. 41 (circulação restrita).

52 Cf. PNUD, *Desarrollo Humano: Informe 1992*, Bogotá, PNUD, 1992, p. 21; para um paralelo entre a situação da quinta parte mais pobre da população mundial e da quinta parte mais rica, cf. *ibid.*, pp. 85-112.

53 Cf. *ibid.*, pp. 25, 30 e 35.

54 Em aditamento, no entanto, o PNUD expressa sua preferência por manter os dois novos índices, o IDH e o ILP, independentes, ao invés de integrá-los em um único índice global, por duas razões: por operarem em escalas de tempo bem diferentes (o IDH mais lentamente), e por depender o IDH - distintamente do ILP - “substancialmente das oportunidades econômicas de um país”. Manter os dois índices independentes, acrescenta o PNUD, propicia comparações que permitem examinar o estado global do desenvolvimento humano (democrático) em um determinado país. Cf. *ibid.*, pp. 75-76.

pessoas sempre em primeiro lugar e no centro do desenvolvimento, concentrando em suas necessidades, potencial e aspirações. Trata-se de um conceito amplo e integral. Para instrumentalizá-lo, o PNUD sugere, no âmbito das atuais propostas de fortalecimento das Nações Unidas, um maior engajamento desta nos assuntos econômicos e sociais mediante a criação de um Conselho de Segurança para o Desenvolvimento, para considerar temas como a erradicação da pobreza, a segurança alimentar, o desenvolvimento humano, a dívida externa, os preços dos produtos primários, dentre outros <sup>(55)</sup>.

O conceito de desenvolvimento humano avançado pelo PNUD tem implicações diretas para a questão da proteção ambiental. Como adverte o PNUD, a pobreza é uma das piores ameaças ao meio-ambiente e à própria sustentabilidade da vida humana. Não é por casualidade que “quase todos os pobres vivem nas áreas mais vulneráveis do ponto de vista ecológico”: 80% dos pobres na América Latina, 60% dos pobres na Ásia e 50% dos pobres na África vivem em “terras marginais caracterizadas por uma baixa produtividade e uma alta susceptibilidade à degradação ambiental” <sup>(56)</sup>. Ora, o desenvolvimento sustentável implica um novo conceito a abranger não só o crescimento econômico, mas também o provimento de justiça e oportunidades para todos; o crescimento assim entendido passa a ser um imperativo (ao invés de uma opção), o objetivo primordial sendo a proteção da vida humana e das opções humanas, e a proteção ambiental um meio para promover o desenvolvimento humano <sup>(57)</sup>.

Enfim, o conceito de desenvolvimento humano avançado pelo PNUD encontra-se diretamente relacionado também com a questão da observância dos direitos humanos. O desenvolvimento humano, além de não se limitar a determinados setores sociais (como a educação ou a saúde), realça a necessidade de desenvolver as capacidades humanas; a liberdade constitui-se um componente vital do desenvolvimento humano, para o qual há que ter sempre presente a democracia. No entendimento do PNUD as fontes de informações não devem limitar-

---

55 Cf. *ibid.*, pp. 29, 40 e 34; e cf. PNUD, *Desarrollo Humano: Informe 1991*, *cit. supra* n. (50), pp. 59-80; UNDP, *Human Development Report 1990*, *cit. supra* n. (49), pp. 29-33.

56 Cf. PNUD, *Desarrollo Humano: Informe 1992*, *cit. supra* n. (52), pp. 20 e 47, e cf. p. 27. Adverte ainda o PNUD que “a pobreza em que vivem três quartas partes da população mundial” causa consideráveis tensões aos sistemas ecológicos do mundo; *ibid.*, p. 45.

57 Cf. *ibid.*, pp. 48-49.

se aos “aspectos negativos”, como as violações dos direitos humanos, mas devem também abarcar as respostas e os logros positivos de cada país nesta área. O desenvolvimento humano e a liberdade e participação políticas encontram-se intimamente relacionados, mas nesta visão ampla há que considerar igualmente a situação dos direitos econômicos e sociais <sup>(58)</sup>. Toda esta temática se encontra igualmente presente nos *travaux préparatoires* da Conferência Mundial de Direitos Humanos das Nações Unidas convocada para 1993, como aliás não poderia deixar de estar.

Os objetivos da Conferência Mundial vindoura <sup>(59)</sup> - expostos na resolução 45/155 de 1990 da Assembleia Geral e na resolução 1991/30 de 1991, da Comissão de Direitos Humanos - são: recapitular e avaliar os progressos logrados desde a adoção da Declaração de 1948; identificar os obstáculos e meios para superá-los; examinar a relação entre o desenvolvimento e o gozo dos direitos econômicos, sociais e culturais, assim como civis e políticos (tendo em mente a interrelação e indivisibilidade de todos os direitos humanos); avaliar a eficácia dos métodos e mecanismos utilizados pelas Nações Unidas; examinar e recomendar meios para aprimorar a implementação dos direitos humanos e os recursos necessários a este fim. Sob o objetivo de revisão e avaliação dos progressos logrados, têm sido lembrados os temas da “discriminação contra grupos vulneráveis” (e.g., minorias e povos indígenas), da discriminação do gênero, da *governance* e administração da justiça (independência e fortalecimento do judiciário). Sob o objetivo da identificação de obstáculos, têm-se lembrado os temas das “disparidades econômicas, pobreza, analfabetismo, conflitos internos envolvendo minorias e situações de emergência”, além das “ameaças à democracia”. Outros temas lembrados incluem: os componentes de direitos humanos do desenvolvimento (direito ao desenvolvimento como um direito humano); o desenvolvimento sustentável; a “participação popular” e o fortalecimento da democracia; as relações entre direitos humanos, desenvolvimento e democracia; o impacto da dívida e da pobreza no gozo dos direitos humanos; as relações entre a

---

58 Cf. *ibid.*, pp. 39, 69-72, 77 e 83-84, e cf. p. 64. E cf. PNUD, *Desarrollo Humano: Informe 1991*, *cit. supra* n. (26), pp. 51-52.

59 Para os aspectos organizacionais, cf. U.N., *Report of the Preparatory Committee for the World Conference on Human Rights (First Session)*, doc. A/CONF.157/PC/13, de 20/09/1991, pp. 1-13.

proteção dos direitos humanos, o direito humanitário e o direito dos refugiados <sup>(60)</sup>.

Para considerações sob os “grupos vulneráveis” têm sido lembrados, até o presente, a condição da mulher (em vários países), as crianças, os trabalhadores migrantes e seus familiares, as populações indígenas, os refugiados e os deslocados (*desplazados*) internos. O *Relatório* da 2a. sessão do Comitê Preparatório da Conferência Mundial contém referência expressa ao tema da proteção dos “direitos das minorias e outros grupos vulneráveis” <sup>(61)</sup>. Comentários e recomendações apresentados até o presente por organizações não-governamentais para a Conferência Mundial têm discorrido, *inter alia*, sobre os temas dos direitos humanos e o meio-ambiente, e da erradicação da pobreza extrema <sup>(62)</sup>. Assim, as indicações atuais são no sentido de que a temática em apreço tem espaço assegurado na agenda internacional dos direitos humanos dos próximos anos.

---

60 Cf. U.N., *Report of the Secretary-General on Studies and Documentation for the World Conference*, doc. A/CONF.157/PC/20, de 26/03/1992, pp. 1-6.

61 Cf. U.N., *Report of the Preparatory Committee for the World Conference on Human Rights (Second Session)*, doc. A/CONF.157/PC/37, de 07/05/1992, p. 15 (item (f)(i)); e, para os aspectos organizacionais, cf. pp. 1-40.

62 Cf. U.N. doc. A/CONF.157/PC/6/Add.2, de 22/08/1991, pp. 3-6, 9-13 e 18-20. E, para comentários e recomendações gerais das agências especializadas e outros órgãos das Nações Unidas (OIT, UNESCO, UNICEF), cf. U.N. doc. A/CONF.157/PC/6/Add.3, de 04/09/1991, pp. 1-27.

## CAPÍTULO II

### A DIMENSÃO PREVENTIVA DAS MEDIDAS PROVISÓRIAS DE PROTEÇÃO: VOTOS NA CORTE INTERAMERICANA DE DIREITOS HUMANOS

#### 1. VOTO CONCURRENTENTE DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO DE LOS *HAITIANOS Y DOMINICANOS DE ORIGEN HAITIANO EN LA REPÚBLICA DOMINICANA versus REPÚBLICA DOMINICANA* (Resolución del 18.08.2000)

1. En la memorable audiencia pública del 08 de agosto de 2000 ante la Corte Interamericana de Derechos Humanos, las Delegaciones tanto de la Comisión Interamericana de Derechos Humanos como de la República Dominicana buscaron contextualizar el presente caso de los *Haitianos y Dominicanos de Origen Haitiano en República Dominicana*, y señalaron - en medio a muestras de una apreciada cooperación procesal - la gran complejidad del mismo y su carácter de verdadera tragedia humana. Siendo así, además de votar en favor la adopción por la Corte de la presente Resolución sobre Medidas Provisionales de Protección, no me eximo de dejar constancia, en este Voto Concurrente, de mis reflexiones al respecto, dadas la dimensión y las proporciones que ha adquirido el problema aquí tratado, configurándose como uno de los grandes desafíos del Derecho Internacional de los Derechos Humanos al inicio del siglo XXI.

#### I. Desarraigo y Derechos Humanos: La Dimensión Global

2. En la referida audiencia pública, la Delegación dominicana señaló que el presente caso refleja un problema que concierne también a la comunidad internacional y que la búsqueda de solución al mismo no debería recaer enteramente sobre los hombros de la República Dominicana. Entiendo que la Delegación dominicana tiene razón en señalar este aspecto del problema: no podemos, efectivamente, hacer abstracción de sus *causas*. El fenómeno contemporáneo del *desarraigo*, que se manifiesta en diferentes regiones del mundo, revela una dimensión verdaderamente global, que presenta un gran desafío a la ciencia del derecho, y, en particular, al Derecho Internacional de los Derechos Humanos.

3. En efecto, en un mundo “globalizado” - el nuevo eufemismo *en vogue*, - se abren las fronteras a los capitales, inversiones, bienes y servicios, pero no necesariamente a los seres humanos. Se concentran las riquezas cada vez más en manos de pocos, al mismo tiempo en que lamentablemente aumentan, de forma creciente (y estadísticamente comprobada), los marginados y excluidos. Las lecciones del pasado parecen olvidadas, los sufrimientos de generaciones anteriores parecen haber sido en vano. El actual frenesí “globalizante”, presentado como algo inevitable e irreversible, - en realidad configurando la más reciente expresión de un perverso neodarwinismo social, - se muestra enteramente desprovisto de todo sentido histórico.

4. Éste es un cuadro revelador de la dimensión que el ser humano (de la era de las computadoras y del *Internet*) ha dado a su semejante, en este umbral del siglo XXI: el ser humano ha sido por sí mismo situado en escala de prioridad inferior a la atribuida a los capitales y bienes, - a pesar de todas las luchas del pasado, y de todos los sacrificios de las generaciones anteriores. Al primado del capital sobre el trabajo<sup>1</sup> corresponde el del egoísmo sobre la solidaridad. Como consecuencia de esta tragedia contemporánea - causada esencialmente por el propio hombre, - perfectamente evitable si la solidaridad humana primase sobre el egoísmo, surge el nuevo fenómeno del desarraigo, sobre todo de aquellos que buscan escapar del hambre, de las enfermedades y de la miseria, - con graves consecuencias e implicaciones para la propia normativa internacional de la protección del ser humano.

5. Ya en 1948, en un ensayo luminoso, el historiador Arnold Toynbee, cuestionando las propias bases de lo que se entiende por *civilización*, - o sea, avances bastante modestos en los planos social y moral, - lamentó que el dominio alcanzado por el hombre sobre la naturaleza no-humana desafortunadamente no se extendió al plano espiritual<sup>2</sup>. Efectivamente, la necesidad de raíces es del propio espíritu humano, tal como lo fue señalado con rara lucidez por Simone Weil en un libro publicado en 1949: toda colectividad humana tiene sus raíces en el pasado, el cual constituye la única vía de preservar el legado

---

1 Entendido este último no como simple ocupación, o medio de producción, o fuente de renta, sino más bien como medio de dar sentido a la vida, de servir a los semejantes, y de intentar mejorar la condición humana.

2 A.J. Toynbee, *Civilization on Trial*, Oxford, University Press, 1948, pp. 262 y 64.

espiritual de los que ya se fueron, y la única vía por medio de la cual los muertos pueden comunicarse con los vivos<sup>3</sup>.

6. Con el desarraigo, uno pierde, por ejemplo, la familiaridad de lo cotidiano, el idioma materno como forma espontánea de la expresión de las ideas y los sentimientos, y el trabajo que da a cada uno el sentido de la vida y de la utilidad a los demás, en la comunidad en que vive<sup>4</sup>. Uno pierde sus medios genuinos de comunicación con el mundo exterior, así como la posibilidad de desarrollar un *proyecto de vida*. Es, pues, un problema que concierne a todo el género humano, que involucra la totalidad de los derechos humanos, y, sobre todo, que tiene una dimensión espiritual que no puede ser olvidada, aún más en el mundo deshumanizado de nuestros días.

7. El problema del desarraigo debe ser considerado en un marco de la acción orientada a la erradicación de la exclusión social y de la pobreza extrema, - si es que se desea llegar a sus causas y no solamente combatir sus síntomas. Se impone el desarrollo de respuestas a nuevas demandas de protección, aunque no estén literalmente contempladas en los instrumentos internacionales de protección del ser humano vigentes<sup>5</sup>. El problema sólo puede ser enfrentado adecuadamente teniendo presente la indivisibilidad de todos los derechos humanos (civiles, políticos, económicos, sociales y culturales).

## II. Desarraigo y Derechos Humanos: La Responsabilidad Estatal

8. Pero hay otro aspecto que debe ser considerado. Parte de las dificultades de protección, en el presente contexto del desarraigo, reside en los vacíos y lagunas de la normativa de protección existente. Nadie cuestiona, por ejemplo, la existencia de un derecho a *emigrar*, como corolario del derecho a la libertad de movimiento. Pero los

---

3 El punto se encuentra desarrollado por la autora, una de las grandes pensadoras del siglo XX, prematuramente fallecida, en su libro póstumo *L'Enracinement* (de 1949, editado posteriormente en inglés bajo el título *The Need for Roots*, 1952).

4 Tal como lo fue señalado con perspicacia por otra gran pensadora de nuestros tiempos, Hannah Arendt (en- *La Tradition cachée*, 1987).

5 Obsérvese que el principio del *non-refoulement*, piedra angular de la protección de los refugiados (como principio del derecho consuetudinario e inclusive del *jus cogens*), puede invocarse inclusive en contextos distintos, como el de la expulsión colectiva de migrantes ilegales o de otros grupos. Dicho principio ha sido recogido también por los tratados de derechos humanos, como lo ilustra el artículo 22(8) de la Convención Americana sobre Derechos Humanos.

Estados aún no aceptaron un derecho a *inmigrar* y a *permanecer* donde uno se encuentre. En lugar de políticas poblacionales, los Estados, en su gran mayoría, ejercen más bien la función policial de proteger sus fronteras y controlar los flujos migratorios, sancionando los llamados migrantes *ilegales*. Como, a juicio de los Estados, no hay un derecho humano de inmigrar y de permanecer donde uno esté, el control de los ingresos migratorios, sumado a los procedimientos de deportaciones y expulsiones, se encuentran sujetos a sus propios criterios soberanos. No sorprende que de ahí advengan inconsistencias y arbitrariedades<sup>6</sup>.

9. La normativa de protección atinente a los derechos humanos sigue siendo insuficiente, ante la falta de acuerdo en cuanto a las bases de una verdadera cooperación internacional referente a la protección de todos los desarraigados. No hay normas jurídicas eficaces sin los valores correspondientes, a ellas subyacentes<sup>7</sup>. En relación con el problema en cuestión, algunas normas de protección ya existen, pero faltan el reconocimiento de los valores, y la voluntad de aplicarlas; no es mera casualidad, por ejemplo, que la Convención Internacional sobre la Protección de los Derechos de Todos los Trabajadores Migratorios y de Sus Familiares<sup>8</sup>, una década después de aprobada, aún no haya entrado en vigor.

10. En relación con el capital (inclusive el puramente especulativo), el mundo se ha “globalizado”; en relación con el trabajo y los seres humanos (inclusive los que intentan escapar de graves e inminentes amenazas a su propia vida), el mundo se ha atomizado en unidades

---

6 Tampoco hay que perder de vista que los actuales programas de “modernización” de justicia, con financiación internacional, no se ocupan de este aspecto, por cuanto su principal motivación es asegurar la seguridad de las inversiones (capitales y bienes). Es esta una pequeña muestra del mundo en que vivimos...

7 Obsérvese que la propia doctrina jurídica contemporánea ha sido simplemente omisa en relación con la Convención de Naciones Unidas sobre la Protección de los Derechos de Todos los Trabajadores Migratorios y de Sus Familiares (1990), - a pesar de la gran significación de que ésta se reviste. La idea básica subyacente en esta Convención es que todos los migrantes - inclusive los *indocumentados* e *ilegales* - deben disfrutar de sus derechos humanos independientemente de su situación jurídica. De ahí la posición central ocupada, también en este contexto, por el principio de la *no-discriminación* (artículo 7). No sorprendentemente, el elenco de los derechos protegidos sigue una visión necesariamente holística o integral de los derechos humanos (abarcando derechos civiles, políticos, económicos, sociales y culturales).

8 Que prohíbe medidas de expulsión colectiva, y determina que cada caso de expulsión deberá ser “examinado y decidido individualmente”, conforme a la ley (artículo 22).

soberanas. En un mundo “globalizado” de profundas iniquidades como el de nuestros días, de la irrupción de tantos conflictos internos desagregadores, ¿cómo identificar el origen de tanta violencia estructural? El mal parece ser de la propia condición humana. La cuestión del desarraigo debe ser tratada no a la luz de la soberanía estatal, sino más bien como problema de dimensión verdaderamente *global* que es (requiriendo una concertación a nivel universal), teniendo presentes las obligaciones *erga omnes* de protección<sup>9</sup>.

11. A pesar de ser el desarraigo un problema que afecta a toda la *comunidad internacional* (concepto éste que ya ha sido respaldado por la doctrina contemporánea más lúcida del derecho internacional<sup>10</sup>), sigue siendo tratado de forma atomizada por los Estados, con la visión de un ordenamiento jurídico de carácter puramente interestatal, sin parecer darse cuenta de que el modelo westphaliano de dicho ordenamiento internacional se encuentra, ya hace mucho tiempo, definitivamente agotado. Es precisamente por esto que los Estados no pueden eximirse de responsabilidad en razón del carácter global del desarraigo, por cuanto siguen aplicando al mismo sus propios criterios de ordenamiento interno.

12. En este umbral del siglo XXI, persiste un descompás entre las demandas de protección en un mundo “globalizado” y los medios de protección en un mundo atomizado. La llamada “globalización”, me permito insistir, todavía no ha abarcado los medios de protección del ser humano. Lamentablemente la *consciencia jurídica universal* - en la cual creo firmemente<sup>11</sup> - todavía no parece haberse despertado

---

9 El desarrollo conceptual de dichas obligaciones es una alta prioridad de la ciencia jurídica contemporánea, tal como vengo insistiendo en algunos de mis Votos en distintas Sentencias de la Corte Interamericana (sobre todo en los casos *Blake*, 1996-1999, y *Las Palmeras*, 2000).

10 A partir de las primeras formulaciones sistemáticas en libros visionarios como, *inter alia*, los de C.W. Jenks (*The Common Law of Mankind*, 1958) y de R.-J. Dupuy (*La communauté internationale entre le mythe et l'histoire*, 1986).

11 Si no existiera, no se hubiera, en el pasado, v.g., abolido el tráfico internacional de esclavos, abandonado la práctica de tratados secretos, prohibido la guerra como instrumento de política exterior, y puesto fin al colonialismo con la cristalización y el ejercicio del derecho de autodeterminación de los pueblos; si no existiera, no se hubiera, en nuestros tiempos, v.g., afirmado la existencia de normas imperativas del derecho internacional (*jus cogens*) y de obligaciones *erga omnes* de protección del ser humano, y configurado un verdadero régimen internacional contemporáneo contra la tortura, las desapariciones forzadas de personas, y las ejecuciones sumarias, extra-legales y arbitrarias. Tal como vengo

suficientemente tampoco para la necesidad del desarrollo conceptual de la responsabilidad internacional otra que la puramente estatal<sup>12</sup>. El Estado debe, pues, responder por las consecuencias de la aplicación práctica de las normas y políticas públicas que adopta en materia de migración, y en particular de los procedimientos de deportaciones y expulsiones.

### III. Desarraigo y Derechos Humanos: La Naturaleza Jurídica de las Medidas Provisionales de Protección

13. Habiendo señalado, en relación con el desarraigo, los aspectos complementarios de su dimensión global y de la responsabilidad estatal, me permito pasar al tercer y último aspecto del problema, atinente a su ubicación en el contexto de las medidas provisionales de protección. Un énfasis especial, al abordar la tragedia del desarraigo, debe recaer en la *prevención*<sup>13</sup>, de la cual constituye una manifestación elocuente la propia adopción de las medidas provisionales de protección en el marco del Derecho Internacional de los Derechos Humanos. La dimensión intertemporal se manifiesta, pues, tanto en el fenómeno del desarraigo como en la aplicación de las medidas provisionales de protección.

14. Del mismo modo, la indivisibilidad de todos los derechos humanos se manifiesta tanto en el fenómeno del desarraigo (cf. *supra*)

---

señalando ya hace algún tiempo (y más recientemente en mi ensayo "A Emancipação do Ser Humano como Sujeito do Direito Internacional e os Limites da Razão de Estado", in *Quem Está Escrevendo o Futuro? 25 Textos para o Século XXI*, Brasília, Ed. Letraviva, 2000, pp. 99-112), es gracias a esta consciencia jurídica universal que el derecho internacional se ha transformado, de un ordenamiento jurídico de pura *reglamentación* (como en el pasado) a un nuevo *corpus juris* de *libertación* del ser humano.

12 Tal como se desprende de las hesitaciones e incertidumbres de la labor voluminosa al respecto, ya a lo largo de tantos años, de la Comisión de Derecho Internacional de las Naciones Unidas.

13 En 1997, el Alto-Comisionado de Naciones Unidas para los Derechos Humanos observó que, en el contexto de los éxodos en masa y los derechos humanos, "el término 'prevención' no debe interpretarse en el sentido de impedir que las personas abandonen una zona o país sino en el sentido de impedir que la situación de los derechos humanos se deteriore a tal punto que el abandono sea la única opción y también el de impedir (...) la adopción deliberada de medidas para desplazar por la fuerza a grandes números de personas, como las expulsiones en masa, los traslados internos y el desalojamiento, el reasentamiento o la repatriación forzosos". ONU, *Derechos Humanos y Éxodos en Masa - Informe del Alto Comisionado para los Derechos Humanos*, documento E/CN.4/1997/42, de 14.01.1997, p. 4, párr. 8.

como en la aplicación de las medidas provisionales de protección. Siendo así, no hay, jurídica y epistemológicamente, impedimento alguno a que dichas medidas, que hasta el presente han sido aplicadas por la Corte Interamericana en relación con los derechos fundamentales a la vida y a la integridad personal (artículos 4 y 5 de la Convención Americana sobre Derechos Humanos), sean aplicadas también en relación con otros derechos protegidos por la Convención Americana. Siendo todos estos derechos interrelacionados, se puede perfectamente, en mi entender, dictar medidas provisionales de protección de cada uno de ellos, siempre y cuando se reúnan los dos requisitos de la “extrema gravedad y urgencia” y de la “prevención de daños irreparables a las personas”, consagrados en el artículo 63(2) de la Convención.

15. En cuanto a los derechos protegidos, entiendo que la extrema gravedad del problema del desarraigo acarrea la extensión de la aplicación de las medidas provisionales tanto a los derechos a la vida y a la integridad personal (artículos 4 y 5 de la Convención Americana) como a los derechos a la libertad personal, a la protección especial de los niños en la familia, y de circulación y residencia (artículos 7, 19 y 22 de la Convención), como en el presente caso de los *Haitianos y Dominicanos de Origen Haitiano en República Dominicana*. Es ésta la primera vez en su historia que la Corte procede de ese modo, a mi modo de ver correctamente, consciente de la necesidad de desarrollar, por su jurisprudencia evolutiva, nuevas vías de protección inspiradas en la realidad de la intensidad del propio sufrimiento humano.

16. La presente Resolución de la Corte revela, además, que el concepto de *proyecto de vida*, tratado recientemente en el ejercicio de su función contenciosa en materia tanto de fondo (caso de los “Niños de la Calle”, Sentencia del 19.11.1999) como de reparaciones (caso *Loayza Tamayo*, 27.11.1998), marca igualmente presencia en el plano de las medidas provisionales de protección, como se desprende de los hechos alegados por las Delegaciones tanto de la República Dominicana como de la Comisión Interamericana, así como por los dos testigos presentados por esta última, en la audiencia pública ante la Corte del 08 de agosto de 2000.

17. Hay que tener siempre presente la evolución de las medidas provisionales de protección, que tienen sus raíces históricas en el proceso cautelar en el plano del ordenamiento jurídico interno, concebido originalmente para salvaguardar la eficacia de la propia

función jurisdiccional. Gradualmente se afirmó la autonomía de la acción cautelar<sup>14</sup>, la cual alcanzó el nivel internacional en la práctica arbitral y judicial. El *rationale* de las medidas provisionales no cambió sustancialmente con esta transposición al plano del Derecho Internacional Público, en el cual continuaron ellas a buscar la preservación de los derechos reivindicados por las partes y la integridad de la decisión del fondo del caso. El cambio del objeto de tales medidas sólo se produjo con el impacto de la emergencia del Derecho Internacional de los Derechos Humanos<sup>15</sup>.

18. Con su transposición del ámbito del contencioso tradicional interestatal al del Derecho Internacional de los Derechos Humanos, las medidas provisionales empezaron a ir más allá en materia de protección, revelando un alcance sin precedentes, al pasar a proteger los propios *derechos sustantivos* de los seres humanos, en la medida en que buscan evitar daños irreparables a la persona humana como sujeto del Derecho Internacional de los Derechos Humanos. El ser humano es tomado como tal, independientemente de la colectividad a la cual pertenece. Esta gradual evolución en materia de medidas provisionales de protección se encuentra hoy consolidada, y para ella la Corte Interamericana de Derechos Humanos ha seguramente contribuido más que cualquier otro tribunal internacional contemporáneo.

19. La Corte Interamericana ha actuado, hasta el presente, a un tiempo con prudencia y visión prospectiva, sin ingresar en el debate doctrinal todavía nebuloso acerca de la existencia o no de una *actio popularis* en el derecho internacional. En su Voto Disidente célebre y progresista en el caso de *Africa del Sudoeste* (1966) ante la Corte Internacional de Justicia, el Juez Philip Jessup tampoco basó su razonamiento en una *actio popularis* en el derecho internacional. Esto no lo impidió de señalar que el derecho internacional ha, sin embargo, aceptado y creado situaciones en las cuales se reconoce “un derecho

---

14 Gracias sobre todo a la contribución de la doctrina procesalista italiana de la primera mitad del siglo XX, en particular las obras conocidas de G. Chiovenda (*Istituzioni di Diritto Processuale Civile*, 1936), P. Calamandrei (*Introduzione allo Studio Sistematico dei Provvedimenti Cautelare*, 1936), y F. Carnelutti (*Diritto e Processo*, 1958).

15 Tal como busco demostrar en mi Prólogo al tomo II del *Compendio de Medidas Provisionales* (Junio 1996 - Junio 2000) de la Corte Interamericana de Derechos Humanos (pp. VII-XVIII).

de acción sin tener que probar un perjuicio individual o un interés sustantivo individual, distinto del interés general<sup>16</sup>.

20. A su vez, en su igualmente célebre y visionario Voto Disidente en el mismo caso de *África del Sudoeste*, el Juez Kotaro Tanaka tampoco necesitó acudir a la figura de la *actio popularis* (aunque reconocida en los sistemas jurídicos nacionales) para afirmar que todo miembro de una sociedad humana tiene interés en la realización de la justicia social y de determinados principios humanitarios, y que la propia evolución histórica del Derecho demuestra que éste se enriquece del punto de vista cultural al abarcar valores que anteriormente se encontraban fuera de su esfera<sup>17</sup>. De ahí, por ejemplo, la jurisdiccionalización de la justicia social; en el caso de la protección de grupos sociales, - agregó con perspicacia el Juez Tanaka, - lo que se protege no es el grupo *per se* como un todo, sino más bien los individuos que lo componen<sup>18</sup>.

21. El campo se encuentra, en mi entendimiento, abierto a una evolución hacia la cristalización de una *actio popularis* en el derecho internacional, en la medida en que se logre una mayor concientización de la existencia de una verdadera *comunidad internacional*, formada tanto por los Estados como por los pueblos, las comunidades, los grupos de particulares y los individuos (tanto gobernados como gobernantes), - tal como fue propugnado a partir del siglo XVI por los llamados fundadores del derecho *de gentes*<sup>19</sup>. Hay una diferencia entre solicitar medidas provisionales de protección para una comunidad de carácter "indeterminado"<sup>20</sup>, y solicitarlas para una comunidad o grupo cuyos integrantes puedan ser *individualizados*<sup>21</sup>.

22. Razonar, en las circunstancias del presente caso, a partir de la existencia de una *actio popularis*, presentaría el riesgo de desfigurar

16 Corte Internacional de Justicia, *ICJ Reports* (1966) p. 388.

17 Corte Internacional de Justicia, *ICJ Reports* (1966) pp. 252-253.

18 *Ibid.*, p. 308.

19 Como se desprende, v.g., de las obras de Francisco de Vitoria (*Relecciones Teológicas*, 1538-1539), Alberico Gentili (*De Jure Belli*, 1598), Francisco Suárez (*De Legibus ac Deo Legislatore*, 1612), Hugo Grotius (*De Jure Belli ac Pacis*, 1625), Samuel Pufendorf (*De Jure Naturae et Gentium*, 1672), Christian Wolff (*Jus Gentium Methodo Scientifica Pertractatum*, 1749).

20 Como lo hace la Comisión Interamericana en el párrafo 31 de su petitorio del 30 de mayo de 2000.

21 Como la Corte Interamericana ya ha admitido, en sus recientes Resoluciones sobre Medidas Provisionales de Protección en los casos *Digna Ochoa y Otros* (del 17.11.1999) y *Clemente Teherán* (del 12.08.2000).

el carácter de las medidas provisionales de protección, en su actual etapa de evolución histórica. Siendo así, en cuanto a las personas protegidas por las Medidas Provisionales que viene de dictar la Corte, en el presente caso de los *Haitianos y Dominicanos de Origen Haitiano en República Dominicana*, el Tribunal las ha debidamente individualizado, sin dejar de contextualizar su situación, al también requerir al Estado información detallada sobre la situación de las comunidades o “bateyes” fronterizos cuyos integrantes puedan verse involucrados en el problema aquí tratado.

23. De ese modo, la Corte, al mismo tiempo en que ha innovado y dado un salto cualitativo en su jurisprudencia - de creciente importancia en los últimos años - en materia de Medidas Provisionales de Protección, también ha actuado con prudencia: ha escuchado atentamente los alegatos orales de la Comisión y del Estado y constatado la gran seriedad de ambos en el tratamiento del tema en sus intervenciones durante la referida audiencia pública ante el Tribunal; ha reconocido la alta complejidad del problema aquí abordado en sus distintos aspectos; ha cuidado de no prejuzgar el fondo del caso pendiente ante la Comisión Interamericana (en particular en cuanto a la cuestión de las garantías del debido proceso legal); se ha mostrado sensible a las necesidades de protección; y ha contribuido a la caracterización definitiva del carácter *tutelar*, más que puramente *cautelar*, de las medidas provisionales de protección en el universo conceptual del Derecho Internacional de los Derechos Humanos (cf. *supra*).

24. No puedo, pues, dejar de expresar mi esperanza de que las providencias que venga a tomar la República Dominicana, en conformidad con las Medidas Provisionales de Protección individualizadas en la presente Resolución de la Corte, se reviertan en beneficio de todas las demás personas - no señaladas nominalmente en el petitorio de la Comisión Interamericana - que se encuentren en la misma situación de vulnerabilidad y riesgo. El Derecho no opera en el vacío; evoluciona en función del atendimiento a las necesidades sociales y del reconocimiento de los valores subyacentes a sus normas.

25. Al Derecho está reservado un papel de fundamental importancia para atender a las nuevas necesidades de protección del ser humano, particularmente en el mundo deshumanizado en que vivimos. Al inicio del siglo XXI, urge, en definitiva, situar el ser humano en el lugar que le corresponde, a saber, en el centro de las políticas públicas de

los Estados (como las poblacionales) y de todo proceso de desarrollo, y ciertamente por encima de los capitales, inversiones, bienes y servicios. Urge, además, desarrollar conceptualmente el derecho de la responsabilidad internacional, de modo a abarcar, a la par de la estatal, también la responsabilidad de actores no-estatales. Es éste uno de los mayores desafíos del poder público y de la ciencia jurídica en el mundo “globalizado” en que vivimos, desde la perspectiva de la protección de los derechos humanos.

## **2. VOTO CONCURRENTENTE DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO DE LAS COMUNIDADES DEL JIGUAMIANDÓ Y DEL CURBARADÓ versus COLOMBIA (Resolución del 15.03.2005)**

1. Al votar a favor de la adopción de las presentes Medidas Provisionales de Protección, mediante las cuales la Corte Interamericana de Derechos Humanos ordena que se extienda protección a todos los miembros de las *Comunidades del Jiguamiandó y del Curbaradó* en Colombia, me veo en la obligación de dejar constancia en este Voto Concurrente de lo que ha sido la fundamentación de mi posición en medidas de protección como las presentes, en circunstancias de la complejidad del *cas d'espèce*. En primer lugar, entiendo, como en ocasiones anteriores<sup>22</sup>, que, como se desprende de la presente Resolución de la Corte, estamos claramente ante obligaciones *erga omnes* de protección, por parte del Estado, a todas las personas bajo su jurisdicción. Tales obligaciones se imponen no sólo en relación con agentes del poder público estatal, sino también en relación con actuaciones de terceros particulares, inclusive grupos armados irregulares de cualquier naturaleza.

2. Las medidas de protección que viene de adoptar la Corte, en las circunstancias del caso de la *Comunidades del Jiguamiandó y del Curbaradó*, de ser eficaces, abarcan efectivamente no sólo las relaciones entre los individuos y el poder público, sino también sus relaciones con terceros (grupos clandestinos, paramilitares, u otros grupos de particulares). Se trata, a mi modo de ver, de un caso que requiere claramente el reconocimiento de los efectos de la Convención Americana *vis-à-vis*

---

22 Cf. mis Votos Concurrentes en las Resoluciones de Medidas Provisionales de Protección del 18.06.2002, en el caso de la *Comunidad de Paz de San José de Apartadó*, y del 06.03.2003 en el presente caso de las *Comunidades del Jiguamiandó y del Curbaradó*.

terceros (el *Drittwirkung*)<sup>23</sup>, sin el cual las obligaciones convencionales de protección se reducirían a poco más que letra muerta. Estas circunstancias revelan las nuevas dimensiones de la protección internacional de los derechos humanos, así como el gran potencial de los mecanismos de protección existentes,- como el de la Convención Americana, - accionados para proteger colectivamente los miembros de toda una comunidad<sup>24</sup>, aunque la base de acción sea la lesión - o la probabilidad o inminencia de lesión - a derechos individuales.

3. En segundo lugar, han sido, efectivamente, las nuevas necesidades de protección del ser humano - reveladas por situaciones como la del presente caso - que han, en gran parte, impulsado en los últimos años las convergencias, - en los planos normativo, hermenéutico y operativo, - entre las tres vertientes de protección de los derechos de la persona humana, a saber, el Derecho Internacional de los Derechos Humanos, el Derecho Internacional Humanitario y el Derecho Internacional de los Refugiados<sup>25</sup>.

4. En tercer lugar, las medidas adoptadas por esta Corte, tanto en el presente caso de las *Comunidades del Jiguamiandó y del Curbaradó*, como en casos anteriores<sup>26</sup>, apuntan en el sentido de la gradual formación de un verdadero *derecho a la asistencia humanitaria*. Dichas medidas ya han salvado muchas vidas, han protegido el derecho a la integridad personal y el derecho de circulación y residencia de numerosos seres

---

23 Cf. mi supracitado Voto Concurrente en el caso de la *Comunidad de Paz de San José de Apartadó* (2002), párrafo 19.

24 Sugiriendo una afinidad con las *class actions*.

25 A.A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Santiago, Editorial Jurídica de Chile, 2001, cap. V, pp. 183-265.

26 Cf. los casos anteriores de la *Comunidad de Paz de San José de Apartadó* (2000-2002), de los *Haitianos y Dominicanos de Origen Haitiano en la República Dominicana* (2000-2002), del *Pueblo Indígena Kankuamo* (2004), del *Pueblo Indígena de Sarayaku* (2004). En mis Votos en todos estos casos, me permití proceder a la construcción de las obligaciones *erga omnes* bajo la Convención Americana. - En realidad, bien antes del sometimiento de los referidos casos al conocimiento de esta Corte, ya yo había advertido para la apremiante necesidad de la promoción del desarrollo doctrinal y jurisprudencial del régimen jurídico de las obligaciones *erga omnes* de protección de los derechos de la persona humana (v.g., en mis Votos Razonados en las Sentencias sobre el fondo, del 24.01.1998, párr. 28, y sobre reparaciones, del 22.01.1999, párr. 40, en el caso *Blake versus Guatemala*; y en mi Voto Razonado en el caso *Las Palmeras*, Sentencia sobre excepciones preliminares, del 04.02.2000, párrs. 2, 6-7, 11-12 y 14).

humanos, *estrictamente dentro del marco del Derecho*<sup>27</sup>. Las medidas de protección que viene de ordenar la Corte revelan que es perfectamente posible sostener el derecho a la asistencia humanitaria *en el marco del Derecho*, y jamás mediante el uso indiscriminado de la fuerza.

5. Tal como ponderé en mi Voto Concurrente en la anterior Resolución sobre Medidas Provisionales de Protección (del 06.03.2003) en el presente caso de las *Comunidades del Jiguamiandó y del Curbaradó*,

El énfasis debe incidir en las personas de los beneficiarios de la asistencia humanitaria, y no en el potencial de acción de los agentes materialmente capacitados a prestarla, - en reconocimiento del necesario primado del Derecho sobre la fuerza. El fundamento último del ejercicio del derecho a la asistencia humanitaria reside en la dignidad inherente de la persona humana. Los seres humanos son los *titulares* de los derechos protegidos, y las situaciones de vulnerabilidad y padecimiento en que se encuentran, sobre todo en situaciones de pobreza, exploración económica, marginación social y conflicto armado, realzan las obligaciones *erga omnes* de la protección de los derechos que les son inherentes (párr. 7).

6. Ésta ha sido, además, la posición que he sostenido al respecto también en el seno del Institut de Droit International<sup>28</sup>. En efecto, en su reciente sesión de Bruges de 2003, el *Institut de Droit International* ha adoptado una resolución precisamente sobre la *asistencia humanitaria*. En dicha resolución (del 02.09.2003) el *Institut* respalda las convergencias del Derecho Internacional de los Derechos Humanos y del Derecho Internacional Humanitario para “prevenir o mitigar el sufrimiento humano” en situaciones que requieren la pronta asistencia humanitaria (preámbulo), además de referirse a un verdadero “derecho a la asistencia humanitaria”<sup>29</sup>.

7. En cuarto lugar, los titulares de los derechos protegidos son los más capacitados a identificar sus necesidades básicas de asistencia humanitaria, la cual constituye una respuesta, basada en el Derecho,

---

27 Sin que para esto sea necesario acudir a la retórica inconvincente e infundada de la así-llamada “injerencia humanitaria”.

28 Cf. A.A. Cançado Trindade, “Reply [- Assistance Humanitaire]”, 70 *Annuaire de l’Institut de Droit International - Session de Bruges (2002-2003)* n. 1, pp. 536-540.

29 Parte operativa, sección II, párrs. 1-3 de la resolución.

a las nuevas necesidades de protección de la persona humana. En la medida en que la personalidad y la capacidad jurídicas internacionales de la persona humana se consoliden en definitivo, sin margen a dudas, el derecho a la asistencia humanitaria puede tornarse gradualmente justiciable<sup>30</sup>. A su vez, el fenómeno actual de la expansión de dichas personalidad y capacidad jurídicas internacionales responde, como se desprende del presente caso de las *Comunidades del Jiguamiandó y del Curbaradó*, a una necesidad apremiante de la comunidad internacional de nuestros días.

8. En quinto lugar, no hay que pasar desapercibido el amplio alcance de las obligaciones *erga omnes* de protección. En mi Voto Concurrente en la Opinión Consultiva n. 18 de la Corte Interamericana sobre *La Condición Jurídica y los Derechos de los Migrantes Indocumentados* (del 17.09.2003), me permití, al respecto, ponderar que dichas obligaciones *erga omnes*, caracterizadas por el *jus cogens* (del cual emanan)<sup>31</sup> como siendo dotadas de un carácter necesariamente objetivo, abarcan, por lo tanto, a todos los destinatarios de las normas jurídicas (*omnes*), tanto a los integrantes de los órganos del poder público estatal como a los particulares (párr. 76). Y proseguí:

A mi modo de ver, podemos considerar tales obligaciones *erga omnes* desde *dos dimensiones*, una horizontal<sup>32</sup> y otra vertical, que se complementan. Así, las obligaciones *erga omnes* de protección, en una *dimensión horizontal*, son obligaciones atinentes a la protección de los seres humanos

30 Cf. A.A. Cançado Trindade, "Reply [- Assistance Humanitaire]", 70 *Annuaire de l'Institut de Droit International* - Session de Bruges (2002-2003) n. 1, pp. 536-540.

31 En este mismo Voto, me permití precisar que "por definición, todas las normas del *jus cogens* generan necesariamente obligaciones *erga omnes*. Mientras el *jus cogens* es un concepto de derecho material, las obligaciones *erga omnes* se refieren a la estructura de su desempeño por parte de todas las entidades y todos los individuos obligados. A su vez, no todas las obligaciones *erga omnes* se refieren necesariamente a normas del *jus cogens*" (párr. 80).

32 Las obligaciones *erga omnes partes*, a su vez, - agregué en este mismo Voto, - "en su dimensión horizontal, encuentran expresión (...) en el artículo 45 de la Convención Americana, que prevé la vía (todavía no utilizada en la práctica en el sistema interamericano de derechos humanos), de reclamaciones o peticiones interestatales. (...) De todos modos, estas dimensiones tanto horizontal como vertical revelan el amplio alcance de las obligaciones *erga omnes* de protección" (párr. 79).

debidas a la comunidad internacional como un todo<sup>33</sup>. En el marco del derecho internacional convencional, vinculan ellas todos los Estados Partes en los tratados de derechos humanos (obligaciones *erga omnes partes*), y, en el ámbito del derecho internacional general, vinculan todos los Estados que componen la comunidad internacional organizada, sean o no Partes en aquellos tratados (obligaciones *erga omnes lato sensu*). En una *dimensión vertical*, las obligaciones *erga omnes* de protección vinculan tanto los órganos y agentes del poder público (estatal), como los simples particulares (en las relaciones inter-individuales).

Para la conformación de esta dimensión vertical han contribuido decisivamente el advenimiento y la evolución del Derecho Internacional de los Derechos Humanos. Pero es sorprendente que, hasta la fecha, estas dimensiones horizontal y vertical de las obligaciones *erga omnes* de protección hayan pasado enteramente desapercibidas de la doctrina jurídica contemporánea. Sin embargo, las veo claramente configuradas en el propio régimen jurídico de la Convención Americana sobre Derechos Humanos. Así, por ejemplo, en cuanto a la dimensión vertical, la obligación general, consagrada en el artículo 1(1) de la Convención Americana, de respetar y garantizar el libre ejercicio de los derechos por ella protegidos, genera efectos *erga omnes*, alcanzando las relaciones del individuo tanto con el poder público (estatal) cuanto con otros particulares<sup>34</sup> (párrs. 77-78).

9. En sexto lugar, aunque no todas las obligaciones *erga omnes* emanen necesariamente del *jus cogens*, el *jus cogens* genera siempre obligaciones *erga omnes*. Son éstas dotadas de un carácter necesariamente objetivo, comprometiendo a todos los destinatarios de la normativa internacional de protección (*omnes*), - los agentes del poder público así como los que actúan a título personal o los que operan en el anonimato y la clandestinidad. De ahí la importancia del deber general de los Estados de *respetar, y asegurar el respeto*, de los

33 CtIADH, caso *Blake versus Guatemala* (Fondo), Sentencia del 24.01.1998, Voto Razonado del Juez A.A. Cançado Trindade, párr. 26, y cf. párrs. 27-30.

34 Cf., al respecto, en general, la resolución adoptada por el *Institut de Droit International* (I.D.I.) en la sesión de Santiago de Compostela de 1989 (artículo 1), in: I.D.I., 63 *Annuaire de l'Institut de Droit International* (1989)-II, pp. 286 y 288-289.

derechos protegidos, *en todas las circunstancias*, - deber éste consagrado tanto en la Convención Americana sobre Derechos Humanos (artículo 1(1)) como en las Convenciones de Ginebra de 1949 sobre el Derecho Internacional Humanitario (y el Protocolo Adicional I de 1977), así como en diversos tratados de derechos humanos.

10. Este deber general es esencial en la vindicación del cumplimiento por los Estados de las obligaciones *erga omnes* de protección. La violación de dichas obligaciones tiene graves consecuencias, como ilustrado por el presente caso de las *Comunidades del Jiguamiandó y del Curbaradó*; es de suma importancia asegurar su observancia, pues su incumplimiento conlleva al quebrantamiento del orden jurídico, del propio orden público, conlleva al caos, y a los efectos corrosivos y devastadores del atropello del Derecho por el uso indiscriminado y abusivo de la fuerza, sea por agentes del poder estatal, sea por paramilitares y agentes clandestinos.

11. En séptimo y último lugar, el desarrollo doctrinal y jurisprudencial de las obligaciones *erga omnes* de protección de la persona humana, en toda y cualquier situación o circunstancia, ciertamente contribuirá a la formación de una verdadera *ordre public* internacional basada en el respeto y observancia de los derechos humanos, capaz de asegurar una mayor cohesión de la comunidad internacional organizada (la *civitas maxima gentium*), centrada en la persona humana como sujeto del derecho internacional. En este propósito, se impone, en nuestros días, concentrar la atención en el contenido y los efectos jurídicos del derecho emergente a la asistencia humanitaria, en el marco de las convergencias del Derecho Internacional de los Derechos Humanos, del Derecho Humanitario, y del Derecho de los Refugiados, de modo a refinar su elaboración, en beneficio de los *titulares* de ese derecho.

12. Al fin y al cabo, el reconocimiento de las obligaciones *erga omnes* de protección se enmarca en el actual proceso de humanización del derecho internacional. En efecto, a la construcción de una comunidad internacional más institucionalizada corresponde un nuevo *jus gentium*, centrado en la satisfacción de las necesidades y aspiraciones del ser humano y la salvaguardia de los derechos que le son inherentes, en todas y cualesquiera circunstancias, en tiempos de paz así como de conflictos armados. En este nuevo escenario de protección, podemos visualizar los efectos de los tratados de derechos humanos *vis-à-vis* terceros, contribuyendo así a la consolidación de un auténtico régimen

jurídico de las obligaciones *erga omnes* de protección de la persona humana.

### **3. VOTO CONCURRENTENTE DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO DE LA COMUNIDAD DE PAZ DE SAN JOSÉ DE APARTADÓ versus COLOMBIA (Resolución del 15.03.2005)**

1. Al votar a favor de la adopción de las presentes Medidas Provisionales de Protección, mediante las cuales la Corte Interamericana de Derechos Humanos ordena que se extienda protección a todos los miembros de la *Comunidad de Paz de San José de Apartadó* en Colombia, me veo en la obligación de dejar constancia en este Voto Concurrente de lo que ha sido la fundamentación de mi posición en medidas de protección como las presentes, en circunstancias de la complejidad del *cas d'espèce*. En primer lugar, entiendo, como en ocasiones anteriores<sup>35</sup>, que, como se desprende de la presente Resolución de la Corte, estamos claramente ante obligaciones *erga omnes* de protección, por parte del Estado, a todas las personas bajo su jurisdicción. Tales obligaciones se imponen no sólo en relación con agentes del poder público estatal, sino también en relación con actuaciones de terceros particulares, inclusive grupos armados irregulares de cualquier naturaleza.

2. Las medidas de protección que viene de adoptar la Corte, en las circunstancias del caso de la *Comunidad de Paz de San José de Apartadó*, de ser eficaces, abarcan efectivamente no sólo las relaciones entre los individuos y el poder público, sino también sus relaciones con terceros (grupos clandestinos, paramilitares, u otros grupos de particulares). Se trata, a mi modo de ver, de un caso que requiere claramente el reconocimiento de los efectos de la Convención Americana *vis-à-vis* terceros (el *Drittwirkung*)<sup>36</sup>, sin el cual las obligaciones convencionales de protección se reducirían a poco más que letra muerta. Estas circunstancias revelan las nuevas dimensiones de la protección internacional de los derechos humanos, así como el gran potencial de los mecanismos de protección existentes,- como el de la Convención Americana, - accionados para proteger colectivamente los miembros

---

35 Cf. mis Votos Concurrentes en las Resoluciones de Medidas Provisionales de Protección del 18.06.2002, en el caso de la *Comunidad de Paz de San José de Apartadó*, y del 06.03.2003 en el presente caso de las *Comunidades del Jiguamiandó y del Curbaradó*.

36 Cf. mi supracitado Voto Concurrente en el caso de la *Comunidad de Paz de San José de Apartadó* (2002), párrafo 19.

de toda una comunidad<sup>37</sup>, aunque la base de acción sea la lesión - o la probabilidad o inminencia de lesión - a derechos individuales.

3. En segundo lugar, han sido, efectivamente, las nuevas necesidades de protección del ser humano - reveladas por situaciones como la del presente caso - que han, en gran parte, impulsado en los últimos años las convergencias, - en los planos normativo, hermenéutico y operativo, - entre las tres vertientes de protección de los derechos de la persona humana, a saber, el Derecho Internacional de los Derechos Humanos, el Derecho Internacional Humanitario y el Derecho Internacional de los Refugiados<sup>38</sup>.

4. En tercer lugar, las medidas adoptadas por esta Corte, tanto en el presente caso de la *Comunidad de Paz de San José de Apartadó*, como en casos anteriores<sup>39</sup>, apuntan en el sentido de la gradual formación de un verdadero *derecho a la asistencia humanitaria*. Dichas medidas ya han salvado muchas vidas, han protegido el derecho a la integridad personal y el derecho de circulación y residencia de numerosos seres humanos, *estrictamente dentro del marco del Derecho*<sup>40</sup>. Las medidas de protección que viene de ordenar la Corte revelan que es perfectamente posible sostener el derecho a la asistencia humanitaria *en el marco del Derecho*, y jamás mediante el uso indiscriminado de la fuerza.

5. Tal como ponderaré en mi Voto Concurrente en la Resolución sobre Medidas Provisionales de Protección (del 06.03.2003) en el caso de las *Comunidades del Jiguamiandó y del Curbaradó*,

---

37 Sugiriendo una afinidad con las *class actions*.

38 A.A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Santiago, Editorial Jurídica de Chile, 2001, cap. V, pp. 183-265.

39 Cf. los casos anteriores de la *Comunidad de Paz de San José de Apartadó* (2000-2002), de los *Haitianos y Dominicanos de Origen Haitiano en la República Dominicana* (2000-2002), del *Pueblo Indígena Kankuamo* (2004), del *Pueblo Indígena de Sarayaku* (2004). En mis Votos en todos estos casos, me permití proceder a la construcción de las obligaciones *erga omnes* bajo la Convención Americana. - En realidad, bien antes del sometimiento de los referidos casos al conocimiento de esta Corte, ya yo había advertido para la apremiante necesidad de la promoción del desarrollo doctrinal y jurisprudencial del régimen jurídico de las obligaciones *erga omnes* de protección de los derechos de la persona humana (v.g., en mis Votos Razonados en las Sentencias sobre el fondo, del 24.01.1998, párr. 28, y sobre reparaciones, del 22.01.1999, párr. 40, en el caso *Blake versus Guatemala*; y en mi Voto Razonado en el caso *Las Palmeras*, Sentencia sobre excepciones preliminares, del 04.02.2000, párrs. 2, 6-7, 11-12 y 14).

40 Sin que para esto sea necesario acudir a la retórica inconvincente e infundada de la así-llamada "injerencia humanitaria".

El énfasis debe incidir en las personas de los beneficiarios de la asistencia humanitaria, y no en el potencial de acción de los agentes materialmente capacitados a prestarla, - en reconocimiento del necesario primado del Derecho sobre la fuerza. El fundamento último del ejercicio del derecho a la asistencia humanitaria reside en la dignidad inherente de la persona humana. Los seres humanos son los *titulares* de los derechos protegidos, y las situaciones de vulnerabilidad y padecimiento en que se encuentran, sobre todo en situaciones de pobreza, exploración económica, marginación social y conflicto armado, realzan las obligaciones *erga omnes* de la protección de los derechos que les son inherentes (párr. 7).

6. Ésta ha sido, además, la posición que he sostenido al respecto también en el seno del Institut de Droit International<sup>41</sup>. En efecto, en su reciente sesión de Bruges de 2003, el *Institut de Droit International* ha adoptado una resolución precisamente sobre la *asistencia humanitaria*. En dicha resolución (del 02.09.2003) el *Institut* respalda las convergencias del Derecho Internacional de los Derechos Humanos y del Derecho Internacional Humanitario para “prevenir o mitigar el sufrimiento humano” en situaciones que requieren la pronta asistencia humanitaria (preámbulo), además de referirse a un verdadero “derecho a la asistencia humanitaria”<sup>42</sup>.

7. En cuarto lugar, los titulares de los derechos protegidos son los más capacitados a identificar sus necesidades básicas de asistencia humanitaria, la cual constituye una respuesta, basada en el Derecho, a las nuevas necesidades de protección de la persona humana. En la medida en que la personalidad y la capacidad jurídicas internacionales de la persona humana se consoliden en definitivo, sin margen a dudas, el derecho a la asistencia humanitaria puede tornarse gradualmente justiciable<sup>43</sup>. A su vez, el fenómeno actual de la expansión de dichas personalidad y capacidad jurídicas internacionales responde, como se desprende del presente caso de la *Comunidad de Paz de San José de*

---

41 Cf. A.A. Cançado Trindade, “Reply [- Assistance Humanitaire]”, 70 *Annuaire de l’Institut de Droit International - Session de Bruges* (2002-2003) n. 1, pp. 536-540.

42 Parte operativa, sección II, párrs. 1-3 de la resolución.

43 Cf. A.A. Cançado Trindade, “Reply [- Assistance Humanitaire]”, 70 *Annuaire de l’Institut de Droit International - Session de Bruges* (2002-2003) n. 1, pp. 536-540.

*Apartadó*, a una necesidad apremiante de la comunidad internacional de nuestros días.

8. En quinto lugar, no hay que pasar desapercibido el amplio alcance de las obligaciones *erga omnes* de protección. En mi Voto Concurrente en la Opinión Consultiva n. 18 de la Corte Interamericana sobre *La Condición Jurídica y los Derechos de los Migrantes Indocumentados* (del 17.09.2003), me permití, al respecto, ponderar que dichas obligaciones *erga omnes*, caracterizadas por el *jus cogens* (del cual emanan)<sup>44</sup> como siendo dotadas de un carácter necesariamente objetivo, abarcan, por lo tanto, a todos los destinatarios de las normas jurídicas (*omnes*), tanto a los integrantes de los órganos del poder público estatal como a los particulares (párr. 76). Y proseguí:

A mi modo de ver, podemos considerar tales obligaciones *erga omnes* desde *dos dimensiones*, una horizontal<sup>45</sup> y otra vertical, que se complementan. Así, las obligaciones *erga omnes* de protección, en una *dimensión horizontal*, son obligaciones atinentes a la protección de los seres humanos debidas a la comunidad internacional como un todo<sup>46</sup>. En el marco del derecho internacional convencional, vinculan ellas todos los Estados Partes en los tratados de derechos humanos (obligaciones *erga omnes partes*), y, en el ámbito del derecho internacional general, vinculan todos los Estados que componen la comunidad internacional organizada, sean o no Partes en aquellos tratados (obligaciones *erga omnes lato sensu*). En una *dimensión vertical*, las obligaciones *erga omnes* de protección vinculan tanto los órganos y

---

44 En este mismo Voto, me permití precisar que “por definición, todas las normas del *jus cogens* generan necesariamente obligaciones *erga omnes*. Mientras el *jus cogens* es un concepto de derecho material, las obligaciones *erga omnes* se refieren a la estructura de su desempeño por parte de todas las entidades y todos los individuos obligados. A su vez, no todas las obligaciones *erga omnes* se refieren necesariamente a normas del *jus cogens*” (párr. 80).

45 Las obligaciones *erga omnes partes*, a su vez, - agregué en este mismo Voto, - “en su dimensión horizontal, encuentran expresión (...) en el artículo 45 de la Convención Americana, que prevé la vía (todavía no utilizada en la práctica en el sistema interamericano de derechos humanos), de reclamaciones o peticiones interestatales. (...) De todos modos, estas dimensiones tanto horizontal como vertical revelan el amplio alcance de las obligaciones *erga omnes* de protección” (párr. 79).

46 CtIADH, caso *Blake versus Guatemala* (Fondo), Sentencia del 24.01.1998, Voto Razonado del Juez A.A. Cançado Trindade, párr. 26, y cf. párrs. 27-30.

agentes del poder público (estatal), como los simples particulares (en las relaciones inter-individuales).

Para la conformación de esta dimensión vertical han contribuido decisivamente el advenimiento y la evolución del Derecho Internacional de los Derechos Humanos. Pero es sorprendente que, hasta la fecha, estas dimensiones horizontal y vertical de las obligaciones *erga omnes* de protección hayan pasado enteramente desapercibidas de la doctrina jurídica contemporánea. Sin embargo, las veo claramente configuradas en el propio régimen jurídico de la Convención Americana sobre Derechos Humanos. Así, por ejemplo, en cuanto a la dimensión vertical, la obligación general, consagrada en el artículo 1(1) de la Convención Americana, de respetar y garantizar el libre ejercicio de los derechos por ella protegidos, genera efectos *erga omnes*, alcanzando las relaciones del individuo tanto con el poder público (estatal) cuanto con otros particulares<sup>47</sup> (párrs. 77-78).

9. En sexto lugar, aunque no todas las obligaciones *erga omnes* emanen necesariamente del *jus cogens*, el *jus cogens* genera siempre obligaciones *erga omnes*. Son éstas dotadas de un carácter necesariamente objetivo, comprometiendo a todos los destinatarios de la normativa internacional de protección (*omnes*), - los agentes del poder público así como los que actúan a título personal o los que operan en el anonimato y la clandestinidad. De ahí la importancia del deber general de los Estados de *respetar, y asegurar el respeto*, de los derechos protegidos, *en todas las circunstancias*, - deber éste consagrado tanto en la Convención Americana sobre Derechos Humanos (artículo 1(1)) como en las Convenciones de Ginebra de 1949 sobre el Derecho Internacional Humanitario (y el Protocolo Adicional I de 1977), así como en diversos tratados de derechos humanos.

10. Este deber general es esencial en la vindicación del cumplimiento por los Estados de las obligaciones *erga omnes* de protección. La violación de dichas obligaciones tiene graves consecuencias, como ilustrado por el presente caso de la *Comunidad de Paz de San José de Apartadó*; es de suma importancia asegurar su observancia, pues su incumplimiento

---

<sup>47</sup> Cf., al respecto, en general, la resolución adoptada por el *Institut de Droit International* (I.D.I.) en la sesión de Santiago de Compostela de 1989 (artículo 1), in: I.D.I., 63 *Annuaire de l'Institut de Droit International* (1989)-II, pp. 286 y 288-289.

conlleva al quebrantamiento del orden jurídico, del propio orden público, conlleva al caos, y a los efectos corrosivos y devastadores del atropello del Derecho por el uso indiscriminado y abusivo de la fuerza, sea por agentes del poder estatal, sea por paramilitares y agentes clandestinos.

11. En séptimo y último lugar, el desarrollo doctrinal y jurisprudencial de las obligaciones *erga omnes* de protección de la persona humana, en toda y cualquier situación o circunstancia, ciertamente contribuirá a la formación de una verdadera *ordre public* internacional basada en el respeto y observancia de los derechos humanos, capaz de asegurar una mayor cohesión de la comunidad internacional organizada (la *civitas maxima gentium*), centrada en la persona humana como sujeto del derecho internacional.

En este propósito, se impone, en nuestros días, concentrar la atención en el contenido y los efectos jurídicos del derecho emergente a la asistencia humanitaria, en el marco de las convergencias del Derecho Internacional de los Derechos Humanos, del Derecho Humanitario, y del Derecho de los Refugiados, de modo a refinar su elaboración, en beneficio de los *titulares* de ese derecho.

12. Al fin y al cabo, el reconocimiento de las obligaciones *erga omnes* de protección se enmarca en el actual proceso de humanización del derecho internacional. En efecto, a la construcción de una comunidad internacional más institucionalizada corresponde un nuevo *jus gentium*, centrado en la satisfacción de las necesidades y aspiraciones del ser humano y la salvaguardia de los derechos que le son inherentes, en todas y cualesquiera circunstancias, en tiempos de paz así como de conflictos armados. En este nuevo escenario de protección, podemos visualizar los efectos de los tratados de derechos humanos *vis-à-vis* terceros, contribuyendo así a la consolidación de un auténtico régimen jurídico de las obligaciones *erga omnes* de protección de la persona humana.

#### **4. VOTO CONCURRENTENTE DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO ELOÍSA BARRIOS Y OTROS versus VENEZUELA (Resolución del 29.06.2005)**

1. Al votar en favor de la adopción por la Corte Interamericana de Derechos Humanos de la presente Resolución sobre Medidas Provisionales de Protección en el caso de *Eloisa Barrios y Otros*, respecto de Venezuela, me veo en la obligación de dejar constancia, en el

presente Voto Concurrente, de una breve reflexión que me suscitan los hechos del *cas d'espèce*, así como de otros casos recientes que han conllevado esta Corte a ordenar Medidas Provisionales de Protección. En la actualidad, más de 11.000 personas (incluyendo miembros de comunidades enteras), residentes en países de América Latina y el Caribe, se encuentran bajo la protección de medidas provisionales ordenadas por esta Corte<sup>48</sup>. Éstas últimas se han expandido y asumido una considerable importancia en la última década, y se han transformado en una verdadera *garantía* jurisdiccional de carácter preventivo<sup>49</sup>. Y la Corte Interamericana, más que cualquier otro tribunal internacional contemporáneo, ha contribuido significativamente para su desarrollo tanto en el Derecho Internacional de los Derechos Humanos como en el Derecho Internacional Público contemporáneo.

2. Siendo así, no deja de causarme profunda preocupación constatar que un notable instituto jurídico, que ha salvado numerosas vidas y evitado otros daños irreparables a las personas, - titulares de los derechos protegidos bajo la Convención Americana sobre Derechos Humanos, - empiece a mostrarse insuficiente en ciertas situaciones-límite. Preocúpame profundamente que, en los cinco últimos años, como consecuencia directa del mundo crecientemente violento y deshumanizado en que vivimos, algunas personas que se encontraban bajo la protección de medidas provisionales ordenadas por esta Corte, hayan, sin embargo, sido privadas arbitrariamente de su vida.

3. Esto ha ocurrido, - paradójicamente, *pari passu* con la extraordinaria expansión de las Medidas Provisionales de Protección bajo la Convención Americana, - no solamente en el presente caso de *Eloisa Barrios y Otros versus Venezuela* (2005), sino también en los

---

48 Sólo en el caso del *Pueblo Indígena Kankuamo versus Colombia*, son cerca de seis mil los beneficiarios de las medidas; en el caso de la *Comunidad de San José de Apartadó versus Colombia*, los beneficiarios son más de 1200; en los casos de las *Comunidades del Juguíamandó y Curbaradó versus Colombia*, los beneficiarios son más de dos mil; en el caso de la *Cárcel de Urso Branco versus Brasil*, casi 900 reclusos se benefician de las medidas; en el caso del *Pueblo Indígena Sarayaku versus Ecuador*, son cerca de 1200 los beneficiarios; entre varios otros casos.

49 A.A. Caçado Trindade, "Les Mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25; A.A. Caçado 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), n. 5-8, pp. 162-168.

casos de la *Cárcel de Urso Branco versus Brasil* (2004), en el caso de las *Penitenciarías de Mendoza versus Argentina* (2005), en el caso de la *Comunidad de San José de Apartadó versus Colombia* (2002-2005), en el caso de las *Comunidades del Juguíamandó y Curbaradó versus Colombia* (2003-2005), y en el caso *James y Otros versus Trinidad y Tobago* (2000-2002). Esto requiere una reacción por parte del Derecho, para proteger a los amenazados e indefensos.

4. En los casos supracitados ha habido, de ese modo, un claro incumplimiento de las Medidas Provisionales de Protección ordenadas por la Corte, las cuales se revisten de un carácter, más que cautelar, verdaderamente *tutelar*. Sin perjuicio del fondo de los referidos casos (las alegadas o presuntas violaciones originales de la Convención Americana), ahí se han violado medidas tutelares, de carácter esencialmente preventivo, que efectivamente protegen derechos fundamentales, - casi siempre derechos inderogables, como el derecho a la vida, - en la medida en que buscan evitar daños irreparables a la persona humana como sujeto del Derecho Internacional de los Derechos Humanos, y del Derecho Internacional Público contemporáneo.

5. Esto significa - y es ese el punto básico que me permito enfatizar en el presente Voto Concurrente - que, sin perjuicio del fondo de los respectivos casos, *la noción de víctima emerge también en el nuevo contexto de las Medidas Provisionales de Protección*. No hay cómo eludir este punto, que me genera inquietud y preocupación. Por otro lado, se afirma, también en el presente contexto de prevención de daños irreparables a la persona humana, la centralidad de esta última<sup>50</sup>, aunque victimada.

6. Las Medidas Provisionales de Protección acarrear obligaciones para los Estados en cuestión, que se distinguen de las obligaciones que emanan de las respectivas Sentencias en cuanto al fondo de los casos respectivos. Por ejemplo, en el presente caso de *Eloisa Barrios y Otros*, las obligaciones establecidas en los puntos resolutivos números 9 y 10 de la presente Resolución de la Corte (deber de investigación de los hechos e identificación y sanción de los responsables) son deberes que incumben al Estado precisamente en consecuencia del incumplimiento de las Medidas Provisionales de Protección ordenadas por la Corte.

---

50 Cf. A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104.

7. Y antes de dicho incumplimiento, habían - y hay - obligaciones emanadas de las Medidas Provisionales de Protección *per se*. Son ellas enteramente distintas de obligaciones que eventualmente se desprendan de una Sentencia de fondo (y, en su caso, reparaciones) sobre el *cas d'espèce*. Esto significa que las Medidas Provisionales de Protección constituyen un instituto jurídico dotado de *autonomía* propia, tienen efectivamente un *régimen jurídico* propio, lo que, a su vez, revela la alta relevancia de la dimensión *preventiva* de la protección internacional de los derechos humanos.

8. Tanto es así que, bajo la Convención Americana (artículo 63(2)), la responsabilidad internacional de un Estado puede configurarse por el incumplimiento de Medidas Provisionales de Protección ordenadas por la Corte, sin que el caso respectivo se encuentre, en cuanto al fondo, en conocimiento de la Corte (sino más bien de la Comisión Interamericana de Derechos Humanos). Esto refuerza mi tesis, que me permito avanzar en este Voto Concurrente, en el sentido de que las Medidas Provisionales de Protección, dotadas que son de autonomía, tienen un régimen jurídico propio, y su incumplimiento genera la responsabilidad del Estado, tiene consecuencias jurídicas, además de destacar la posición central de la víctima (de dicho incumplimiento), sin perjuicio del examen y resolución del caso concreto en cuanto al fondo.

9. Tengo la sensación de que, a pesar de todo lo que ha hecho esta Corte en pro de la evolución de las Medidas Provisionales de Protección, - e insisto, más que cualquier otro tribunal internacional contemporáneo, - todavía hay un largo camino que recorrer. Hay que salvar el legado ya considerable de dichas medidas bajo la Convención Americana. Hay que fortalecer conceptualmente su régimen jurídico, en pro de las personas protegidas y de las víctimas de su incumplimiento (sin perjuicio del fondo de los casos respectivos). Esto se impone con aún mayor vigor en situaciones - como la del presente caso de *Eloisa Barrios y Otros* - de repetición de actos de hostigamiento y agresión reveladores de un patrón creciente de amenazas y violencia<sup>51</sup>. Esto se impone con todo vigor en el mundo deshumanizado y vacío de valores en que vivimos.

10. Las Medidas Provisionales de Protección, cuyo desarrollo hasta la fecha bajo la Convención Americana constituye una verdadera

---

51 Cf. el *considerandum* 12 de la presente Resolución de la Corte.

conquista del Derecho, se encuentran, en mi percepción, sin embargo, todavía en su infancia, el albor de su evolución, y crecerán y se fortalecerán aún más en la medida en que despierte la conciencia jurídica universal para la necesidad de su refinamiento conceptual en todos sus aspectos. El Derecho Internacional de los Derechos Humanos ha transformado la propia *concepción* de dichas medidas<sup>52</sup> - de cautelares en tutelares, - revelando el proceso histórico corriente de *humanización* del Derecho Internacional Público<sup>53</sup> también en este dominio específico, pero se trata de un proceso que se encuentra todavía en curso.

11. Hay que proseguir decididamente en esta dirección. Como próximo paso a ser dado, urge, en nuestros días, que se desarrolle su *régimen jurídico*, y, en el marco de éste último, las *consecuencias jurídicas* del incumplimiento o violación de las Medidas Provisionales de Protección, dotadas de autonomía propia. En mi entender, las *víctimas* ocupan, tanto en el presente contexto de prevención, como en la resolución del fondo (y eventuales reparaciones) de los casos contenciosos, una posición verdaderamente central, como sujetos del Derecho Internacional de los Derechos Humanos y del Derecho Internacional Público contemporáneo, dotados de capacidad jurídico-procesal internacional.

## **5. VOTO CONCURRENTENTE DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO *ELOÍSA BARRIOS Y OTROS versus VENEZUELA* (Resolución del 22.09.2005)**

1. Al concurrir con mi voto a la adopción por la Corte Interamericana de Derechos Humanos de esta nueva Resolución sobre Medidas Provisionales de Protección en el caso de *Eloisa Barrios y Otros*, respecto de Venezuela, me veo en la obligación de reiterar, en el presente Voto Concurrente, la esencia de mis ponderaciones en mi anterior Voto Concurrente en la previa Resolución de la Corte, del 25 de junio de 2005, en el *cas d'espèce*. Cuando no se da pronto cumplimiento a las Medidas Provisionales de Protección ordenadas por la Corte, las

---

52 A.A. Cançado Trindade, "Prólogo del Presidente de la Corte Interamericana de Derechos Humanos", in *Compendio de Medidas Provisionales* (Junio 2001-Julio 2003), vol. 4, Serie E, San José de Costa Rica, Corte Interamericana de Derechos Humanos, 2003, pp. V-XXII.

53 Cf. A.A. Cançado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* - Belo Horizonte/Brasil (2001) pp. 11-23.

cuales se revisten de un carácter, más que cautelar, verdaderamente *tutelar*, se pone en riesgo derechos que son, casi siempre, inderogables, como el derecho a la vida, - en la medida en que aquellas Medidas de Protección buscan evitar daños irreparables a la persona humana como sujeto del Derecho Internacional de los Derechos Humanos, y del Derecho Internacional Público contemporáneo.

2. Esto significa que, sin perjuicio del fondo de los respectivos casos, *la noción de víctima - aunque potencial - emerge también en el nuevo contexto de las Medidas Provisionales de Protección*. Estas últimas acarrear obligaciones para los Estados en cuestión, que se distinguen de las obligaciones que emanan de las respectivas Sentencias en cuanto al fondo de los casos respectivos. Dichas obligaciones son enteramente distintas de obligaciones que eventualmente se desprendan de una Sentencia de fondo (y, en su caso, de reparaciones) sobre el *cas d'espèce*.

3. Esto significa - tal como lo he señalado en mi anterior Voto Concurrente en el *cas d'espèce*, las Medidas Provisionales de Protección constituyen un instituto jurídico dotado de *autonomía* propia, tienen efectivamente un *régimen jurídico* propio, lo que, a su vez, revela la alta relevancia de la dimensión *preventiva* de la protección internacional de los derechos humanos. Tanto es así que, bajo la Convención Americana sobre Derechos Humanos (artículo 63(2)), la responsabilidad internacional de un Estado puede configurarse por el incumplimiento de Medidas Provisionales de Protección ordenadas por la Corte, sin que el caso respectivo se encuentre, en cuanto al fondo, en conocimiento de la Corte (sino más bien de la Comisión Interamericana de Derechos Humanos).

4. Esto refuerza mi tesis, - expresada en mi Voto Concurrente en la anterior Resolución de la Corte del 29.06.2005, y que me permito reiterar en este nuevo Voto Concurrente en el presente caso de *Eloisa Barrios y Otros*, - en el sentido de que las Medidas Provisionales de Protección, dotadas que son de autonomía y de un régimen jurídico propio, generan, por su incumplimiento, la responsabilidad del Estado, con consecuencias jurídicas para el mismo. La Convención Americana dota dichas Medidas de Protección de base *convencional* (artículo 63(2)), y su cumplimiento de carácter obligatorio, lo que, además, realza la posición central de la víctima (de su eventual incumplimiento), sin perjuicio del examen y resolución del caso concreto en cuanto al fondo del mismo.

5. En suma, las referidas Medidas de Protección conforman un régimen de responsabilidad propio, bajo la Convención Americana, adicional al atinente a la violación de las normas sustantivas de la Convención atinentes a los derechos protegidos. Con toda razón la Corte ha estimado necesario adoptar esta nueva Resolución en el presente caso, dada la persistencia de una situación de extrema gravedad y urgencia afectando los miembros de la familia Barrios, y la ocurrencia de nuevos hechos (amenazas y hostigamientos, durante la vigencia de las Medidas de Protección anteriormente adoptadas por la Corte) que les pueden causar daños irreparables, en demostración de la falta de efectividad de las providencias adoptadas por el Estado<sup>54</sup>.

6. La Corte se ha visto, además, en la necesidad de expresar su justa preocupación en el sentido de que

el incumplimiento de la presentación del [requerido] informe por parte del Estado es especialmente grave dada la naturaleza jurídica de las medidas urgentes y medidas provisionales, que buscan la prevención de daños irreparables a las personas en situación de extrema gravedad y urgencia<sup>55</sup>.

La supervisión *motu proprio* por la Corte, del cumplimiento o no, por el Estado en cuestión, de las Medidas Provisionales de Protección por ella ordenadas, es una facultad inherente a sus funciones de protección, de ejercicio aún más necesario y apremiante en situación de extrema gravedad y urgencia.

7. Además de la base convencional del artículo 63(2) de la Convención Americana, las Medidas Provisionales ante esta última se encuentran reforzadas por el deber general de los Estados Partes, bajo el artículo 1(1) de la Convención, de respetar y asegurar el respeto, sin discriminación, de los derechos protegidos, en beneficio de todas las personas bajo sus respectivas jurisdicciones. El amplio alcance de este deber general de garantía, - que abarca también las medidas provisionales de protección, - se encuentra analizado en mis recientes Voto Razonado (párrs. 15-21) en la Sentencia de la Corte en el caso de las *Niñas Yean y Bosico versus República Dominicana* (del 08.09.2005), y Voto Razonado (párrs. 2-7 y 17-29) en su Sentencia en el caso de la *Masacre de*

<sup>54</sup> Considerandum 16.

<sup>55</sup> Considerandum 11; y cf. también los *consideranda* 19-21 de la presente Resolución.

*Mapiripán* (del 15.09.2005) atinente a Colombia. El mencionado artículo 1(1) provee, además, la base convencional para las obligaciones *erga omnes partes* bajo la Convención.

8. Así, a pesar de todos los avances considerables logrados por la Corte Interamericana en los últimos años en materia de Medidas Provisionales de Protección, resta un largo camino que recorrer en el fortalecimiento y refinamiento conceptuales de su régimen jurídico autónomo (tal como lo diviso), en pro de las personas protegidas y para asegurar el debido y pronto cumplimiento de las Medidas ordenadas por la Corte por los Estados en cuestión. Esto se impone con aún mayor vigor en situaciones - tales como la del presente caso de *Eloisa Barrios y Otros* - de repetición de actos de hostigamiento y agresión reveladores de un patrón creciente de amenazas y violencia<sup>56</sup>.

9. Como me permití señalar en mi Voto Concurrente en la previa Resolución de la Corte del 29.06.2005 en el presente caso de *Eloisa Barrios y Otros*, y aquí me veo en la contingencia de tener que reiterarlo,

Las Medidas Provisionales de Protección, cuyo desarrollo hasta la fecha bajo la Convención Americana constituye una verdadera conquista del Derecho, se encuentran, en mi percepción, sin embargo, todavía en su infancia, el albor de su evolución, y crecerán y se fortalecerán aún más en la medida en que despierte la conciencia jurídica universal para la necesidad de su refinamiento conceptual en todos sus aspectos. El Derecho Internacional de los Derechos Humanos ha transformado la propia *concepción* de dichas medidas<sup>57</sup> - de cautelares en tutelares, - revelando el proceso histórico corriente de *humanización* del Derecho Internacional Público<sup>58</sup> también en este dominio específico, pero se trata de un proceso que se encuentra todavía en curso.

56 Como ya señalado en el *considerandum* 12 de la anterior Resolución de la Corte, del 29.06.2005, en el presente caso.

57 A.A. Cançado Trindade, "Prólogo del Presidente de la Corte Interamericana de Derechos Humanos", in *Compendio de Medidas Provisionales* (Junio 2001-Julio 2003), vol. 4, Serie E, San José de Costa Rica, Corte Interamericana de Derechos Humanos, 2003, pp. V-XXII.

58 Cf. A.A. Cançado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* - Belo Horizonte/Brasil (2001) pp. 11-23.

Hay que proseguir decididamente en esta dirección. Como próximo paso a ser dado, urge, en nuestros días, que se desarrolle su *régimen jurídico*, y, en el marco de éste último, las *consecuencias jurídicas* del incumplimiento o violación de las Medidas Provisionales de Protección, dotadas de autonomía propia. En mi entender, las *víctimas* ocupan, tanto en el presente contexto de prevención, como en la resolución del fondo (y eventuales reparaciones) de los casos contenciosos, una posición verdaderamente central, como sujetos del Derecho Internacional de los Derechos Humanos y del Derecho Internacional Público contemporáneo, dotados de capacidad jurídico-procesal internacional" (párrs. 10-11).

## **6. VOTO CONCORDANTE DO JUIZ A.A. CANÇADO TRINDADE NO CASO DAS CRIANÇAS E ADOLESCENTES PRIVADOS DE LIBERDADE NO 'COMPLEXO DO TATUAPÉ' DA FEBEM versus BRASIL (Resolução de 17.11.2005)**

1. Ao votar em favor da adoção, pela Corte Interamericana de Direitos Humanos, da presente Resolução sobre Medidas Provisórias de Proteção no caso das *Crianças e Adolescentes Privados de Liberdade no Complexo do Tatuapé da FEBEM versus Brasil*, vejo-me, ademais, no dever de deixar registro das sérias preocupações que me suscitam a simples leitura do documento da Comissão Interamericana de Direitos Humanos (CIDH), de solicitação das referidas Medidas à Corte, de 08 de novembro de 2005. Lamento não ter mais que sérias preocupações a externar.

2. Preocupa-me, de início, o fato de que, em um caso como o presente, que revela uma situação de violência crônica e, portanto, de extrema gravidade e urgência, tenha a CIDH declarado a petição admissível (em 09.10.2002) *mais de dois anos depois* de tê-la recebido (em 05.09.2000). Ademais, ante uma solicitação de medidas cautelares no *cas d'espèce* (de 27.04.2004), a CIDH só requereu a adoção de tais medidas quase *oito meses depois* (em 21.12.2004).

3. Preocupa-me, em seguida, o fato de, somente *sete meses depois* (em 23.07.2005), ter a CIDH resolvido dar seguimento a suas medidas cautelares (desprovidas de base convencional), nelas insistindo em vão e sem êxito, sem solicitar medidas provisórias de proteção à Corte (dotadas de base convencional), embora não exista disposição convencional alguma que requeira o suposto "prévio esgotamento"

de medidas cautelares da CIDH antes de solicitar medidas provisórias à Corte.

4. Somente há pouco, em 08.11.2005, a CIDH atuou nesse sentido, por iniciativa dos representantes dos beneficiários das medidas de proteção, atuando estes como verdadeira parte demandante e como sujeitos do Direito Internacional dos Direitos Humanos. Nesse meio tempo, quando já estavam vigentes as medidas cautelares da CIDH e antes que esta submetesse o pedido daqueles beneficiários de medidas provisórias à Corte, ocorreram não menos de quatro mortes de beneficiários das medidas de proteção no *Complexo do Tatuapé da FEBEM*, que poderiam talvez ter sido evitadas, se o chamado “sistema interamericano” fosse mais eficaz.

5. Em toda e qualquer circunstância, os imperativos de proteção devem primar sobre os aparentes zelos institucionais. Em situações de violência crônica como a que se depreende do presente caso das *Crianças e Adolescentes Privados de Liberdade no Complexo do Tatuapé da FEBEM* no Brasil, não vejo porque a CIDH tivesse insistido - como o tem feito em tantos outros casos - em desde o início testar prolongadamente suas próprias medidas cautelares, ao invés de submeter de imediato uma solicitação de medidas provisórias à Corte, tão logo se configurasse uma situação de extrema gravidade e urgência, capaz de causar danos irreparáveis a pessoas, como já ocorreu no presente caso.

6. Preocupa-me, ademais, que tudo isto pareça prender-se à melancólica - e também crônica - carência de recursos humanos e materiais adequados dos dois órgãos de supervisão da Convenção Americana sobre Direitos Humanos<sup>59</sup>. Recordo-me de que, tão logo a Corte e a Comissão Interamericanas modificaram seus Regulamentos (os atuais Regulamentos, vigentes a partir de 2001), houve um compromisso por parte da Organização dos Estados Americanos (OEA) de incrementar adequadamente os recursos da Corte e da Comissão, para fazer face às despesas daí advindas e para assegurar uma justiça mais célere, sem prejuízo da segurança jurídica.

7. As resoluções 1827 (de 2001, par. 6), 1828 (de 2001, par. 1), 1850 (de 2002, par. 3), 1890 (de 2002, par. 1(d)), 1925 (de 2003, par. 4(a)), e 1918

---

59 Para uma advertência contra tal carência, cf. A.A. Cançado Trindade e M.E. Ventura Robles, *El Futuro de la Corte Interamericana de Derechos Humanos*, 2a. ed., San José de Costa Rica, CtiADH/ACNUR, 2004, pp. 7-461.

(de 2003, par. 5), da Assembleia Geral da OEA, vêm, neste particular, sendo descumpridas desde sua adoção até o presente, reduzidas a pouco mais que letra morta. Isto sugere uma falta de compromisso dos responsáveis pelo funcionamento eficaz do chamado “sistema interamericano”, salvo raros e honrosos esforços em vão de alguns poucos abnegados.

8. Esta expressão - “sistema interamericano” - não passa de um pleonasma, como assinaei em um ensaio publicado há sete anos, e como continua ocorrendo<sup>60</sup>. A isto se soma uma falta de reação mais vigorosa por parte da CIDH assim como da própria Corte, contra o atual descaso em relação aos meios para assegurar uma proteção internacional mais eficaz dos direitos humanos em nossa região.

