

SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. PROLEGOMENA.

1. In the handling of the present case of the *Application of the U.N. Convention on the Elimination of All Forms of Racial Discrimination* (CERD Convention) (Qatar versus United Arab Emirates - UAE), the International Court of Justice (ICJ) has had to face an unfortunate sequence with the lodging with it of the present request. The inevitable decision it has just taken draws attention to the importance of the provisional measures of protection that it indicated in its previous Order of 23.07.2018, the compliance with which is obligatory. They duly safeguard human rights under the CERD Convention.

2. In addition to the present Order dismissing the UAE's *Request*, I feel obliged to leave on the records, under the relentless pressure of time, in the present Separate Opinion, my personal considerations on the matter dealt with, moved by a sense of duty in the exercise of the international judicial function. I am encouraged to do so since the ICJ has had to decide on a request which has not invoked human rights protected under a core human rights treaty like the CERD Convention.

3. This being so, I shall develop my reflections in the following sequence: a) provisional measures of protection already ordered to secure respect for some human rights safeguarded under the CERD Convention; b) the problem of the absence of link in the present request; c) the problem of its inconsistencies as to the CERD Convention and as to the CERD Committee; d) relevance and persistence of provisional measures of protection of persons in continuing situations of vulnerability; and e) the longstanding importance of the fundamental principle of equality and non-discrimination. Last but not least, in an epilogue, I shall conclude with a recapitulation of the key points that I sustain in the present Separate Opinion.

4. There is an additional point to make here. I reach the conclusion, like the ICJ, that the present *Request* is not grounded for the ordering of provisional measures under the CERD Convention. Yet, as in my perception the reasoning of the Court itself is not always sufficiently clear in reaching this decision, and unnecessarily generates uncertainties, I deem it fit, furthermore, to fulfil the need to clarify some points along the present Separate Opinion, also drawing attention to the provisional measures of protection already indicated by the ICJ in its previous Order of 23.07.2018, which remain in force and are to be complied with.

II. PROVISIONAL MEASURES OF PROTECTION ALREADY ORDERED TO SECURE RESPECT FOR CERTAIN RIGHTS SAFEGUARDED UNDER THE CERD CONVENTION.

5. To start with, this is a case of human rights protection under the CERD Convention, - like other cases lodged before with