9. Ao me recordar das horas e horas que consumi, preparando e apresentando extensos e sucessivos relatórios aos órgãos principais da OEA (no período 1999-2004), como então Presidente desta Corte, enfatizando *inter alia* a premente necessidade de recursos adicionais

---

60 Com efeito, o termo “sistema” pressupõe, no plano substantivo, “um conjunto coerente de princípios e normas, metodicamente organizados, formando o *substratum* de um pensamento, dotado de um propósito comum, e operando sob uma determinada forma de controle exercido por órgãos próprios de supervisão, constituindo um todo integral e orgânico”; e, no plano processual, pressupõe a coordenação permanente e adequada e o entendimento comum entre os dois órgãos de supervisão. A.A. Cançado Trindade, “Reflexiones sobre el Futuro del Sistema Interamericano de Protección de los Derechos Humanos”, in *El Futuro del Sistema Interamericano de Protección de los Derechos Humanos* (eds. J.E. Méndez e F. Cox), San José de Costa Rica, IIDH, 1998, pp. 574-575. E o adjetivo qualificativo “interamericano” pressupõe um regime jurídico que abarque igualmente os países das “três Américas” (do Sul, Central e do Norte), ademais dos do Caribe; mas sabemos que os países da América do Norte, que se arvoram em paladinos dos direitos humanos, têm até o presente se auto-excluído da Convenção Americana, mantendo assim uma dívida histórica a resgatar com os demais países da região, além de seus próprios governados; *ibid.*, pp. 575-576. - Como assinaei em meu Voto Concordante no Parecer n. 16 da Corte Interamericana sobre o *Direito à Informação sobre a Assistência Consular no Âmbito das Garantias do Devido Processo Legal* (1999), “o compromisso real de um país com os direitos humanos se mede, não tanto por sua capacidade de preparar unilateralmente, *sponte sua* e à margem dos instrumentos internacionais de proteção, relatórios governamentais sobre a situação dos direitos humanos em outros países, mas sim por sua iniciativa e determinação de tornar-se Parte nos tratados de direitos humanos, assumindo assim as obrigações convencionais de proteção nestes consagradas. No presente domínio de proteção, os mesmos critérios, princípios e normas devem ser válidos para todos os Estados, independentemente de sua estrutura federal ou unitária, assim como operar em benefício de todos os seres humanos, independentemente de sua nacionalidade ou quaisquer outras circunstâncias” (parágrafo 21).

para que os órgãos de supervisão da Convenção Americana, - em particular a Corte, - viessem a operar com maior agilidade e eficácia, tenho hoje a impressão de que estava discursando para as paredes. E temo que estes relatórios que apresentei já tenham sido tragados pelo passar impiedoso do tempo, e que talvez para pouco ou nada tenham servido, em meio às persistentes faltas de consciência e indiferença que nos circundam.

10. Voto, assim, a favor da presente Resolução da Corte, para tentar evitar que haja mais mortos e maltratados no *Complexo do Tatuapé da FEBEM* no Brasil, e deixo registro de minhas sérias preocupações anteriormente expostas. Tendo presentes os antecedentes deste caso, faço-o ciente de que o chamado “sistema interamericano” de proteção continua impassivelmente igual a si mesmo. E, em um ambiente marcado por intermináveis discursos e seminários, protagonismos efêmeros e vazios, quase nenhuma reflexão séria, e uma certa dose de surrealismo, constato com pesar que o trabalho dedicado e silencioso de Juiz da Corte Interamericana continua sendo irremediavelmente um apostolado.

## **7. VOTO CONCORDANTE DO JUIZ A.A. CANÇADO TRINDADE NO CASO DAS CRIANÇAS E ADOLESCENTES PRIVADOS DE LIBERDADE NO ‘COMPLEXO DO TATUAPÉ’ DA FEBEM versus BRASIL (Resolução de 29.11.2005)**

1. Ao votar a favor da adoção, pela Corte Interamericana de Direitos Humanos, da presente Resolução sobre Medidas Provisórias de Proteção no caso das *Crianças e Adolescentes Privados de Liberdade no Complexo do Tatuapé da FEBEM versus Brasil*, vejo-me, ademais, no dever de deixar registro de minhas reflexões pessoais como fundamento de minha posição acerca do deliberado pela Corte. Faço-o em meio à pressão impiedosa do tempo, contando com não mais que um dia e meio para deliberar, incluídas as horas consumidas pela frutuosa audiência pública de ontem, dia 29 de novembro de 2005, perante a Corte. Esta angustiante premência de tempo é um dos reflexos da precariedade dos recursos humanos e materiais, característica marcante e melancólica do assim-chamado “sistema interamericano” de direitos humanos.

2. O tempo de que somos privados pelos “responsáveis” pela alocação de recursos para a operação deste “sistema”, busco compensá-lo pelo que felizmente em nada depende dos demais: a bela vista das

montanhas do vale central de São José da Costa Rica, que me habituei a contemplar como grata recordação das montanhas de Minas Gerais. Nestas poucas horas com que posso contar para fundamentar minha posição - como sempre busco fazer - no presente Voto, proponho-me concentrar minhas breves reflexões em cinco pontos centrais, a saber: a) os direitos da criança e do adolescente na jurisprudência em matéria contenciosa e consultiva da Corte; b) o caráter tutelar, mais que cautelar, das medidas provisórias de proteção da Corte; c) as medidas provisórias da Corte e as obrigações *erga omnes* de proteção; d) o amplo alcance das obrigações *erga omnes* de proteção: suas dimensões vertical e horizontal; e e) o regime jurídico autônomo das medidas provisórias da Corte.

## I. Os Direitos da Criança e do Adolescente na Jurisprudência da Corte em Matéria Contenciosa e Consultiva

3. Antes de passar em revista o primeiro ponto, permito-me preliminarmente recordar uma alegoria. Na célebre obra literária *Lord of the Flies* (1954) de W. Golding, um grupo de meninos, abandonados à própria sorte (em uma ilha deserta, após sofrerem um acidente), gradualmente se brutaliza, desvendando a precariedade (se não a falácia) da “civilização”, ante o perene conflito entre o bem e o mal no interior de cada ser humano<sup>61</sup>. Quando, ao final do romance, os meninos (sobreviventes) são encontrados e resgatados na ilha, passam a tremer, chorar e soluçar, ante a inocência perdida e a constatação da escuridão da condição humana.

4. Quando, há meia-década, a tragédia dos meninos de rua alcançou esta Corte, - em um caso referente à Guatemala, mas que poderia ter ocorrido em qualquer outro país, - ao estudar o expediente, assaltaram-me perguntas que desde então se tornaram recorrentes. O que podemos esperar de meninos abandonados pela “civilização” nas ruas obscuras do mundo? O que podemos esperar de meninos confinados em “centros de reabilitação” ou de “bem-estar”, nos quais se familiarizam com o mal, ao invés de aprender a discernir entre o bem e o mal (que coexistem dentro de cada um de nós)? O que podemos esperar de meninos condenados pelo meio social, por políticas públicas

---

61 A fantasia do “bom selvagem” de J.J. Rousseau é, assim, reduzida a cinzas. - Sobre a concepção de Rousseau da infância, cf., recentemente, D. Youf, *Penser les droits de l'enfant*, Paris, PUF, 2002, pp. 22-24.

(“macroeconômicas”) em sociedades repressivas<sup>62</sup>, a uma existência sem sentido, sem projeto de vida, sem futuro, e não raro também sem passado, - condenados, em suma, a um presente perene, frágil e fugaz, e, portanto, ameaçador, se não desesperador? Em nada me surpreende que a coexistência entre o bem o mal dentro de todo ser humano tenha ocupado todo o pensamento filosófico e religioso em todas as eras da história da humanidade<sup>63</sup>.

5. O contencioso dos “*Meninos de Rua*” (caso *Villagrán Morales e Outros versus Guatemala*), concluído ante esta Corte há quatro anos, que hoje faz parte da história dos direitos humanos na América Latina<sup>64</sup>, revelou a importância do acesso direto dos indivíduos à jurisdição internacional, possibilitando-lhes vindicar seus direitos contra as manifestações do poder arbitrário, e dando um conteúdo ético às normas tanto do direito público interno como do direito internacional. Sua relevância foi claramente demonstrada perante a Corte no decorrer daquele histórico caso, no qual as mães dos meninos assassinados, tão pobres e abandonadas como os filhos, tiveram acesso à jurisdição internacional, compareceram a juízo<sup>65</sup>, e, graças às Sentenças quanto ao mérito e reparações desta Corte<sup>66</sup>, que as ampararam, puderam ao menos recuperar a fé na Justiça humana<sup>67</sup>.

6. Transcorridos quatro anos, o caso do *Instituto de Reeducação do Menor versus Paraguai* veio uma vez mais demonstrar, como assinei em meu Voto Separado (pars. 3-4) que o ser humano, ainda nas condições mais adversas, irrompe como sujeito do Direito Internacional dos

---

62 Em que, por exemplo, um delegado de polícia é muitíssimo mais valorizado socialmente do que um educador ou um professor universitário.

63 Cf. a obra magistral (dessas que não mais se escrevem em nossos dias apressados e “informatizados”) de R.P. Sertillanges, *Le problème du mal - l'histoire*, Paris, Aubier, 1948, pp. 5-412.

64 Cf., especificamente sobre o referido caso dos “*Meninos de Rua*”, referente à Guatemala, e.g., os livros: CEJIL, *Crianças e Adolescentes - Jurisprudência da Corte Interamericana de Direitos Humanos*, Rio de Janeiro, CEJIL/Brasil, 2003, pp. 7-237; Casa Alianza, *Los Pequeños Mártires...*, San José de Costa Rica, Casa Alianza/A.L., 2004, pp. 13-196; dentre várias outras publicações sobre o caso em questão.

65 Audiências públicas de 28-29.01.1999 e 12.03.2001 perante esta Corte.

66 De 19.11.1999 e de 26.05.2001, respectivamente.

67 Em meu extenso Voto Separado (pars. 1-43) naquele caso (Sentença de reparações, de 26.05.2001), ressaltai precisamente este ponto, ademais de outro virtualmente inexplorado na doutrina e jurisprudência internacionais até o presente, a saber, a tríade da vitimização, do sofrimento humano e da reabilitação das vítimas.

Direitos Humanos, dotado de plena capacidade jurídico-processual internacional. A Sentença da Corte neste caso referente ao Paraguai reconheceu devidamente a alta relevância das históricas reformas introduzidas pela Corte em seu atual Regulamento (pars. 107, 120-121 e 126), vigente a partir de 2001<sup>68</sup>, em prol da *titularidade*, dos indivíduos, dos direitos protegidos, outorgando-lhes *locus standi in judicio* em todas as etapas do procedimento contencioso perante a Corte. Os referidos casos dos “Meninos de Rua” e do *Instituto de Reeducação do Menor* são testemunhos eloquentes de tal titularidade, afirmada e exercida perante esta Corte, mesmo em situações da mais extrema adversidade<sup>69</sup>.

7. Em meu Voto Concordante em outro caso contencioso resolvido por esta Corte, o dos *Cinco Aposentados versus Peru* (Sentença de 28.02.2003), ponderei, na mesma linha de pensamento, que

Com efeito, a afirmação de tais personalidade e capacidade jurídicas constitui o legado verdadeiramente revolucionário da evolução da doutrina jurídica internacional na segunda metade do século XX. É chegado o momento de superar as limitações clássicas da *legitimitio ad causam* no Direito Internacional, que tanto têm freiado seu desenvolvimento progressivo rumo à construção de um novo *jus gentium*. (...) (par. 24).

8. Manifestações neste sentido encontram-se na jurisprudência recente desta Corte em matéria não só *contenciosa*, como também *consultiva*, a exemplo de seu Parecer Consultivo n. 17, sobre a *Condição Jurídica e Direitos Humanos da Criança* (de 28.08.2002), o qual situou-se na mesma linha de afirmação da emancipação jurídica do ser humano, ao enfatizar a consolidação da personalidade jurídica das crianças, como verdadeiros sujeitos de direito e não simples objeto de proteção.

---

68 Cf., a respeito, A.A. Cançado Trindade, “Le nouveau Règlement de la Cour Interaméricaine des Droits de l’Homme: quelques réflexions sur la condition de l’individu comme sujet du Droit international”, in *Libertés, justice, tolérance - Mélanges en hommage au Doyen G. Cohen-Jonathan*, vol. I, Bruxelles, Bruylant, 2004, pp. 351-365.

69 Como, no caso do *Instituto de Reeducação do Menor*, as que padeceram os internos no Instituto “Panchito López”, inclusive em meio a três incêndios (com internos mortos queimados, ou feridos), e mesmo ante as limitações de sua capacidade jurídica em razão de sua condição existencial de meninos (menores de idade); ainda assim, sua *titularidade* de direitos emanados diretamente do direito internacional tem subsistido intacta, e sua causa alcançou um tribunal internacional de direitos humanos.

Foi este o *Leitmotiv* que permeou todo o Parecer Consultivo n. 17 da Corte<sup>70</sup>.

9. Em meu Voto Concordante neste Parecer n. 17 da Corte sobre a *Condição Jurídica e Direitos Humanos da Criança*, uma vez mais destaquei que a importância, no *jus gentium* de nossos dias, da consolidação da personalidade e capacidade jurídicas internacionais do indivíduo, “independentemente de seu tempo existencial” (par. 70). E ponderei neste mesmo Voto, que

As crianças abandonadas nas ruas, as crianças tragadas pela delinquência, o trabalho infantil, a prostituição infantil forçada, o tráfico de crianças para venda de órgãos, as crianças envolvidas em conflitos armados, as crianças refugiadas, deslocadas e apátridas, são aspectos do cotidiano da tragédia contemporânea de um mundo aparentemente sem futuro.

Não vejo como evitar este prognóstico sombrio de que, um mundo que se descuida de suas crianças, que destrói o encanto de sua infância dentro delas, que põe um fim prematuro a sua inocência, e que as submete a toda sorte de privações e humilhações, efetivamente não tem futuro. (...)

(...) O passar do tempo deveria fortalecer os vínculos de solidariedade que unem todos os seres humanos, jovens e idosos, que experimentam um maior ou menor grau de vulnerabilidade em diferentes momentos ao longo de sua existência. Não obstante, nem sempre prevalece esta percepção dos efeitos implacáveis do passar do tempo, que a todos nós consome.

De modo geral, é ao início e ao final do tempo existencial que se experimenta maior vulnerabilidade, frente à proximidade do desconhecido (o nascimento e a primeira infância, a velhice e a morte). Todo meio social deve, assim, estar atento à condição humana. O meio social que se descuida de suas crianças não tem futuro. O meio social que se descuida de seus idosos não tem passado. E contar tão só com o presente fugaz não é mais do que uma mera ilusão. (...)

---

70 E afirmado de modo eloquente nos parágrafos 41 e 28.

(...) Todos vivemos no tempo. Cada um vive em seu tempo, que deve ser respeitado pelos demais. Importa que cada um viva em seu tempo, em harmonia com o tempo dos demais. A criança vive no minuto, o adolescente vive no dia, e o ser adulto, já 'impregnado de história'<sup>71</sup>, vive na época; os que já partiram, vivem na memória dos que ficam e na eternidade. Cada um vive em seu tempo, mas todos os seres humanos são iguais em direitos (pars. 2-5 e 69).

10. Após recordar que "toda criança tem efetivamente o direito de criar e desenvolver seu *projeto de vida*<sup>72</sup>", expressei meu entendimento no sentido de que "a aquisição do conhecimento é uma forma - talvez a mais eficaz - de emancipação humana, e imprescindível para a salvaguarda dos direitos inerentes a todo ser humano<sup>73</sup>" (par. 52). E adverti, em seguida, que os avanços logrados no plano jurídico para a proteção internacional dos direitos da criança

não nos podem fazer esquecer de que a atual deterioração das políticas sociais básicas em toda parte, agravando os problemas econômico-sociais que tanto afetam as crianças, e que transformam a necessidade de assegurar-lhes o direito de criar e desenvolver seu projeto de vida uma inegável questão de justiça. Os problemas recorrentes, e agravados, que hoje em dia afetam as crianças (somados à tragédia das crianças refugiadas, deslocadas e apátridas, e das crianças envolvidas em conflitos armados), advertem que continuamos longe de sua 'proteção integral' (par. 60).

11. Desse modo, em sua jurisprudência recente em matéria tanto *consultiva* como *contenciosa*, a Corte Interamericana tem sustentado a preservação dos direitos substantivos e processais da criança em todas e quaisquer circunstâncias. Subjacente a este notável desenvolvimento encontra-se a concepção kantiana da pessoa humana como um

71 Na feliz caracterização de Bertrand Russell, *A Última Oportunidade do Homem*, Lisboa, Guimarães Ed., 2001, p. 205.

72 Como a própria Corte afirmou em sua Sentença quanto ao mérito no supracitado caso dos "*Meninos de Rua*" (*Villagrán Morales e Outros versus Guatemala*, de 19.11.1999), Série C, n. 63, pp. 64-65, par. 144.

73 E como nossa capacidade de conhecimento é inelutavelmente limitada, a consciência dessa finitude é o melhor remédio para lutar contra os dogmatismos, a ignorância e os fanatismos, tão comuns em nossos dias.

fim em si mesmo, que abarca naturalmente as crianças, ou seja, todos os seres humanos independentemente das limitações de sua capacidade jurídica (de exercício). Tal desenvolvimento é guiado pelo princípio fundamental do respeito à dignidade da pessoa humana, independentemente de sua condição existencial.

12. Em virtude desse princípio, todo ser humano, independentemente da situação e das circunstâncias em que se encontra, tem direito à dignidade. Este princípio fundamental encontra-se invocado em distintos tratados e instrumentos internacionais de direitos humanos<sup>74</sup>. Em realidade, o reconhecimento e a consolidação da posição do ser humano como sujeito pleno do Direito Internacional dos Direitos Humanos constituem, em nossos dias, uma manifestação inequívoca e eloquente dos avanços do processo atual de *humanização* do próprio Direito Internacional (o novo *jus gentium* de nossos tempos)<sup>75</sup>.

## II. O Caráter Tutelar, Mais que Cautelar, das Medidas Provisórias de Proteção da Corte

13. A questão dos direitos da criança e do adolescente, já tratada por esta Corte no exercício de suas funções tanto consultiva como contenciosa (*supra*), ressurgiu agora, perante este Tribunal, em matéria de *medidas provisórias de proteção*, no presente caso das *Crianças e Adolescentes Privados de Liberdade no Complexo do Tatuapé da FEBEM*. Assim ressurgiu, - não há que passar despercebido, - por iniciativa não da Comissão Interamericana de Direitos Humanos, mas sim dos *representantes dos beneficiários das medidas de proteção*, atuando estes como verdadeira parte demandante e como sujeitos do Direito Internacional dos Direitos Humanos, como assinalei em meu Voto Concordante (par. 4) na recente Resolução desta Corte de 17.11.2005 no *cas d'espèce*.

14. A relevância destas medidas de proteção passa, assim, a requerer crescente atenção, também neste contexto (da efetiva proteção dos mais vulneráveis). Em perspectiva histórica, a transposição das medidas cautelares do ordenamento jurídico interno (tais como

74 E.g., os preâmbulos da Convenção das Nações Unidas sobre os Direitos da Criança de 1989; da Declaração dos Direitos da Criança de 1959; do Protocolo Adicional à Convenção Americana sobre Direitos Humanos em Matéria de Direitos Econômicos, Sociais e Culturais (Protocolo de San Salvador, de 1988), entre outros.

75 Cf., sobre este ponto, A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre, S.A. Fabris Ed., 2003, pp. 447-497.

construídas doutrinariamente, sobretudo no Direito Processual Civil, a partir da notável contribuição da doutrina italiana) ao ordenamento jurídico internacional - especificamente, ao contencioso *interestatal*, - não parece haver gerado, neste particular, uma mudança fundamental no *objeto* de tais medidas. Esta alteração só veio a ocorrer com a mais recente transposição das medidas provisórias do ordenamento jurídico internacional - o contencioso tradicional entre os Estados - ao Direito Internacional dos Direitos Humanos, dotado de especificidade própria.

15. No universo conceitual do Direito Internacional dos Direitos Humanos, - como tenho assinalado em diversas ocasiões e em distintos estudos, - as medidas provisórias de proteção têm passado a salvar, mais do que a eficácia da função jurisdicional, os próprios direitos fundamentais da pessoa humana, revestindo-se, assim, de um caráter verdadeiramente *tutelar*, mais do que *cautelar*<sup>76</sup>. Para isto tem contribuído decisivamente a jurisprudência da Corte Interamericana de Direitos Humanos sobre a matéria, mais do que a de qualquer outro tribunal internacional até o presente.

16. Sua construção jurisprudencial a respeito, dotada de uma base convencional, é verdadeiramente exemplar, sem paralelos - quanto a seu amplo alcance - na jurisprudência internacional contemporânea, tendo, nos últimos anos e até o presente, explorado devidamente um grande potencial de proteção - por meio da prevenção - que se depreende dos termos do artigo 63(2) da Convenção Americana sobre Direitos Humanos. Mas não obstante os avanços logrados até pela Corte até o presente, ainda resta um longo caminho a percorrer (*infra*).

17. Na audiência pública de ontem perante a Corte no presente caso das *Crianças e Adolescentes Privados de Liberdade no Complexo do Tatuapé da FEBEM*, ao formular minhas perguntas às três partes processuais

---

76 Para um estudo desta evolução, 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, "Provisional Measures of Protection in the Evolving Case-Law of the Inter-American Court of Human Rights (1987-2001)", in *El Derecho Internacional en los Albores del Siglo XXI - Homenaje al Prof. J.M. Castro-Rial Canosa* (ed. F.M. Mariño Menéndez), Madrid, Ed. Trotta, 2002, pp. 61-74; A.A. Cançado Trindade, "Les mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25; 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* (2003) pp. 162-168.

intervenientes, reiterei minhas sérias reservas, registradas em meu Voto na resolução da Corte de poucos dias atrás (17.11.2005) no *cas d'espèce*, quanto à demora da Comissão Interamericana em solicitar as presentes medidas provisórias à Corte, tratando-se de uma situação de violência crônica e de extrema gravidade e urgência. Não vejo razão para que a Comissão, em situações desta natureza, continue insistindo em suas medidas cautelares, em lugar de solicitar prontamente medidas provisórias de proteção - dotadas de base convencional - à Corte, que se revestem, como assinaei, de um caráter verdadeiramente *tutelar*.

### III. As Medidas Provisórias da Corte e as Obrigações *Erga Omnes* de Proteção

18. Passo ao terceiro ponto de minhas breves reflexões. Em meu Voto Concordante no caso da *Comunidade de Paz de San José de Apartadó versus Colômbia* (Resolução sobre medidas provisórias de proteção de 18.06.2002), permiti-me assinalar que a obrigação de proteção por parte do Estado não se limita às relações deste com as pessoas sob sua jurisdição, mas também, em determinadas circunstâncias, se estende às relações entre particulares; trata-se de uma autêntica obrigação *erga omnes* de proteção. Como ponderei naquele Voto, estamos, em última análise, perante uma obrigação *erga omnes* de proteção por parte do Estado de todas as pessoas sob sua jurisdição, obrigação esta que cresce em importância em uma situação de violência e insegurança pessoal crônicas, - como a do presente caso das *Crianças e Adolescentes Privados de Liberdade no Complexo do Tatuapé da FEBEM*, - a qual, como observei em meu Voto Concordante no caso da *Prisão de Urso Branco versus Brasil* (Resolução sobre medidas provisórias de proteção de 07.07.2004), - e aqui reitero, -

(...) requer claramente o reconhecimento dos efeitos da Convenção Americana *vis-à-vis* terceiros (o *Drittwirkung*), sem o qual as obrigações convencionais de proteção se reduziriam a pouco mais que letra morta.

A linha de raciocínio a partir da tese da responsabilidade *objetiva* do Estado é, em meu entender, inelutável, particularmente em um caso de medidas provisórias de proteção como o presente. Trata-se, aqui, de evitar danos irreparáveis aos membros de uma comunidade (...), em uma

situação de extrema gravidade e urgência, que involucra (...) órgãos e agentes da força pública (pars. 14-15).

19. Meu entendimento parece-me se impor, com particular vigor, quando se trata de pessoas que se encontram sob a custódia do Estado, e, ainda mais, quando se trata de crianças e adolescentes (menores de idade). Posteriormente, em outro caso de dimensões tanto individual como coletiva, em meu Voto Concordante no caso das *Comunidades do Jiguamiandó e do Curbaradó versus Colômbia* (Resolução sobre medidas provisórias de proteção de 06.03.2003), permiti-me insistir na necessidade do “reconhecimento dos efeitos da Convenção Americana vis-à-vis terceiros (o *Drittwirkung*)”, - próprio das obrigações *erga omnes*, - “sem o qual as obrigações convencionais de proteção se reduziriam a pouco mais que letra morta” (pars. 2-3). E agreguei que, das circunstâncias daquele caso se depreendia claramente que

a proteção dos direitos humanos determinada pela Convenção Americana, para ser eficaz, abarca não só as relações entre os indivíduos e o poder público, mas também suas relações com terceiros (...). Isto revela as novas dimensões da proteção internacional dos direitos humanos, assim como o grande potencial dos mecanismos de proteção existentes, - como o da Convenção Americana, - acionados para proteger coletivamente os membros de toda uma comunidade<sup>77</sup>, ainda que a base de ação seja a lesão - ou a probabilidade ou iminência de lesão - a direitos individuais (par. 4).

20. Ao longo da memorável audiência pública ontem realizada perante esta Corte, no presente caso das *Crianças e Adolescentes Privados de Liberdade no Complexo do Tatuapé da FEBEM*, - em que as três partes processuais intervenientes (os representantes dos beneficiários, o Estado brasileiro e a Comissão Interamericana) apresentaram importantes elementos factuais a esta Corte, imbuídos de um notável espírito construtivo e de cooperação processual, - ficou a meu ver demonstrado que a situação de violência crônica do presente caso se manifesta tanto nas relações dos jovens detidos com os agentes de segurança, como nas relações dos jovens detidos *inter se*. Daí a importância do correto entendimento das obrigações *erga omnes* de proteção, abarcando também as relações interindividuais.

---

<sup>77</sup> Sugerindo uma afinidade com as *class actions*.

21. Na presente Resolução (*considerandum* 13), a Corte dispõe corretamente que o dever do Estado de proteger todas as pessoas que se encontrem sob sua jurisdição compreende a obrigação de controlar as atuações de terceiros particulares, - obrigação esta de caráter *erga omnes*. Com efeito, há anos venho me empenhando, no seio desta Corte, na construção conceitual e jurisprudencial das obrigações *erga omnes* de proteção sob a Convenção Americana. Não é meu propósito aqui reiterar detalhadamente as ponderações que tenho desenvolvido anteriormente a respeito, particularmente em meus Votos Concordantes nas Resoluções de medidas provisórias de proteção adotadas pela Corte nos casos supracitados da *Comunidade de Paz de San José de Apartadó* (de 18.06.2002), das *Comunidades do Jiguamiandó e do Curbaradó* (de 06.03.2003) e da *Prisão de Urso Branco* (de 07.07.2004), assim como nos casos do *Povo Indígena Kankuamo versus Colômbia* (do 05.07.2004), do *Povo Indígena de Sarayaku versus Equador* (do 06.07.2004), da *Emissora de Televisão 'Globovisión' versus Venezuela* (de 04.09.2004), e das *Prisões de Mendoza versus Argentina* (18.06.2005), - mas sim singularizar brevemente os pontos centrais de minhas reflexões a respeito, a fim de assegurar a proteção eficaz dos direitos humanos em uma situação complexa como a do presente caso dos jovens reclusos no Complexo do Tatuapé da FEBEM.

22. Na verdade, bem antes do envio dos casos supracitados ao conhecimento desta Corte, já havia eu advertido para a premente necessidade da promoção do desenvolvimento doutrinal e jurisprudencial do regime jurídico das obrigações *erga omnes* de proteção dos direitos da pessoa humana (e.g., em meus Votos Separados nas Sentenças quanto ao mérito, de 24.01.1998, par. 28, e sobre reparações, de 22.01.1999, par. 40, no caso *Blake versus Guatemala*). E em meu Voto Separado no caso *Las Palmeras* (Sentença sobre exceções preliminares, de 04.02.2000), referente à Colômbia, ponderei que o correto entendimento do amplo alcance da obrigação geral de *garantia* dos direitos consagrados na Convenção Americana, estipulada em seu artigo 1(1), pode contribuir à realização do propósito do desenvolvimento das obrigações *erga omnes* de proteção (pars. 2 e 6-7).

23. Tal obrigação geral de garantia<sup>78</sup>, - agreguei em meu citado Voto no caso *Las Palmeras*, - impõe-se a cada Estado Parte individualmente e a todos eles em conjunto (obrigação *erga omnes partes* - pars. 11-12). Sendo assim,

difícilmente poderia haver melhores exemplos de mecanismo para aplicação das obrigações *erga omnes* de proteção (...) do que os métodos de supervisão previstos nos próprios tratados de direitos humanos, para o exercício da garantia coletiva dos direitos protegidos. (...) Os mecanismos para aplicação das obrigações *erga omnes partes* de proteção já existem, e o que urge é desenvolver seu regime jurídico, com atenção especial às obrigações positivas e às consequências jurídicas das violações de tais obrigações (par. 14).

Nessa linha de pensamento, na presente Resolução sobre o caso das *Crianças e Adolescentes Privados de Liberdade no Complexo do Tatuapé da FEBEM*, a Corte, ao endossar a tese das obrigações positivas do Estado (*considerandum* 14), refere-se precisamente ao dever geral dos Estados consagrado no artigo 1(1) da Convenção Americana.

#### **IV. O Amplo Alcance das Obrigações *Erga Omnes* de Proteção: Suas Dimensões Vertical e Horizontal.**

24. Passando à questão do que identifico como o amplo alcance das obrigações *erga omnes* de proteção<sup>79</sup>, em meu Voto Concordante no Parecer Consultivo n. 18 da Corte Interamericana sobre a *Condição Jurídica e Direitos dos Migrantes Indocumentados* (de 17.09.2003), permite-me recordar que tais obrigações *erga omnes*, caracterizadas pelo *jus cogens* (do qual emanam)<sup>80</sup> como dotadas de um caráter necessariamente

78 Efetivamente, a obrigação geral de garantia abarca a aplicação das medidas provisórias de proteção sob a Convenção Americana. En meu Voto Concordante no caso dos *Haitianos e Dominicanos de Origem Haitiana na República Dominicana* (Resolução de 18.08.2000), permiti-me destacar a modificação operada tanto no próprio *rationale* como no objeto das medidas provisórias de proteção (trasladadas originalmente, em sua trajetória histórica, do Direito Processual Civil ao Direito Internacional Público), com o impacto de sua aplicação no âmbito do Direito Internacional dos Direitos Humanos (pars. 17 e 23).

79 Cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre, S.A. Fabris Ed., 1999, pp. 412-420.

80 Neste mesmo Voto, permiti-me precisar que “por definição, todas as normas do *jus cogens* geram necessariamente obrigações *erga omnes*. Enquanto o *jus cogens* é um conceito

objetivo, abarcam, portanto, todos os destinatários das normas jurídicas (*omnes*), tanto os integrantes dos órgãos do poder público estatal como os particulares (par. 76). E prossegui, em meu propósito de construção doutrinária do amplo alcance das obrigações *erga omnes* de proteção:

(...) Em uma *dimensão vertical*, as obrigações *erga omnes* de proteção vinculam tanto os órgãos e agentes do poder público (estatal), como os simples particulares (nas relações interindividuais).

(...) No tocante à *dimensão vertical*, a obrigação geral, consagrada no artigo 1(1) da Convenção Americana, de respeitar e garantir o livre exercício dos direitos por ela protegidos, gera efeitos *erga omnes*, alcançando as relações do indivíduo tanto com o poder público (estatal) quanto com outros particulares<sup>81</sup> (pars. 77-78).

25. A doutrina jurídica contemporânea, em mostra de miopia, ao abordar as obrigações *erga omnes*, tem-se concentrado quase que exclusivamente na *dimensão horizontal* (obrigações devidas à comunidade internacional como um todo), esquecendo-se de distingui-la precisamente desta outra *dimensão*, a *vertical*, e lamentavelmente se descuidando inteiramente desta última, tão importante para o Direito Internacional dos Direitos Humanos. Urge dedicar maior atenção à *dimensão* que me permito denominar de *vertical* das obrigações *erga omnes* de proteção.

26. Venho insistindo neste ponto, no seio tanto da Corte Interamericana como do *Institut de Droit International*. Neste último o tenho feito tanto em meus comentários escritos<sup>82</sup>, como em seus debates. Há três meses, precisamente em seus últimos debates sobre a matéria, em sua última sessão de Cracóvia, permiti-me advertir, em minha intervenção oral do dia 25 de agosto de 2005 naquela cidade da Polônia, *inter alia* que

---

de direito material, as obrigações *erga omnes* se referem à estrutura de seu desempenho por parte de todas as entidades e todos os indivíduos obrigados. Por sua vez, nem todas as obrigações *erga omnes* se referem necessariamente a normas do *jus cogens*" (par. 80).

81 Cf., a esse respeito, em geral, a resolução adotada pelo *Institut de Droit International* (I.D.I.) na sessão de Santiago de Compostela de 1989 (artigo 1), in: I.D.I., 63 *Annuaire de l'Institut de Droit International* (1989)-II, pp. 286 e 288-289.

82 Cf. A.A. Cançado Trindade, "Reply [- Obligations and Rights *Erga Omnes* in International Law]", in 71 *Annuaire de l'Institut de Droit International - Session de Cracovie* (2005) n. 1, pp. 153-156 e 208-211.

(...) Precisely because obligations *erga omnes* incorporate fundamental values shared by the international community as a whole, compliance with them appears to me required not only of States, but also of other subjects of international law (including international organizations as well as peoples and individuals). Related to *jus cogens*, such obligations bind everyone.

After all, the beneficiaries of the compliance with, and due performance of, obligations *erga omnes* are all human beings (rather than States). I am thus concerned (...) that an essentially inter-State outlook (...) does not sufficiently reflect this important point. Moreover, the purely inter-State dimension of international law has long been surpassed, and seems insufficient, if not inadequate, to address obligations and rights *erga omnes*. To me, it is impossible here not to take into account the other subjects of international law, including the human person. (...)

Furthermore, the obligation to *respect*, and to *ensure respect* of, the protected rights, in all circumstances, - set forth in humanitarian and human rights treaties, - that is to say, the exercise of the collective guarantee, - is akin to the nature and substance of *erga omnes* obligations, and can effectively assist in the vindication of compliance with those obligations. *Jus cogens*, in generating obligations *erga omnes*, endows them with a necessarily objective character, encompassing all the addressees of the legal norms (*omnes*), - States, peoples and individuals. In sum, it seems to me that the rights and duties of all subjects of international law (including human beings, the ultimate beneficiaries of compliance with *erga omnes* obligations) should be taken into account in the determination of the legal regime of obligations *erga omnes*, and in particular of the juridical consequences of violations of such obligations.

Last but not least, I support the reference (...) to the qualification of "grave" breaches of *erga omnes* obligations, as they affect fundamental values shared by the international community as a whole and are owed to this latter, which, in my view, comprises all States as well as other subjects of international law. All of us who have accumulated experience in the resolution of human rights cases know for sure that rather often we

have been faced with situations which have disclosed an unfortunate diversification of the sources of grave violations of the rights of the human person (such as systematic practices of torture, of forced disappearance of persons, of summary or extra-legal executions, of traffic of persons and contemporary forms of slave work, of gross violations of the fundamental principle of equality and non-discrimination) - on the part of State as well as of non-State agents (such as clandestine groups, unidentified agents, death squads, paramilitary, and the like). This has required a clear recognition of the effects of the conventional obligations of protection also *vis-à-vis* third parties (the *Drittwirkung*), including individuals (identified and unidentified ones).

I feel that we cannot adequately approach *erga omnes* obligations, - compliance with which benefits ultimately the human person, - from a strictly inter-State perspective or dimension, which would no longer reflect the complexity of the contemporary international legal order. Obligations *erga omnes* have a *horizontal* dimension, in the sense that they are owed to the international community as a whole, to all subjects of international law, but they also have also a *vertical* dimension, in the sense that they bind everyone, - both the organs and agents of the State, of public power, as well as the individuals themselves (including in inter-individual relations, where grave breaches also do occur)<sup>83</sup>.

27. Com efeito, em sua *jurisprudence constante*, a Corte Interamericana tem recordado que o Estado, como responsável pelos estabelecimentos de detenção, é o garante dos direitos dos detidos, que se encontram sujeitos a sua custódia<sup>84</sup>. O Estado tem, assim, o dever inelutável de proteção *erga omnes*, inclusive nas relações

---

83 Intervenção oral de A.A. Cançado Trindade na Sessão de Cracóvia (agosto de 2005), ainda não publicada (e destinada a publicação no próximo volume do *Annuaire* do referido *Institut*).

84 Corte Interamericana de Derechos Humanos (CtIADH), caso *Bulacio versus Argentina*, Sentença de 18.09.2003, Série C, n. 100, pars. 126-127 e 138); CtIADH, caso *Hilaire, Constantine e Benjamin e Outros versus Trinidad e Tobago*, Sentença de 21.06.2002, Série C, n. 94, par. 165; CtIADH, caso *Bámaca Velásquez versus Guatemala*, Sentença de 25.11.2000, Série C, n. 70, par. 171; caso *Neira Alegría e Outros versus Peru*, Sentença de 19.01.1995, Série C, n. 20, par. 60.

interindividuais, de todos os que se encontram sob sua custódia. A Corte Interamericana tem advertido, a respeito, que “toda pessoa privada de liberdade tem direito a viver em condições de detenção compatíveis com sua dignidade pessoal e o Estado deve garantir-lhe o direito à vida e à integridade pessoal”<sup>85</sup>. Sendo assim, - agregou a Corte, - o poder do Estado de manter a ordem pública “não é ilimitado”, porquanto “tem o dever, em todo momento, de aplicar procedimentos conformes ao Direito e respeitosos dos direitos fundamentais, a todo indivíduo que se encontre sob sua jurisdição. (...)”<sup>86</sup>.

28. Em suma, como se depreende de minhas considerações anteriores, assim como jurisprudência supracitada, em toda e qualquer circunstância se impõe a obrigação de *devida diligência* por parte do Estado, para evitar danos irreparáveis a pessoas sob sua jurisdição e sua custódia. Medidas provisórias de proteção como as que vem de adotar a Corte Interamericana na presente Resolução sobre o caso das *Crianças e Adolescentes Privados de Liberdade no Complexo do Tatuapé da FEBEM* contribuem ao estabelecimento de um *monitoramento contínuo*, com base em uma disposição de um tratado de direitos humanos como a Convenção Americana (artigo 63(2)), de uma situação de extrema gravidade e urgência capaz de causar danos irreparáveis a seres humanos.

29. Como que se antecipando à presente Resolução da Corte, com este monitoramento contínuo estiveram de acordo as três partes processuais intervenientes na frutuosa audiência pública sobre o presente caso realizada ontem na sede do Tribunal. Me atrevo, pois, a nutrir a confiança de que o Estado brasileiro (representado na referida audiência por autoridades do Governo tanto federal como estadual de São Paulo), saberá dar cumprimento às medidas provisórias de proteção especificadas na presente Resolução da Corte, para manter-se à altura da valiosa e respeitável cultura jurídica brasileira.

## V. O Regime Jurídico Autônomo das Medidas Provisórias da Corte

30. Desse modo, estará resgatando uma parcela mínima de sua grande dívida social, ao estender proteção a jovens que vivem, ou

85 Cf.IADH, caso *Castillo Petruzzi e Outros versus Peru*, Sentença de 30.05.1999, Série C, n. 52, par. 195.

86 Cf.IADH, caso *J.H. Sánchez versus Honduras*, Sentença de 07.06.2003, Série C, n. 99, par. 111.

sobrevivem, no Complexo do Tatuapé da FEBEM na mais completa vulnerabilidade. Na audiência de ontem, os esforços já empreendidos pelos Governos federal e estadual foram reconhecidos pela própria Comissão Interamericana. Mas a lista das 11 reivindicações pendentes, a curto prazo, acrescidas de 3 outras reivindicações, a médio prazo, dos representantes dos beneficiários das medidas<sup>87</sup>, parece-me procedente e justa, e merecedora da maior atenção por parte desta Corte ao exercer seu monitoramento contínuo.

31. Ademais, no presente caso das *Crianças e Adolescentes Privados de Liberdade no Complexo do Tatuapé da FEBEM*, um jovem faleceu depois de adotadas as medidas provisórias da Corte de 17 de novembro de 2005, - o que faz surgir a noção de vítima também no âmbito das medidas provisórias de proteção, independentemente do mérito do caso, o que não deixa de ser motivo de preocupação. Por outro lado, também no contexto da prevenção de danos irreparáveis à pessoa humana, afirmou-se a centralidade desta última<sup>88</sup>, ainda que vitimada.

32. A esta questão específica dediquei meus dois Votos Concordantes no recente caso de *Eloísa Barrios e Outros versus Venezuela* (resoluções de 25.06.2005 e 22.09.2005), em meu propósito de elaborar a construção doutrinária do que denomino *regime jurídico autônomo das medidas provisórias de proteção*. Com efeito, estas últimas geram obrigações *per se* para os Estados em questão, que se distinguem das obrigações que emanam das respectivas Sentenças quanto ao mérito (e eventuais reparações) dos casos respectivos. Isto significa que as medidas provisórias de proteção constituem um instituto jurídico dotado de *autonomia* própria, tem efetivamente um *regime jurídico* próprio, o que, por sua vez, revela a alta relevância da dimensão *preventiva* da proteção internacional dos direitos humanos.

33. Tanto é assim que, sob a Convenção Americana (artigo 63(2)), a responsabilidade internacional de um Estado pode se configurar pelo descumprimento de medidas provisórias de proteção ordenadas pela Corte, sem que se encontre o caso respectivo, quanto ao mérito, em conhecimento da Corte (mas sim da Comissão Interamericana de Direitos Humanos). Isto reforça a minha tese no sentido de que as medidas provisórias de proteção da Corte, dotadas de base

87 CEJIL, *Os Pedidos*, pp. 1-3 (documento apresentado à Corte na audiência de 29.11.2005).

88 Cf. A.A. Cañado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104.

convencional, também o são de autonomia, têm um regime jurídico próprio, e seu descumprimento gera a responsabilidade do Estado, tem consequências jurídicas, ademais de destacar a posição central da vítima (de tal descumprimento), sem prejuízo do exame e resolução do caso concreto quanto ao mérito. Isto, por sua vez, revela a alta relevância da dimensão *preventiva* da proteção internacional dos direitos humanos, em seu amplo alcance (*supra*).

34. Além da base convencional do artigo 63(2) da Convenção Americana, as medidas provisórias de proteção da Corte se encontram reforçadas pelo dever geral dos Estados Partes, sob o artigo 1(1) da Convenção, de respeitar e assegurar o respeito, sem discriminação, dos direitos protegidos, em benefício de todas as pessoas sob suas respectivas jurisdições. Resta - como já adverti - um longo caminho a percorrer no fortalecimento do regime jurídico autônomo (tal como o vislumbro) das medidas provisórias da Corte, em benefício das pessoas protegidas e para assegurar o devido e pronto cumprimento, das medidas ordenadas pela Corte, pelos Estados em questão.

35. Como me permiti assinalar em meus dois supracitados Votos Concordantes nas Resoluções desta Corte de 29.06.2005 (pars. 10-11 de meu Voto) e de 22.09.2005 (par. 9 de meu Voto) no caso de *Eloisa Barrios e Outros*, e aqui me vejo na contingência de ter que reiterar, as medidas provisórias de proteção, cujo desenvolvimento até o presente sob a Convenção Americana constitui uma verdadeira conquista do Direito, encontram-se, em minha percepção, no entanto, ainda em sua infância, na aurora de sua evolução, e crescerão e se fortalecerão ainda mais na medida em que desperte a consciência jurídica universal para a necessidade de seu refinamento conceitual em todos os seus aspectos. O Direito Internacional dos Direitos Humanos tem transformado - como assinaléi ao início deste Voto - a própria *concepção* de tais medidas<sup>89</sup> - de cautelares em tutelares, - revelando o processo histórico corrente de *humanização* do Direito Internacional Público<sup>90</sup> também neste domínio específico, mas se trata de um processo que ainda se encontra em curso.

89 A.A. Cançado Trindade, "Prólogo del Presidente de la Corte Interamericana de Derechos Humanos", in *Compendio de Medidas Provisionales* (Junho 2001-Julho 2003), vol. 4, Serie E, San José da Costa Rica, Corte Interamericana de Derechos Humanos, 2003, pp. V-XXII.

90 Cf. A.A. Cançado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* - Belo Horizonte (2001) pp. 11-23; A.A. Cançado Trindade, "General Course

36. Há que prosseguir decididamente nesta direção. Como próximo passo a ser dado, urge, em nossos dias, que se desenvolva seu *regime jurídico*, e, no âmbito deste último, as *consequências jurídicas* do descumprimento ou violação das medidas provisórias de proteção, dotadas de autonomia própria. No meu entender, as *vítimas* ocupam, tanto no presente contexto de prevenção, como na resolução quanto ao mérito (e eventuais reparações) dos casos contenciosos, uma posição verdadeiramente central, como sujeitos do Direito Internacional dos Direitos Humanos e do Direito Internacional Público contemporâneo, dotados de capacidade jurídico-processual internacional<sup>91</sup>.

## **8. VOTO CONCURRENTENTE DEL JUEZ A.A. CAÑADO TRINDADE EN EL CASO DE LA COMUNIDAD DE PAZ DE SAN JOSÉ DE APARTADÓ versus COLOMBIA (Resolución del 02.02.2006)**

1. Al concurrir con mi voto a la adopción por la Corte Interamericana de Derechos Humanos de esta nueva Resolución sobre Medidas Provisionales de Protección en el caso de las *Comunidad de San José de Apartadó*, respecto de Colombia, me veo en la obligación de dejar constancia, en el presente Voto Concurrente, de una breve reflexión que me suscitan los hechos del *cas d'espèce*, así como de otros casos recientes que han conllevado esta Corte a ordenar Medidas Provisionales de Protección. En la actualidad, más de 11.500 personas (incluyendo miembros de comunidades enteras), residentes en países de América Latina y el Caribe, se encuentran bajo la protección de medidas provisionales ordenadas por esta Corte<sup>92</sup>. Éstas últimas se

---

on Public International Law - International Law for Humankind: Towards a New *Jus Gentium*", in *Recueil des Cours de l'Académie de Droit International de la Haye* (2005) (no prelo).

91 A.A. Cañado Trindade, "The Procedural Capacity of the Individual as Subject of International Human Rights Law: Recent Developments", in *K. Vasak Amicorum Liber - Les droits de l'homme à l'aube du XXIe siècle*, Bruxelles, Bruylant, 1999, pp. 521-544; A.A. Cañado Trindade, "A Consolidação da Personalidade e da Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", 16 *Anuario del Instituto Hispano-Luso-Americano de Derecho Internacional* - Madrid (2003) pp. 237-288.

92 Sólo en el caso del *Pueblo Indígena Kankuamo versus Colombia*, son cerca de seis mil los beneficiarios de las medidas; en el caso de la *Comunidad de San José de Apartadó versus Colombia*, los beneficiarios son más de 1200; en los casos de las *Comunidades del Juguiamandó y Curbaradó versus Colombia*, los beneficiarios son más de dos mil; en el caso de la *Cárcel de Urso Branco versus Brasil*, casi 900 reclusos se benefician de las medidas; en el caso del *Pueblo Indígena Sarayaku versus Ecuador*, son cerca de 1200 los beneficiarios; entre varios otros casos.

han expandido y asumido una considerable importancia en la última década, y se han transformado en una verdadera *garantía* jurisdiccional de carácter preventivo<sup>93</sup>. Y la Corte Interamericana, más que cualquier otro tribunal internacional contemporáneo, ha contribuido significativamente para su desarrollo tanto en el Derecho Internacional de los Derechos Humanos como en el Derecho Internacional Público contemporáneo.

2. Siendo así, no deja de causarme profunda preocupación constatar que un notable instituto jurídico, que ha salvado numerosas vidas y evitado otros daños irreparables a las personas, - titulares de los derechos protegidos bajo la Convención Americana sobre Derechos Humanos, - empiece a mostrarse insuficiente en ciertas situaciones-límite. Preocúpame profundamente que, en los cinco últimos años, como consecuencia directa del mundo crecientemente violento y deshumanizado en que vivimos, algunas personas que se encontraban bajo la protección de medidas provisionales ordenadas por ésta Corte, hayan, sin embargo, sido privadas arbitrariamente de su vida.

3. Esto ha ocurrido, - paradójicamente, *pari passu* con la extraordinaria expansión de las Medidas Provisionales de Protección bajo la Convención Americana, - no solamente en el presente caso de las en el caso de la *Comunidad de San José de Apartadó versus Colombia* (2002-2006), sino también en los casos de *Eloisa Barrios y Otros versus Venezuela* (2005), en el caso de la *Cárcel de Urso Branco versus Brasil* (2004-2006), en el caso de las *Penitenciarías de Mendoza versus Argentina* (2005-2006), en el caso de las *Comunidades del Juguiamandó y Curbaradó versus Colombia* (2003-2006), en el caso de los *Niños y Adolescentes Privados de Libertad en el 'Complexo do Tatuapé' de la FEBEM versus Brasil* (2005-2006), y en el caso *James y Otros versus Trinidad y Tobago* (2000-2002). Esto requiere una reacción por parte del Derecho, para proteger a los amenazados e indefensos.

---

93 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 y J.-F. Flauss), Bruxelles, Bruylant/Nemesis, 2005, pp. 145-163; A.A. Cançado Trindade, "Les Mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25; 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), n. 5-8, pp. 162-168.

4. En los casos supracitados ha habido, de ese modo, un claro incumplimiento de las Medidas Provisionales de Protección ordenadas por la Corte, las cuales se revisten de un carácter, más que cautelar, verdaderamente *tutelar*. Sin perjuicio del fondo de los referidos casos (las alegadas o presuntas violaciones originales de la Convención Americana), ahí se han violado medidas tutelares, de carácter esencialmente preventivo, que efectivamente protegen derechos fundamentales, - casi siempre derechos inderogables, como el derecho a la vida, - en la medida en que buscan evitar daños irreparables a la persona humana como sujeto del Derecho Internacional de los Derechos Humanos, y del Derecho Internacional Público contemporáneo.

5. Esto significa - y es ese el punto básico que me permito enfatizar en el presente Voto Concurrente, tal como lo vengo haciendo en otros de mis Votos en el mismo sentido - que, sin perjuicio del fondo de los respectivos casos, *la noción de víctima emerge también en el nuevo contexto de las Medidas Provisionales de Protección*. No hay cómo eludir este punto, que me genera inquietud y preocupación. Por otro lado, se afirma, también en el presente contexto de prevención de daños irreparables a la persona humana, la centralidad de esta última<sup>94</sup>, aunque victimada.

6. Las Medidas Provisionales de Protección acarrear obligaciones para los Estados en cuestión, que se distinguen de las obligaciones que emanan de las respectivas Sentencias en cuanto al fondo de los casos respectivos. Hay efectivamente obligaciones emanadas de las Medidas Provisionales de Protección *per se*. Son ellas enteramente distintas de obligaciones que eventualmente se desprendan de una Sentencia de fondo (y, en su caso, reparaciones) sobre el *cas d'espèce*. Esto significa que las Medidas Provisionales de Protección constituyen un instituto jurídico dotado de *autonomía* propia, tienen efectivamente un *régimen jurídico* propio, lo que, a su vez, revela la alta relevancia de la dimensión *preventiva* de la protección internacional de los derechos humanos.

7. Tanto es así que, bajo la Convención Americana (artículo 63(2)), la responsabilidad internacional de un Estado puede configurarse por el incumplimiento de Medidas Provisionales de Protección ordenadas por la Corte, sin que el caso respectivo se encuentre, en cuanto al fondo, en conocimiento de la Corte (sino más bien de la Comisión Interamericana

---

94 Cf. A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104.

de Derechos Humanos). Esto refuerza mi tesis, que me permito avanzar en este Voto Concurrente, en el sentido de que las Medidas Provisionales de Protección, dotadas que son de autonomía, tienen un régimen jurídico propio, y su incumplimiento genera la responsabilidad del Estado, tiene consecuencias jurídicas, además de destacar la posición central de la víctima (de dicho incumplimiento), sin perjuicio del examen y resolución del caso concreto en cuanto al fondo.

8. Además de la base convencional del artículo 63(2) de la Convención Americana, las Medidas Provisionales ante esta última se encuentran reforzadas por el deber general de los Estados Partes, bajo el artículo 1(1) de la Convención, de respetar y asegurar el respeto, sin discriminación, de los derechos protegidos, en beneficio de todas las personas bajo sus respectivas jurisdicciones. El amplio alcance de este deber general de garantía, - que abarca también las medidas provisionales de protección, - se encuentra analizado en mis recientes Voto Razonado (párrs. 15-21) en la Sentencia de la Corte en el caso de las *Niñas Yean y Bosico versus República Dominicana* (del 08.09.2005), Voto Razonado (párrs. 2-7 y 17-29) en su Sentencia en el caso de la *Masacre de Mapiripán* (del 15.09.2005) atinente a Colombia, y Voto Razonado (párrs. 2-13) en su Sentencia en el caso de la *Masacre de Pueblo Bello* (del 31.01.2006) también referente a Colombia. El mencionado artículo 1(1) provee, además, la base convencional para las obligaciones *erga omnes partes* bajo la Convención.

9. Tengo la sensación de que, a pesar de todo lo que ha hecho esta Corte en pro de la evolución de las Medidas Provisionales de Protección, - e insisto, más que cualquier otro tribunal internacional contemporáneo, - todavía hay un largo camino que recorrer. Hay que salvar el legado ya considerable de dichas medidas bajo la Convención Americana. Hay que fortalecer conceptualmente su régimen jurídico, en pro de las personas protegidas y de las víctimas de su incumplimiento (sin perjuicio del fondo de los casos respectivos). Esto se impone con aún mayor vigor en situaciones - como la del presente caso de la *Comunidad de San José de Apartadó versus Colombia* - de repetición de actos de hostigamiento y agresión (e inclusive muerte) de personas que ya se encontraban bajo medidas provisionales de protección de esta Corte, - actos estos reveladores de un patrón creciente de amenazas y violencia. Esto se impone con todo vigor en el mundo deshumanizado y vacío de valores en que vivimos.

10. Las Medidas Provisionales de Protección, cuyo desarrollo hasta la fecha bajo la Convención Americana constituye una verdadera conquista del Derecho, se encuentran, en mi percepción, sin embargo, todavía en su infancia, el albor de su evolución, y crecerán y se fortalecerán aún más en la medida en que despierte la conciencia jurídica universal para la necesidad de su refinamiento conceptual en todos sus aspectos. El Derecho Internacional de los Derechos Humanos ha transformado la propia *concepción* de dichas medidas<sup>95</sup> - de cautelares en tutelares, - revelando el proceso histórico corriente de *humanización* del Derecho Internacional Público<sup>96</sup> también en este dominio específico, pero se trata de un proceso que se encuentra todavía en curso.

11. Hay que proseguir decididamente en esta dirección. Como próximo paso a ser dado, urge, en nuestros días, que se desarrolle su *régimen jurídico*, y, en el marco de éste último, las *consecuencias jurídicas* del incumplimiento o violación de las Medidas Provisionales de Protección, dotadas de autonomía propia. En mi entender, las *víctimas* ocupan, tanto en el presente contexto de prevención, como en la resolución del fondo (y eventuales reparaciones) de los casos contenciosos, una posición verdaderamente central, como sujetos del Derecho Internacional de los Derechos Humanos y del Derecho Internacional Público contemporáneo, dotados de capacidad jurídico-procesal internacional.

## **9. VOTO CONCURRENTENTE DEL JUEZ A.A. CAÑADO TRINDADE EN EL CASO DE LAS COMUNIDADES DEL JIGUAMIANDÓ Y DEL CURBARADÓ versus COLOMBIA (Resolución del 07.02.2006)**

1. Al concurrir con mi voto a la adopción por la Corte Interamericana de Derechos Humanos de esta nueva Resolución sobre Medidas Provisionales de Protección en el caso de las *Comunidades del Jiguamiandó y del Curbaradó*, respecto de Colombia, me veo en la obligación de dejar constancia, en el presente Voto Concurrente, de una breve reflexión que me suscitan los hechos del *cas d'espèce*, así como de

95 A.A. Cañado Trindade, "Prólogo del Presidente de la Corte Interamericana de Derechos Humanos", in *Compendio de Medidas Provisionales* (Junio 2001-Julio 2003), vol. 4, Serie E, San José de Costa Rica, Corte Interamericana de Derechos Humanos, 2003, pp. V-XXII.

96 Cf. A.A. Cañado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais - Belo Horizonte/Brasil* (2001) pp. 11-23.

otros casos recientes que han conllevado esta Corte a ordenar Medidas Provisionales de Protección. En la actualidad, más de 11.500 personas (incluyendo miembros de comunidades enteras), residentes en países de América Latina y el Caribe, se encuentran bajo la protección de medidas provisionales ordenadas por esta Corte<sup>97</sup>. Éstas últimas se han expandido y asumido una considerable importancia en la última década, y se han transformado en una verdadera *garantía* jurisdiccional de carácter preventivo<sup>98</sup>. Y la Corte Interamericana, más que cualquier otro tribunal internacional contemporáneo, ha contribuido significativamente para su desarrollo tanto en el Derecho Internacional de los Derechos Humanos como en el Derecho Internacional Público contemporáneo.

2. Siendo así, no deja de causarme profunda preocupación constatar que un notable instituto jurídico, que ha salvado numerosas vidas y evitado otros daños irreparables a las personas, - titulares de los derechos protegidos bajo la Convención Americana sobre Derechos Humanos, - empiece a mostrarse insuficiente en ciertas situaciones-límite. Preocúpame profundamente que, en los cinco últimos años, como consecuencia directa del mundo crecientemente violento y deshumanizado en que vivimos, algunas personas que se encontraban bajo la protección de medidas provisionales ordenadas por ésta Corte, hayan, sin embargo, sido privadas arbitrariamente de su vida.

3. Esto ha ocurrido, - paradójicamente, *pari passu* con la extraordinaria expansión de las Medidas Provisionales de Protección bajo la Convención Americana, - no solamente en el presente caso de

---

97 Sólo en el caso del *Pueblo Indígena Kankuamo versus Colombia*, son cerca de seis mil los beneficiarios de las medidas; en el caso de la *Comunidad de San José de Apartadó versus Colombia*, los beneficiarios son más de 1200; en los casos de las *Comunidades del Juguíamandó y Curbaradó versus Colombia*, los beneficiarios son más de dos mil; en el caso de la *Cárcel de Urso Branco versus Brasil*, casi 900 reclusos se benefician de las medidas; en el caso del *Pueblo Indígena Sarayaku versus Ecuador*, son cerca de 1200 los beneficiarios; entre varios otros casos.

98 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 y J.-F. Flauss), Bruxelles, Bruylant/Nemesis, 2005, pp. 145-163; A.A. Cançado Trindade, "Les Mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", *4 Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25; 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), n. 5-8, pp. 162-168.

las en el caso de las *Comunidades del Jiguamiandó y Curbaradó versus Colombia* (2003-2006), sino también en los casos de *Eloisa Barrios y Otros versus Venezuela* (2005), en el caso de la *Cárcel de Urso Branco versus Brasil* (2004-2006), en el caso de las *Penitenciarías de Mendoza versus Argentina* (2005-2006), en el caso de la *Comunidad de San José de Apartadó versus Colombia* (2002-2006), en el caso de los *Niños y Adolescentes Privados de Libertad en el 'Complexo do Tatuapé' de la FEBEM versus Brasil* (2005-2006), y en el caso *James y Otros versus Trinidad y Tobago* (2000-2002). Esto requiere una reacción por parte del Derecho, para proteger a los amenazados e indefensos.

4. En los casos supracitados ha habido, de ese modo, un claro incumplimiento de las Medidas Provisionales de Protección ordenadas por la Corte, las cuales se revisten de un carácter, más que cautelar, verdaderamente *tutelar*. Sin perjuicio del fondo de los referidos casos (las alegadas o presuntas violaciones originales de la Convención Americana), ahí se han violado medidas tutelares, de carácter esencialmente preventivo, que efectivamente protegen derechos fundamentales, - casi siempre derechos inderogables, como el derecho a la vida, - en la medida en que buscan evitar daños irreparables a la persona humana como sujeto del Derecho Internacional de los Derechos Humanos, y del Derecho Internacional Público contemporáneo.

5. Esto significa - y es ese el punto básico que me permito enfatizar en el presente Voto Concurrente, tal como lo vengo haciendo en otros de mis Votos en el mismo sentido - que, sin perjuicio del fondo de los respectivos casos, *la noción de víctima emerge también en el nuevo contexto de las Medidas Provisionales de Protección*. No hay cómo eludir este punto, que me genera inquietud y preocupación. Por otro lado, se afirma, también en el presente contexto de prevención de daños irreparables a la persona humana, la centralidad de esta última<sup>99</sup>, aunque victimada.

6. Las Medidas Provisionales de Protección acarrear obligaciones para los Estados en cuestión, que se distinguen de las obligaciones que emanan de las respectivas Sentencias en cuanto al fondo de los casos respectivos. Hay efectivamente obligaciones emanadas de las Medidas Provisionales de Protección *per se*. Son ellas enteramente distintas de obligaciones que eventualmente se desprendan de una Sentencia de

---

99 Cf. A.A. Caçado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104.

fondo (y, en su caso, reparaciones) sobre el *cas d'espèce*. Esto significa que las Medidas Provisionales de Protección constituyen un instituto jurídico dotado de *autonomía* propia, tienen efectivamente un *régimen jurídico* propio, lo que, a su vez, revela la alta relevancia de la dimensión *preventiva* de la protección internacional de los derechos humanos.

7. Tanto es así que, bajo la Convención Americana (artículo 63(2)), la responsabilidad internacional de un Estado puede configurarse por el incumplimiento de Medidas Provisionales de Protección ordenadas por la Corte, sin que el caso respectivo se encuentre, en cuanto al fondo, en conocimiento de la Corte (sino más bien de la Comisión Interamericana de Derechos Humanos). Esto refuerza mi tesis, que me permito avanzar en este Voto Concurrente, en el sentido de que las Medidas Provisionales de Protección, dotadas que son de autonomía, tienen un régimen jurídico propio, y su incumplimiento genera la responsabilidad del Estado, tiene consecuencias jurídicas, además de destacar la posición central de la víctima (de dicho incumplimiento), sin perjuicio del examen y resolución del caso concreto en cuanto al fondo.

8. Además de la base convencional del artículo 63(2) de la Convención Americana, las Medidas Provisionales ante esta última se encuentran reforzadas por el deber general de los Estados Partes, bajo el artículo 1(1) de la Convención, de respetar y asegurar el respeto, sin discriminación, de los derechos protegidos, en beneficio de todas las personas bajo sus respectivas jurisdicciones. El amplio alcance de este deber general de garantía, - que abarca también las medidas provisionales de protección, - se encuentra analizado en mis recientes Voto Razonado (párrs. 15-21) en la Sentencia de la Corte en el caso de las *Niñas Yean y Bosico versus República Dominicana* (del 08.09.2005), Voto Razonado (párrs. 2-7 y 17-29) en su Sentencia en el caso de la *Masacre de Mapiripán* (del 15.09.2005) atinente a Colombia, y Voto Razonado (párrs. 2-13) en su Sentencia en el caso de la *Masacre de Pueblo Bello* (del 31.01.2006) también referente a Colombia. El mencionado artículo 1(1) provee, además, la base convencional para las obligaciones *erga omnes partes* bajo la Convención.

9. Tengo la sensación de que, a pesar de todo lo que ha hecho esta Corte en pro de la evolución de las Medidas Provisionales de Protección, - e insisto, más que cualquier otro tribunal internacional contemporáneo, - todavía hay un largo camino que recorrer. Hay que salvar el legado ya considerable de dichas medidas bajo la Convención

Americana. Hay que fortalecer conceptualmente su régimen jurídico, en pro de las personas protegidas y de las víctimas de su incumplimiento (sin perjuicio del fondo de los casos respectivos). Esto se impone con aún mayor vigor en situaciones - como la del presente caso de las *Comunidades del Jiguamiandó y Curbaradó versus Colombia* - de repetición de actos de hostigamiento y agresión (e inclusive muerte) de personas que ya se encontraban bajo medidas provisionales de protección de esta Corte, - actos estos reveladores de un patrón creciente de amenazas y violencia. Esto se impone con todo vigor en el mundo deshumanizado y vacío de valores en que vivimos.

10. Las Medidas Provisionales de Protección, cuyo desarrollo hasta la fecha bajo la Convención Americana constituye una verdadera conquista del Derecho, se encuentran, en mi percepción, sin embargo, todavía en su infancia, el albor de su evolución, y crecerán y se fortalecerán aún más en la medida en que despierte la conciencia jurídica universal para la necesidad de su refinamiento conceptual en todos sus aspectos. El Derecho Internacional de los Derechos Humanos ha transformado la propia *concepción* de dichas medidas<sup>100</sup> - de cautelares en tutelares, - revelando el proceso histórico corriente de *humanización* del Derecho Internacional Público<sup>101</sup> también en este dominio específico, pero se trata de un proceso que se encuentra todavía en curso.

11. Hay que proseguir decididamente en esta dirección. Como próximo paso a ser dado, urge, en nuestros días, que se desarrolle su *régimen jurídico*, y, en el marco de éste último, las *consecuencias jurídicas* del incumplimiento o violación de las Medidas Provisionales de Protección, dotadas de autonomía propia. En mi entender, las *víctimas* ocupan, tanto en el presente contexto de prevención, como en la resolución del fondo (y eventuales reparaciones) de los casos contenciosos, una posición verdaderamente central, como sujetos del Derecho Internacional de los Derechos Humanos y del Derecho

---

100 A.A. Cançado Trindade, "Prólogo del Presidente de la Corte Interamericana de Derechos Humanos", in *Compendio de Medidas Provisionales* (Junio 2001-Julio 2003), vol. 4, Serie E, San José de Costa Rica, Corte Interamericana de Derechos Humanos, 2003, pp. V-XXII.

101 Cf. A.A. Cançado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais - Belo Horizonte/Brasil* (2001) pp. 11-23.

Internacional Público contemporáneo, dotados de capacidad jurídico-procesal internacional.

## **10. VOTO RAZONADO DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO DE LAS PENITENCIARIAS DE MENDOZA versus ARGENTINA (Resolución del 30.03.2006)**

1. Al concurrir a la adopción, en esta ciudad de Brasília, de la presente Resolución de la Corte Interamericana de Derechos Humanos, mediante la cual el Tribunal ordena nuevas Medidas Provisionales de Protección en beneficio de todas las personas privadas de libertad en las *Penitenciarías de Mendoza* en Argentina, me veo en la obligación de retomar dos razonamientos personales en cuya construcción conceptual he estado empeñado hace tiempo en el seno de esta Corte. El primero se refiere a las obligaciones *erga omnes* de protección bajo la Convención Americana (teniendo presente la necesidad de contener y prevenir la situación de violencia crónica intra-prisional), obligaciones éstas que han sido objeto de numerosos Votos que he anteriormente presentado en el seno de esta Corte<sup>102</sup>; y el segundo atañe a lo que me permito denominar la *responsabilidad autónoma* del Estado en relación con las medidas provisionales de protección bajo la Convención Americana sobre Derechos Humanos. El campo estará entonces abierto para la presentación de las lecciones que me permito extraer de la audiencia

---

102 V.g., mis otros Votos Concurrentes en las Resoluciones de Medidas Provisionales de Protección adoptadas por la Corte en los casos de la *Comunidad de Paz de San José de Apartadó versus Colombia* (del 18.06.2002 y 15.03.2005), de las *Comunidades del Jiguamiandó y del Curbaradó versus Colombia* (del 06.03.2003 y 15.03.2005), del *Pueblo Indígena Kankuamo versus Colombia* (del 05.07.2004), del *Pueblo Indígena de Sarayaku versus Ecuador* (del 06.07.2004 y del 17.06.2005), y del *Cárcel de Urso Branco versus Brasil* (del 07.07.2004), de la *Emisora de Televisión 'Globovisión' versus Venezuela* (del 04.09.2004), de las *Penitenciarías de Mendoza versus Argentina* (del 18.06.2005), de los *Niños y Adolescentes Privados de Libertad en el Complejo del Tatuapé de FEBEM versus Brasil* (del 30.11.2005). Cf., asimismo, v.g., sobre el mismo tema de las medidas *erga omnes* de protección, mis anteriores Votos Razonados en las Sentencias sobre el fondo, del 24.01.1998, y sobre reparaciones, del 22.01.1999, en el caso *Blake versus Guatemala*; y mi Voto Razonado en el caso *Las Palmeras versus Colombia* (Sentencia sobre excepciones preliminares, del 04.02.2000). Y cf., más recientemente, sobre el mismo tema, mis Votos Razonados en los casos de la *Masacre de Mapiripán versus Colombia* (Sentencia del 15.09.2005) y de la *Masacre de Pueblo Bello versus Colombia* (Sentencia del 31.01.2006), así como mi extenso Voto Concurrente en la Opinión Consultiva n. 18 sobre la *Condición Jurídica y Derechos de los Migrantes Indocumentados* (del 17.09.2003); entre otros.

pública ante la Corte Interamericana recién concluida aquí en Brasília, y de la conclusión del presente Voto Razonado.

2. Lo hago, como siempre, bajo la presión despiadada y agotadora del tiempo, pocas horas después de la realización de la audiencia pública el día de hoy (30.03.2006) ante la Corte Interamericana en la ciudad de Brasilia, Brasil, sobre el presente caso de las *Penitenciarías de Mendoza en Argentina*, en medio a condiciones laborales típicas de la Organización de los Estados Americanos (OEA), - marcadas por muchos discursos y pocos recursos, - muy poco propicias a la meditación. Afortunadamente, en medio a las audiencias públicas de la Corte en Brasilia, logré encontrarme con el silencio, este fiel compañero, en los intervalos de dichas audiencias y actos protocolarios, para reflejar en la tan necesaria y reconfortante soledad sobre cómo avanzar en el presente dominio de protección en materia de medidas provisionales, en beneficio de los justiciables encarcelados.

### **I. Las Obligaciones *Erga Omnes* de Protección bajo la Convención Americana y el *Drittwirkung***

3. En mi Voto Concurrente en el caso de la *Comunidad de Paz de San José de Apartadó* (Resolución del 18.06.2002), me permití señalar que la obligación de protección por parte del Estado no se limita a las relaciones de éste con las personas bajo su jurisdicción, sino también, en determinadas circunstancias, se extiende a las relaciones entre particulares; se trata de una auténtica obligación *erga omnes* de protección, en favor, en el presente caso, de todas las personas recluidas en las *Penitenciarías de Mendoza*. Como ponderé en aquel Voto, así como en mi Voto Concurrente en la anterior Resolución de la Corte (del 18.06.2005) en el presente caso de las *Penitenciarías de Mendoza* - y lo reitero en este Voto Razonado, - estamos, en última instancia, ante una obligación *erga omnes* de protección por parte del Estado de todas las personas que se encuentren bajo su jurisdicción.

4. Esta obligación crece en importancia en una situación de violencia e inseguridad permanentes - enfatizadas en la recién concluida audiencia pública del 30.03.2006 - como la de las *Penitenciarías de Mendoza*, y la cual requiere claramente el reconocimiento de los efectos de la Convención Americana *vis-à-vis* terceros (el *Drittwirkung*), sin el cual las obligaciones convencionales de protección se reducirían a poco más que letra muerta. El razonamiento a partir de la tesis de

la responsabilidad *objetiva* del Estado es, a mi juicio, - me permito aquí reiterar, -ineluctable, particularmente en un caso de medidas provisionales de protección como el presente, en beneficio de personas que se encuentran encarceladas, bajo la custodia del Estado.

5. Estamos ante una situación de extrema gravedad y urgencia, que abarca tanto acciones de órganos y agentes de la fuerza pública, como relaciones inter-individuales al interior de las cárceles. Tal como lo advertí en mi Voto Concurrente en el caso de las *Comunidades del Jiguamiandó y del Curbaradó* (Resolución del 06.03.2003), atinente a Colombia, hay una necesidad apremiante del “reconocimiento de los efectos de la Convención Americana *vis-à-vis* terceros (el *Drittwirkung*)”, - propio de las obligaciones *erga omnes*, dado que, en circunstancias tanto de aquel caso como del *cas d’espèce*,

la protección de los derechos humanos determinada por la Convención Americana, de ser eficaz, abarca no sólo las relaciones entre los individuos y el poder público, sino también sus relaciones con terceros (...). Esto revela las nuevas dimensiones de la protección internacional de los derechos humanos, así como el gran potencial de los mecanismos de protección existentes, - como el de la Convención Americana, - accionados para proteger colectivamente los miembros de toda una comunidad, aunque la base de acción sea la lesión - o la probabilidad o inminencia de lesión - a derechos individuales (párr. 4).

6. En la presente Resolución, la Corte ha expresamente reconocido las obligaciones *erga omnes* de protección bajo la Convención Americana, mediante las cuales los Estados Partes deben salvaguardar los derechos protegidos en las relaciones de todas las personas bajo su jurisdicción no sólo *vis-à-vis* el poder público sino también *vis-à-vis* las actuaciones de terceros particulares (*considerandum* 6). La Corte ha, además, recordado que, de las obligaciones generales consagradas en los artículos 1(1) y 2 de la Convención, derivan deberes específicos que tienen presentes tanto la condición personal como las situaciones circunstanciales en que se encuentren los individuos en cuestión, como sujetos del derecho tanto interno como internacional (*considerandum* 9); y la Corte invoca tanto las disposiciones convenciones como el

derecho internacional general (*considerandum* 9), a mi modo de ver correctamente<sup>103</sup>.

## II. La Responsabilidad Internacional Autónoma en Materia de Medidas Provisionales de Protección bajo la Convención Americana

7. En la actualidad, en América Latina y el Caribe, casi 12 mil personas (incluyendo miembros de comunidades enteras) se encuentran bajo la protección de medidas provisionales ordenadas por esta Corte<sup>104</sup>. Éstas últimas se han expandido y asumido una considerable importancia en la última década, y se han transformado en una verdadera *garantía* jurisdiccional de carácter preventivo<sup>105</sup>. Y la Corte Interamericana, más que cualquier otro tribunal internacional contemporáneo, ha contribuido significativamente para su desarrollo tanto en el Derecho Internacional de los Derechos Humanos como en el Derecho Internacional Público contemporáneo.

8. Siendo así, no deja de causarme profunda preocupación constatar que un notable instituto jurídico, que ha salvado numerosas vidas y evitado otros daños irreparables a las personas, - titulares de los derechos protegidos bajo la Convención Americana sobre Derechos

---

103 Sobre este último punto, en particular, cf. A.A. Cançado Trindade, "La Convention Américaine relative aux Droits de l'Homme et le droit international général", in *Droit international, droits de l'homme et juridictions internationales* (eds. G. Cohen-Jonathan y J.-F. Flauss), Bruxelles, Bruylant, 2004, pp. 59-71.

104 Sólo en el caso del *Pueblo Indígena Kankuamo versus Colombia*, son cerca de seis mil los beneficiarios de las medidas; en el caso de la *Comunidad de San José de Apartadó versus Colombia*, los beneficiarios son más de 1200; en los casos de las *Comunidades del Juguíamandó y Curbaradó versus Colombia*, los beneficiarios son más de dos mil; en el caso de la *Cárcel de Urso Branco versus Brasil*, casi 900 reclusos se benefician de las medidas; en el caso del *Pueblo Indígena Sarayaku versus Ecuador*, son cerca de 1200 los beneficiarios; entre varios otros casos.

105 Para un estudio de esta evolución, cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brasil, 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 y J.-F. Flauss), Bruxelles, Bruylant/Nemesis, 2005, pp. 145-163; A.A. Cançado Trindade, "Les Mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25; 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), n. 5-8, pp. 162-168.

Humanos, - empiece a mostrarse insuficiente en ciertas situaciones-límite. Preocúpame profundamente que, en los cinco últimos años, como consecuencia directa del mundo crecientemente violento y deshumanizado en que vivimos, algunas personas que se encontraban bajo la protección de medidas provisionales ordenadas por ésta Corte, hayan, sin embargo, sido privadas arbitrariamente de su vida<sup>106</sup>. Esto requiere una reacción por parte del Derecho, para proteger a los amenazados e indefensos.

9. En los casos en que Esto ha ocurrido ha habido, de ese modo, un claro incumplimiento de las Medidas Provisionales de Protección ordenadas por la Corte, las cuales se revisten de un carácter, más que cautelar, verdaderamente *tutelar*. Sin perjuicio del fondo de los referidos casos (las alegadas o presuntas violaciones originales de la Convención Americana), ahí se han violado medidas tutelares, de carácter esencialmente preventivo, que efectivamente protegen derechos fundamentales, - casi siempre derechos inderogables, como el derecho a la vida, - en la medida en que buscan evitar daños irreparables a la persona humana como sujeto del Derecho Internacional de los Derechos Humanos, y del Derecho Internacional Público contemporáneo.

10. Esto significa - y es ese el punto básico que me permito enfatizar en el presente Voto Razonado, tal como lo vengo haciendo en otros de mis Votos en el mismo sentido - que, sin perjuicio del fondo de los respectivos casos, *la noción de víctima emerge también en el nuevo contexto de las Medidas Provisionales de Protección*. No hay cómo eludir este punto, que me genera inquietud y preocupación. Por otro lado, se afirma, también en el presente contexto de prevención de daños

---

106 Esto ha ocurrido, - paradójicamente, *pari passu* con la extraordinaria expansión de las Medidas Provisionales de Protección bajo la Convención Americana, - no solamente en el presente caso de las *Penitenciarias de Mendoza versus Argentina* (2005-2006), así como, v.g., en el caso de la *Comunidad de San José de Apartadó versus Colombia* (2002-2006), en el caso de *Eloisa Barrios y Otros versus Venezuela* (2005), en el caso de la *Cárcel de Urso Branco versus Brasil* (2004-2006), en el caso de las *Comunidades del Juguiamandó y Curbaradó versus Colombia* (2003-2006), en el caso de los *Niños y Adolescentes Privados de Libertad en el 'Complexo do Tatuapé' de la FEBEM versus Brasil* (2005-2006), y en el caso *James y Otros versus Trinidad y Tobago* (2000-2002).

irreparables a la persona humana, la centralidad de esta última<sup>107</sup>, aunque victimada.

11. Las Medidas Provisionales de Protección acarrear obligaciones convencionales para los Estados en cuestión, que se distinguen de las obligaciones que emanan de las respectivas Sentencias en cuanto al fondo de los casos respectivos. Hay efectivamente obligaciones emanadas de las Medidas Provisionales de Protección *per se*. Son ellas enteramente distintas de obligaciones que eventualmente se desprendan de una Sentencia de fondo (y, en su caso, reparaciones) sobre el *cas d'espèce*. Esto significa que las Medidas Provisionales de Protección constituyen un instituto jurídico dotado de *autonomía propia*, tienen efectivamente un *régimen jurídico propio*, lo que, a su vez, revela la alta relevancia de la dimensión *preventiva* de la protección internacional de los derechos humanos.

12. Tanto es así que, bajo la Convención Americana (artículo 63(2)), la responsabilidad internacional de un Estado puede configurarse por el incumplimiento de Medidas Provisionales de Protección ordenadas por la Corte, sin que el caso respectivo se encuentre, en cuanto al fondo, en conocimiento de la Corte (sino más bien de la Comisión Interamericana de Derechos Humanos). Esto refuerza mi tesis, que me permito avanzar en este Voto Concurrente, en el sentido de que las Medidas Provisionales de Protección, dotadas que son de autonomía, tienen un régimen jurídico propio, y su incumplimiento genera la responsabilidad del Estado, tiene consecuencias jurídicas, además de destacar la posición central de la víctima (de dicho incumplimiento), sin perjuicio del examen y resolución del caso concreto en cuanto al fondo.

12. Además de la base convencional del artículo 63(2) de la Convención Americana, las Medidas Provisionales ante esta última se encuentran reforzadas por el deber general de los Estados Partes, bajo el artículo 1(1) de la Convención, de respetar y asegurar el respeto, sin discriminación, de los derechos protegidos, en beneficio de todas las personas bajo sus respectivas jurisdicciones<sup>108</sup>. Tengo la sensación de

107 Cf. A.A. Caçado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104.

108 El amplio alcance de este deber general de garantía, - que abarca también las medidas provisionales de protección, - se encuentra analizado en mis recientes Voto Razonado (párrs. 15-21) en la Sentencia de la Corte en el caso de las *Niñas Yean y Bosico versus República Dominicana* (del 08.09.2005), Voto Razonado (párrs. 2-7 y 17-29) en su Sentencia en

que, a pesar de todo lo que ha hecho esta Corte en pro de la evolución de las Medidas Provisionales de Protección, - e insisto, más que cualquier otro tribunal internacional contemporáneo, - todavía hay un largo camino que recorrer. Hay que salvar el legado ya considerable de dichas medidas bajo la Convención Americana.

14. Hay que fortalecer conceptualmente su régimen jurídico, en pro de las personas protegidas y de las víctimas de su incumplimiento (sin perjuicio del fondo de los casos respectivos). Esto se impone con aún mayor vigor en situaciones - como la del presente caso de la *Comunidad de San José de Apartadó versus Colombia* - de repetición de actos de hostigamiento y agresión (e inclusive muerte) de personas que ya se encontraban bajo Medidas Provisionales de Protección de esta Corte, - actos estos reveladores de un patrón creciente de amenazas y violencia. Esto se impone con todo vigor en el mundo deshumanizado y vacío de valores en que vivimos.

### **III. Lecciones de la Audiencia Pública de Brasíla ante la Corte Interamericana del 30 de marzo de 2006**

15. En la supracitada audiencia pública ante esta Corte realizada el día de hoy, 30 de marzo de 2006, hace algunas horas, en la ciudad de Brasíla, en respuesta a preguntas que me permití formular a las Delegaciones tanto de los Representantes de los Beneficiarios de las Medidas como de la Comisión Interamericana de Derechos Humanos y del Estado, - que demostraron un espíritu de alentadora cooperación procesal durante la audiencia, - las partes procesales intervinientes coincidieron en que las obligaciones convencionales en materia de medidas provisionales de protección bajo la Convención Americana tienen efectos *erga omnes*. De ahí la necesidad, por ellos admitida, de asegurar la seguridad personal de los reclusos inclusive *dentro* de los pabellones (y no sólo mediante vigilancia externa de los mismos).

16. También convergieron los intervinientes en cuanto a la necesidad de una resolución clara e *contundente* por parte de la Corte (como lo solicitó expresamente inclusive el propio Estado), - ocasión en que manifesté mi escepticismo en cuanto a buscar “negociación”

---

el caso de la *Masacre de Mapiripán* (del 15.09.2005) atinente a Colombia, y Voto Razonado (párrs. 2-13) en su Sentencia en el caso de la *Masacre de Pueblo Bello* (del 31.01.2006) también referente a Colombia. El mencionado artículo 1(1) provee, además, la base convencional para las obligaciones *erga omnes partes* bajo la Convención.

o “conciliación” entre las “partes” en un procedimiento sumario atinente a situaciones de extrema gravedad y urgencia como lo es el de las medidas provisionales de protección. La Corte Interamericana no es un “órgano de conciliación”, y debe actuar como el tribunal internacional que es, con aún mayor fuerza en materia de medidas provisionales de protección. Así lo solicitaron expresamente las tres partes intervinientes en la audiencia pública de hoy ante la Corte.

17. Escuché sus alegatos con particular atención y comprensión, pues coinciden con mi visión de la materia en aprecio: en efecto, nunca me han convencido los intentos recientes de la Corte de estimular una solución “negociada”, o resultante de “conciliación”, entre las “partes”, para los propósitos de las medidas provisionales de protección, sobre todo de personas privadas de su libertad. La Corte debe *ordenar* dichas medidas *tout court*. Son conocidas y manifiestas las distinciones entre la conciliación y la solución judicial, y esta última<sup>109</sup> es reconocidamente la vía más evolucionada y perfeccionada de solución de controversias.

18. Esto me conduce a la tercera y última lección que me permito extraer de la audiencia de Brasilia; atañe a la admisión por parte de los intervinientes de la necesidad del reconocimiento del *carácter autónomo* de la responsabilidad internacional del Estado, con base en los artículos 63(2) y 1(1) de la Convención Americana, - tesis que vengo sosteniendo firmemente en el seno de esta Corte. Esto se pone de manifiesto, y genera grave preocupación, al menos de mi parte, cuando, del incumplimiento de las medidas provisionales de protección ordenadas por la Corte, resultan, - como en el presente caso, entre otros, - violaciones de derechos *inderogables*, como el derecho fundamental a la vida.

19. Así, si hay una violación de las medidas provisionales de protección ordenadas por esta Corte, dicha violación *se suma* a las supuestas violaciones que dieron origen al caso concreto en cuanto al fondo. Los casos, ante esta Corte, de medidas provisionales de protección de personas privadas de libertad, en que han ocurrido sucesivas violaciones del derecho a la vida de personas protegidas por dichas medidas (v.g, casos de las *Penitenciarías de Mendoza*, de la

---

109 Cf. A.A. Caçado Trindade, “Peaceful Settlement of International Disputes: Current State and Perspectives”, 31 *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* - OEA (2004-2005) pp. 1-46; A.A. Caçado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Ed. Renovar, 2002, pp. 749-789.

*Prisión de Urso Branco, de los Niños y Adolescentes Privados de Libertad en el Complejo del Tatuapé de la FEBEM, entre otros), confirman la inadecuación e inutilidad de la búsqueda de una “solución negociada” o de “conciliación” en el presente contexto, así como la apremiante necesidad de abordar toda esta materia de medidas provisionales de protección desde la óptica de una relación de *responsabilidad internacional del Estado*, y, - me permito agregar, - de una responsabilidad *autónoma* en relación con el *fondo* de los respectivos casos.*

#### IV. Conclusión

20. Las Medidas Provisionales de Protección, cuyo desarrollo hasta la fecha bajo la Convención Americana constituye una verdadera conquista del Derecho, se encuentran, en mi percepción, sin embargo, todavía en su infancia, el albor de su evolución, y crecerán y se fortalecerán aún más en la medida en que despierte la conciencia jurídica universal para la necesidad de su refinamiento conceptual en todos sus aspectos. El Derecho Internacional de los Derechos Humanos ha transformado la propia *concepción* de dichas medidas<sup>110</sup> - de cautelares en tutelares, - revelando el proceso histórico corriente de *humanización* del Derecho Internacional Público<sup>111</sup> también en este dominio específico, pero se trata de un proceso que se encuentra todavía en curso.

21. Hay que proseguir decididamente en esta dirección. Como próximo paso a ser dado, urge, en nuestros días, que se desarrolle su *régimen jurídico*, y, en el marco de éste último, las *consecuencias jurídicas* del incumplimiento o violación de las Medidas Provisionales de Protección, dotadas de autonomía propia. En mi entender, las *víctimas* ocupan, tanto en el presente contexto de prevención, como en la resolución del fondo (y eventuales reparaciones) de los casos contenciosos, una posición verdaderamente central, como sujetos

---

110 A.A. Cançado Trindade, “Prólogo del Presidente de la Corte Interamericana de Derechos Humanos”, in *Compendio de Medidas Provisionales* (Junio 2001-Julio 2003), vol. 4, Serie E, San José de Costa Rica, Corte Interamericana de Derechos Humanos, 2003, pp. V-XXII.

111 Cf. A.A. Cançado Trindade, *A Humanização do Direito Internacional*, Belo Horizonte/Brasil, Edit. Del Rey, 2006, pp. 3-409; A.A. Cançado Trindade, “La Humanización del Derecho Internacional y los Límites de la Razón de Estado”, 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais - Belo Horizonte/Brasil* (2001) pp. 11-23.

del Derecho Internacional de los Derechos Humanos y del Derecho Internacional Público contemporáneo, dotados de capacidad jurídico-procesal internacional.

## **11. VOTO FUNDAMENTADO DO JUIZ A.A. CANÇADO TRINDADE NO CASO DA PENITENCIÁRIA DE ARARAQUARA versus BRASIL (Resolução de 30.09.2006)**

1. Ao votar a favor da adoção, pela Corte Interamericana de Direitos Humanos, da presente Resolução sobre Medidas Provisórias de Proteção no caso da *Penitenciária de Araraquara versus Brasil*, vejo-me, ademais, no dever de deixar registro de minhas reflexões pessoais como fundamento de minha posição acerca do deliberado pela Corte. Faço-o, novamente, em meio à pressão impiedosa do tempo, tomando em conta a frutuosa audiência pública de anteontem, dia 28 de setembro de 2005, perante a Corte. Nestas poucas horas com que posso contar para fundamentar minha posição - como sempre busco fazer nesta Corte - no presente Voto, proponho-me concentrar minhas breves reflexões em cinco pontos centrais, a saber: a) o caráter *tutelar*, mais que *cautelar*, das medidas provisórias de proteção da Corte; b) a responsabilidade internacional *autônoma* em matéria de medidas provisórias de proteção sob a Convenção Americana; c) a interrelação entre os deveres gerais de proteção dos artigos 1(1) e 2 da Convenção Americana; d) as medidas provisórias da Corte Interamericana e as obrigações *erga omnes* de proteção; e) o amplo alcance das obrigações *erga omnes* de proteção: suas dimensões vertical e horizontal; f) o regime jurídico autônomo das medidas provisórias da Corte Interamericana; e g) problemas derivados da coexistência de medidas cautelares e Medidas Provisórias de Proteção à luz do imperativo do acesso direto do indivíduo à justiça internacional.

### **I. O Caráter Tutelar, Mais que Cautelar, das Medidas Provisórias de Proteção da Corte**

2. A relevância e o uso crescente das Medidas Provisórias de Proteção desta Corte passam a requerer cada vez maior atenção, sobretudo em situações de alta vulnerabilidade (da efetiva proteção de pessoas privadas de liberdade em condições infra-humanas de detenção). Em perspectiva histórica, a transposição das medidas cautelares do ordenamento jurídico interno (tais como construídas

doutrinariamente, sobretudo no Direito Processual Civil, a partir da notável contribuição da doutrina italiana) ao ordenamento jurídico internacional - especificamente, ao contencioso *interestatal*, - não parece haver gerado, neste particular, uma mudança fundamental no *objeto* de tais medidas. Esta alteração só veio a ocorrer com a mais recente transposição das medidas provisórias do ordenamento jurídico internacional - o contencioso tradicional entre os Estados - ao Direito Internacional dos Direitos Humanos, dotado de especificidade própria.

3. No universo conceitual do Direito Internacional dos Direitos Humanos, - como tenho assinalado em sucessivos Votos nesta Corte e em distintos estudos, - as medidas provisórias de proteção têm passado a salvaguardar, mais do que a eficácia da função jurisdicional, os próprios direitos fundamentais da pessoa humana, revestindo-se, assim, de um caráter verdadeiramente *tutelar*, mais do que *cautelar*<sup>112</sup>. Para isto tem contribuído decisivamente a jurisprudência da Corte Interamericana de Direitos Humanos sobre a matéria, mais do que a de qualquer outro tribunal internacional até o presente. Sua construção jurisprudencial a respeito, dotada de uma base convencional, é verdadeiramente exemplar, sem paralelos - quanto a seu amplo alcance - na jurisprudência internacional contemporânea, tendo, nos últimos anos e até o presente, explorado devidamente um grande potencial de proteção - por meio da prevenção - que se depreende dos termos do artigo 63(2) da Convenção Americana sobre Direitos Humanos. Mas não obstante os avanços logrados até pela Corte até o presente, ainda resta um longo caminho a percorrer (*infra*).

---

112 Para um estudo desta evolução, 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, "Provisional Measures of Protection in the Evolving Case-Law of the Inter-American Court of Human Rights (1987-2001)", in *El Derecho Internacional en los Albores del Siglo XXI - Homenaje al Prof. J.M. Castro-Rial Canosa* (ed. F.M. Mariño Menéndez), Madrid, Ed. Trotta, 2002, pp. 61-74; A.A. Cançado Trindade, "Les mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25; 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* (2003) pp. 162-168.

## II. A Responsabilidade Internacional *Autônoma* em Matéria de Medidas Provisórias de Proteção sob a Convenção Americana

4. Revestidas que se encontram de um caráter verdadeiramente *tutelar*, as Medidas Provisórias de Proteção sob a Convenção Americana acarretam, - como tenho assinalado em sucessivos Votos nesta Corte, - uma responsabilidade internacional *autônoma* por seu cumprimento, que se soma à responsabilidade inicial pela salvaguarda dos direitos protegidos. Tais medidas provisórias têm se expandido (protegendo, na atualidade, na América Latina e no Caribe, quase 12 mil personas, inclusive membros de comunidades inteiras<sup>113</sup>), e se transformado em uma verdadeira *garantia* jurisdicional de caráter preventivo<sup>114</sup>. Daí a autonomia da responsabilidade internacional que acarretam, devidamente reconhecida na presente Resolução da Corte no caso da *Penitenciária de Araraquara versus Brasil* (*considerandum* 18).

5. Isto significa, como assinalei em meu recente Voto Fundamentado no caso das *Penitenciárias de Mendoza versus Argentina* (Resolução sobre Medidas Provisórias de Proteção, de 30.03.2006, - assim como em outros Votos no seio desta Corte) que,

sin perjuicio del fondo de los respectivos casos, la noción de víctima emerge también en el nuevo contexto de las Medidas Provisionales de Protección. (...) Se afirma, también en el presente contexto de prevención de daños irreparables a la

113 Somente no caso do *Povo Indígena Kankuamo versus Colômbia*, são cerca de seis mil os beneficiários das medidas; no caso da *Comunidade de San José de Apartadó versus Colômbia*, os beneficiários são mais de 1200; nos casos das *Comunidades do Juguiamandó e Curbaradó versus Colômbia*, os beneficiários são mais de dois mil; no caso da *Prisão de Urso Branco versus Brasil*, quase 900 detentos se beneficiam das medidas; no caso do *Povo Indígena Sarayaku versus Equador*, são cerca de 1200 os beneficiários; entre vários outros casos.

114 Para um estudo desta evolução, 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 e J.-F. Flauss), Bruxelles, Bruylant/Nemesis, 2005, pp. 145-163; A.A. Cançado Trindade, "Les Mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25; 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), n. 5-8, pp. 162-168.

persona humana, la centralidad de esta última<sup>115</sup>, aunque victimada.

Las Medidas Provisionales de Protección acarrear obligaciones convencionales para los Estados en cuestión, que se distinguen de las obligaciones que emanan de las respectivas Sentencias en cuanto al fondo de los casos respectivos. Hay efectivamente obligaciones emanadas de las Medidas Provisionales de Protección *per se*. Son ellas enteramente distintas de obligaciones que eventualmente se desprendan de una Sentencia de fondo (y, en su caso, reparaciones) sobre el *cas d'espèce*. Esto significa que las Medidas Provisionales de Protección constituyen un instituto jurídico dotado de *autonomía* propia, tienen efectivamente un *régimen jurídico* propio, lo que, a su vez, revela la alta relevancia de la dimensión *preventiva* de la protección internacional de los derechos humanos.

Tanto es así que, bajo la Convención Americana (artículo 63(2)), la responsabilidad internacional de un Estado puede configurarse por el incumplimiento de **M e d i d a s** Provisionales de Protección ordenadas por la Corte, sin que el caso respectivo se encuentre, en cuanto al fondo, en conocimiento de la Corte (sino más bien de la Comisión Interamericana de Derechos Humanos). Esto refuerza mi tesis, que me permito avanzar en este Voto Concurrente, en el sentido de que las Medidas Provisionales de Protección, dotadas que son de autonomía, tienen un régimen jurídico propio, y su incumplimiento genera la responsabilidad del Estado, tiene consecuencias jurídicas, además de destacar la posición central de la víctima (de dicho incumplimiento), sin perjuicio del examen y resolución del caso concreto en cuanto al fondo.

Además de la base convencional del artículo 63(2) de la Convención Americana, las Medidas Provisionales ante esta última se encuentran reforzadas por el deber general de los Estados Partes, bajo el artículo 1(1) de la Convención, de respetar y asegurar el respeto, sin discriminación, de los derechos protegidos, en beneficio

---

115 Cf. A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104.

de todas las personas bajo sus respectivas jurisdicciones<sup>116</sup>. Tengo la sensación de que, a pesar de todo lo que ha hecho esta Corte en pro de la evolución de las Medidas Provisionales de Protección, - e insisto, más que cualquier otro tribunal internacional contemporáneo, - todavía hay un largo camino que recorrer. Hay que salvar el legado ya considerable de dichas medidas bajo la Convención Americana.

Hay que fortalecer conceptualmente su régimen jurídico, en pro de las personas protegidas y de las víctimas de su incumplimiento (sin perjuicio del fondo de los casos respectivos). Esto se impone con aún mayor vigor en situaciones (...) reveladoras de un patrón creciente de amenazas y violencia. Esto se impone con todo vigor en el mundo deshumanizado y vacío de valores en que vivimos (parágrafos 10-14).

### III. A Interrelação entre os Deveres Gerais de Proteção dos Artigos 1(1) e 2 da Convenção Americana

6. Na presente Resolução no caso da *Penitenciária de Araraquara*, a Corte deixou consignado como ponto positivo o espírito construtivo e de cooperação processual demonstrado pelas partes intervenientes na audiência pública realizada anteontem, dia 28.09.2005, perante o Tribunal (*considerandum* 9). Mais adiante, a Corte reiterou o seu entendimento no sentido da interrelação entre os deveres gerais - de caráter *erga omnes* - de respeitar e assegurar o respeito aos direitos consagrados na Convenção Americana, e de harmonizar o direito interno com a normativa de proteção desta última, tal como disposto nos artigos 1(1) e (2) da Convenção (*considerandum* 17).

7. Com efeito, desde meus primeiros anos no seio desta Corte, tenho consistentemente interrelacionado os deveres gerais dos artigos

---

116 El amplio alcance de este deber general de garantía, - que abarca también las medidas provisionales de protección, - se encuentra analizado en mis recientes Voto Razonado (párrs. 15-21) en la Sentencia de la Corte en el caso de las *Niñas Yean y Bosico versus República Dominicana* (del 08.09.2005), Voto Razonado (párrs. 2-7 y 17-29) en su Sentencia en el caso de la *Masacre de Mapiripán* (del 15.09.2005) atinente a Colombia, y Voto Razonado (párrs. 2-13) en su Sentencia en el caso de la *Masacre de Pueblo Bello* (del 31.01.2006) también referente a Colombia. El mencionado artículo 1(1) provee, además, la base convencional para las obligaciones *erga omnes partes* bajo la Convención.

1(1) e 2 da Convenção Americana, desde meu Voto Dissidente (pars. 2-11) no caso *El Amparo* referente à Venezuela, na Sentença sobre reparações, de 14.09.1996. Em outro Voto Dissidente no mesmo caso *El Amparo* (Resolução de 16.04.1997 sobre Interpretação de Sentença), sustentei a responsabilidade internacional objetiva ou “absoluta” do Estado por falta de cumprimento de suas obrigações *legislativas* sob a Convenção Americana, de modo a harmonizar seu direito interno com suas obrigações convencionais (pars. 12-14 e 21-26). Ainda há poucos dias (precisamente há quatro dias), retomei o mesmo ponto em meu Voto Fundamentado (pars. 24-25) no caso *Almonacid Arellano e Outros versus Chile* (Sentença de 26.09.2006), acerca da total incompatibilidade com a Convenção Americana do decreto-lei de auto-anistia de 1978 do regime Pinochet.

8. Ademais, e voltando à década passada, em meu Voto Dissidente no caso *Caballero Delgado e Santana versus Colômbia* (Sentença sobre reparações, de 29.01.1997) sustentei, sobre a referida interrelação entre os deveres gerais de respeitar e garantir os direitos protegidos e de adequar o ordenamento jurídico interno à normativa de proteção da Convenção Americana (par. 6), que

En realidad, estas dos obligaciones generales, - que se suman a las demás obligaciones convencionales, específicas, en relación con cada uno de los derechos protegidos, - se imponen a los Estados Partes por la aplicación del propio Derecho Internacional, de un principio general (*pacta sunt servanda*) cuya fuente es metajurídica, al buscar basarse, más allá del consentimiento individual de cada Estado, en consideraciones acerca del carácter obligatorio de los deberes derivados de los tratados internacionales. En el presente dominio de protección, los Estados Partes tienen la obligación general, emanada de un principio general del Derecho Internacional, de tomar todas las medidas de derecho interno para *garantizar* la protección eficaz (*effet utile*) de los derechos consagrados.

Las dos obligaciones generales consagradas en la Convención Americana - la de respetar y garantizar los derechos protegidos (artículo 1.1) y la de adecuar el derecho interno a la normativa internacional de protección (artículo 2) - me parecen ineluctablemente interligadas. (...) Como estas normas convencionales vinculan los Estados Partes

- y no solamente sus Gobiernos, - también los Poderes Legislativo y Judicial, además del Ejecutivo, están obligados a tomar las providencias necesarias para dar eficacia a la Convención Americana en el plano del derecho interno. El incumplimiento de las obligaciones convencionales, como se sabe, compromete la responsabilidad internacional del Estado, por actos u omisiones, sea del Poder Ejecutivo, sea del Legislativo, sea del Judicial. En suma, las obligaciones internacionales de protección, que en su amplio alcance vinculan conjuntamente todos los poderes del Estado (...) (párrs. 8-10).

#### **IV. As Medidas Provisórias da Corte Interamericana e as Obrigações *Erga Omnes* de Proteção**

9. Passo ao ponto seguinte de minhas breves reflexões no presente caso da *Penitenciária de Araraquara*. Em meu Voto Concordante no caso da *Comunidade de Paz de San José de Apartadó versus Colômbia* (Resolução sobre Medidas Provisórias de Proteção de 18.06.2002), permiti-me assinalar que a obrigação de proteção por parte do Estado não se limita às relações deste com as pessoas sob sua jurisdição, mas também, em determinadas circunstâncias, se estende às relações entre particulares; trata-se de uma autêntica obrigação *erga omnes* de proteção. Como ponderei naquele Voto, estamos, em última análise, perante uma obrigação *erga omnes* de proteção por parte do Estado de todas as pessoas sob sua jurisdição, obrigação esta que cresce em importância em uma situação de violência e insegurança pessoal crônicas, - como a do presente caso da *Penitenciária de Araraquara*, - a qual, como observei em meu Voto Concordante no caso da *Prisão de Urso Branco versus Brasil* (Resolução sobre Medidas Provisórias de Proteção de 07.07.2004), - e aqui reitero, -

(...) requer claramente o reconhecimento dos efeitos da Convenção Americana *vis-à-vis* terceiros (o *Drittwirkung*), sem o qual as obrigações convencionais de proteção se reduziriam a pouco mais que letra morta.

A linha de raciocínio a partir da tese da responsabilidade *objetiva* do Estado é, em meu entender, inelutável, particularmente em um caso de medidas provisórias de proteção como o presente. Trata-se, aqui, de evitar danos irreparáveis aos membros de uma comunidade (...), em uma

situação de extrema gravidade e urgência, que involucra (...) órgãos e agentes da força pública (pars. 14-15).

10. Meu entendimento parece-me se impor, com particular vigor, quando se trata de pessoas que se encontram sob a custódia do Estado, e, ainda mais, quando se trata de crianças e adolescentes (menores de idade). Posteriormente, em outro caso de dimensões tanto individual como coletiva, em meu Voto Concordante no caso das *Comunidades do Jiguamiandó e do Curbaradó versus Colômbia* (Resolução sobre Medidas Provisórias de Proteção de 06.03.2003), permiti-me insistir na necessidade do “reconhecimento dos efeitos da Convenção Americana vis-à-vis terceiros (o *Drittwirkung*)”, - próprio das obrigações *erga omnes*, - “sem o qual as obrigações convencionais de proteção se reduziriam a pouco mais que letra morta” (pars. 2-3). E agreguei que, das circunstâncias daquele caso se depreendia claramente que

a proteção dos direitos humanos determinada pela Convenção Americana, para ser eficaz, abarca não só as relações entre os indivíduos e o poder público, mas também suas relações com terceiros (...). Isto revela as novas dimensões da proteção internacional dos direitos humanos, assim como o grande potencial dos mecanismos de proteção existentes, - como o da Convenção Americana, - acionados para proteger coletivamente os membros de toda uma comunidade<sup>117</sup>, ainda que a base de ação seja a lesão - ou a probabilidade ou iminência de lesão - a direitos individuais (par. 4).

11. Depreende-se claramente da presente Resolução o entendimento no sentido de que o dever do Estado de proteger todas as pessoas que se encontrem sob sua jurisdição compreende a obrigação de controlar as atuações de terceiros particulares, - obrigação esta de caráter *erga omnes* (*consideranda* 17 e 23-24). Com efeito, há anos venho me empenhando, no seio desta Corte, na construção conceitual e jurisprudencial das obrigações *erga omnes* de proteção sob a Convenção Americana. Não é meu propósito aqui reiterar detalhadamente as ponderações que tenho desenvolvido anteriormente a respeito, particularmente em meus Votos Concordantes nas Resoluções de Medidas Provisórias de Proteção adotadas pela Corte nos casos supracitados da *Comunidade de Paz de San José de Apartadó* (de 18.06.2002), das *Comunidades do*

---

<sup>117</sup>Sugerindo uma afinidade com as *class actions*.

*Jiguamiandó e do Curbaradó* (de 06.03.2003) e da *Prisão de Urso Branco* (de 07.07.2004), assim como nos casos do *Povo Indígena Kankuamo versus Colômbia* (do 05.07.2004), do *Povo Indígena de Sarayaku versus Equador* (do 06.07.2004), da *Emissora de Televisão 'Globovisión' versus Venezuela* (de 04.09.2004), e das *Prisões de Mendoza versus Argentina* (18.06.2005), - mas sim singularizar brevemente os pontos centrais de minhas reflexões a respeito, a fim de assegurar a proteção eficaz dos direitos humanos em uma situação complexa como a do presente caso da *Penitenciária de Araraquara*.

12. Na verdade, bem antes do envio dos casos supracitados ao conhecimento desta Corte, já havia eu advertido para a premente necessidade da promoção do desenvolvimento doutrinal e jurisprudencial do regime jurídico das obrigações *erga omnes* de proteção dos direitos da pessoa humana (e.g., em meus Votos Fundamentados nas Sentenças quanto ao mérito, de 24.01.1998, par. 28, e sobre reparações, de 22.01.1999, par. 40, no caso *Blake versus Guatemala*). E em meu Voto Fundamentado no caso *Las Palmeras* (Sentença sobre exceções preliminares, de 04.02.2000), referente à Colômbia, ponderei que o correto entendimento do amplo alcance da obrigação geral de *garantia* dos direitos consagrados na Convenção Americana, estipulada em seu artigo 1(1), pode contribuir à realização do propósito do desenvolvimento das obrigações *erga omnes* de proteção (pars. 2 e 6-7).

13. Tal obrigação geral de garantia<sup>118</sup>, - agreguei em meu citado Voto no caso *Las Palmeras*, - impõe-se a cada Estado Parte individualmente e a todos eles em conjunto (obrigação *erga omnes partes* - pars. 11-12). Sendo assim,

difícilmente poderia haver melhores exemplos de mecanismo para aplicação das obrigações *erga omnes* de proteção (...) do que os métodos de supervisão previstos nos próprios tratados de direitos humanos, para o exercício da garantia coletiva dos direitos protegidos. (...) Os

---

118 Efetivamente, a obrigação geral de garantia abarca a aplicação das medidas provisórias de proteção sob a Convenção Americana. En meu Voto Concordante no caso dos *Haitianos e Dominicanos de Origem Haitiana na República Dominicana* (Resolução de 18.08.2000), permiti-me destacar a modificação operada tanto no próprio *rationale* como no objeto das medidas provisórias de proteção (trasladadas originalmente, em sua trajetória histórica, do Direito Processual Civil ao Direito Internacional Público), com o impacto de sua aplicação no âmbito do Direito Internacional dos Direitos Humanos (pars. 17 e 23).

mecanismos para aplicação das obrigações *erga omnes partes* de proteção já existem, e o que urge é desenvolver seu regime jurídico, com atenção especial às *obrigações positivas* e às *consequências jurídicas* das violações de tais obrigações (par. 14).

Nessa linha de pensamento, na presente Resolução sobre o caso da *Penitenciária de Araraquara*, a Corte, ao endossar a tese das obrigações positivas do Estado, refere-se precisamente ao dever geral dos Estados consagrado no artigo 1(1) da Convenção Americana, em interrelação inelutável com o outro dever geral consignado no artigo 2 da Convenção (cf. *supra*).

## V. O Amplo Alcance das Obrigações *Erga Omnes* de Proteção: Suas Dimensões Vertical e Horizontal.

14. Passando à questão do que identifico como o amplo alcance das obrigações *erga omnes* de proteção<sup>119</sup>, em meu Voto Concordante no Parecer Consultivo n. 18 da Corte Interamericana sobre a *Condição Jurídica e Direitos dos Migrantes Indocumentados* (de 17.09.2003), permiti-me recordar que tais obrigações *erga omnes*, caracterizadas pelo *jus cogens* (do qual emanam)<sup>120</sup> como dotadas de um caráter necessariamente *objetivo*, abarcam, portanto, todos os destinatários das normas jurídicas (*omnes*), tanto os integrantes dos órgãos do poder público estatal como os particulares (par. 76). E prossegui, em meu propósito de construção doutrinária do amplo alcance das obrigações *erga omnes* de proteção:

(...) Em uma *dimensão vertical*, as obrigações *erga omnes* de proteção vinculam tanto os órgãos e agentes do poder público (estatal), como os simples particulares (nas relações interindividuais).

(...) No tocante à *dimensão vertical*, a obrigação geral, consagrada no artigo 1(1) da Convenção Americana, de respeitar e garantir o livre exercício dos direitos por ela

119Cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. II, Porto Alegre, S.A. Fabris Ed., 1999, pp. 412-420.

120Neste mesmo Voto, permiti-me precisar que “por definição, todas as normas do *jus cogens* geram necessariamente obrigações *erga omnes*. Enquanto o *jus cogens* é um conceito de direito material, as obrigações *erga omnes* se referem à estrutura de seu desempenho por parte de todas as entidades e todos os indivíduos obrigados. Por sua vez, nem todas as obrigações *erga omnes* se referem necessariamente a normas do *jus cogens*” (par. 80).

protegidos, gera efeitos *erga omnes*, alcançando as relações do indivíduo tanto com o poder público (estatal) quanto com outros particulares<sup>121</sup> (pars. 77-78).

15. A doutrina jurídica contemporânea, em mostra de miopia, ao abordar as obrigações *erga omnes*, tem-se concentrado quase que exclusivamente na dimensão *horizontal* (obrigações devidas à comunidade internacional como um todo), esquecendo-se de distingui-la precisamente desta outra dimensão, a vertical, e lamentavelmente se descuidando inteiramente desta última, tão importante para o Direito Internacional dos Direitos Humanos. Urge dedicar maior atenção à dimensão que me permito denominar de *vertical* das obrigações *erga omnes* de proteção.

16. Venho insistindo neste ponto, no seio tanto da Corte Interamericana como do *Institut de Droit International*. Neste último o tenho feito tanto em meus comentários escritos<sup>122</sup>, como em seus debates. Há pouco mais de um ano, precisamente em seus últimos debates sobre a matéria, em sua última sessão de Cracóvia, permiti-me advertir, em minha intervenção oral do dia 25 de agosto de 2005 naquela cidade da Polônia, *inter alia* que

(...) Precisely because obligations *erga omnes* incorporate fundamental values shared by the international community as a whole, compliance with them appears to me required not only of States, but also of other subjects of international law (including international organizations as well as peoples and individuals). Related to *jus cogens*, such obligations bind everyone.

After all, the beneficiaries of the compliance with, and due performance of, obligations *erga omnes* are all human beings (rather than States). I am thus concerned (...) that an essentially inter-State outlook (...) does not sufficiently reflect this important point. Moreover, the purely inter-State dimension of international law has long been surpassed, and seems insufficient, if not inadequate, to

121 Cf., a esse respeito, em geral, a resolução adotada pelo *Institut de Droit International* (I.D.I.) na sessão de Santiago de Compostela de 1989 (artigo 1), in: I.D.I., 63 *Annuaire de l'Institut de Droit International* (1989)-II, pp. 286 e 288-289.

122 Cf. A.A. Cançado Trindade, "Reply [- Obligations and Rights *Erga Omnes* in International Law]", in 71 *Annuaire de l'Institut de Droit International - Session de Cracovie* (2005) n. 1, pp. 153-156 e 208-211.

address obligations and rights *erga omnes*. To me, it is impossible here not to take into account the other subjects of international law, including the human person. (...)

Furthermore, the obligation to *respect*, and to *ensure respect* of, the protected rights, in all circumstances, - set forth in humanitarian and human rights treaties, - that is to say, the exercise of the collective guarantee, - is akin to the nature and substance of *erga omnes* obligations, and can effectively assist in the vindication of compliance with those obligations. *Jus cogens*, in generating obligations *erga omnes*, endows them with a necessarily objective character, encompassing all the addressees of the legal norms (*omnes*), - States, peoples and individuals. In sum, it seems to me that the rights and duties of all subjects of international law (including human beings, the ultimate beneficiaries of compliance with *erga omnes* obligations) should be taken into account in the determination of the legal regime of obligations *erga omnes*, and in particular of the juridical consequences of violations of such obligations.

Last but not least, I support the reference (...) to the qualification of “grave” breaches of *erga omnes* obligations, as they affect fundamental values shared by the international community as a whole and are owed to this latter, which, in my view, comprises all States as well as other subjects of international law. All of us who have accumulated experience in the resolution of human rights cases know for sure that rather often we have been faced with situations which have disclosed an unfortunate diversification of the sources of grave violations of the rights of the human person (such as systematic practices of torture, of forced disappearance of persons, of summary or extra-legal executions, of traffic of persons and contemporary forms of slave work, of gross violations of the fundamental principle of equality and non-discrimination) - on the part of State as well as of non-State agents (such as clandestine groups, unidentified agents, death squads, paramilitary, and the like). This has required a clear recognition of the effects of the conventional obligations of protection also *vis-à-vis* third parties (the *Drittwirkung*), including individuals (identified and unidentified ones).

I feel that we cannot adequately approach *erga omnes* obligations, - compliance with which benefits ultimately the human person, - from a strictly inter-State perspective or dimension, which would no longer reflect the complexity of the contemporary international legal order. Obligations *erga omnes* have a *horizontal* dimension, in the sense that they are owed to the international community as a whole, to all subjects of international law, but they also have also a *vertical* dimension, in the sense that they bind everyone, - both the organs and agents of the State, of public power, as well as the individuals themselves (including in inter-individual relations, where grave breaches also do occur)<sup>123</sup>.

17. Com efeito, em sua *jurisprudence constante*, a Corte Interamericana tem recordado que o Estado, como responsável pelos estabelecimentos de detenção, é o garante dos direitos dos detidos, que se encontram sujeitos a sua custódia<sup>124</sup>. O Estado tem, assim, o dever inelutável de proteção *erga omnes*, inclusive nas relações interindividuais, de todos os que se encontram sob sua custódia. A Corte Interamericana tem advertido, a respeito, que “toda pessoa privada de liberdade tem direito a viver em condições de detenção compatíveis com sua dignidade pessoal e o Estado deve garantir-lhe o direito à vida e à integridade pessoal”<sup>125</sup>. Sendo assim, - agregou a Corte, - o poder do Estado de manter a ordem pública “não é ilimitado”, porquanto “tem o dever, em todo momento, de aplicar procedimentos conformes ao Direito e respeitosos dos direitos fundamentais, a todo indivíduo que se encontre sob sua jurisdição. (...)”<sup>126</sup>.

---

123 Intervenção oral de A.A. Cançado Trindade na Sessão de Cracóvia (agosto de 2005), ainda não publicada (e destinada a publicação no próximo volume do *Annuaire* do referido *Institut*).

124 Corte Interamericana de Direitos Humanos (CtIADH), caso *Bulacio versus Argentina*, Sentença de 18.09.2003, Série C, n. 100, pars. 126-127 e 138); CtIADH, caso *Hilaire, Constantine e Benjamin e Outros versus Trinidad e Tobago*, Sentença de 21.06.2002, Série C, n. 94, par. 165; CtIADH, caso *Bámaca Velásquez versus Guatemala*, Sentença de 25.11.2000, Série C, n. 70, par. 171; caso *Neira Alegría e Outros versus Peru*, Sentença de 19.01.1995, Série C, n. 20, par. 60.

125 CtIADH, caso *Castillo Petruzzi e Outros versus Peru*, Sentença de 30.05.1999, Série C, n. 52, par. 195.

126 CtIADH, caso *J.H. Sánchez versus Honduras*, Sentença de 07.06.2003, Série C, n. 99, par. 111.

18. Em suma, como se depreende de minhas considerações anteriores, assim como jurisprudência supracitada, em toda e qualquer circunstância se impõe a obrigação de *devida diligência* por parte do Estado, para evitar danos irreparáveis a pessoas sob sua jurisdição e sua custódia. Medidas provisórias de proteção como as que vem de adotar a Corte Interamericana na presente Resolução sobre o caso da *Penitenciária de Araraquara* contribuem ao estabelecimento de um *monitoramento contínuo*, com base em uma disposição de um tratado de direitos humanos como a Convenção Americana (artigo 63(2)), de uma situação de extrema gravidade e urgência capaz de causar danos irreparáveis a seres humanos.

19. Como que se antecipando à presente Resolução da Corte, com este monitoramento contínuo estiveram de acordo as três partes processuais intervenientes na frutuosa audiência pública sobre o presente caso realizada anteontem, dia 28.09.2006, na sede do Tribunal em San José da Costa Rica. Me atrevo, pois, a nutrir a confiança de que o Estado brasileiro (representado na referida audiência por autoridades do Governo tanto federal como estadual de São Paulo), saberá dar cumprimento às medidas provisórias de proteção especificadas na presente Resolução da Corte, para manter-se à altura da valiosa e respeitável cultura jurídica brasileira.

20. O caráter *erga omnes* das Medidas Provisórias de Proteção ordenadas pela Corte cresce em evidência e relevância em um contexto como o do presente caso da *Penitenciária de Araraquara*, revestido de um alto grau de violência crônica, como reconhecido e ressaltado na supracitada audiência pública de anteontem. Em resposta a uma de minhas perguntas, o agente do Estado assinalou que somente em São Paulo sobe a cerca de 150 mil o total de presos, no quadro de um total de cerca de 380 mil em todo o Brasil, - ou seja, proporcionalmente “um número muito maior de presos em São Paulo” se comparado à população carcerária do “resto do Brasil”<sup>127</sup>. A este quadro se agrega o combate ao *crime organizado*, - agravado pelo descontrole, por parte das autoridades públicas, dos detentos entregues à própria sorte, - do que deram testemunho os numerosos motins ocorridos simultaneamente no Estado de São Paulo no mês de maio de 2006 (como recordado pela presente Resolução desta Corte, *visto* 6).

---

127 Cf. IADH, *Transcrição da Audiência Pública...*, *op. cit. infra* n. (17), p. 37 (circulação interna).

21. Tal descontrole conduz ao crime organizado no interior das próprias prisões, afetando a população como um todo, levando à escalada da violência crônica e aumentando consideravelmente as vítimas potenciais. É todo o tecido social que se vê ameaçado por este estado de decomposição da sociedade, realçando o caráter verdadeiramente *erga omnes* das obrigações estatais de proteção de todas as pessoas sob sua jurisdição. Em um contexto como o do presente caso da *Penitenciária de Araraquara*, já não se trata só dos direitos das pessoas privadas de liberdade, mas, em última análise, de todas as pessoas sob a jurisdição do Estado. O amplo alcance de tais obrigações *erga omnes* de proteção reveste-se, assim, da maior importância, ainda mais em uma situação de manifesta urgência como a do presente caso.

## VI. O Regime Jurídico Autônomo das Medidas Provisórias da Corte Interamericana

22. No tocante aos beneficiários das atuais Medidas Provisórias de Proteção que vem de adotar esta Corte, ao dar às mesmas o devido cumprimento estará o Estado resgatando uma parcela mínima de sua grande dívida social, ao estender proteção aos detentos que se encontravam na Penitenciária de Araraquara e que foram transferidos a outros centros de detenção, onde agora vivem, ou sobrevivem, na mais completa vulnerabilidade. Na audiência pública de anteontem perante esta Corte, a representação dos beneficiários das presentes Medidas Provisórias de Proteção advertiu para a carência de uma verdadeira justiça penal, no sentido da recuperação dos detidos, suplantada que se encontra por uma distorcida política de internamento em condições infra-humanas<sup>128</sup>.

23. Na verdade, trata-se de um problema que flagela os detentos não só no Brasil, mas em toda a América Latina, e em todo o mundo. E se trata de um problema que já tem uma longa história, mostrando-se lamentavelmente crônico, e cuja reversão representa um desafio constante à proteção internacional dos direitos humanos. Um grande escritor universal, F.M. Dostoiévski, deixou-nos, a respeito, já em

---

128 Corte Interamericana de Derechos Humanos (CtIADH), *Transcrição da Audiência Pública de 28 de setembro de 2006 sobre a Solicitação pela Comissão Interamericana de Derechos Humanos de Medidas Provisórias de Proteção em Benefício das Pessoas Privadas de Liberdade na Penitenciária "Dr. Sebastião Martins Silveira" em Araraquara, São Paulo, San José da Costa Rica, CtIADH, 2006, p. 35 (circulação interna).*

meados do século XIX, o legado de suas *Recordações da Casa dos Mortos* (1862)<sup>129</sup>. Os ingênuos arautos do “progresso” das civilizações nada têm do que de vangloriar do tratamento - ou seja, dos sacrifícios indescritíveis - dispensado ou infligido, ao longo dos tempos, aos prisioneiros<sup>130</sup>. Em nada surpreende que hoje se busque uma “nova inteligência” dos fins e limites do direito penal<sup>131</sup>.

24. Também no contexto da *prevenção* de danos irreparáveis à pessoa humana, afirma-se a centralidade desta última<sup>132</sup>, ainda que vitimada. A esta questão específica dediquei meus dois Votos Concordantes no recente caso de *Eloísa Barrios e Outros versus Venezuela* (resoluções de 25.06.2005 e 22.09.2005), em meu propósito de elaborar a construção doutrinária do que denomino *regime jurídico autônomo das medidas provisórias de proteção*. Com efeito, estas últimas geram obrigações *per se* para os Estados em questão, que se distinguem das obrigações que emanam das respectivas Sentenças quanto ao mérito (e eventuais reparações) dos casos respectivos. Isto significa que as medidas provisórias de proteção constituem um instituto jurídico dotado de *autonomia* própria, tem efetivamente um *regime jurídico* próprio, o que, por sua vez, revela a alta relevância da dimensão *preventiva* da proteção internacional dos direitos humanos.

25. Tanto é assim que, sob a Convenção Americana (artigo 63(2)), a responsabilidade internacional de um Estado pode se configurar pelo descumprimento de Medidas Provisórias de Proteção ordenadas pela Corte, sem que se encontre o caso respectivo, quanto ao mérito, em conhecimento da Corte (mas sim da Comissão Interamericana de Direitos Humanos). Isto reforça a minha tese no sentido de que as Medidas Provisórias de Proteção da Corte, dotadas de base convencional, também o são de *autonomia*, têm um regime jurídico próprio, e seu descumprimento gera a responsabilidade do Estado, tem consequências jurídicas, ademais de destacar a posição central da vítima (de tal descumprimento), sem prejuízo do exame e resolução

129 F. Dostoievski, *Souvenirs de la maison des morts*, Paris, Gallimard, 1997 [reed.], pp. 41-443.

130 Cf., e.g., *inter alia*, R. Wright, *Breve Historia del Progreso - Hemos Aprendido por Fin las Lecciones del Pasado?*, Barcelona, Ed. Urano, 2006, p. 88.

131 Cf., e.g., reflexões in C. Barros Leal, *Prisão: Crepúsculo de uma Era*, Belo Horizonte, Edit. Del Rey, 1998, pp. 31-220.

132 Cf. A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104.

do caso concreto quanto ao mérito. Isto, por sua vez, revela a alta relevância da dimensão *preventiva* da proteção internacional dos direitos humanos, em seu amplo alcance (*supra*).

26. Além da base convencional do artigo 63(2) da Convenção Americana, as medidas provisórias de proteção da Corte se encontram reforçadas pelo dever geral dos Estados Partes, sob o artigo 1(1) da Convenção, de respeitar e assegurar o respeito, sem discriminação, dos direitos protegidos, em benefício de todas as pessoas sob suas respectivas jurisdições. Resta - como já adverti - um longo caminho a percorrer no fortalecimento do regime jurídico autônomo (tal como o vislumbro) das medidas provisórias da Corte, em benefício das pessoas protegidas e para assegurar o devido e pronto cumprimento, das medidas ordenadas pela Corte, pelos Estados em questão.

27. Como me permiti assinalar em meus dois supracitados Votos Concordantes nas Resoluções desta Corte de 29.06.2005 (pars. 10-11 de meu Voto) e de 22.09.2005 (par. 9 de meu Voto) no caso de *Eloisa Barrios e Outros*, e aqui me vejo na contingência de ter que reiterar, as medidas provisórias de proteção, cujo desenvolvimento até o presente sob a Convenção Americana constitui uma verdadeira conquista do Direito, encontram-se, em minha percepção, no entanto, ainda em sua infância, na aurora de sua evolução, e crescerão e se fortalecerão ainda mais na medida em que desperte a consciência jurídica universal para a necessidade de seu refinamento conceitual em todos os seus aspectos. O Direito Internacional dos Direitos Humanos tem transformado - como assinalai ao início deste Voto - a própria *concepção* de tais medidas<sup>133</sup> - de cautelares em tutelares, - revelando o processo histórico corrente de *humanização* do Direito Internacional Público<sup>134</sup> também neste domínio específico, mas se trata de um processo que ainda se encontra em curso.

28. Há que prosseguir decididamente nesta direção. Como próximo passo a ser dado, urge, em nossos dias, que se desenvolva

133 A.A. Caçado Trindade, "Prólogo del Presidente de la Corte Interamericana de Derechos Humanos", in *Compendio de Medidas Provisionales* (Junho 2001-Julho 2003), vol. 4, Série E, San José da Costa Rica, Corte Interamericana de Derechos Humanos, 2003, pp. V-XXII.

134 Cf. A.A. Caçado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais - Belo Horizonte* (2001) pp. 11-23; A.A. Caçado Trindade, "General Course on Public International Law - International Law for Humankind: Towards a New *Jus Gentium*", in *Recueil des Cours de l'Académie de Droit International de la Haye* (2005) (no prelo).

seu *regime jurídico*, e, no âmbito deste último, as *consequências jurídicas* do descumprimento ou violação das medidas provisórias de proteção, dotadas de autonomia própria. No meu entender, as *vítimas* ocupam, tanto no presente contexto de prevenção, como na resolução quanto ao mérito (e eventuais reparações) dos casos contenciosos, uma posição verdadeiramente central, como sujeitos do Direito Internacional dos Direitos Humanos e do Direito Internacional Público contemporâneo, dotados de capacidade jurídico-processual internacional<sup>135</sup>.

## **VII. Problemas Derivados da Coexistência de Medidas Cautelares e Medidas Provisórias de Proteção à Luz do Imperativo do Acesso Direto do Indivíduo à Justiça Internacional**

29. Passo ao derradeiro ponto de minhas reflexões, que deixo consignadas no presente Voto Fundamentado, - sempre sob a pressão insuportável da falta de tempo no atual labor insensatamente acelerado deste Tribunal: refiro-me aos problemas derivados da coexistência das medidas cautelares da Comissão Interamericana e das Medidas Provisórias de Proteção da Corte Interamericana, à luz do imperativo do acesso direto do indivíduo à justiça internacional. Venho de ocupar-me, mais detidamente, desta temática (que reflete uma das atuais lacunas do sistema interamericano de direitos humanos) em meus recentes Votos Fundamentados nas Resoluções sobre Medidas Provisórias de Proteção desta Corte nos casos de *Mery Naranjo e Outros versus Colômbia* (de 22.09.2006) e de *Gloria Giralt de García Prieto e Outros versus El Salvador* (de 26.09.2006).

30. Em meus Votos Fundamentados nestes dois casos recentes, reiterarei o que tenho assinalado tanto em recentes reuniões conjuntas da Corte e Comissão Interamericanas, como em numerosas audiências públicas perante esta Corte, e em deliberações da mesma, no sentido de que, em situações de extrema gravidade e urgência, mais vale enviar *diretamente* à Corte solicitações de Medidas Provisórias de Proteção sem que insista a Comissão em adotar anteriormente suas

---

135 A.A. Cançado Trindade, "The Procedural Capacity of the Individual as Subject of International Human Rights Law: Recent Developments", in *K. Vasak Amicorum Liber - Les droits de l'homme à l'aube du XXIe siècle*, Bruxelles, Bruylant, 1999, pp. 521-544; A.A. Cançado Trindade, "A Consolidação da Personalidade e da Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", *16 Anuario del Instituto Hispano-Luso-Americano de Derecho Internacional - Madrid* (2003) pp. 237-288.

medidas cautelares (desprovidas de base convencional). Isto se torna ainda mais necessário quando o caso se encontra pendente (quanto ao mérito) na Comissão, ainda não enviado à Corte. E acrescentei os seguintes argumentos como fundamentação de minha posição<sup>136</sup>:

*Primero*, en mi entender, no se aplica el prerequisite del previo agotamiento de recursos internos en solicitudes de Medidas Provisionales de Protección a la Corte; dicho requisito es una condición de admisibilidad de peticiones a la Comisión, en cuanto al fondo (y eventuales reparaciones) del caso concreto. Las Medidas Provisionales de Protección, a su vez, tienen un rito sumario, en conformidad con la propia naturaleza de ese instituto jurídico de carácter preventivo-tutelar, y por no prejuzgar en nada el fondo del caso.

*Segundo*, a mi juicio no existe requisito alguno de previo agotamiento de medidas cautelares de la Comisión antes de acudir a la Corte Interamericana para solicitar Medidas Provisionales de Protección. Así lo he expresamente señalado en mi Voto Concurrente en una Resolución reciente de la Corte sobre Medidas Provisionales de Protección<sup>137</sup>. Asimismo, las medidas cautelares de la Comisión tienen base tan sólo reglamentaria, y no convencional, y no pueden retardar - a veces indefinidamente - la aplicación de Medidas Provisionales de Protección de la Corte, dotadas éstas de base convencional.

Como agregué en el supracitado Voto Concurrente, “en toda y cualquier circunstancia, los imperativos de protección deben primar sobre los aparentes celos institucionales”, aún más en medio a situaciones de “violencia crónica”<sup>138</sup>. La insistencia de la Comisión en su práctica sobre medidas cautelares previas puede, en algunos casos, tener consecuencias negativas para las víctimas potenciales, y crear un obstáculo más para ellas.

136 Parágrafos 5-11 de meu Voto Fundamentado no caso *Mery Naranjo e Outros*, e parágrafos 7-13 de meu Voto Fundamentado no caso *Gloria Giralte de García Prieto e Outros*.

137 Cf. CHADH, Resolução de 17.11.2005 no caso das *Crianças e Adolescentes Privados de Liberdade no ‘Complexo do Tatuapé’ da FEBEM versus Brasil*, Voto Concordante do Juiz A.A. Cançado Trindade, par. 3.

138 *Ibid.*, par. 5.

En determinados casos, puede configurar una denegación de justicia en el plano internacional.

*Tercero*, en caso de negativa de medidas cautelares por parte de la Comisión, debe tal decisión contar con la debida fundamentación. Las decisiones de la Comisión y de la Corte en materia de medidas tanto cautelares como provisionales, respectivamente, deben estar siempre debidamente motivadas, como garantía de la observancia del *principio del contradictorio* - el cual es un principio general del derecho, - para que los peticionarios se sientan seguros de que la cuestión que plantearon ha sido debida y atentamente tratada por la instancia internacional, y para que quede claro el sentido de la decisión por ésta tomada<sup>139</sup> (aún más en una alegada situación de extrema gravedad y urgencia con supuesta probabilidad de un daño irreparable a la persona humana).

Una decisión denegatoria de medidas cautelares por parte de la Comisión debe estar siempre, y necesaria y debidamente, motivada. Además, una negativa adicional por parte de la Comisión de solicitar Medidas Provisionales a la Corte, igualmente sin fundamentación, legitima a las víctimas potenciales, como sujetos del Derecho Internacional de los Derechos, para poder recurrir a la Corte, en búsqueda del otorgamiento de éstas Medidas Provisionales; de otro modo, se podría configurar una denegación de justicia en el plano internacional.

*Cuarto*, si el individuo peticionario en cuestión, ante las dos negativas de la Comisión, recurre a la Corte y ésta se abstiene de tomar medida alguna, por alegada falta de base convencional (por tratarse de caso pendiente ante la Comisión y no ante ella misma, la Corte) y reglamentaria, - inclusive para llenar este aparente vacío legal y cambiar la actual situación (con base en consideraciones de equidad *praeter legem*), se podría configurar una denegación de justicia en el plano internacional. En dos episodios

---

139 Cf. [Vários Autores,] *Le principe du contradictoire devant les juridictions internationales* (eds. H. Ruiz Fabri e J.-M. Sorel), Paris, Pédone, 2004, pp. 14, 33, 81, 86, 118 e 168.

recientes me permití formular una advertencia a la Corte en este sentido<sup>140</sup>.

En este momento, no consigo detectar sensibilidad alguna por parte de la Comisión ni de la Corte para dar el salto cualitativo por mi propugnado. Aún más, pienso que, si hubiera prevalecido la actual insensibilidad (para este punto específico) que detecto en los dos órganos de supervisión de la Convención Americana, en el año 2000, quizás no se hubiera siquiera logrado algunos de los cambios reglamentarios en pro del fortalecimiento del acceso directo de los individuos a las instancias internacionales de la Convención Americana, o sea, su acceso a la justicia internacional.

31. Ante a atual e desnecessária paralisia em que se encontra o sistema interamericano de direitos humanos a respeito (em prejuízo das vítimas potenciais), permiti-me estender, nos mesmos Votos Fundamentados, minhas considerações *lex lata* também ao plano *de lege ferenda*<sup>141</sup>:

Siendo así, - y, como el rinoceronte de Ionesco, *je ne capitule pas*, - me permito aquí, en este Voto Razonado, insistir en mi razonamiento, - tal como lo he hecho recientemente en el seno de la Corte, - en pro del acceso pleno del individuo a la justicia internacional en el marco de la Convención Americana. Me permito aquí referirme a las bases para un *Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos para Fortalecer su Mecanismo de Protección*, que redacté (como relator de la Corte) y presenté (como Presidente de la Corte) a la Organización de los Estados Americanos [OEA] en mayo 2001<sup>142</sup>, y que ha conestado invariablemente de la agenda de la Asamblea General de la

140 Cf. CtIADH, caso dos *Irmãos Dante, Jorge e José Peirano Basso versus Uruguai*, carta dos Juizes A.A. Caçado Trindade e M.E. Ventura Robles ao Presidente da Corte, de 07.07.2006, doc. CDH-S/1181, pp. 1-2; caso de *Loretta Ortiz Ahlf e Outros Cidadãos Mexicanos versus México*, carta do Juiz A.A. Caçado Trindade ao Presidente em exercício da Corte, de 19.09.2006, doc. Corte IDH/1641, p. 1.

141 Parágrafos 12-15 de meu Voto Fundamentado no caso *Mery Naranjo e Outros*, e parágrafos 14-17 de meu Voto Fundamentado no caso *Gloria Giralt de García Prieto e Outros*.

142 Cf. A.A. Caçado Trindade, *Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección*, vol. II, 2a. ed., San José da Costa Rica, Corte Interamericana de Derechos Humanos, 2003, pp. 1-1015.

OEA (como lo ilustran las Asambleas de San José de Costa Rica en 2001, de Bridgetown/Barbados en 2002, de Santiago de Chile en 2003, e de Quito en 2004), y permanece presente en los documentos pertinentes de la OEA del bienio 2005-2006<sup>143</sup>. Espero que en el futuro próximo venga a generar frutos concretos.

En el referido documento, propuse *inter alia* que el artículo 77 de la Convención debe, a mi juicio, ser enmendado, en el sentido de que no sólo cualquier Estado Parte y la Comisión, sino también la Corte, puedan presentar Proyectos de Protocolos Adicionales a la Convención Americana, - como naturalmente le corresponde al órgano de supervisión de mayor jerarquía de dicha Convención, - con miras a la ampliación del elenco de los derechos convencionalmente protegidos y al fortalecimiento del mecanismo de protección establecido por la Convención<sup>144</sup>.

Además, teniendo siempre presente la posición de la persona humana como sujeto del Derecho Internacional de los Derechos Humanos (y, a mi juicio, del propio Derecho Internacional Público), me permití sostener que el artículo 61(1) de la Convención pasaría, significativamente, a tener la siguiente redacción:

- Los Estados Partes, la Comisión y las presuntas víctimas tienen derecho a someter un caso a la decisión de la Corte<sup>145</sup>.

---

143 OEA, documento AG/RES.2129 (XXXV-0/050), de 07.06.2005, pp. 1-3; OEA, documento CP/CAJP-2311/05/Rev.2, de 27.02.2006, pp. 1-3.

144 Assinei ademais que também o Estatuto da Corte Interamericana (de 1979) requer uma série de emendas (que indiquei no mencionado documento). Ademais, agreguei que os artigos 24(3) e 28 do Estatuto requerem alterações: no artigo 24(3), as palavras “se comunicarán en sesiones públicas y” devem ser eliminadas; e no artigo 28, as palavras “y será tenida como parte” devem igualmente ser suprimidas.

145 Em sua redação atual e original, o artigo 61(1) da Convenção Americana determina que só os Estados Partes e a Comissão têm direito a “someter un caso” à decisão da Corte. Mas a Convenção, ao dispor sobre reparações, também se refere a “la parte lesionada” (artigo 63(1)), i.e., as vítimas e não a Comissão. Neste início do século XXI, encontram-se superadas as razões históricas que levaram à denegação de tal *locus standi* das vítimas; nos sistemas europeu e interamericano de direitos humanos, a própria prática cuidou de revelar as insuficiências, deficiências e distorções do mecanismo paternalista da intermediação da Comissão entre o indivíduo e a Corte. Cf. A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universi-

Y, en la misma línea de pensamiento, me permito aquí agregar, en este Voto Razonado, la propuesta adicional en el sentido de que el artículo 63(2) de la Convención Americana pasaría, de modo igualmente significativo, a tener la siguiente redacción:

- En casos de extrema gravedad y urgencia, y cuando se haga necesario evitar daños irreparables a las personas, la Corte, en los asuntos que esté conociendo, podrá tomar las medidas provisionales que considere pertinentes. Si se tratare de asuntos que aún no estén sometidos a su conocimiento, podrá actuar a solicitud de la Comisión o de las presuntas víctimas potenciales.

En el mecanismo de protección de la Convención Americana, el derecho de petición individual alcanzará su plenitud el día en que pueda ser ejercido por los peticionarios directamente ante la Corte Interamericana de Derechos Humanos. De ahí la presente propuesta de enmienda del artículo 61(1) de la Convención, *alcanzando también el artículo 63(2), en determinadas circunstancias, en materia de Medidas Provisionales de Protección*. Esto, a mi modo de ver, se justifica plenamente, aún más tratándose de alegadas situaciones de extrema gravedad y urgencia, con supuesta probabilidad de daño irreparable a la persona humana.

32. No presente caso da *Penitenciária de Araraquara*, a Comissão corretamente solicitou Medidas Provisórias de Proteção à Corte, tão logo se evidenciou a gravidade da situação (cf. *supra*), sem tentar adotar suas medidas cautelares anteriormente. Evitou, assim, sensatamente, repetir o equívoco que cometeu no anterior caso das *Crianças e Adolescentes Privados de Liberdade no 'Complexo do Tatuapé' da FEBEM versus Brasil*, - equívoco este apontei em meu Voto Concordante na Resolução de 17.11.2005 desta Corte, - de tentar infrutiferamente a adoção prévia, durante anos, de suas medidas cautelares, mesmo ante a sucessiva ocorrência de vítimas fatais (o que não se repetiu no presente caso). Apraz-me constatar que a Comissão deu ouvidos a minhas advertências.

---

dad de Deusto, 2001, pp. 9-104; A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre, S.A. Fabris Ed., 2003, pp. 447-497.

33. Com efeito, na audiência pública de anteontem, 28.09.2006, perante esta Corte, o próprio representante da Comissão (Sr. Florentín Meléndez), em resposta a minha pergunta, assim o confirmou, admitindo meu argumento (*supra*) de que “definitivamente não existe base normativa para sustentar que se requer o esgotamento prévio de medidas cautelares para acudir à Corte solicitando Medidas Provisórias” de Proteção<sup>146</sup>. No mesmo sentido de pronunciou, igualmente em resposta a outra pergunta minha, o representante dos beneficiários destas Medidas, e ex-Presidente da Comissão (Sr. Hélio Bicudo), que recordou com acerto que “as medidas cautelares não têm a força que têm as Medidas Provisórias; é que as medidas cautelares são recomendações ao Estado, ao passo que as Medidas Provisórias são impostas”<sup>147</sup>.

34. Há efetivamente que buscar e aplicar as vias jurídicas dotadas de base convencional que assegurem a proteção mais eficaz dos que desta necessitem, com ainda maior razão em situações de emergência. Não é mera causalidade que, em meu recente *Curso Geral de Direito Internacional Público*, que ministrei na Academia de Direito Internacional de Haia (2005), ao abordar - logo de início - a dimensão *temporal* do Direito Internacional, dediquei atenção especial às Medidas Provisórias de Proteção, e particularmente as ordenadas pelo tribunal internacional contemporâneo que mais tem contribuído ao aperfeiçoamento de seu regime jurídico, a saber, precisamente a Corte Interamericana de Direitos Humanos<sup>148</sup>.

35. Constitui para mim motivo de satisfação constatar que, do modo anteriormente exposto, gradualmente se vem dando *effet utile* à normativa da Convenção Americana também neste particular, - no âmbito das Medidas Provisórias de Proteção, - em que ainda subsiste uma lacuna no sistema interamericano de direitos humanos, que cabe prontamente suprir, e que a meu ver já se poderia - e se deveria - ter suprido há algum tempo. Não me cansarei de insistir em que o acesso direto das vítimas potenciais à justiça internacional (tema ao qual tenho tanto me dedicado nas últimas décadas) também se impõe

146 CtIADH, *Transcrição da Audiência Pública...*, *op. cit. supra* n. (17), p. 39 (circulação interna).

147 CtIADH, *Transcrição da Audiência Pública...*, *op. cit. supra* n. (17), p. 41 (circulação interna).

148 Cf. A.A. Cançado Trindade, “International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law”, *Recueil des Cours de l'Académie de Droit International de la Haye* (2005) cap. II (no prelo).

no domínio das Medidas Provisórias de Proteção. O presente caso da *Penitenciária de Araraquara* representa, da perspectiva da aplicação das normas relevantes da Convenção Americana sobre a matéria, um avanço discreto, mas alentador neste sentido.

## **12. VOTO RAZONADO DEL JUEZ A.A. CANÇADO TRINDADE EN EL CASO DE LOS INTEGRANTES DEL EQUIPO DE ESTUDIOS COMUNITARIOS Y ACCIÓN PSICOSOCIAL - ECAP (CASO DE LA MASACRE DE PLAN DE SÁNCHEZ) versus GUATEMALA (Resolución del 29.11.2006)**

1. He concurrido con mi voto a la adopción de la presente Resolución de la Corte Interamericana de Derechos Humanos sobre Medidas Provisionales de Protección en el caso de los *Integrantes del Equipo de Estudios Comunitarios y Acción Psicosocial - ECAP* (caso de la *Masacre de Plan de Sánchez*) versus *Guatemala*. Me veo, además, en la obligación de dejar constancia en este breve Voto Razonado - mi último Voto en esta Corte en materia de Medidas Provisionales de Protección - de mis reflexiones sobre algunas inquietudes que he venido exponiendo a la Corte en los últimos meses, con miras al fortalecimiento de este mecanismo de salvaguardia de derechos de dimensión preventiva. Me refiero, en particular, a algunos problemas que han surgido en la práctica bajo la Convención Americana, originados de la co-existencia entre medidas cautelares de la Comisión Interamericana de Derechos Humanos y medidas provisionales de la Corte Interamericana, a la luz del imperativo del acceso directo de los individuos a las instancias internacionales. A continuación, presento, bajo la usual presión del tiempo, mis breves reflexiones al respecto, tanto *lex lata* como *de lege ferenda*.

### **I. Breves Reflexiones *Lex Lata***

2. El presente caso ante la Corte de los *Integrantes del Equipo de Estudios Comunitarios y Acción Psicosocial - ECAP* (caso de la *Masacre de Plan de Sánchez*), atinente a Guatemala, se originó en una solicitud de Medidas Provisionales de Protección, presentada a la Corte el 15.10.2006 por el Centro para la Acción Legal en Derechos Humanos (CALDH), para proteger la vida e integridad personal de los integrantes de la Asociación Civil Equipo de Estudios Comunitarios y Acción Psicosocial (ECAP). Desde la Sentencia de esta Corte (del 19.11.2004) en el caso de la *Masacre de Plan de Sánchez* (reparaciones), el ECAP ha

venido realizando una serie de actividades con los sobrevivientes de aquella masacre, en las comunidades del municipio de Rabinal, Baja Verapaz, en Guatemala con el propósito de dar seguimiento a las medidas de reparación ordenadas por esta Corte.

3. En consideración de que la referida solicitud fue presentada al Tribunal por los representantes de las víctimas y sus familiares, de un caso (el de la *Masacre de Plan de Sánchez*) que se encuentra bajo el conocimiento de la Corte, en la etapa de supervisión de cumplimiento de su referida Sentencia, la Corte estimó que la solicitud de Medidas Provisionales de Protección se encontraba en conformidad con el artículo 63(2) de la Convención Americana sobre Derechos Humanos y el artículo 25 de su Reglamento, y adoptó las Medidas correspondientes, mediante la emisión de la presente Resolución del día de hoy, 25.11.2006.

4. Irónicamente, en el mismo día en que la Corte tomaba conocimiento de la solicitud que generó las presentes Medidas de Protección, - antier, 23.11.2006, - también tomó conocimiento de otro escrito, relativo al caso del *Movimento dos Servidores Públicos Aposentados e Pensionistas (MOSAP)*<sup>149</sup>, atinente al Brasil, igualmente solicitando Medidas Provisionales de Protección, en relación al cual la Corte se limitó a informar al representante del MOSAP<sup>150</sup> que carecía de competencia para actuar<sup>151</sup> por no encontrarse el caso todavía bajo su conocimiento, y sí del de la Comisión. Ocurre que ésta, a su vez, rechazó (el 08.11.2006) una solicitud de medidas cautelares del MOSAP, y no solicitó hasta la fecha medidas provisionales a la Corte en el referido caso del *Movimento dos Servidores Públicos Aposentados e Pensionistas*.

5. Como el tiempo cronológico no es lo mismo que el tiempo biológico, la situación me parece revelar extrema gravedad y urgencia, dada la edad avanzada de muchos jubilados y pensionistas, reflejada en el hecho de que, desde que la petición del MOSAP fue recibida por la Comisión (el 30.08.2006)<sup>152</sup>, 63 de ellos ya fallecieron y 18 otros han

---

149 Escrito del 10.11.2006, del representante legal de MOSAP (Sr. L.A. Costa de Medeiros).

150 Carta de la Secretaría del Tribunal, del 24.11.2006, al representante legal del MOSAP.

151 En virtud del artículo 63(2) de la Convención Americana y del artículo 25(2) de su Reglamento.

152 Con nueva petición interpuesta ante la Comisión el 26.10.2006.

contraído enfermedades generadoras de discapacidades, hasta la fecha. Situaciones congéneres, en los más distintos contextos y circunstancias, se han planteado también en sesiones anteriores de esta Corte<sup>153</sup>. En todas estas ocasiones he manifestado mi preocupación e insatisfacción con este estado de real indefensión de las personas en búsqueda de protección, y aquí las reitero, en el presente Voto Razonado, ante la irónica ocurrencia que aquí relato, en el presente período de sesiones de la Corte.

6. Tanto en recientes reuniones conjuntas de la Corte y la Comisión Interamericanas, como en numerosas audiencias públicas ante esta Corte, y en deliberaciones de la misma, me he permitido expresar mi profunda preocupación con la no-solicitud (deseada por los potenciales beneficiarios) por la Comisión de Medidas Provisionales de Protección a la Corte. Este cuadro se agrava aún más cuando la Comisión niega medidas cautelares a los peticionarios, sin fundamentación suficiente en su decisión denegatoria, y sin que los peticionarios puedan acudir a la Corte, por encontrarse sus casos pendientes ante la Comisión y no ante la Corte.

7. En estos casos se puede configurar, a mi modo de ver, una denegación del derecho de acceso a la justicia internacional. Siendo así, me permito dejar constancia, en este Voto Razonado, de mi posición al respecto, ahora que ya vislumbro bien de cerca los rayos del crepúsculo de mi tiempo como Juez Titular de la Corte Interamericana de Derechos Humanos (*tempus fugit*). Lo hago con miras al perfeccionamiento de ese importante mecanismo de protección de dimensión preventiva de la Convención Americana, y sin dejar de consignar mi voto de confianza en el *common sense* de mis colegas tanto de la Corte como de la Comisión Interamericanas.

8. *Primero*, en mi entender, no se aplica el prerequisite del previo agotamiento de recursos internos en solicitudes de Medidas Provisionales de Protección a la Corte; dicho requisito es una condición de admisibilidad de peticiones a la Comisión, en cuanto al fondo (y eventuales reparaciones) del caso concreto. Las Medidas Provisionales de Protección, a su vez, tienen un rito sumario, en conformidad con la propia naturaleza de ese instituto jurídico de carácter preventivo-tutelar, y por no prejuzgar en nada el fondo del caso.

---

153 Cf. nota (178), *infra*.

9. *Segundo*, a mi juicio no existe requisito alguno de previo agotamiento de medidas cautelares de la Comisión antes de acudir a la Corte Interamericana para solicitar Medidas Provisionales de Protección. Así lo he expresamente señalado en mi Voto Concurrente en una Resolución reciente de la Corte sobre Medidas Provisionales de Protección<sup>154</sup>. Asimismo, las medidas cautelares de la Comisión tienen base tan sólo reglamentaria, y no convencional, y no pueden retardar - a veces indefinidamente - la aplicación de Medidas Provisionales de Protección de la Corte, dotadas éstas de base convencional.

10. Como agregué en el supracitado Voto Concurrente, “en toda y cualquier circunstancia, los imperativos de protección deben primar sobre los aparentes celos institucionales”, aún más en medio a situaciones de “violencia crónica”<sup>155</sup>. La insistencia de la Comisión en su práctica sobre medidas cautelares previas puede, en algunos casos, tener consecuencias negativas para las víctimas potenciales, y crear un obstáculo más para ellas. En determinados casos, puede configurar una denegación de justicia en el plano internacional.

11. *Tercero*, en caso de negativa de medidas cautelares por parte de la Comisión, debe tal decisión contar con la debida fundamentación. Las decisiones de la Comisión y de la Corte en materia de medidas tanto cautelares como provisionales, respectivamente, deben estar siempre debidamente motivadas, como garantía de la observancia del *principio del contradictorio* - el cual es un principio general del derecho, - para que los peticionarios se sientan seguros de que la cuestión que plantearon ha sido debida y atentamente tratada por la instancia internacional, y para que quede claro el sentido de la decisión por ésta tomada<sup>156</sup> (aún más en una alegada situación de extrema gravedad y urgencia con supuesta probabilidad de un daño irreparable a la persona humana).

12. Una decisión denegatoria de medidas cautelares por parte de la Comisión debe estar siempre, y necesaria y debidamente, motivada. Además, una negativa adicional por parte de la Comisión de solicitar Medidas Provisionales a la Corte, igualmente sin fundamentación,

---

154 Cf. Corte Interamericana de Derechos Humanos [CIADH], Resolución del 17.11.2005 en el caso de los Niños y Adolescentes Privados de Libertad en el ‘Complexo do Tatuapé’ de FEBEM versus Brasil, Voto Concurrente del Juez A.A. Cançado Trindade, párr. 3.

155 *Ibid.*, párr. 5.

156 Cf. [Varios Autores,] *Le principe du contradictoire devant les juridictions internationales* (eds. H. Ruiz Fabri y J.-M. Sorel), Paris, Pédone, 2004, pp. 14, 33, 81, 86, 118 y 168.

legítima a las víctimas potenciales, como sujetos del Derecho Internacional de los Derechos Humanos, para poder recurrir a la Corte, en búsqueda del otorgamiento de éstas Medidas Provisionales; de otro modo, se podría configurar una denegación de justicia en el plano internacional.

13. *Cuarto*, si el individuo peticionario en cuestión, ante las dos negativas de la Comisión, recurre a la Corte y ésta se abstiene de tomar medida alguna, por alegada falta de base convencional (por tratarse de caso pendiente ante la Comisión y no ante ella misma, la Corte) y reglamentaria, - inclusive para llenar este aparente vacío legal y cambiar la actual situación (con base en consideraciones de equidad *praeter legem*), se podría configurar una denegación de justicia en el plano internacional. En dos episodios recientes me permití formular una advertencia a la Corte en este sentido<sup>157</sup>.

14. En este momento, no consigo detectar sensibilidad alguna por parte de la Comisión ni de la Corte para dar el salto cualitativo por mi propugnado. Aún más, pienso que, si hubiera prevalecido la actual insensibilidad (para este punto específico) que detecto en los dos órganos de supervisión de la Convención Americana, en el año 2000, quizás no se hubiera siquiera logrado algunos de los cambios reglamentarios en pro del fortalecimiento del acceso directo de los individuos a las instancias internacionales de la Convención Americana, o sea, su acceso a la justicia internacional.

## II. Breves Reflexiones *De Lege Ferenda*

15. Siendo así, - y, como el rinoceronte de Ionesco, *je ne capitule pas*, - me permito aquí, en este Voto Razonado, insistir en mi razonamiento, - tal como lo he hecho recientemente en el seno de la Corte<sup>158</sup>, - en pro del acceso pleno del individuo a la justicia internacional en el marco

---

157 Cf. CHADH, caso de los *Hermanos Dante, Jorge y José Peirano Basso versus Uruguay*, carta de los Jueces A.A. Cançado Trindade y M.E. Ventura Robles al Presidente de la Corte, del 07.07.2006, doc. CDH-S/1181, pp. 1-2; caso de *Loretta Ortiz Ahlf y Otros Ciudadanos Mexicanos versus México*, carta del Juez A.A. Cançado Trindade al Presidente en ejercicio de la Corte, del 19.09.2006, doc. Corte IDH/1641, p. 1.

158 En mis recientes Votos Razonados en las Resoluciones de la Corte sobre Medidas Provisionales de Protección tanto en el caso *Gloria Giralte de García Prieto y Otros versus El Salvador* (del 26.09.2006) como el anterior caso *Mery Naranjo y Otros versus Colombia* (del 22.09.2006).

de la Convención Americana. Me permito aquí referirme a las bases para un *Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos para Fortalecer su Mecanismo de Protección*, que redacté (como relator de la Corte) y presenté (como Presidente de la Corte) a la Organización de los Estados Americanos [OEA] en mayo 2001<sup>159</sup>, y que ha constado invariablemente de la agenda de la Asamblea General de la OEA (como lo ilustran las Asambleas de San José de Costa Rica en 2001, de Bridgetown/Barbados en 2002, de Santiago de Chile en 2003, e de Quito en 2004), y permanece presente en los documentos pertinentes de la OEA del bienio 2005-2006<sup>160</sup>. Espero que en el futuro próximo venga a generar frutos concretos.

16. En el referido documento, propuse *inter alia* que el artículo 77 de la Convención debe, a mi juicio, ser enmendado, en el sentido de que no sólo cualquier Estado Parte y la Comisión, sino también la Corte, puedan presentar Proyectos de Protocolos Adicionales a la Convención Americana, - como naturalmente le corresponde al órgano de supervisión de mayor jerarquía de dicha Convención, - con miras a la ampliación del elenco de los derechos convencionalmente protegidos y al fortalecimiento del mecanismo de protección establecido por la Convención<sup>161</sup>.

17. Además, teniendo siempre presente la posición de la persona humana como sujeto del Derecho Internacional de los Derechos Humanos (y, a mi juicio, del propio Derecho Internacional Público), me permití sostener que el artículo 61(1) de la Convención pasaría, significativamente, a tener la siguiente redacción:

---

159 Cf. A.A. Cançado Trindade, *Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección*, vol. II, 2a. ed., San José de Costa Rica, Corte Interamericana de Derechos Humanos, 2003, pp. 1-1015.

160 OEA, documento AG/RES.2129 (XXXV-0/050), del 07.06.2005, pp. 1-3; OEA, documento CP/CAJP-2311/05/Rev.2, del 27.02.2006, pp. 1-3.

161 Señalé además que también el Estatuto de la Corte Interamericana (de 1979) requiere una serie de enmiendas (que indiqué en el mencionado documento). Asimismo, agregué que los artículos 24(3) y 28 del Estatuto requieren alteraciones: en el artículo 24(3), las palabras "se comunicarán en sesiones públicas y" deben ser eliminadas; y en el artículo 28, las palabras "y será tenida como parte" deben igualmente ser suprimidas.

- Los Estados Partes, la Comisión y las presuntas víctimas tienen derecho a someter un caso a la decisión de la Corte<sup>162</sup>.

Y, en la misma línea de pensamiento, me permito aquí agregar, en este Voto Razonado, la propuesta adicional en el sentido de que el artículo 63(2) de la Convención Americana pasaría, de modo igualmente significativo, a tener la siguiente redacción:

En casos de extrema gravedad y urgencia, y cuando se haga necesario evitar daños irreparables a las personas, la Corte, en los asuntos que esté conociendo, podrá tomar las medidas provisionales que considere pertinentes. Si se tratare de asuntos que aún no estén sometidos a su conocimiento, podrá actuar a solicitud de la Comisión o de las presuntas víctimas potenciales.

18. En el mecanismo de protección de la Convención Americana, el derecho de petición individual alcanzará su plenitud el día en que pueda ser ejercido por los peticionarios directamente ante la Corte Interamericana de Derechos Humanos. De ahí la presente propuesta de enmienda del artículo 61(1) de la Convención, *alcanzando también el artículo 63(2), en determinadas circunstancias, en materia de Medidas Provisionales de Protección*. Esto, a mi modo de ver, se justifica plenamente, aún más tratándose de alegadas situaciones de extrema gravedad y urgencia, con supuesta probabilidad de daño irreparable a la persona humana.

---

162 En su redacción actual y original, el artículo 61(1) de la Convención Americana determina que sólo los Estados Partes y la CIDH tienen derecho a “someter un caso” a la decisión de la Corte. Pero la Convención, al disponer sobre reparaciones, también se refiere a “la parte lesionada” (artículo 63(1)), i.e., las víctimas y no la CIDH. En este inicio del siglo XXI, se encuentran superadas las razones históricas que llevaron a la denegación de dicho *locus standi* de las víctimas; en los sistemas europeo e interamericano de derechos humanos, la propia práctica cuidó de revelar las insuficiencias, deficiencias y distorsiones del mecanismo paternalista de la intermediación de la CIDH entre el individuo y la Corte.



# CAPÍTULO III

## A DIMENSÃO PREVENTIVA DAS MEDIDAS PROVISÓRIAS DE PROTEÇÃO: VOTOS NA CORTE INTERNACIONAL DE JUSTIÇA

### 1. DISSENTING OPINION OF JUDGE A.A. CANÇADO TRINDADE IN THE CASE CONCERNING *QUESTIONS RELATING TO THE OBLIGATION TO PROSECUTE OR TO EXTRADITE* (Belgium versus Senegal, Order of 28.05.2009)

1. I regret not to be able to concur with the decision taken by the majority of the Court not to indicate provisional measures in the *cas d'espèce*, for having considered that the circumstances presented to it were not such as to require the exercise of its power under Article 41 of the Statute to that end. My position is, *a contrario sensu*, that the circumstances surrounding the present case concerning *Questions Relating to the Obligation to Prosecute or to Extradite* fully meet the preconditions for the indication of provisional measures, and that the International Court of Justice could and should thereby have indicated them. Given the high importance that I attach to the issues raised in the present Order, I feel obliged to present and leave on the records, in this Dissenting Opinion, the foundations of my position on the matter.

#### I. Preliminary Observations

2. To this end, I shall concentrate my reasoning on successive and interrelated points, but not without first recalling that the present case concerning *Questions Relating to the Obligation to Prosecute or to Extradite* is the first case lodged with the Court on the basis of the 1984 U.N. Convention against Torture. And it was on the basis of this highly relevant Convention (Article 30), which bears witness of the significant development of contemporary International Law, that the Court found, in the present Order, that it indeed had *prima facie* jurisdiction (pars. 54-55 of the Order) to examine the request lodged with it for the indication of provisional measures. As the Order of the Court does not, in my view, reflect all the points that I deem relevant to the proper consideration of the issues raised by such request, I feel it is my duty to

address those points, in a logical sequence, in support of my dissenting position.

3. I shall thus focus my reasoning on the following points: a) the transposition of provisional measures onto the international legal procedure; b) the juridical nature and effects of provisional measures of the ICJ; c) the overcoming of the strictly inter-State dimension in the acknowledgement of the rights to be preserved; d) the rationale of the purported aims of provisional measures of the ICJ; e) the saga of the victims of the Habré regime in their persistent struggle against impunity (encompassing the historical record of the case, and the issue of justiciability in the long search for justice); f) the time of human beings and the time of human justice (comprising the décalage to be bridged, the determination of urgency, and the determination of the probability of irreparable damage); g) legal nature, content and effects of the right to be preserved; h) provisional measures to be indicated (comprehending time and the imperativeness of the realization of justice, and i) the required indication of provisional measures in the present case.

4. The way will thus be paved for extracting the lesson of the present case at this stage (provisional measures for the realization of justice), and for at last presenting my concluding observations on the matter. With these preliminary observations in mind, I shall thus proceed to dwell upon each of the points identified for the development of my reasoning, as the foundation of my dissenting position in relation to the decision taken by the majority of the Court.

## **II. Provisional Measures: Their Transposition onto the International Legal Procedure**

5. In approaching provisional measures, one has, first of all, to bear in mind the historical transposition of such measures from the domestic legal systems to the international legal order. In fact, the precautionary measures, of internal procedural law, inspired the provisional measures<sup>1</sup> which developed subsequently in the ambit of international procedural law, to the extent of contributing decisively

---

1 The notable example of the contribution of the Italian procedural law doctrine of the first half of the XXth century (e.g., the well-known works by G. Chiovenda, *Istituzioni di Diritto Processuale Civile*, Naples, 1936; P. Calamandrei, *Introduzione allo Studio Sistemático dei Provvedimenti Cautelare*, Padua, 1936; and F. Carnelutti, *Diritto e Processo*, Naples, 1958) may here be recalled.

to affirm the autonomy of the precautionary legal action<sup>2</sup>. However, this whole doctrinal construction did not succeed to free itself from a certain juridical formalism, leaving at times the impression of taking the process as an end in itself, rather than as a means for the realization of justice.

6. May it be recalled that, at the level of the domestic legal order, the precautionary process evolved in order to safeguard the effectiveness of the jurisdictional function itself. The precautionary legal action turned in its origins to aim at guaranteeing, rather than the subjective right *per se*, the jurisdictional activity itself. Precautionary measures reached the international level (in the international arbitral and judicial practice)<sup>3</sup>, in spite of the distinct structure of this latter, when compared with the domestic law level.

7. The transposition of the provisional measures from the domestic to the international legal order - always in face of the probability or imminence of an “irreparable damage”, and the concern or necessity to secure the “future realization of a given juridical situation” - had the effect of expanding the domain of international jurisdiction, with the consequent reduction of the so-called “reserved domain” of the State<sup>4</sup>. This transposition faced difficulties<sup>5</sup>, but, throughout the years, the erosion of the concept of “reserved domain” (or “exclusive national competence”) of the State became evident, to what the international judicial practice itself, also in the present domain, contributed.

### III. The Juridical Nature and Effects of Provisional Measures of the ICJ

8. Article 41 of the Statute of the ICJ - and of its predecessor, the PCIJ - in fact sets forth the power of the Hague Court to “indicate” provisional measures. The verb utilized generated a wide doctrinal

2 As a *tertium genus*, parallel to the legal actions as to the merits and of execution.

3 P. Guggenheim, «Les mesures conservatoires dans la procédure arbitrale et judiciaire», 40 *Recueil des Cours de l'Académie de Droit International de La Haye* (1932) pp. 649-761, and cf. pp. 758-759.

4 P. Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, Paris, Libr. Rec. Sirey, 1931, pp. 15, 174, 186, 188 and 14-15, and cf. pp. 6-7 and 61-62.

5 As illustrated, e.g., by the Iranian reaction to provisional measures indicated by the ICJ in the case of the *Anglo-Iranian Oil Company* (United Kingdom *versus* Iran), on 05 July 1951; cf. account in: M.S. Rajan, *United Nations and Domestic Jurisdiction*, Bombay/Calcutta/Madras, Orient Longmans, 1958, pp. 399 and 442 n. 2.

debate as to its binding character, which did not hinder the development of a vast case-law (of the PCIJ and the ICJ) on the matter<sup>6</sup>. Yet, given the lack of precision which persisted for years as to the legal effects of the indication of provisional measures by the ICJ, uncertainties were generated, in theory and practice, on the matter, which lasted for more than five decades, affecting compliance with them<sup>7</sup>.

9. Despite the growing case-law on provisional measures of the ICJ<sup>8</sup>, one had to wait for more than half a century until, in the Judgment of 27 June 2001, the ICJ found at last the occasion to clarify that provisional measures indicated by it were binding. In that Judgment, concerning the two LaGrand brothers, opposing Germany to the United States, the ICJ reviewed the preparatory work of Article 41 of its Statute (in its French and English versions - pars. 104-107), and, bearing in mind Article 33(4) of the 1969 Vienna Convention on the Law of Treaties (par. 101), found that the object and purpose of Article 41 of its Statute were to preserve its own ability to fulfil its function

---

6 Cf. J. Sztucki, *Interim Measures in the Hague Court - An Attempt at a Scrutiny*, Deventer, Kluwer, 1983, pp. 35-60 and 270-280; J.B. Elkind, *Interim Protection - A Functional Approach*, The Hague, Nijhoff, 1981, pp. 88-152; and, for jurisdictional aspects, cf. L. Daniele, *Le Misure Cautelari nel Processo dinanzi alla Corte Internazionale di Giustizia*, Milano, Giuffrè, 1993, pp. 5-183; B.H. Oxman, "Jurisdiction and the Power to Indicate Provisional Measures", in *The International Court of Justice at a Crossroads* (ed. L.F. Damrosch), Dobbs Ferry/N.Y., ASIL/Transnational Publs., 1987, pp. 323-354.

7 Cf., e.g., K. Oellers-Frahm, "Anmerkungen zur einstweiligen Anordnung des Internationalen Gerichtshofs im Fall *Bosnien-Herzegowina gegen Jugoslawien (Serbien und Montenegro)* vom 8 April 1993", 53 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1993) pp. 638-656; E. Robert, "La protection consulaire des nationaux en péril? Les ordonnances en indication de mesures conservatoires rendues par la Cour internationale de Justice dans les affaires *Breard* (Paraguay c. États-Unis) et *LaGrand* (Allemagne c. États-Unis)", 31 *Revue belge de Droit international* (1998) pp. 413-449, esp. pp. 441 and 448; J.G. Merrills, "Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice", 44 *International and Comparative Law Quarterly* (1995) pp. 137-139, and cf. pp. 90-146.

8 Cf. S. Rosenne, *Provisional Measures in International Law*, Oxford, University Press, 2005, pp. 22-44, 122-123, 138-141, 174-180 and 189-213; A.G. Koroma, "Provisional Measures in Disputes between African States before the International Court of Justice", in *L'ordre juridique international, un système en quête d'équité et d'universalité - Liber Amicorum G. Abi-Saab* (eds. L. Boisson de Chazournes and V. Gowlland-Debbas), The Hague, Nijhoff, 2001, pp. 591-602; K. Oellers-Frahm, "Article 41", in *The Statute of the International Court of Justice - A Commentary* (eds. A. Zimmermann et alii), Oxford, University Press, 2006, pp. 923-966.

of peaceful settlement of international disputes, which implied that provisional measures should be binding (pars. 102 and 109).

10. Furthermore, *Orders* of provisional measures were “*decisions*” of the Court, which, in the terms of Article 94(1) of the United Nations Charter, States were bound to comply with (par. 108). The binding character of provisional measures of the ICJ - brought into line with the position upheld in other contemporary international jurisdictions - ensued from this understanding by the ICJ of Article 41 of its Statute, in combination with Article 94(1) of the U.N. Charter; this has now become *res interpretata*, paving the way for developments hopefully to take place in the years to come in this respect. In any case, longstanding uncertainties surrounding the matter are at last now to be put aside.

11. What, in fact, would be the point of *deciding* on the indication of provisional measures, and of issuing *Orders* on them, after gathering *prima facie* - rather than substantial - evidence (*summaria cognitio*) in documents as well as public hearings, if they were not to have binding effect? What would be the point of denying them such effect if what was aimed at, without prejudice to the merits of the *cas d'espèce*, was precisely to preserve the integrity of the rights at stake? Such uncertainties nowadays belong to the past; it is now reckoned that they were not contributing to the evolution of the preventive dimension of the peaceful settlement of international disputes lodged with an international tribunal such as the ICJ.

12. In the past, despite the prevailing uncertainties which then surrounded the matter, international case-law nevertheless sought to clarify the *juridical nature* of provisional measures, of an essentially preventive character, indicated or granted without prejudice to the final decision as to the merits of the respective cases. Such measures came to be indicated or ordered by contemporary international<sup>9</sup>, as well as national<sup>10</sup>, tribunals. Their generalized use at both national and international levels has led a contemporary doctrinal trend to consider such measures as equivalent to a true *general principle of Law*, common

---

9 Cf. R. Bernhardt (ed.), *Interim Measures Indicated by International Courts*, Berlin/Heidelberg, Springer-Verlag, 1994, pp. 1-152.

10 Cf. E. García de Enterría, *La Batalla por las Medidas Cautelares*, 2nd. [enlarged] ed., Madrid, Civitas, 1995, pp. 25-385.

to virtually all national legal systems, and endorsed by the practice of national, arbitral, and international tribunals<sup>11</sup>.

13. It is not my intention to dwell on this aspect of the matter here, but rather to draw attention onto a specific point, before moving on to other aspects relating the consideration of the *cas d'espèce*, in so far as the present request for provisional measures is concerned. In international legal procedures pertaining to the safeguard of human rights, provisional measures go much further in the matter of protection, revealing an unprecedented scope, and determining the effectiveness of the right of individual petition itself at international level; it becomes clear that they here protect individual rights and appear endowed with a character, more than precautionary, truly *tutelary*<sup>12</sup>.

14. In the inter-State *contentieux*, the power of a tribunal like the ICJ to indicate provisional measures of protection in a case pending of decision aims at *preserving the equilibrium* between the respective rights of the contending parties<sup>13</sup>, avoiding an irreparable damage to the rights in litigation in a judicial process<sup>14</sup>. Overcoming the formalism

11 In the sense of Article 38(1)(c) of the Statute of the ICJ; cf. L. Collins, "Provisional and Protective Measures in International Litigation", 234 *Recueil des Cours de l'Académie de Droit International de La Haye* (1992) pp. 23, 214 and 234.

12 Cf. R.St.J. MacDonald, "Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights", 52 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1993) pp. 703-740; 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), Bruxelles, Bruylant/Nemesis, 2005, pp. 145-163, and in 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25; and cf., in general, A. Saccucci, *Le Misure Provvisorie nella Protezione Internazionale dei Diritti Umani*, Torino, Giappichelli Ed., 2006, pp. 103-241 and 447-507.

13 Cf. E. Hambro, "The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice", in *Rechtsfragen der Internationalen Organisation - Festschrift für Hans Wehberg* (eds. W. Schätzel and H.-J. Schlochauer), Frankfurt a/M, 1956, pp. 152-171.

14 This has been pointed out by the ICJ, for example, in the case of *Fisheries Jurisdiction (United Kingdom versus Iceland)*, *ICJ Reports* (1972) p. 16, para. 21, and p. 34, para. 22), in the *Hostages in Teheran* case (*United States Diplomatic and Consular Staff - in United States versus Iran*), *ICJ Reports* (1979) p. 19, para. 36; and, subsequently, e.g., in the case of *Nicaragua versus United States*, *ICJ Reports* (1984) pp. 179 and 182, paras. 24 and 32), and in the case of the *Application of the Convention against Genocide (Bosnia and Herzegovina versus Yugoslavia)*, *ICJ Reports* (1993) p. 19, para. 34, and p. 342, para. 35. And cf., e.g., the cases of the *Frontier Dispute (Burkina Faso versus Mali, 1986)*, of the *Aegean Sea Continental Shelf (Greece versus Turkey, 1976)*, of the *Nuclear Tests (New Zealand and Australia versus*

of the international procedural law of the past, it can nowadays be safely acknowledged that compliance with provisional measures of protection has a direct bearing upon the rights invoked by the contending parties, which, in circumstances such as that of the present case of *Belgium versus Senegal*, have a direct relationship with the legitimate expectations of thousands of human beings.

#### **IV. The Overcoming of the Strictly Inter-State Dimension in the Acknowledgement of the Rights to be Preserved**

15. In the international litigation before this Court, only States, as contending parties, can request provisional measures. Yet, in recent years, such requests have invoked rights which go beyond the strictly inter-State dimension. In the triad *Breard/LaGrand/Avena* cases, provisional measures were requested to prevent an irreparable damage also to the right to life of the convicted persons (stay of execution), in the circumstances of their cases. In its order of 09 April 1998 in the *Breard* case (*Paraguay versus United States*), the Court took note of the requesting State's invocation of the right to life and, in particular, of Article 6 of the U.N. Covenant on Civil and Political Rights (par. 8), and indicated that A.F. Breard, a Paraguayan national, was not to be executed pending the final decision in the proceedings of the case (resolatory point I).

16. In the following year, in its Order of 03 March 1999 in the *LaGrand Brothers* case (*Germany versus United States*), the ICJ again took cognizance of the requesting State's argument likewise invoking the right to life and Article 6 of the same U.N. Covenant (par. 8), and indicated that W. LaGrand, a German national, was not to be executed pending the final decision in the proceedings of the case (resolatory point I). Likewise, in its Order of 05 February 2003 in the case of *Avena and Others* (*Mexico versus United States*), the ICJ took note of the requesting State's argument on the basis of the recognition by international law of "the sanctity of human life", and its invocation of Article 6 of the same U.N. Covenant, and again indicated that C.R. Fierro Reyna, R. Moreno Ramos, and O. Torres Aguilera, three

---

France, 1973), of the *Trial of Pakistani Prisoners of War* (*Pakistan versus India*, 1973), among others.

Mexican nationals, were not to be executed pending final judgment in the proceedings of the case (resolatory point I(a)).

17. The ultimate beneficiaries were meant to be the individuals concerned, and to that end the requesting States advanced their arguments to obtain the Court's Orders of Provisional Measures. On earlier occasions, the ICJ was likewise concerned with the protection of human life, in distinct contexts. Thus, two decades earlier, in its Order of 15 December 1979, in the *Hostages* case (United States *versus* Iran), the Court took into account the State's arguments to protect the life, freedom and personal security of its nationals (diplomatic and consular staff in Tehran - par. 37), and indicated provisional measures of protection of those rights (resolatory point I(A)), after referring to the "obligations impératives" under the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations (par. 41), and pondering that

la persistance de la situation qui fait l'objet de la requête expose les êtres humains concernés à des privations, à un sort pénible et angoissant et même à des dangers pour leur vie et leur santé et par conséquent à une possibilité sérieuse de préjudice irréparable (para. 42).

18. Half a decade later, in its Order of 10 May 1984, in the *Nicaragua versus United States* case, the ICJ indicated provisional measures (resolatory point B(2)) after taking note of the requesting State's argument calling for protection of the rights to life, to freedom and to personal security of Nicaraguan citizens (par. 32). Shortly afterwards, in its celebrated Order of 10 January 1986 in the *Frontier Dispute* case (Burkina Faso *versus* Mali), duly complied with by the contending parties, the Court's Chamber took note of the concern expressed by the parties with the personal integrity and safety of those persons who were in the zone under dispute (pars. 6 and 21). One decade later, in its Order of 15 March 1996 in the case of the *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon *versus* Nigeria), the Court took note of the requesting State's warning that continuing armed clashes in the region were notably causing "irremediable loss of life as well as human suffering and substantial material damage" (par. 19); in deciding to order provisional measures, the ICJ pondered that

it is clear from the submissions of both Parties to the Court that there were military incidents and that they caused suffering, occasioned fatalities - of both military and civilian personnel - while causing others to be wounded or unaccounted for, as well as causing major material damage;

(...) the rights at issue in these proceedings are sovereign rights which the Parties claim over territory, and (...) these rights also concern persons; (...)

(...) the events that have given rise to the request, and more especially the killing of persons, have caused irreparable damage to the rights that the Parties may have over the Peninsula; (...) persons in the disputed area and, as a consequence, the rights of the Parties within that area are exposed to serious risk of further irreparable damage (paras. 38-39 and 42).

19. Another Order illustrative of the overcoming of the strictly inter-State dimension in the acknowledgement of the rights to be preserved by means of provisional measures pertains to the case of *Armed Activities on the Territory of the Congo*, opposing this latter to Uganda. In its Order of 01 July 2000 in this case, the ICJ took into account the requesting State's denunciation of alleged "human rights violations" - invoking international instruments for their protection (pars. 4-5 and 18-19), - and of its plea for protection for its inhabitants (par. 31) as well as for its own "rights to respect for the rules of international humanitarian law and for the instruments relating to the protection of human rights" (par. 40). The Court, recognizing the pressing need to indicate provisional measures of protection (pars. 43-44), found that it was

not disputed that grave and repeated violations of human rights and international humanitarian law, including massacres and other atrocities, have been committed on the territory of the Democratic Republic of the Congo (par. 42).

The Court, accordingly, ordered both parties *inter alia* to

take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for

the applicable provisions of humanitarian law (resolatory point 3).

20. In its Order of 08 April 1993 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *versus* Yugoslavia), the Court, after finding “a grave risk” to human life, indicated provisional measures, and recalled General Assembly resolution 96(I) of 11 December 1946 (referred to in its own Advisory Opinion of 1951 on *Reservations on the Convention against Genocide*) to the effect that the crime of genocide “shocks the conscience of mankind, results in great losses to humanity (...) and is contrary to moral law and to the spirit and aims of the United Nations” (*cit. in par.* 49). In the subsequent Order of 13 September 1993 in the same case, the Court again its concern for the protection of human rights and the rights of peoples (par. 38). And in its recent Order of 15 October 2008 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *versus* Russia), the ICJ once again disclosed its concern for the preservation of human life and personal integrity (pars. 122 and 142-143).

21. From the survey above it can be seen that, along the last three decades, the ICJ has gradually overcome the strictly inter-State outlook in the acknowledgement of the rights to be preserved by means of its Orders of provisional measures of protection. Nostalgics of the past, clung to their own dogmatism, can hardly deny that, nowadays, States litigating before this Court, despite its inter-State contentious procedure, have conceded that they have no longer the monopoly of the rights to be preserved, and, much to their credit, they recognize so, in pleading before this Court on behalf also individuals, their nationals, or even in a larger framework, its inhabitants.

22. They are not thereby exercising diplomatic protection, as they argue in a much wider conceptual framework. The ICJ, in its turn, - whether nostalgics of the past like it or not, - has, on certain occasions, issued Orders of provisional measures in which it has expressly placed the rights of the human person beside the rights of States (*cf. supra*). This calls for a reassessment of the contemporary international legal order itself, with greater attention focused on one of the constituent elements of States, their population, and its needs of protection, even by means of the operation of an inter-State mechanism.

23. Facts tend to come before the norms, requiring of these latter the aptitude to cover new situations they are meant to regulate, with due attention to superior values<sup>15</sup>. Before this Court, States keep on holding the monopoly of *jus standi*, as well as *locus standi in judicio*, in so far as requests for provisional measures are concerned, but this has not proved incompatible with the preservation of the rights of the human person, together with those of States. The ultimate beneficiaries of the rights to be thereby preserved have been, not seldom and ultimately, human beings, alongside the States wherein they live. Reversely, requesting States themselves have, in their arguments before this Court, gone beyond the strictly inter-State outlook of the past, in invoking principles and norms of the International Law of Human Rights and of International Humanitarian Law, to safeguard the fundamental rights of the human person.

24. In so far as material or substantive law is concerned, the inter-State structure of litigation before this Court has not been an unsurmountable obstacle to such vindication of observance of principles and norms of International Human Rights Law and International Humanitarian Law, as requests for provisional measures of protection before this Court have not purported to limit themselves to the preservation of the rights of States.

25. As one of the constitutive elements of these latter - and a most prominent one - is their population, it comes as no surprise that provisional measures indicated in successive Orders of the ICJ have transcended the artificial inter-State dimension of the past, and have come to preserve also rights whose ultimate subjects (*titulaires*) are the human beings. This reassuring development admits no steps backwards, as it has taken place to fulfil a basic need and aspiration not only of States, but of the contemporary international community as a whole.

## **V. The Rationale of the Purported Aims of Provisional Measures of the ICJ**

26. Along the last decades, in its Orders of Provisional Measures pursuant to Article 41 of its Statute, the ICJ has to a large extent based its reasoning either on the need to avoid or prevent an imminent and irreparable harm to the rights of the contending Parties (including the

---

<sup>15</sup> Cf., *inter alia*, G. Morin, *La Révolte du Droit contre le Code - La révision nécessaire des concepts juridiques*, Paris, Libr. Rec. Sirey, 1945, pp. 2, 6-7 and 109-115.

rights of the human person), or, more comprehensively, on the need to avoid or prevent the aggravation of the situation which would be bound to affect or harm irreparably the rights of the parties. Yet, the rationale of such Orders of the Court does not need to limit or exhaust itself in a reasoning of the kind.

27. Once again, facts tend to come before the norms, and much will depend on the nature and content of the rights to be preserved. In the present case concerning *Questions Relating to the Obligation to Prosecute or to Extradite*, such right pertains, in my view, to the *realization of justice*. The Court's reasoning is bound, accordingly, to reflect the purported end of preservation of this right. In the distinct contexts of other cases, the ICJ has already disclosed its attention to the imperative of the realization of justice.

28. Thus, in its Order of 10 January 1986 in the case of the *Frontier Dispute (Burkina Faso versus Mali)*, the Court's Chamber indicated provisional measures in order not to aggravate the situation, aware that such measures were to contribute to "assurer la bonne administration de la justice" and to prevent "la destruction d'éléments de preuve pertinents" to its own decision (pars. 19-20). The preservation of evidence relevant for the decision on the case was also the concern of the Court, as expressly stated in its Order of 15 March 1996 (par. 42), in the case of the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon versus Nigeria)*.

29. Thus, in the case-law itself of the ICJ there are already elements disclosing the concern of the Court, when issuing Orders of provisional measures, *to strive towards achieving a good administration of justice*. In the present Order of the Court in the case concerning *Questions Relating to the Obligation to Prosecute or to Extradite*, the *right to the realization of justice* assumes a central place, and a paramount importance, and becomes thus deserving of particular attention. I shall retake this point later on, in this Dissenting Opinion, after reviewing the historical record of the present case, and the situation of impunity which has prevailed for almost two decades, which, in my view, do have a direct bearing on the requirements of urgency and risk of irreparable harm to the right to be preserved, for the purpose of consideration of the present request for provisional measures lodged with this Court.

## **VI. The Saga of the Victims of the Habré Regime in their Persistent Struggle against Impunity**

30. In the oral hearings before this Court, *both* Belgium and Senegal saw it fit to recall the atrocities of the Habré regime (1982-1000), wherefrom the *cas d'espèce* emerges. In its pleading of 06 April 2009, Belgium referred to the findings of the Chadian Truth Commission, as to the loss of human life as well as to the 54 thousand political detainees between 1982 and 1990<sup>16</sup>. Significantly, Senegal dwelt even further upon those findings, in its pleadings of 08 April 2009: it added that, besides those 54 thousand political detainees, there were approximately 40 thousand fatal victims in the period of the Habré regime, bringing the total to “au moins 94.000 victimes directes ou leurs ayant-droits” who are “susceptibles d’être concernés par le procès de M. Hissène Habré”<sup>17</sup>.

31. It should not pass unnoticed that both Parties, Belgium and Senegal, referred to those sombre figures in the course of the proceedings concerning provisional measures. In the circumstances of the present case, it is, in fact, ineluctable to dwell upon the atrocities of the Habré regime, for addressing the issue of the right to be preserved by provisional measures of the ICJ. It is commendable that both Parties, Senegal and Belgium, reckoned that gravity of the case and the human tragedy it amounts to, in a strictly inter-State procedure before this Court. The States concerned themselves made a point of acknowledging the human dimension of the present *contentieux* between them.

### **1. The Historical Record of the Case**

32. The facts wherefrom the present case originates are, in fact, of public and notorious knowledge, being documented, e.g., in the *Report of the Chadian Truth Commission* (of 07 May 1992)<sup>18</sup>, which covered the period of the regime of former President Hissène Habré (from 07 June 1982 to 01 December 1990). Both Belgium and Senegal referred to them. The Truth Commission, after the investigation it

---

16 ICJ, public sitting of 06.04.2009, *Verbatim Record*, doc. CR.2009/8, pp. 18-19.

17 ICJ, public sitting of 08.04.2009, *Verbatim Record*, doc. CR.2009/11, p. 10.

18 The “Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories” was created by the Government of Chad’s decree n. 014/P.CE/CJ/90, of 29.12.1990.

undertook, reported the crimes systematically committed against the physical and mental integrity of persons and their possessions (part I) during the period at issue, and determined a grim record of more than 40 thousand persons murdered, over 80 thousand orphans, over 54 thousand persons arbitrarily detained, and 200 thousand of persons destituted and deprived of moral and material support. The Commission made it clear that this was the result of a systematic pattern of State-perpetrated arbitrary detentions, torture, inhuman conditions of detention, summary or arbitrary or extra-judicial executions, successive massacres or mass executions, occultation of mortal remains, destruction of villages, persecutions, forced eviction and plundering<sup>19</sup>.

33. The *Report* further investigated the misappropriation of public funds (part II), and elucidated that the Habré regime deliberately terrorized the population. The pillars of the State-conducted repression, according to the Truth Commission, were the political police (the Directorate of Documentation and Security - DDS) and the Presidential Investigation Service (SIP), added to the State party. The Commission added that the communication between the terrifying DDS and the President was direct, with no intermediaries. The "State-policies" devised, at the highest level of the Executive, according to the Truth Commission, were carried out with "predisposition", cruelty and "contempt for human life"<sup>20</sup>. The executions were "ordered directly" by the President<sup>21</sup>. The objects collected by plundering were taken directly to the office of the President<sup>22</sup>.

34. In sum, Habré's regime, according to the Chadian Truth Commission, amounted to an 8-year reign of State terror, with people mourning their dead in complete defencelessness, in an abominable distortion of the ends of the State, and with impunity for such crimes prevailing to this day. The *Report* of the Chadian Truth Commission was

---

19 Cf. "Chad: Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories" [Done in Ndjamená, 07 May 1992], in: *Transitional Justice* (ed. N.J. Kritz), vol. III, Washington D.C., U.S. Institute of Peace Press, 1995, pp. 51-93.

20 *Ibid.*, pp. 58 and 61. The DDS received assistance from foreign States (p. 64), and promptly attained the objective pursued, to terrorize the population (pp. 66 and 88), with a "proliferation of detention centres throughout the country" (p. 72).

21 *Ibid.*, p. 77.

22 *Ibid.*, p. 81.

but the beginning of the saga of the victims of the atrocities perpetrated during the Habré regime (1982-1990) in Chad. Their search for justice has followed a long path, at both national and international levels.

## **2. The Issue of Justiciability in the Long Search for Justice**

35. The issue of justiciability for the grave violations perpetrated during the Habré regime, starting with the right to be preserved in the *cas d'espèce*, has a distinct dimension. In the oral arguments before this Court, Belgium argued, on 06 April 2009, that its implication in the present case «trouve son origine dans une plainte déposée à Bruxelles, avec constitution de partie civile devant un juge d'instruction, le 30 novembre 2000, par un ressortissant belge d'origine tchadienne"<sup>23</sup>. Furthermore, - Belgium added, - it was not in Belgium but in Senegal that the first complaints against Mr. H. Habré were presented, in January 2000, without success, as «la Chambre d'accusation de la Cour d'appel de Dakar avait annulé le procès-verbal d'inculpation délivré par le juge d'instruction sénégalais qui inculpait M. Hissène Habré pour complicité de crimes contre l'humanité, d'actes de torture et de barbarie"<sup>24</sup>.

36. Senegal, on its turn, contended before this Court, also on 06 April 2009, that the origin of the present case is found in the lodging, on 25 January 2000, with the *Juge d'instruction* of a complaint (by Mr. S. Guengueng and seven other petitioners) against Mr. H. Habré, of crimes against humanity, torture, barbaric acts, discrimination, killings and forced disappearances; the eight petitioners claimed to have been victims of crimes against humanity and acts of torture in Chad, between June 1982 and December 1990<sup>25</sup>. Three years earlier, in 1987, Senegal had ratified the 1984 U.N. Convention against Torture<sup>26</sup>.

37. In its oral arguments before this Court, Senegal recalled the endeavours by the two groups of victims of the atrocities of the Habré regime in their search for justice:

---

23 ICJ, public sitting of 06.04.2009, *Verbatim Record*, doc. CR.2009/8, p. 17.

24 ICJ, public sitting of 06.04.2009, *Verbatim Record*, doc. CR.2009/8, p. 19.

25 ICJ, public sitting of 06.04.2009, *Verbatim Record*, doc. CR.2009/9, pp. 10 and 23. The petitioners were members of the "Association des victimes des crimes et répressions politiques au Tchad" (AVCRP), established in 1991; *ibid.*, p. 10.

26 As recalled by Senegal itself before this Court; ICJ, public sitting of 06.04.2009, *Verbatim Record*, doc. CR.2009/9, p. 23.

Alors que la Cour de cassation sénégalaise examinait encore l'affaire, une autre plainte a été déposée, en Belgique, par un autre groupe de victimes tchadiennes ou d'origine tchadienne, dont M. Aganaye a porté plainte le 20 novembre 2000.

Ce groupe de victimes était différent de celui qui avait porté plainte à Dakar mais les deux groupes bénéficiaient des mêmes soutiens. (...)

Au Sénégal, le 20 mars 2001, la Cour de cassation (...) a rejeté le pourvoi formé par les victimes tchadiennes du groupe Guengueng. Elle a jugé qu'aucun texte de procédure ne donnait une compétence universelle aux juridictions sénégalaises pour connaître des faits dénoncés sur le fondement de la Convention de 1984 contre la torture"<sup>27</sup>.

38. Belgium conceded that Senegal has lately modified its legislation (Penal Code and Code of Criminal Procedure), in February 2007, introducing therein the principle of universal jurisdiction for the repression of genocide, war crimes and crimes against humanity<sup>28</sup>. In the meantime, however, on 18 April 2001, - as Senegal itself saw it fit to recall before this Court, - the group of victims headed by Mr. Guengueng seized the U.N. Committee against Torture, established by Article 17 of the U.N. Convention against Torture<sup>29</sup>.

39. It should not pass unnoticed that years have lapsed till the rights of the victims of the reported repression of the Habré regime became justiciable at domestic law level, and even more time has lapsed - almost two decades - till they were vindicated under the U.N. Convention against Torture, and now in the inter-State procedure before this Court. This discloses that the time of human justice is surely not the time of human beings (cf. *infra*). Moreover, if there are today rights invoked by States in connection with the atrocities of the Habré regime, this is due to the *initiative of the victims themselves*, before national tribunals (in Senegal and Belgium), and subsequently before the U.N. Committee against Torture, with the course of facts leading to the lodging of the present case now with this Court.

27 ICJ, public sitting of 06.04.2009, *Verbatim Record*, doc. CR.2009/09, p. 24.

28 ICJ, public sitting of 06.04.2009, *Verbatim Record*, doc. CR.2009/8, p. 20.

29 ICJ, public sitting of 06.04.2009, *Verbatim Record*, doc. CR.2009/9, p. 24.

40. Grave violations of human rights are thus at the origin of the present inter-State *contentieux* before the ICJ, and it is significant - and much to the credit of Senegal and Belgium - that the contending Parties have not attempted to controvert this in their oral arguments before this Court. Senegal, in addition, in its pleadings of 06 April 2009, expressly referred to the *victims* of the Habré regime who are seeking justice (cf. *supra*). The *right of States* invoked before the ICJ in the present case under the 1984 Convention against Torture emerges as from the *rights of human beings* victimized by repression and cruelty of an oppressive regime. This case reveals that the human dimension of the rights of States themselves can under certain circumstances become undeniable.

41. Once the U.N. Committee against Torture was seized, in 2001, of the *S. Guengueng et alii* case, concerning Senegal, it issued an interim or provisional measure requesting the State Party not to expel Mr. H. Habré and “to take all necessary measures to prevent him from leaving the territory, other than under an extradition procedure”, and the Committee found that the State Party concerned acceded to such request<sup>30</sup>. Half a decade later, in its decision of 17 May 2006 in the case of *Suleymane Guengueng et alii versus Senegal*, the U.N. Committee against Torture found *inter alia* (already at that time, eight years ago) that “the reasonable time within which the State Party should have complied” with the obligation under Article 5(2) of the U.N. Convention against Torture “has been considerably exceeded”<sup>31</sup>. It added that the objective of Article 7 of the Convention was “to prevent any act of torture from going unpunished”<sup>32</sup>, and concluded that there had been breaches of both provisions, Articles 7 and 5(2) of the Convention against Torture<sup>33</sup>.

42. Not only the U.N. Committee against Torture, as supervisory organ of the corresponding Convention, but also a regional international organization, the African Union, were engaged in the struggle against impunity in the present case concerning *Questions Relating to the Obligation to Prosecute or to Extradite* now before the ICJ. In fact, both Belgium<sup>34</sup> and Senegal<sup>35</sup> expressly acknowledged, in

30 U.N., document CAT/C/36/D/181/2001, of 19.05.2006, p. 2, para. 1(3).

31 U.N., document CAT/C/36/D/181/2001, of 19.05.2006, p. 15, para. 9(5).

32 *Ibid.*, p. 15, para. 9(7).

33 *Ibid.*, p. 16, pars. 9(9), 9(11) and 9(12).

34 ICJ, public sitting of 06.04.2009, *Verbatim Record*, doc. CR.2009/8, pp.41-42.

35 ICJ, public sitting of 06.04.2009, *Verbatim Record*, doc. CR.2009/9, p. 27.

their oral arguments before this Court, the contribution of the African Union to the principle of universal jurisdiction in the context of the *cas d'espèce*.

43. As Senegal transmitted the “*Hissène Habré case*” to the African Union in January 2006, this latter established a Committee of Eminent African Jurists to examine it (Decision 103(VI)). In its *Report* to the Assembly of Heads of State and Government of the African Union (2006), the Committee *inter alia* recommended, in July 2006, that

Tous les États africains devraient s’assurer que chacun adhère complètement à la Convention contre la torture et au Protocole additionnel afin de permettre l’application de la Convention sur l’ensemble du Continent. Les déclarations pertinentes prévues à l’article 22 doivent aussi être faites pour offrir une protection réelle des droits des citoyens. Cette adhésion est aussi importante pour la prévention de la torture (...).

Tous les États doivent prendre des mesures nécessaires pour adopter des lois sur ces crimes et intégrer la Convention contre la torture dans leur législation interne<sup>36</sup>.

44. On the basis of that *Report*, the Assembly of the African Union, by its Decision 127(VII), mandated Senegal

to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial<sup>37</sup>.

The controversy between Belgium and Senegal, in their oral arguments before the ICJ on 07 and 08 April 2009, then focused on a very specific issue, namely: while Belgium argued that “Senegal only regards itself as under an obligation not to release Mr. Habré because of the mandate given to it by the African Union, not because of its obligations owed to Belgium under the Torture Convention”<sup>38</sup>, Senegal, in turn, recalled, in reply, that

36 Union Africaine, *Rapport du Comité d’Éminent Juristes Africains sur l’affaire Hissène Habré*, 2006, p. 5, paras. 36-37.

37 African Union, *Decisions and Declarations*, Banjul, July 2006, Decision 127(VII), p. 1, para. 5(ii).

38 ICJ, public sitting of 07.04.2009, *Verbatim Record*, doc. CR.2009/10, p. 23.

il n'a jamais considéré que l'obligation de juger Hissène Habré trouve sa source dans la décision de l'Union Africaine et (...) il s'est toujours référé à la Convention de 1984 au moment d'apporter les modifications nécessaires à sa législation afin de rendre possible le procès envisagé<sup>39</sup>.

45. It should not pass unnoticed that the "Hissène Habré case" has been brought to the attention of yet another instance of the United Nations, namely, the Working Group on the Universal Periodic Review (UPR) of the U.N. Human Rights Council. A compilation prepared for that Working Group by the Office of the U.N. High Commissioner for Human Rights<sup>40</sup>, as well as a Draft Report (of February 2009) of the Working Group itself<sup>41</sup>, contain express references to the case, in the framework of the struggle against impunity. Yet, despite all this, the surviving victims of the atrocities of the Habré regime keep on waiting for justice. Hope is the last one to vanish.

## **VII. The Time of Human Beings and the Time of Human Justice**

### **1. The *Décalage* to be bridged**

46. The time of human beings surely does not appear to be the time of human justice. The time of human beings is not long (*vita brevis*), at least not long enough for the full realization of their project of life. The brevity of human life has been commented upon time and time again, along the centuries; in his *De Brevitate Vitae*<sup>42</sup>, Seneca pondered that, except for but a few, most people in his times departed from life while they were still preparing to live<sup>43</sup>. Yet, the time of human justice is prolonged, not seldom much further than that of human life, seeming to make abstraction of the vulnerability and briefness of this latter, even in face of adversities and injustices. The time of human justice

39 ICJ, public sitting of 08.04.2009, *Verbatim Record*, doc. CR.2009/11, p. 14.

40 U.N. Human Rights Council, document A/HRC/WG.6/4/SEN/2, of 18.12.2008, p. 7, par. 27.

41 U.N. Human Rights Council, document A/HRC/WG.6/4/L.10, of 11.02.2009, p. 7, 12, 15, 16 and 21, pars. 31, 63, 79, 92 and 98(5), respectively.

42 Written sometime between the years 49 and 62.

43 Seneca, *La Brevità della Vita (De Brevitate Vitae)*, 23rd. ed., Milano, RCS, 2008, pp. 40-41, ch. I-1: "(...) i giorni a noi concessi scorrono così veloci e travolgenti che, eccetto pochissimi, gli altri sono abbandonati dalla vita proprio mentre si preparano a vivere" / "(...) tam rapide dati nobis temporis spatia decurrant, adeo ut exceptis admodum paucis ceteros in ipso vitae apparatu vita destituat".

seems, in sum, to make abstraction of the time human beings count on for the fulfilment of their needs and aspirations.

47. Chronological time is surely not the same as biological time. The time of the succession of events does not equate with the time of the briefness of human life. *Tempus fugit*. On its turn, biological time is not the same as psychological time either. Surviving victims of cruelty lose, in moments of deep pain and humiliation, all they could expect of life; the younger lose in a few moments their innocence for ever, the elderly suddenly lose their confidence on fellow human beings, not to speak of institutions. Their lives become deprived of meaning, and all that is left, is their hope in human justice. Yet, the time of human justice does not appear to be the time of human beings.

48. For those victimized, the passing of time without justice is painful, as it is time leading to despair. Victims of torture are only left with that hope in human justice. The devastating effects of torture have been denounced likewise time and time again, and international tribunals should not appear indifferent to that. In an eloquent personal account, for example, it was warned that

(...) Whoever was tortured, stays tortured. Torture is ineradicably burned into him, even when no clinically objective traces can be detected. (...) The person who has survived torture and whose pains are starting to subside (before they flare up again) experiences an ephemeral peace that is conducive to thinking. (...) If from the experience of torture any knowledge at all remains that goes beyond the plain nightmarish, it is that of a great amazement and a foreignness in the world that cannot be compensated by any sort of subsequent human communication. (...) Whoever has succumbed to torture can no longer feel at home in the world. (...) Trust in the world, (...) collapsed in part at the first blow, (...) will not be regained<sup>44</sup>.

---

44 J. Améry, *At the Mind's Limits*, Bloomington, Indiana Univ. Press, 1980 [reed.], pp. 34 and 38-40. And J. Améry, *Par-delà le crime et le châtement*, Arles, Actes Sud/Babel, 2005 [reed.], pp. 83-84, 92 and 94-96: "(...) Celui qui a été torturé reste un torturé. La torture est marquée dans sa chair au fer rouge, même lorsque aucune trace cliniquement objective n'y est plus repérable. (...) Celui qui vient de réchapper de la torture et dont la douleur se calme (avant de reprendre de plus belle) se sent gagné par une sorte de paix éphémère, propice à la réflexion. (...) Si ce qui reste de l'expérience de la torture peut jamais être autre chose qu'une impression de cauchemar, alors c'est un immense étonnement, et c'est aussi

49. It is here imperative to reduce or bridge the *décalage* between the time of victimized human beings and the time of human justice. This is indeed imperative, also bearing in mind that torture and other atrocities should not at all have taken place, and are not at all to take place again, and further keeping in mind their absolute and peremptory prohibition in any circumstances whatsoever, - a prohibition of *jus cogens*, - in contemporary International Law (cf. *infra*). This has, in my view, a direct bearing on the issue of the indication of provisional measures.

## 2. The Determination of Urgency

50. It is pressing and imperative to reduce or bridge the gap between the time of human justice and the time of human beings. In my understanding, for the purposes of deciding whether to indicate provisional measures, the *urgency* of a situation cannot be measured mechanically in all cases, nor leniently in any case. May it be recalled that the term “*urgent*” derives from Latin “*urgens/urgentis*” (part. of *urgere*), meaning what is necessary to be done promptly, and, *a fortiori*, what is indispensable and cannot be prescindend from. The term “urgency” has its roots in late Latin (XVI and XVII centuries) *urgentia*, meaning “the state, condition, or fact of being urgent”, or “pressing importance”, or else “imperativeness”<sup>45</sup>. As to the Law, *urgency* means the pressing need and relevance of compliance with legal precepts and obligations<sup>46</sup>. In this same sense, related to imperativeness, urgency means the

caractère d'un état de fait susceptible d'entraîner, s'il n'y est porté remède à bref délai, un préjudice irréparable, sans cependant qu'il y ait nécessairement péril imminent<sup>47</sup>.

---

le sentiment d'être devenu étranger au monde, état profond qu'aucune forme de communication ultérieure avec les hommes ne pourra compenser. (...) Celui qui a été soumis à la torture est désormais incapable de se sentir chez soi dans le monde. (...) La confiance dans le monde qu'ébranle déjà le premier coup reçu (...) est irrécupérable”.

45 *Apud Oxford English Dictionary* (online), [www/oed/com](http://www/oed/com), entry from 2nd. ed. (1989), Oxford, University Press, with latest additions of March 2009, item I(1)(a) (emphasis added).

46 *Apud Real Academia Española* (R.A.E.), *Diccionario de la Lengua Española*, 21st. ed., Madrid, R.A.E., 1992, p. 2050.

47 G. Cornu/Association Henri Capitant, *Vocabulaire juridique*, 8th. ed., Paris, Quadrige/PUF, 2008 [reprint], p. 946 [emphasis added].

51. *Urgency* thus relates to measures that ought to be promptly taken, in the context of a given situation, so as to avoid further delays which may bring about additional prejudice, or, indeed, irreparable harm (cf. *infra*). The determination of urgency, in my understanding, is thus not amenable to reliance on an abstract definition of the term, applicable uniformly to all cases; on the contrary, it ought to be determined in relation to the legal nature and content of the right to be preserved, and in the light of the particular circumstances of each case, as, for the purposes of the indication of provisional measures of protection, it is further linked to other elements, such as the probability of irreparable harm.

52. Furthermore, for the purposes of deciding whether to indicate provisional measures, the *urgency* of a situation cannot be measured in a way which appears disconnected from the human drama underlying the situation at issue; it is to be measured and determined in the light of the circumstances of each case and of the nature of the right to be preserved. *Urgency* is determined not in relation to time spans of legal procedures in force at domestic and international levels, but rather in relation to the legitimate expectations of the subjects of originally violated rights, those who are justiciable, and taking into account the time of human beings, which is not the same as the time of human justice.

53. In ascertaining urgency, it may further reasonably be asked: urgent to whom? To the “administrators” or “operators” of justice, anywhere? Most likely not, as, in all latitudes, they are used to the time of human justice, which is not the time of human beings. To the victims? Certainly yes, as their time (*vita brevis*) is not the time of human justice. If abstraction is made of the time of human beings, and of the human drama underlying a situation such as that of the present case, Justice is bound to fail.

54. The *urgency* of a situation becomes evident not only, e.g., when convicted individuals are about to be executed, as in the triad *Breard/LaGrand/Avena* cases, or when a growing number of people are about to be murdered, as in cases concerning armed conflicts<sup>48</sup>. The urgency of a situation can be determined by reference to *action as well as omission*.

---

48 Such as the cases, before this Court, of the *Frontier Dispute* (Burkina Faso *versus* Mali), the *Application of the Convention against Genocide* (Bosnia-Herzegovina *versus* Yugoslavia), the *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon *versus* Nigeria), the *Armed Activities on the Territory of the Congo* (Congo *versus* Uganda), the *Application of*

The urgency of a situation becomes manifest also when people endure a lifetime of impunity, seeking in vain for the realization of justice at domestic and international levels.

55. In the present documented case concerning the search for justice for the reported atrocities of the Habré regime, it is of public and notorious knowledge that people - in a considerable number - have already been murdered, and a long time ago, as a result of a State-planned and executed policy of repression in Chad. But the right to be now preserved is, however, of a distinct nature: it is the *right to the realization of justice*, which finds expression in the corresponding obligations set forth in Articles 5(2) and 7(1) of the 1984 U.N. Convention against Torture.

56. Irrespective of the arguments advanced by the contending Parties, this Court holds the faculty of an entirely free appreciation of the character of *urgency* of the situation brought to its knowledge and decision. In the present case concerning *Questions Relating to the Obligation to Prosecute or to Extradite*, the present-day home surveillance of Mr. H. Habré in Senegal is *only one* of the aspects of the situation before the Court (cf. pars. 82-83, *infra*), and not the determining one, as the Court seemed to believe, for the decision whether to indicate provisional measures. The crucial factor here is, in my view, the endurance by the victims of the ungrateful passing of time throughout their long search, in vain, for human justice to date.

57. The full text of the *Report* of the Chadian Truth Commission, adopted in N'Djamena on 07 May 1992, and published in book form shortly afterwards<sup>49</sup>, was accompanied by the documental and testimonial evidence obtained by the Commission, including declarations from surviving victims. It related the forms of torture and arbitrary detentions perpetrated<sup>50</sup>, and included a section on the “volonté délibérée d’exterminer les prétendus opposants au régime”<sup>51</sup>,

---

*the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia versus Russia).

49 Cf. Ministère Tchadien de la Justice, *Rapport de la Commission d'Enquête Nationale - Les crimes et détournements de l'Ex-Président Habré et de Ses Complices*, Paris, L'Harmattan, 1993, pp. 5-269.

50 Cf. *ibid.*, pp. 38-43.

51 *Ibid.*, pp. 51-54.

and assessed the systematic violence of the Habré regime in the following terms:

Le régime de Hissèine Habré a été une véritable hécatombe pour le peuple tchadien; des milliers de personnes ont trouvé la mort, des milliers d'autres ont souffert dans leur âme et dans leur corps et continuent d'en souffrir.

(...) Jamais dans l'histoire du Tchad il n'y a eu autant de morts. Jamais il n'y a eu autant de victimes innocentes. Au début de ses travaux, la Commission d'enquête pensait avoir affaire, au pire des cas, à des massacres, mais plus elle avançait dans ses investigations, plus l'étendue du désastre s'agrandissait pour aboutir finalement au constat qu'il s'agissait plutôt d'une extermination. (...) La machine à tuer ne faisait aucune différence entre hommes, femmes et enfants<sup>52</sup>.

58. Impunity has ever since prevailed, almost two decades later, despite the aforementioned endeavours in search of justice on the part of the Chadian Truth Commission, the U.N. Committee against Torture, the African Union, the U.N. Human Rights Council, the U.N. High Commissioner for Human Rights, and the step taken by Senegal itself to modify its Penal Code and Code of Criminal Procedure. The surviving victims, notwithstanding, are still in search of justice. Many of them have passed away in the course of their search. One of the surviving victims has declared last year that they "have been fighting for 18 years to bring Hissène Habré to justice, and time is running out. Unless Senegal takes action soon, there will not be any victims left at the trial"<sup>53</sup>. This is yet another illustration of the fact that the time of human justice is not the time of human beings.

59. Time is inherent to Law, to its interpretation and application in relation to all situations and relations it regulates. The lapse of time, since the occurrence of the documented facts, does not, in my understanding, render the matter at issue less urgent or less relevant; quite on the contrary, it renders the situation to be settled *more urgent*, and the prolonged delays amount to an *aggravating* circumstance. The prevalence of impunity in the passage of time renders the realization

52 *Ibid.*, p. 68, and cf. p. 239.

53 United Nations High Commissioner for Refugees (UNHCR) - Refworld, "U.N. Decision on Hissène Habré Flouted", [www.unhcr.org/cgi](http://www.unhcr.org/cgi), 16.05.2008, p. 1.

of justice more and more urgent. In the context of impunity, urgency increases, rather than decreases, with the passing of time.

### 3. The Determination of the Probability of Irreparable Damage

60. The right to be preserved by provisional measures in the present case is the *right to the realization of justice*. It finds expression in the corresponding obligations *erga omnes partes* set forth in the 1984 U.N. Convention against Torture, such as the taking of measures to establish jurisdiction (Article 5) over crimes referred to in Article 4 of the Convention, and the one enshrined into the principle *aut dedere aut judicare* (Article 7). The several years of impunity following the pattern of systematic State-planned crimes, perpetrated - according to the Chadian Truth Commission - by State agents in Chad in 1982-1990, render the situation, in my view, endowed with the elements of gravity and urgency, as prerequisites for the indication of provisional measures. The passing of time with impunity renders the gravity of the situation even greater, and stresses more forcefully the urgency to make justice to prevail.

61. The other prerequisite for the indication of provisional measures is likewise present in the situation at issue. The right to the realization of justice is a right *erga omnes partes* under the U.N. Convention against Torture, which corresponds to the aforementioned obligations. The subjects (*titulaires*) of this right are all the States Parties to that Convention, amongst which are Belgium and Senegal. But the ultimate beneficiaries of that right are not the States, are not abstract entities, but rather human beings, of flesh and bones, of body and soul, who, like everyone, grow old and die. To overlook this fact amounts to wander in a Vattelian dreamworld of a strictly inter-State society which is long past.

62. Each time a surviving victim of torture, waiting for justice, dies without having had it, there is an (additional) irreparable harm. The prevailing impunity to date amounts in fact to a *continuing* situation of irreparable harm. Further delays in the *cas d'espèce* bring about the probability of further or growing irreparable harm. The original violations of rights of the human person which led to the invocation, at inter-State level, of the present right to be preserved - the right to the realization of justice - cannot be neglected or ignored.

63. Furthermore, the nature of the right to be preserved, and the circumstances surrounding it, do have a bearing on a decision of indication of provisional measures. As to the obligations corresponding to that right to be preserved, the segment *aut judicare* of the enunciation of the principle of universal jurisdiction, *aut dedere aut judicare*, forbids undue delays in the realization of justice. Such undue delays bring about an irreparable damage to those who seek justice in vain; furthermore, they frustrate and obstruct the fulfilment of the object and purpose of the U.N. Convention against Torture, to the point of conforming a breach of this latter<sup>54</sup>.

64. In the present case concerning *Questions Relating to the Obligation to Prosecute or to Extradite*, there is, in my view, no room for doubt that the elements of *urgency* and of the *probability of irreparable harm* are present, and clearly so. These latter do not allow reasoning in the abstract. The assumption of the absence of urgency of the present decision of the Court's majority requires demonstration. The ICJ should, thereby, in my view, have indicated provisional measures, in the faithful exercise of its functions, so as to seek to ensure the prompt realization of justice in the *cas d'espèce*.

### VIII. Legal Nature, Content and Effects of the Right to be Preserved

65. In the course of the summary proceedings concerning the present case concerning *Questions Relating to the Obligation to Prosecute or to Extradite*, the contending Parties, Belgium and Senegal, had the opportunity to dwell upon the nature and legal effects of the right to be preserved, in the course of the public hearings of 06-08.04.2009 before the Court and thereafter<sup>55</sup>. They repeatedly referred to their

---

54 Cf., to this effect, A. Boulesbaa, *The U.N. Convention on Torture and the Prospects for Enforcement*, The Hague, Nijhoff, 1999, p. 227.

55 Thereafter, in virtue of the following question I saw it fit to put to both parties at the [end] of the public sitting of 08.04.2009, namely: - "For the purposes of a proper understanding of the *rights* to be preserved (under Article 41 of the Statute of the Court), are there rights corresponding to the obligations set forth in Article 7(1), in combination with Article 5(2), of the 1984 U.N. Convention against Torture and, if so, what are their *legal nature, content and effects*? Who are the *subjects* of those rights, States having nationals affected, or all States Parties to the aforementioned Convention? Whom are such rights opposable to, only the States concerned in a concrete case, or any State Party to the aforementioned Convention?". Belgium and Senegal forwarded two letters each to the ICJ, in which they presented their views in response to that question (ICJ, Letter from Belgium of

own obligations as States Parties to the 1984 U.N. Convention against Torture. The Court itself, in the present Order, based its *prima facie* jurisdiction on Article 30 of that Convention (pars. 54-55 of the Order).

66. In the present case, the right to the realization of justice has come to the fore as a result of the original violation of the absolute prohibition of torture, a prohibition of *jus cogens*, in the years of the Habré regime in Chad (1982-1990). In fact, an international regime against torture, forced disappearances, and summary or extra-judicial, executions has been conformed along more than two decades, on the basis of the absolute prohibition (one of *jus cogens*) also of those crimes. Consideration of this issue as a whole goes beyond the purposes of the present Dissenting Opinion, but, in so far as the absolute prohibition of torture, in particular, is concerned, I shall not omit to recall that the 1984 U.N. Convention against Torture is accompanied by the 1985 Inter-American Convention against Torture and the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Moreover, to the work undertaken by the international supervisory organs of those three Conventions, one may add the work of the extra-conventional mechanisms of the United Nations in this same domain.

67. Furthermore, there is a remarkable jurisprudential construction of two contemporary international tribunals on the *jus cogens* prohibition of torture, namely, that of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTFY) and that of the Inter-American Court of Human Rights (IACtHR). The former, in the case of the *Prosecutor versus Furundzija* (Judgment of 10.12.1998), sustained that the absolute prohibition of torture has the character of a norm of *jus cogens*, and added that the application of the principle of universal jurisdiction in respect of torture ensues from the *jus cogens* prohibition of this latter (pars. 137-139, 144, 156 and 160). The IACtHR, on its turn, in its Judgments in the cases *Cantoral Benavides versus Peru* (18.08.2000, pars. 95 and 102-103) and *Maritza Urrutia versus Guatemala* (27.11.2003, pars. 89 and 92), asserted the absolute prohibition of torture, - belonging to the domain of *jus cogens*, - even under the most

---

15.04.2009, pp. 1-6; ICJ, Letter from Senegal of 15.04.2009, pp. 3; ICJ, Letter from Belgium of 20.04.2009, p. 1; ICJ, Letter from Senegal of 20.04.2009, pp. 1-3).

difficult circumstances<sup>56</sup>. This position has become its *jurisprudence constante* to date.

68. Accountability for breaches of norms of *jus cogens* is ineluctable. The facts wherefrom the right to be preserved in the *cas d'espèce* emerged were violations of *jus cogens*. The realization of justice grows in importance. The 1984 U.N. Convention against Torture sets forth the obligations for States Parties to establish jurisdiction over the offence of torture (Article 5) and to prosecute or to extradite the offenders (Article 7). These are obligations *erga omnes partes*, binding not only the contending Parties, but all States Parties to the Convention, which are further committed to its *collective guarantee*. Likewise, *all States Parties* have the corresponding right, on the basis of the Convention, to see to it that these obligations are duly complied with.

69. They are entitled by the Convention to exercise such right *erga omnes partes*. Such right is thus opposable to each of the States Parties to the Convention. The relevance of this Convention, and the nature and effects of the right to be preserved and the obligations it stipulates, giving expression to the principle of universal jurisdiction (*aut dedere aut judicare*), are not reflected in the considerations that motivate the decision of the majority of the Court in the present Order. They deserved, in my perception, much greater weight in the consideration of the prerequisites for the indication of provisional measures.

70. Had this occurred, the decision reached in the present Order of the Court would have been different. If customary international law were to be brought into the picture, one would be before a right corresponding to obligations *erga omnes*, disclosing a wider horizon, not circumscribed to the States Parties to the U.N. Convention against Torture. It is not my intention to embark on this aspect of the matter in the present Dissenting Opinion, but only to draw attention to one specific point, deserving of attention here, as the issue did not pass unnoticed in the public sitting of the Court of 07.04.2009<sup>57</sup> in the present case concerning *Questions Relating to the Obligation to Prosecute or to Extradite*.

---

56 Such as, - it exemplified, - under war, threat of war, "struggle against terrorism", state of emergency, domestic conflicts or other public calamities. Also in this sense, its Judgment in the case of the *Brothers Gómez Paquiyauri versus Peru* (of 08.07.2004, paras. 111-112).

57 Cf. ICJ, public sitting of 07.04.2009, *Verbatim Record*, doc. CR.2009/10, pp. 14-15.

71. The consolidation of *erga omnes* obligations of protection, ensuing from the imperative norms of international law, in my understanding overcomes the pattern erected in the past upon the autonomy of the will of the State, which can no longer be invoked or pursued in view of the existence of norms of *jus cogens*. These latter transcend the law of treaties, and encompass nowadays the domain of State responsibility. Those obligations, in their turn, clearly transcend the individual consent of States, heralding the advent of the international legal order of our times, committed to the prevalence of superior common values, in the ongoing construction of the international law for humankind.

72. Obligations *erga omnes* cannot properly be approached from a strictly inter-State perspective, which would no longer reflect the essence of the contemporary international legal order. Those obligations disclose not only a *horizontal* dimension, as they are owed to the international community as a whole (a point overworked in expert writing), but also, in my perception, a *vertical* dimension, as compliance with them is required not only from organs and agents of the public power, but also from natural persons (*simples particuliers*), in their inter-individual relations (a point insufficiently examined in expert writing to date). A proper understanding of the scope of those obligations, and due compliance with them, can help to rid the world of violence and repression, such as those which, in the present case, victimized thousands of persons in the years of the Habré regime in Chad (1982-1990).

73. There could hardly be better examples of a mechanism for the application of the obligations *erga omnes* of protection (at least in the relations of the States Parties *inter se*) than the methods of supervision provided for the human rights treaties themselves, such as the 1984 U.N. Convention against Torture, for the exercise of the *collective guarantee* of the protected rights. In the present case, the right to be preserved is the right to the realization of justice, which corresponds to those obligations *erga omnes partes*. Had the ICJ issued the requested provisional measures, it would have taken up upon itself the task or role of guarantor of the collective guarantee of the U.N. Convention against Torture.

## IX. Provisional Measures to be Indicated

### 1. Time and the Imperativeness of the Realization of Justice

74. The *passing* of time, and its effects, constitute possibly the greatest enigma or mystery surrounding human existence, which has defied human thinking, in distinct domains of human knowledge, along centuries. The domain of Law is no exception to that: the passing of time has, not surprisingly, raised issues which continue to defy legal thinking as to the proper interpretation and application of Law. In my understanding, time is to be made to operate to secure the realization of justice, and surely not to suggest its impossibility (for alleged lack of material or financial resources), or to impose legal inaction or even oblivion (e.g., prescription, in other contexts). The universal juridical conscience has evolved so as no longer to admit obstacles, in space or in time, to the investigation and sanction of grave violations of human rights and of International Humanitarian Law.

75. The exercise of universal jurisdiction purports to overcome past obstacles in space. One is, furthermore, to bridge the gap between the time of human beings and the time of human justice, so as to overcome obstacles in time. It is the gravity of human rights violations, of the crimes perpetrated, that admits no prolonged extension in time of the impunity of the perpetrators, so as to honour the memory of the fatal victims and to bring relief to the surviving ones and their relatives. In my understanding, even more significant that retribution is the judicial recognition of human suffering<sup>58</sup>, and only the realization of justice can *alleviate* the suffering of the victims caused by the irreparable damage of torture.

76. To that end, time is necessarily short, such as human life, and the indefinite prolongation of time in the realization of justice is an aggravating circumstance. It goes without saying that oblivion cannot be imposed, as, in the domain of Law, it would amount to an obstruction of justice. The investigation and sanction of grave violations of human rights brings the past into the present, to render the latter bearable, once the responsibility for the atrocities occurred in the past are properly determined. Surviving victims and their relatives can

---

58 The right to be herein preserved, the right to justice, is inextricably linked to [non-pecuniary] reparation.

thus earn their future. Impunity is unacceptable in our times; imposed oblivion is overwhelmed by memory, rendering the future possible.

77. The *décalage* between the time of human beings and the time of human justice is to be reduced. Without the realization of justice, without the right to the Law (*le droit au Droit*), there is no legal system at all, neither at domestic, nor at international, level. In the meantime, with the persistence of impunity in the present case concerning *Questions Relating to the Obligation to Prosecute or to Extradite*, the passing of time will continue hurting people, much more than it normally does, in particular those victimized by the absence of human justice. The time of this latter is not the time of human beings.

## 2. The Required Indication of Provisional Measures in the Present Case

78. In the light of the aforementioned, the decision taken by the Court's majority, not to indicate provisional measures in the present case, can be severely questioned. The Court based its *prima facie* jurisdiction, in the present Order, on the U.N. Convention against Torture (Article 30); in my view, the prerequisites were present for the indication of provisional measures, and, even if the Court were not fully satisfied with the arguments of the parties, it is not limited or constrained by such arguments.

79. In its own case-law, the Court, invoking the principle *jura novit curia*, has clarified that it is not bound to confine its consideration of the case at issue to the pleas or the materials formally submitted to it by the parties. It has so warned, e.g., in its Judgments in the cases of *Fisheries Jurisdiction (United Kingdom versus Iceland, 25.07.1974, pars. 17-18)*, and of *Nicaragua versus United States (27.06.1986, pars. 29-30)*. In sum, the Court is the *master of its own jurisdiction*, and it is empowered to indicate any provisional measures it deems necessary in a case, irrespective of the arguments of the parties, or even in the absence of such arguments.

80. That the Court is not restricted by the arguments of the parties, is further confirmed by Article 75(1) and (2) of the Rules of Court<sup>59</sup>, which expressly entitles it to indicate, *motu proprio*, provisional

---

<sup>59</sup> Article 75(1) of the Rules of Court sets forth that "the Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the par-

measures that it regards as necessary, even if they are wholly or in part distinct from those that are requested. A decision of the ICJ indicating provisional measures in the present case, as I herein sustain, would have set up a remarkable precedent in the long search for justice in the theory and practice of international law. After all, this is the first case lodged with the ICJ on the basis of the 1984 U.N. Convention against Torture, which, on its turn, is “the first human rights treaty incorporating the principle of universal jurisdiction as an international obligation of all States Parties without any precondition other than the presence of the alleged torturer”<sup>60</sup>.

81. The Court has made use of its prerogatives under Article 75 on some previous occasions. Examples are provided by its Orders of Provisional Measures, invoking Article 75(2), in the cases concerning the *Application of the Convention against Genocide* (Bosnia-Herzegovina versus Yugoslavia, 08.04.1993, par. 46), the *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon versus Nigeria, 15.03.1996, par. 48), the *Armed Activities on the Territory of the Congo* (Congo versus Uganda, 01 July 2000, par. 43), and, more lately, the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia versus Russia, 15.10.2008, par. 145).

82. That it has found unnecessary to do so, in the present case concerning *Questions Relating to the Obligation to Prosecute or to Extradite*, pertaining to the right to the realization of justice, is a cause of concern to me. After all, there was nothing precluding it from doing so; on the contrary, the prerequisites of urgency and the probability of irreparable harm were and remain in my view present in this case (cf. *supra*), requiring from it the indication of provisional measures. Moreover, there subsist, at this stage, - and without prejudice to the merits of the case, - uncertainties which surround the matter at issue before the Court, despite the amendment in February 2007 of the Senegalese Penal Code and Code of Criminal Procedure.

---

ties”. And Article 75(2) determines that “when a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request”.

60 M. Nowak, E. McArthur *et alii*, *The United Nations Convention against Torture - A Commentary*, Oxford, University Press, 2008, p. 316.

83. Examples are provided by the prolonged delays apparently due to the alleged high costs of holding the trial of Mr. H. Habré, added to pre-trial measures still to be taken, and the lack of definition of the time still to be consumed before that trial takes place (if it does at all). Despite all that, as the Court's majority did not find it necessary to indicate provisional measures, the Court can now only hope for the best.

84. This is all the more serious in the light of the nature of the aforementioned *obligations* of the States Parties to the U.N. Convention against Torture. Eight years ago, the U.N. Committee against Torture, in the exercise of its functions, decided to issue an interim or provisional measure in the case of *S. Guengueng et alii case*, concerning Senegal, to secure the full application of the pertinent provisions of the U.N. Convention against Torture. Yet, despite all that, this Court found that the circumstances, as they now presented themselves to the Court, were not such as to require provisional measures of protection.

85. Much to my regret, as a result of this decision, a precious occasion has been lost by the Court to contribute to the development of contemporary international law in a domain of crucial importance such as that concerning the principle of universal jurisdiction, on the basis of a high relevant U.N. Convention enshrining a series of obligations ensuing from the domain of *jus cogens*, the 1984 Convention against Torture.

86. Had the Court taken a different view, it could, and should, have indicated provisional measures to the effect of requiring from the contending parties, *ex abundante cautela*, periodical reports to it, on the basis of Article 78 of the Rules of Court<sup>61</sup>, on any measures taken and advances eventually achieved by them towards the realization of justice in the present case (i.e., the holding of the trial of Mr. H. Habré in Senegal). This would also have enhanced the mandate issued by the African Union itself in 2006 (*supra*). Provisional measures of this kind, with the requirement of reporting, have precedents in the case-law of the ICJ itself.

87. May it be recalled that this Court has issued Orders of Provisional Measures, containing such requirement of reporting, and remaining

---

61 Article 78 of the Rules of Court provides that "the Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated".

seized of the matter till the delivery of its final judgment, in the cases of *Fisheries Jurisdiction* (Federal Republic of Germany *versus* Iceland, 17.08.1972, resolatory point 1(f)), of the *U.S. Diplomatic and Consular Staff in Teheran* (United States *versus* Iran, 15.12.1979, resolatory point 2), of the *Frontier Dispute* (Burkina Faso *versus* Mali, 10.01.1986, resolatory point 2), of *Breard* (Paraguay *versus* United States, 09.04.1998, resolatory point I), of *LaGrand* (Germany *versus* United States, 03.03.1999, resolatory point I(a)), of *Avena and Others* (Mexico *versus* United States, 05.02.2003, resolatory point I(b)), of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *versus* Russia, 15.10.2008, resolatory point D)<sup>62</sup>.

88. This Court should in my view have remained seized of the matter at stake. It should not have relinquished its jurisdiction in the matter of provisional measures, on the ground of its reliance on what may have appeared the professed intentions of the parties, placing itself in a position more akin to that of a conciliator, if not an expectator. Had the Court done so, it would have assumed the role of the guarantor of the compliance, in the *cas d'espèce*, of the conventional obligations by the States Parties to the U.N. Convention against Torture in pursuance of the principle *aut dedere aut judicare*.

89. We are here before the invocation of the principle of universal jurisdiction, grounded on a U.N. Convention which reckons the absolute prohibition of torture, bringing us to the domain of *jus cogens*, a conceptual construction proper of the new *jus gentium* of our times. In my understanding, the obligations set forth by the U.N. Convention against Torture are not simply obligations of conduct or behaviour, but rather indeed obligations of *result*.

90. In so far as provisional measures are concerned, had the ICJ decided to remain seized of the matter at issue, by requesting further periodical information and reports from the contending Parties as to the measures taken to have justice at last done in the concrete case, it would thereby have given its own contribution not only to the settlement of the issue raised before it at this stage, but also, in the fruitful exercise of its functions in the domain of provisional measures of protection, to the realization of justice.

---

62 Cf. also the Court's Order in the case of the *Application of the Convention against Genocide* (Bosnia and Herzegovina *versus* Yugoslavia, 08.04.1993, para. 3).

91. This would have appeared to me the right course to be taken, in a decision which could have set up a relevant, if not historical, precedent, in the domain of provisional measures. However, by having proceeded otherwise, not indicating these latter, it has now become somewhat difficult to avoid the impression that universal jurisdiction keeps on having a long past, a refrained present, and an uncertain future.

## **X. The Lesson of the Present Case at This Stage: Provisional Measures for the Realization of Justice**

92. By means of its provisional measures, the ICJ can indeed contribute not only to the preservation of the right to the realization of justice in a given case, but also to the development of the law of nations itself, the new *jus gentium* of our times. All will depend on how provisional measures are approached. My own conception is that, by preserving rights whose subjects are not only States but also human beings, they can also contribute to the development of the law of nations (*droit des gens*).

93. There is nothing new under the sun; this outlook of the matter, somewhat uncultivated in our days<sup>63</sup>, was present in a trend of international legal thinking of the matter which cannot now be forgotten, and which ought to be retaken and further developed in our days. As soon as 1931, for example, Paul Guggenheim pondered with insight that provisional measures are bound to contribute to the development of international law; after all, they do contribute to “rendre justice”, to the “réalisation future d’une situation juridique déterminée”<sup>64</sup>.

94. One decade earlier, throughout the work of the Advisory Committee of Jurists of drafting (June-July 1920) the Statute of the Hague Court (PCIJ and ICJ), Raul Fernandes sought to enhance provisional measures by proposing enforcement measures (penalties) by the PCIJ<sup>65</sup>. Shortly afterwards, he asserted his commitment to the

---

63 It is to be kept in mind, whenever anything is claimed to be novel, that, from time immemorial, it has been warned that whatever appears novel, most likely it is not, it has been reflected upon or expressed before; *Ecclesiastes*, cf. ch. I-10.

64 P. Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, *op. cit. supra* n. (4), pp. 14-15 and 62.

65 Cf. Cour Permanente de Justice Internationale, *Procès-verbaux des séances du Comité Consultatif de Juristes (16 juin-24 juillet 1920) avec annexes*, La Haye, Van Langenhuyesen Frs., 1920, p. 588 (intervention by R. Fernandes of 20.07.1920).

realization of justice at international level bearing particularly in mind the principle of the juridical equality of States<sup>66</sup>. Provisional measures, with their preventive dimension, can indeed contribute to the development of international law.

95. For the purposes of provisional measures, in the present case concerning *Questions Relating to the Obligation to Prosecute or to Extradite*, the right to be preserved is ultimately the *right to the realization of justice*, the right to see to it that justice is done (a right of States - before this Court, - emerged from the violation of fundamental rights of the human beings concerned, originally victimized by torture). There is in the *cas d'espèce*, in my perception, a risk of (ongoing) irreparable damage, in the form of insufficient action, of further delays<sup>67</sup>. As an old maxim warns, justice delayed is justice denied.

96. It can, in my understanding, be forcefully argued that the denial of access to justice is peremptorily prohibited: without such right, there is simply no legal system at all, at international and national levels. Furthermore, grave violations of human rights, and of international humanitarian law, such as torture, are detrimental not only to the direct and indirect victims, as they directly affect their *social milieu* as a whole. In this framework, the right to the realization of justice appears ineluctably of the utmost relevance. The perpetuation of impunity is corrosive of the whole *social milieu*. There is urgency, in the sense of imperativeness, in the preservation of the right to the realization of justice, by means of provisional measures of protection.

## XI. Concluding Observations

97. I come thus to my concluding observations of this Dissenting Opinion. The fact that the binding character of provisional measures of protection is nowadays beyond question, on the basis of the *res interpretata* of the ICJ itself (cf. pars. 9-11, *supra*), does not mean that we have reached a culminating point in the evolution of the ICJ case-law on this matter. Quite on the contrary, I can hardly escape the impression that we are living the infancy of this jurisprudential

---

66 R. Fernandes, *Le principe de l'égalité juridique des États dans l'activité internationale de l'après-guerre*, Genève, Impr. A. Kundig, 1921, pp. 18-22 and 33.

67 May it be recalled that, at domestic law level, in legal procedure, the *periculum in mora*, associated with prolonged and undue delays in the realization of justice, has been a key concept for the determination of precautionary or interim measures.

development. The Court has not yet pronounced on the autonomy of an *Order* of indication of provisional measures; nor has it yet pronounced on the legal consequences of non-compliance with them; nor has it yet pronounced on issues of State responsibility in this very specific context, - apart from the decision on the merits on the corresponding cases. There is thus still a long way to move forward.

98. It has already been argued<sup>68</sup> that, in the present case, the violation of the peremptory prohibition of torture has taken us to the invocation, in the inter-State *contentieux*, of the right to the realization of justice, on the basis of the relevant provisions of the 1984 U.N. Convention against Torture (Articles 7 (1) and 5(2)). The nature of the right to be preserved, a right *erga omnes partes*, does have a bearing on a decision to indicate provisional measures. Provisional measures do have a place in the *cas d'espèce*, as the preconditions for them are herein met. Urgency (imperativeness) requires such measures, so as to avoid the probability of further irreparable damage as a result of the prolongation of undue delays in the realization of justice.

99. In the present Order (pars. 47-48) the ICJ found that there appeared to be a *prima facie* continuing dispute between the Parties as to the interpretation and application of the relevant provisions of the U.N. Convention against Torture. In my view, States Parties to this Convention have undertaken the obligation to exercise universal jurisdiction (Article 7), in respect of torture, and thus to contribute to the gradual construction of a truly universal international law. There is thus need to go beyond the traditional types of territorial jurisdiction, active and passive personality (nationality) jurisdictions, and protective jurisdiction, in cases of grave violations of human rights and International Humanitarian Law. One would thus be giving expression to superior legal values shared and upheld by the international community as a whole, as well as responding in particular to its legitimate concern to overcome impunity at national level.

100. This Court has, so far, succinctly and rightly held, in a distinct context, that the prohibition of genocide belongs to the domain of *jus cogens*<sup>69</sup>. We are here in the domain of material or substantive law, as distinguished from, though related to, the conception of obligations

68 Para. 40, and cf. paras. 17 and 21-25, *supra*.

69 ICJ, case concerning *Armed Activities on the Territory of the Congo* (Congo versus Rwanda, Judgment of 03.02.2006, paras. 64 and 78); and case concerning the *Application of the*

*erga omnes*, proper of procedural law (cf. pars. 68-73, *supra*). Although the Court has dwelt mainly upon these latter<sup>70</sup>, - still having to extract the consequences of their existence and breach, - it has a long way to go in relation to the former, - the imperatives of *jus cogens*, - if it decides, as I hope, to embark on the acknowledgement of the gradual expansion of its material content.

101. The present case, even at this stage, appears to me as one of great relevance, as the right to be preserved - the *right to the realization of justice* - is ineluctably linked to the rule of law at both national and international levels. Significantly, due to the awakening of the universal juridical conscience, the matter is nowadays being considered at both levels, and attracting increasing attention, in the agenda of the General Assembly of the United Nations, over the last three years. The U.N. General Assembly has in fact reaffirmed "the need for universal adherence to and implementation of the rule of law at both the national and international levels", as well as its "commitment to an international order based on the rule of law and international law"<sup>71</sup>.

102. On its part, earlier on, the old U.N. Commission on Human Rights, in its resolution 2000/43, stressed that "all allegations of torture or other cruel, inhuman or degrading treatment or punishment be promptly and impartially examined by the competent national authority", and that "those who encourage, order, tolerate or perpetrate acts of torture must be held responsible and severely punished" (par. 6). The Commission next called for rehabilitation of the victims (par. 6), and further urged that "States should abrogate legislation leading

---

*Convention against Genocide* (Bosnia-Herzegovina *versus* Serbia, Judgment of 26.02.2007, para. 161).

<sup>70</sup> Since its celebrated *obiter dictum* in the case of the *Barcelona Traction* (Belgium *versus* Spain, 2nd. phase), Judgment of 05.02.1970, paras. 33-34; and cf., subsequently, ICJ, case concerning *East Timor* (Portugal *versus* Australia), Judgment of 30.06.1995, para. 29; ICJ, case concerning the *Application of the Convention against Genocide* (Bosnia-Herzegovina *versus* Yugoslavia), Judgment (on Preliminary Objections) of 11.07.1996, para. 31; ICJ, case concerning *Armed Activities on the Territory of the Congo* (Congo *versus* Rwanda, new application), Judgment of 03.02.2006, paras. 54 and 125; ICJ, case concerning the *Application of the Convention against Genocide* (Bosnia-Herzegovina *versus* Serbia), Judgment of 26.02.2007, paras. 147, 161 and 185). And cf. also the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, of 09.07.2004, paras. 155-157.

<sup>71</sup> G.A. resolution 63/128, of 11 December 2008, on "The Rule of Law at the National and International Levels", fourth preambular paragraph.

to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law” (par. 2).

103. The central dilemma, on the matter at issue, facing nowadays not only States, but the legal profession as well, is quite clear to me: either they keep on relying on the traditional types of criminal jurisdiction (cf. par. 99, *supra*), irrespective of the gravity of the offences committed, or else they admit that there are crimes that do indeed shock the conscience of humankind and that render thereby ineluctable the recourse to universal jurisdiction. Either they continue to reason as from the outlook of an international legal order atomized in sovereign units, or else they decide to move closer to the ideal of the *civitas maxima gentium*.

104. According to this latter, above consent (the will), is the right use of reason; it is the *recta ratio* which guides the will of States, and is conducive to the *necessary*, rather than voluntary, law of nations<sup>72</sup>, holding all of them together, bound in conscience, in the *civitas maxima*, the legal community of the whole of humankind. This ideal, pursued notably by Christian Wolff in the XVIIIth century, has its historical roots in the Stoics in ancient Greece, has survived to date and has been recalled from time to time<sup>73</sup>. It repeals all that shocks the universal juridical conscience. In the conceptual construction of the *civitas maxima gentium*, nations need each other’s assistance to repress grave crimes (wherever they may occur) and to promote the common good (*commune bonum promovere*)<sup>74</sup>, pursuant to the dictates of the right reason<sup>75</sup>.

104. If States and the legal profession opt for this outlook, as I sincerely hope, the principle of universal jurisdiction has to be pursued and applied *universally*, in all corners of the world, without selectivity<sup>76</sup>. In the present case concerning *Questions Relating to*

72 Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764 - Series *The Classics of International Law*, ed. J. Brown Scott), *Prolegomena*, p. 2, para. 4.

73 Cf., e.g., over half a century ago, W. Schiffer, *The Legal Community of Mankind*, N.Y., Columbia University Press, 1954, pp. 63-78.

74 C. Wolff, *Jus Gentium...*, *op. cit. supra* n. (72), p. 5, paras. 12-13.

75 *Ibid.*, p. 7, para. 21.

76 As Christian Wolff furthermore upheld in 1764, since all persons are by nature equal, so all nations too are by nature equal one to the other (*gentes etiam omnes natura inter se aequales sunt*); cf. *ibid.*, p. 6, par. 16.

*the Obligation to Prosecute or to Extradite*, Senegal has now a rare opportunity, by bringing promptly Mr. H. Habré to trial, to give an example to the world, in compliance with the mandate issued by the African Union in 2006, which is well in keeping with the legal nature, content and effects of the right to be preserved in the *cas d'espèce*, and the corresponding obligations *erga omnes partes* of the U.N. Convention against Torture (Articles 7(1) and 5(2)). I dare to nourish the hope that States and the legal profession embark on the right path, for the sake of the development of contemporary International Law, as a true law of nations (*droit des gens*), the new *jus gentium* of our times, emanated ultimately from human conscience.

## **2. SEPARATE OPINION OF JUDGE CANÇADO TRINDADE IN THE CASE OF THE TEMPLE OF PRÉAH VIHÉAR (Cambodia *versus* Thailand, Order of 18.07.2011)**

### **I. Introduction**

1. I have concurred, with my vote, for the adoption today, 18 July 2011, by the International Court of Justice (ICJ), of the present Order of Provisional Measures of Protection in the case of the *Temple of Preah Vihear* (Cambodia *versus* Thailand). Given the great importance that I attribute to the issues dealt with in the present Order, or else underlying it, I feel obliged to leave on the records of this transcendental case (as I perceive it) the foundations of my own personal position on them. I do so moved by a sense of duty in the exercise of the international judicial function, even more so as some of the lessons I extract from the present decision of the Court are not explicitly developed and stated in the present Order. This appears to be, in my view, a unique case, lodged again with the Court after half a century; it discloses, in my view, a series of elements for a reconsideration not only of the spacial, but also the temporal dimensions, which can hardly pass unnoticed.

2. This being so, I shall develop my reflections that follow pursuant to the following sequence: a) the passing of time and the *chiaroscuro* of Law; b) the density of time; c) the temporal dimension in International Law; d) the search for timelessness; e) from timelessness to timeliness; f) the passing of time and the *chiaroscuro* of existence; g) time, legal interpretation, and the nature of legal obligation; h) from time to space: territory and people together (in Cambodia's and Thailand's

submissions); i) the effects of provisional measures of protection in the *cas d'espèce* (encompassing the protection of people in territory; the prohibition of use or threat of force; and the protection of cultural and spiritual world heritage); and j) provisional measures of protection, beyond the strict territorialist approach. The way will then be paved for the presentation of my final considerations, *sub specie aeternitatis*.

## II. The Passing of Time: The *Chiaroscuro* of Law

3. The case of the *Temple of Preah Vihear* (Cambodia versus Thailand) brings to the fore, now in May 2011, as it did half a century ago, in 1961-1962, the multifaceted relationship between time and law, an issue which discloses the *chiaroscuro* of international law as well as, ultimately, of existence itself (cf. *infra*). One cannot assume a linear progress in the regulations of relations among States *inter se*, or among human beings *inter se*, or among States and human beings. The present requests for provisional measures and for interpretation in respect of the Judgment of this Court of 15.06.1962, bear witness of the element of factual unpredictability of endeavours of peaceful settlement, to guard us against any assumption as to definitive progress achieved in those relations among States or among human beings, or among the former and the latter.

4. In a public sitting before this Court of half a century ago, precisely that of the morning of 5 March 1962, in the same case of the *Temple of Preah Vihear*, the learned jurist Paul Reuter (who happened to be one of the counsel for Cambodia), pondered that the passing of time is not linear, nor is it always the same either; it contains variations. For example, in his perception, “[à] certaines heures, dans la splendeur de l’été méditerranéen, le temps semble suspendu, peut-être alors n’y a-t-il que du noir et du blanc”<sup>77</sup>.

5. May I add, in this connection, that, to someone (like myself) from, and in, the South Atlantic, for example, the *chiaroscuro* also exists, but not so sharply distinguished as in the summer of the Mediterranean four seasons. There, in the South Atlantic, in the two - the dry and the rainy - seasons, the *chiaroscuro* evolves in greater grey shades. Yet, the *chiaroscuro* falls thereupon as well. All regions of the world have their

---

<sup>77</sup> CJ, case concerning the *Temple of Preah Vihear* (Cambodia versus Thailand); Pleadings, Oral Arguments, Documents (1961-1962), vol. II, p. 525.

own *chiaroscuro*, each one with its own characteristics, and the region of the Temple of Preah Vihear is no exception to that. Ancient cultures, in distinct parts of the world, grasped the mystery of the passing of time in distinct ways, as in the never-ending succession of the *chiaroscuro*.

6. The *chiaroscuro* of international law itself was, coincidentally, referred to in the public sitting of 1 March 1962, in the same case of the *Temple of Preah Vihear*; in opening of the sitting, the then President of the Court, Judge B. Winiarski, recalled that, forty years earlier, precisely on 15.02.1922, the former Permanent Court of International Justice held its first sitting; ever since, and throughout four decades, “the element of permanency” of international justice had taken shape<sup>78</sup>, further fostered by the acceptance by States of numerous compromissory clauses, and the fact that the successor ICJ became “the principal judicial organ of the United Nations”, while remaining, within the framework of the U.N., an independent judicial organ. And he added that

The function of the Court is to state the law as it is; it contributes to its development, but in the manner of a judicial body, for instance, when it analyses out of a rule contained by implication in another, or when, having to apply a rule to a specific instance, which is always individualized and with its own clear-cut features, it gives precision to the meaning of that rule, which is sometimes surrounded by (...) the *chiaroscuro* of international law<sup>79</sup>.

7. There was only this brief reference to such *chiaroscuro* in Judge Winiarski’s message in 1962; he did not elaborate on it, the reference was sufficient. Thus, four decades of operation of international justice had not removed the *chiaroscuro* of international law. Today, five other decades later, that *chiaroscuro* remains present, as disclosed by the case of the *Temple of Preah Vihear* brought again before this Court. The *chiaroscuro* of law appears enmeshed with the passing of time. This is one of the aspects of the complex relationship between time and law, which, despite much that has been written on it, keeps on challenging legal thinking in our days.

---

<sup>78</sup> *Ibid.*, p. 121.

<sup>79</sup> *Ibid.*, p. 122.

### III. The Density of Time

8. Turning attention to time and law, in his aforementioned *plaidoirie* of 05.03.1962, in the case of the *Temple of Preah Vihear*, Paul Reuter saw it fit to add:

(...) Le temps exerce en effet une influence puissante sur l'établissement et la consolidation des situations juridiques (...). [C]omment le droit international mesure-t-il l'écoulement du temps? Il est bien évident qu'il n'existe en droit international aucun délai fixe, comme en connaissent les droits nationaux (...). Certains ont cru voir dans cette situation une imperfection du droit international. Nous n'en pensons rien, et nous pensons, au contraire, que cette incertitude donne au droit international une flexibilité qui lui permet de s'adapter à la variété des circonstances concrètes<sup>80</sup>.

9. Three such circumstances were identified by P. Reuter, namely: the matters at issue, the "density" of time, and the dynamics of the relations between the States concerned<sup>81</sup>. In his view, "[d']abord la longueur du délai dépend des *matières*. Il y a des *matières* où la sécurité des actes juridiques est l'objet d'une exigence sociale impérieuse"<sup>82</sup> (e.g., territorial or maritime spaces). It is, however, in relation to the second circumstance - the "density" of time - that P. Reuter devoted special attention, expressing his reflections in a language which disclosed a certain literary flair:

Pour réaliser [l']adaptation aux circonstances concrètes de chaque espèce, un deuxième élément doit être pris en considération, nous serions tentés de l'appeler "*la densité*" du temps. Le temps des hommes n'est pas le temps des astres. Ce qui fait le temps des hommes, c'est la densité des événements réels ou des événements éventuels qui auraient pu y trouver place. Et ce qui fait la densité du temps humain apprécié sur le plan juridique, c'est la densité, la multitude des actes juridiques qui y ont trouvé ou qui y auraient pu trouver place.

<sup>80</sup> *Ibid.*, p. 203.

<sup>81</sup> Cf. *ibid.*, pp. 203-204.

<sup>82</sup> *Ibid.*, p. 203.

Dans la vie des nations comme dans la vie des individus, il y a des années légères, des années heureuses où il n'arrive rien et où il ne peut rien arriver. Mais il y a aussi des années lourdes, pleines de substances. Si nous appliquons cette considération aux circonstances de l'espèce, nous voyons qu'il y a peut-être des années légères: 1908 à 1925, mais il y a des années bien lourdes: 1925, 1934-35, 1937, 1939-1940, 1946, 1949; il nous semble que l'ensemble de cette période est donc extrêmement dense<sup>83</sup>.

10. But as time does not cease to pass, and keeps on flowing, one could now add, half-a-century later, as subsequent years of particular "density", in respect of the present case of the *Temple of Preah Vihear*, those of 1961-1962, 2000, 2007-2008 and 2011. This can be confirmed by an examination of the *dossier* of the *cas d'espèce* and of the records of the recent public sittings before this Court, of 30-31 May 2011 (concerning the Joint Communiqué between Cambodia and Thailand of 14.06.2000 regarding the demarcation of their land boundary, and, particularly, - for the purposes of the present Provisional Measures of the ICJ - the events which preceded and promptly followed the inscription of the Temple of Preah Vihear in UNESCO's World Heritage List on 07.07.2008 - cf. *infra*). The temporal dimension, in the present case of the *Temple of Preah Vihear*, can be examined, in my understanding, from distinct angles.

11. In 1998, in the adjudication of the case *Blake versus Guatemala* by the Inter-American Court of Human Rights (IACtHR - merits, Judgment of 24.01.1998), I deemed it fit to retake P. Reuter's point and to seek to develop it further. I pondered therein, *inter alia*, that

The time of human beings certainly is not the time of the stars, in more than one sense. The time of the stars, - I would venture to add, - besides being an unfathomable mystery which has always accompanied human existence from the beginning until its end, is indifferent to legal solutions devised by the human mind; and the time of human beings, applied to their legal solutions as an element which integrates them, not seldom leads to situations which defy their own legal logic (...). One specific aspect, however, appears to suggest a sole point of

---

83 *Ibid.*, p. 203.

contact, or common denominator, between them: the time of the stars is inexorable; the time of human beings, albeit only conventional, is, like that of the stars, implacable (...) (par. 6).

#### **IV. The Temporal Dimension in International Law**

12. The temporal dimension marks presence in the domain of humanities<sup>84</sup> in general, and of Law in particular. The awareness of time, of the temporal dimension, is essential to the labour not only of those who seek to secure the evolution of law, but also to those concerned with ascribing to this latter foreseeability and juridical security. One is to be aware of the influence of the passage of time in the *continuation* of the rules of international law<sup>85</sup>, as well as in the *evolution* of the rules of international law: this is not a phenomenon external to Law.

13. The temporal dimension is clearly inherent to the conception of the “progressive development” of international law. By the same token, the conscious search for new juridical solutions is to presuppose the solid knowledge of solutions of the past and of the evolution of the applicable law as an open and dynamic system, capable of responding to the changing needs of regulation<sup>86</sup>. In effect, the temporal dimension underlies the whole domain of Law in general, and of Public International Law in particular<sup>87</sup>.

---

84 It has for centuries attracted the attention of philosophers and thinkers (such as, *inter alii*, Plato, Aristotle, Seneca, Saint Augustine, Plotino, Descartes, Pascal, Kant, M. Proust, Spinoza, Newton, Husserl, H. Bergson, P. Ricoeur, among others); it has, moreover, been present in modern historiography, as disclosed by the writings on the matter of, e.g., Fernand Braudel (*Écrits sur l'histoire*, 1969), G.J. Whitrow (*Time in History*, 1988), Norbert Elias (*Über die Zeit*, 1984), among others.

85 Cf. K. Doehring, “Die Wirkung des Zeitablaufs auf den Bestand völkerrechtlicher Regeln”, *Jahrbuch 1964 der Max-Planck-Gesellschaft*, Heidelberg, 1964, pp. 70-89.

86 A.A. Cançado Trindade, “Reflections on International Law-Making: Customary International Law and the Reconstruction of *Jus Gentium*”, in *International Law and Development/Le droit international et le développement* (Proceedings of the 1986 Conference of the Canadian Council on International Law/Travaux du Congrès de 1986 du Conseil canadien de droit international), Ottawa, 1986, pp. 78-81, and cf. pp. 63-81.

87 As to this latter, illustrations can be found in the work on the so-called “intertemporal law”, in the Sessions of Rome (1973) and Wiesbaden (1975) of the *Institut de Droit International*. Cf., in particular, 55 *Annuaire de l'Institut de Droit International [AIDI]* (1973) pp. 33, 27, 35-37, 48, 50, 86, 106 and 114-115; and 56 *Annuaire de l'Institut de Droit Interna-*

14. Time is inherent to Law, to its interpretation and application, and to all the situations and human relations regulated by it. One of the ineluctable pitfalls of legal positivism (still very popular in the legal profession in our days) lies in its vain attempt to conceive Law in general, and international law in particular, *independently* of time. Legal positivism and political “realism”, with their static vision of the world, focused on the legal order or the “reality” of a given moment, have, not surprisingly, been invariably subservient to the established order, to the relations of domination and power. Neither the positivists, nor the “realists”, have shown themselves capable of anticipating and understanding - and have difficulties to accept - the profound transformations of contemporary international law in the unending search for the realization of the imperatives of justice.

15. Startled by the changes occurred in the world, they have had to move or jump from one historical moment to another, entirely distinct, seeking to readjust themselves to the new empirical “reality”, and then trying to apply again to this latter the static scheme which they are mentally used to, once again projecting their illusion, of permanence and “inevitability”, into the future, and, at times - almost in desperation - also into the past. Their basic error has been their minimization of the *principles*, as well as of the temporal dimension of social facts. They can only behold interests and advantages, and do not seem to believe in human reason, in the *recta ratio*,<sup>88</sup> nor in the human capacity to extract lessons from the historical experience.

16. Time marks a noticeable presence in the whole domain of international procedural law. As to substantive law, the temporal dimension permeates virtually all domains of Public International Law, such as, - to evoke a few examples, - the law of treaties (regulation *pro futuro*), peaceful settlement of international disputes (settlement *pro futuro*), State succession, the international law of human rights (the notion of potential victims), international environmental law (the preventive dimension), among others. In the field of regulation of

---

*tional* (1975) p. 536-541. The debates and work of the Institut disclosed an ambivalence, antinomy or tension between the forces in favour of the evolution or transformation of the legal order and those in favour of the stability or legal security, - and this was to be reflected in the cautious resolution adopted by the Institut in Wiesbaden in 1975.

88 The *recta ratio* was well captured and conceptualized, throughout the centuries, by Plato, Aristotle, Cicero, and Thomas Aquinas, and, subsequently, situating it in the foundations of *jus gentium* itself, by Vitoria, Suárez and Grotius.

spaces (e.g., law of the sea, law of outer space), the temporal dimension stands out likewise. There is nowadays greater awareness of the need to fulfill the interests of present and future generations (with a handful of multilateral conventions in force providing for that).

17. Evolving international law, attentive to secure an element of previsibility in the conduction and regulation of the social relations subjected thereto, is itself permeated by the major enigma which permeates the existence of all subjects of law: the passage of time. If one seeks for answers to that enigma, I am afraid we can hardly find them in the domain of Law, or elsewhere. Instead, some consolation for the lack of answers to that overwhelming enigma can perhaps be found in the domains of philosophy or theology.

## **V. The Search for Timelessness**

18. The present case is, by the way, centred on the Temple of Preah Vihear, which appears to resist the onslaught of time and to be endowed with a touch of timelessness. The Temple of Preah Vihear, a monument of Khmer art, dates back to the first half of the XIth century, and is located on a high promontory of the range of the Dangrek mountains (one of religious significance, by the border between Cambodia and Thailand). The Temple of Preah Vihear is composed of a series of sanctuaries linked by a system of pavements and staircases over an axis 800-meter long, rising up the mountain, and standing on the edge of a cliff 547m high.

19. This *millénaire* masterpiece of Khmer art and architecture was erected and used for religious purposes. It was dedicated to Shiva (one of the Hindu divine triad of Vishnu, Shiva and Brahma – cf. *infra*). It was intended to stand for times immemorial, to bring together the faithful of the region, to fulfill their spiritual needs. Temples and shrines, giving expression to different religious faiths, have been erected in times past in distinct localities in all continents, in search of timelessness, to render eternal the human faith, carved in stone to that end.

20. Writing in 1912, Max Scheler deemed it fit to point out that the construction of temples, monasteries, cathedrals, shrines of the more distant past, engaged generations of people who built them, within their communities that were to survive them, thus giving them

the feeling of being inserted, in peace with themselves, into eternity, in the continuity of human generations<sup>89</sup>. Writing twelve years later, in 1924, Stefan Zweig regretted that in the modern world, human beings no longer erect such temples or monuments, in an epoch of fast communications and precipitated action, when they pursue objectives which appear usually quite close. Ours is an epoch which has lost the idea of a durable image; no one, or no generation, would spend nowadays the whole life building a shrine, a temple or a cathedral. Our modern world “counts the hours with different measures, and life goes by with distinct velocities”. We have

forgotten the art of expressing our essence in durable stones for the years which do not finish. (...) We are quite aware to have lost the aptitude for the infinite, (...) the aptitude to give shape so powerfully in one work (*obra*) to the spirit of a whole people, to the genius of an epoch<sup>90</sup>.

Hence the importance of preservation of such sanctuaries or temples<sup>91</sup>, as cultural and spiritual heritage of humankind (cf. *infra*).

21. Being itself the concrete expression of human inspiration, the Temple of Preah Vihear seems now faced with the threat of human resentment (cf. *infra*). Recent developments (2007-2011) in the region of that part by the border between Cambodia and Thailand suggest that the times of human beings remain troubled and unpredictable, to a far greater extent than the times of stars. The shrines of the Temple of Preah Vihear appear now surrounded by tension, hostilities and conflict, proper of the human condition.

## VI. From Timelessness to Timeliness

22. What was meant to be a monument endowed with *timelessness*, is now again the object of contention before this Court, raising before it, *inter alia*, the issue of *timeliness*. The case of the *Temple of Preah Vihear* is now, half a century after its adjudication by the Court on 15.06.1962, brought again to the attention of the Court, by means of two requests

---

89 M. Scheler, *L'homme du ressentiment*, op. cit. *infra* n. (145), p. 41.

90 S. Zweig, *Tiempo y Mundo - Impresiones y Ensayos (1904-1940)*, Barcelona, Edit. Juventud, 1998, pp. 147-148 (my translation).

91 It has been pointed out that, in their art, there is “une jonction miraculeuse entre le temporel et l'intemporel”; G. Duby, *Le temps des cathédrales - L'art et la société, 980-1420*, Paris, Gallimard, 1979, p. 117.

from Cambodia, one for interpretation of the 1962 Judgment, and the other for provisional measures of protection.

23. In the first request, for interpretation, Cambodia draws attention to its timeliness. In the public sitting of 30.05.2011 before the Court, though conceding that the prolonged lapse of time, of half a century, since the Court's Judgment of 15.06.1962, render "certain aspects" of the present case "unusual", it pointed out that Article 60 of the Court's Statute (that it invoked as basis of jurisdiction of the Court in the *cas d'espèce*) contains no time-limit for such a request for interpretation. In its view,

the right to seek the assistance of the Court to resolve a dispute of that kind is not subjected to any time-limit by Article 60 of the Statute<sup>92</sup>.

In sustaining the timeliness of its request for interpretation, Cambodia referred to paragraphs 29-35 of the request itself, lodged with the Court on 20.04.2011, wherein it referred to tensions, hostilities and incidents occurred in the area of the Temple of Preah Vihear in 2008, 2009 and 2011 (pars. 33-35); Cambodia also invoked, in its request, Article 2(3) and chapter VI of the U.N. Charter (par. 32).

24. Thailand, in turn, in the public sitting of 30.05.2011 before the Court, stressed the consequence it beheld, of the passing of so much time, for the Cambodian requests recently lodged with the Court. While conceding that there is no time-limit in Article 60 of the Statute, it argued that

an interpretation goes back to the text of the Judgment, whereas a request for provisional measures relates to the future conduct of normally both parties. There is a tension between the two, which becomes ever more acute as time passes<sup>93</sup>.

It added that the character of the Court's "interpretation jurisdiction is such that provisional measures will only be available in special cases, especially when a lengthy period has elapsed since the

---

92 ICJ, *Compte rendu* CR 2011/13, of 30.05.2011, p. 31. And, to the same effect, ICJ, *Compte rendu* CR 2011/15, of 31.05.2011, pp. 23-24.

93 ICJ, *Compte rendu* CR 2011/16, of 31.05.2011, p. 18.

first judgment”<sup>94</sup>. The fact that both Thailand and Cambodia - or, more precisely, those who have served as counsel for one and the other, in the recent public sittings before this Court, - have felt compelled to address, each one in its own way, the issue of timeliness in the circumstances of the *cas d'espèce*, seemingly startled by it, renders the present case of the *Temple of Preah Vihear*, in my view, indeed fascinating. It shows the human face of an inter-State case before the World Court.

## VII. The Passing of Time: The *Chiaroscuro* of Existence

25. In effect, the present case of the *Temple of Preah Vihear* appears to contain some lessons, not so easy to grasp. As already pointed out, it enshrines the *chiaroscuro* not only of law (cf. *supra*), but also of existence itself. It suggests that we, mortals, still have to learn to live within boundaries in space and in time, so as to live in peace (mainly of mind). As to space, those boundaries which bring countries and their peoples together, rather than separate them. As to time, those which link day and night, light and darkness, life and after-life. As I have already indicated, all cultures, including the ancient ones, in distinct latitudes, grasped the mystery of the passing of time, each one in its own way.

26. As I pondered in my Separate Opinion in the case of *Bámaca Velásquez versus Guatemala*, resolved by the IACtHR (Judgment on reparations, of 22.02.2002),

Time keeps on being a great mystery surrounding human existence. Human knowledge of the extreme frontiers of life (birth and death) continues to be limited, and such frontiers have become “more mobile” as a consequence of the cultural changes and the technological development, what attributes an even greater responsibility to the jurists, who ought to be attentive to the ethical codes and to the cultural manifestations in evolution. (...) The very conscience of time is “a very late product of human civilization” (...). Despite all that has been written on the subject, the very *origin* of the cultures still continues without an answer<sup>95</sup>; and time and space, which they

94 *Ibid.*, p. 20. And, to the same effect, ICJ, *Compte rendu* CR 2011/14, of 30.05.2011, pp. 32-33 and 26.

95 E. Cassirer, *Essai sur l'homme*, Paris, Éd. de Minuit, 1975, p. 47, and cf. p. 243.

seek to explain, appear ultimately as mental creations of the social conscience, which allow to conceive a unified and coherent cosmos<sup>96</sup>. Of the essence of cultural life are “the perception and the awareness of time”, which, in turn, constitute component elements of “the solidarity of human generations which succeeded each other and return, repeating each other as the stations”<sup>97</sup>. Time was even considered - as in the *Confessions* of Saint Augustin - as an essential aspect of the spiritual life of individuals and groups, as an integral part of the social conscience itself<sup>98</sup> (pars. 4-5).

27. In fact, there is no social *milieu* wherein collective representations pertaining to its origin and to its destiny are not found. There is a spiritual legacy which is transmitted, with the passing of time, from generation to generation, conforming a “perfect spiritual continuity among generations”; hence the relevance of the conscience of living *in time*, and of the burial rites<sup>99</sup>. Just as the living experience of a human community develops with the continuous flux of thought and action of the individuals who compose it, there is likewise a spiritual dimension which is transmitted from an individual to another, from a generation to another, which precedes each human being and survives him, *in time*. The *passing* of time, - a source of desperation to some, - in fact brings the living ineluctably closer to their dead, and binds them together, and the preservation of the spiritual legacy of our predecessors constitutes a means whereby they can communicate themselves with the living, and vice-versa.

96 A.Y. Gurevitch, “El Tiempo como Problema de Historia Cultural”, in *Las Culturas y el Tiempo*, Salamanca/Paris, Ed. Sígueme/UNESCO, 1979, pp. 260-261. In this way, “converted into ruler of time”, the human being “is also dominated by it” (*ibid.*, p. 261).

97 *Ibid.*, pp. 280 and 264, and cf. p. 272.

98 Few persons, like Saint Augustine, felt with such intensity the inscrutable mystery of the time. In the unsurmountable pages on the matter, of book XI of his *Confessions* (written between the years 398 to 400), to the question “what is time?”, he answered: “if no one asks me, I know it; but if I want to explain it to whoever asks me, then I do not know it” (par. 17). And he added, as to the “three times” (or “three moments in the spirit”, namely, “expectation, attention and remembrance” - par. 37): the three times - past, present and future - “are in the mind and I do not see them elsewhere. The present of the past is memory. The present of the present is the vision. The present of the future is the expectation” (par. 26).

99 E. Durkheim, *Las Formas Elementales de la Vida Religiosa*, Madrid, Alianza Ed., 1993 (reed.), pp. 393, 419, 436, 443 and 686.

28. The living perceive time in distinct ways. The chronological time is not the same as the biological time. In a life-time, time seems different for each age. Children seem to live their minutes, adults their day-to-day life, and the elderly their epoch or personal history. The biological time is not the same as the psychological time. Time gives human beings, at first, innocence, gradually replaced, later, with the passing of years, by growing experience. The time of human beings nourishes them, first, with hope, and, later, with memory. The time of human beings is indeed implacable.

29. Time links the beginning and the end of human existence, rather than separates them. Time impregnates human existence of memory, and enables the search for the meaning of each moment of existence. Time appears to invite the cultivation of the study of history, and shows the ephemeral in the search for supremacy and glory. It is arguable whether life-time can be invoked as an adequate measure to approach a legal situation extending in time, and even less so to approach the nature of a legal obligation.

30. As to the relationship between the passing of time and human existence, in a couple of his many and *célèbres Letters to Lucilius*<sup>100</sup> (124 in number), Seneca warns us, in his wise stoicism, that just as we have time, the time has us: in our brief life-time, a few of us try to gather knowledge, while the majority tries to accumulate possessions, goods and wealth; yet, the passing of time dispossesses us of everything, - Seneca lucidly concludes, - and we leave this world as helpless as we entered it. Life-time is shorter than many continuing legal obligations.

### **VIII. Time, Legal Interpretation, and the Nature of Legal Obligation**

31. This is an appropriate moment to turn attention to time, legal interpretation and the nature of legal obligation. In this connection, in the course of the proceedings before the Court concerning the request for Provisional Measures of Protection in the present case of the *Temple of Preah Vihear*, Thailand, at a given moment of its pleadings of 30.05.2011, argued that

Even in the long history of the law of nations, 50 years is a considerable time. The last two Judges who participated in the *Temple* case died in 1989 - Judge Morelli on his

---

100 In particular, his *Letters* ns. XII, LXXVIII, CII and CXXII.

89th birthday, Judge Bustamante just after his 94th. Yet Cambodia would have the Court speak in a continuous present, prescribing the withdrawal of forces whose members were not born at the time, enjoining activities which, if they have occurred at all, began after the time<sup>101</sup>.

32. Even taking a life-time as a measure to approach a legal situation which appears to subsist in time, are 50 years really a considerable time? In my perception, a lapse of 50 years may be seen from different angles. For a very young person, in the dawn of life-time, looking forward in time, 50 years may appear a far too long a time. For an elderly person, approaching the twilight of life-time, looking back in time, 50 years may appear to have passed by very fastly, to have been not so long at all. The impression I can hardly escape from, is that mere chronological time does not assist us much: it seems to conceal more than what it discloses.

33. In the long history of the law of nations, 50 years may appear a long, or not so long a time, depending on how we see them, and on what period of that history we have in mind. All will depend on the density of time (cf. *supra*) of the period at issue, - whether at that period much has happened, or nothing significant has taken place at all. In any case, the work undertaken in the Court by the generation of Judges Morelli and Bustamante is *linked* to the work being undertaken in the Court by the present generation of its Judges. Ours is a common mission, prolonged in time. The present Order of Provisional Measures of Protection, which the Court is adopting today, 18 July 2011, half-a-century after its Judgment of 15 June 1962, in the case of the *Temple of Preah Vihear*, bears witness of this.

34. One cannot lose sight of the fact that time and space do not form part of the empirical or real world, but are rather part of our "mental constitution", of our apparatus "to grasp the world"<sup>102</sup>, to examine and understand events that have occurred or occur and mark our lives. The perception of time was gradually divided by human beings to help them, at first, to overcome "the briefness and the unicity" of their lives; with that, living in their social environment, human beings imagined

101 ICJ, *Compte rendu* CR 2011/14, of 30.05.2011, p. 33.

102 K. Popper, *En Busca de un Mundo Mejor*, Barcelona, Ed. Paidós, 1996, pp. 171-173.

they could in a way “deceive death” itself<sup>103</sup>. Cultures seek to explain time and space, each one in its own way. It is widely reckoned today that cultures, in their diversity, also assist human beings to relate themselves with the outside world, to strive to understand it.

35. In so far as human knowledge is concerned, there are no final answers on Law, nor on humanities, nor even on science. Law is not self-sufficient, as legal positivists, in their characteristic arrogance (symptomatic of short-sightedness), seem to assume. In my understanding, Law has much to learn from other branches of human knowledge, and vice-versa. The limitations of human knowledge recommend a certain modesty as to what we do. As to Law, there is a *continuing* quest for the realization of Justice.

36. I have already drawn attention to the fact that both Thailand and Cambodia, in the course of the very recent proceedings before the Court in the case of the *Temple of Preah Vihear*, have shown their preoccupation with how to approach properly, each one in its own way, the issue of timeliness in the circumstances of the *cas d'espèce* (cf. *supra*). Underlying their concerns are, first, the distinct theses they uphold of legal interpretation itself, and secondly, the distinct theses that Cambodia and Thailand uphold of the existence of a *continuing*, or else an *instantaneous* obligation, respectively.

37. As to the first point, concerning legal *interpretation*, it should not pass unnoticed that both Cambodia<sup>104</sup> and Thailand<sup>105</sup> evoked, in distinct ways, *obiter dicta* of the Judgment n. 11 (of 16.12.1927) of the old Permanent Court of International Justice (PCIJ) in the case of the *Chorzów Factory – Interpretation of Judgments ns. 7 and 8*, in order to seek to substantiate their submissions on the matter. In fact, with regard to legal interpretation, in my view some precision is here called for, which I deem it fit to dwell upon in the present Separate Opinion. In an application for *revision* of a Judgment (which is not the case here), the facts to take into account are only those set forth in the original application, which formed the object of the corresponding Judgment. There could not be new or additional facts, which would fall outside

---

103 A.Y. Gurevitch, “El Tiempo como Problema de Historia Cultural”, *op. cit. supra* n. (19), p. 263.

104 ICJ, *Compte rendu* CR 2011/13, of 30.05.2011, p. 29, 34 and 36; ICJ, *Compte rendu* CR 2011/15, of 31.05.2011, pp. 15, 22 and 24-25.

105 ICJ, *Compte rendu* CR 2011/14, of 30.05.2011, pp. 22-24 and 38-40.

the scope of revision, and would call for a new application, a new case, if the applicant State would wish to submit to the Court.

38. This is not the situation in an application for *interpretation* of a Judgment. In so far as interpretation is concerned, in my understanding one cannot make abstraction of subsequent facts, which gave rise to the different views advanced by the contending parties. Even more so when *both* parties rely upon, or refer to, such new or subsequent facts, in their submissions to the Court, as they have done in this case of the *Temple of Preah Vihear*. The Court can take such new facts into account, in order to perform faithfully its judicial function and its duty to decide on the request for interpretation lodged with it.

39. We have not yet reached this stage. We are presently taking cognizance *provisional measures of protection*. In this respect, the considerations I have just made apply even more forcefully, in face of a situation which appears to be endowed with the prerequisites of urgency and gravity, an imminence of irreparable harm (cf. *infra*). I shall turn to this point later; for the moment, suffice it to point out that, in a request for provisional measures of protection like the present one, the Court cannot simply decline to answer the points raised before it.

40. As to the second point, concerning the *nature* of legal obligation, in its request for interpretation, of 20.04.2011, Cambodia saw it fit to refer to a “permanent situation” and an obligation endowed with a “caractère de permanence” (para. 37), and explained:

L’obligation pour la Thaïlande de “retirer tous les éléments de forces armées ou de police ou autres gardes ou gardiens qu’elle a installés dans le Temple ou dans ses environs situés en territoire cambodgien” (point 2 du dispositif [de l’arrêt de la CIJ de 1962]) est une conséquence particulière de l’obligation générale et continue de respecter l’intégrité du territoire du Cambodge (...) (para. 45).

41. The point was retaken by both parties in their respective pleadings before the Court, of 30-31 May 2011, concerning the application for provisional measures of 28.04.2011. In its submissions of 30.04.2011, Thailand retorted that the applicant State was attempting to transform into a “continuing obligation” what was “an immediate

and instantaneous obligation” deriving from paragraph 2 of the Court’s Judgment of 1962 in the present case of the *Temple of Preah Vihear*<sup>106</sup>.

42. On the following day (public sitting of 31.04.2011), Cambodia replied that the obligation at issue was not “immediate and instantaneous”, but rather “*continuous and permanent*, because it was “the consequence of the fact that a State should not violate the territorial sovereignty of another State”. To regard that obligation as “instantaneous”, - Cambodia concluded, convincingly in my view, - would allow the respondent State “to withdraw its troops the day after the Judgment and move them back in again a week later”<sup>107</sup>. In the domain of inter-State relations, when the fundamental principle of the prohibition of use or threat of force (cf. *infra*), is at stake, the corresponding obligation is, in my understanding, a continuing or permanent one, for the States concerned.

## IX. From Time to Space: Territory and People Together

43. It is time now to move from my considerations on time and law to those pertaining to space and law. I can hardly develop my considerations on space without relating it to the human element of statehood: the population. In their recent submissions before the Court in the case of the *Temple of Preah Vihear*, the contending parties themselves, Cambodia and Thailand, much to their credit, were attentive to territory *together* with people. In the public sitting of 30 May 2011, Cambodia expressed its concern with the fatal victims of, and those injured in, the armed hostilities of 15.07.2008, 04 to 07.02.2011<sup>108</sup>, as well as with the “50.000 personnes de la population civile de la région”, encompassing the “zone” of the Temple of Preah Vihear, as well as the zones of the Temples of Ta Moan and Ta Krabei, as a result of the hostilities of 22.04.2011<sup>109</sup>. For its part, Thailand, in its pleadings on the same day, conceded that “des dizaines de milliers d’habitants de la région frontrière ont été déplacés”<sup>110</sup>.

44. In its final submissions to the Court, in the public sitting of 31 May 2011, Cambodia stated:

---

106 ICJ, *Compte rendu* CR 2011/14, of 30.05.2011, p. 25.

107 ICJ, *Compte rendu* CR 2011/15, of 31.05.2011, p. 18.

108 Cf. ICJ, *Compte rendu* CR 2011/13, of 30.05.2011, p. 20, and cf. pp. 44-45.

109 Cf. *ibid.*, p. 22, and cf. p. 46.

110 Cf. ICJ, *Compte rendu* CR 2011/14, of 30.05.2011, p. 16, and cf. p. 51.

Les droits dont le Cambodge demande la protection se situent bien dans la zone du Temple et concernent bien le patrimoine culturel et spirituel que représente le Temple, ainsi que le préjudice que pourrait subir le Cambodge à travers les atteintes à sa souveraineté, son intégrité territoriale et la survie de sa population<sup>111</sup>.

45. Thailand, for its part, in its final submissions of the same day, argued that “events at the Ta Kwai and Ta Muen Temples are of no relevance to the present proceedings”, and that there was “no risk of aggravation of the dispute due to Thailand’s behaviour”. It added that

The picture is that of two neighbouring countries sharing a common border approximately 800 km long, where people engage in peaceful activities every day throughout the year. This is the fact between peoples of Thailand and Cambodia - the fact that has not and will not change<sup>112</sup>.

46. In sum, neither of the contending parties focused on territory only; both of them took duly into account the fate of the local population. This having been so, at the end of the public sitting of the Court of 31 March 2011, I deemed it fit to put the following questions to both Parties:

Dans la demande en indication de mesures conservatoires objet de la présente procédure, il est notamment indiqué que les incidents qui se sont produits depuis le 22 avril 2011 dans “la zone du temple de Préah Vihéar” ainsi qu’en d’autres lieux situés le long de la frontière entre les deux États parties au différend ont provoqué des “morts, blessés et évacuations de populations”.

Les Parties peuvent-elles donner à la Cour de plus amples informations concernant le déplacement de ces populations? Combien d’habitants ont été déplacés? Ceux-ci ont-ils pu retourner em toute sécurité et volontairement dans leurs foyers? Où dans la région sont-ils installés? Y sont-ils installés depuis longtemps? Quel est leur mode de vie? Quelle est la densité de population dans la région? Pour préserver l’équilibre linguistique de la Cour, je me permets de poser la même question aux Parties en anglais.

111 ICJ, *Compte rendu* CR 2011/15, of 31.05.2011, p. 15.

112 ICJ, *Compte rendu* CR 2011/16, of 31.05.2011, pp. 26 and 28-29.

In the present request for the indication of provisional measures by the Court, it is stated, *inter alia*, that, as a result of the incidents since 22 April 2011 in the occurred since 22 April 2011 in “the area of the Temple of Preah Vihear”, as well as at other places along the boundary between the two contending States, “fatalities, injuries and the evacuation of local inhabitants” were caused.

What further information can be provided by the Parties to the Court about such evacuated local inhabitants? How many inhabitants were displaced? Have they safely and voluntarily returned to their homes? Whereabouts do they live in the region? Have they been settled there for a long time? What is their *modus vivendi*? What is the population density of the region?<sup>113</sup>.

## 1. Cambodia's First Submissions

47. On 06 June 2011, Cambodia responded to my questions, including 7 annexes<sup>114</sup> to its response<sup>115</sup>. At the beginning of its response, Cambodia explained that it understood my questions as referring to the displacement of the local population from, on the one hand, the area of the Temple of Preah Vihear, and, on the other hand, from other places along the border between the two States. Cambodia submitted that since that there are no inhabitants living in the Temple itself, Cambodia understood the expression the “area of the Temple”, from my questions, as the area indicated on map 5 attached to Cambodia’s request for interpretation (and projected by Cambodia during the public hearing before the Court).

48. Cambodia further submitted that “the consequences of the incidents in this area have affected the villages or dwellings in the immediate proximity”<sup>116</sup> of the said area. It is further reiterated that, although the incidents are interconnected, Cambodia was only requesting the indication of provisional measures in the area of the

---

113 ICJ, *Compte rendu* CR 2011/16, of 31.05.2011, p. 32.

114 The seven Annexes consist of photos of the Province of Oudor Meanchey (between 22 April and 03 May 2011) referred to in Cambodia’s response, as well as a map of the area of the Temple of Preah Vihear.

115 ICJ, document CTh 2011/11, of 07.06.2011, pp. 1-12.

116 In the original French text: “les conséquences des incidents dans cette zone ont touché des village [sic] ou habitations à proximité immédiate de cette zone”.

Temple itself. Cambodia also explained that its response to my questions was limited to the most recent events, even though some of the displacement of the local inhabitants were sometimes “the result of incidents that took place before 22 April 2011” and that the “consequences of such displacements have been prolonged beyond 22 April”. Yet, Cambodia submitted that the information provided in its response covered the period of 22 April to 05 May 2011.

49. Cambodia further submitted that, during that period, more than 50.000 persons were placed in provisional camps and 10.000 inhabitants were sheltered by their close entourage and friends in secured areas. Cambodia asserted that, during these “armed aggressions”, the Cambodian Red Cross provided food supply and assisted in the reconstruction of their dwellings; and that donations from various institutions and private persons also provided assistance to the population.

50. As to the *area of the Temple of Preah Vihear* precisely, Cambodia responded that a total of 9.412 persons were displaced from three villages in the proximity<sup>117</sup> of the area of the Temple. Cambodia added that the inhabitants returned to their homes on 5 May 2011 and that the camps were closed also on 5 May 2011. Yet, - it further contended, - the local inhabitants who worked in the market at close proximity of the Temple were not able to resume their activities because the market “was destroyed by the combats”<sup>118</sup>. Cambodia contended, moreover, that 80% of the local population practices agriculture for a living, and that the population density of the region is about 50 persons/km<sup>2</sup>.

51. As to *other areas in the region*, Cambodia submitted that in the Province of Ouddor Meanchey, 52.538 persons, who come from various villages along the border with Thailand near the Temples of Ta Mone and Ta Krabey (that is, 150 km west of the area of the Temple of Preah Vihear) have been displaced. It further submitted that 52 houses in this region have been “partially or totally destroyed”<sup>119</sup> and that 147 (out of 194) schools have been closed, making it impossible for 39.873

---

117 Cambodia referred in this regard to the map attached to its response (Annex 7).

118 Cambodia further submitted that the local inhabitants live in the immediate proximity of the Temple of Preah Vihear and that they have settled in the village of Sra Em since its establishment in 1997, in Svay Chrum village since 1995 and in the village of Samdech Techo Hun Sen since 2009.

119 Cambodia refers in this regard to the pictures attached to its response.

students to go to school. Cambodia added local inhabitants have lived in distinct villages established a long time ago<sup>120</sup>. In response to my question as to whether they have returned safely and voluntarily to their homes, Cambodia contended, moreover, that the local inhabitants have returned to their homes on 5 May 2011 and that the camps have been closed also on 05 May 2011. It added that 85 % of the displaced population make their living from their agricultural production<sup>121</sup>. Last but not least, Cambodia submitted that the population density in this region is about 28-29 persons/km<sup>2</sup>.

## 2. Thailand's First Submissions

52. On 7 June 2011, Thailand submitted its response to my questions, and included therewith one map illustrating the location of the provinces and districts referred to in its response<sup>122</sup>. Thailand began by addressing the incidents *near the Temples of Ta Muen and Ta Kwai* (situated about 150 km from the Temple of Preah Vihear<sup>123</sup>). In respect of the incidents that took place, from 22 April to 3 May 2011, in the Surin province (where Ta Kwai and Ta Muen Temples are situated), it submitted, in response to my questions, first that Thai authorities evacuated 45.042 local inhabitants to "safe shelters" as of 22 April 2011, "[a]s a precautionary measure to prevent loss of lives of the Thai population in the area around Ta Kwai and Ta Muen Temples in Surin Province". It added that on 2 May 2011 "all [inhabitants] returned safely and voluntarily to their homes" and have since then resumed their lives normally.

53. Moreover, Thailand submitted that the evacuated population came from the Phanom Dong Rak, Prasat, Kabcheung and Sangkha districts and that the majority of them were born in the region "and their

---

120 Namely: 2.517 families, totalling 11.124 inhabitants, have been living in the Kok Morn village; 3.198 families, totalling 13.408 persons, have been living in the Ampil village; 1.103 families, totalling 4.913 persons, have been living in the village of Kok Khpos; 1.934 families, totalling 9.651 people, have been living in the O'Smach village; 1.493 families, amounting to 6.809 persons, have been living in the Bansay Rak village; 990 families, totalling 4.913 persons, have been living in the Kaun Kriel village; and 354 families, amounting to 1.720 people, have been living in the Trapeang Prey village.

121 And that 52.421 hectares have been contaminated by "Unexploded Ordnances (UXOs)", including 8.000 hectares of cultivated land from a total of 37.093 hectares.

122 ICJ, document CTh 2011/13, of 07.06.2011, pp. 1-4.

123 Thailand uses the denomination "Temple of Phra Viharn".

families have lived there for many generations". Thailand contended that the majority of them are farmers; they cultivate rice, rubber trees, sweet potatoes, sugar cane and some of them also engage in silk worm breeding industry. Regarding the population density of the region, Thailand responds that in the Phanom Dong Rak district, there are 116 persons/km<sup>2</sup>, with a total population accounting for 37.197 persons; in the district of Prasat, the population of the subdistrict of Choke Na Sam is 139 persons/km<sup>2</sup> and of Kok Sa-ard subdistrict is 203 persons/km<sup>2</sup>, making the total population of the Prasat district 11.423 persons; in the Kabcheung district, the population density is 105 persons/km<sup>2</sup>, amounting to a total of 60.421 persons; and the Sangkha district has a population density of 126 persons/km<sup>2</sup>, making the total population 127.592 persons.

54. Concerning the *Buriram province*, which is adjacent to the Surin province, Thailand asserted that the incidents that took place since 22 April 2011 in the area around Ta Kwai and Ta Muen Temples prompted the Thai authorities to evacuate the local population in the Ban Kruat district of the Buriram Province, which is situated about 10 kilometres from the Ta Kwai and Ta Muen Temples. Thailand submits that, "[a]s a precautionary measure to prevent loss of lives of the Thai population in the area near the site of the clashes", 7.396 local inhabitants were evacuated by Thai authorities to "safe shelters" from 22 April 2011. Thailand further submits that on 2 May 2011 "all [inhabitants] returned safely and voluntarily to their homes" and have since then resumed their lives normally.

55. It added that the local inhabitants live in the Ban Kruat district of the Buriam Province and that the "majority of [them] were born there and their families have lived in the region for many generations"; the majority of them "are farmers who cultivate rice, rubber trees, sweet potatoes, and sugar cane". It further contended that the population density of the Ban Kruat district is 136 persons/km<sup>2</sup>, the total population amounting to 73.400 persons. Finally, as to the *incident at Phu Makua*, situated 2.5 kilometres from the Temple of Preah Vihear, Thailand submitted that no local inhabitants were displaced, as a result of the said incident, occurred on 26 April 2011.

### 3. Cambodia's Second Submissions

56. On 13 June 2011, Cambodia submitted its comments to the responses provided by Thailand to my questions put to both Parties (cf. *supra*). Cambodia first noted that Thailand provided very little information concerning the area of the Temple of Preah Vihear itself and indicated that no population was displaced therefrom; in its view, that statement showed that, until recent incursions, the situation on the ground complied with the Court's 1962 Judgment concerning Cambodia's control and sovereignty over the area of the Temple. Cambodia further submitted that Thailand's response confirmed that there were incidents in the area of the Temple and at other sites, at the time of the filing of the request for Provisional Measures, which were needed to preserve the rights at stake and to prevent irreparable harm.

57. Moreover, Cambodia contended that, although calm had been restored and the populations had returned to their homes since 02.05.2011, yet the calm was fragile and nothing could guarantee that armed hostilities would not break out again, as they did in July 2008, October 2008, April 2009, February 2011 and April 2011. As to Thailand's account of displaced populations in an area 150 km west of the Temple, Cambodia reiterated its argument that "only the incidents in the area of the Temple of Preah Vihear should be taken into account", and that "the incidents in the area 150 km away from the Temple of Preah Vihear should not enter into consideration for the measures the Court might pronounce"<sup>124</sup>.

### 4. Thailand's Second Submissions

58. On 14 June 2011, Thailand presented its comments to the responses provided by Cambodia to my questions put to both Parties (cf. *supra*)<sup>125</sup>. Thailand first submitted that some information provided in Cambodia's response was either of no relevance, or referred to incidents that occurred before 22 April 2011, thus falling outside the scope of my questions (cf. *supra*). Referring to the villages of Sra Em,

---

124 ICJ, document CTh 2011/17, of 14.06.2011, pp. 1-2; Cambodia further dismissed Thailand's claim of sovereignty over the Temples of Ta Mone and Ta Krabey and argued that this stemmed from Thailand's unilateral interpretation regarding the border line in this area.

125 Thailand enclosed one attachment to its comments.

Svay Chrum and Samdech Techo Hun Sen, Thailand submitted that the *only* incident outside the Ta Muen and Ta Kwai Temples area occurred after 22 April 2011 at Phu Makhua, on 26 April 2011. Thailand submits that this incident was a minor one resulting from a misunderstanding. Thailand contended that there was no link between the evacuation of the three villages referred to in Cambodia's response, and the incident of 26.04.2011. Thailand thus submits that the evacuation of these villagers could not be the consequence of incidents that took place from 22 April 2011, as inquired by me in the question I put to the Parties (cf. *supra*).

59. Thailand further argued that Cambodia did not specify when the evacuation began or the reasons for the evacuation, and that Cambodia herself admitted that the origin of the displacement could have been the incidents that took place before 22.04.2011. Thailand submits that this, "together with the fact that no incident occurred anywhere within 150 kilometres of the Temple of Phra Viharn since 7 February 2011, (...) leads to the only plausible conclusion that (...) the alleged evacuation of the three villages was in fact undertaken as a result of the incidents that occurred during February 2011"<sup>126</sup>. In Thailand's view this displacement fell outside the scope of the questions I posed to the Parties. Furthermore, Thailand argued that Cambodia's response concerning the establishment of the three villages confirmed its argument - made during the hearings - that villagers were put in the region only recently to serve political motives outside the scope of the current proceedings. As to Cambodia's statement that some inhabitants could not resume their work in the market, because of the latter's destruction, Thailand retorted that the market was destroyed as a result of the incidents that occurred in April 2009, thus also outside the scope of the questions I put to both Parties<sup>127</sup>.

---

126 ICJ, document CTh 2011/18, of 14.06.2011, p. 1, and cf. pp. 1-3.

127 As to the province of Oddor Meanchey, Thailand argued that Cambodia's reference to 52,421 hectares of land contaminated by "Unexploded Ordnances" (UXOs) was irrelevant to both the question and the present proceedings, since, according to its understanding, any UXOs contaminated area found in Cambodia is "the result of past conflicts in Cambodia that lasted until 1998"; *ibid.*, p. 2. Last but not least, Thailand questioned the credibility of the photographs submitted by Cambodia, since no information was provided as to the exact dates and locations where they were taken; *ibid.*, p. 2.

## 5. General Assessment

60. The two rounds of submissions and comments, provided by the Parties in response to my questions (cf. *supra*), clarify some of the issues underlying the present case of the *Temple of the Preah Vihear*, lodged with the Court. Yet, there remain still some points of difference between the Parties. Their submissions, at first, differ in respect of the motivation or reason for the evacuation of local inhabitants. While Cambodia asserts that some of the evacuation was the consequence of incidents that took place before 22 April 2011, Thailand claims that local inhabitants were displaced as “a precautionary measure to prevent loss of lives of the Thai population” in the area near the site of the clashes<sup>128</sup>. Secondly, while Cambodia maintains that “only the incidents in the area of the Temple of Preah Vihear should be taken into account”<sup>129</sup> for the indication of provisional measures, in its response Thailand does not focus on incidents in the area of the Temple of Preah Vihear, but concentrates rather on displacements that took place in an area situated about 150 kilometres of the Temple of Preah Vihear<sup>130</sup>.

61. Thirdly, as to the displaced persons themselves, Cambodia refers to 9.412 persons displaced in the area of the Temple of Preah Vihear and 52.538 displaced persons in the province of Oddor Meanchey; Thailand, for its part, submits that 45.042 local inhabitants were evacuated in the Surin Province, 7.396 local inhabitants were displaced in the Buriram Province and no inhabitants were displaced as a result of the incident on 26 April 2011 at Phu MaKua (situated 2.5 kilometres from the Temple of Preah Vihear). The Parties responses coincide, however, on the statement that the displaced population has returned safely and voluntarily to their homes, even though Cambodia claims that their date of return is 05 May 2011<sup>131</sup>, while Thailand claims that they returned on 02 May 2011<sup>132</sup>.

62. In sum and conclusion of the matter at issue, while the responses provide some clarification and the situation seems to have

---

128 ICJ document CTh 2011/13, of 07.06.2011, p. 2.

129 ICJ document CTh 2011/17, of 14.06.2011, pp. 1-2.

130 Cf. ICJ document CTh 2011/18, of 14.06.2011, p. 1.

131 It is noted, however, that in its comments to Thailand’s responses, in a letter dated 13.06.2011, Cambodia claims that “calm was restored (and populations returned) as early as 2 May” 2011; ICJ document CTh 2011/17, of 14.06.2011, pp. 1-2.

132 ICJ document CTh 2011/13, of 07.06.2011, p. 2.

progressed in a positive manner, with regard to the safe and voluntary return of local inhabitants to their homes, the calm achieved remains fragile, and seems to be provisional. The ceasefire is only verbal. There are no assurances that the armed hostilities will not resume and that the population will not be displaced yet again. The cease-fire seems to be temporary, and nothing indicates that the conflict will not break out again. Accordingly, in my view, the situation in the present case requires the indication of Provisional Measures of Protection to prevent or avoid the *further aggravation* of the dispute or situation, given its current gravity, urgency, and the risks of irreparable harm.

63. May I just observe, in this connection, that it has become almost commonplace today to evoke Provisional Measures of Protection to prevent or avoid the “aggravation” of the dispute or situation at issue. Yet, this sounds almost tautological, given the fact that a dispute or situation which calls for Provisional Measures of Protection is already -- *per definitionem* - endowed with gravity and urgency, given the probability or imminence of irreparable harm. It would thus be more accurate to evoke Provisional Measures of Protection to prevent or avoid the “*further aggravation*” of the dispute or situation at issue.

## X. The Effects of Provisional Measures of Protection in the *Cas d’Espèce*

64. International law in a way endeavours to be *anticipatory* in the regulation of social facts, so as to avoid disorder and chaos, as well as irreparable harm. What is anticipatory is Law itself, and not the unwarranted recourse to force. We are here before the *raison d’être* of Provisional Measures of Protection, to prevent and avoid irreparable harm in situations of gravity and urgency. They are endowed with a preventive character, being anticipatory in nature, looking forward in time. They disclose the preventive dimension of the safeguard of rights. Here, again, the time factor marks its presence in a notorious way.

65. As I pointed out in my lengthy Dissenting Opinion (paras. 1-105) in the case concerning *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal case, Order of 28.05.2009), Provisional Measures of Protection, as evolved in recent years, have enabled contemporary international tribunals to secure the protection of rights in a *preventive* way, and to undertake a *continuous monitoring* (projected in time) of compliance with them, on the part of the States concerned. Here, once again, further lessons can be extracted from this

case of the *Temple of Preah Vihear*, also in respect of: a) the protection of people in territory; b) the prohibition of use or threat of force; c) the protection of cultural and spiritual world heritage. Let me turn next to these particular points.

## 1. The Protection of People in Territory

66. There is epistemologically no impossibility or inadequacy for provisional measures, of the kind of the ones indicated in the present Order, not to extend protection also to human life, and to cultural and spiritual world heritage (cf. *infra*). Quite on the contrary, the reassuring effects of the provisional measures indicated in the present Order are that they do extend protection not only to the territorial zone at issue, but also, by asserting the prohibition of the use or threat of force - pursuant to a fundamental principle of international law (cf. *infra*), - to the life and personal integrity of human beings who live or happen to be in that zone or near it, as well as to the Temple of Preah Vihear itself, situated in the aforementioned zone, and all that the Temple represents.

67. The present Order of Provisional Measures of Protection has taken due account of the concerns of both contending Parties with securing the protection of people in territory. In addition to the answers which both Parties have given to the question I put to them at the end of the public sitting of the Court of 31 March 2011 (cf. *supra*), the Parties have made sure to convey to the Court their concerns on the point at issue throughout the proceedings of the case. And the Court, in the Order it has just adopted, has taken due account of those concerns.

68. Thus, the Court acknowledged, in the present Order, Cambodia's complaints of "serious armed incidents" occurred in the area of the Temple of Preah Vihear since 22.04.2011, that caused "fatalities, bodily injuries and the evaluation of local inhabitants" (para. 8), as well as Cambodia's warning as to the worsening of the situation, with "loss of life and human suffering as a result of those armed clashes" (para. 9). Further on, the Court again acknowledged Cambodia's complaints of "numerous armed incidents" that took place in the area of the Temple of Preah Vihear since 15.07.2008, that caused "irreparable damage to the Temple itself", part of the cultural heritage of humankind, as well as "loss of human life, bodily injuries and the

displacement of local people” (para. 48)<sup>133</sup>. And, once again, it took note of Cambodia’s warning as to the worsening of the situation, with “damage to the Temple of Preah Vihear, as well as human suffering and loss of life” (para. 50).

69. The Court, likewise, acknowledged, in the present Order, Thailand’s complaints of “numerous armed incidents” occurred in the area of the Temple of Preah Vihear which caused “loss of human life, bodily injuries, the displacement of local people, and material damage” (para. 51). Having considered the submissions of both Parties as to the facts, the Court found that

since 15 July 2008, armed clashes have taken place and have continued to take place in that area, in particular between 4 and 7 February 2011, leading to fatalities, bodily injuries and the displacement of local inhabitants; (...) damage has been caused to the Temple and to the objects associated with it (para. 53)<sup>134</sup>.

70. Yet, the Court’s valuation or assessment of the *prima facie* evidence (proper to Provisional Measures of Protection) which the Parties brought to its attention was not, in my view, satisfactory: the Court did not extract all the consequences that it could, and should, from the facts pertaining to the *protection of people* in territory. The Court’s main attention was focused on *territory* itself (one of the component elements of statehood), and not so much of the *people*, which, in my perception, is the most precious constitute element of statehood. I shall turn again to this point later on (cf. items XI-XII, *infra*) in the present Separate Opinion.

## 2. The Prohibition of Use or Threat of Force

71. On a distinct line of considerations, the Court, in its present Order, indicated Provisional Measures to the effect that

Both Parties shall immediately withdraw their military personnel currently present in the provisional

---

133 Cambodia further noted that those incidents led, on its initiative, to a meeting of the U.N. Security Council on 14.02.2011 (para. 48).

134 The Court further noted that “on 14 February 2011, the [U.N.] Security Council called for a permanent ceasefire to be established between the two Parties and expressed its support for ASEAN in seeking a solution to the conflict” (para. 53).

demilitarized zone, as defined in paragraph (62) of this Order, and refrain from any military presence in this zone and of any armed activity directed at that zone;

Thailand shall not create obstacle to the free access of Cambodia to the the Temple of Preah Vihear nor to the fresh supplies to its non military personnel in the Temple;

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve (...) <sup>135</sup>.

72. Underlying the Court's decision, - informing and conforming it, - is the fundamental principle of the prohibition of the use or threat of force. In fact, in the corresponding reasoning of the Court in the present Order, it is clearly stated that

the U.N. Charter obliges all member States of the United Nations to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations; (...) United Nations member States are also obliged to settle their international disputes by peaceful means in such a maner that international peace, security and justice are not endangered, and (...) both Parties are obliged, under the Charter and under general international law, to respect these fundamental principles of international law <sup>136</sup> (para. 66).

73. Due attention is rightly given by the Court to compliance with the fundamental principles of international law, as enshrined into the U.N. Charter (Article 2) and reckoned in general international law,

---

135 Resolatory points B(1), (2) and (4) of the *dispositif*.

136 Or, in the other official language of the Court,

- "la Charte des Nations Unies fait obligation à tous les États Membres de l'Organisation des Nations Unies de s'abstenir dans leurs relations internationales de recourir à la menace ou à l'emploi de la force, soit contre l'intégrité territoriale ou l'indépendance politique de tout État, soit de toute autre manière incompatible avec les buts des Nations Unies; (...) les États membres de l'Organisation sont également tenus de régler leurs différends internationaux par des moyens pacifiques, de telle manière que la paix et la sécurité internationales ainsi que la justice ne soient pas mises en danger; et (...) les deux Parties sont **dès lors** tenues, en vertu de la Charte et du droit international général, de respecter ces principes fondamentaux du droit international" (para. 66).

in particular that of the prohibition of use or threat of force (Article 2(4)), in addition to that of the peaceful settlement of disputes (Article 2(3)). This has in fact been a concern of the Court in recent years. Three relevant precedents can be here recalled in this connection, namely, the case of the *Frontier Dispute* (Burkina Faso *versus* Mali, 1986), the case of the *Land and Maritime Boundary* (Cameroon *versus* Nigeria, 1996), and the case of *Armed Activities on the Territory of the Congo* (D.R. Congo *versus* Uganda, 2000).

74. In those previous three cases, the Court, in indicating Provisional Measures of Protection, most significantly went *beyond the inter-State dimension*, in expressing its concern also for *the human persons (les personnes humaines)* in situations of risk, or vulnerability and adversity. Thus, in its Order of 10.01.1986 in the *Frontier Dispute* case, the Chamber of the Court asserted the power, “independently of the requests submitted by the Parties”, to indicate provisional measures “with a view to preventing the aggravation or extension of the dispute whenever it considers that circumstances so require” (para. 18)<sup>137</sup>. It can exercise such power, - it added, - even more so in case of “a resort to force which is irreconcilable with the principle of the peaceful settlement of international disputes”, when it can adopt such provisional measures “as may conduce to the due administration of justice” (para. 19). It decided to indicate those measures, comprising the withdrawal by the parties of their armed forces, as it was of the view that the facts at issue

expose the persons and property in the disputed area, as well as the interests of both States within that area, to serious risk of irreparable damage (para. 21).

75. One decade later, in its Order of 15.03.1996 in the case of the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court pondered that

the rights at issue in these proceedings are sovereign rights which the Parties claim over territory, and (...) these rights also concern persons; (...) independently of

---

137 In a notorious precedent, that of the Court’s Order of 10.05.1984, in the case of *Nicaragua versus United States*, the Court determined that the circumstances of the case required it to indicate provisional measures, as provided by Article 41 of its Statute, without prejudging the question of its jurisdiction as to the merits (paras. 39-40).

the requests for the indication of provisional measures submitted by the Parties to preserve specific rights, the Court possesses by virtue of Article 41 of the Statute the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that such circumstances so require (...); (...) the events that have given rise to the request, and more especially the killing of persons, have caused irreparable damage to the rights that the Parties may have over the Peninsula; (...) persons in the disputed area and, as a consequence, the rights of the Parties within that area are exposed to serious risk of further irreparable damage (...) (paras. 39 and 41-42).

Accordingly, in the provisional measures it indicated, the Court determined, *inter alia*, that the Parties were to refrain from any action by their armed forces, which might prejudice the rights of each other in respect of whatever judgment the Court might render in the case, or which might “aggravate or extend” the dispute before it<sup>138</sup>.

76. Almost half a decade later, in its Order of 01.07.2000, in the case of *Armed Activities on the Territory of the Congo* (D.R. Congo *versus* Uganda), the Court, once again, was attentive *also* to the fate of persons. It pondered that, in the *cas d’espèce*, it was “not disputed” that

grave and repeated violations of human rights and international humanitarian law, including massacres and other atrocities, have been committed on the territory of the Democratic Republic of the Congo; (...) in the circumstances, the Court is of the opinion that persons, assets and resources present on the territory of the Congo, particularly in the area of the conflict, remain extremely vulnerable, and that there is a serious risk that the rights at issue in this case (...) may suffer irreparable prejudice (paras. 42-43).

77. This being so, the Court was of the view that “independently of the requests” by the Parties for provisional measures, it was endowed, under Article 41 of the Statute, with the power to indicate such measures with a view to “preventing the aggravation or extension of the dispute” whenever it considered that the circumstances so

---

138 Paragraph 1 of the *dispositif*.

required. In the case opposing the D.R. Congo to Uganda, it was of the opinion that there existed “a serious risk of events occurring which might aggravate or extend the dispute or make it more difficult to resolve” (para. 44). Accordingly, in the measures it indicated the Court determined that the parties must “prevent and refrain from any action, “and in particular any armed action”, which might “aggravate or extend the dispute”, and, furthermore,

Both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law<sup>139</sup>.

78. It should not pass unnoticed here that, very recently, for less than in the present case of the *Temple of Preah Vihear*, opposing Cambodia to Thailandia (wherein successive armed hostilities have occurred, the Court has indicated Provisional Measures of Protection, in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, opposing Costa Rica to Nicaragua (Order of 08.03.2011). In this case, competing claims between the contending Parties, and Nicaragua’s intention to carry out activities in the border area, were regarded by the Court as sufficient to conform “a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death” (para. 75), and for it, accordingly, to order Provisional Measures of Protection.

79. The fundamental principle of international law of the prohibition of the use or threat of force has found expression on numerous occasions, before and after its insertion into the U.N. Charter (Article 2(4)) at the 1945 San Francisco Conference. After its assertion at the 1907 II Hague Peace Conference, it became of nearly universal application under the 1928 General Treaty for the Renunciation of

---

139 Paragraphs 1 and 3 of the *dispositif*. – May it be recalled, however, that, in its subsequent Order of 10.07.2002, in the case of the *Armed Activities on the Territory of the Congo*, opposing the D.R. Congo to Rwanda, the Court did not indicate provisional measures, as it found itself without *prima facie* jurisdiction to do so (para. 89), though it expressed its deep concern with “the deplorable human tragedy, loss of life, and enormous suffering” in the east of the D.R. Congo resulting from “the continued fighting there” (para. 54).

War as an Instrument of National Policy (the Briand-Kellogg Pact)<sup>140</sup>; following the U.N. Charter, the fundamental principle at issue was restated by the 1970 U.N. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, the 1974 U.N. Definition of Aggression, and the 1987 U.N. Declaration on Enhancing the Effectiveness of the Principle of the Non-Use of Force.

80. The over-all prohibition of the use or threat if force is a cornerstone of contemporary international law. For its part, the 1997 UNESCO Declaration on the Responsibilities of the Present Generations towards the Future Generations stated (Article 9(2)) that

The present generations should spare future generations the scourge of war. To that end, they should avoid exposing future generations to the harmful consequences of armed conflicts as well as all other forms of aggression and use of weapons, contrary to humanitarian principles.

The corresponding obligation, not to resort to force, or to threat of it, is not a simple immediate or “instantaneous” obligation (whatever that may mean); it is, by definition, a continuing or permanent obligation.

81. Decisions ensuing from, and grounded on, the fundamental principle of the prohibition of the use or threat of force, such as the Provisional Measures of Protection aforementioned, can nowadays be approached, in my perception, from a humanist perspective, proper of the contemporary *jus gentium*: this is the case of the Provisional Measures of Protection just adopted by the Court in the present case of the *Temple of Preah Vihear*, which took into account people and territory together, *comme il faut*, in the circumstances of the case, keeping in mind the fundamental principles of international law of the prohibition of the use or the threat of force and of peaceful settlement of disputes. The Court should, from now onwards, in such circumstances, embrace expressly and more resolutely this approach (cf. items XI-XII, *infra*).

---

140 Followed, in the American continent, by the 1933 Pact Saavedra Lamas, the 1938 Declaration of Principles adopted by the Inter-American Conference of Lima, and the 1948 OAS Charter.

### 3. Space and Time, and the Protection of Cultural and Spiritual World Heritage

82. My considerations on space and law seem likewise permeated by time. This is also what ensues from an examination of the submissions by the contending parties with regard to the inscription of the Temple of Preah Vihear in UNESCO's World Cultural Heritage List on 07.07.2008. In its request for interpretation (of 20.04.2001) of the Court's Judgment of 15.06.1962 in the case of the *Temple of Preah Vihear*, Cambodia stated:

Ce n'est donc qu'à partir de 2007, lors des démarches pour l'inscription du Temple de Préah Vihéar sur la Liste du Patrimoine Mondial [de l'UNESCO], que la question d'une revendication territoriale de la part de la Thaïlande émerge (...) (para. 15).

83. And Cambodia referred, in this connection, to the recent hostilities which ensued therefrom:

(...) la période récente a été marquée par une profonde détérioration des relations entre les deux États dont on peut situer l'origine lors du début des discussions dans le cadre de l'UNESCO à propos de l'inscription du Temple sur la liste du Patrimoine Mondial.

Le Temple a été inscrit par l'UNESCO sur la liste des sites du Patrimoine Mondial le 7 juillet 2008 en dépit d'une forte opposition de la Thaïlande. Dès le 15 juillet 2008 de nombreux soldats thaïlandais ont franchi la frontière et occupé une zone du territoire cambodgien près du Temple sur le site de la pagode Keo Sikha Kiri Svava (...). Cette pagode fut construite par le Cambodge en 1998 et n'avait donné lieu, jusqu'alors, à aucune protestation thaïlandaise (...) (paras. 13-14).

84. Cambodia singled out, in particular, "the grave incidents of 15 July 2008" (para. 16), and added that, "[l]ors de ces différents incidents entre 2008 et 2011, des éléments architecturaux du Temple ont été endommagés provoquant enquêtes et rapports de la part des autorités de l'UNESCO (...)" (para. 35). Furthermore, in its request for Provisional Measures of 28.04.2011, Cambodia asked the Court to order the withdrawal of troops and the prohibition of any military activities

in “the zone of the Temple of Preah Vihear”, given the urgency and the “gravity of the situation” (paras. 7-9). Last but not least, Cambodia stated, in its pleadings of 30.05.2011 before the Court, that “la Thaïlande a décidé, à la suite de l’inscription du Temple de Préah Vihéar au Patrimoine Mondial de l’UNESCO le 7 juillet 2008, de contester cette inscription par les armes dans une zone unilatéralement définie proche du Temple”; hence the “armed incidents” which followed, on 15 July 2008, that is, “immediately after the inscription of the Temple in the World Heritage of UNESCO on 7 July 2008” (para. 6)<sup>141</sup>.

85. For its part, Thailand addressed this particular issue in its pleadings before the Court, of 30 and 31.05.2011. Thailand began by admitting clearly and frankly, in its pleadings of 30.05.2011, that it it accepts the Court’s Judgment of of 15.06.1962 in the case of the *Temple of Preah Vihear*,

malgré le fait que le Temple est un symbole historique et culturel très important pour sa population. C’est pour cela que la décision de la Cour a causé en Thaïlande consternation et ressentiment dans toutes les couches sociales, au point de devenir, pour certains, un traumatisme national qui se manifeste encore aujourd’hui de diverses manières (para. 3)<sup>142</sup>.

86. In its following pleadings of 31.05.2011, turning to the inscription of the “Temple of Phra Viharn” on UNESCO’s World Cultural Heritage List, Thailand deemed it fit to add:

The Temple requires a buffer zone as a World Heritage site, and that can only be found in Thai territory. We understand that, and have always been ready and willing to undertake a joint nomination with Cambodia. It is Cambodia’s constant refusal of such joint undertaking that is the root cause of the problems that have arisen over the inscription” (para. 4)<sup>143</sup>.

87. To Thailand, thus, the inscription of the Temple of Preah Vihear in the World Cultural Heritage List of UNESCO, at the 32nd session of the World Heritage Committee (Quebec City, 2008), became

141 ICJ, *Compte rendu* CR 2011/13, of 30.05.2011, pp. 39-40.

142 ICJ, *Compte rendu* CR 2011/14, of 30.05.2011, p. 11.

143 ICJ, *Compte rendu* CR 2011/16, of 31.05.2011, p. 26.

a matter of concern regarding its border with Cambodia in the area in the vicinity of the Temple. The Temple itself was in the middle of the controversy, which seems to have been reignited by the Temple's inscription in the aforementioned List of UNESCO, as a result of Cambodia's application. Thailand expressly admitted its resentment, going back to the Court's Judgment of 15.06.1962 (cf. *supra*).

88. Here we are faced with the time element again. Resentment flows with the passing of time; it may last for a short time, months or years, or it may prolong for a much longer time, decades, passing on from one generation to another, or even centuries. History is full of examples illustrating such prolongation in time<sup>144</sup>. Here, again, simple chronological time does not help much in assessing each situation, as the "horizontal" approach of chronological time does not reveal the depth of the problem of resentment in each historical situation<sup>145</sup>. What is important here is to be attentive to the complexities of the relationship between time and Law, in the settlement of international disputes.

89. It has recently been pointed out, rightly and with due sensitivity, that

À travers la protection des biens culturels, ce ne sont donc pas seulement des monuments et des objets que l'on cherche à protéger, c'est la mémoire des peuples, c'est leur conscience collective, c'est leur identité, mais c'est aussi la mémoire, la conscience et l'identité de chacun des individus qui les composent. Car en vérité, nous n'existons pas en dehors de notre famille et du corps social auquel nous appartenons.

Fermez les yeux et imaginez Paris sans Notre-Dame, Athènes sans le Parthénon, Gizeh sans les Pyramides, Jérusalem sans le Dôme du Rocher, la Mosquée Al-Aqsa ni le Mur des Lamentations, l'Inde sans le Taj Mahal, Pékin sans la Cité Interdite, New York sans la statue de la

144 Cf., e.g., Marc Ferro, *El Resentimiento en la Historia* [*Le ressentiment dans l'histoire*, 2007], Madrid, Ed. Cátedra, 2009, pp. 9-187.

145 Cf. *ibid.*, p. 185. Some decades ago, in his endeavours to elaborate a phenomenology and sociology of resentment, Max Scheler identified factors which had to do with the structure of the society concerned, or else with the individuals within it, and the prevailing articulation of values in it, at a given historical moment; M. Scheler, *L'homme du ressentiment* (1912), Paris, Gallimard, 1933, p. 36, and cf. pp. 48, 55-57, 88-89 and 189-190.

Liberté. Ne serait-ce pas un peu de l'identité de chacun de nous qui nous serait arrachée?<sup>146</sup>.

Other examples could be referred to the same effect, such as, *inter alia*, e.g., Moscow without the Red Square and St. Basil's Cathedral, Rio de Janeiro without the Statue of Christ the Redeemer, Samarkand without the Registan and the Gur Emir, Guatemala without Antigua and Tikal, Rome without the Coliseum, Peru without Machu-Picchu, and so forth. The examples abound, in every continent, all over the world.

90. The universal value of the Temple of Preah Vihear was brought before the attention of the World Heritage Committee (2007-2008), established by the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage<sup>147</sup>. The Temple of Preah Vihear was inscribed as a UNESCO World Heritage Site on

---

146 Or, in the other official language of the Court,

- "by protecting cultural property, one is attempting to protect not only monuments and objects, but a people's memory, its collective consciousness and its identity, and indeed the memory, consciousness and identity of all the individuals who make up that people. Ultimately, we do not exist outside of our families and the social frameworks to which we belong.

Close your eyes and imagine Paris without Notre Dame, Athens without the Parthenon, Giza without the Pyramids, Jerusalem without the Dome of the Rock, the Al-Aqsa Mosque and the Wailing Wall, India without the Taj Mahal, Peking without the Forbidden City, New York without the Statue of Liberty. Would we not all have lost part of our identities?" F. Bugnion, "La genèse de la protection juridique des biens culturels en cas de conflit armé", 86 *Revue internationale de la Croix Rouge* (2004) n. 854, p. 322.

147 Article 8(1). The 1972 Convention expresses its concern with the deterioration of the cultural and natural heritage, "to be preserved as part of the world heritage of mankind as a whole" (preamble, paras. 1-2 and 6). To that effect, it calls for the establishment of "an effective system of collective protection of the cultural and natural heritage of outstanding universal value, organized on a permanent basis" (preamble, para. 8). The 1972 Convention asserts the duty of cooperation of the international community as a whole (Article 6(1)). Moreover, each State Party undertakes not to take any "deliberate measures" which "might damage directly or indirectly" the cultural and natural heritage "on the territory of other States Parties" (Article 6(3)). The UNESCO Convention further provides for the establishment of the World Heritage List (Article 11(2)), and, in addition, of a list of World Heritage in Danger (as a result of various causes, including, *inter alia*, "the outbreak or the threat of an armed conflict" - Article 11(4)). The World Heritage Committee is also to consider requests for international assistance to property forming part of cultural or natural heritage (Article 13(1)). The 1972 Convention further provides for the creation of a World Heritage Fund (Article 15).

07.07.2008, at the 32nd. session of the World Heritage Committee, held in Quebec City, Canada (02-10.2008). The nomination of the Temple<sup>148</sup> had been before the World Heritage Committee also at its previous 31st. session, held in Christchurch, New Zealand (23.06.2007 to 02.07.2007), when it was evaluated<sup>149</sup>.

91. The Temple of Preah Vihear was regarded as an outstanding masterpiece of Khmer art and architecture, disclosing the highpoint of a significant stage in human history (in the first half of the XIth century), and the capacity of the Khmer civilization to make use of that site - one of difficult access - over a long period. Particularly impressive was considered the position of the Temple on a high cliff edge site, 547m above the Cambodian Plain, close to the border with Thailand.

92. At the time I write this Separate Opinion, shortly before the adoption of the present Order of Provisional Measures of Protection of the Court, there are 34 properties around the world that the World Heritage Committee has decided to include on the List of World Heritage in Danger, in accordance with Article 11(4) of the 1972 UNESCO Convention. The fact that the Temple of Preah Vihear does not appear in this particular List in no way can be construed as meaning that it does not have “an outstanding universal value for purposes other than those resulting from inclusion” therein, as warned by Article 12 of the 1972 Convention.

93. This provision appears interrelated with that of Article 4 of the 1972 Convention, on the obligation of each State Party to secure the protection, conservation and transmission to future generations of the cultural heritage situation in its territory. The prohibition of destruction of cultural heritage of an outstanding universal value and great relevance for humankind is arguably an obligation *erga omnes*.<sup>150</sup>

---

148 Made by Cambodia, though Thailand had sought a joint nomination.

149 Cf. UNESCO/World Heritage, documents WHC-07/31.COM/8B-8B.1 (2007); and WHC-07/31.COM/24 (2007). - For the UNESCO guidelines for the inscription in the World Heritage List and the corresponding monitoring of the properties at issue, cf. UNESCO, *Operational Guidelines for the Implementation of the World Heritage Convention*, document WHC.08/01, of January 2008, pp. 30-53, paras. 120-198.

150 Cf., to this effect, F. Francioni and F. Lenzerini, “The Destruction of the Buddhas of Bamiyan and International Law”, 14 *European Journal of International Law* (2003) pp. 634 and 638, and cf. p. 631.

94. The Temple, while being inscribed as a UNESCO World Heritage Site, was seen as inextricably linked to its landscape, - the cultural, the spiritual and the natural dimensions appearing together. The three surrounding peaks have been taken to reflect the Hindu divine triad of Vishnu, Shiva and Brahma. The Temple of Preah Vihear was considered to have an outstanding universal value, testifying to the Khmer genius for domesticating the local territory, and adapting the construction on it to the landscape.

95. UNESCO itself has been attentive to the recent hostilities in the zone in the vicinity of the Temple of Preah Vihear. Its Special Envoy for Preah Vihear (Mr. K. Matsuura) recently met Thai and Cambodian authorities, to consider ways to safeguard the World Heritage Site of the Temple of Preah Vihear, during his visits to Bangkok and Phnom Penh between 27 February and 01 March 2011. The Special Envoy stressed the need to set up a lasting dialogue between the two States so as to create the conditions necessary for the safeguarding of the Temple of Preah Vihear, and for establishing long-term sustainable conservation of the Site<sup>151</sup>.

## **XI. Provisional Measures of Protection: Beyond the Strict Territorialist Approach**

96. As already pointed out, given the circumstances of the present case of the *Temple of Preah Vihear*, the gravity of the situation, the probability or imminence of irreparable harm, and the resulting urgency, the Court has rightly indicated Provisional Measures of Protection. To that end, it has established a provisional demilitarized zone, in the vicinity of the Temple of Preah Vihear. Yet, though the Court has taken the correct decision in the present Order, it has done so pursuant to a reductionist reasoning. In laying the grounds for its decision to order the Provisional Measures, the Court was attentive essentially to territory, although the case lodged with it goes well beyond it.

97. Despite the wealth of information placed before it by the Parties concerning the fate and the need of protection of *people in territory*, the Court repeatedly insisted on respect for “sovereignty” and “territorial integrity” (paras. 35, 39 and 42), and on protection of “rights to

---

151 UNESCO, “UNESCO Special Envoy for Preah Vihear Meets Thai and Cambodian Leaders”, Paris, UNESCO-Press, 02.03.2011, p. 1.

sovereignty” (para. 44). Instead of *bringing people and territory together*, expressly, for the purpose of protection, as in my view it should, the Court has preferred to rely on its traditional outlook, utilizing the conceptual framework and the language it is used to, and refusing to behold, and give concrete expression to, any other factors beyond territorial integrity and sovereignty. This is certainly to be regretted, as the Court should be prepared, in our days, to give proper weight to the *human factor*.

98. On an earlier occasion, in the case of the *Land and Maritime Boundary between Cameroon and Nigeria* (Order of 15.03.1996), as I have already pointed out<sup>152</sup>, the Court, faced with the victimization of human beings resulting from armed conflicts of greater intensity, expressly conceded that the rights are issue concerned *also persons* (para. 39). I would say that, in those grave circumstances, they concerned, for the purpose of Provisional Measures of Protection, *mainly persons*, human beings, who were killed.

99. In the present Order of Provisional Measures in the case of the *Temple of Preah Vihear*, the traditional and unsatisfactory territorialist outlook pursued by the Court leads it to state, e.g., that “the rights which Cambodia claims to hold under the terms of the 1962 Judgment in the area of the Temple might suffer irreparable prejudice resulting from the military activities in the area and, in particular, from the loss of life, bodily injuries and damage caused to the Temple and the property associated with it” (para. 55). Not everything can be subsumed under territorial sovereignty. The fundamental human right to life is not at all subsumed under State sovereignty. The human right not to be forcefully displaced or evacuated from one’s home is not to be equated with territorial sovereignty. The Court needs to adjust its conceptual framework and its language to the new needs of protection, when it decides to indicate or order the Provisional Measures requested from it.

100. If we add, to the aforementioned, the protection of cultural and spiritual world heritage (cf. *supra*), for the purposes of Provisional Measures, the resulting picture will appear even more complex, and the strict territorialist approach even more unsatisfactory. The *human factor* is the most prominent one here. It shows how multifaceted, in these circumstances, the protection provided by Provisional Measures

---

152 Cf. paragraph 73, *supra*.

can be. It goes well beyond State territorial sovereignty, *bringing territory, people and human values together*.

## **XII. Final Considerations, *Sub Specie Aeternitatis***

101. When we come to consider cultural and spiritual world heritage, there is still one remaining aspect, which I deem it fit to dwell upon, however briefly, in this Separate Opinion: I refer in particular to the protection of the *spiritual* needs of human beings. Such protection is brought to the fore by the safeguard of cultural and spiritual world heritage, as raised, *inter alia*, in the present case of the *Temple of Preah Vihear*. Here we come back to timelessness (cf. *supra*), and we are led, ultimately, to considerations from the perspective of eternity (*sub specie aeternitatis*).

102. In this respect, it may be recalled that the needs of protection of people comprise all their needs, starting with the protection of the fundamental right to life in its wide dimension (i.e., the right to *live with dignity*, e.g., not to keep on being forcefully and suddenly evacuated from one's home), and also including their *spiritual* needs. In this connection, may I further recall that the Judgment of 15.06.2005 (merits and reparations) of the IACtHR in the case of the *Moiwana Community versus Suriname*, in addressing the massacre of the N'djukas of the Moiwana village and the drama of the forced displacement of the survivors, duly valued the relationship of the N'djukas in Moiwana with their traditional land as being of "vital spiritual, cultural and material importance", also for the preservation of the "integrity and identity" of their culture<sup>153</sup>.

103. In my extensive Separate Opinion appended to that Judgment, I recalled what the surviving members of the Moiwana Community pointed out before the IACtHR<sup>154</sup>, namely, that the massacre at issue perpetrated in Suriname in 1986, planned by the State, had "destroyed the cultural tradition (...) of the *Maroon* communities in Moiwana" (para. 80). Ever since this has tormented them, as they were unable to give a proper burial to the mortal remains of their beloved ones (paras. 13-22). Their suffering projected itself in time, for almost two decades (paras. 24-33). In their culture, mortality had an inescapable relevance to the living, the survivors (paras. 41-46), who had duties towards their dead (paras.

---

153 The Court warned that "larger territorial land rights are vested in the entire people, according to N'djuka custom; community members consider such rights to exist in perpetuity and to be unalienable" (para. 86(6)).

154 In the public hearing of 09.09.2004.

47-59). Duties of the kind, - I added in the same Separate Opinion (pars. 60-61), - were present in the origins of the law of nations itself, as pointed out, in the XVIIth century, by Hugo Grotius in chapter XIX of book II of his classic work *De Jure Belli ac Pacis* (1625)<sup>155</sup>.

104. In the case of the *Moiwana Community*, I sustained in my aforementioned Separate Opinion the configuration, beyond moral damage, of a true *spiritual damage* (pars. 71-81), and, beyond the *right to a project of life*, I dared to identify what I termed the *right to a project of after-life*:

The present case of the *Moiwana Community*, in my view, takes us even further than the emerging right to the project of life. (...) I can visualize, in the griefs of the N'djukas of the *Moiwana* village, a claim to the *right to the project of after-life*, taking into account the living in the relations with their dead, altogether. International Law in general, and the International Law of Human Rights in particular, cannot remain indifferent to the spiritual manifestations of human beings (...). There is no cogent reason to remain in the world exclusively of the living. In the *cas d'espèce*, it appears to me that the N'djukas are certainly well entitled to cherish their project of after-life, the encounter of each of them with their ancestors, the harmonious relationship between the living and their dead. Their outlook of life and after-life embodies fundamental values (...) (paras. 67-70).

105. I turned next to what I termed the *spiritual damage*, which I sought to elaborate conceptually as

an aggravated form of moral damage, which has a direct bearing on what is most intimate to the human person, namely, her inner self, her beliefs in human destiny, her relations with their dead. This *spiritual damage* would of course not give rise to pecuniary reparations, but rather to other forms of reparation. The idea is launched herein, for the first time ever, to the best of my knowledge. (...) This new category of damage, - as I perceive it, - embodies the principle of humanity in a temporal dimension,

---

155 Dedicated to the "right to burial", inherent to all human beings, in conformity with a precept of "virtue and humanity"; H. Grotius, *Del Derecho de la Guerra y de la Paz* [1625], vol. III (books II and III), Madrid, Edit. Reus, 1925, pp. 39, 43 and 45, and cf. p. 55.

encompassing the living in their relations with their dead, as well as the unborn, conforming the future generations. (...) The principle of *humanitas* has, in fact, a long historical projection, and owes much to ancient cultures (in particular to that of the Greeks), having become associated in time with the very moral and spiritual formation of human beings<sup>156</sup> (pars. 71-73).

106. I further recalled, in my Separate Opinion, that the testimonial evidence produced before the IACtHR in the *cas d'espèce* indicated that, in the N'djukas cosmovision, in circumstances like those of the present case, "the living and their dead suffer together, and this has an intergenerational projection". Unlike moral damages, in my view the *spiritual damage* was not susceptible of "quantifications", and could only be repaired, and redress be secured, by means of obligations of doing (*obligaciones de hacer*), in the form of *satisfaction* (e.g., honouring the dead in the persons of the living) (para. 77)<sup>157</sup>. In fact, the expert evidence produced before the Court indeed referred expressly to "spiritually-caused illnesses"<sup>158</sup>. I then concluded, in my Separate Opinion, on this particular point, that

All religions devote attention to human suffering, and attempt to provide the needed transcendental support to the faithful; all religions focus on the relations between life and death, and provide distinct interpretations and

---

156 G. Radbruch, *Introducción a la Filosofía del Derecho*, 3rd. ed., Mexico/Buenos Aires, Fondo de Cultura Económica, 1965, pp. 153-154.

157 It should be kept in mind, - I proceeded, - that, in the present case of the *Moiwana Community*, as a result of the massacre of 1986, "the whole community life in the *Moiwana* village was disrupted; family life was likewise disrupted, displacements took place which last until now (almost two decades later). The fate of the mortal remains of the direct victims, the non-performance of funerary rites and ceremonies, and the lack of a proper burial of the deceased, deeply disrupted the otherwise harmonious relations of the living N'djukas with their dead. The grave damage caused to them, in my view, was not only psychological, it was more than that: it was a *true spiritual damage*, which seriously affected, in their cosmovision, not only the living, but the living with their dead altogether" (par. 78). Moreover, "the resulting impunity, in the form of a generalized and sustained violence (increased by the sense of indifference of the public power to the fate of the victims) (...), has generated, in the members of the *Moiwana Community*, a sense of total defencelessness. This has been accompanied by their loss of faith in human justice, the loss of faith in Law, the loss of faith in reason and conscience governing the world" (para. 79).

158 Paragraphs 77(e) and 83(9) of the Court's Judgment.

explanations of human destiny and after-life<sup>159</sup>. Undue interferences in human beliefs - whatever religion they may be attached to - cause harm to the faithful (...). [S]uch harm (...) is to be duly taken into account, like other injuries, for the purpose of redress. *Spiritual damage*, like the one undergone by the members of the *Moiwana Community*, is a serious harm, requiring corresponding reparation, of the (non-pecuniary) kind I have just indicated. (...)

The N' djukas had their right to the project of life, as well as their *right to the project of after-life*, violated, and continuously so, ever since the State-planned massacre perpetrated in the *Moiwana* village on 29.11.1986. They suffered material and immaterial damages, as well as spiritual damage. (...) In sum, the wide range of reparations ordered by the Court in the present Judgment in the *Moiwana Community* case (...) has concentrated on, and enhanced the centrality of, the position of the victims, - as well as on devising a wide range of possible and adequate means of redress. In the *cas d'espèce*, the collective memory of the Maroon N' djukas is hereby duly preserved, against oblivion, honouring their dead, thus safeguarding their right to life *lato sensu*, encompassing the right to cultural identity, which finds expression in their acknowledged links of solidarity with their dead (paras. 81 and 91-92).

107. In my following Separate Opinion in the same case of the *Moiwana Community* (Interpretation of Judgment, of 08.02.2006), I insisted on the need of reconstruction and preservation of cultural identity (paras. 17-24) of the members of the Community, on which the *project of life and of post-life* of each member of the Community much depended. In fact, the understanding has been manifested within UNESCO to the effect that the assertion and preservation of cultural identity (including that of minorities) contributes to the "liberation of the peoples"; cultural identity has thus been regarded as "a treasure which vitalizes mankind's possibilities for self-fulfillment by encouraging every people and every group to seek nurture in the past, to welcome contributions from outside compatible with their own characteristics, and so to continue the process

---

159 Cf., e.g., [Various Authors,] *Life after Death in World Religions*, Maryknoll N.Y., Orbis, 1997, pp. 1-124.

of their own creation”<sup>160</sup>. In this new Separate Opinion, I expressed my own understanding of “the pressing need to redress the *spiritual damage* caused to the N’djukas of the Moiwana Community, and to create the conditions for the prompt reconstruction of their cultural tradition” (para. 19)<sup>161</sup>.

108. In the present case of the *Temple of Preah Vihear* before the ICJ, it is indeed a pity that a Temple that was built with inspiration in the first half of the XIth century, to assist in fulfilling the religious needs of human beings, and which is nowadays - since the end of the first decade of the XXIst century - regarded as integrating the world heritage of humankind, becomes now part of the bone of contention between the two bordering States concerned. This seems to display the worrisome frailty of the human condition, anywhere in the world, in that individuals appear prepared to fight each other and to kill each other in order to possess or control what was erected in times past to help human beings to understand their lives and their world, and to relate themselves to the cosmos.

109. Such relationship, by the way, is what is conveyed by the very term *religion* (deriving from the Latin *re-ligare*), assisting each human being in attaining his connection with the cosmos he barely understands, so as to find peace for himself. This leads to yet another aspect of the *cas d’espèce*, as I perceive it, to be referred to herein, in relation to the context of the Order which the Court adopts today, 18 June 2011. Religions are a complex matter, deserving of close and respectful attention; it has been suggested some decades ago that, from a social perspective, they are more complex than scientific knowledge<sup>162</sup>.

110. The relationship, in its distinct aspects, between different religions of the world and the law of nations (*le droit des gens*) itself, has been the object of constant attention throughout the last nine

---

160 J. Symonides, “UNESCO’s Contribution to the Progressive Development of Human Rights”, 5 *Max Planck Year Book of United Nations Law* (2001) p. 317.

161 To that end, - I added, - the delimitation, demarcation, issuing of title and return of their traditional land were essential. This was “a question of survival of the cultural identity of the N’djukas, so that they may conserve their memory, at personal as well as collective levels. Only thus one will be duly giving protection to their fundamental right to life *lato sensu*, comprising their cultural identity” (para. 20).

162 Cf. Bertrand Russell, *Science et religion* [*Religion and Science*, 1935], Paris, Gallimard, 1957, p. 8.

decades<sup>163</sup>. There have been studies focused on the influence of theology in the evolution of international legal doctrine<sup>164</sup>. The interest on the relationship between religions and the law of nations has remained alive lately. Some recent essays look back in time, focusing on the relationship between international law and religions in times past<sup>165</sup>. Others look forward in time, centering attention on the role of religions in the progressive development of international law<sup>166</sup>. Still others concentrate on topical aspects of that relationship<sup>167</sup>.

---

163 As attested, e.g., by the thematic courses devoted to the subject by The Hague Academy of International Law, with its universalist and pluralist outlook; cf., e.g., A. Hobza, "Questions de droit international concernant les religions", 5 *Recueil des Cours de l'Académie de Droit International de La Haye [RCADI]* (1924) pp. 371-420; G. Goyau, "L'Église catholique et le droit des gens", 6 *RCADI* (1925) pp. 127-236; M. Boegner, "L'influence de la Réforme sur le développement du droit international", 6 *RCADI* (1925) pp. 245-321; J. Muller-Azúa, "L'oeuvre de toutes les confessions chrétiennes (Églises) pour la paix internationale", 31 *RCADI* (1930) pp. 299-388; K.N. Jayatilleke, "The Principles of International Law in Buddhist Doctrine", 120 *RCADI* (1967) pp. 445-563; H. de Riedmatten, "Le catholicisme et le développement du droit international", 151 *RCADI* (1976) pp. 121-158; P. Weil, "Le judaïsme et le développement du droit international", 151 *RCADI* (1976) pp. 259-335; P.H. Kooijmans, "Protestantism and the Development of International Law", 152 *RCADI* (1976) pp. 87-116; M. Charfi, "L'influence de la religion dans le droit international privé des pays musulmans", 203 *RCADI* (1987) pp. 329-454.

164 Cf., e.g., Association Internationale Vitoria-Suárez, *Vitoria et Suárez - Contribution des théologiens au droit international moderne*, Paris, Pedone, 1939, pp. 7-170; A. García y García, "The Spanish School of the Sixteenth and Seventeenth Centuries: A Precursor of the Theory of Human Rights", 10 *Ratio Juris - University of Bologna* (1997) pp. 27-29; L. Getino (ed.), *Francisco de Vitoria, Sentencias de Doctrina Internacional - Antología*, Madrid, Ediciones Fe, 1940, pp. 15-130; C.A. Stumpf, *The Grotian Theology of International Law - Hugo Grotius and the Moral Foundations of International Relations*, Berlin, W. de Gruyter, 2006, pp. 1-243.

165 Cf., e.g., D.J. Bederman, "Religion and the Sources of International Law in Antiquity", in *Religion and International Law* (eds. M.W. Janis and C. Evans), Leiden, Nijhoff, 2004, pp. 1-26; V.P. Nanda, "International Law in Ancient Hindu India", in *ibid.*, pp. 51-61; H. McCoubrey, "Natural Law, Religion and the Development of International Law", in *ibid.*, pp. 177-189.

166 Cf., e.g., M. Veuthey, "Religions et droit international humanitaire: histoire et actualité d'un dialogue nécessaire", in *Religions et droit international humanitaire* (Colloque de Nice, de juin 2007; ed. A.-S. Millet-Devalle), Paris, Pedone, 2008, pp. 9-45; P. Tavernier, "La protection de l'exercice des religions par le droit international humanitaire", in *ibid.*, pp. 105-118; M.C.W. Pinto, "Reflections on the Role of Religion in International Law", in *Liber Amicorum In Memoriam of Judge J.M. Ruda* (eds. C.A. Armas Barea, J.A. Barberis et alii), The Hague, Kluwer, 2000, pp. 25-42.

167 Cf., e.g., T.J. Gunn, "The Complexity of Religion and the Definition of 'Religion' in International Law", in *Religion and Human Rights - Critical Concepts in Religious*

111. Here we are taken back to timelessness again. In his inspiring essay of 1948 titled *Civilization on Trial*, Arnold J. Toynbee pondered that the works of artists and men of letters have outlived the deeds of soldiers, businessmen and statesmen; statues, poems and philosophical works have counted for more than the texts of laws and treaties, and the teachings of religious prophets and saints (of distinct religions of the world) have outlasted them all, as lasting benefactors of humankind<sup>168</sup>.

112. Toynbee beheld a “unified world”, working its way towards “an equilibrium between its diverse component cultures”, resulting from the “encounters” between them as well as the religions of the world<sup>169</sup>. He was attentive to what he wisely termed the *encounters*<sup>170</sup> of civilizations (and religions), and he recalled, as examples in this connection,

Judaism and Zoroastrianism, which sprang from an encounter between the Syrian and Babylonian civilizations; Christianity and Islam, which sprang from an encounter between the Syrian and Greek civilizations; the Mahayana form of Buddhism and Hinduism, which sprang from an encounter between the Indian and Greek civilizations<sup>171</sup>.

Those were just a couple of examples of religions, in a long-term perspective, which appeared within the last 4000 years. Toynbee repeatedly referred to the “historically illuminating” *encounters* between civilizations, to “the time-span” of such “encounters between civilizations”, with their “long-term religious consequences”, seeking

---

*Studies* (ed. N. Ghanea), vol. IV, London/N.Y., Routledge, 2010, pp. 159-187; Th. van Boven, “Advances and Obstacles in Building Understanding and Respect between People of Diverse Religions and Beliefs”, in *ibid.*, pp. 469-481; K. Hashemi, *Religious Legal Traditions, International Human Rights Law and Muslim States*, Leiden, Nijhoff, 2008, pp. 135-265 (on protection of religious minorities, and rights of the child); [Various Authors,] *The Religious in Responses to Mass Atrocity* (eds. Th. Brudholm and Th. Cushman), Cambridge, Cambridge University Press, 2009, pp. 1-263.

168 A.J. Toynbee, *Civilization on Trial*, Oxford, Oxford University Press, 1948, pp. 4-5, 90 and 156.

169 *Ibid.*, pp. 158-159.

170 Rather than “clash”, as some post-moderns say in our hectic days, without giving much thought to the matter, and with their characteristic and regrettable shallowness and prejudice.

171 A.J. Toynbee, *Civilization on Trial*, *op. cit. supra* n. (91), p. 159.

to bring improvement to “the conditions of human social life on Earth”<sup>172</sup>.

113. Cultural and spiritual heritage appears more closely related to a *human context*, rather than to the traditional State-centric context; it appears to transcend the purely inter-State dimension, that the Court is used to. I have made this point also on other occasions, in the adjudication of distinct cases lodged with the Court. For example, two weeks ago, in the Court’s Order of 04 July 2011 in the case of the *Jurisdictional Immunities of the State* (Germany *versus* Italy, intervention of Greece), I sustained, in my Separate Opinion, that rights of States and rights of individuals evolve *pari passu* in contemporary *jus gentium* (paras. 1-61), to a greater extent than one may *prima facie* realize or assume.

114. In any case, beyond the States are the human beings who organize themselves socially and compose them. The State is not, and has never been, conceived as an end in itself, but rather as a means to regulate and improve the living conditions of the *societas gentium*, keeping in mind the basic *principle of humanity*, amongst other fundamental principles of the law of nations, so as to achieve the *common good*. Beyond the States, the ultimate *titulaires* of the right to the safeguard and preservation of their cultural and spiritual heritage are the collectivities of human beings concerned, or else humankind as a whole.

115. As it can be inferred from the present case of the *Temple of Preah Vihear*, we are here in the domain of superior *human values*, the protection of which is not unknown to the law of nations<sup>173</sup>, although not sufficiently worked upon in international case-law and doctrine to date. It is beyond doubt that the States, as promoters of the *common good*, are under the duty of cooperation between themselves to that end of the safeguard and preservation of the cultural and spiritual heritage. I dare to nourish the hope that both Thailand and Cambodia, with their respectable, ancient cultures, will know how to comply jointly with the Provisional Measures of Protection indicated by the Court in the Order it has just adopted today.

116. Half a century ago, the Court’s Judgment of 15.06.1962 in the case of the *Temple of Preah Vihear* expressly stated, in its *dispositif* (para.

172 *Ibid.*, pp. 159, 215, 218-220 and 251.

173 Cf., over half a century ago, e.g., S. Glaser, “La protection internationale des valeurs humaines”, 60 *Revue générale de Droit international public* (1957) pp. 211-241.

2), that “Thailand is under an obligation to withdraw any military or police forces, or other guards or keepers, stationed by her at the Temple, or in its vicinity on Cambodian territory”. The Temple is and remains the reference to “its vicinity” (from Latin *vicinitas*). The zone set up by the Court for the purpose of the Provisional Measures of Protection indicated in the present Order, of 18 July 2011, encompasses the territory neighbouring (*vicinus* to) the Temple.

117. For the issue of the supervision of compliance by the States concerned with the present Provisional Measures of Protection, the Court’s Order, with the demilitarized zone set forth herein, encompasses, in my understanding, to the effect of protection, the people living in the said zone and its surroundings, the Temple of Preah Vihear itself, and all that it represents, all that comes with it from time immemorial, nowadays regarded by UNESCO as part of the cultural and spiritual world heritage. Cultures, like human beings, are vulnerable, and need protection. The universality of international law is erected upon respect for cultural diversity. It is reassuring that, for the first time in the history of this Court, Provisional Measures of Protection indicated or ordered by it are, as I perceive them, so meaningfully endowed with a scope of this kind. This is well in keeping with the *jus gentium* of our times.

### **3. DISSENTING OPINION OF JUDGE A.A. CANÇADO TRINDADE IN THE CASES OF CONSTRUCTION OF A ROAD IN COSTA RICA ALONG THE SAN JUAN RIVER AND OF CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (Nicaragua versus Costa Rica, and Costa Rica versus Nicaragua, Order of 16.07.2013)**

#### **I. Prolegomena**

1. I regret not to be able to concur with the decision taken by the majority of the Court (first resolutive point) not to indicate *new* provisional measures in the *cas d’espèce*. My perception is that the Court majority’s reasoning and decision, *data venia*, suffer from an ineluctable incongruence: having admitted that there is a change in the situation (para. 25), it extracts no consequence therefrom, as in its view “the conditions have not been fulfilled” for it to modify the measures it indicated in its previous Order of 08.03.2011 (para. 35). In limiting itself to simply reaffirming its previous provisional measures, yet it expresses

its concerns at the new situation created in the disputed area (para. 36), with the presence therein no longer of *personnel* (whether civilian, police or security), but rather of “organized groups” of individuals, or any “private individuals”.

2. My position is, *a contrario sensu*, that the changing circumstances surrounding the present cases (joined), opposing Costa Rica to Nicaragua and *vice-versa*, concerning, respectively, *Certain Activities Carried out by Nicaragua in the Border Area*, and the *Construction of a Road in Costa Rica along the San Juan River*, require from the International Court of Justice (ICJ), in the light of the relevant provisions of its *interna corporis*<sup>174</sup>, the exercise of its powers to indicate *new* provisional measures in order to face the *new* situation, which is one of urgency and of probability of irreparable harm, in the form of bodily injury or death of the persons staying in the disputed area.

3. Given the high importance that I attach to the issues raised in the present Order, I feel obliged to present and leave on the records, in the present Dissenting Opinion, the foundations of my position on the matter. I thus take the care to examine herein its aspects, as to the facts and as to the law. I shall start by reviewing the concomitant new requests of additional provisional measures of protection on the part of Costa Rica as well as Nicaragua, and the position taken by them, in their respective requests, as to the purported expansion of provisional measures of protection. After reviewing the technical missions *in loco* pursuant to the 1971 Ramsar Convention, I shall consider the requisites of urgency, and risk or probability of harm (in the form of bodily injury or death, of the persons staying in the disputed area), before proceeding to a general assessment of the requests of Costa Rica and of Nicaragua.

4. I shall then turn my attention to the aspects of the matter as to the law, as I perceive them, namely: a) the effects of provisional measures of protection beyond the strict territorialist outlook; b) the beneficiaries of provisional measures of protection, beyond the traditional inter-State dimension; and c) the effects of provisional measures of protection beyond the traditional inter-State dimension. The way will then be paved for my considerations on the proper exercise of the international judicial function (in the present domain of provisional measures) in

---

174 Article 76(1) of the Rules of Court, in addition to Article 41 of its Statute.

the form of a rebuttal of so-called “judicial self-restraint”, or *l’art de ne rien faire*. Last but not least, I shall present my concluding reflections towards an *autonomous legal regime* of provisional measures of protection.

## II. Provisional Measures of Protection: The Concomitant New Requests by Costa Rica and Nicaragua

5. May it be recalled, to start with, that, on 18.11.2010, the International Court of Justice (ICJ) was seised of a Request by Costa Rica for the indication of provisional measures in the case, opposing it to Nicaragua, concerning *Certain Activities Carried out by Nicaragua in the Border Area*. After the holding of public hearings, the ICJ issued its Order on provisional measures of protection, of 08.03.2011, whereby it determined that

1. Each Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security; (...) 2. Notwithstanding point (1) above, Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect; (...) 3. Each Party shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve; (...) 4. Each Party shall inform the Court as to its compliance with the above provisional measures<sup>175</sup>.

Shortly afterwards, on 21.12.2011, Nicaragua filed a case against Costa Rica with the ICJ, concerning the *Construction of a Road in Costa Rica along the San Juan River*. Subsequently, by its Order of 17.04.2013, the ICJ decided to join the proceedings in the two cases.

---

175 ICJ, case concerning *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua), Provisional Measures - Order of 08.03.2011, *ICJ Reports* (2011) p. 6.

6. One month later, on 23.05.2013, Costa Rica filed a Request<sup>176</sup> for the modification of the aforementioned Order of provisional measures of 08.03.2011. Nicaragua was invited to present written observations concerning Costa Rica's Request<sup>177</sup>. On the stipulated date (14.06.2013), Nicaragua submitted its *Written Observations* on Costa Rica's Request, and presented its own *Request* for the modification of the same Order of 08.03.2011<sup>178</sup>. Costa Rica, for its part, submitted (on 20.06.2013) its own *Written Observations* on Nicaragua's Request, within the stipulated time-limit by the Court<sup>179</sup>.

7. The Court thus had before it two Requests (Costa Rica's and Nicaragua's) and the pieces it needed to proceed to its deliberation on the matter<sup>180</sup>. It should not pass unnoticed that, since the Court issued its Order of provisional measures of 08.03.2011, there have been 16 communications<sup>181</sup> submitted by the parties to the Court in relation to compliance with the Order<sup>182</sup>. This discloses the importance ascribed by both contending parties, Costa Rica and Nicaragua, to the provisional measures of protection in the two respective cases, the proceedings of which having been joined by the ICJ<sup>183</sup>.

### **III. Technical Missions *in Loco* Pursuant to the Ramsar Convention**

8. The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (known as the Ramsar Convention, adopted in Ramsar, Iran, in 1971, and entered into force on 21.12.1975)<sup>184</sup> states in its preamble that "the conservation of wetlands and their flora and fauna can be ensured by combining far-sighted national policies with co-ordinated international action". Both Costa Rica and Nicaragua

176 ICJ, doc. CRN 2013/14.

177 Cf. ICJ, doc. CRN-NCR 2013/3, of 24.05.2013.

178 ICJ, doc. CRN-NCR 2013/8, of 14.06.2013.

179 CRN-NCR 2013/10, of 20.06.2013.

180 Cf. CRN-NCR 2013/3, of 24.05.2013.

181 Cf. cover page of Costa Rica's Request, ICJ, doc. CRN 2013/14, of 23.05.2013.

182 Cf. ICJ, docs. CR 2011/31, 2011/32, 2011/33, 2011/34, 2011/35, 2011/36, 2011/37, 2012/1, 2012/2, 2012/3, 2012/4, 2012/6, 2012/6 Add., 2012/8, 2013/4 and 2013/5.

183 Pursuant to the Court's two Orders of 17.04.2013.

184 Cf. *United Nations Treaty Series (UNTS)*, vol. 996, n. I-14583, p. 245. The text of the Ramsar Convention was amended by the Protocol of 03.12.1982 and the Amendments of 28.05.1987.

are Parties to it<sup>185</sup>. In its Order of 08.03.2011<sup>186</sup>, the Court pointed out that, pursuant to Article 2 of the Ramsar Convention, Costa Rica has designated the “*Humedal Caribe Noreste*” wetland “for inclusion in [the] List of Wetlands of International Importance (...) maintained by the [continuing] bureau” established by the Convention, while Nicaragua has proceeded likewise in respect of the “*Refugio de Vida Silvestre Río San Juan*” wetland, of which Harbor Head Lagoon is part (para. 79).

9. Furthermore, the Court, having acknowledged that the disputed area is situated in the “*Humedal Caribe Noreste*” wetland, in respect of which Costa Rica bears obligations under the Ramsar Convention, further considered that,

pending delivery of the Judgment on the merits, Costa Rica must be in a position to avoid irreparable prejudice being caused to the part of that wetland where that territory is situated; (...) for that purpose Costa Rica must be able to dispatch civilian personnel charged with the protection of the environment to the said territory, including the *caño*, but only in so far as it is necessary to ensure that no such prejudice be caused; and (...) Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect (para. 80).

10. In this line of reasoning, the Court ordered, in the resolatory point (2) of the *dispositif* of its aforementioned Order, that:

Notwithstanding point (1) above, Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect.

---

185 Costa Rica is a Party to it since 27.04.1992, and Nicaragua since 30.11.1997. The Convention counts today (early July 2013), on 168 States Parties.

186 Cf. Order of 08.03.2011, *I.C.J. Reports* (2011) p. 6.

Thus, it stems from the Court's Order of 08.03.2011, that, pursuant to the Ramsar Convention (cf. Article 3(2)<sup>187</sup>), Costa Rica has a duty thereunder to monitor the disputed area which forms part of a protected wetland registered by Costa Rica under the Ramsar Convention.

11. According to those communications submitted to the ICJ, there have been three technical visits, conducted by Costa Rica in the disputed area<sup>188</sup>, in accordance with the Order (resolatory point (2), *supra*). The *first visit in loco* took place in April 2011<sup>189</sup>, in order to determine the situation of the wetland and to take "those actions deemed necessary with the aim of avoiding an irreparable damage to the wetlands indicated by the Court in its providence"<sup>190</sup>. It is reported that the mission acknowledged "the valuable technical work accomplished at the site during the day of 5 April, which allowed them to gather the technical elements necessary in order to determine the actual condition of the wetland". It is also stated that "because of the lack of security measures to guarantee the personal safety of the experts as a result of actions outside the control of the Government of Costa Rica, the decision was taken not to return to the ground area and only use the over flight option to compliment the information"<sup>191</sup>.

12. This joint Ramsar-Costa Rica first visit included members of the Technical Advisory Mission of the Secretariat of the Ramsar Convention and Costa Rican civilian technicians in charge of the protection of the environment<sup>192</sup>. Costa Rica further alleges that, during this visit, Costa Rican personnel and members of the Ramsar

---

187 Article 3(2) of the Ramsar Convention stipulates that: "Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. Information on such changes shall be passed without delay to the organization or government responsible for the continuing bureau duties specified in Article 8".

188 Cf. ICJ, docs. CRN 2011/33, of 07.04.2011; CRN 2011/34, of 11.04.2011; CRN 2011/35, of 13.04.2011; CRN 2012/1, of 30.01.2012; CRN 2013/4, of 01.03.2013.

189 Cf. ICJ, docs. CRN 2011/33, of 07.04.2011, CRN 2011/34, of 11.04.2011, and CRN 2011/35, of 13.04.2011.

190 ICJ, doc. CRN 2011/33, of 07.04.2011.

191 ICJ, doc. CRN 2011/35, of 13.04.2011; there was the correspondence "Minutes, Coordination Meeting, Advisory Technical Mission of the Secretariat of the Ramsar Convention and Representatives of the Ministry for the Environment, Energy and Telecommunications".

192 ICJ, doc. CRN 2011/33, of 07.04.2011.

Mission were “aggressively harassed by Nicaraguan protestors and journalists”. The mission acknowledged “the valuable technical work” accomplished on 05.04.2011, which enabled them to gather the technical elements necessary “in order to determine the actual condition of the wetland”. Yet, “because of the lack of security measures to guarantee the personal safety of the experts as a result of actions outside the control of the Government of Costa Rica”, - Costa Rica adds, - “the decision was taken not to return to the ground area (...)”<sup>193</sup>.

13. The *second visit in loco* took place in January 2012. Costa Rica informed the Court that its purpose was to “continue the assessment of the conditions of that wetland in order to avoid irreparable damage”<sup>194</sup>. Costa Rica claims that the visit formed “part of the action plan proposed to the Secretariat of the Ramsar Convention, and agreed to by the Secretariat”<sup>195</sup>.

14. The *third visit* occurred in March 2013, Costa Rica having informed the Court that its civilian personnel charged with the protection of the environment were to conduct a visit on site. It further communicated to the Court two correspondences, whereby “Costa Rica informed the Ramsar Convention Secretariat and Nicaragua of this site visit”<sup>196</sup>. And it also reported that this third technical site visit was “carried out in accordance with the Working Plan” contained in the report presented by Costa Rica to the Ramsar Secretariat on 28.10.2011, which was approved by the Ramsar Secretariat in a note dated 07.11.2011. The stated purpose of the visit was to “avoid irreparable prejudice to that part of the northeast Caribbean Wetland”<sup>197</sup>.

#### **IV. The Position of the Parties as to the Purported Expansion of Provisional Measures: The Request of Costa Rica**

15. In its *Request* of 23.05.2013 to “modify” the Order of provisional measures of 08.03.2011, Costa Rica calls for three new measures to be added to it, namely, to order:

---

193 ICJ, doc. CRN 2011/35, of 13.04.2011.

194 Cf. ICJ, doc. CRN 2012/1, of 30.01.2012.

195 Cf. CRN 2012/1, of 30.01.2012.

196 ICJ, doc. CRN 2013/4, of 01.03.2013.

197 ICJ, doc. CRN 2013/4, 01.03.2013.

1. The immediate and unconditional withdrawal of all Nicaraguan persons from the Area indicated by the Court in its Order on provisional measures of 8 March 2011;
2. That both Parties take all necessary measures to prevent any person (other than the persons whose presence is authorized by paragraph 86(2) of the Order) coming from their respective territory from accessing the area indicated by the Court in its Order on provisional measures of 8 March 2011; and
3. That each Party shall inform the Court as to its compliance with the above provisional measures within two weeks of the issue of the modified Order<sup>198</sup>.

16. It is, in fact, in my perception, a request for an *expansion* of provisional measures of protection. Costa Rica contends that its *Request* is prompted by “Nicaragua’s sending to the area indicated by the Court in its Order [...] and maintaining thereon large numbers of persons, and by the activities undertaken by these persons affecting that territory and its ecology” (para. 2). It adds that there is a change in the situation (para. 4), in the light of Article 76(2) of the Rules of Court<sup>199</sup>. Costa Rica further claims that the presence of Nicaraguan nationals in the disputed area issue causes a risk of irremediable harm in the form of bodily injury or death (paras. 18-19). Costa Rica at last contends that there is urgency, since in its view there is a real risk that, without such modification of the Court’s Order, action prejudicial to Costa Rica’s rights will occur before the Court renders its decision on the merits (paras. 18-20).

17. Costa Rica purports to explain further its requested new provisional measures. It alleges that Nicaragua sponsors the continuous presence, in the disputed area, of a large number of Nicaraguan nationals, by its operation of an “academic” program whereby they

---

<sup>198</sup> ICJ, doc.CRN 2013/14, of 23.05.2013.

<sup>199</sup> Article 76 of the Rules of Court reads as follows:

“1. At the request of a party the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification.

2. Any application by a party proposing such a revocation or modification shall specify the change in the situation considered to be relevant.

3. Before taking any decision under paragraph 1 of this Article the Court shall afford the parties an opportunity of presenting their observations on the subject”.

are sent thereto to carry out activities. In the annexes to its *Request*, Costa Rica refers to press reports on the matter, and adds that it has kept the Court informed about these activities, has formally protested to Nicaragua against them, and has exhausted all efforts to resolve the dispute by diplomatic means, which have failed. Costa Rica claims that the activities at issue have consist in: a) deliberately interfering with a site visit; b) carrying out works in an attempt to keep the artificial *caño* open; c) engaging in uncontrolled planting of trees in the area; d) raising of cattle in the area; and e) erecting fences in the Area to the North of, and alongside, the *caño* (paras. 4-9)<sup>200</sup>. This presence of Nicaraguan nationals in the disputed area, and their described activities thereon, are, in Costa Rica's view, in breach of the Court's Order, and create a new situation, requiring the "modification" of the Court's Order (paras. 10-14), - in the sense of the expansion of the provisional measures of protection.

18. In its *Written Observations*, Nicaragua, in turn, retorts that Costa Rica's *Request*, in its view, is "groundless", as there has been no change in the situation that would call for a "modification" of the Court's Order in the way described by Costa Rica, and it has not breached the provisional measures indicated by the Court (paras. 1-3). Nicaragua adds that the presence of private individuals is not a new issue under the Court's Order (para. 13). And as to the presence of members of the *Guardabarranco* Environment Movement referred to by Costa Rica, Nicaragua claims that Costa Rica did not ask, in its request for the indication of provisional measures, for the withdrawal of private individuals, and adds that the members of the *Guardabarranco* Environment Movement are "private individuals", as conceded by Costa Rica; it alleges that they are neither part of the Nicaraguan Government, nor are they acting under Nicaragua's control (paras. 6-14).

19. In its *Written Observations* on Nicaragua's *Request*, Costa Rica reiterates its perceived change in the situation, pointing out that Nicaragua does not deny, in its own *Written Observations*, that it is sponsoring, sending and maintaining large number of persons in the

---

200 Costa Rica further recalls that Nicaragua maintains the position that the Court's Order does not prevent private citizens from accessing the area and carrying activities thereon; in its *Counter-Memorial*, Nicaragua recognizes the presence of its nationals in the area. Costa Rica controverts Nicaragua's views (paras. 10-14).

area (para. 7). In Costa Rica's view, the unlawful presence of Nicaraguan nationals in the area is not in dispute. Costa Rica then claims that this is a new situation that did not exist at the time of the oral hearings on provisional measures, as then only *military* personnel was in the area; the Court did not implicitly recognize in its Order of 08.03.2011 that private individuals could enter, remain on, and carry out unsupervised, unpoliced activities in the Area. Costa Rica maintains that the presence of Nicaraguan nationals in the area is unlawful, and increases the risk of incidents likely to cause irreparable harm<sup>201</sup>.

## **V. Urgency, and Risk of Harm in the Form of Bodily Injury or Death**

20. In its Order of provisional measures of protection of 08.03.2011, the ICJ, recalling the competing claims over the disputed area and Nicaragua's intention to carry out thereon, "if only occasionally", certain activities, noted, in paragraph 75, the ensuing risk of irreparable harm in the form of bodily injury or death,. The Court stated that such situation created

an imminent risk of irreparable prejudice to Costa Rica's claimed title to sovereignty over the said territory and to the rights deriving therefrom; (...) this situation moreover gives rise to a real and present risk of incidents liable to cause irreparable harm in the form of bodily injury or death (para. 75).

Under these circumstances, the Court decided that provisional measures should be indicated<sup>202</sup>.

21. The ICJ thus took into account the risk of incidents likely to cause irreparable harm in the form of bodily injury or death, and then ordered the requested measures. From the arguments more recently submitted to the Court, it seems that similar concerns about a risk of incidents that could cause irreparable harm in the form of bodily injury or death call for additional provisional measures to be adopted by the Court. To this effect, Costa Rica claims that the presence of Nicaraguan nationals in the disputed territory poses of risk of such irreparable harm<sup>203</sup>. In

201 *Ibid.*, paras. 25-29.

202 Order, para. 75.

203 Costa Rica's *Request*, paras. 18-20; it further alleges that there have lately been incidents in the area, where Nicaraguan nationals have subjected Costa Rican environ-

its *Request*, Costa Rica sustains that there is “a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death” (para. 18); in particular, it links the presence of Nicaraguan nationals in the disputed area to the risk of irremediable harm in the form of bodily injury or death, and it adds that there is “real urgency”. There is, furthermore, in its view, “a serious threat to its internationally-protected wetlands and forests” (para. 18).

22. In its *Written Observations*, Costa Rica also argues that there is urgency. Costa Rica links the urgency of the situation to the “real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death” in the disputed area (para. 29), and stresses this risk (paras. 25 and 28). Costa Rica asserts that, pursuant to the Court’s Order, it has prevented its police force and residents from entering the area, while Nicaragua has refused to ensure that people from its territory do not enter the area, and continues to maintain therein a constant presence of “substantial numbers of Nicaraguan persons”. Costa Rica then submits that “[t]here is a real risk that, without a modification of the Court’s Order of 8 March 2011, action prejudicial to the rights of Costa Rica will occur before the Court has the opportunity to render its final decision on the questions for determination set out in the Application” (para. 19).

23. For its part, in its *Written Observations* Nicaragua retorts that, after three technical visits to the site, Costa Rica has in its view failed to demonstrate the existence of any “serious threat” to the disputed territory, or any “incidents liable to cause irremediable harm in form of bodily injury or death” (para. 37). It adds that Costa Rica first made such assertions in its *Memorial*, but they had been rebutted by Nicaragua in its *Counter-Memorial*. Thus, Nicaragua denies any urgency in the situation, and adds that Costa Rica’s new allegations could be more properly addressed in the merits phase. Nicaragua claims that, since the Order, it has acted with due diligence to ensure that the area remains free of Nicaraguan *personnel*; as to the presence in the area of members of the *Guardabarranco* Environment Movement referred to by Costa Rica, Nicaragua argues that Costa Rica had not asked, in its earlier *Request* for the indication of provisional measures, for the withdrawal of “private individuals” (paras. 6-14).

---

mental personnel to harassment and verbal abuse, posing a risk of incidents that might cause bodily injury or death.

## **VI. The Position of the Parties as to the Purported Expansion of Provisional Measures: The Request of Nicaragua**

24. On 14.06.2013, Nicaragua submitted its *Written Observations* on Costa Rica's Request, and made its own *Request* for modification of the Court's Order<sup>204</sup> on the basis of an alleged new factual situation, that is, the construction of a 160 km-long road along the San Juan River and the joinder of the proceedings. Nicaragua argues, in its *Written Observations and Request*, that, despite its call on Costa Rica for halting the construction without an appropriate transboundary Environmental Impact Assessment, Costa Rica announced that the work is about to be restarted. Nicaragua argues that the construction of the road has resulted in increased sedimentation and pollution of the River, adverse impact on water quality, aquatic life, navigation and other general uses of the River by the population (paras. 43-46).

25. Nicaragua further argues that the Court's Order of 08.03.2011 should be adjusted to take into account the "harmful environmental effect of the works in and along the San Juan River on the fragile fluvial ecosystem (including protected nature preserves in and along the river)", which cover the area in dispute located at the mouth of the River. Nicaragua also refers to the UNITAR/UNOSAT report observing that the area in dispute is being affected by the "accumulation of fluvial sediments including those of bank erosion, attributable in part by sediments transmitted to the River by the road construction activities. Nicaragua maintains that the Order should be adjusted to take this into account. Both Parties should be precluded from undertaking

---

204 Nicaragua requests that the provisional measure ordered by the Court in resolatory point (2) be modified to read:

"Notwithstanding point (1) above, both Parties may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; both Parties shall consult in regard to these actions and use their best endeavours to find common solutions with the other Party in this respect".

The third measure ordered by the Court should be modified to read as follows:

"Each Party shall refrain from any action, which might aggravate or extend the dispute before the Court in either of the joined cases or make it more difficult to resolve, and will take those actions necessary for avoiding such aggravation or extension of the dispute before the Court".

any activities unilaterally that increases the “accumulation of fluvial sediments” in the Area (paras. 47-52).

26. As to the joinder of proceedings (cf. *supra*), Nicaragua claims that the Order should be made applicable to the two joined cases, in relation to all activities by either Party that might harm the environment in the area, in order not to aggravate the dispute. Nicaragua recalls a list of urgent measures to prevent further damages to the River which it described in its *Memorial* in the case concerning the *Construction of a Road in Costa Rica along the San Juan River*: reducing the rate and frequency of road fill failure slumps and landslides; eliminating or significantly reducing the risk of future erosion and sediment delivery at all stream crossings along *route 1856*; immediately reducing road surface erosion and sediment delivery; controlling surface erosion and resultant sediment delivery from bare soil areas (paras. 47-52).

27. For its part, in its *Written Observations* on Nicaragua’s Request, Costa Rica argues that the request at issue must be rejected on a number of reasons (para. 6). First, the Court had explicitly held that “Costa Rica’s claim to title over Islas Portillos was ‘plausible’, whereas it had made “no such finding with respect to Nicaragua” (paras. 7-10). Secondly, the Court had explicitly held that Costa Rica “must be able to dispatch civilian personnel charged with the protection of the environment” to the area, whereas it made no such indication for Nicaragua (paras. 11-13). Thirdly, only Costa Rica, and not Nicaragua, has an obligation to monitor the area forming part of a protected wetland registered by Costa Rica under the Ramsar Convention (paras. 14-18). Fourthly, Costa Rica adds that the basis for the Court’s Order was that neither Party should send persons to the area or maintain them there (paras. 19-21).

28. Fifthly, Costa Rica further claims that the sponsoring of activities calculated to change the *status quo* of the area is completely inconsistent with the provisional measures actually indicated by the Court and with the whole object and purpose of provisional measures in general (paras. 22-24). Sixthly, Nicaragua’s proposed modification implies the possibility of concomitant exercise of public environmental activities by two different States in the same area, increasing the risk of serious incidents (paras. 25-29). Seventhly, Costa Rica argues that Nicaragua’s proposed deletion of the Ramsar Secretariat from the provisional measure (second resolutive point of the Order) is an attempt to vitiate the role of that supervisory organ in supporting

Costa Rica in the environmental recovery process of the disputed area in line with the Ramsar Convention, to which Nicaragua is also a Party (paras. 30-31). Finally, Costa Rica claims that the case concerning the *Construction of a Road in Costa Rica along the San Juan River*, as well as the joinder of proceedings of this case with those of the case concerning *Certain Activities Carried out by Nicaragua in the Border Area*, in its view are not valid reasons to modify the previous provisional measure and to authorize the presence of Nicaraguan personnel charged with the protection of the environment in the area (paras. 32-33)<sup>205</sup>.

## VII. General Assessment of the Requests of Costa Rica and of Nicaragua

### 1. Costa Rica's Request

29. In support of its Request, Costa Rica recalls that, at the time of the public hearings preceding the previous Order of the ICJ on provisional measures, it claimed that Nicaraguan *personnel* should leave the disputed area, as it then appeared that only military personnel was present therein. At that time, it did not seem that there was a concern with the presence of “private individuals”. Indeed, it appears that there is a change in the situation. In its *Written Observations*, Nicaragua does not seem to object to this assertion by Costa Rica, as it claims that Costa Rica did not request at that time, provisional measures in respect of the withdrawal of “private individuals” from the area (cf. para. 11).

30. The situation, as it appears today, from the evidence and the arguments submitted to the Court, is that “private individuals”, holding Nicaraguan flags, are present in the disputed area. Again, in its *Written Observations*, Nicaragua does not seem to contest this fact (cf. paras. 11-14)<sup>206</sup>. It thus appears that there is indeed a change in the situation. The change seems to lie in the fact that, at the time of the issuance of the Court's Order of 08.03.2011, there seemed to be no

---

205 Costa Rica further argues that the proper avenue for Nicaragua to proceed with its request for the indication of provisional measures in the case it lodged with the Court is by way of a new application for the indication of provisional measures, and not by asking for a modification of the Court's Order of 08.03.2011 (paras. 34-39). Costa Rica adds that the mitigation works for the protection of the environment that it is undertaking on the Road (entirely on Costa Rican territory) are an issue for the merits phase of the proceedings in the case lodged by Nicaragua, not to be dealt with by way of a request for modification of the Court's Order of 08.03.2011 (paras. 40-41).

206 And cf. also Costa Rica's *Written Observations* on Nicaragua's Request, para. 26.

Nicaraguan private citizens in the disputed area, but only the presence of Nicaraguan military *personnel*. The fact that the Court mentioned in the operative paragraphs of the Order the withdrawal of Nicaraguan *personnel*, reflects the situation as it stood at the time of the adoption of its Order of 08.03.2011.

31. It does not necessarily mean that the Court, by using the word “personnel”, was thereby allowing the presence of any and all Nicaraguan persons other than civilian, security or police personnel. Accordingly, the presence of private individuals in the disputed area does not seem to be in line with the objective of safeguarding “Costa Rica’s claimed title to sovereignty over the said territory and to the rights deriving therefrom” or avoiding “incidents liable to cause irremediable harm in the form of bodily injury or death”, in the line of its reasoning in paragraph 75 of the Order of 08.03.2011.

32. Thus, on the basis of the foregoing, the presence of private individuals in the disputed area amounts to a change in the original situation, as presented to the Court in the public hearings on provisional measures which preceded its Order of 08.03.2011. The presence of “private individuals” does not seem to be in line with the reasoning of the Court, nor with the objectives of the provisional measures it indicated, in its Order of 08.03.2011.

33. It seems not disputed that there are currently Nicaraguan nationals present in the disputed area, conforming a new situation posing a risk of incidents in the disputed area. With the change in the situation now created (on the basis of the documents and arguments presented to the Court), there appears to be a risk of irremediable harm in the form of bodily injury or death (in the terms of paragraph 75 of its Order of 08.03.2011) that would warrant a “modification” – or, more precisely, an expansion - of the Order, so as to avoid that risk. It further appears that there is urgency, in view of a further risk of damage to the disputed area.

## **2. Nicaragua’s Request**

34. The questions that Nicaragua raises in its Request for “modification” or expansion of the Court’s previous Order on the Joinder of Proceedings, of 17.04.2013, are centred on important points. In fact, the relevance of the construction of the road to the examination

of the *whole* dispute between the Parties has been recognized by the Court in that Order, wherein the Court stated that:

A decision to join the proceedings will allow the Court to address simultaneously the totality of the various interrelated and contested issues raised by the Parties, including any questions of fact or law that are common to the disputes presented. In the view of the Court, hearing and deciding the two cases together will have significant advantages. The Court does not expect any undue delay in rendering its Judgment in the two cases (para. 17).

35. Be that as it may, the construction of the road, albeit an important question, does not appear to be a matter to be treated in an Order for the “modification” or expansion of a previous Order of provisional measures (of 08.03.2011). The Court does not seem to be satisfied that the construction of the road, as allegedly an entirely new issue, is endowed with urgency, so as to be treated in the form of a new provisional measure. May it be recalled that Nicaragua brought this issue before the Court on 21.12.2011, when it lodged the case concerning the *Construction of a Road in Costa Rica along the San Juan River* with the Court.

36. Moreover, the joinder of the proceedings of the cases concerning *Certain Activities Carried out by Nicaragua in the Border Area* and the *Construction of a Road in Costa Rica along the San Juan River*, does not appear by itself to support a “modification” of the Order of 08.03.2011. This Order was based on the situation as then argued by the Parties, concerning the disputed area. It rested upon an assessment by the ICJ that the situation, as presented to it, gave rise to “a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death”; on this basis, the Court decided to indicate the provisional measures of protection appropriate to that situation.

37. Thus, the joinder of proceedings in the two aforementioned cases does not amount to a change of the situation, as presented to the Court at the time of the hearings that led to the adoption of its Order of 08.03.2011; nor does it seem to amount to a new fact that would warrant a “modification” of that Order. Keeping in mind the foregoing, and acknowledging that the questions raised by Nicaragua concerning the construction of the road along the San Juan River are relevant, the best course to take is to deal with them in the merits phase

of the case concerning the *Construction of a Road in Costa Rica along the San Juan River*.

### VIII. Effects of Provisional Measures of Protection beyond the Strict Territorialist Outlook

38. The factual context before the Court takes us beyond the traditional outlook of State territorial sovereignty. The concerns expressed before the Court encompass living conditions of people in their natural habitat, and the required environmental protection. International case-law on the matter (of distinct international tribunals) has so far sought to clarify the *juridical nature* of provisional measures, stressing its essentially preventive character. In effect, the likelihood or probability of *irreparable damage*, and the *urgency* of a situation, become evident when, e.g., a growing number of people are about to be injured or murdered, as in cases concerning armed conflicts (cf. *infra*). Whenever ordered provisional measures protect rights of individuals, they appear endowed with a character, more than precautionary, truly *tutelary*<sup>207</sup>, besides preserving the parties' (States') rights at stake<sup>208</sup>.

39. The circumstances of certain cases before the Court have led this latter, in its decisions on provisional measures, to shift its attention on to the *protection of people in territory* (e.g., the case of the *Frontier Dispute, Burkina Faso versus Mali*, 1986; the case of the *Land and Maritime Boundary, Cameroon versus Nigeria*, 1996; the case of *Armed Activities on the Territory of the Congo, D.R. Congo versus Uganda*, 2000; the case concerning the *Application of the International Convention on the Elimination of All Forms of*

---

207 Cf. R.St.J. MacDonald, "Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights", 52 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1993) pp. 703-740; 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), Bruxelles, Bruylant/Nemesis, 2005, pp. 145-163, and in 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25; A. Saccucci, *Le Misure Provvisorie nella Protezione Internazionale dei Diritti Umani*, Torino, Giappichelli Ed., 2006, pp. 103-241 and 447-507.

208 Cf. E. Hambro, "The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice", in *Rechtsfragen der Internationalen Organisation - Festschrift für Hans Wehberg* (eds. W. Schätzel and H.-J. Schlochauer), Frankfurt a/M, 1956, pp. 152-171.

*Racial Discrimination, Georgia versus Russia, 2008 – cf. infra*). In those decisions, among others, the ICJ became attentive also to the fate of persons.

40. The ICJ thus looked (moved) beyond the strict territorialist outlook. The fact is that, in successive cases lodged with the Court, the beneficiaries of provisional measures of protection are identified well beyond the traditional inter-State dimension. The present cases concerning *Certain Activities Carried out by Nicaragua in the Border Area*, and the *Construction of a Road in Costa Rica along the San Juan River*, provide yet new illustrations to this effect, in so far as the persons currently found in the disputed area are concerned.

41. It should not pass unnoticed that provisional measures of protection have lately invited the Court to move its reasoning beyond the strict territorialist approach, as I observed in my Separate Opinion in the recent Order of the Court of provisional measures of protection (of 18.07.2011) in the case of the *Temple of Preah Vihear (Cambodia versus Thailand)*. After dwelling upon the relationship between time and law, I moved to considerations pertaining to space and law, relating (territorial) space to the human element of statehood: the population. (paras. 43-44 and 62-63). International law in a way endeavours to be *anticipatory* in the regulation of social facts, so as to avoid disorder and chaos, as well as irreparable harm; we are here before the *raison d'être* of provisional measures of protection, *i.e.*, to prevent and avoid irreparable harm in situations of gravity and urgency. Endowed with a notorious preventive character, they are anticipatory in nature, looking forward in time; they thus disclose the preventive dimension of the safeguard of rights (para. 64).

42. In my Separate Opinion, I sustained that there was epistemologically no impossibility or inadequacy for provisional measures, of the kind of the ones indicated in that Order, to extend protection - as they should - also to human life, as well as to cultural and spiritual world heritage. In fact, the reassuring effects of the provisional measures indicated in that recent Order of the ICJ were precisely that they extended protection not only to the territorial zone at issue, but also, by asserting the prohibition of the use or threat of force - pursuant to a fundamental principle of international law, - to the life and personal integrity of human beings who live or happen

to be in that zone or near it, as well as to the Temple of Preah Vihear itself, situated in the aforementioned zone, and all that the Temple represents (para. 66).

43. I then added, in my Separate Opinion in the case of the *Temple of Preah Vihear* (provisional measures), that the Court should be prepared, in our days, to give proper weight to the *human factor* (para. 97), thus *bringing people and territory together*; and I pondered that:

Not everything can be subsumed under territorial sovereignty. The fundamental human right to life is not at all subsumed under State sovereignty. The human right not to be forcefully displaced or evacuated from one's home is not to be equated with territorial sovereignty. The Court needs to adjust its conceptual framework and its language to the new needs of protection, when it decides to indicate or order the Provisional Measures requested from it.

If we add, to the aforementioned, the protection of cultural and spiritual world heritage (cf. *supra*), for the purposes of Provisional Measures, the resulting picture will appear even more complex, and the strict territorialist approach even more unsatisfactory. The *human factor* is the most prominent one here. It shows how multifaceted, in these circumstances, the protection provided by Provisional Measures can be. It goes well beyond State territorial sovereignty, *bringing territory, people and human values together* (paras. 99-100).

## **IX. The Beneficiaries of Provisional Measures of Protection, beyond the Traditional Inter-State Dimension**

44. In the international litigation before the ICJ, only States, as contending parties, can request provisional measures. Yet, in recent years, such requests have invoked rights which go beyond the strictly inter-State dimension<sup>209</sup>. In successive cases, the ultimate beneficiaries were meant to be the individuals concerned, - and to that end the

---

209 In the triad *Breard/LaGrand/Avena* cases, for example, provisional measures were requested to prevent an irreparable damage to the right to life of the convicted persons (stay of execution), in the circumstances of their cases (cf. provisional measures in the Court's Orders of 09.04.1998, 03.03.1999, and 05.02.2003, respectively).

requesting States advanced their arguments to obtain the Court's Orders of provisional measures of protection, in distinct contexts. Thus, in its Order of 15.12.1979, in the *Hostages* case (United States *versus* Iran), the Court took into account the State's arguments to protect the life, freedom and personal security of its nationals (diplomatic and consular staff in Tehran - para. 37), and indicated provisional measures of protection of those rights (resolatory point I(A)), after referring to the "*obligations impératives*" under the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations (para. 41), and pondering that

la persistance de la situation qui fait l'objet de la requête expose les êtres humains concernés à des privations, à un sort pénible et angoissant et même à des dangers pour leur vie et leur santé et par conséquent à une possibilité sérieuse de préjudice irréparable (para. 42).

45. Half a decade later, in its Order of 10.05.1984, in the *Nicaragua versus United States* case, the ICJ indicated provisional measures (resolatory point B(2)) after taking note of the requesting State's argument calling for protection of the rights to life, to freedom and to personal security of Nicaraguan citizens (para. 32). Shortly afterwards, in its celebrated Order of 10.01.1986 in the *Frontier Dispute* case (Burkina Faso *versus* Mali), duly complied with by the contending parties, the Court's Chamber took note of the concern expressed by the parties with the personal integrity and safety of those persons who were in the zone under dispute (paras. 6 and 21). One decade later, in its Order of 15.03.1996 in the case of the *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon *versus* Nigeria), the Court took note of the requesting State's warning that continuing armed clashes in the region were notably causing "irremediable loss of life as well as human suffering and substantial material damage" (para. 19).

46. In deciding to order provisional measures, the ICJ pondered that the rights at stake were not only claimed State rights, but *also* rights of the *persons* concerned (paras. 38-39 and 42). In fact, in the circumstances of that case, the victimization of human beings resulting from armed conflicts of greater intensity, I would say that the purpose of the provisional measures was to extend protection *mainly to persons*. Another Order illustrative of the overcoming of the strictly inter-State dimension in the acknowledgement of the rights to be preserved by means of provisional

measures pertains to the case of *Armed Activities on the Territory of the Congo*, opposing this latter to Uganda. In its Order of 01.07.2000 in this case, the ICJ took into account the requesting State's denunciation of alleged "human rights violations" - invoking international instruments for their protection (paras. 4-5 and 18-19), - and of its plea for protection for its inhabitants (para. 31) as well as for its own "rights to respect for the rules of international humanitarian law and for the instruments relating to the protection of human rights" (para. 40).

47. The Court, recognizing the pressing need to indicate provisional measures of protection (paras. 43-44), found that it was "not disputed that grave and repeated violations of human rights and international humanitarian law, including massacres and other atrocities", had been committed on the territory of the D.R. Congo (para. 42). The Court, accordingly, ordered both parties *inter alia* to "take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law" (resolatory point 3).

48. In its Order of 08.04.1993 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina *versus* Yugoslavia), the Court, after finding "a grave risk" to human life, indicated provisional measures<sup>210</sup>. In the subsequent Order of 13.09.1993 in the same case, the Court again expressed its concern for the protection of human rights and the rights of peoples (para. 38). In its subsequent Order of 15.10.2008 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *versus* Russia), the ICJ once again disclosed its concern for the preservation of human life and personal integrity (paras. 122 and 142-143).

49. From the survey above it can be seen that, along the last three decades, the ICJ has gradually overcome the strictly inter-State outlook in the acknowledgement of the rights to be preserved by means of its Orders of provisional measures of protection. Nostalgics of the past, clung to their own dogmatism, can hardly deny that, nowadays,

---

210 The Court, furthermore, recalled General Assembly resolution 96(I) of 11.12.1946 (referred to in its own Advisory Opinion of 1951 on *Reservations on the Convention against Genocide*), to the effect that the crime of genocide "shocks the conscience of mankind, results in great losses to humanity (...) and is contrary to moral law and to the spirit and aims of the United Nations" (*cit. in* para. 49).

States litigating before this Court, despite its inter-State contentious procedure, have conceded that they have no longer the monopoly of the rights to be preserved, and, much to their credit, they recognize so, in pleading before this Court on behalf also of individuals, their nationals and others, or even in a larger framework, its inhabitants.

50. Facts tend to come before the norms, requiring of these latter the aptitude to cover new situations they are meant to regulate, with due attention to superior values<sup>211</sup>. Before this Court, States keep on holding the monopoly of *jus standi*, as well as *locus standi in judicio*, in so far as requests for provisional measures are concerned, but this has not proved incompatible with the preservation of the rights of the human person, together with those of States. The ultimate beneficiaries of the rights to be thereby preserved have been, not seldom and ultimately, human beings, alongside the States wherein they live. Provisional measures indicated in successive Orders of the ICJ have transcended the artificial inter-State dimension of the past, and have come to preserve also rights whose ultimate subjects (*titulaires*) are human beings.

## **X. Effects of Provisional Measures of Protection beyond the Traditional Inter-State Dimension**

51. In the case concerning *Questions Relating to the Obligation to Prosecute or to Extradite* (Order of 28.05.2009), the ICJ decided not to indicate provisional measures. On the occasion, I warned, in my extensive Dissenting Opinion, that the basic right at issue pertained to the *realization of justice*, which assumed a central place in the case, one of a paramount importance, deserving of particular attention. The strictly inter-State dimension seemed to have been overcome in the acknowledgement of the rights to be preserved, in particular as the *search for justice* (the right to the realization of justice) was (and remains to date) at stake. In that case, opposing Belgium to Senegal, the crucial factor was, - as I stressed in my Dissenting Opinion, - the endurance by the victims of an ungrateful two-decade search for justice, in vain until now, for the reported atrocities of the Habré regime in Chad (para. 56).

---

211 Cf., *inter alia*, G. Morin, *La révolte du Droit contre le Code - La révision nécessaire des concepts juridiques*, Paris, Libr. Rec. Sirey, 1945, pp. 2, 6-7 and 109-115.

52. I further pointed out in that Dissenting Opinion (para. 97) that, the fact that the binding character of provisional measures of protection is nowadays beyond question (moving from the pre-history into the history of the matter in the ICJ case-law), on the basis of the *res interpretata* of the ICJ itself, does not mean that we have reached a culminating point in the evolution of the ICJ case-law on this matter. Quite on the contrary, I can hardly escape the impression that we are still living the infancy of this jurisprudential development. The review of the matter (*supra*) in the present Separate Opinion indicates that, although some advances have been achieved, there remains a long way to go.

53. The determination of urgency and the probability of irreparable damage are exercises which the ICJ is nowadays used to; yet, although the identification of the legal nature and the material content of the right(s) to be preserved seem not to raise great difficulties, the same cannot be said of the consideration of the *legal effects* and *consequences* of the right at issue, in particular when provisional measures are not indicated or ordered by the Court. We here move to the *effects* of provisional measures of protection, beyond the traditional inter-State dimension. In this respect, there seems to remain still a long way to go.

54. In the *cas d'espèce* before the Court, opposing two Latin American countries, the new provisional measures of protection envisaged in Costa Rica's *Request* seek the protection of individuals against "harm in the form of bodily injury or death" (*supra*), by making sure that they do not remain in the disputed area; the new provisional measures are requested not only in respect of agents of the public power (*personnel*), but also in respect of individuals (*simples particuliers*), well beyond the traditional inter-State dimension.

55. In this connection, the expressions used, by both Nicaragua and Costa Rica, in their arguments presented to the Court, should not pass unnoticed. In its *Written Observations*<sup>212</sup>, Nicaragua refers to "private individuals" (paras. 11 and 13-14), "private persons" (para. 12), "Nicaraguan nationals" (paras. 16 and 30), and "a group of young people" (para. 29). Costa Rica, for its part, in its *Request*<sup>213</sup> refers to "Nicaraguan nationals" (paras. 7-8, 10-11 and 17-18), "Nicaraguans" (paras. 13-14), "Nicaraguan persons" (paras. 19-21), "individuals"

212 ICJ, doc. CRN-NCR 2013/8, of 14.06.2013.

213 ICJ, doc. CRN 2013/14, of 23.05.2013.

(para. 9), and “citizens” (para. 10); and, in its *Written Observations*<sup>214</sup>, Costa Rica refers to “Nicaraguan nationals” (paras. 17-18, 25-27 and 29), “Nicaraguans” (para. 28), Nicaraguan “volunteers” (para. 21), “private individuals” (para. 27), and “persons” (paras. 7 and 28). Both Nicaragua and Costa Rica clearly have in mind human beings, of flesh and bones and soul.

56. States are bound to protect all persons under their respective jurisdictions. Provisional measures, with their preventive nature, appear as truly *tutelary*, rather than only precautionary, purporting to protect individuals also against harassment and threats, thus avoiding “harm in the form of bodily injury or death”. After all, the beneficiaries of the compliance with, and due performance of, obligations under ordered provisional measures of protection, are not only States, but also human beings. A strictly inter-State outlook does not reflect this important point. The strictly inter-State dimension has long been surpassed, and seems insufficient, if not inadequate, to address obligations under provisional measures of protection.

## **XI. The Proper Exercise of the International Judicial Function: A Rebuttal of So-Called “Judicial Self-Restraint”, or *L’Art de ne Rien Faire***

57. The present Order of the Court, on requests for provisional measures in the cases concerning *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica versus Nicaragua), and the *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua versus Costa Rica), suffers from a stark incongruence. The Court reviews the arguments of the parties, and concludes, in respect of Costa Rica’s request, that a change in the situation has occurred, as “organized groups of persons”, - whose presence was not contemplated when it issued its previous decision to indicate provisional measures, - are now “regularly staying in the disputed territory” (para. 25). Though the Court admits a change in the situation, it extracts no consequence therefrom.

58. The Court limits itself to say that, “despite the change that has occurred in the situation”, in its view “the conditions have not been fulfilled for it to modify the measures” that it indicated in its previous Order of 08.03.2011 (para. 35). This conclusion simply begs

---

214 ICJ, doc. CRN-NCR 2013/10, of 20.06.2013.

the question. The Court's majority feels free to introduce an artificial and surrealist distinction between "potential risk" and "real and imminent risk" of irreparable prejudice (nothing but a *jeu de mots*), and even to add that the "potential risk" that it beholds "is exarcebated" (!!!) by "the presence of organized groups of Nicaraguan nationals" in the disputed area of "limited size" (para. 36).

59. It admits that incidents may any time occur, entailing "personal injury, as well as environmental damage" (para. 36). The truth is that all risks are ultimately *potential*, without ceasing to be likewise real and imminent. And the new situation created in the disputed area in the *cas d'espèce* clearly calls for new provisional measures, in order to prevent or avoid irreparable harm to the persons concerned and to the environment. The new provisional measures here proposed would make it clear that each Party shall refrain from sending to, or maintaining in, the disputed area, including the *caño*, not only any *personnel* (whether civilian, police or security), but also "organized groups" of individuals, or any "private individuals".

60. As a matter of fact, this is not the first time that the Court discloses its unjustified "judicial self-restraint" (so praised in traditionally conservative, if not reactionary, segments of the legal profession) in respect of provisional measures of protection, even when faced with the presence of the prerequisites of *urgency* and the *probability of irreparable harm*. Four years ago, it did so in its Order of 28.05.2009 in the case concerning the *Obligation to Prosecute or Extradite* (Belgium *versus* Senegal), wherein it refrained from ordering or indicating the requested provisional measures of protection.

61. On the occasion, I appended an extensive Dissenting Opinion (paras. 1-105) to that Order, seeking to preserve the integrity of the *corpus juris* of the 1984 U.N. Convention against Torture. Shortly after the Court's Order of 28.05.2009 wherein it found that the circumstances of the case were, in its view, not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures, there followed a succession of uncertainties (*infra*), amidst the emptiness of the Court's self-imposed "restraint", and its apparent insensitiveness towards the underlying human values.

62. On that occasion, contrary to the Court's majority, I sought to demonstrate that there was manifest urgency in the situation affecting surviving victims of torture, or their close relatives, in respect of their

right to the realization of justice under the U.N. Convention against Torture. As I have recently recapitulated<sup>215</sup>, the Court preferred to rely comfortably on an unilateral act of promise (conceptualized in the traditional framework of inter-State relations) made by the respondent State in the course of the legal proceedings before itself. That pledge, in my view, did not remove the prerequisites of urgency and probability of irreparable harm for the indication of provisional measures<sup>216</sup>, nor did it efface the longstanding sufferings of the Habré regime, in their saga of more than two decades in search of the realization of justice.

63. Yet the Court took a passive posture, reduced to that of an expectator of subsequent events. In effect, following the Court's Order of 28.05.2009, no initiative was taken in the respondent State towards the trial of Mr. Hissène Habré in Senegal; the return to Mr. H. Habré to Chad was announced, as well as his imminent expulsion from Senegal, which was then cancelled in the last minute under public pressure<sup>217</sup>. The Court was lucky that Mr. H. Habré did not escape from his house *surveillance* in Dakar, and that he was not expelled from Senegal. Instead of assuming its own control over the situation, the self-restrained Court preferred to count on the imponderable, on *la fortuna*. The Court cannot keep on counting on the imponderable, as *la fortuna* may at any time turn against it. As Sophocles, in his perennial wisdom, warned, through the voices of the chorus of one of his tragedies: count no man happy till he passed the final threshold of his life secure from pain<sup>218</sup> (bodily or spiritual harm).

64. In the present Order that the Court has just adopted today, 16 July 2013, it has exercised self-restraint once again: this time, after finding that there has been a change in the situation, it has added that the circumstances presented to it, nevertheless, are not such as to require modification of its previous Order of 08.03.2011, which is simply reaffirmed. Moreover, it "does not see (...) the evidence of urgency" (para. 34). The Court's reasoning rests on a *petitio principii*, adducing no persuasive argument to support its decision not to order

---

215 Cf. ICJ, case concerning the *Obligation to Prosecute or Extradite* (merits, Belgium *versus* Senegal), Judgment of 20.07.2012, Separate Opinion of Judge Cañado Trindade, paras. 82-103.

216 Cf. *ibid.*, para. 79.

217 Cf. *ibid.*, paras. 73-75.

218 Sophocles, *Oedipus the King* (circa 429 b.C.), verse 1684.

new provisional measures in face of the new situation. The Court limits itself to reasserting the previous provisional measures, addressed to a new and distinct situation, which the Court admits has now changed.

65. The Court has preferred to indulge into an unfortunate formalism, limiting itself to add that, despite the change in the situation, “the conditions have not been fulfilled for it to modify the measures that it indicated in its Order of 8 March 2011” (paras. 34-35). This is a *petitio principii*, whereby the Court unduly establishes a further test for the indication of provisional measures, rendering it more difficult - or simply avoiding - to order these latter, at variance with its *interna corporis*. The Court does not elaborate on its *dictum*, nor does it provide any demonstration whatsoever to corroborate its assertion. Its ineluctable incongruence lies in the fact that, once it finds that there is a change in the situation, it fails to modify - or rather expand - its previous Order, so as to face the new situation, endowed with the requisite elements of risk (in the form of bodily harm or death, and harm to the environment) and urgency.

66. The ICJ has not adopted new provisional measures in the present Order simply because it did not want to adopt them, for reasons which escape beyond my comprehension. The Court, from now on, will once again only hope for the best, but not without expressing its “concerns” with regard to the new situation (para. 36), given the ostensible risk and the probability of harm posed by it. Instead of remaining preoccupied, the ICJ should have ordered the new provisional measures required by the new situation created in the disputed area. Once again, the Court will nourish the hope that fate is on its side, oblivious of the extreme care with which someone so familiar with human suffering and tragedy like Cicero approached fate, in one of his fragmented reflections<sup>219</sup>. Even so, despite all his awareness, Cicero did not cross over the final threshold of his life secure from pain: at the end of his path, he suffered bodily injuries and violent death...

67. The ICJ, on 08.03.2011, ordered provisional measures not simply because the persons present in the disputed area were *personnel* (whether civilian, police or security) but also because their presence therein presented a risk to the fragile ecosystem of the disputed area, and a risk of irreparable harm in the form of bodily injury or death

---

219 M.T. Cicero, *On Fate [De Fato]* (circa 44 b.C.), fragments 41-43.

(para. 75). The new situation, i.e., the presence of “organized groups” of *private individuals* in the disputed area, discloses in my view new circumstances, which clearly call for the indication of additional provisional measures. The change in the situation, endowed with urgency and the probability of irreparable harm, thus provides a basis for the modification of the Court’s previous Order, in the light of the provisions of Article 41 of the Statute and Article 76(1) of the Rules of Court.

68. Moreover, the Court’s reasoning is far from coherent when, at the end of the present Order, it recognizes that the presence of “organized groups” of individuals in the disputed area is liable to create “the potential risk of incidents which might entail personal injury” as well as “environmental damage”, taking into account in particular “the limited size of the area” at issue and the “numbers of Nicaraguan nationals” staying there (para. 36). If the Court expressly recognizes such risk and the probability of irreparable harm, and expresses its “concerns” with this new situation (para. 36), it is then clear that the provisional measures already ordered should be modified, or expanded, so as to face this new situation. That the Court has not done so, in face of the likelihood of bodily harm or death of the individuals staying in the disputed area, is a cause of concern to me, as the rights at issue - and the corresponding obligations - are beyond the strictly inter-State dimension, and the Court seems not to have valued this as it should.

## **XII. Epilogue: Towards an Autonomous Legal Regime of Provisional Measures of Protection**

69. I have already made the point that the strictly inter-State dimension has long been surpassed, and appears inappropriate to address obligations under provisional measures of protection; I have done so in other cases taken before the ICJ, as well as in another international jurisdiction<sup>220</sup>, and I have deemed it fit to dwell further

---

220 Cf. A.A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006)*, México, Edit. Porrúa/Universidad Iberoamericana, 2007, pp. 925, 935, 947, 952, 958, 974, 977, 981, 985, 991, 1010 and 1014; A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires/ Argentina, Edit. Ad-Hoc, 2013, pp. 22-28, 77-90, 106-113 and 175-179; A.A. Cançado Trindade, “La Hu-

upon it in the present Dissenting Opinion (*supra*). The handling of cases from a strict and exclusively inter-State perspective or dimension, irrespective of their circumstances, no longer reflects the complexity of the contemporary international legal order. In my understanding, the institute of provisional measures of protection stands in need of a conceptual refinement, in all its aspects. This leads me into the last point of the present Dissenting Opinion, namely, the needed construction of an *autonomous legal regime* of provisional measures of protection, as I perceive it.

70. Compliance with provisional measures of protection runs parallel to the course of proceedings leading to the Court's subsequent decision on the merits of the cases at issue. Should the Court find, e.g., a breach of international law in its decision on the merits of a given case, and, parallel to that, it further finds non-compliance with its provisional measures, this latter is an *additional* breach of an international obligation. In its work in the present context, the Court still has before itself the task of elaborating on the *legal consequences* of non-compliance with provisional measures, endowed, in my perception, with an autonomy of their own.

71. Provisional measures of protection indicated or ordered by the ICJ (or other international tribunals) generate *per se* obligations for the States concerned, which are distinct from the obligations which emanate from the Court's (subsequent) Judgments on the merits (and on reparations) of the respective cases. In this sense, in my conception, provisional measures have an autonomous legal regime of their own, disclosing the high relevance of their *preventive* dimension. Parallel to the Court's (subsequent) decisions on the merits, the international responsibility of a State may be engaged for non-compliance with, or breach of, a provisional measure of protection ordered by the Court (or other international tribunals).

72. My thesis, in sum, is that provisional measures, endowed with a conventional basis, - such as those of the ICJ (under Article 41 of the Statute), - are also endowed with autonomy, have a legal regime of their own, and non-compliance with them generates the responsibility of the State, entails legal consequences, without prejudice of the

---

manización del Derecho Internacional y los Límites de la Razón de Estado", 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* - Belo Horizonte/Brazil (2001) pp. 11-23.

examination and resolution of the concrete cases as to the merits. This discloses their important preventive dimension, in their wide scope. The proper treatment of this subject-matter is the task before this Court, now and in the years to come.

73. The *juridical nature* of provisional measures, with their preventive dimension, has lately been clarified by a growing case-law on the matter, - as those measures came to be increasingly indicated or ordered, in recent years, by contemporary international<sup>221</sup>, as well as national<sup>222</sup>, tribunals<sup>223</sup>. Soon the recourse to provisional measures of protection, also at international level, had the effect of expanding the domain of international jurisdiction, with the consequent reduction of the so-called “reserved domain” of the State<sup>224</sup>. This grows in importance in respect of regimes of *protection*, such as those of the human person<sup>225</sup> as well as of the environment. The clarification of the juridical nature of provisional measures is, however, still the initial stage of the evolution of the matter, - to be followed, in our days, in my understanding, by the elaboration on the *legal consequences* of non-compliance with those measures, and the conceptual development of what I deem it fit to call their *autonomous legal regime*.

74. What leads me to leave on the records, in the present Dissenting Opinion, my position on the matter, - which I have been sustaining for years<sup>226</sup>, - is not a lack of confidence in the contending parties

---

221 Cf. R. Bernhardt (ed.), *Interim Measures Indicated by International Courts*, Berlin/Heidelberg, Springer-Verlag, 1994, pp. 1-152.

222 Cf. E. García de Enterría, *La Batalla por las Medidas Cautelares*, 2nd. [enlarged] ed., Madrid, Civitas, 1995, pp. 25-385.

223 Cf. also L. Collins, “Provisional and Protective Measures in International Litigation”, 234 *Recueil des Cours de l’Académie de Droit International de La Haye* (1992) pp. 23, 214 and 234.

224 P. Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, Paris, Libr. Rec. Sirey, 1931, pp. 15, 174, 186, 188 and 14-15, and cf. pp. 6-7 and 61-62.

225 Cf., e.g., E.R. Rieter, *Preventing Irreparable Harm - Provisional Measures in International Human Rights Adjudication*, Maastricht, Intersentia, 2010, pp. 3-1109; C. Burbano Herrera, *Provisional Measures in the Case-Law of the Inter-American Court of Human Rights*, Antwerp, Intersentia, 2010, pp. 1-221; among others. On the needed new mentality, and its benefits, in the present domain of protection, cf., in general, [Various Authors,] *Le particularisme interaméricain des droits de l’homme* (eds. L. Hennebel and H. Tigroudja), Paris, Pédone, 2009, pp. 3-413.

226 Cf. A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, 2nd. ed., Belo Horizonte/Brazil,

complying with them: I dare to nourish the hope that they will, and the 16 communications (already referred to) that they have submitted to the ICJ, seeking to comply with its Order of 08.03.2011, disclose their awareness and good will. The two contending parties come both from a part of the world, Latin America, with a longstanding and strong tradition in international legal doctrine. What leads me to leave on the records my dissenting position, is the Court's self-restraint, and the incongruence of its reasoning (cf. *supra*), in a matter of such importance for the progressive development international law. I have cared to take the time and work to leave on the records the present Dissenting Opinion, so as to render a service to our mission of imparting justice.

75. In effect, the notion of victim (or of *potential* victim<sup>227</sup>), of injured party, can thus emerge also in the context proper to provisional measures of protection, parallel to the merits (and reparations) of the *cas d'espèce*. Provisional measures of protection generate obligations (of prevention) for the States concerned, which are distinct from the obligations which emanate from the Judgments of the Court as to the merits (and reparations) of the respective cases. This ensues from their autonomous legal regime, as I conceive it. There is, in my perception, pressing need nowadays to refine and to develop conceptually this autonomous legal regime, - focused, in particular, on the contemporary expansion of provisional measures, the means to secure due and prompt compliance with them, and the legal consequences of non-compliance, - to the benefit of those protected thereunder.

76. In this matter, the worst possible posture would be that of passiveness, if not indifference, that of judicial inactivism. As I warned in an earlier Dissenting Opinion (cf. *supra*) and reiterate now in the present one, the matter before the Court calls for a more proactive posture on its part<sup>228</sup>, so as not only to settle the controversies

---

Edit. Del Rey, 2013, ch. XXI: "The Preventive Dimension: The Binding Character and the Expansion of Provisional Measures of Protection", pp. 177-186.

227 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 Haye* (1987), ch. XI, pp. 243-299, esp. pp. 271-292.

228 In likewise advocating such pro-active posture of the Court in respect of provisional measures of protection, in my earlier Dissenting Opinion in the Court's Order of

filed with it, but also to tell what the Law is (*juris dictio*), and thus to contribute effectively to the avoidance or prevention of irreparable harm in situations of urgency, to the ultimate benefit of *all* subjects of international law, - States as well as groups of individuals, and *simples particuliers*. After all, the human person (living in harmony in her natural habitat) occupies a central place in the new *jus gentium* of our times.

#### **4. SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE IN THE CASE OF CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA (Costa Rica versus Nicaragua, Order of 22.11.2013)**

##### **I. Introduction**

1. In its previous Order, of 16.07.2013, in the present case opposing Costa Rica to Nicaragua, in which the International Court of Justice [ICJ] refrained from indicating new provisional measures of protection,

---

28.05.2009 in the case of *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium versus Senegal), I deemed it fit to recall that the Court is not restricted by the arguments of the parties, as confirmed by Article 75(1) and (2) of the Rules of Court. Article 75(1) sets forth that “the Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties”. And Article 75(2) determines that “when a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request”. Article 75(1) and (2) of the Rules of Court, - I proceeded in my Dissenting Opinion, - thus expressly entitles it to indicate, *motu proprio*, provisional measures that it regards as necessary, even if they are wholly or in part distinct from those that are requested. A decision of the ICJ indicating provisional measures in the present case, - as I sustained, - “would have set up a remarkable precedent in the long search for justice in the theory and practice of international law”, as this was “the first case lodged with the ICJ on the basis of the 1984 United Nations Convention against Torture”, the first human rights treaty incorporating the principle of universal jurisdiction as an international obligation of all States Parties (para. 80). And I further recalled (para. 81) that the ICJ has made use of its prerogatives under Article 75 of its Rules on some previous occasions, as illustrated by its Orders of Provisional Measures, invoking Article 75(2), in the cases concerning the *Application of the Convention against Genocide* (Bosnia-Herzegovina versus Yugoslavia, 08.04.1993, para. 46), the *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon versus Nigeria, 15.03.1996, para. 48), the *Armed Activities on the Territory of the Congo* (Congo versus Uganda, 01.07. 2000, para. 43), and, more lately, the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia versus Russian Federation, 15.10.2008, para. 145).

I presented a Dissenting Opinion expressing the foundations of my personal position on the matter; today, 22.11.2013, as the Court has now decided to order new provisional measures of protection in the case concerning *Certain Activities Carried out by Nicaragua in the Border Area*, I have concurred with my vote to the adoption of the present Order. As there are still a couple of points which appear to me deserving of closer attention, I feel thus obliged to leave on the records the reflections which form the present Separate Opinion, wherein I care - under the merciless pressure of time - to address those points and to lay the foundation of my personal position thereon.

2. To start with, I deem it appropriate to extract, from the corresponding *dossier* of the present case, the submissions of the parties which seem to me particularly pertinent for the consideration of the new factual situation brought to the attention of the Court. I shall then move on the juridico-epistemological level, so as to focus on the questions of the configuration of the autonomous legal regime (as I perceive and conceive it) of Provisional Measures of Protection. In doing so, I shall address the task of international tribunals, and a reassuring jurisprudential construction (2000-2013). I shall, in sequence, overview the on-going construction of an autonomous legal regime of provisional measures of protection. The way will then be paved for the presentation of my final considerations on the matter.

## **II. Submissions of the Parties in the Course of the Present Proceedings**

### **1. Submissions in the Written Phase**

3. May I start at the factual level. In its new *Request for Provisional Measures* lodged with the Court on 24.09.2013, Costa Rica stated that this new Request was “an independent request based on new facts” (para. 4). After invoking its rights to territorial sovereignty and integrity, and to non-interference with its land and environmentally-protected areas (paras. 21-22), Costa Rica asked the Court for four provisional measures, transcribed in paragraph 15 of the present Order. The *next* facts brought to the Court’s attention in the present Request for new provisional measures in the *cas d’espèce* concerning *Certain Activities Carried out by Nicaragua in the Border Area*, are in fact, all of them, subsequent to the Court’s previous Orders in the present case (of 08.03.2011 and 16.07.2013), certainly to the construction of

two “caños”, and the existence of a Nicaraguan military encampment, allegedly in “disputed territory”.

4. Costa Rica argued that the new dredging and dumping activities allegedly conducted by Nicaragua were affecting the disputed territory and its ecology (paras. 1 and 10-11). For its part, in a *Diplomatic Note* of 18.09.2013, Nicaragua opposed those contentious, arguing that, in its previous Order of 16.07.2013, the ICJ determined that the provisional measures previous indicated (on 08.03.2011) could not be modified, as Costa Rica had not demonstrated urgency nor risk of irreparable harm (pp. 1-2).

5. The present proceedings concerning *Certain Activities Carried out by Nicaragua in the Border Area* have demonstrated the importance of holding public sittings of the ICJ, in the matter of provisional measures, for the clarification of a given factual situation. After all, to the effect of the adoption of its Orders on such matters, the ICJ gathers *prima facie* - rather than substantial - evidence (*summaria cognitio*), and then renders a *binding* decision, as its provisional measures are endowed with a conventional basis (Article 41 of its Statute).

## 2. First Round of Oral Arguments

6. It was, in effect, in the oral proceedings (rather than in the written phase) that the two contending parties found the occasion to present to the ICJ their submissions in a more elaborate way. The public hearings of 14-17 October 2013 were in my view essential for the clarification of the position of the parties as to the newly requested provisional measures of protection lodged with the Court. I shall next review such submissions, and then proceed to a general assessment of them.

7. In the first round of oral arguments, Costa Rica argued that, despite the provisional measures of protection indicated by the Court in its Order of 08.03.2011<sup>229</sup>, and its concerns expressed in its Order of 16.07.2013, “Nicaragua continues to send groups of Nicaraguan nationals to the disputed area”, and, furthermore, “it is engaged in the construction of two new *caños* in the northern part of Isla Portillos”, with a “real risk” of creating “a *fait accompli* involving irreparable

---

229 ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica versus Nicaragua), Provisional Measures, Order of 08.03.2011, *I.C.J. Reports* (2011) p. 6.

damage”, before the case is finally settled by the ICJ<sup>230</sup>. There has thus been, - Costa Rica proceeded, - an “egregious breach” of the provisional measures<sup>231</sup>. Costa Rica then stated that

Since that time, work on the Pastora first *caño* has been continued, including by more than 10,000 Sandinista youth who have been officially brought to the area to further Nicaragua’s policies. (...) Nicaraguan personnel have been in the disputed territory carrying out dredging and other works, as late as 18 September 2013<sup>232</sup>.

8. After the Court’s Order of 08.03.2011, - Costa Rica proceeded, - Nicaragua “changed the existing situation by occupying the territory”, and continuing “to send government personnel and, in particular, the head of the works, Commander Pastora, as well as numerous contingents of Nicaraguans who, by the Respondent’s own admission, are engaging in so-called ‘environmental’ activities”<sup>233</sup>. In Costa Rica’s perception, “Nicaragua has resorted to a piece of ‘sophistry’, namely, that the provisional measures ordered by the ICJ “prevented Nicaraguan personnel, but not citizens, from entering the disputed territory and planting trees”<sup>234</sup>. And Costa Rica added that

(...) Nicaragua has undertaken action on that territory on a major scale, with dredgers and chainsaws, which it has taken several weeks to carry out. It is thus not sufficient to remind the Parties of the existing obligation not to send personnel, but it is necessary to order a measure requiring the cessation of all canalization, dredging or other works in the disputed territory, and that no further works should be carried out in the future. It also requires that Nicaragua be ordered to dismantle all infrastructure on the territory and to refrain from introducing any more *pendente lite*. The same applies to the equipment used to carry out the works of canalization. (...) [T]he provisional measures of 2011 are

230 ICJ, doc. CR 2013/24, p. 14, para. 8.

231 Costa Rica added that, moreover, Nicaragua announced, “at the very last moment”, that “it had withdrawn from the disputed territory, though without admitting it had ever been there (...) in the first place” ICJ, doc. CR 2013/24, p. 34, para. 1.

232 ICJ, doc. CR 2013/24, p. 36, para. 7, and cf. p. 44, par. 32.

233 ICJ, doc. CR 2013/24, p. 54, para. 24.

234 ICJ, doc. CR 2013/24, pp. 59-60, para. 37.

incapable of preventing canalization or other works being continued or resumed<sup>235</sup>.

9. Nicaragua retorted that Costa Rica also violated the Court's Order "by overflights and visits to the disputed area" without fulfilling its requirements", and by the construction of the road "running along 160 km of the border of Nicaragua and Costa Rica and along the margin of the greater part of the San Juan River (...) without any environmental impact assessment and without any notice to Nicaragua"<sup>236</sup>. Nicaragua then denied that 10,000 members of the *Guardabarranco* group had been in the territory in dispute, as alleged by Costa Rica; there were only "small groups of youngsters" visiting "the place for a short period of time"; they "have not performed any work on the *caño*", and they caused no damages to the disputed territory<sup>237</sup>.

10. Nicaragua then added that Mr. E. Pastora "was wrong" in claiming (in a television interview in a news programme) that his works of "clearing or constructing *caños*" at the at the mouth of the San Juan River were conducted "in areas not covered by the Court's Order"<sup>238</sup>. Nicaragua observed that it "had not authorized any dredging or *caño* clearing activities in the disputed area", to comply "fully" with the Court's Order of 08.03.2011. And Nicaragua added:

Mr. Pastora himself knew that this was Nicaragua's policy. In the television interview (...) he insisted repeatedly that his actions were consistent with the Court's Order, as he understood it. Of course, he was wrong; and this does not exonerate Nicaragua of responsibility for his behaviour. Nicaragua has never said otherwise. But it does explain what happened. (...) There was no intention by Nicaragua to change the natural course of the San Juan River. What happened was that Mr. Pastora exceeded his mandate, and engaged in activities in the disputed area because he had an erroneous understanding of the Court's Order, specifically in regard to what constituted the disputed area, which was different from Nicaragua's understanding, and

235 ICJ, doc. CR 2013/24, pp. 55-56, paras. 28-29.

236 ICJ, doc. CR 2013/25, pp. 9-10, paras. 6-7.

237 ICJ, doc. CR 2013/25, pp. 12-13, paras. 20-22.

238 In its clarification, it was "plain to Nicaragua from Mr. Pastora's indication of the location of his activities that they were inside the disputed territory, as defined in the Order"; ICJ, doc. CR 2013/25, p. 22, para. 17.

which Nicaragua did not appreciate, until 18 September [2013]. Since that date, when it learned of his activities, Nicaragua has not denied that they occurred or that they were inconsistent with the Court's Order. To the contrary, what Nicaragua contends, what it has consistently contended, is that it did not instruct or intend for Mr. Pastora to conduct any activities in the disputed area. They were the result of a misunderstanding, not a conspiracy<sup>239</sup>.

11. Nicaragua further added that it had not intended to send Mr. E. Pastora "into the disputed area", but only "to clean up the river and the channels in Nicaragua's undisputed waters. It accepts responsibility for his mistaken and unauthorized actions in the disputed area, and has taken concrete steps to prevent their recurrence"<sup>240</sup>. Yet, - it went on, - the problem now raised before the ICJ is not whether Nicaragua is responsible for the acts *ultra vires* of Mr. E. Pastora; it is a distinct one<sup>241</sup>.

### 3. Second Round of Oral Arguments

12. In the second round of oral arguments, Costa Rica began by stating that "Mr. Pastora and the National Port Authority were organs of the Nicaraguan State", with "actual authority" (at least until 22.09.2013) "to carry out the works in the disputed territory"<sup>242</sup>. Costa Rica stressed that "[t]he only evidence on the record is the specific authorization for Mr. Pastora and the National Port Authority to carry out the project for the 'Improvement of Navigation on the San Juan de Nicaragua River'. We heard nothing about *ultra vires* action on the previous Request"<sup>243</sup>. Costa Rica then added that

Nicaragua now finally accepts that its personnel were constructing and dredging the *caños* (...), its personnel have entered the disputed territory in breach of [the Court's] Order and carried out activities there. It finally accepts that its army, camped in close and convenient proximity to the lagoon at the end of the eastern *caño*,

239 ICJ, doc. CR 2013/25, pp. 22-23, paras. 20-21.

240 ICJ, doc. CR 2013/25, pp. 28-29, paras. 42-43.

241 ICJ, doc. CR 2013/25, pp. 50-51, paras. 21-22.

242 Costa Rica added that, following the Court's Order of 08.03.2011, "they were never prohibited from doing so by any Nicaraguan instruction in evidence"; ICJ, doc. CR 2013/26, p. 12, para. 12.

243 ICJ, doc. CR 2013/26, pp. 12-13, paras. 13-16.

must have known of it. It accepts that it is responsible for the acts of Mr. Pastora, its Government Delegate, and it is responsible for the acts of its government department, the National Port Authority. These reluctant concessions can hardly be considered timely: they finally came yesterday, 36 days after we wrote to protest, 36 days after we provided the co-ordinates of the new *caños*. But Nicaragua has still not admitted that its Mr. Pastora, his dredgers and the National Port Authority personnel were authorized to go there in the first place. (...) [T]hey had ostensible authority to do so, and there is nothing in the evidentiary record to suggest otherwise<sup>244</sup>.

13. Moreover, Costa Rica retorted that “the construction of the new *caños*” could not be portrayed as a “simple blunder”. It insisted on its argument pertaining to the presence of “the Sandinista youths” in the “disputed area”, stating that there was evidence to this effect. Thus, its Note to Nicaragua of 16.09.2013 “not only protested the construction of new *caños*, but it pointed out that the Nicaraguan media reported on 9 September that some 10,000 youths had already visited the area”<sup>245</sup>. Costa Rica further stated that “Nicaragua admitted that it has breached the 2011 Order”; yet, it has provided “no evidence (...) about the present state of the *caño*, its depth, its carrying capacity, its length”<sup>246</sup>. To Costa Rica,

Nicaragua’s belated explanations (...) do not provide sufficient protection of Costa Rica’s rights. (...) Yesterday Nicaragua told [the ICJ] that it had breached [its] 2011 Order; (...) the measures Costa Rica requests are urgently needed to prevent irreparable prejudice to its rights. (...) Costa Rica merely asks the Court to exercise its power to preserve and protect Costa Rica’s rights; rights which are at imminent risk of being irreparably harmed<sup>247</sup>.

14. For its part, Nicaragua, at the second round of oral arguments, began by stating that “Mr. Pastora did what he did, and Nicaragua does not deny responsibility for his actions. (...) The evidence shows that Nicaragua did not ‘send’ Mr. Pastora to the disputed area, or

244 ICJ, doc. CR 2013/26, pp. 20-21, para. 43, and cf. paras. 40 and 46.

245 ICJ, doc. CR 2013/26, pp. 22-23, para. 47.

246 ICJ, doc. CR 2013/26, p. 22, para. 48.

247 ICJ, doc. CR 2013/26, p. 34, para. 3.

'maintain' him there, as prohibited by the first operative paragraph of the Court's March 2011 Order"<sup>248</sup>. And Nicaragua added that

It is notable that Costa Rica's Request for New Provisional Measures does not complain about the presence of this military camp, which is in plain sight. (...) This is offered as evidence that a crew of workmen was clearing *caños* in the wetland, not that Nicaragua is unlawfully (...) maintaining a small military camp on the beach. There is no mention of the military camp anywhere in Costa Rica's Request<sup>249</sup>.

15. As to the works carried out under the direction of Mr. E. Pastora, - which Costa Rica alleges were undertaken in the "territoire contesté", - Nicaragua argues that, in requesting "le retrait du petit détachement nicaraguayen stationné sur la rive gauche, le Costa Rica modifie la définition même du "territoire contesté" (...). (...) [C]eci constitue une prétention nouvelle qui ne saurait être formulée à ce stade: c'est la requête qui fixe les contours de l'affaire (...). Le Costa Rica ne peut aujourd'hui s'en dédire pour élargir la portée de sa requête en redéfinissant subrepticement son champ d'application territoriale"<sup>250</sup>. Yet, it conceded that

le Nicaragua était "peut-être" responsable des actions de M. Pastora. (...) [M]ême s'il n'est pas ministre mais seulement assimilé à un directeur d'administration centrale, M. Pastora exerce des fonctions officielles"; - les travaux effectués sur les canaux (...) sont, sans aucun doute, incompatibles avec les indications de votre ordonnance de 2011; et - ces mesures (...) sont juridiquement obligatoires pour les Parties (ICJ, doc. CR 2013/27, p. 33, para. 18).

#### 4. General Assessment

16. The point which was object of most submissions of the parties (*supra*) during the oral hearings of 14-17 October 2013 was the dredging and dumping works undertaken, allegedly by Nicaragua, after June 2013, in the construction to the two "*caños*" in the disputed area. In its own assessment, the Court found, in the present Order, that, in the

248 ICJ, doc. CR 2013/27, p. 13, para. 22.

249 ICJ, doc. CR 2013/27, p. 17, para. 36.

250 ICJ, doc. CR 2013/27, p. 31, para. 13.

new situation thus created in the “disputed territory”, the requisites of urgency and real and imminent risk of “irreparable prejudice” are present therein (paras. 48-49), requiring from it new Provisional Measures of Protection.

17. The dredging operations for the construction of the two “caños”, the Court added, - “were conducted by a group of Nicaraguan nationals led by Mr. Pastora”, who was officially appointed “to carry out the project” (para. 45). Such construction and the digging of the trench, in the Court’s own assessment, “appear, *prima facie*, to be attributable to Nicaragua” (para. 44); they have caused “a change in the situation in the disputed territory”, after its recent Order of 16.07.2013. The Court then decided to indicate the new Provisional Measures contained in the Order it has just adopted today, 22.11.2013.

18. As to the other point which was object of submissions of the parties, concerning the Nicaraguan military encampment in the area, it appears from the arguments of the parties during the oral hearings held in October 2013<sup>251</sup>, and from the complementing evidence which the Parties submitted to the Court (photographs and satellite images), that there is a Nicaraguan military encampment indeed exists in the region, and after the Court’s previous Order of 08.03.2011. As to its location, the contending parties submitted arguments as to its presence within “disputed territory”<sup>252</sup>, as defined by the Court’s Order of 08.03.2011<sup>253</sup>.

19. The evidence submitted to the Court, however, led to its finding that the military encampment is indeed located within the “disputed territory”, as the Court has concluded in the present Order (para. 46); the Court added that the “ongoing presence of this encampment” is confirmed by recent satellite images and photograph

---

251 Cf., e.g., ICJ, doc. CR 2013/26, pp. 19-20, paras. 35-39 (Costa Rica); doc. CR 2013/25, p. 29, paras. 43-44 (Nicaragua), and doc. CR 2013/27, pp. 16-17, paras. 35-37 (Nicaragua).

252 The Court defined the “disputed territory” as “the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon” (para. 55).

253 While Costa Rica claimed that the encampment is within the “disputed territory” as defined by the Court, Nicaragua contended that Costa Rica did not complain about the camps until the first day of the hearings, and that, in any event, the encampment is not located within the “disputed territory” as defined by the Court. Cf., e.g., doc. CR 2013/25, p. 29, paras. 43-44, and cf. also doc. CR 2013/27, pp. 16-17, paras. 35-37.

(para. 46). Recalling, in this respect, that that the previous Order of 08.03.2011 determined that the Parties ought to “refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security” (para. 86(1)), it has become undisputable that the presence of the Nicaraguan military encampment in the disputed territory, after the Order of 08.03.2011, is in clear breach of that Order.

### III. The Configuration of the Autonomous Legal Regime of Provisional Measures of Protection

#### 1. The Task of International Tribunals

20. The new facts of the present case (*supra*) bring to the fore, in a prominent way, the issue of the necessary *compliance* with Provisional Measures of Protection. This issue can be properly addressed, in my understanding, within the framework of what I behold as the *autonomous* legal regime of those measures. To embark on this task, I move from the factual context onto my considerations at the juridico-epistemological level. Preliminarily, I deem it fit to point out that, it has been in the era of contemporary international tribunals that Provisional Measures of Protection have seen the light of day, and have flourished, in international legal procedure.

21. It was indeed with the advent of international tribunals that the conditions were met to move ahead with provisional measures, in the pursuit of the realization of justice, to the benefit of the *justiciables* in distinct domains of international law. In the historical trajectory of international tribunals, there are antecedents disclosing that, even at an early stage, one purported to ascribe *obligatory* character to provisional measures indicated or ordered by them. This is pointed out, for example, in a pioneering study on the matter by Paul Guggenheim, given to the public in 1931<sup>254</sup>. Yet, progress in this respect has been very slow: for example, it has taken more than half a century for the ICJ to reach the obvious conclusion, in 2001, that provisional measures are, under its Statute<sup>255</sup>, binding.

---

254 Cf. P. Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, Paris, Rec. Sirey, 1931, p. 177.

255 I.e. endowed with a conventional basis (Article 41).

22. Yet, since the beginning of the evolution of Provisional Measures of Protection in international legal procedure, the issue of compliance with them was already present, but was not sufficiently studied and cultivated, and, after several decades, there still remains nowadays much to be studied and cultivated in this matter. Already in the days of the Permanent Court of International Justice (PCIJ), there were indications that provisional measures were meant to be obligatory, in particular those ordered by the PCIJ and other international tribunals (such as the old Central American Court of Justice)<sup>256</sup>; already in the era of the League of Nations, those measures were meant to have *legal effects*<sup>257</sup>.

23. In his early study, P. Guggenheim lucidly drew attention to the importance of Provisional Measures of Protection, ultimately, to the progressive development of international law itself<sup>258</sup>. Writing in 1931, the learned author warned that one of the points to be solved in the future, was *to secure compliance with, and the faithful execution of, those provisional measures*<sup>259</sup>. And the learned author added, with insight, as to the consequences of breach of provisional measures, that

Tôt ou tard, la jurisprudence de la Cour Permanente de Justice Internationale ou des tribunaux compétents réussira certainement à faire admettre que l'inexécution des mesures provisoires ordonnées par ces juridictions, en raison du dommage causé (avec ou sans la faute de l'auteur), a pour effet juridique d'ouvrir un droit à la réparation du dommage. (...) (...) [I] ne semble guère possible de substituer à la responsabilité qui incombe en dernier lieu à ces membres [de la communauté internationale elle-même] des mesures provisoires des organes collectifs institués par eux. Néanmoins, les grandes décisions 'définitives' de la vie internationale - qu'elles soient d'ordre politique ou d'ordre juridique - ont, elles aussi, en fin de compte, un caractère provisoire,

256 Cf., in this sense, P. Guggenheim, *op. cit. supra* n. (26), pp. 24-25, 71-72, 177 and 187, and cf. p. 33;

257 *Ibid.*, p. 58.

258 Cf. *ibid.*, pp. 195-196.

259 As "le droit international, de nos jours, ne dispose pas encore, le plus souvent, de moyens propres pour assurer l'exécution de ses ordres ou pour contrôler du moins l'exécution des ordonnances de ses organes collectifs"; *ibid.*, p. 175, and cf. p. 59.

conformément à l'adage, d'une si profonde vérité : 'Il n'y a que le provisoire qui dure'<sup>260</sup>.

24. As I pointed out almost one decade ago, the gradual conceptualization of the *autonomous* international responsibility in respect of Provisional Measures of Protection owes much to the expansion of those measures at international level in our times, calling for the configuration of a legal regime of their own<sup>261</sup>, thanks to the operation of contemporary international tribunals. In our days, there is indeed a growing attention to the importance of Provisional Measures of Protection in expert writing<sup>262</sup>, but advances in case-law remain rather slow, as international tribunals have not yet elaborated on their *autonomous legal regime*, nor have they so far extracted the legal consequences of non-compliance with those measures. But at least the issue has been identified for forthcoming developments, hopefully.

## 2. A Reassuring Jurisprudential Construction (2000-2013)

25. And there have, however, been some endeavours clearly to this effect. Within the ICJ, for example, in my Dissenting Opinion in the Court's Order (of 28.05.2009) in the case of *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal), in which the Court refrained from indicating the requested provisional measures of protection, I deemed it fit to examine, *inter alia*, the transposition of such measures from legal proceedings in comparative domestic procedural law onto the international legal procedure (paras. 5-7) and

<sup>260</sup> *Ibid.*, pp. 197-198.

<sup>261</sup> Cf. 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.

<sup>262</sup> Cf., *inter alia*, e.g., [Various Authors,] *Le contentieux de l'urgence et l'urgence dans le contentieux devant les juridictions internationales: regards croisés* (eds. H. Ruiz Fabri and J.-M. Sorel), Paris, Pédone, 2003, pp. 7-180 and 205-210; 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), Civitas/Thomson Reuters, 2012, pp. 99-117; T. Treves, "Mesures conservatoires et obligations environnementales - Tribunal International du Droit de la Mer et Cour Internationale de Justice", in *ibid.*, pp. 119-137; and cf., for a general study, Eva Rieter, *Preventing Irreparable Harm - Provisional Measures in International Human Rights Adjudication*, Maastricht, Intersentia, 2010, pp. 3-1109.

their juridical nature and effects (paras. 8-13). I then drew attention to the relevance of *compliance* with provisional measures of protection, which has “a direct bearing upon the rights invoked by the contending parties” (para. 14).

26. In reality, depending on the rights which are at stake, provisional measures may assume a character, more than precautionary, truly *tutelary*, directly related, as they are, to the realization of justice itself. In that same Dissenting Opinion I pondered that, this being so, provisional measures of protection, “with their preventive dimension, can indeed contribute to the development of international law” (para. 94). For that to happen, there remains a long way to go, in the refinement of their autonomous legal regime, as I have further pointed out on earlier occasions.

27. It is necessary, to start with, to bear in mind the advances already achieved in international case-law in this respect. One decade ago, in 2000, I had the occasion, in another international jurisdiction, to dwell upon the *legal nature* of provisional measures of protection<sup>263</sup>. Half a decade later the time seemed ripe, on the basis of the experience accumulated on the matter, to dwell upon the *autonomous legal regime* of those measures<sup>264</sup>. Thus, in the case of the *Community of Peace of San José of Apartadó* (Resolution of 02.02.2006), I stated that

Provisional Measures of Protection bring about obligations for the States at issue, which are distinguished from the obligations which emanate from the respective Judgments as to the merits of the respective cases. There are effectively obligations emanated from Provisional Measures of Protection *per se*. They are entirely distinct from the obligations which eventually ensue from a Judgment as to the merits (and also, reparations) on the *cas d’espèce*. This means that Provisional Measures of Protection constitute

---

263 Cf. Inter-American Court of Human Rights [IACtHR], case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (Resolution of 18.08.2000), Concurring Opinion of Judge Cançado Trindade, paras.13-25.

264 Cf. IACtHR. case of *Eloísa Barrios and Others* (Resolution of 29.06.2005), Concurring Opinion of Judge Cançado Trindade, paras. 4-11; IACtHR. case of *Eloísa Barrios and Others* (Resolution of 22.09.2005), Concurring Opinion of Judge Cançado Trindade, paras. 2-9; IACtHR, case of the *Children and Adolescents Deprived of Their Freedom in the ‘Complex of Tatuapé’ of FEBEM* (Resolution of 17.11.2005), Concurring Opinion of Judge Cançado Trindade, paras. 30-26.

a juridical institute endowed with an *autonomy* of its own, what, in turn, reveals the high relevance of the *preventive* dimension (...). Provisional Measures of Protection, endowed as they are with autonomy, have a legal regime of their own, and non-compliance with them generates the responsibility of the State, has legal consequences, besides singling out the central position of the victim (of such non-compliance), without prejudice to the examination and resolution of the concrete case as to the merits.

28. One has here in mind, of course, Provisional Measures of Protection endowed with a *conventional* basis, and ordered or indicated by international tribunals. The figure of the “injured party” may thus also appear, in my perception, in the realm of Provisional Measures of Protection, in case of non-compliance with them. Accordingly, non-compliance with, or breach of, such measures, engages autonomously the international responsibility of the State at issue, within the domain of Provisional Measures of Protection<sup>265</sup>, irrespective of the subsequent judgments as to the merits of the concrete cases. Hence the utmost importance of compliance with those measures<sup>266</sup>, for the realization of justice itself.

#### IV. The On-Going Construction of an Autonomous Legal Regime of Provisional Measures of Protection

29. In the previous Court’s Order of 16.07.2013, where it refrained from indicating the requested Provisional Measures of Protection, I presented a Dissenting Opinion wherein, *inter alia*, I sought to demonstrate the need to proceed in the [conceptual] construction of an *autonomous legal regime* of Provisional Measures of Protection (paras. 69-76). To that end, I pondered that

---

265 Cf. also, in this sense, IACtHR, case of the *Prisons of Mendoza* (Resolution of 30.03.2006), Concurring Opinion of Judge Cançado Trindade, paras. 11-12; IACtHR, case of the *Prison of Araraquara* (Resolution of 30.09.2006), Concurring Opinion of Judge Cançado Trindade, paras. 24-25.

266 Cf. in this sense, IACtHR, case of the *Communities of Jiguamiandó and Curbaradó* (Resolution of 15.03.2005), Concurring Opinion of Judge Cançado Trindade, paras. 4 and 10; case of the *Community of Peace of San José of Apartadó* (Resolution of 15.03.2005), Concurring Opinion of Judge Cançado Trindade, paras. 4 and 10; case of the *Indigenous People of Sarayaku* (Resolution of 06.07.2004), Concurring Opinion of Judge Cançado Trindade, paras. 2 and 30.

Compliance with provisional measures of protection runs parallel to the course of proceedings leading to the Court's subsequent decision on the merits of the cases at issue. Should the Court find, e.g., a breach of international law in its decision on the merits of a given case, and, parallel to that, it further finds non-compliance with its provisional measures, this latter is an *additional* breach of an international obligation. In its work in the present context, the Court still has before itself the task of elaborating on the *legal consequences* of non-compliance with provisional measures, endowed, in my perception, with an autonomy of their own.

Provisional measures of protection indicated or ordered by the ICJ (or other international tribunals) generate *per se* obligations for the States concerned, which are distinct from the obligations which emanate from the Court's (subsequent) Judgments on the merits (and on reparations) of the respective cases. In this sense, in my conception, provisional measures have an autonomous legal regime of their own, disclosing the high relevance of their *preventive* dimension. Parallel to the Court's (subsequent) decisions on the merits, the international responsibility of a State may be engaged for non-compliance with, or breach of, a provisional measure of protection ordered by the Court (or other internationaltribunal).

My thesis, in um, is that provisional measures, endowed with a conventional basis, - such as those of the ICJ (under Article 41 of the Statute), - are also endowed with autonomy, have a legal regime of their own, and non-compliance with them generates the responsibility of the State, entails legal consequences, without prejudice of the examination and resolution of the concrete cases as to the merits. This discloses their important preventive dimension, in their wide scope. The proper treatment of this subject-matter is the task before this Court, now and in the years to come (paras. 70-72).

30. This is, after all, - I then proceeded, - a matter of much importance for the progressive development international law (para. 74). A related aspect to be kept in mind, I continued, is

The *juridical nature* of provisional measures, with their preventive dimension, has lately been clarified by a growing case-law on the matter, - as those measures came to be increasingly indicated or ordered, in recent years, by contemporary international<sup>267</sup>, as well as national<sup>268</sup>, tribunals<sup>269</sup>. Soon the recourse to provisional measures of protection, also at international level, had the effect of expanding the domain of international jurisdiction, with the consequent reduction of the so-called 'reserved domain' of the State<sup>270</sup>. This grows in importance in respect of regimes of *protection*, such as those of the human person as well as of the environment. The clarification of the juridical nature of provisional measures is, however, still the initial stage of the evolution of the matter, - to be followed, in our days, in my understanding, by the elaboration on the *legal consequences* of non-compliance with those measures, and the conceptual development of what I deem it fit to call their *autonomous legal regime*. (...)

In effect, the notion of victim (or of *potential* victim<sup>271</sup>), of injured party, can thus emerge also in the context proper to provisional measures of protection, parallel to the merits (and reparations) of the *cas d'espèce*. Provisional measures of protection generate obligations (of prevention) for the States concerned, which are distinct from the obligations which emanate from the Judgments of the Court as to the merits (and reparations) of the respective cases. This ensues from their autonomous legal regime, as I conceive

---

267 Cf. R. Bernhardt (ed.), *Interim Measures Indicated by International Courts*, Berlin/Heidelberg, Springer-Verlag, 1994, pp. 1-152.

268 Cf. E. García de Enterría, *La Batalla por las Medidas Cautelares*, 2nd. [enlarged] ed., Madrid, Civitas, 1995, pp. 25-385.

269 Cf. also L. Collins, "Provisional and Protective Measures in International Litigation", 234 *Recueil des Cours de l'Académie de Droit International de La Haye* (1992) pp. 23, 214 and 234.

270 P. Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, Paris, Libr. Rec. Sirey, 1931, pp. 15, 174, 186, 188 and 14-15, and cf. pp. 6-7 and 61-62.

271 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 Haye* (1987), ch. XI, pp. 243-299, esp. pp. 271-292.

it. There is, in my perception, pressing need nowadays to refine and to develop conceptually this autonomous legal regime, - focused, in particular, on the contemporary expansion of provisional measures, the means to secure due and prompt compliance with them, and the legal consequences of non-compliance, - to the benefit of those protected thereunder" (paras. 73 and 75).

31. By means of the construction of the propounded autonomous legal regime of Provisional Measures of Protection, - I added, - contemporary international tribunals can

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

The contribution of contemporary international tribunals to the conceptualization of the legal regime of Provisional Measures of Protection has been taking place, is on-going; yet, there is still much to be done, there remains a long way to go, in the perennial search for the realization of justice.

## **V. Final Considerations**

32. In the domain of Provisional Measures of Protection, the ICJ has recently moved forward, in ordering provisional measures, in the case of the *Temple of Preah Vihear (Cambodia versus Thailand, Order of 18.07.2011)*, to the effect of the withdrawal of military personnel from a provisional demilitarized zone that it defined in the Order itself (para. 62). In my Separate Opinion appended to it, I dwelt upon the relation between time and law (paras. 3-42), and the *legal effects* of the aforementioned measures in connection with the importance of prevention of irreparable harm for the protection of people in territory, and of cultural and spiritual heritage, altogether (paras. 64-70, 82-94 and 96-117). There is thus reason for hope that, on the basis of this precedent, the Court will keep on advancing in the present domain of Provisional Measures of Protection, to the benefit of the *justiciables*.

33. In the present Order that it has just adopted today, 22.11.2013, the Court finds that there has indeed been “a change in the situation in the disputed territory” (para. 43) since it adopted its last Order (of 16.07.2013). Accordingly, the Court, in the present Order, decided, at last, that the earlier provisional measures (indicated in the Order of 08.03.2011) “must be reinforced and supplemented” (para. 54), especially concerning, in addition, the presence of private individuals in the “disputed territory” (para. 54bis). However, in its previous Order of 16.07.2013 concerning the Parties’ Requests for modification of the Court’s Order of 08.03.2011, the Court did not find, on the basis of the facts presented to it, any “evidence of urgency that would justify the indication of further provisional measures”; the Court thus decided - with my dissent - that it had then not yet been sufficiently demonstrated that there was a risk of irreparable prejudice to the rights claimed by Costa Rica<sup>272</sup>.

34. Yet, the presence of private individuals in the disputed territory already configured a change in the situation, by the time Order of 16.07.2003 was adopted; the Court should *then*, four months ago, have modified the earlier Order of 08.03.2011, by means of its Order of 16.07.2003, so as expressly to provide for the prohibition not only of the presence of personnel, but also of incursion of private individuals as well into the disputed territory. By then, last July, in my perception there had already occurred a change in the situation in the disputed territory, disclosing urgency and the risk of irreparable harm, thus calling for the ordering of *new* provisional measures.

35. Indeed, the new, changed situation had already been clearly formed by the time the ICJ was called to issue its Order of 16.07.2013; the earlier Order of 08.03.2011, having referred only to “personnel”, had become too narrow. In the Order of 16.07.2013 the Court took note of the presence of Nicaraguan private individuals in the disputed area as an aggravating circumstance, yet it did nothing concrete about it. Only now, in the present Order of 22.11.2013, it has done so, in order to prevent the deterioration of the situation. The Court has at last clarified that the disputed area is to be free of *all* persons, comprising personnel and private individuals (apart from the remediation work to be promptly done in the eastern *caño*).

---

272 When Costa Rica requested (on 23.05.2013) it to do so alleging that there were private Nicaraguan nationals present in the disputed territory (cf. para. 35.)

36. So, only with the worsening of the situation (with the dredging and construction of the two new *caños*) in the disputed territory, the Court reconsidered its previous “self-restrained” approach. This worsening of the situation once again demonstrates that the worst possible posture that an international tribunal can take is that of judicial inactivism. Fortunately the Court has now taken a distinct stand. This time, four months later, the provisional measures just indicated or ordered today (22.11.2013) by the Court address both *personnel* and *private persons*, to be kept all away from the disputed territory (resolatory points 2(C) and (D)); they also order the cessation of any dredging and other activities in the disputed territory (resolatory point 2(A)), in addition to what I perceive as remediation work in respect of the eastern *caño* (resolatory point 2(B)).

37. The two contending parties do not actually controvert the responsibility for non-compliance (cf. *supra*) with the Court’s earlier Order of 08.03.2011<sup>273</sup>. The only point surrounded by some controversy is that of the *attribution* of responsibility (cf. *supra*) for such non-compliance. To me, this point is clear, as responsibility for non-compliance is necessarily accompanied by the attribution of that responsibility to the State concerned. There is an autonomous breach of a conventional obligation (concerning provisional measures), without prejudice to what will later be decided by the Court as to the merits.

38. Had the Court last July, on the occasion of the adoption of its Order of 16.07.2013, indicated or ordered the provisional measures of protection requested, probably the present situation in the disputed territory (created in the last four months) would not have arisen. Be that as it may, this new situation has been created, and the Court now, in the Order of today (23.11.2013), has just taken the right decision to order the present provisional measures of protection. Better late, and still in time, than never.

39. In any case, in the handling of the present controversy between two States which share the longstanding and respectable Latin American tradition in international legal doctrine, the ICJ has been provided with the occasion to dwell at greater depth upon the legal nature and effects of provisional measures, endowed with a relevant

---

273 Admitted by the respondent State itself, as pointed out by the Court in the present Order (cf. CR 2013/27, p. 33, para.18, and CR 2013/25, pp. 22-23, paras. 20-21, transcribed *supra*).

preventive dimension. The Court could have gone further than it did, in its analysis of this legal issue, - an analysis which does not need to be deferred to the merits. The present case reveals an *additional* ground of responsibility (irrespective of any decision on the merits), for non-compliance with provisional measures.

40. The *legal effects* of these latter, without prejudice to the subsequent decision of the Court as to the merits of the case, can be more appropriately examined within the framework of the *autonomous* legal regime of Provisional Measures of Protection. Non-compliance with such measures entails an *additional* ground of responsibility; the task ahead of us is to extract the consequences ensuing therefrom. The day this is done, an additional service will be rendered to the cause of the realization of justice at international level.

**5. SEPARATE OPINION OF JUDGE CANÇADO TRINDADE IN THE JOINED CASES OF *CERTAIN ACTIVITIES CARRIED OUT BY NICARAGUA IN THE BORDER AREA* AND OF CONSTRUCTION OF A ROAD IN COSTA RICA ALONG THE SAN JUAN RIVER (Costa Rica versus Nicaragua, and Nicaragua versus Costa Rica, Judgment of 16.12.2015)**

**I. *Prolegomena***

1. I have accompanied the majority in voting in favour of the adoption today, 16 December 2015, of the present Judgment of the International Court of Justice (ICJ) in the two joined cases of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica versus Nicaragua) and of the *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua versus Costa Rica). Yet, there are certain points ensuing from the Court's decision which, though not dwelt upon at depth by the Court in its reasoning, are in my view endowed with importance, related as they are to the proper exercise of the international judicial function. I feel thus obliged to dwell upon them, in the present Separate Opinion, nourishing the hope that the considerations that follow may be useful for the handling of this matter by the ICJ in future cases.

2. I start drawing attention to the manifestations, in the *cas d'espèce*, of the preventive dimension in contemporary international law. I then turn attention to the key point, which I have been sustaining in the adjudication of successive cases in this Court, namely, that of the conformation of the *autonomous legal regime* of provisional measures

of protection, in the course of their evolution (after their transposition from comparative domestic procedural law into international law). Next, I consider the widening of the scope of protection by means of provisional measures, and the breach of these latter as an autonomous breach, engaging State responsibility by itself. I then proceed to examine the determination by the ICJ of breaches of obligations under Provisional Measures of Protection.

3. In sequence, I present a plea for the prompt determination by the Court of breaches of Provisional Measures of Protection. My next line of considerations is on the supervision of compliance with Provisional Measures of Protection. Following that, I examine the interrelationship between the breach of provisional measures and the duty of reparation (in its distinct forms) for damages. I then turn attention to due diligence, and the interrelatedness between the principle of prevention and the precautionary principle. Next, I purport to detect the path towards the progressive development of Provisional Measures of Protection. Last but not least, I present, in an epilogue, my final considerations on the matter, in the form of a recapitulation of the main points sustained herein, in the course of the present Separate Opinion.

## **II. Manifestations of the Preventive Dimension in Contemporary International Law**

4. May I begin by observing that the two joined cases of *Certain Activities Carried out by Nicaragua in the Border Area* and of the *Construction of a Road in Costa Rica along the San Juan River* bring to the fore the relevance of the *preventive dimension* in contemporary international law, as reflected in the present Judgment, of 16 December 2015, in the finding and legal consequences of breaches of Provisional Measures of Protection (in the *Certain Activities* case), as well as in the acknowledgment of the obligation of conducting an environmental impact assessment (EIA) (in the *Construction of a Road* case as well). This preventive dimension grows in importance in the framework of regimes of protection (such as those, e.g., of the human person, and of the environment). Moreover, it brings us particularly close to general principles of law. Such preventive dimension stands out clearly in the

succession of the Court's Orders of Provisional Measures of Protection of 08.03.2011, 16.07.2013 and 22.11.2013<sup>274</sup>.

5. The question of the non-compliance with, or of breaches of, the aforementioned Orders of Provisional Measures of Protection, was carefully addressed by the two contending parties in the course not only of the Court's proceedings pertaining to such Orders<sup>275</sup>, but also in the course of its proceedings (written and oral phases) as to the merits of the *Certain Activities* case. Concern with the issue of non-compliance with, or breaches of the Court's Order of 08.03.2011, for example, was in effect expressed in Costa Rica's *Memorial*<sup>276</sup> - a whole chapter, - as well as in its oral arguments<sup>277</sup>; Nicaragua, likewise, devoted a chapter of its *Counter-Memorial*<sup>278</sup>, as well as its oral arguments<sup>279</sup>, to the issue. The same concern was expressed, in respect of the Court's subsequent Order of Provisional Measures of 16.07.2013, - and of events following it, - in the oral arguments of Costa Rica<sup>280</sup> and of Nicaragua<sup>281</sup>. Again, in respect of the Court's third Order of Provisional Measures, of 22.11.2013, reference can further be made to the oral arguments of both Costa Rica<sup>282</sup> and Nicaragua<sup>283</sup>.

### III. The Autonomous Legal Regime of Provisional Measures of Protection

6. The *autonomous legal regime* of Provisional Measures of Protection has been quite discernible to me: I have been drawing attention to it, in the way I conceive such autonomous legal regime, in successive Dissenting and Individual Opinions in this Court. The

---

274 Reference can further be made to the Court's subsequent Order of 13.12.2013.

275 Cf., as to Costa Rica's oral arguments, ICJ, docs. CR 2013/24, of 14.10.2013, pp. 12-61; and CR 2013/26, of 16.10.2013, pp. 8-35; and, as to Nicaragua's oral arguments, ICJ, docs. CR 2013/25, of 15.10.2013, pp. 8-57; and CR 2013/27, of 17.10.2013, pp. 8-44.

276 Cf. *Memorial*, chapter VI, paras. 6.1-6.63.

277 Cf. ICJ, docs. CR 2015/2, of 14.04.2015, pp. 17 and 23-25; CR 2015/4, of 15.04.2015, pp. 23-32; and CR 2015/14, of 28.04.2015, pp. 39-42 and 65-66.

278 Cf. *Counter-Memorial*, chapter 7, paras. 7.4-7.46.

279 Cf. ICJ, docs. CR 2015/5, of 16.04.2015, p. 18; CR 2015/7, of 17.04.2015, pp. 46-50; and CR 2015/15, of 29.04.2015, pp. 43-44.

280 Cf. ICJ, docs. CR 2015/2, of 14.04.2015, pp. 24-25; CR 2015/4, of 15.04.2015, pp. 31-32.

281 Cf. ICJ, doc. CR 2015/7, of 17.04.2015, pp. 48-50.

282 Cf. ICJ, docs. CR 2015/4, of 15.04.2015, pp. 31-34; and CR 2015/14, of 28.04.2015, pp. 65-66.

283 Cf. ICJ, doc. CR 2015/7, of 17.04.2015, pp. 41-45.

present Judgment of the ICJ in the two joined cases of *Certain Activities* and of the *Construction of a Road* is a proper occasion to dwell further upon it. The Court has duly considered the submissions of the parties, Costa Rica and Nicaragua (paras. 121-129), and has found that the respondent State incurred into a breach of the obligations under its Order of Provisional Measures of Protection of 08.03.2011 by the excavation of two *caños* in 2013 and the establishment of a military presence in the disputed territory (paras. 127 and 129, and resolutive point n. 3 of the *dispositif*). The ICJ has pointed out that the respondent State itself had acknowledged, in the course of the oral hearings, that “the excavation of the second and third *caños* represented an infringement of its obligations under the 2011 Order” (para. 125)<sup>284</sup>.

## 1. The Evolution of Provisional Measures of Protection

7. There are, as from this finding of the Court of a breach of provisional measures in the *cas d’espèce*, several points that come to my mind, all relating to what I have been conceptualizing, along the years, as the autonomous legal regime of Provisional Measures of Protection<sup>285</sup>. This regime can be better appreciated if we consider provisional measures in their historical evolution. May I recall that, in their origins, in domestic procedural law doctrine of over a century

---

284 In the oral hearing of 16.04.2015, the agent of the respondent State asserted that “Nicaragua deeply regrets the actions following the 2011 Order on Provisional Measures that led the Court to determine, in November 2013, that a new Order was required”; ICJ, doc. 2015/5, of 16.04.2015, p. 18, para. 42. On the following day counsel recalled this (ICJ, doc. 2015/7, of 17.04.2015, p. 45, para. 14), and again it did so in the hearing of 29.04.2015, adding that there was thus “no need for future remedial measures”; ICJ, doc. 2015/15, of 29.04.2015, p. 44, paras. 23-24.

285 Cf. A.A. Cançado Trindade, *Évolution du Droit international au droit des gens - L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pédone, 2008, pp. 64-70; A.A. Cançado Trindade, “La Expansión y la Consolidación de las Medidas Provisionales de Protección en la Jurisdicción Internacional Contemporánea”, in *Retos de la Jurisdicción Internacional* (eds. S. Sanz Caballero and R. Abril Stoffels), Cizur Menor/ Navarra, Cedri/CEU/Thomson Reuters, 2012, pp. 99-117; A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, 3rd. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013, chapters V and XXI (Provisional Measures), pp. 47-52 and 177-186; 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), Bruxelles, Bruylant/Nemesis, 2005, pp. 145-163.

ago, provisional measures were considered, and evolved, in order to safeguard the effectiveness of the jurisdictional function itself.

8. They thus emerged, in the domestic legal systems, in the form of a *precautionary legal action* (*mesure conservatoire / acción cautelar / ação cautelar*), aiming at guaranteeing, not directly subjective rights *per se*, but rather the jurisdictional process itself. They had not yet freed themselves from a certain juridical formalism, conveying the impression of taking the legal process as an end in itself, rather than as a means for the realization of justice. With the gradual transposition of provisional measures from domestic into international law level, they came to be increasingly resorted to, in face of the most diverse circumstances disclosing the probability or imminence of an irreparable damage, to be prevented or avoided.

9. Their transposition into international legal procedure, and the increasing recourse to them within the framework of domains of protection (e.g., of the human person or of the environment), had the effect, in my perception, of enlarging the scope of international jurisdiction, and of refining their conceptualization. International case-law on Provisional Measures of Protection expanded considerably along the last three decades, making it clear to the contending parties that they are to abstain from any action which may aggravate the dispute *pendente lite*, or may have a prejudicial effect on the compliance with the subsequent judgment as to the merits.

10. Their *rationale* stood out clearer, turning to the protection of rights, of the equality of arms (*égalité des armes*), and not only of the legal process itself. Along the last three decades, Provisional Measures of Protection have freed themselves from the juridical formalism of the procedural doctrine of over a century ago, and have, in my perception, come closer to reaching their plenitude. They have become endowed with a character, more than precautionary, truly *tutelary*. When their basic requisites, - of gravity and urgency, and the needed prevention of irreparable harm, - are met, they have been ordered, in the light of the needs of protection, and have thus conformed a true *jurisdictional guarantee of a preventive character*.

11. For many years I have been insisting on this particular point. To recall but one example, already by the turn of the century, in another international jurisdiction, in my Concurring Opinion appended to the Order of 25.05.1999 of the Inter-American Court of Human Rights

(IACtHR) in the case of *James and Others*, concerning Trinidad and Tobago, I deemed it fit to draw attention to the configuration, in provisional measures of protection of our times, of a true *jurisdictional guarantee of a preventive character* (para. 10). I further drew attention to the inherent power or *faculté* of an international tribunal to determine the *scope* of the provisional measures that it decided to order (para. 7). All this comes to reinforce the preventive dimension, proper of those measures.

12. In the case of the ICJ (like in that of the IACtHR), such provisional measures do have a conventional basis (Article 41 of the ICJ's Statute). But even if an international tribunal does not count on such a conventional basis, it has, in my understanding, inherent powers to indicate such measures, so as to secure the sound administration of justice (*la bonne administration de la justice*). Contemporary international tribunals have the *compétence de la compétence* (*Kompetenz-Kompetenz*) in the domain of provisional measures as well, so as to safeguard the respective rights of the contending parties in the course of the legal process. The grant of those measures is a significant manifestation of the preventive dimension in contemporary international law.

## 2. The Conformation of Their Autonomous Legal Regime

13. In effect, the evolution of provisional measures in recent years has, in my perception, made very clear that they operate within an autonomous legal regime of their own, encompassing their juridical nature, the rights and obligations at issue, their legal effects, and the duty of compliance with them. It is now the duty of contemporary international tribunals to elaborate on such autonomous legal regime, and to extract the legal consequences ensuing therefrom. In order to do so, it is necessary, in my understanding, to keep in mind - may I reiterate - their juridical nature, the rights to be preserved and the corresponding obligations in their wide scope, and their legal effects (cf. *infra*).

14. In my Dissenting Opinion in the Court's Order (of 28.05.2009) in the case of *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal), wherein the Court decided not to indicate or order provisional measures, I pondered that Provisional Measures of Protection have lately much evolved, and appear nowadays as being "endowed with a character, more than precautionary, truly *tutelary*"

(para. 13). Their development - I added - has led the Court gradually to overcome the strictly inter-State outlook in the acknowledgment of the rights to be preserved (paras. 21, 25 and 72). Such rights to be protected by Provisional Measures have encompassed, in the *cas d'espèce*, the *right to the realisation of justice*, - i.e., the right to see to it that justice is done, - "ineluctably linked to the rule of law at both national and international levels" (paras. 92-95 and 101).

15. Four years later, in my Dissenting Opinion in the Court's Order (of 16.07.2013) in the joined cases of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica versus Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua versus Costa Rica), wherein the Court simply reaffirmed a previous Order (of 08.03.2011) and decided not to indicate or order new provisional measures or modify the previous Order, I drew attention to the overcoming of the inter-State outlook in the present domain of provisional measures (para. 49), given that they came to extend protection also to the human person (paras. 39-42). I further warned that non-compliance with Provisional Measures of Protection amounts to a breach of an international obligation, engaging State responsibility *per se* (paras. 70-72). Provisional measures have an *autonomous legal regime* of their own, - I concluded, - and they have grown in importance, - with their preventive dimension underlined by their juridical nature, - "in respect of regimes of *protection*, such as those of the human person as well as of the environment" (paras. 73 and 75).

16. Shortly afterwards, in my subsequent Separate Opinion in the Court's following Order of Provisional Measures (of 22.11.2013) in the same two joined cases opposing the two Central American countries, Nicaragua and Costa Rica, wherein the Court decided to indicate or order new provisional measures, I observed that the duty of compliance with Provisional Measures of Protection outlines their *autonomous legal regime* (paras. 23-24). Provisional Measures - I proceeded - generate *per se* obligations, irrespective of, or independently from, those ensuing from the Court's Judgments on the merits or on reparations (para. 29). I insisted that Provisional Measures of Protection, in their evolution, have become, more than precautionary, truly *tutelary* (para. 26), and I then added, moving into their effects, that non-compliance with Provisional Measures of Protection engages autonomously the international responsibility of the State (paras. 24 and 39-40). Such non-

compliance is “an autonomous breach of a conventional obligation (concerning provisional measures), without prejudice to what will later be decided by the Court as to the merits” (para. 37).

#### IV. Provisional Measures: The Enlargement of the Scope of Protection

17. In the present Judgment in the two joined cases of *Certain Activities* and of the *Construction of a Road*, the Court has found, - in section III.C concerning the *Certain Activities* case, - that the excavation of the second and the third *caños* and the establishment of a military presence in the disputed territory breached the obligations of the provisional measures of protection it had ordered (on 08.03.2011), and constituted “a violation of the territorial sovereignty” of the applicant State (para. 129). Beyond that, provisional measures, in my perception, do widen the scope of protection; it is not only a matter of State sovereignty. Protection extends to the environment, and the right to life; their safeguard is also necessary to avoid aggravating the dispute or rendering it more difficult to resolve (cf. para. 123).

18. The enlargement, by provisional measures, of the scope of protection, is deserving of attention and praise. It is reassuring that prevention and precaution have found their place in the conceptual universe of the law of nations, the *droit des gens*, - and a prominent place in international environmental law. It could not have been otherwise. From the days of the U.N. Conference on Environment and Development (Rio de Janeiro, 1992) up to the present, this has occurred amidst the acknowledgment of risks and the limitations of human knowledge. Prevention and precaution have enforced each other, and the new awareness of their need has paved the way to the aforementioned expansion of Provisional Measures of Protection along the last three decades.

19. It is not casual that they came to be conceived as precautionary measures (*mesures provisoires / medidas cautelares*), prevention and precaution underlying them all. Precaution, in effect, takes prevention further, in face of the uncertainty of risks, so as to avoid irreparable damages. And here, again, in the domain of Provisional Measures of Protection, the relationship between international law and time becomes manifest. The inter-temporal dimension is here ineluctable, overcoming the constraints of legal positivism. International law endeavours to be *anticipatory* in the regulation of social facts, so as to

avoid irreparable harm; Provisional Measures of Protection expand the protection they pursue, as a true international *jurisdictional guarantee* of a preventive character<sup>286</sup>.

20. In order to avoid irreparable harm, one cannot remain closed in the fugacious present, but rather look back in time and learn the lessons of the past, as much as, at the same time, look into the future, to see how to avoid irreparable harm. We live - or survive - surrounded by uncertainties, which call for precaution. As Seneca warned in his *De Brevitate Vitae* (circa 49 A.D.), it is wise to keep in mind all times - past, present and future - together: time past, by recollection; time present, by making the best use of it; and time future, by anticipating whatever one can, and thus making one's life meaningful, safer and longer<sup>287</sup>. In his late years, in his *Letters to Lucilius* (circa 62-64 A.D.), Seneca, in his Stoic search for some means of reconciliation with the frailty of human nature, stated:

We are tormented alike by what is past and what is to come. (...) [M]emory brings back the agony of fear while foresight brings it on prematurely. No one confines his unhappiness to the present<sup>288</sup>.

21. Back to our times, in this XXIst. century, in yet another case before this Court, on the request for interpretation in the case of the *Temple of Préah Vihéar* (Cambodia *versus* Thailand), the ICJ, in its Order of Provisional Measures of Protection of 18.07.2011, took the unprecedented and correct decision to order, *inter alia*, the creation of a provisional "demilitarized zone" around the Temple and in the proximities of the border between the two countries, which contributed to put an end to the armed hostilities around the Temple in the border region between Cambodia and Thailand. In my Separate Opinion appended to that Order, I supported the Court's correct decision, which, in my understanding, extended protection not only to the territory at issue, but also to the populations living thereon, as well as to the monuments conforming the Temple which, by decision of

---

286 Cf., in this sense, A.A. Cançado Trindade, *International Law for Humankind - Towards a New Jus Gentium*, 2<sup>nd</sup>. rev. ed., Leiden/The Hague, Nijhoff/The Hague Academy of International Law, 2013, pp. 40-47.

287 L.A. Seneca, *On the Shortness of Life* (*De Brevitate Vitae*) [circa 49 A.D.], part XV.

288 L.A. Seneca, "Letter V", in *Letters to Lucilius* [circa 62-64 A.D.].

UNESCO (of 2008), integrate the cultural and spiritual world heritage (paras. 66-95).

22. In the same Separate Opinion, I dwelt upon the temporal dimension in international law, this latter being also *anticipatory* in the regulation of social facts (paras. 64-65). In the context of the *cas d'espèce*, Provisional Measures rightly extended protection also to cultural or spiritual heritage, upholding a universal value (para. 93). They brought “*territory, people and human values together*”, well beyond State territorial sovereignty (para. 100), - as shown by the establishment, in the Order, of the aforementioned demilitarized zone (para. 117). I further observed that rights of States and rights of individuals evolve *pari passu* in contemporary *jus gentium*, and added:

Cultural and spiritual heritage appears more closely related to a *human context*, rather than to the traditional State-centric context; it appears to transcend the purely inter-State dimension (...) (para. 113).

23. Beyond the classic territorialist outlook is the “*human factor*”; protection by means of provisional measures extended itself to local populations as well as to the cultural and spiritual world heritage (paras. 96-113), in the light of the *principle of humanity*, orienting the *societas gentium* towards the realization of the common good (paras. 114-115 and 117). After all, - I added, - one cannot consider territory (whereon hostilities were taking place) in isolation (as in the past), making abstraction of the population (or the local populations), which form the most precious component of statehood. One is to consider people on territory (cf. paras. 67, 81, 97, 100 and 114), - I concluded, - there being epistemologically no inadequacy to extend protection, by means of provisional measures, also to human life and cultural and spiritual world heritage.

## **V. Breach of Provisional Measures of Protection as an Autonomous Breach, Engaging State Responsibility by Itself**

24. The breach of a provisional measure of protection is *additional* to the breach which comes, or may come, later to be determined as to the merits of the case at issue. The factual context may be the same, but State responsibility is engaged not only with the occurrence and determination of a breach of an international obligation as to the merits,

but also earlier on, with the occurrence and determination of a breach of an obligation under an Order of provisional measures of protection. The latter is an autonomous breach. State responsibility is thus engaged time and time again, in respect of the breaches of obligations as to provisional measures (prevention) and as to the merits.

25. The breach of a provisional measure of protection is an autonomous breach, added to the one which comes, or may come, later to be determined as to the merits. As such, it can be promptly determined, with its legal consequences, without any need to wait for the conclusion of the proceedings as to the merits. Although in the Order of 22.11.2013 the Court did not expressly determine the occurrence of a breach of the earlier Order of 08.03.2011, it implicitly held so, in reiterating the earlier Order and indicating new provisional measures. In my view, the Court should have done so already in its Order of 16.07.2013, as explained in my Dissenting Opinion appended thereto.

## **VI. The ICJ's Determination of Breaches of Obligations under Provisional Measures of Protection**

26. In its practice, the ICJ has come to determine, on a few occasions so far, breaches of obligations under provisional measures of protection it had ordered; it has done so at the end of the proceedings as to the merits of the corresponding cases. This has occurred, until the Judgment the Court has just delivered today, 16 December 2015, in the joined cases of *Certain Activities* and of the *Construction of a Road*, in its Judgments as to the merits in the three cases of *LaGrand* (of 27.06.2001), of *Armed Activities on the Territory of the Congo* (of 19.12.2005), and of the *Bosnian Genocide* (of 26.02.2007).

27. Earlier on, in the case of the *Hostages in Tehran* (United States *versus* Iran, Judgment of 24.05.1980), the ICJ stated that its Order of Provisional Measures of 15.12.1979 had been either "rejected" or "ignored" by the authorities of the respondent State (paras. 75 and 93); the Court expressed its concern with the aggravation of the "tension between the two countries" (para. 93), but, in the *dispositif* of the Judgment, it did not expressly assert that the aforementioned Order of Provisional Measures had been breached. No consequences from non-compliance with its provisional measures were drawn by the Court.

28. The ICJ only started doing so in the course of the last 15 years, i.e., in the XXIst. century, - although, in my view, nothing hindered it from doing so well before, in earlier cases. Thus, in its Judgment of 27.06.2001 in the *LaGrand* case (Germany *versus* United States), the ICJ, after holding that its Order of Provisional Measures of 03.03.1999 had not been complied with (para. 115), stated, in resolatory point n. 5 of the *dispositif*, that the respondent State had breached the obligation incumbent upon it under the aforementioned Order of Provisional Measures. Yet, once again the Court did not draw any consequences from the conduct in breach of its provisional measures.

29. Four years later, in its Judgment of 19.12.2005 in the case concerning *Armed Activities on the Territory of the Congo* (D.R. Congo *versus* Uganda), the ICJ, dwelling again on the matter, first recalled its finding that the respondent State was “responsible for acts in violation of international human rights law and international humanitarian law carried out by its military forces” in the territory of the D.R. Congo (para. 264), committed in the period between the issue of its Order of Provisional Measures (of 01.07.2000) and the withdrawal of Ugandan troops in June 2003. Turning to its Order of Provisional Measures adopted half a decade earlier, the ICJ found that the respondent State had not complied with it (para. 264), and reiterated its finding in resolatory point n. 7 of the *dispositif*.

30. Another case of determination by the ICJ of a breach of its Orders of Provisional Measures of Protection was that of the *Application of the Convention against Genocide* (Bosnia and Herzegovina *versus* Serbia and Montenegro): the Court held so in its Judgment of 26.02.2007, while the Orders of Provisional Measures had been adopted 14 years earlier, on 08.04.1993 and 13.09.1993. They were intended to cease the atrocities that were already being perpetrated. The Court found, only in its Judgment of 2007 (para. 456), that the respondent State had failed to “take all measures within its power to prevent commission of the crime of genocide”, as indicated in its Order of 08.04.1993 (para. 52.A(1)) and reaffirmed in its Order of 13.09.1993, nor did it comply with the measure of ensuring that “any (...) organizations and persons which may be subject to its (...) influence (...) do not commit any acts

of genocide”, as also indicated in its Order of 08.04.1993 (para. 52.A(2)) and reiterated in its Order of 13.09.1993<sup>289</sup>.

31. Two years after the first Order (of 08.04.1993), the U.N. safe-area of Srebrenica collapsed, and the mass-killings of July 1995 in Srebrenica occurred, in a flagrant breach of the provisional measures ordered by the ICJ. In the meantime, the proceedings in the case before the ICJ prolonged in time: as to preliminary objections until 1996; as to counter-claims until 1997, and again until 2001; and as to the merits until 2007. Along these years, much criticism was expressed in expert writing that the manifest breaches of the ICJ’s Orders of Provisional Measures of Protection of 1993 (*supra*) passed for a long time without determination, and without any legal consequences.

32. As to the ICJ’s Judgment on the merits of the aforementioned case of *Application of the Convention against Genocide* (2007), the Court was requested by the applicant State to hold the respondent State to be under an obligation to provide “symbolic compensation” (para. 458) for the massacres at Srebrenica in July 1995. The Court, however, considered that, for the purposes of reparation, the respondent State’s non-compliance with its Orders of 08.04.1993 and 13.09.1993 “is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention” (para. 469). Thus, instead of ordering symbolic compensation, the Court deemed it fit to “include in the operative clause of the present Judgment, by way of satisfaction, a declaration that the Respondent has failed to comply with the Court’s Orders indicating provisional measures” (para. 469).

33. The ICJ then found, in resolatory point n. 7 of the *dispositif*, that the respondent State had “violated its obligations to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995”. It took 14 years for the Court to determine the breach of its Provisional Measures of Protection in the *cas d’espèce*. In my understanding, there was no need to wait such a long time to determine the breach of such measures;

---

289 Bosnia and Herzegovina promptly brought the matter before the U.N. Security Council, to have the Court’s Orders enforced; the Security Council promptly adopted its Resolution 819 (of 16.04.1993), which, after expressly invoking the ICJ’s Order of 08.04.1993), ordered the immediate cessation of the armed attacks and several other measures to protect persons in Srebrenica and its surrounding areas.

on the contrary, they should have been promptly determined by the ICJ, will all legal consequences. This tragic case shows that we are still in the infancy of the development of the legal regime of provisional measures of protection in contemporary international law. A proper understanding of the *autonomous legal regime* of those measures may foster their development at conceptual level.

## VII. A Plea for the Prompt Determination of Breaches of Provisional Measures of Protection: Some Reflections

34. In the *cas d'espèce* (*Certain Activities* case), the breaches of provisional measures have been determined by the Court within a reasonably short lapse of time, - unlike in the case of *Armed Activities on the Territory of the Congo* (half a decade later) and in the *Bosnian Genocide* case (almost one and a half decade later). In the *cas d'espèce*, the damages caused by the breaches of provisional measures have not been irreparable, - unlike in the *LaGrand* case, - and with their determination by the Court in the present Judgment its effects can be made to cease. This brings to the fore, in my perception, an important point related to the autonomous legal regime of provisional measures of protection.

35. In effect, in my understanding, the determination of a breach of a provisional measure of protection is not - should not be - conditioned by the completion of subsequent proceedings as to the merits of the case at issue. The legal effects of a breach of a provisional measure of protection should in my view be promptly determined, with all its legal consequences. In this way, its anticipatory rationale would be better served. There is no room for raising here alleged difficulties as to evidence, as for the ordering of provisional measures of protection, and the determination of non-compliance with them, it suffices to rely on *prima facie* evidence (*commencement de preuve*). And it could not be otherwise.

36. Furthermore, the rights that one seeks to protect under provisional measures are not necessarily the same as those vindicated on the merits, as shown in the case of the *Temple of Préah Vihear* (cf. *supra*). Likewise, the obligations (of prevention) are new or additional ones, in relation to those ensuing from the judgment on the merits. There is yet another point which I deem it fit to single out here, namely, contemporary international tribunals have, in my understanding, an

inherent power or *faculté* to order provisional measures of protection, whenever needed, and to determine, *ex officio*, the occurrence of a breach of provisional measures, with its legal consequences. Having pointed this out, my concern here is now turned to a distinct, and very concrete point.

37. The fact that, in its practice, the ICJ has only indicated provisional measures *at the request* of a State party, in my view does not mean that it cannot order such measures *sponte sua, ex officio*. The ICJ Statute endows the Court with “the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party” (Article 41(1)). The Rules of Court provide for request by a party for the indication of provisional measures (Article 73(1)); yet they add that, irrespective of such request, the Court may indicate provisional measures that, in its view, “are in whole or in part other than those requested” (Article 75(2)).

38. For example, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the ICJ indicated, in its Order of 15.03.1996 (paras. 20 and 49), provisional measures that were distinct from, and broader than, those requested by the applicant State<sup>290</sup>. It expressly stated, in that Order, that it was entitled to do so, that it had the power to indicate measures “in whole or in part other than those requested / *totalement ou partiellement différentes de celles qui sont sollicités*” (para. 48). Furthermore, the Rules of Court provide that

The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties (Article 75(1)).

The Rules of Court moreover set forth that it “may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated” (Article 78).

39. The Court, thus, is not conditioned by what a party, or the parties, request(s), nor - in my view - even by the existence of the

---

290 The Court then found, six years later, in its Judgment of 10.10.2002, that the applicant State had not established that there had been a breach by the respondent State (para. 322) of the provisional measures indicated in its Order of 15.03.1996.

request itself. Here, in the realm of Provisional Measures of Protection, once again the constraints of voluntarist legal positivism are, in my view, overcome<sup>291</sup>. The Court is not limited to what the contending parties want (in the terms they express their wish), or so request. The Court is not an arbitral tribunal, it stands above the will of the contending parties. This is an important point that I have been making on successive occasions within the ICJ, in its work of international adjudication.

40. In effect, there have lately been cases lodged with it, where the ICJ has been called upon to reason beyond the inter-State dimension, not being limited by the contentions or interests of the litigating States: this is the point I deemed it fit to stress in my Separate Opinion (paras. 227-228) in the Court's Judgment (merits) of 30.11.2010 in the case of *A.S. Diallo (Guinea versus D.R. Congo)*. Earlier on, in the Court's Order (provisional measures) of 28.05.2009 in the case of *Questions Relating to the Obligation to Prosecute or Extradite (Belgium versus Senegal)*, I stated, in my Dissenting Opinion appended thereto, that the Court is not to relinquish its jurisdiction in respect of Provisional Measures of Protection in face of what appears to be the professed intentions of the parties; on the contrary, the Court is to assume the role of guarantor of compliance with conventional obligations, beyond the professed intention or will of the parties (para. 88).

41. In the same line of thinking, in the ICJ's Judgment (preliminary objections) of 01.04.2011 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD - Georgia versus Russian Federation)*, I asserted, in my Dissenting Opinion appended thereto, that the ICJ cannot "keep on embarking on a literal or grammatical and static interpretation of the terms of compromissory clauses" enshrined in human rights treaties (such as the CERD Convention), "drawing 'preconditions' therefrom for the exercise of its jurisdiction, in an attitude remindful of traditional international arbitral practice" (para. 206). On the contrary, - I added, - "[w]hen human rights treaties are at stake, there is need, in my perception, to overcome the force of inertia, and to assert and

---

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

develop the compulsory jurisdiction of the ICJ on the basis of the compromissory clauses contained in those treaties” (para. 206).

42. The Court, - may I reiterate, - is not an arbitral tribunal, it stands above the will of the contending parties. It is not conditioned by requests or professed intentions of the contending parties. It has an inherent power or *faculté* to proceed promptly to the determination of a breach of provisional measures, in the interests of the sound administration of justice. And *recta ratio* guides the sound administration of justice (*la bonne administration de la justice*). *Recta ratio* stands above the will. It guides international adjudication and secures its contribution to the rule of law (*prééminence du droit*) at international level.

43. The Court is entirely free to order the provisional measures that it considers necessary, so as to prevent the aggravation of the dispute or the occurrence of irreparable harm, even if the measures it decides to order are quite different from those requested by the contending parties. The ICJ has in fact done so, not surprisingly, also in relation to situations of armed conflicts; the Court has been faced, in such situations (surrounded by complexity), with the imperative of *protection* of human life. Thus, in its Order of Provisional Measures of Protection, of 01.07.2000, in the case concerning *Armed Activities on the Territory of the Congo* (D.R. Congo *versus* Uganda), the ICJ, invoking Article 75(2) of the Rules of Court, once again asserted its power to order measures that are “in whole or in part other than those requested / *totalemment ou partiellement différentes de celles qui sont sollicités*” (para. 43).

44. The Court, in my view, after examining the circumstances of the *cas d'espèce*, may proceed to order, *sponte sua*, provisional measures of protection. And it may, in my conception, proceed *motu proprio*, - thus avoiding the aggravation of a situation, - to determine *ex officio*, the occurrence of a breach of an Order of Provisional Measures of Protection. Keeping in mind the preventive dimension in contemporary international law (cf. *supra*), and the need to prevent further irreparable harm, the Court does not have to wait until the completion of the proceedings as to the merits, especially if such proceedings are unreasonably prolonged, as, e.g., in the case of the *Bosnian Genocide* (cf. *supra*).

### VIII. Supervision of Compliance with Provisional Measures of Protection

45. The fact that the ICJ has, so far, very seldom proceeded to the determination of a breach of provisional measures in the subsequent proceedings as to the merits of the respective cases, in my view does not mean that it cannot do so promptly, by means of another Order of Provisional Measures. Furthermore, the Court has monitoring powers as to *compliance* with provisional measures. If any unforeseeable circumstance may arise, the ICJ is, in my understanding, endowed with inherent powers or *facultés* to take the decision that ensures compliance with the provisional measures it has ordered, and thus the safeguard of the rights at stake.

46. All the aforesaid enhances the preventive dimension of Provisional Measures of Protection. These latter have experienced a remarkable development in recent years, in contemporary international law on the matter. Such measures now call for further development at conceptual level. They have an autonomous legal regime of their own, which encompasses supervision of compliance with them. The Court is endowed with monitoring powers to this effect. This is yet another element which comes to enforce the rule of law (*prééminence du droit*) at international level.

### IX. Breach of Provisional Measures and Reparation for Damages

47. May I now turn to yet another relevant point pertaining to the autonomous legal regime of Provisional Measures of Protection, namely, the legal consequences of the finding of a breach of such provisional measures. In addressing those consequences, the Court is likely to face the need to consider remedies, reparations in their distinct forms, and costs. This point has not passed unperceived in the present Judgment of the ICJ in the two joined cases of *Certain Activities* and of the *Construction of a Road*. The Court has addressed reparations in the two joined cases<sup>292</sup>.

48. Reparations are here contemplated in all their forms, - namely, e.g., compensation, satisfaction, guarantee of non-repetition, among others. In the *cas d'espèce*, - the *Certain Activities* case, - the ICJ has determined the respondent's duty of *compensation* for the material

---

292 Paras. 137-144 and 224-228, respectively.

damage (para. 142); it has further determined that, in the circumstances of the case, given its finding of a breach of provisional measures (by the excavation of the *caños* and the establishment of a military presence in the disputed territory), the declaration by the Court to this effect provides adequate *satisfaction* to the applicant for the non-material damage (para. 132), without the need to award costs (para. 144).

49. The ICJ has found that it has thereby afforded “adequate satisfaction” (para. 139) to the applicant, by its declaration, in the *Certain Activities* case<sup>293</sup>, of a breach of obligations ensuing from the Order of provisional measures of 08.03.2011. Furthermore, the ICJ indicated new provisional measures in its Order of 22.11.2013, so as to cease the effects of the harmful activities and to remedy that breach. In the joined case of *Construction of a Road*, the ICJ declined to award *compensation* (para. 226), but determined - even if not here referring specifically to a breach of provisional measures - that its declaration of wrongful conduct for the respondent’s breach of the obligation to conduct an environmental impact assessment provides adequate *satisfaction* to the applicant (para. 229).

50. The grant of this form of reparation (satisfaction) in the two joined cases is necessary and reassuring. The fact that the ICJ did not establish a breach of provisional measures nor did it indicate new provisional measures *already* in its Order of 16.07.2013 (as it should, for the reasons explained in my Dissenting Opinion appended thereto), and only did so in its subsequent Order of 22.11.2013, gives weight to its decision not to award costs<sup>294</sup>. After all, the prolongation of the proceedings (as to provisional measures)<sup>295</sup> was due to the hesitation of the Court itself. Accordingly, the relevant issue here is, thus, reparation (rather than costs of hearings) for breach of Provisional Measures of Protection.

51. In effect, breach and duty of reparation come together. As I pointed out in my Separate Opinion in the *A.S. Diallo* case (Guinea

---

293 Paras. 127 and 129, and resolutive point n. 3.

294 Paragraph 144 (*Certain Activities* case) of the present Judgment.

295 After the hearings of 11-13.01. 2011 (following Costa Rica’s initial request for the indication of provisional measures in the *Certain Activities* case), those of 14-17.10.2013 (following Costa Rica’s further request for the indication of provisional measures in the *Certain Activities* case), and those of 05-08.11.2013 (following Nicaragua’s request for the indication of provisional measures in the *Construction of a Road* case).

*versus* D.R. Congo, reparations, Judgment of 19.06.2012), the duty of reparation has deep historical roots, going back to the origins of the law of nations, and marking presence in the legacy of the “founding fathers” of our discipline (paras. 14-21). The duty of reparation is widely acknowledged as one of general or customary international law (para. 25). I stressed that

The duty of full reparation is the prompt and indispensable complement of an international wrongful act, so as to cease all the consequences ensuing therefrom, and to secure respect for the international legal order. (...) The breach of international law and the ensuing compliance with the duty of reparation for injuries are two sides of the same coin; they form an *indissoluble whole* (...). (...) [T]he *reparatio* (from the Latin *reparare*, “to dispose again”) ceases all the effects of the breaches of international law (...) at issue, and provides satisfaction (as a form of reparation) to the victims; by means of the reparations, the Law re-establishes the legal order broken by those violations (...). One has to be aware that it has become commonplace in legal circles - the conventional wisdom of the legal profession - to repeat that the duty of reparation, conforming a “secondary obligation”, comes after the breach of international law. This is not my conception; when everyone seems to be thinking alike, no one is actually thinking at all. In my own conception, breach and reparation go together, conforming an indissoluble whole: the latter is the indispensable consequence or complement of the former. The duty of reparation is a *fundamental obligation* (...). The indissoluble whole that violation and reparation conform admits no disruption (...), so as to evade the indispensable consequence of the international breaches incurred into: the reparations due to the victims (paras. 32, 35 and 39-40).

52. The interrelationship between breach and duty of reparation marks presence also in the realm of the autonomous legal regime of Provisional Measures of Protection. A breach of a provisional measure promptly generates the duty to provide reparation for it. It is important, for provisional measures to achieve their plenitude (within their legal regime), to remain attentive to reparations - in their distinct forms - for their breach. Reparations (to a greater extent than costs)

for the autonomous breach of Provisional Measures of Protection are a key element for the consolidation of the autonomous legal regime of Provisional Measures of Protection.

## **X. Due Diligence, and the Interrelatedness between the Principle of Prevention and the Precautionary Principle**

53. Now that I approach the conclusion of the present Separate Opinion, may I come back to its point of departure, namely, the relevance of the preventive dimension in contemporary international law. Such preventive dimension marks presence in the Judgment the ICJ has just adopted, in the two joined cases of *Certain Activities Carried out by Nicaragua in the Border Area* and of the *Construction of a Road in Costa Rica along the San Juan River*. It is significant that, in the course of the proceedings in the present joined cases, the duty of *due diligence* has been invoked, just as it was in an earlier Latin American case, that of the *Pulp Mills on the River Uruguay* (2010), opposing Argentina to Uruguay.

54. In respect of the *cas d'espèce* (and specifically of the *Construction of a Road* case), it has been asserted that the populations of both countries, Nicaragua and Costa Rica, “deserve to benefit from the highest possible standards of environmental protection”, and that the States of Central America have adopted and applied environmental and related laws to secure “high standards of protection”<sup>296</sup>. Due diligence has thus been duly acknowledged, once again, in a Latin American case before the ICJ. There are other related aspects in the preventive dimension. The duty to conduct an environmental impact assessment, for example, as determined by the Court in the present Judgment, in the case of the *Construction of a Road* (paras. 153-162), brings to the fore, in my perception, the interrelatedness between the *principle of prevention* and the *precautionary principle*.

55. I had the occasion to dwell upon this particular point in the other aforementioned Latin American case, of half a decade ago, concerning *Pulp Mills on the River Uruguay* (Argentina *versus* Uruguay). In my Separate Opinion appended to the ICJ’s Judgment of 20.04.2010 in the *Pulp Mills* case, I pondered that, while the principle of prevention

---

296 ICJ, doc. CR 2015/15, of 29.04.2015, paras. 26-27 (statement of counsel of Nicaragua).

assumes that risks can be objectively assessed so as to avoid damage, the precautionary principle assesses risks in face of uncertainties, taking into account the vulnerability of human beings and the environment, and the possibility of irreversible harm (paras. 72-73).

56. Unlike the positivist belief in the certainties of scientific knowledge, - I proceeded, - the precautionary principle is geared to the duty of *due diligence*, in face of scientific uncertainties<sup>297</sup>; precaution is thus, nowadays, more than ever, needed (paras. 83 and 89). It is not surprising that some environmental law Conventions give expression to both the principle of prevention and the precautionary principle, acknowledging the link between them, providing the foundation of the duty to conduct an environmental impact assessment (paras. 94-96), - as upheld by the ICJ in the joined case of the *Construction of a Road*.

57. In the present Judgment, the Court, recalling its earlier decision in the *Pulp Mills* case (2010), referred in a reiterated way to the requirement of due diligence in order to prevent significant transboundary environmental harm (para. 104). It focused on the undertaking of an environmental impact assessment in the wider realm of general international law (paras. 104-105). And it then stated that

If the environmental impact assessment indicates that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk (para. 104).

## **XI. The Path towards the Progressive Development of Provisional Measures of Protection**

58. Having pointed that out, the main lesson learned from the adjudication of the *cas d'espèce*, that I deem it fit to leave on the records, in the present Separate Opinion, under the umbrella of the preventive

---

<sup>297</sup> For a recent reassessment of the precautionary principle, cf. A.A. Cançado Trindade, "Principle 15 - Precaution", in *The Rio Declaration on Environment and Development - A Commentary* (ed. J.E. Viñuales), Oxford, Oxford University Press, 2015, pp. 403-428.

dimension in contemporary international law, as developed in the preceding paragraphs, pertains to what I conceptualize as the conformation of an *autonomous legal regime* of provisional measures of protection, with all its elements and implications, as related to the Court's finding in the joined case of *Certain Activities*.

59. Thus, in my Dissenting Opinion in the ICJ's Order of 16.07.2013 in the present two joined cases of *Certain Activities* and of the *Construction of a Road*, wherein the Court decided not to indicate new provisional measures, nor to modify the provisional measures indicated in its previous Order of 08.03.2011, I asserted, and deem it fit here to reiterate:

My thesis, in sum, is that provisional measures, endowed with a conventional basis, - such as those of the ICJ (under Article 41 of the Statute), - are also endowed with autonomy, have a legal regime of their own, and noncompliance with them generates the responsibility of the State, entails legal consequences, without prejudice of the examination and resolution of the concrete cases as to the merits. This discloses their important preventive dimension, in their wide scope. The proper treatment of this subjectmatter is the task before this Court, now and in the years to come.

(...) Provisional measures of protection generate obligations (of prevention) for the States concerned, which are distinct from the obligations which emanate from the Judgments of the Court as to the merits (and reparations) of the respective cases. This ensues from their autonomous legal regime, as I conceive it. There is, in my perception, pressing need nowadays to refine and to develop conceptually this autonomous legal regime, focused, in particular, on the contemporary expansion of provisional measures, the means to secure due and prompt compliance with them, and the legal consequences of noncompliance, - to the benefit of those protected thereunder.

(...) [T]he matter before the Court calls for a more proactive posture on its part, so as not only to settle the controversies filed with it, but also to tell what the Law is (*juris dictio*), and thus to contribute effectively to the avoidance or prevention of irreparable harm in situations of urgency,

to the ultimate benefit of *all* subjects of international law, - States as well as groups of individuals, and *simples particuliers*. After all, the human person (living in harmony in her natural habitat) occupies a central place in the new *jus gentium* of our times (paras. 72 and 75-76).

60. Provisional Measures of Protection have grown in importance, and have expanded and have much developed in recent years, particularly in the framework of regimes of protection (such as those, e.g., of the human person and of the environment). Provisional Measures of Protection have become, more than precautionary, truly *tutelary*, enlarging the scope of protection. The autonomous legal regime of Provisional Measures of Protection, in conclusion, is conformed, in my conception, by the juridical nature of such measures, the rights at issue and the obligations derived therefrom, their legal effects, and the duty of compliance with them, - all running parallel to the proceedings as to the merits of the *cas d'espèce*. It also encompasses the legal consequences ensuing therefrom.

61. The rights protected by Provisional Measures of Protection are not the same as those pertaining to the merits of the case at issue. The obligations ensuing from Provisional Measures of Protection are distinct from, and additional to, the ones that may derive later from the Court's subsequent decision as to the merits. In case of a breach of a provisional measure of protection, the notion of victim of a harm emerges also in the framework of such provisional measures; irreparable damages can, by that breach, occur in the present context of prevention.

62. In order to avoid or prevent those damages, provisional measures of protection set forth obligations of their own<sup>298</sup>, distinct from the obligations emanating later from the respective Judgments as to the merits of the corresponding cases<sup>299</sup>. As I pondered, one decade ago, in another international jurisdiction, an international tribunal has the inherent power or *faculté* to supervise *motu proprio* the compliance or otherwise, on the part of the State concerned, with the provisional

---

298 Cf., in this sense, IACtHR, case of *Eloísa Barrios and Others*, concerning Venezuela, Order of 29.06.2005, Concurring Opinion of Judge Cançado Trindade, paras. 5-6.

299 Cf., in this sense, IACtHR, case of the *Communities of Jiguamiandó and Curbaradó*, concerning Colombia, Order of 07.02.2006, Concurring Opinion of Judge Cançado Trindade, paras. 5-6.

measures of protection it ordered; this is “even more necessary and pressing in a situation of extreme gravity and urgency”, so as to prevent or avoid irreparable damage<sup>300</sup>.

63. In such circumstances, an international tribunal cannot abstain from exercising its inherent power or *faculté* of supervision of compliance with its own Orders, in the interests of the sound administration of justice (*la bonne administration de la justice*). Non-compliance with Provisional Measures of Protection amounts to a breach of international obligations deriving from such measures. This being so, the determination of their breach, in my understanding, does not need to wait for the conclusion of the proceedings as to the merits of the case at issue, particularly if such proceedings are unduly prolonged.

64. Furthermore, the determination of their breach is not conditioned by the existence of a request to this effect by the State concerned; the Court, in my view, is fully entitled to proceed promptly to the determination of their breach *sponte sua, ex officio*, in the interests of the sound administration of justice (*la bonne administration de la justice*). The determination of a breach of provisional measures entails legal consequences; this paves the way for the granting of remedies, of distinct forms of reparation, and eventually costs.

65. In the present Judgment of the ICJ in the two joined cases of *Certain Activities* and of the *Construction of a Road*, the ICJ was attentive to this point, having found that, by its own determination of a breach of obligations ensuing from the Order of provisional measures of 08.03.2011 - in the *Certain Activities* case<sup>301</sup>, - it has afforded “adequate satisfaction” to the applicant State (para. 132). For all the aforesaid, it is high time to refine, at conceptual level, the autonomous legal regime of Provisional Measures of Protection.

66. Such refinement can clarify further this domain of international law marked by prevention and the duty of due diligence, and can thus foster the progressive development of those measures in the contemporary law of nations, faithful to their preventive dimension, to the benefit of all the *justiciables*. The progressive development of

---

300 Cf., in this sense, IACtHR, case of *Eloísa Barrios and Others*, Order of 22.09.2005, concerning Venezuela, Concurring Opinion of Judge Cançado Trindade, para. 6.

301 Paras. 127 and 129, and resolutive point n. 3.

Provisional Measures of Protection is a domain in respect of which international case-law seems to be preceding legal doctrine, and it is a source of satisfaction to me to endeavour to contribute to that.

## XII. Epilogue: A Recapitulation

67. Provisional Measures of Protection provide, as we can see, a fertile ground for reflection at the juridico-epistemological level. Time and law are here ineluctably together, as in other domains of international law. Provisional measures underline the preventive dimension, growing in clarity, in contemporary international law. Provisional measures have undergone a significant evolution, but there remains a long way to go for them to reach their plenitude. In order to endeavour to pave this way, 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 Provisional Measures of Protection, in the course of the present Separate Opinion.

68. *Primus*: The preventive dimension in contemporary international law is clearly manifested in the formation of what I conceive as the autonomous legal regime of Provisional Measures of Protection. *Secundus*: Such preventive dimension grows in importance in the framework of regimes of protection (e.g., of the human person and of the environment), bringing us closer to general principles of law. *Tertius*: Provisional measures, historically emerged in comparative domestic law as a precautionary legal action, had their scope enlarged in international jurisdiction, becoming endowed with a tutelary - rather than only precautionary - character, as a true jurisdictional guarantee of a preventive nature. *Quartus*: Prevention and precaution underlie provisional measures, anticipatory in nature, so as to avoid the aggravation of the dispute and irreparable damage.

69. *Quintus*: In the framework of their autonomous legal regime, provisional measures guarantee rights which are not necessarily the same as those invoked in the proceedings as to the merits. *Sextus*: In the framework of their autonomous legal regime, provisional measures generate *per se* obligations, independently from those ensuing from the Court's subsequent judgment on the merits or on reparations. *Septimus*: The Court is fully entitled to order Provisional Measures of Protection, and to order *motu proprio*, any measure which it deems necessary.

70. *Octavus*: The Court is fully entitled to order *motu proprio* provisional measures which are totally or partially different from those requested by the contending parties. *Nonus*: The Court is fully entitled to order further provisional measures *motu proprio*; it does not need to wait for a request by a party to do so. *Decimus*: The Court has inherent powers or *facultés* to supervise *ex officio* compliance with Provisional Measures of Protection and thus to enhance their preventive dimension.

71. *Undecimus*: Non-compliance amounts to an autonomous breach of provisional measures, irrespective of what will later be decided (any other breach) by the Court as to the merits. *Duodecimus*: A breach of a Provisional Measure of Protection engages by itself State responsibility, being additional to any other breach will may come later to be determined by the Court as to the merits. *Tertius decimus*: The notion of victim marks presence also in the realm of Provisional Measures of Protection.

72. *Quartus decimus*: The determination by the Court of a breach of a provisional measure should not be conditioned by the completion of subsequent proceedings as to the merits; the legal effects of such breach should be promptly determined by the Court, in the interests of the sound administration of justice (*la bonne administration de la justice*). *Quintus decimus*: Contemporary international tribunals have an inherent power or *faculté* to determine promptly such breach, with all its legal consequences (remedies, satisfaction as a form of reparation, and eventually costs). *Sextus decimus*: The duty to provide reparation (in its distinct forms) is promptly generated by the breach of Provisional Measures of Protection.

73. *Septimus decimus*: The interrelationship between breach and duty of reparation marks presence also in the realm of the autonomous legal regime of Provisional Measures of Protection. *Duodevicesimus*: The autonomous legal regime of their own, with all its elements (cf. *supra*), contributes to the prevalence of the rule of law (*prééminence du droit*) at international level. *Undevicesimus*: Provisional Measures of Protection have much evolved in recent decades, but there remain a long way to go so as to reach their plenitude. *Vicesimus*: Contemporary international tribunals are to refine the autonomous legal regime of Provisional Measures of Protection, and to foster their progressive development, to the benefit of all the *justiciables*.

**6. SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE IN THE CASE OF APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM [ICSFT] AND OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION [CERD] (Ukraine versus Russian Federation, Provisional Measures, Order of 19.04.2017)**

**1. Prolegomena**

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

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

them, non-compliance and State responsibility, prompt determination of their breaches, and duty of reparation. I shall then move to my final considerations in the epilogue.

## II. Conceptual Development of Provisional Measures of Protection

3. Provisional measures of protection already have a long history, which originally flourished in comparative domestic law; as from their early conceptualization, there followed their gradual transposition, along the first half of the XXth century, from domestic into international (procedural) law<sup>302</sup>, in international arbitral and judicial practice. In recent decades, there has occurred the clarification of their juridical preventive character, of their legal effects, as well as their progressive development<sup>303</sup>.

4. As from the times of the transposition of provisional measures into the international legal order, in the era of the old Permanent Court of International Justice (PCIJ), their relevance to the progressive development of international law itself was detected<sup>304</sup>. Provisional measures of protection have indeed evolved historically, in my perception, from *precautionary* legal measures in domestic procedural law into jurisdictional guarantees of a preventive character in international procedural law, endowed with a truly *tutelary* character<sup>305</sup>.

---

302 Cf., on the caselaw of national tribunals, e.g., E. García de Enterría, *La Batalla por las Medidas Cautelares*, 2nd. rev. ed., Madrid, Civitas, 1995, pp. 25385; and cf., on the caselaw of international tribunals, e.g., R. Bernhardt (ed.), *Interim Measures Indicated by International Courts*, Berlin/Heidelberg, SpringerVerlag, 1994, pp. 1152.

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

304 Cf. P. Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, Paris, Libr. Rec. Sirey, 1931, pp. 1415 and 62. Already in its time, the PCIJ admitted its prerogative to indicate or modify *ex officio* provisional measures of protection, in terms other than the ones requested by either of the contending parties; cf. G. Guyomar, *Commentaire du Règlement de la Cour Internationale de Justice - Interprétation et pratique*, Paris, Pédone, 1973, pp. 348. And, as to the earlier ICJ era, cf. for jurisdictional aspects, *inter alia*, L. Daniele, *Le Misure Cautelari nel Processo dinanzi alla Corte Internazionale di Giustizia*, Milano, Giuffrè, 1993, pp. 5-183; S. Rosenne, *Provisional Measures in International Law*, Oxford, University Press, 2005, pp. 85-187.

305 A.A. Cançado Trindade, "Preface...", *op. cit. supra* n. (303), p. X.

5. Furthermore, provisional measures of protection have paved the way for *continuous monitoring*, in prolonged situations of “extreme gravity and urgency”, seeking to “avoid irreparable damage to persons”, in particular those in a situation of great vulnerability, if not defencelessness. In effect, as I pointed out elsewhere, almost two decades ago, where situations of “vulnerability of the fundamental rights of the human person are prolonged pathologically in time”, the adopted “provisional measures of protection have had likewise to be maintained in time, in order to face up to the chronic threats to those fundamental rights”<sup>306</sup>.

6. Provisional measures of protection have been evolving, with the growing awareness of their importance in the realisation of justice; yet, there remains a long way to go to that effect. It has not passed unnoticed in expert writing that the first contemporary international tribunal “which explicitly held that its provisional measures are binding, was the Inter-American Court of Human Rights [IACtHR], which stated that the relevant provision of the Convention ‘makes it mandatory for the State to adopt the provisional measures ordered by this Tribunal’<sup>307</sup>”<sup>308</sup>.

7. This was made clear by the IACtHR in 1999-2000, in the period when it achieved a remarkable jurisprudential construction on the matter<sup>309</sup>; afterwards, the International Court of Justice [ICJ] did the same, in the *LaGrand* case (Judgment of 27.06.2001), in the proceedings of which the IACtHR’s pioneering jurisprudential construction was brought to its attention by the contending parties<sup>310</sup>. Within the ICJ,

306 *Ibid.*, p. XVII.

307 Inter-American Court of Human Rights [IACtHR], case of the *Constitutional Tribunal versus Peru*, Provisional Measures of Protection, Resolution of 14.08.2000; and cf. note (139), *infra*.

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

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

310 The IACtHR was also the first international tribunal to affirm the existence of an *individual* right to information on consular assistance in the framework of the guarantees of the due process of law, in its Advisory Opinion (n. 16) on *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (of 01.10.1999, pa-

I have drawn attention to this development in my Separate Opinion (paras. 167-172) in the *A.S. Diallo* case (merits, Judgment of 30.11.2010), to which I deem it sufficient to refer here. I have likewise drawn attention to this in my writings on the matter<sup>311</sup>.

8. In effect, even before the turn of the century (from 1999 onwards), I have had occasions, in another international jurisdiction (the IACtHR, wherein provisional measures of protection are also endowed with a *conventional* basis), to dwell further upon the *legal nature* of provisional measures of protection and their binding character<sup>312</sup>, and to keep on

---

ras. 1-141. The IACtHR, disclosing the impact of the International Law of Human Rights in the evolution of Public International Law itself, held therein that non-compliance with Article 36(1)(b) of the Vienna Convention on Consular Relations of 1963 took place to the detriment not only of a State Party but also of the human beings at issue (as the ICJ *subsequently* also admitted, in the *LaGrand* case, Judgment of 27.06.2001). This pioneering contribution by the IACtHR in 1999 was acknowledged by expert writing on the subject; cf., e.g., G. Cohen-Jonathan, "Cour Européenne des Droits de l'Homme et droit international général (2000)", 46 *Annuaire français de Droit international* (2000) p. 642; Ph. Weckel, M.S.E. Helali and M. Sastre, "Chronique de jurisprudence internationale", 104 *Revue générale de Droit international public* (2000) pp. 794 and 791; and, on the impact of aforementioned IACtHR's Advisory Opinion n. 16 of 1999, cf. A.A. Cançado Trindade, "The Humanization of Consular Law: The Impact of Advisory Opinion n. 16 (1999) of the Inter-American Court of Human Rights on International Case-Law and Practice", 6 *Chinese Journal of International Law* (2007) n. 1, p. 1-16.

311 Cf. note (137), *supra*, and cf. also: A.A. Cançado Trindade, "The Evolution of Provisional Measures of Protection under the Case-Law of the Inter-American Court of Human Rights (1987-2002)", 24 *Human Rights Law Journal - Strasbourg/Kehl* (2003) n. 5-8, pp. 162-168; A.A. Cançado Trindade, "Les mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", in *Mesures conservatoires et droits fondamentaux* (eds. G. Cohen-Jonathan and J.-F. Flauss), Bruxelles, Bruylant/Nemesis, 2005, pp. 145-163; A.A. Cançado Trindade, "Une ère d'avancées jurisprudentielles et institutionnelles: souvenirs de la Cour interaméricaine des droits de l'homme", in *Le particularisme interaméricain des droits de l'homme* (eds. L. Hennebel and H. Tigroudja), Paris, Pédone, 2009, pp. 65-66; A.A. Cançado Trindade, "La Expansión y la Consolidación de las Medidas Provisionales de Protección en la Jurisdicción Internacional Contemporánea", in *Retos de la Jurisdicción Internacional* (eds. S. Sanz Caballero and R. Abril Stoffels), Cizur Menor/Navarra, Cedri/CEU/Thomson Reuters, 2012, pp. 99-117.

312 Cf. IACtHR, case of *James and Others versus Trinidad and Tobago* (Resolution of 25.05.1999), Concurring Opinion of Judge Cançado Trindade, paras. 9-10 (where I asserted the binding character of provisional measures of protection as a "jurisdictional guarantee of preventive character"); IACtHR, case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (Resolution of 18.08.2000), Concurring Opinion of Judge Cançado Trindade, paras. 13-25; cf. IACtHR, case of the *Community of Peace of San José of Apartadó* (Resolution of 18.06.2002, pursuant to its previous Resolu-

devoting my attention, along the years, to the conceptual development of the *autonomous legal regime* of those measures<sup>313</sup>. I have identified obligations emanating from provisional measures of protection *per se*, entirely distinct from obligations eventually ensuing from a Judgment as to the merits (and reparations) on the *cas d'espèce*; I have further pointed out that non-compliance with the former - as well as the latter - generates the responsibility of the State, with legal consequences<sup>314</sup>.

9. I have thus made the point that the “injured party” or victim may, in my perception, appear promptly in the realm of provisional measures of protection<sup>315</sup>, in case of non-compliance with them. Accordingly, non-compliance with, or breach of, such measures, engages autonomously the international responsibility of the State at issue, within the domain of provisional measures of protection<sup>316</sup>, irrespective of the subsequent Judgments as to the merits of the concrete cases (cf. *infra*).

---

tion, in the same case, of 20.11.2000), Concurring Opinion of Judge Caçado Trindade, paras. 14-17 and 19-20.

313 Cf. IACtHR. case of *Eloísa Barrios and Others* (Resolution of 29.06.2005), Concurring Opinion of Judge Caçado Trindade, paras. 4-11; IACtHR. case of *Eloísa Barrios and Others* (Resolution of 22.09.2005), Concurring Opinion of Judge Caçado Trindade, paras. 2-9; IACtHR, case of the *Children and Adolescents Deprived of Their Freedom in the 'Complex of Tatuapé' of FEBEM* (Resolution of 17.11.2005), Concurring Opinion of Judge Caçado Trindade, paras. 2-10; IACtHR, *ibid.* (Resolution of 29.11.2005), Concurring Opinion of Judge Caçado Trindade, paras. 13-36.

314 IACtHR, case of the *Community of Peace of San José of Apartadó* (Resolution of 02.02.2006), Concurring Opinion of Judge Caçado Trindade, paras. 6-7, and cf. also paras. 4 and 8-10; and cf., to the same effect, IACtHR, case of the *Communities of Jiguamiandó and Curbaradó* (Resolution of 07.02.2006), Concurring Opinion of Judge Caçado Trindade, paras. 6-7, and cf. also paras. 4 and 8-11.

315 Cf. IACtHR, case of *Eloísa Barrios and Others* (Resolution of 29.06.2005). Concurring Opinion of Judge Caçado Trindade, para. 5; case of the *Community of Peace of San José of Apartadó* (Resolution of 02.02.2006), Concurring Opinion of Judge Caçado Trindade, para. 5; case of the *Communities of Jiguamiandó and Curbaradó* (Resolution of 07.02.2006), Concurring Opinion of Judge Caçado Trindade, para. 5. And, on “potential victims” in the realm of provisional measures of protection, cf. IACtHR, case of the *Members of the Group of Community Studies and Psychosocial Action - ECAP* (case of the *Massacre of Plan de Sánchez*) (Resolution of 29.11.2006), Separate Opinion of Judge Caçado Trindade, paras. 10 and 12.

316 Cf. IACtHR, case of the *Prisons of Mendoza* (Resolution of 30.03.2006), Concurring Opinion of Judge Caçado Trindade, paras. 11-12; IACtHR, case of the *Prison of Araraquara* (Resolution of 30.09.2006), Concurring Opinion of Judge Caçado Trindade, paras. 24-25.

10. Hence the utmost importance of compliance with those measures<sup>317</sup>, for the realization of justice itself. Over a decade ago I deemed it fit to warn that one is not to take for granted advances in interim measures of protection (in distinct international jurisdictions), as such advances still appear threatened by the increasing violence in the world today, everywhere; attention is thus to be kept so as to avoid steps backwards and to keep on enhancing the institute of provisional measures of protection<sup>318</sup>.

11. In effect, for the last eight years (2009 onwards), I have been devoting myself to the conceptual development of the autonomous legal regime of those measures, this time in the case-law of the ICJ (cf. *infra*). In the recent case of *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste versus Australia)*, provisional measures, Order of 22.04.2015), I have pointed out, in my Separate Opinion, that, in our days, the progressive development of international law, by means of provisional measures of protection,

requires an awareness of the autonomous legal regime of provisional measures of protection, as well as judicial decisions which reflect it accordingly, with all its implications (para. 10).

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

#### 1. Human Vulnerability in International Case-Law

12. The present case of the *Application of the ICSFT Convention and of the CERD Convention (Ukraine versus Russian Federation)*, is not the first one wherein the alleged *vulnerability* of segments of the population concerned is brought to the Court's attention, in its consideration of provisional measures of protection. Suffice it here to recall a couple of examples to this effect. In the case of *Armed Activities on the Territory of*

---

317 Cf. IACtHR, case of the *Communities of Jiguamiandó and Curbaradó* (Resolution of 15.03.2005), Concurring Opinion of Judge Cançado Trindade, paras. 4 and 10; case of the *Community of Peace of San José of Apartadó* (Resolution of 15.03.2005), Concurring Opinion of Judge Cançado Trindade, paras. 4 and 10; case of the *Indigenous People of Sarayaku* (Resolution of 06.07.2004), Concurring Opinion of Judge Cançado Trindade, paras. 2 and 30.

318 Cf. IACtHR, case of the *Members of the Group of Community Studies and Psychosocial Action - ECAP* (case of the *Massacre of Plan de Sánchez* (Resolution of 29.11.2006), Separate Opinion of Judge Cançado Trindade, paras. 1, 5, 10 and 14-15.

Congo (D.R. Congo *versus* Uganda), e.g., - where it was not disputed that there had already occurred “grave and repeated violations of human rights and international humanitarian law”, - the ICJ found (Order of 01.07.2000, paras. 42-43) that persons in the area of the armed conflict (in the D.R. Congo) remained “extremely vulnerable”, undergoing “a serious risk that the rights at issue” in the *cas d’espèce* might suffer further “irreparable prejudice”; this being so, the ICJ, accordingly, decided to indicate provisional measures “as a matter of urgency in order to protect those rights” (para. 43).

13. Subsequently, in the case of the *Application of the International Convention against All Forms of Racial Discrimination - CERD* (Georgia *versus* Russian Federation), the ICJ again found (Order of 15.10.2008, para. 143) that, given “the ongoing tension and the absence of an overall settlement to the conflict in the region” of South Ossetia, Abkhazia and adjacent areas, the segments of the population concerned “remain[ed] vulnerable” (para. 143). The ICJ pondered that “the problems of refugees and internally displaced persons” in the region at issue had “not yet been resolved in their entirety”; the persons concerned ran a “serious risk of irreparable prejudice”, which could involve “potential loss of life or bodily injury”, in breach of rights under the CERD Convention (paras. 142-143). The Court, accordingly, decided likewise to indicate provisional measures of protection (para. 149).

14. In the ICJ’s Advisory Opinion on the *Declaration of Independence of Kosovo* (of 22.07.2010), I addressed in my Separate Opinion the overcoming of the inter-State paradigm in contemporary international law (paras. 182-188), and the growing care of the United Nations and other international organizations in respect of the needs and values of peoples (paras. 53-66). I focused on the people-centered outlook in contemporary international law (paras. 169-176), and the increasing attention to the centrality of the sufferings of peoples (paras. 161-168).

15. In the same Separate Opinion, I then gave an account of the attention of the U.N. main organs - in particular the General Assembly (paras. 103-114) and the Secretary General (paras. 119-129) - to the needs of people, “especially of the most vulnerable groups affected by the conflict” (para. 105). Furthermore, I recalled the humane ends of the State (paras. 177-181), and dwelt upon the fundamental principle of humanity in the framework of the Law of the United Nations (paras. 196-211). I then underlined the special attention required to those in

“situation of greater vulnerability and standing thus in greater need of protection” (para. 185), - keeping always in mind the humane ends of the State.

16. Later on, in my Dissenting Opinion in the case of the *Jurisdictional Immunities of States* (Germany versus Italy, Greece intervening, Judgment of 03.02.2012), I deemed it fit to warn that there is greater need of protection and justice not only to potential or actual victims, “increasingly vulnerable, if not defenceless”, but also to “the social milieu as a whole” (para. 175). And, shortly afterwards, in my Separate Opinion in the case of *A.S. Diallo* (Guinea versus D.R. Congo, reparations, Judgment of 19.06.2012), I deemed it necessary to draw attention to the needed measures “intended to overcome the extreme vulnerability of victims” (para. 84).

17. It is significant that, in our times, cases pertaining to situations of extreme adversity or vulnerability of human beings have been brought to the attention of the ICJ as well as other international tribunals. This is, in my perception, a sign of the new paradigm of the *humanized* international law, the new *jus gentium*<sup>319</sup> of our times, sensitive and attentive to the needs of protection of the human person in any circumstances of vulnerability. The case-law of international human rights tribunals is particularly illustrative in this respect.

18. For example, there have been cases where the IACtHR was faced with the extreme vulnerability of the victims amidst the decomposition of the public power and the social tissue<sup>320</sup>, or else in the context of forced displacement of members of (indigenous) communities amidst chronic poverty<sup>321</sup>. In such situations, the social

---

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

320 E.g., IACtHR, case of *Servellón and Others versus Honduras* (Judgment of 21.09.2006), para. 99; and Separate Opinion of Judge Cançado Trindade, singling out the extreme vulnerability of the victimized (paras. 7, 17, 24, 26 and 32).

321 E.g., IACtHR, case of the *Indigenous Community Sawhoyamaya versus Paraguay* (Judgment of 29.03.2006), Separate Opinion of Judge Cançado Trindade, paras. 14, and cf. paras. 16, 18-19, 24, 29 and 37 (on the situation of flagrant and extreme vulnerability and abandonment).

exclusion of the victimized renders the international jurisdiction their “last hope”, given their situation of extreme vulnerability and defencelessness<sup>322</sup>.

19. For its part, the ECtHR has likewise been attentive to the alleged “*vulnerabilité*” and “*frustration*” of some of the applicants in general<sup>323</sup>. Along the years, the ECtHR acknowledged the vulnerability of children, and disabled persons, among other victimized individuals<sup>324</sup>. In the case of *M. Mayeka and K. Mitunga versus Belgium* (2006), the ECtHR outlined the “position of extreme vulnerability” of young and unaccompanied, undocumented migrants<sup>325</sup>. And in the *M.S.S. versus Belgium and Greece* case (2011), the ECtHR focused on the particular “vulnerability inherent” in the situation of homeless asylum-seekers<sup>326</sup>.

20. Furthermore, in the *Tanrikulu versus Turkey* case (1999), e.g., the ECtHR drew attention to the situation of vulnerability of the complainant, like that of applicant villagers in previous cases, under intimidation and “unacceptable pressure”, in breach of the right of individual petition under the ECHR<sup>327</sup>. And in the *Cyprus versus Turkey* case (2001), the ECtHR took into account the testimony of witnesses on “vulnerability and fear of the enclaved population”<sup>328</sup>.

---

322 *Ibid.*, paras. 58, 67 and 73.

323 E.g., ECtHR/3rd. Section, case *Varnava and Others versus Turkey* (Judgment of 10.01.2008), para.137. The case was then referred to the ECtHR/Grand Chamber, which was likewise attentive to the circumstances surrounding the victims case *Varnava and Others versus Turkey* (Judgment of 18.09.2009), paras. 147-149.

324 Cf., *inter alia*, e.g., ECtHR, case *A. versus United Kingdom* (Judgment of 23.09.1998), para. 22; ECtHR/1st. Section, case *Dordević versus Croatia* (Judgment of 24.07.2012), para. 138, and cf. paras. 131 and 133.

325 Cf. ECtHR/1st. Section (Judgment of 12.10.2006, para. 103, and cf. para. 55), in breach of Article 3 of the European Convention on Human Rights (paras. 59, 61 and 63).

326 Cf. ECtHR/Grand Chamber (Judgment of 21.01.2011, paras. 232-233 and 258-259), in breach of Article 3 of the European Convention on Human Rights (paras. 233-234 and 264).

327 Cf. ECtHR (Judgment of 08.07.1999), paras. 130 and 142(7).

328 Cf. ECtHR (Judgment of 10.05.2001), para. 224.

## 2. Human Vulnerability in the *Cas d'Espèce*

### a) Ukraine's Request for Provisional Measures of Protection

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

22. In its *Request*, the complainant State repeatedly drew attention to the extreme *vulnerability* of segments of the civilian population in eastern Ukraine and Crimea (paras. 4, 10, 13-14, 18-19 and 21). Ukraine stressed that it was seeking the protection of “its rights, and those of its people” (paras. 16-17). In effect, the present case, opposing Ukraine to the Russian Federation, is not the first one wherein, in its consideration of provisional measures of protection, the ICJ is called upon to take into account people and territory together, and, more particularly, the protection of people in territory.

### b) Arguments of the Contending Parties on Human Vulnerability

23. In the oral phase of the present proceedings, there was not one single round of public hearings before the Court (of 06-09.03.2017) when the contending parties did not expressly address the test of vulnerability of segments of the population. Ukraine did so to a larger extent than the Russian Federation. Although the object of their arguments was the test of the vulnerability of segments of the population, they pointed, as expected, to distinct directions.

24. In the first round of public hearings before the ICJ (06-07.03.2017), Ukraine contended that, given the very large number of displaced persons, “any population could be called ‘vulnerable’ and in need of protection”<sup>329</sup>. It added that the populations, in both eastern Ukraine and Crimea, “are vulnerable”<sup>330</sup>, and that, by and large, the

329 ICJ, doc. CR 2017/1, of 06.03.2017, p. 32, para. 25.

330 *Ibid.*, p. 70, para. 51.

“ethnic Ukrainian community has been vulnerable”<sup>331</sup>. The Russian Federation, for its part, challenged the accuracy of Ukraine’s claim that “Crimean Tatars are particularly vulnerable”<sup>332</sup>.

25. In the second round of public hearings before the ICJ (08-09.03.2017), Ukraine retook its argument, referring to “the displacement of some 1.7 million Ukrainian citizens”, and to the “fatalities and other injuries to Ukraine’s vulnerable civilian population”<sup>333</sup>. Such violations were suffered by “a vulnerable population, stripped of (...) protections”<sup>334</sup>; it added that the “civilian populations of Ukraine, including in particular eastern Ukraine and Crimea, are extremely vulnerable and require the Court’s immediate protection”<sup>335</sup>.

26. The Russian Federation, in turn, referred to Ukraine’s claim “to protect the vulnerable population”, in particular “in the east of Ukraine”<sup>336</sup>, and added that, to that effect (of protection), it was necessary to secure the implementation of the Minsk Agreements<sup>337</sup>. This is how far the contending parties have gone in their arguments on the vulnerability of segments of the population. It is significant that both of them deemed it fit to address the issue, each one in its own way.

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

27. Human vulnerability was thus addressed, in distinct ways, by both contending parties in their pleadings before the ICJ (*supra*). Also in the documents submitted to the ICJ by both parties, shortly before the public hearings, evidence was produced of the utmost vulnerability of segments of the local population (e.g., in eastern Ukraine). In effect, in the course of the present proceedings on Provisional Measures of Protection, the two contending parties have shown procedural cooperation in providing relevant evidence to the Court. They both brought to the attention of the Court, in their documents lodged with it, e.g., several reports on the human rights situation in Ukraine (mainly

331 *Ibid.*, p. 67, para. 43.

332 ICJ, doc. CR 2017/2, of 07.03.2017, p. 55, paras. 7-8.

333 ICJ, doc. CR 2017/3, of 08.03.2017, p. 12, para. 2.

334 *Ibid.*, p. 60, para. 31.

335 *Ibid.*, p. 61, para. 5.

336 ICJ, doc. CR 2017/4, of 09.03.2017, p. 68, para. 20.

337 *Ibid.*, p. 69, para. 23.

of the Office of the United Nations High Commissioner for Human Rights - OHCHR), containing accounts of *indiscriminate shellings* of the civilian population from all sides.

28. The accounts of such shelling are numerous, going beyond the specific passages referred to by each of the two contending parties in their arguments before the ICJ. The OHCHR reports address indiscriminate shelling of civilians - in breach of the human rights and international humanitarian law - from all sides, in densely populated areas, both government-controlled areas<sup>338</sup> and towns and villages controlled by armed groups<sup>339</sup>. Artillery and military weaponry have been kept within or near those densely populated areas, so as to keep on conducting indiscriminate shelling of their civilian residents.

29. Some specific examples may here be pointed out. According to OHCHR Reports on the ongoing conflict in eastern Ukraine, all parties - including Ukrainian forces and non-State armed groups - have carried out indiscriminate shelling and used explosive weapons, with wide-area effects, in densely populated areas<sup>340</sup>. Intense shelling remains a daily occurrence in many locations<sup>341</sup> (including government-controlled areas as well as towns controlled by non-State armed groups)<sup>342</sup>. These widespread attacks have resulted in heavy damages to civilians (injuries and casualties)<sup>343</sup>.

---

338 Such as Avdiivka, Debaltseve, Popasna, Shchastia and Stanychno Luhanske.

339 Including Donetsk city, Luhansk and Horlivka.

340 OHCHR, *Report on the Human Rights Situation in Ukraine* (16 November 2016 to 15 February 2017), paras. 18 and 22-24; OHCHR, *Report on the Human Rights Situation in Ukraine* (01 December 2014 to 15 February 2015), para. 5; OHCHR, *Report on the Human Rights Situation in Ukraine* (17 August 2014), paras. 4 and 26.

341 OHCHR, *Report on the Human Rights Situation in Ukraine* (16 November 2016 to 15 February 2017), para. 18.

342 OHCHR, *Report on the Human Rights Situation in Ukraine* (16 August to 15 November 2016), para. 23; OHCHR, *Report on the Human Rights Situation in Ukraine* (16 February to 15 May 2016), para. 19; OHCHR, *Report on the Human Rights Situation in Ukraine* (16 August to 15 November 2016), para. 23; OHCHR, *Report on the Human Rights Situation in Ukraine* (16 May to 15 August 2015), para. 4; OHCHR, *Report on the Human Rights Situation in Ukraine* (01 December 2014 to 15 February 2015), paras. 6, 23 and 44; OHCHR, *Report on the Human Rights Situation in Ukraine* (17 August 2014), para. 26.

343 OHCHR, *Accountability for Killings in Ukraine from January 2014 to May 2016*, para. 32: The "OHCHR estimates that up to 2,000 civilians may have been killed during the armed conflict period (...). About 85 to 90 per cent of these deaths, recorded by OHCHR both in the territories controlled by the Government and in the areas controlled by armed

30. For instance, indiscriminate shelling has struck and damaged residential buildings<sup>344</sup>, hospitals<sup>345</sup>, ambulances<sup>346</sup>, schools<sup>347</sup>, kindergartens<sup>348</sup>, and a school football pitch<sup>349</sup>. In addition to the attacks on schools (encompassing the military use of them<sup>350</sup>), the OHCHR also reports attacks on churches (including on priests and parishioners)<sup>351</sup>.

---

groups, are as a result of shelling of populated areas with mortars, canons, howitzers, tanks and multiple launch rocket systems". And cf., likewise: OHCHR, *Report on the Human Rights Situation in Ukraine* (16 August to 15 November 2016), para. 23; OHCHR, *Report on the Human Rights Situation in Ukraine* (16 May to 15 August 2016), para. 40; OHCHR, *Report on the Human Rights Situation in Ukraine* (16 February to 15 May 2016), paras. 11, 19 and 25; OHCHR, *Report on the Human Rights Situation in Ukraine* (16 August to 15 November 2015), para. 26; OHCHR, *Report on the Human Rights Situation in Ukraine* (16 May to 15 August 2015), paras. 23 and 25-26; OHCHR, *Report on the Human Rights Situation in Ukraine* (01 December 2014 to 15 February 2015), paras. 5 and 7; OHCHR, *Report on the Human Rights Situation in Ukraine* (15 December 2014), paras. 5 and 38. And cf. also, more recently, OHCHR, *Report on the Human Rights Situation in Ukraine* (16 November 2016 to 15 February 2017), paras. 28-31.

344 OHCHR, *Report on the Human Rights Situation in Ukraine* (01 December 2014 to 15 February 2015), para. 44; OHCHR, *Report on the Human Rights Situation in Ukraine* (15 June 2014), para. 259.

345 OHCHR, *Report on the Human Rights Situation in Ukraine* (16 November 2016 to 15 February 2017), para. 24; OHCHR, *Report on the Human Rights Situation in Ukraine* (16 May to 15 August 2016), para. 36; OHCHR, *Report on the Human Rights Situation in Ukraine* (16 May to 15 August 2015), para. 104; OHCHR, *Report on the Human Rights Situation in Ukraine* (01 December 2014 to 15 February 2015), paras. 7 and 44; OHCHR, *Report on the Human Rights Situation in Ukraine* (15 June 2014), para. 172.

346 OHCHR, *Report on the Human Rights Situation in Ukraine* (16 May to 15 August 2015), para. 104.

347 OHCHR, *Report on the Human Rights Situation in Ukraine* (16 August to 15 November 2016), para. 19; OHCHR, *Report on the Human Rights Situation in Ukraine* (16 May to 15 August 2016), para. 35; OHCHR, *Report on the Human Rights Situation in Ukraine* (01 December 2014 to 15 February 2015), paras. 7 and 44.

348 OHCHR, *Report on the Human Rights Situation in Ukraine* (16 November 2016 to 15 February 2017), para. 24; OHCHR, *Report on the Human Rights Situation in Ukraine* (01 December 2014 to 15 February 2015), paras. 7 and 44.

349 OHCHR, *Report on the Human Rights Situation in Ukraine* (15 December 2014), para. 38.

350 Cf. also, on this particular point, Human Rights Watch, *Studying Under Fire – Attacks on Schools, Military Use of Schools During the Armed Conflict in Eastern Ukraine*, 11.02.2016 (<https://www.hrw.org/report/2016/02/11/studying-under-fire/attacks-schools-military-use-schools-during-armed-conflict>) [HRW - Report]; *Ukraine: Attacks, Military Use of Schools*, 11.02.2016 (<https://www.hrw.org/news/2016/02/11/ukraine-attacks-military-use-schools>).

351 Cf. OHCHR, *Report on the Human Rights Situation in Ukraine* (15 June 2014), para. 315 (in the village of Perevalnoe, Crimea); OHCHR, *Report on the Human Rights Situ-*

In some towns, up to 80 per cent of residential buildings and public facilities have been destroyed<sup>352</sup>. Those injured and killed as a result of indiscriminate shelling have included women<sup>353</sup>, children<sup>354</sup>, and elderly people<sup>355</sup>, among others<sup>356</sup>.

31. In such indiscriminate shelling - which, as warned by the OHCHR in late 2014 and early 2015, “must cease immediately”<sup>357</sup>, - there has been an increasing and continuing flow of heavy and sophisticated weaponry<sup>358</sup>. In the same period, the OHCHR also recorded “a considerable number of alleged summary executions and killings of civilians who were not taking part in hostilities”, and also singled out the “vast majority of civilian casualties” as a result of “the indiscriminate shelling of residential areas, in violation of the international humanitarian law principle of distinction”<sup>359</sup>. The OHCHR further warned, in mid-2016, that both sides (Government forces and armed groups)

continue to disregard the protections afforded under international humanitarian law to schools as civilian objects used for educational purposes. (...) Hospitals used for medical purposes have also been frequently hit by artillery fire, in violation of their protected status under international humanitarian law. (...) In some

---

*ation in Ukraine* (17 August 2014), para. 163 (Ukrainian Orthodox Church of the Kyiv Patriarchate, village of Mramornoye, near Simferopol); OHCHR, *Report on the Human Rights Situation in Ukraine* (15 December 2014), para. 84 (same church in same patriarchate, again in Simferopol area); OHCHR, *Accountability for killings in Ukraine from January 2014 to May 2016*, Annex I, paras. 39-40 (evangelical church “Transfiguration of Christ”, town of Sloviansk).

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

353 OHCHR, *Report on the Human Rights Situation in Ukraine* (01 December 2014 to 15 February 2015), para. 5.

354 *Ibid.*, para. 5.

355 *Ibid.*, para. 5.

356 Cf. OHCHR, *Report on the Human Rights Situation in Ukraine* (15 June 2014), para. 172; OHCHR, *Report on the Human Rights Situation in Ukraine* (16 February to 15 May 2015), para. 65.

357 OHCHR, *Report on the Human Rights Situation in Ukraine* (01 December 2014 to 15 February 2015), para. 2.

358 *Ibid.*, para. 3.

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

cases, Government forces and armed groups have used educational and health facilities for military purposes<sup>360</sup>.

32. Furthermore, indiscriminate shelling has had a serious impact on civilian infrastructure, such as water pipes and filtration systems, gas pipelines and power stations. As a result, thousands of people have been deprived of life-saving services (including heating, water and electricity), thus triggering additional humanitarian needs<sup>361</sup>. In some of the worst affected areas, there has been an “almost total economic and infrastructure breakdown”<sup>362</sup>.

33. Moreover, civilian populations attempting to flee from such precarious situations have been attacked at checkpoints, apparently by both Government armed forces<sup>363</sup> and non-State armed groups<sup>364</sup>. Such limitations on freedom of movement have compelled civilians to spend prolonged periods exposed to the violence and risks of ongoing hostilities<sup>365</sup>. Despite the ever growing civilian death toll, on no occasion have armed groups or Government authorities taken responsibility for any civilian victims of the conflict. As a result, civilian victims of indiscriminate shelling have suffered both the effects of their physical injuries (in addition to casualties), and of the denial of social and legal protection<sup>366</sup>.

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

---

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

361 OHCHR, *Report on the Human Rights Situation in Ukraine* (16 November 2016 to 15 February 2017), paras. 18 and 25-27; OHCHR, *Report on the Human Rights Situation in Ukraine* (16 August to 15 November 2016), para. 18; OHCHR, *Report on the Human Rights Situation in Ukraine* (16 May to 15 August 2016), para. 125; OHCHR, *Report on the Human Rights Situation in Ukraine* (16 February to 15 May 2016), para. 15; OHCHR, *Report on the Human Rights Situation in Ukraine* (01 December 2014 to 15 February 2015), paras. 7 and 44.

362 OHCHR, *Report on the Human Rights Situation in Ukraine* (01 December 2014 to 15 February 2015), para. 44.

363 OHCHR, *Report on the Human Rights Situation in Ukraine* (16 February to 15 May 2016), para. 20.

364 OHCHR, *Report on the Human Rights Situation in Ukraine* (17 August 2014), para. 4.

365 OHCHR, *Report on the Human Rights Situation in Ukraine* (16 February to 15 May 2016), para. 20.

366 OHCHR, *Report on the Human Rights Situation in Ukraine* (16 August to 15 November 2016), para. 136.

for Security and Cooperation in Europe (OSCE - Special Monitoring Mission to Ukraine, of July 2016) referred to “ongoing hostilities, shelling and general insecurity”, and “serious human rights violations”, as the main reason for the massive internal displacement of persons in the areas affected<sup>367</sup>.

35. A report of the U.N. special *rapporteur* on the “Human Rights of Internally Displaced Persons” (of April 2015) stated likewise that ongoing hostilities have caused “massive internal displacement” in the eastern regions of Ukraine ; it urged “all parties to the hostilities to bring the fighting to an end without delay”, and “to protect civilians”, as well as to ensure the voluntary and safe return of internally displaced persons to their homes<sup>368</sup>.

## V. The Decisive Test: Human Vulnerability over “Plausibility” of Rights

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

37. The so-called “plausibility” test is a recent invention of the Court: it was introduced in the case of *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal, Order of 28.05.2009), and the ICJ has ever since been trying to clarify it. Sometimes its invocation of the term “plausible” appears to be related to *rights*, sometimes to *facts*, or else to *arguments* of the parties, - as can be seen in the erratic use of the term in paragraphs 63-64, 66-71, 74-75, 79 and 82-83 of the present Order.

---

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

368 U.N./Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons (C. Beyani) - Addendum: Mission to Ukraine*, U.N. doc. A/HRC/29/34/Add. 3, of 02.04.2015, p. 19, para. 75; and, for refugees in general, cf. United Nations High Commissioner for Refugees [UNHCR], *Profiling and Needs Assessment of Internally Displaced Persons (IDPs)*, of 17.10.2014, pp. 1-116.

38. In effect, in the present Order, the ICJ uses the term “plausible” not only in respect of rights (paras. 63-64, 69, 75, 79 and 82), but also more widely in respect of the application of international instruments (para. 70), thus disclosing two distinct forms of legal “plausibility”. Likewise, in the present Order, the ICJ uses the term “plausible” also in relation to facts (paras. 66, 68, 75 and 82-83), thus referring to another distinct form, this time of factual “plausibility”. The term is used even by reference to “intent” and “purpose” (para. 66). And the ICJ, in the present Order, further uses the term “plausible” also in relation to arguments or allegations (para. 71).

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

40. This is not the first time within the ICJ that I deem it fit to warn against the uncertainties surrounding the so-called “plausibility” test. I have already highlighted this point, e.g., in my Separate Opinion in the case of *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste versus Australia)*, where I pondered that “a right is a right, irrespective of its so-called ‘plausibility’ (whatever that might concretely mean)” (para. 48). Attention is to be kept on the needs of protection, rather than on strategies of litigation.

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

42. The Court is here faced with a situation where the fundamental rights to life (and of living) and to the security and integrity of the person are at stake, in the circumstances of the *cas d’espèce*. The individuals concerned live (or survive) in a situation of great vulnerability. In

addition, there is here another related point to be kept in mind, namely, that the rights protected at the stage of provisional measures of protection are not necessarily identical to the rights vindicated later, at the stage of the merits of the case.

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

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

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

45. In the present case of the *Application of the ICSFT Convention and of the CERD Convention (Ukraine versus Russian Federation)*, in my understanding the Court is entitled and obliged, in view of the evidence produced before it, to indicate provisional measures of protection, on the basis of both the ICSFT Convention and of the CERD Convention. At this stage of the proceedings, it suffices to determine the Court's *prima facie* jurisdiction thereunder; an in-depth analysis of these two Conventions is not required, and should be kept for the merits stage<sup>369</sup>. The evidence already submitted to the Court is sufficient for the purposes of provisional measures.

46. To determine its *prima facie* jurisdiction at the present stage, the Court does not need to establish definitively breaches of the two

---

369 Cf., in this sense, ICJ, case of the *Temple of Preah Vihear (Cambodia versus Thailand, Provisional Measures, Order of 18.07.2011)*, para. 53.

Conventions at issue (Article 18 of the ICSFT Convention, and Articles 2(1) and 5(b) of the CERD Convention). At the stage of provisional measures, the Court cannot make definitive findings of fact nor findings of attribution of responsibility<sup>370</sup>, - issues to be determined later on, at the stage of the merits. At the present stage, the ICJ - as the International Court of *Justice*, - is under the duty to focus, on the basis of the evidence produced, on the protection of the vulnerable civilian population living (or surviving) in the areas concerned.

47. On the basis on the documents and evidence submitted by the Parties, there appear to be ongoing attacks on civilians in eastern Ukraine (particularly in Avdiika); this situation has been ongoing since 2014<sup>371</sup> and continues to result in fatalities, deaths and bodily injuries. There were and there continue to be armed incidents causing loss of life or bodily injuries, which by their nature and gravity are inherently irreparable<sup>372</sup>. There is urgency in the situation, and the Court is to protect the vulnerable segments of the population. The fact that after the two Minsk Agreements (of 05.09.2014 and 12.02.2015)<sup>373</sup> the situation remains unstable, and the tensions and indiscriminate shelling (from all sides) are still ongoing<sup>374</sup>, stresses the ICJ's duty to order provisional measures of protection.

48. For its part, the CERD Convention is a core U.N. human rights Convention intended to protect rights of the human person at intra-State level. Accordingly, concern for the protection of vulnerable segments of the population must inform the Court's finding that the test of human vulnerability here applies, requiring provisional

---

370 Cf. ICJ, case of the *Application of CERD Convention (Georgia versus Russian Federation, Provisional Measures, Order of 15.10.2008)*, p. 353, para. 141.

371 On the very recent escalation of hostilities in Avdiivka/Donetsk/Makiivka, cf. OHCHR, [Report on] *Conflict-Related Civilian Casualties in Ukraine* (06.03.2017), p. 1; OHCHR, *Escalation of Hostilities Has Exacerbated Civilian Suffering - U.N. Report* (04.03.2017), pp. 1-2.

372 Cf., in this respect, ICJ, case of the *Application of CERD Convention (Georgia versus Russian Federation, Provisional Measures, Order of 15.10.2008)*, p. 353, para. 142.

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

374 As reported, e.g., by the OSCE Special Monitoring Mission to Ukraine, based on information received up to 30.01.2017.

measures of protection. To this end, there is *prima facie* jurisdiction under the CERD Convention (*inter alia* Articles 2(1) and 5(b)), as well as under the ICSFT Convention (Article 18, as related to Article 2), and undue and groundless obstacles to access to justice thereunder are to be discarded.

49. Where there is a risk to human life or health, the Court has duly considered the probability of a damage which would be *ipso facto* irreparable. Imminence of breaches of rights under the CERD Convention, insofar as they could involve privation, hardship, anguish and danger to life and health, can result in damages that can be properly qualified as irreparable; such risk of irreparable harm renders certain ethnic segments of local populations (in Crimean Tatar and ethnic Ukrainian communities) particularly vulnerable<sup>375</sup>.

50. As the security of the vulnerable segments of the population remains at risk, provisional measures by the Court are necessary to protect them. Furthermore, the state of armed conflict and the application of International Humanitarian Law do not exclude the application of the ICSFT and CERD Conventions: they are not mutually-excluding, but rather, they reinforce each other in the factual context of the *cas d'espèce*, so as to secure the protection due to persons in situations of great vulnerability.

51. It is reassuring that the ICJ, as “the principal judicial organ of the United Nations” (Article 92 of the U.N. Charter), orders provisional measures of protection in face of the imminence of (new) breaches of human rights and of International Humanitarian Law. The circumstances of the *cas d'espèce* call for a *vue d'ensemble* of the relevant provisions of the ICSFT and CERD Conventions, and ILHR and IHL in the exercise of hermeneutics. Other main organs of the United Nations (like the General Assembly<sup>376</sup> and the Security Council<sup>377</sup>) have likewise expressed their concerns with the circumstances of the *cas d'espèce*.

---

<sup>375</sup>Case of the *Application of CERD Convention (Georgia versus Russian Federation, Provisional Measures, Order of 15.10.2008)*, paras. 142-143.

<sup>376</sup> Cf. U.N., General Assembly resolution 68/262, of 27.03.2014 (para. 4, on the need of protection of human life in Ukraine); General Assembly resolution 71/205, of 19.12.2016 (paras. 1 and 2(h), concern with discriminatory measures and practices in Crimea).

<sup>377</sup> Cf. U.N., Security Council resolution 2202 (2015), of 17.02.2015 (paras. 1 and 3, on the needed implementation of the “Package of Measures for the Implementation of the Minsk Agreements” of 12.02.2015).

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

52. This is not the first time that, in face of the victimization of vulnerable segments of the population in an ongoing armed conflict or hostilities, I upheld the “approximations and convergences”, and the concomitant application, of International Humanitarian Law and other international Conventions (of human rights and others), a situation which, - as I pointed out 15 years ago in another international jurisdiction, - clearly requires the recognition of the effects of the Convention at issue *vis-à-vis* others, *simples particuliers* (*Drittwirkung*)<sup>378</sup>. In the *cas d'espèce*, such is the case of the ICSFT and CERD Conventions: *Drittwirkung* has as incidence here, as both Conventions cover inter-individual relations as well, without thereby excluding the determination of State responsibility (even if by omission, a question for consideration at the subsequent stage of the merits).

53. As I have already pointed out in the present Separate Opinion, the vulnerability of victims, with its implications, are thus clearly acknowledged in contemporary international case-law, of distinct international tribunals (cf. part III, *supra*). In a still wider framework, may I just add, in this connection, that the cycle of World Conferences of the United Nations<sup>379</sup> (along the nineties and beginning of the last decade), came significantly to disclose a common denominator, giving cohesion to the final documents they adopted, namely, the recognition of the legitimacy of the concern of the international community as a whole with the *conditions of living* of the population everywhere<sup>380</sup>.

---

378 Cf. IACtHR, case of the *Community of Peace of San José of Apartadó* (Resolution of 18.06.2002), Concurring Opinion of Judge Cançado Trindade, para. 14; IACtHR, case of the *Prisons of Mendoza* (Resolution of 30.03.2006), Concurring Opinion of Judge Cançado Trindade, para. 5.

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

380 Cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. I, 2nd. ed., Porto Alegre/Brazil, S.A. Fabris Ed., 2003, chs. III-VII, pp. 165-338; and cf. A.A. Cançado Trindade, “Sustainable Human Development and Conditions of Life as a Matter of Legitimate International Concern: The Legacy of the U.N. World Conferences”, in *Japan and International Law - Past, Present and Future* (Symposium of

54. The U.N. World Conference of Vienna (1993), in particular, added an important element to this common denominator, namely, the special attention devoted to the *vulnerable segments* of the population everywhere. The protection of the vulnerable constitutes the great legacy of the II World Conference of Human Rights (Vienna, 1993)<sup>381</sup>: more than any other of the World Conferences of that cycle, it presented, given its wide theme, a systemic vision of all segments of the population affected by vulnerability or extreme adversity.

55. The Declaration and Programme of Action of Vienna, final document adopted by the 1993 Vienna Conference, sought to concentrate special attention on persons suffering from discrimination and vulnerable groups, on the socially excluded, in greater need of protection<sup>382</sup>. The aforementioned document much contributed to the recognition of the *centrality* of victims in the present domain of protection, with special attention to their living conditions amidst vulnerability. In its legacy, such centrality of the victims is projected until current times, and underlined in cases of systematic violation of their fundamental rights, amidst particularly *aggravating* circumstances<sup>383</sup>.

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

56. Eight years ago, in the case of *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium *versus* Senegal), the ICJ decided, in its Order of 28.05.2009, not to indicate provisional measures of protection. I appended a Dissenting Opinion to that Order, recalling the saga of the

---

the Centennial of the Japanese Association of International Law), The Hague, Kluwer, 1999, pp. 285-309.

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

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

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

victims of the Hissène Habré regime (1982-1990) in Chad (paras. 30-45) in their search for justice; and, after drawing attention to the preventive juridical nature of such provisional measures, granted without prejudice to the Court's final decision on the merits of the case at issue (para. 12), as well as to their truly tutelary character (para. 13), I deemed it fit to point out that, along recent decades, there have been occasions when the ICJ, in deciding on provisional measures of protection, has endeavoured gradually to overcome the strictly inter-State outlook, in acknowledging the need of preservation of "human life and personal integrity", fundamental rights of individuals (paras. 20-21).

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

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

58. I singled out the importance and time dimension of provisional measures of protection, particularly in face of the briefness and vulnerability of human life (paras. 46-47), and warned that prolonged delays in a situation of adversity or even defencelessness may amount to an aggravating circumstance (para. 59). Subsequently, in the same case of *Questions Relating to the Obligation to Prosecute or Extradite* (merits, Judgment of 20.07.2012), I pondered that the central position is of the human person, of the victims (and not of the States), and attention to their situation of great vulnerability requires further development in the treatment of the matter (para. 174).

59. And, in my Separate Opinion in the case of *A.S. Diallo* (Guinea versus D.R. Congo, merits, Judgment of 30.11.2010), I pointed out that “humaneness is to condition human behaviour in all circumstances, in times of peace as well as of disturbances and armed conflict” (para. 102), particularly in face of a “situation of vulnerability, or even defencelessness” (para. 105). More recently, in my Dissenting Opinion in the Court’s Order of 16.07.2013 in the joined cases of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica versus Nicaragua), and of the *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua versus Costa Rica), I pointed out that

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

60. May I, at this stage, briefly recall the two cases *Ukraine versus Russian Federation*, pending before the European Court of Human Rights (ECtHR), illustrative of the protection of the human person, beyond the strict inter-State dimension. The ECtHR applied provisional measures of protection in those (inter-State) cases, in addition to over 150 individual cases (out of a total of more than 1400 individual cases) lodged by individuals against Ukraine, or the Russian Federation or both<sup>384</sup>.

61. In the first case *Ukraine versus Russian Federation*, for example, the ECtHR, in applying provisional measures of protection, called upon both contending parties to refrain from taking any measures (in particular military action) which might entail breaches of the ECtHR rights of the civilian population (including putting their life and health

---

384 In a third *Ukraine versus Russia* case (application n. 49537/14), provisional measures were promptly adopted by the ECtHR, in a case concerning security of the person of a Ukrainian national of the Crimean Tatars ethnic group, a case which was then struck out of its list of cases; cf. ECtHR, Press Release 286 (2015), of 24.09.2015, p. 1. In the second pending case *Ukraine versus Russia* (application n. 43800/14, concerning abducted persons, then returned to Ukraine), provisional measures were promptly adopted and then lifted by the ECtHR; cf. ECtHR, Press Release 345 (2014), of 26.11.2014, p. 2. As to the more than 150 individual cases, cf. ECtHR, Press Release 296 (2015), 01.10.2015, p. 2; and ECtHR, Press Release 122 (2015), of 13.04.2015, p. 1.

at risk), as well as to comply with their engagements under the ECtHR, notably in respect of the fundamental right to life (Article 2) and the prohibition of inhuman or degrading treatment (Article 3)<sup>385</sup>.

## IX. Chronic Violence and the Tragedy of Human Vulnerability

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

63. Already in his earlier writings (of 1854-1856), on the conflict of Sevastópol (the *Sevastópol Sketches*) during the War of Crimea (from December 1854 to August 1856), L. Tolstói gave expression to his humanist and pacifist outlook, supporting non-violent resistance to injustice and oppression, and warning against the irrationality and cruelty of war. To L. Tolstói, it was unjustifiable to prepare people to slaughter each other in war, to send people into the battlefield to inflict sufferings, wounds and death to each other. In face of this fostering of hatred, either war was a madness, or those who produced such madness were not rational creatures. War was a tragedy of the human condition, leaving survivors surrounded by corpses; it was an evil to be avoided<sup>386</sup>, he concluded.

64. Years later, L. Tolstói permeated also his epic masterpiece novel *War and Peace* (1869) with philosophical humanist considerations. Along the centuries, - he wrote, - “millions of men perpetrated so great a mass of crime[s]” with the utmost wickedness, not looking at them as crimes<sup>387</sup>. Often with patriotism they prepared themselves for murder, the “object of warfare”; they met together to murder the

---

385 Cf. ECtHR, Press Release 073 (2014), 13.03.2014, p. 1; and cf. also ECtHR, Press Release 345 (2014), of 26.11.2014, pp. 1-2.

386 L. Tolstói, *Contos de Guerra* [1855-1856], Lisbon, Relógio d’Água Edit., 2015 [reed.], pp. 21, 26, 32 and 74.

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

others, glorifying victories, “supposing that the more men have been slaughtered the greater the achievement”<sup>388</sup>.

65. L. Tolstoi warned that, against “all humanity”, “[g]reatness would appear to exclude all possibility of right and wrong”, even in face of atrocities; nothing was esteemed as wrong, in face “of *glory* and of *greatness*”<sup>389</sup>. To him, quite on the contrary, - he concluded in *War and Peace*, - “there can be no free-will”, as human action is to be controlled, and knowledge is to bring “the essence of life under the laws of reason”, and man can only know himself “through consciousness”<sup>390</sup>.

66. L. Tolstoi kept his concerns in mind along the years. Much later on in his life, after writing his acclaimed literary novels *War and Peace* and *Anna Karénina*, he devoted himself to his writings on religious thinking, focusing attention more on non-violence and passive resistance. Thus, in a subsequent book (*The Slavery of Our Times*), he again warned (in 1900) against organized and extreme violence, criticizing the recruitment of personnel to be sent to war and to kill vulnerable and defenseless persons<sup>391</sup>.

67. In the remaining years of his life, in his book *The Kingdom of God is Within You* (1894-1897), L. Tolstoi positioned himself against war and armamentism<sup>392</sup>, invoking the “conscience of mankind”<sup>393</sup>. In particular, he condemned the compulsory military recruitment of persons to be sent to war<sup>394</sup> as a form of State violence, depriving those persons of their private and family life<sup>395</sup>. This, he added, was an inversion of the humane ends of the State<sup>396</sup>, it was a form of “military slavery”<sup>397</sup>, sending the recruited persons to the slaughtering of others

---

388 *Ibid.*, pp. 885-886.

389 *Ibid.*, pp. 1218 and 1291.

390 *Ibid.*, pp. 1370 and 1382.

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

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

393 *Ibid.*, pp. 24 and 229, and cf. pp. 412 and 414.

394 *Ibid.*, pp. 186-189, 209 and 353.

395 *Ibid.*, pp. 211-212 and 230-231.

396 *Ibid.*, p. 213.

397 *Ibid.*, p. 216, and cf. p. 364.

and to their own death<sup>398</sup>. This amounted to inflicting evil on others and on themselves<sup>399</sup>.

## X. Provisional Measures: Protection of People in Territory

68. I have already made the point that, amidst generalized violence, the ultimate beneficiaries of obligations under ordered provisional measures of protection are human beings. A strictly inter-State outlook is, in my perception, insufficient and surpassed, to address adequately obligations under provisional measures (cf. part VIII, *supra*). Thus, over half a decade ago, in my Separate Opinion in the case of the *Temple of Préah Vihéar* (Cambodia *versus* Thailand, Order of 18.07.2011), for example, I deemed it fit to draw attention to this point (in my Separate Opinion, paras. 66, 70, 77 and 113), wherein I pondered that

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

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

Not everything can be subsumed under territorial sovereignty. The fundamental human right to life is not at all subsumed under State sovereignty. The human right not to be forcefully displaced or evacuated from one’s home is not to be equated with territorial sovereignty. The Court needs to adjust its conceptual framework and its

398 *Ibid.*, pp. 371-372.

399 *Ibid.*, pp. 387 and 393.

language to the new needs of protection, when it decides to indicate or order the Provisional Measures requested from it (para. 99).

70. Shortly afterwards, I had the occasion to elaborate further on this issue, in the consideration of the matter in the joined cases of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica versus Nicaragua), and of the *Construction of a Road in Costa Rica along the San Juan River* (Nicaragua versus Costa Rica): in its Order of 16.07.2013, as the ICJ decided not to order provisional measures, I appended a Dissenting Opinion thereto; and in its subsequent Order of 22.11.2013, where the Court indicated provisional measures, I appended a Separate Opinion thereto.

71. In my Dissenting Opinion of 16.07.2013, I underlined the fact that the Court was once again faced with the requested protection of people in territory (paras. 39 and 46-47), drawing attention to the preventive dimension of the safeguard of the rights at issue (para. 41). After recalling other situations of the kind, I added that

along the last three decades, the ICJ has gradually overcome the strictly inter-State outlook in the acknowledgement of the rights to be preserved by means of its Orders of provisional measures of protection.

(...) Facts tend to come before the norms, requiring of these latter the aptitude to cover new situations they are meant to regulate, with due attention to superior values<sup>400</sup>. Before this Court, States keep on holding the monopoly of *jus standi*, as well as *locus standi in judicio*, in so far as requests for provisional measures are concerned, but this has not proved incompatible with the preservation of the rights of the human person, together with those of States. The ultimate beneficiaries of the rights to be thereby preserved have been, not seldom and ultimately, human beings, alongside the States wherein they live. Provisional measures indicated in successive Orders of the ICJ have transcended the artificial inter-State dimension of the past, and have come to preserve also rights whose ultimate subjects (*titulaires*) are human beings (paras. 49-50).

---

400 Cf., *inter alia*, G. Morin, *La révolte du Droit contre le Code - La révision nécessaire des concepts juridiques*, Paris, Libr. Rec. Sirey, 1945, pp. 2, 6-7 and 109-115.

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

73. The obligations which the ordering of those measures generates “are distinct from the obligations” ensuing from the Court’s judgments as to the merits (para. 75). I concluded that this calls for “a more proactive posture” on the part of the Court, so as

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

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

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

75. As the *cas d’espèce* shows, the claimed rights to be protected encompass the fundamental rights of human beings, such as the right to life, the right to personal security and integrity, the right not to be forcefully displaced or evacuated from one’s home. The duty of compliance with provisional measures of protection brings to the

fore another element configuring their autonomous legal regime, to which I now turn attention, in its component elements, namely: non-compliance and the prompt engagement of State responsibility; prompt determination by the Court of breaches of provisional measures of protection; and the ensuing duty of reparation for damages resulting from those breaches.

76. Shortly after my aforementioned Dissenting Opinion in the Court's Order of 16.07.2013, in my Separate Opinion in the Court's following Order of 22.11.2013 in the same joined cases opposing Costa Rica and Nicaragua, I began by observing that, much as provisional measures of protection have expanded in our times, the configuration of the autonomous legal regime of their own<sup>401</sup> keeps on calling for further elaboration, for example, in respect of the necessary *compliance* with them (paras. 20-26). Given that provisional measures generate *per se* obligations, non-compliance with them generates State responsibility and entails legal consequences (para. 29).

## 1. Non-Compliance and State Responsibility

77. The beneficiaries of compliance with provisional measures, - I proceeded, - can be "States as well as groups of individuals, and *simples particuliers*" (para. 31). I then added that, had the ICJ, in its previous Order of 16.07.2013 in the aforementioned merged cases (*supra*), indicated or ordered the provisional measures requested, "probably the present situation in the disputed territory (...) would not have arisen" (para. 38). And I concluded that non-compliance with provisional measures "entails an *additional* ground of responsibility; the task ahead of us is to extract the consequences ensuing therefrom" (para. 40).

78. Two years later, in the same joined cases of *Certain Activities Carried out by Nicaragua in the Border Area*, and of the *Construction of a Road in Costa Rica along the San Juan River*, in the Court's Order of 16.12.2015, I appended a new Separate Opinion, wherein I presented a plea for the prompt determination by the ICJ of breaches of provisional measures of protection (paras. 3 and 34-44) and sustained the duty of reparation (in its distinct forms) for damages resulting from those breaches (paras. 3 and 47-52).

---

<sup>401</sup>Cf. note (139), *supra*.

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

79. The determination of breaches of provisional measures of protection, - I stressed, - does not need to wait until the end of proceedings as to the merits of the case at issue (paras. 26 and 33), as obligations of prevention are additional ones, in relation to those ensuing from the judgment on the merits; in order to serve better their anticipatory rationale, “the determination of a breach of provisional measures of protection is not - should not be - conditioned by the completion of subsequent proceedings as to the merits of the case at issue” (para. 35). And I added that

contemporary international tribunals have, in my understanding, an inherent power or *faculté* to order provisional measures of protection, whenever needed, and to determine, *ex officio*, the occurrence of a breach of provisional measures, with its legal consequences (para. 36).

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

once again the constraints of voluntarist legal positivism are, in my view, overcome<sup>402</sup>. The Court is not limited to what the contending parties want (in the terms they express their wish), or so request. The Court is not an arbitral tribunal, it stands above the will of the contending parties. This is an important point that I have been making on successive occasions within the ICJ, in its work of international adjudication.

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

(...) The Court, - may I reiterate, - is not an arbitral tribunal, it stands above the will of the contending parties. It has an inherent power or *faculté* to proceed promptly to the determination of a breach of provisional measures, in the interests of the sound administration of justice. And *recta*

---

402 For my criticisms of the voluntarist conception of international law, cf. A.A. Cançado Trindade, “The Voluntarist Conception of International Law: A ReAssessment”, 59 *Revue de droit international de sciences diplomatiques et politiques* - Sottile (1981) pp. 201240.

*ratio* guides the sound administration of justice (*la bonne administration de la justice*). *Recta ratio* stands above the will (paras. 39-40 and 42).

### 3. Breaches of Provisional Measures and the Duty of Reparation

81. In case of a finding of breaches of provisional measures, - I proceeded in the same Separate Opinion in the two joined cases, - the Court is entitled to address reparations (in all its forms), irrespective of subsequent proceedings on the merits, as “breach and reparation come together” (paras. 47-48 and 51). In the interests of the sound administration of justice (*la bonne administration de la justice*), an international tribunal has the inherent power or *faculté* to supervise *motu proprio* compliance with its Orders of provisional measures, and, in case of non-compliance, to address the legal consequences arising therefrom and to determine the duty of reparation (paras. 62-63).

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

83. As I further pointed out in my Separate Opinion in the case of *Questions Relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste *versus* Australia, provisional measures, Order of 22.04.2015), such rights and obligations being proper to provisional measures, the ICJ is fully entitled to decide on the legal consequences of noncompliance with them (including the due reparations),

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

## XII. Epilogue

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

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

86. The pressing need to secure protection of human beings in situations of great vulnerability, in my perception, requires the ICJ to go beyond the strict inter-State dimension (the one it is used to, attached to a dogma of the past), and to concentrate attention on *victims* (including the potential ones<sup>403</sup>), - be they individuals<sup>404</sup>, groups

---

403 On the notion of *potential* victims in the framework of the evolution of the notion of victim (or the condition of the complainant) in the domain of the International Law of Human Rights, cf. A.A. Cançado Trindade, "Co-Existence and Co-Ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de Haye* (1987), ch. XI, pp. 243-299, esp. pp. 271-292.

404 As I pointed out in my Separate Opinions of the *A.S. Diallo* case (Judgments of 30.11.2010, merits; and of 19.06.2012, reparations).

of individuals<sup>405</sup>, peoples or humankind<sup>406</sup>, as subjects of international law, - and not on inter-State susceptibilities. Human beings in vulnerability are the ultimate beneficiaries of provisional measures of protection, endowed nowadays with a truly *tutelary* character, as true jurisdictional guarantees of preventive character.

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

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

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

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

---

405 As I sustained in my Dissenting and Separate Opinions in the case of *Questions Relating to the Obligation to Prosecute or Extradite* (Order of 28.05.2009, and Judgment of 20.07.2012, respectively), as well as in my Dissenting Opinion in the case of the *Application of the Convention against Genocide* (Judgment of 03.02.2015).

406 As I upheld in my three Dissenting Opinions in the three cases of the *Obligations of Nuclear Disarmament* (Judgments of 05.10.2016).

excluding the subsequent consideration of State responsibility (as to the merits), even if by omission.

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



## CAPÍTULO IV

# DIREITOS HUMANOS E MEIO AMBIENTE: A DIMENSÃO PREVENTIVA NO DIREITO INTERNACIONAL, NAS MEDIDAS PROVISÓRIAS DE PROTEÇÃO

Desde os meus anos na CtIADH, até anos recentes e o presente na CIJ, venho me dedicando, *inter alia*, a conceitualizar o que já então apreendia como o *regime jurídico autónomo das medidas provisórias de proteção*. Como revelado em meus Votos Individuais sobre a matéria (tais como os selecionados e transcritos no presente tomo, capítulos II [CtIADH] e III [CIJ], *supra*), logo identifiquei os elementos componentes de tal regime jurídico autónomo, a saber: os direitos a ser protegidos, as obrigações próprias das medidas provisórias, a pronta determinação da responsabilidade (ante seu descumprimento), com suas consequências jurídicas, a presença da vítima (ou vítima potencial, já nesta fase), e o dever de reparação de danos.

As medidas provisórias de proteção, durante meus anos na CtIADH, experimentaram uma notável construção jurisprudencial, e estenderam proteção a um número crescente de justiciáveis em toda a região (América Latina e Caribe). Assim, por exemplo, em meu Voto Arrazoado/Fundamentado no caso da *Penitenciária de Araraquara*, atinente ao Brasil (Resolução de 30.09.2006), ao ressaltar a “relevância e o uso crescente das medidas provisórias de proteção” em defesa dos direitos de pessoas “em situações de alta vulnerabilidade” (par. 2), ponderei que

Tais medidas provisórias têm se expandido (protegendo, na atualidade, na América Latina e no Caribe, quase 12 mil personas, inclusive membros de comunidades inteiras<sup>1</sup>), e se transformado em uma verdadeira *garantia*

---

1 Somente no caso do *Povo Indígena Kankuamo versus Colômbia*, são cerca de seis mil os beneficiários das medidas; no caso da *Comunidade de San José de Apartadó versus Colômbia*, os beneficiários são mais de 1200; nos casos das *Comunidades do Juguimandó e Curbaradó versus Colômbia*, os beneficiários são mais de dois mil; no caso da *Prisão de Urso Branco versus Brasil*, quase 900 detentos se beneficiam das medidas; no caso do *Povo Indígena Sarayaku versus Equador*, são cerca de 1200 os beneficiários; entre vários outros casos.

jurisdicional de caráter preventivo<sup>2</sup>. Daí a autonomia da responsabilidade internacional que acarretam (par. 4).

Mais recentemente, em meus anos na CIJ, tenho continuado a contribuir ao desenvolvimento conceitual do regime jurídico das medidas provisórias de proteção. Os casos diante da CIJ têm se revestido de grande diversidade temática nos últimos anos. As medidas provisórias de proteção dão claro testemunho da dimensão preventiva do direito internacional, e têm sido aplicadas na proteção tanto dos direitos humanos como do meio-ambiente. É este um ponto que não pode passar despercebido, - como vem sendo até o presente na bibliografia especializada.

Em meus Votos nos casos (conjuntos) da *Construção de uma Estrada na Costa Rica à Beira do Rio San Juan* e de *Certas Atividades Efetuadas pela Nicarágua na Área Fronteiriça* (Voto Dissidente na *Ordonnance* de 16.07.2013, e Voto Arrazoadado na Sentença de 16.12.2015), por exemplo, assinalei sua incidência na proteção ambiental. Mesmo que esta não seja o tema central dos casos em questão, é um de seus componentes importantes. É difícil evitar a impressão de que o potencial de aplicação de medidas provisórias de proteção é, e pode ser, ainda bem maior. Tais medidas têm evoluído em meio a uma conscientização crescente de sua importância na realização da justiça, mas ainda resta um longo caminho a percorrer.

No tocante à CIJ, ainda que seu procedimento em casos contenciosos continue a ser estritamente interestatal (por apego a um dogma superado do passado), isto em nada implica que os beneficiários das medidas provisórias de proteção em determinadas circunstâncias sejam os próprios seres humanos, individualmente ou em grupos, tal como assinalei, e.g., em meus Votos, reproduzidos no presente tomo,

---

2 Para um estudo desta evolução, 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 e J.-F. Flauss), Bruxelles, Bruylant/Nemesis, 2005, pp. 145-163; A.A. Cançado Trindade, "Les Mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25; 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), n. 5-8, pp. 162-168.

nos casos da *Obrigação de Julgar ou Extraditar* (Bélgica *versus* Senegal, cf. *supra*), e da *Aplicação da Convenção Internacional para a Supressão do Financiamento do Terrorismo [ICSFT] e da Convenção Internacional sobre a Eliminação de Todas as Formas de Discriminação Racial [CERD]* (Ucrânia *versus* Federação Russa, *Ordonnance* de 19.04.2017).

Nesta mais recente decisão da CIJ, no caso da *Aplicação das Convenções ICSFT e CERD*, anexei um novo Voto Arrazoado, no qual tive a ocasião de recapitular todo o desenvolvimento conceitual do *regime jurídico autônomo* das medidas provisórias de proteção, ao qual tenho me dedicado, sucessivamente, em duas jurisdições internacionais (CtIADH e CIJ). De início assinalei que a CtIADH, - na época em que estava sob minha presidência, - foi o primeiro tribunal internacional a afirmar (em 1999-2000) que as medidas provisórias de proteção por ela ordenadas - dotadas de base convencional - são obrigatórias<sup>3</sup>. Neste período, a CtIADH realizou uma notável construção jurisprudencial sobre a matéria. *Posteriormente*, em 2001<sup>4</sup>, a CIJ também afirmou o seu caráter obrigatório<sup>5</sup>. No seio da CIJ, chamei atenção para este

3 Cf. CtIADH, caso do *Constitutional Tribunal versus Peru*, Resolução de 14.08.2000. Assim, ainda antes da passagem do século (1999-2000), tive a ocasião, no seio da CIJ, de concentrar-se na *natureza jurídica* das medidas provisórias de proteção e em seu caráter obrigatório; cf. CtIADH, caso de *James e Outros versus Trinidad e Tobago* (Resolução de 25.05.1999), Voto Concordante do Juiz Caçado Trindade, pars. 9-10 (onde afirmei o caráter obrigatório das medidas provisórias de proteção como uma “garantia jurisdicional de caráter preventivo”); CtIADH, caso dos *Haitianos e Dominicanos de Origem Haitiana na República Dominicana* (Resolução de 18.08.2000), Voto Concordante do Juiz Caçado Trindade, pars. 13-25; cf. CtIADH, caso da *Comunidade de Paz de San José of Apartadó* (Resolução de 18.06.2002, em conformidade com sua Resolução anterior, no mesmo caso, de 20.11.2000), Voto Concordante do Juiz Caçado Trindade, pars. 14-17 e 19-20.

4 No caso *LaGrand* (Sentença de 27.06.2001), em cujos procedimentos a construção jurisprudencial pioneira da CtIADH foi trazido à atenção da CIJ pelas partes litigantes. O tema das medidas provisórias de proteção encontra-se examinado detalhadamente (particularmente no período 1999-2004) em meu livro de memórias da CtIADH: A.A. Caçado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, 4ª ed., Belo Horizonte/Brasil, Edit. Del Rey, 2017, pp. 47-52, 199-208 e 277-278.

5 A CtIADH foi também o primeiro tribunal internacional a afirmar a existência de um direito *individual* a informação sobre assistência consular no âmbito das garantias do devido processo legal, em seu Parecer Consultivo (n. 16) sobre o *Direito à Informação sobre Assistência Consular no Âmbito das Garantias do Devido Processo Legal* (def 01.10.1999, pars. 1-141). A CtIADH, revelando o impacto do Direito Internacional dos Direitos Humanos na evolução do próprio Direito Internacional Público, aí susten-

desenvolvimento em meu Voto Arrazoadado (pars. 167-172) no caso *A.S. Diallo* (mérito, Sentença de 30.11.2010), - tendo feito o mesmo em meus escritos sobre a matéria<sup>6</sup>.

Tanto em meu recente Voto Arrazoadado no caso da *Aplicação das Convenções ICSFT e CERD*, como em Votos anteriores em matéria de medidas provisórias de proteção (na CIJ e, anteriormente, na CtIADH), passei a identificar e sistematizar os elementos integrantes de seu regime jurídico autônomo (capítulos II-III), a requerer na atualidade um tratamento doutrinário mais aprofundado. Isto se reverteria em benefício da proteção internacional dos direitos humanos assim como do meio-ambiente<sup>7</sup>.

No final das contas, as medidas provisórias de proteção têm um importante papel a exercer nos sistemas de proteção, como se desprende dos 18 Votos Individuais que emiti, sobre a matéria, em duas jurisdições internacionais (12 na CtIADH e 6 na CIJ), e que selecionei, dentre outros, para inclusão na presente coletânea. São tais Votos ilustrativos da *dimensão preventiva* e do amplo alcance da proteção dos direitos da pessoa humana, e têm, ademais, por vezes

---

tuou que o descumprimento do artigo 36(1)(b) da Convenção de Viena sobre Relações Consulares de 1963 dá-se em detrimento não só de um Estado Parte mas também dos seres humanos em questão (como a CIJ *posteriormente* também admitiu, no caso *La-Grand*, Sentença de 27.06.2001). Sobre o impacto do mencionado Parecer Consultivo n. 16 de 1999 da CtIADH, cf. A.A. Cançado Trindade, "The Humanization of Consular Law: The Impact of Advisory Opinion n. 16 (1999) of the Inter-American Court of Human Rights on International Case-Law and Practice", 6 *Chinese Journal of International Law* (2007) n. 1, p. 1-16.

6 Cf. 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) n. 5-8, pp. 162-168; A.A. Cançado Trindade, "Les mesures provisoires de protection dans la jurisprudence...", *op. cit. supra* n. (2), pp. 145-163; A.A. Cançado Trindade, "Une ère d'avancées jurisprudencielles et institutionnelles: souvenirs de la Cour interaméricaine des droits de l'homme", in *Le particularisme interaméricain des droits de l'homme* (eds. L. Hennebel e H. Tigroudja), Paris, Pédone, 2009, pp. 65-66; A.A. Cançado Trindade, "La Expansión y la Consolidación de las Medidas Provisionales de Protección en la Jurisdicción Internacional Contemporánea", in *Retos de la Jurisdicción Internacional* (eds. S. Sanz Caballero e R. Abril Stofels), Cizur Menor/Navarra, Cedri/CEU/Thomson Reuters, 2012, pp. 99-117.

7 Cf., em geral, A.A. Cançado Trindade, "Human Rights and the Environment", in *Human Rights: New Dimensions and Challenges* (ed. J. Symonides), UNESCO/Dartmouth, Paris/Aldershot, 1998, pp. 117-153; A.A. Cançado Trindade, "Direitos Humanos e Meio Ambiente" [em búlgaro], in *Direitos Humanos: Novas Dimensões e Desafios* [em búlgaro], Bourgas/Bulgária, Universidade Livre de Bourgas, 2000, pp. 126-161;

se voltado também à proteção do meio-ambiente (cf. capítulo III, *supra*). Desenvolvidas sobretudo na jurisprudência internacional contemporânea, as medidas provisórias de proteção têm, no entanto, sido insuficientemente estudadas na doutrina jusinternacionalista até o presente.

Requerem, pois, maior atenção em nossos dias. Seu estudo não se exaure em si mesmas, e se estende aos princípios gerais do direito, que se encontram em seus próprios fundamentos. Também neste particular me concentrei, em diversos Votos que emiti tanto na CtIADH como na CIJ<sup>8</sup>, e inclusive em muitas outras questões. É para mim uma grata satisfação constatar o interesse geral despertado, nos círculos jurídicos internacionais, por meus Votos apresentados ao longo dos anos nos dois tribunais internacionais, - tais como sistematizados nas duas coletâneas dos mesmos recentemente editadas (uma delas reeditada)<sup>9</sup> em idiomas distintos.

Sempre atribuí, em meus Votos, a maior importância aos princípios do direito internacional contemporâneo, matéria que tenho ademais examinado em outros livros e escritos<sup>10</sup>. Para os propósitos do presente tomo, permito-me tão só agregar referências a dois Votos que emiti na presente década na CIJ, em que abordei este ponto. Em

8 Cf. 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. 409-453 and 799-852; vol. II (ICJ), Leiden, Brill/Nijhoff, 2014, pp. 1787-1864; vol. III (ICJ), Leiden, Brill/Nijhoff, 2017, pp. 673-764; e cf. n. (8), *infra*.

9 [Série *The Judges*:], Judge A.A. Cançado Trindade - *The Construction of a Humanized International Law - A Collection of Individual Opinions (1991-2013)*, vol. I (Inter-American Court of Human Rights), Leiden, Brill/Nijhoff, 2014, pp. 9-852; vol. II (International Court of Justice), Leiden, Brill/Nijhoff, 2014, pp. 853-1876; vol. III (International Court of Justice ICJ), Leiden, Brill/Nijhoff, 2017, pp. 9-764; A.A. Cançado Trindade, *Esencia y Transcendencia del Derecho Internacional de los Derechos Humanos (Votos en la Corte Interamericana de Derechos Humanos, 1991-2008)*, vols. I-III, 2ª ed. rev., México D.F., Ed. Cámara de Diputados, 2015, vol. I, pp. 3-687; vol. II, pp. 3-439; vol. III, pp. 3-421. Ademais, encontra-se no momento (fins de abril de 2017) no prelo uma outra coletânea de meus Votos Individuais, também em língua francesa.

10 Cf., e.g., *inter alia*, A.A. Cançado Trindade, *Princípios do Direito Internacional Contemporâneo*, Brasília, Ed. Universidade de Brasília, 1981, pp. 1-268; 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 - OEA (2003)* pp. 359-415; A.A. Cançado Trindade, *El Principio Básico de Igualdad y No-Discriminación: Construcción Jurisprudencial*, Santiago de Chile, Ed. Librotecnia, 2013, pp. 39-748.

meu Voto Arrazoado, e.g., no caso das *Papeleras* (Argentina *versus* Uruguai, Sentença de 20.04.2010), concentrei-me nos princípios gerais do direito, inclusive os próprios ao Direito Ambiental Internacional, em particular os princípios da prevenção e da precaução<sup>11</sup>. Destaquei a dimensão axiológica dos *prima principia*<sup>12</sup>, e assinalai serem os princípios fundamentais o *substratum* do próprio ordenamento jurídico<sup>13</sup>, e indicadores do *status conscientiae* da comunidade internacional<sup>14</sup>.

Ainda em meu supracitado Voto Arrazoado no caso das *Papeleras*, também abordei, em dimensão temporal, a equidade intergeracional<sup>15</sup>. Voltei a abordá-la, quatro anos depois, em meu Voto Arrazoado<sup>16</sup> no caso da *Caça das Baleias na Antártica* (Austrália *versus* Japão, com intervenção da Nova Zelândia, Sentença de 31.03.2014), em que também me debrucei na relevância dos princípios da prevenção e da precaução<sup>17</sup>, no âmbito da evolução do direito sobre a conservação das espécies ou recursos marinhos vivos.

No seio da CIJ, recentemente, em um período de menos de dois anos (de fevereiro de 2015 a outubro de 2016), apresentei quatro extensos e contundentes Votos Dissidentes, nos quais alertei para a premente necessidade de os tribunais internacionais enfrentarem, com lucidez e coragem, os grandes desafios que dizem respeito à humanidade como um todo (tais como lograr a correta aplicação da Convenção contra o Genocídio, e proceder de imediato ao desarmamento nuclear), em sua missão comum e ineludível da realização da justiça. Deixei claro o importante papel hoje reservado, neste propósito, aos tribunais internacionais.

No primeiro desses meus quatro recentes e contundentes Votos Dissidentes, no caso da *Aplicação da Convenção contra o Genocídio* (Croácia *versus* Sérvia, Sentença de 03.02.2015), assinalai, *inter alia*, que o princípio de humanidade permeia as vertentes de proteção internacional da pessoa humana (DIDH, DIH e DIR), acrescidas do

11 Parte VII, pars. 52-95, e cf. parte VIII, pars. 97-113.

12 Parte XIV, pars. 201-206.

13 Parte XIII, pars. 191-200.

14 Parte XV, pars. 207-217.

15 Parte IX, pars. 114-131.

16 Parte VI, pars. 41-47.

17 Parte VIII, pars. 60-71. Para um estudo recente, cf. A.A. Cançado Trindade, "Principle 15 - Precaution", in *The Rio Declaration on Environment and Development - A Commentary* (ed. J.E. Viñuales), Oxford, Oxford University Press, 2015, pp. 403-428.

Direito Penal Internacional (DPI) contemporâneo (par. 523). Critiquei a decisão da CIJ por não haver tomado em conta a jurisprudência dos tribunais internacionais de direitos humanos (para a determinação da responsabilidade internacional do Estado) e dos tribunais penais internacionais (para a determinação da responsabilidade penal internacional do indivíduo, no sentido de admitir uma carga probatória razoável e não indevidamente exigente)<sup>18</sup>, em uma livre avaliação probatória, incluindo presunções com base em provas circunstanciais<sup>19</sup>.

Em meus três outros Votos Dissidentes recentes, nos três casos das *Obrigações Atinentes ao Desarmamento Nuclear* (interpostos pelas Ilhas Marshall contra o Reino Unido, a Índia e o Paquistão, Sentenças de 05.10.2016), ao assinalar a atenção dedicada pela Carta das Nações Unidas aos povos<sup>20</sup>, ponderei *inter alia* que cabia ter sempre em mente a *raison d'humanité* (em lugar da *raison d'État*)<sup>21</sup>. O *princípio de humanidade*, - prossegui, - permeia todo o direito internacional contemporâneo, em uma visão universalista, em que o *jus necessarium* transcende as limitações do *jus voluntarium*<sup>22</sup>. Em nossos dias, - concluí nos três Votos Dissidentes, - há uma *opinio juris communis* claramente formada em prol da obrigação universal do desarmamento nuclear, emanada da consciência humana, e não da “livre vontade” de cada Estado individualmente<sup>23</sup>. A preocupante vulnerabilidade afeta aqui a comunidade internacional como um todo, a própria humanidade<sup>24</sup>.

Em nossos dias, gradualmente se vem formando o entendimento - que sustento - de que o exercício da função judicial internacional não se limita a resolver uma controvérsia tão só nos termos em que foi apresentada pelas partes ao tribunal internacional e devolvê-

18 Pars. 96-124 e 125-148.

19 Pars. 122-123 e 143. De outro modo, persistiria a impunidade dos perpetradores de genocídio, afetando o próprio acesso à justiça por parte de suas vítimas e familiares, e tornando a aplicação da referida Convenção quase impossível, reduzindo-a assim a uma quase letra morta; pars. 94, 143-144 e 531. Para um estudo de caso, cf. A.A. Cançado Trindade, *A Responsabilidade do Estado sob a Convenção contra o Genocídio: Em Defesa da Dignidade Humana*, Haia/Fortaleza, IBDH/IIDH, 2015, pp. 9-265.

20 Pars. 123-131, 119-127 e 113-121, respectivamente.

21 Pars. 201-209, 197-205 e 191-199, respectivamente.

22 Pars. 221-233, 217-229 e 211-223, respectivamente.

23 Pars. 300-314, 296-310 e 290-304, respectivamente.

24 Para um estudo de caso, cf., recentemente, A.A. Cançado Trindade, A.A. Cançado Trindade, *A Obrigação Universal de Desarmamento Nuclear*, Brasília, MRE/FUNAG, 2017, pp. 41-224.

la às mesmas (em uma forma de justiça transacional), mas abarca ademais dizer o que é o Direito (*juris dictio*), contribuindo assim ao desenvolvimento progressivo do direito internacional<sup>25</sup>. Isto se torna imprescindível quando se trata de questão que diz respeito à comunidade internacional como um todo, à própria humanidade. Em minha percepção, cabe ter em mente a missão comum dos tribunais internacionais contemporâneos de realização da justiça<sup>26</sup> desde uma visão essencialmente humanista<sup>27</sup>.

---

25 Cf., nesse sentido, e.g., A.A. Cançado Trindade, "A Century of International Justice and Prospects for the Future", in: *A Century of International Justice and Prospects for the Future / Rétrospective d'un siècle de justice internationale et perspectives d'avenir* (eds. A.A. Cançado Trindade e D. Spielmann), Oisterwijk, Wolf Publs., 2013, pp. 16-17; A.A. Cançado Trindade, "Quelques réflexions sur les systèmes régionaux dans le cadre de l'universalité des droits de l'homme", in: *Select Proceedings of the European Society of International Law* (vol. IV: 2012 Valencia Colloquy), Ocford/Portland, Hart Publ., 2015, pp. 345-347; [Vários Autores,] *International Judicial Lawmaking* (eds. A. von Bogandy e I. Venzke), Heidelberg, Springer, 2012, pp. 9-15 e 35-36; A. von Bogandy e I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication*, Oxford, Oxford University Press, 2016 [reed.], pp. 49 e 62.

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

27 Cf. A.A. Cançado Trindade, *A Visão Humanista da Missão dos Tribunais Internacionais Contemporâneos*, Haia/Fortaleza, IBDH/IIDH, 2016, pp. 11-283.

## ANEXO BIBLIOGRÁFICO

### LIVROS DO MESMO AUTOR(\*)

*Tratado de Direito Internacional dos Direitos Humanos*, volume I, Porto Alegre, S.A. Fabris Ed., 1997, pp. 1-486 (1a. edição, esgotada); volume I, Porto Alegre, S.A. Fabris Ed., 2003, pp. 1-640 (2a. edição);

*Tratado de Direito Internacional dos Direitos Humanos*, volume II, Porto Alegre, S.A. Fabris Ed., 1999, pp. 1-440 (esgotado);

*Tratado de Direito Internacional dos Direitos Humanos*, volume III, Porto Alegre, S.A. Fabris Ed., 2003, pp. 1-663;

*Developments in the Rule of Exhaustion of Local Remedies in International Law*, em 2 volumes, 15 capítulos, 1.728 páginas (circ. interna): Tese premiada com o Yorke Prize, concedido pela Faculdade de Direito da Universidade de Cambridge, Inglaterra, como a melhor das teses de Ph.D. defendidas naquela Universidade na área do Direito Internacional no biênio 1977-1978;

*The Application of the Rule of Exhaustion of Local Remedies in International Law*, Cambridge, Cambridge University Press (Série "Cambridge Studies in International and Comparative Law"), 1983, pp. 1-445 (livro baseado na tese de Ph.D. do Autor, esgotado);

*O Esgotamento de Recursos Internos no Direito Internacional*, 1ª ed., Brasília, Ed. Universidade de Brasília, 1984, pp. 1-285 (esgotada); 2a. edição atualizada, Brasília, Editora Universidade de Brasília, 1997, pp. 1-327;

*Princípios do Direito Internacional Contemporâneo*, 1ª ed., Brasília, Ed. Universidade de Brasília, 1981, pp. 1-268 (esgotado);

*International Law for Humankind - Towards a New Jus Gentium*, 11ª ed., Leiden/The Hague, Nijhoff/The Hague Academy of International Law (Monograph Series n. 6), 2010, pp. 1-726; 2ª rev. ed., 2013, pp. 1-726;

*Co-Existence and Co-Ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)*, The Hague/

Dordrecht, M. Nijhoff, 1987, pp. 1-435 (vol. 202 do *Recueil des Cours de l'Académie de Droit International de La Haye*);

*International Law for Humankind: Towards a New Jus Gentium - General Course on Public International Law - Part I*, 316 *Recueil des Cours de l'Académie de Droit International de La Haye* (2005), pp. 31-439;

*International Law for Humankind: Towards a New Jus Gentium - General Course on Public International Law - Part II*, 317 *Recueil des Cours de l'Académie de Droit International de La Haye* (2005), pp. 19-312;

*A Humanização do Direito Internacional*, 1ª. edição, Belo Horizonte, Edit. Del Rey, 2006, pp. 3-409; 2ª. edição, Belo Horizonte, Edit. Del Rey, 2015, pp. 3-789;

*A Visão Humanista da Missão dos Tribunais Internacionais Contemporâneos*, Haia/Fortaleza, IBDH/IIDH, 2016, pp. 11-283;

*A Obrigação Universal de Desarmamento Nuclear*, Brasília, MRE/FUNAG, 2017, pp. 41-224;

*Os Tribunais Internacionais e a Realização da Justiça*, 2ª ed., Belo Horizonte, Edit. Del Rey, 2017, pp. 1-467;

*Derecho Internacional de los Derechos Humanos - Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006)*, 1a. edición México, Edit. Porrúa /Universidad Iberoamericana, 2007, pp. 1-1055 (1a. edición, esgotada);

*Esencia y Trascendencia del Derecho Internacional de los Derechos Humanos (Votos en la Corte Interamericana de Derechos Humanos, 1991-2008)*, vols. I-III, 2ª ed. rev., México D.F., Ed. Cámara de Diputados, 2015, vol. I, pp. 3-687; vol. II, pp. 3-439; vol. III, pp. 3-421;

*Évolution du Droit international au droit des gens - L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pédone, 2008, pp. 1-187;

*The Access of Individuals to International Justice* [2007 General Course at the Academy of European Law in Florence], Oxford, Oxford University Press, 2011, pp. 1-236;

*El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, 4ª edición, Belo Horizonte, Edit. Del Rey, 2017, pp. 1-441;

- *El Derecho de Acceso a la Justicia en Su Amplia Dimensión*, 2ª edición, Santiago de Chile, Ed. Librotecnia, 2012, pp. 79-574;

*El Principio Básico de Igualdad y No-Discriminación: Construcción Jurisprudencial*, 1. edição, Santiago de Chile, Ed. Librotecnia, 2013, pp. 39-748;

*Le Droit international pour la personne humaine*, Paris, Pédone, 2012, pp. 45-368;

*La Humanización del Derecho Internacional Contemporáneo*, México, Edit. Porrúa, 2014, pp. XV-XVII e 1-324;

*Conversación con Antônio Augusto Cançado Trindade - Reflexiones sobre la Justicia Internacional* (em forma de livro-entrevista com Emilia Bea), Valencia, Tirant lo Blanch, 2013, pp. 15-111;

*Judge A.A. Cançado Trindade - The Construction of a Humanized International Law - A Collection of Individual Opinions (1991-2013)*, vol. I (Inter-American Court of Human Rights), Leiden, Brill/Nijhoff, 2014, pp. 9-852; vol. II (International Court of Justice), Leiden, Brill/Nijhoff, 2014, pp. 853-1876;

*Direito das Organizações Internacionais*, Brasília, Escopo Ed., 1990, pp. 1-521 (esgotada); 2ª edição, Belo Horizonte, Ed. Del Rey, 2002, pp. 1-795 (esgotada); 3a. edição, Belo Horizonte, Ed. Del Rey, 2003, pp. 1-990 (esgotada); 4ª ed., Belo Horizonte, Edit. Del Rey, 2009, pp. 1-814 (esgotada); 5ª ed., Belo Horizonte, Edit. Del Rey, 2012, pp. 1-838; 6ª ed., Belo Horizonte, Edit. Del Rey, 2014, pp. 1-846;

*O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Ed. Renovar, 2002, pp. 1-1163;

*El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, 2ª ed., Santiago, Editorial Jurídica de Chile, 2006, pp. 9-559;

*Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 7-185;

*Os Tribunais Internacionais Contemporâneos*, Brasília, FUNAG, 2013, pp. 7-132;

*Os Tribunais Internacionais e a Realização da Justiça*, 1ª ed., Rio de Janeiro, Ed. Renovar, 2015, pp. 1-507 (esgotado);

*La Protección de la Persona Humana frente a los Crímenes Internacionales y la Invocación Indevida de Inmidades Estatales*, Fortaleza, IBDH/IIDH/SLADI, 2013, pp. 5-305;

*A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)*, Fortaleza/Brasil, IBDH/IIDH/SLADI, 2014, pp. 13-356;

*A Responsabilidade do Estado sob a Convenção contra o Genocídio: Em Defesa da Dignidade Humana*, Fortaleza, IBDH/IIDH, 2015, pp. 9-265;

*El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104;

*Repertório da Prática Brasileira do Direito Internacional Público (Período 1961-1981)*, Brasília, Fundação Alexandre de Gusmão/Ministério das Relações Exteriores, 1984, pp. 1-353 (1a. edição esgotada); 2ª edição, Brasília, Fundação Alexandre de Gusmão/Ministério das Relações Exteriores, 2012, pp. 1-424;

*Repertório da Prática Brasileira do Direito Internacional Público (Período 1941-1960)*, Brasília, Fundação Alexandre de Gusmão/Ministério das Relações Exteriores, 1984, pp. 1-365 (1a. edição esgotada); 2ª edição, Brasília, Fundação Alexandre de Gusmão/Ministério das Relações Exteriores, 2012, pp. 1-444;

*Repertório da Prática Brasileira do Direito Internacional Público (Período 1919-1940)*, Brasília, Fundação Alexandre de Gusmão/Ministério das Relações Exteriores, 1984, pp. 1-278 (1a. edição esgotada); 2ª edição, Brasília, Fundação Alexandre de Gusmão/Ministério das Relações Exteriores, 2012, pp. 1-388;

*Repertório da Prática Brasileira do Direito Internacional Público (Período 1899-1918)*, Brasília, Fundação Alexandre de Gusmão/Ministério das Relações Exteriores, 1986, pp. 1-518 (1a. edição esgotada); 2ª edição, Brasília, Fundação Alexandre de Gusmão/Ministério das Relações Exteriores, 2012, pp. 1-587;

*Repertório da Prática Brasileira do Direito Internacional Público (Período 1889-1898)*, Brasília, Fundação Alexandre de Gusmão/Ministério das Relações Exteriores, 1988, pp. 1-271 (1ª edição esgotada); 2ª edição, Brasília, Fundação Alexandre de Gusmão/Ministério das Relações Exteriores, 2012, pp. 1-302;

*Repertório da Prática Brasileira do Direito Internacional Público (Índice Geral Analítico)*, Brasília, Fundação Alexandre de Gusmão/Ministério das Relações Exteriores, 1987, pp. 1-237 (1a. edição esgotada); 2ª edição, Brasília, Fundação Alexandre de Gusmão/Ministério das Relações Exteriores, 2012, pp. 1-284;

*O Direito Internacional e a Solução Pacífica das Controvérsias Internacionais*, Rio de Janeiro, Sindicato dos Bancos do Estado do Rio de Janeiro, 1988, pp. 3-135 (edição experimental, esgotada);

*A Proteção Internacional dos Direitos Humanos (Coletânea de Ensaios)*, Rio de Janeiro, Sindicato dos Bancos do Estado do Rio de Janeiro, 1988, pp. 7-280 (edição experimental, esgotada);

*A Proteção Internacional dos Direitos Humanos - Fundamentos Jurídicos e Instrumentos Básicos*, São Paulo, Editora Saraiva, 1991, pp. 1-742 (esgotado);

*A Proteção dos Direitos Humanos nos Planos Nacional e Internacional: Perspectivas Brasileiras* (ed.), San José de Costa Rica/Brasília, IIDH/Fundação F. Naumann, 1992, pp. 1-358 (esgotado);

*Derechos Humanos, Desarrollo Sustentable y Medio Ambiente/Human Rights, Sustainable Development and the Environment/Direitos Humanos, Desenvolvimento Sustentável e Meio Ambiente* (ed.), San José de Costa Rica/Brasília, IIDH/BID, 1992, pp. 1-356 (1a. edição, esgotada); 2a. edição, San José de Costa Rica/Brasília, IIDH/BID, 1995, pp. 1-414 (2ª. edição, esgotada);

*Direitos Humanos e Meio-Ambiente: Paralelo dos Sistemas de Proteção Internacional*, Porto Alegre, S.A. Fabris Ed., 1993, pp. 1-351 (esgotado);

- *La Protección Internacional de los Derechos Humanos en America Latina y el Caribe (Reunión Regional de America Latina y el Caribe Preparatoria de la Conferencia Mundial de Derechos Humanos de Naciones Unidas)*, San José de Costa Rica, IIDH/CEE, 1993, pp. 1-137 (1ª edição, esgotada); e in: ONU, doc. A/CONF.157/PC/63/Add.3, de 18.03.1993, pp. 9-137 (2ª edição, esgotada);

- *A Incorporação das Normas Internacionais de Proteção dos Direitos Humanos no Direito Brasileiro* (ed.), San José de Costa Rica/Brasília, IIDH/ACNUR/CICV/CUE, 1996, pp. 1-845 (1a. edição, esgotada); 2ª edição, San José de Costa Rica / Brasília, IIDH/ACNUR/CICV/CUE/ASDI, 1996, pp. 1-845 (2ª edição, esgotada);

- *As Três Vertentes da Proteção Internacional dos Direitos da Pessoa Humana* (em coautoria com G. Peytrignet e J. Ruiz de Santiago), Brasília/San José de Costa Rica, IIDH/ACNUR/CICV, 1996, pp. 1-289 (esgotado);

- *A Proteção Internacional dos Direitos Humanos e o Brasil (1948-1997): As Primeiras Cinco Décadas*, 1ª edição, Brasília, Editora Universidade

de Brasília (Edições Humanidades), 1998, pp. 1-208 (1a. edição, esgotada); 2ª edição, Brasília, Editora Universidade de Brasília (Edições Humanidades), 2000, pp. 1-214;

- *A Sociedade Democrática no Final do Século* (em coautoria com M. Faro de Castro), Brasília, Paralelo 15, 1997, pp. 7-255 (esgotado);

- *La Nueva Dimensión de las Necesidades de Protección del Ser Humano en el Inicio del Siglo XXI* (em coautoria com Jaime Ruiz de Santiago), San José de Costa Rica, ACNUR, 2001, pp. 09-421 (1ª edição, esgotada; reimpressão, 2002); San José de Costa Rica, ACNUR, 2003, pp. 7-764 (2a. edição); San José de Costa Rica, ACNUR, 2004, pp. 17-1212 (3a. edição); San José de Costa Rica, ACNUR, 2006, pp. 21-1284 (4a. edição);

- *Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección* (Relator: A.A. Cançado Trindade), volume II, San José de Costa Rica, Corte Interamericana de Derechos Humanos, 2001, pp. 1-669 (1a. edição); San José de Costa Rica, Corte Interamericana de Derechos Humanos, 2003, pp. 1-1015 (2a. edição);

- *Las Tres Vertientes de la Protección Internacional de los Derechos de la Persona Humana* (em coautoria com G. Peytrignet e J. Ruiz de Santiago), México, Ed. Porrúa/Univ. Ibero-americana, 2003, pp. 1-169;

- *O Direito Internacional e o Primado da Justiça* (em coautoria com A.C. Alves Pereira), Rio de Janeiro, Ed. Renovar, 2014, pp. 1-363;

- *Doctrina Latinoamericana del Derecho Internacional*, volume I (em coautoria com A. Martínez Moreno), San José de Costa Rica, Corte Interamericana de Derechos Humanos, 2003, pp. 5-64 (esgotado);

- *Doctrina Latinoamericana del Derecho Internacional*, volume II (em coautoria com F. Vidal Ramírez), San José de Costa Rica, Corte Interamericana de Derechos Humanos, 2003, pp. 5-66 (esgotado);

- *Pareceres dos Consultores Jurídicos do Itamaraty (1985-1990 - Pareceres de A.A. Cançado Trindade)*, vol. VIII (org. A.P. Cachapuz de Medeiros), Brasília, Ministério das Relações Exteriores/Senado Federal, 2004, pp. 7-679 (esgotado);

*El Futuro de la Corte Interamericana de Derechos Humanos* (em coautoria com M.E. Ventura Robles), 3ª ed. rev., San José de Costa Rica, Corte Interamericana de Derechos Humanos, 2005, pp. 7-629;

*La Nueva Dimensión de las Necesidades de Protección del Ser Humano en el Inicio del Siglo XXI* (em coautoría com J. Ruiz de Santiago), 3ª ed., San José de Costa Rica, ACNUR, 2004, pp. 23-1284;

*Derecho Internacional y Derechos Humanos / Droit international et droits de l'homme* (em coordenação com D. Bardonnnet e R. Cuéllar) (Libro Conmemorativo de la XXIV Sesión del Programa Exterior de la Academia de Derecho Internacional de la Haya), 2ª ed., San José C.R./ Haia, 2005, pp. V-VIII e 7-322.

E cerca de setecentos e vinte (720) outros trabalhos publicados, entre monografias, ensaios, contribuições a livros e coletâneas e *Mélanges/Festschriften*, e artigos, publicados em numerosos países e em diferentes idiomas.

(\*) Relação atualizada até 20 de abril de 2017.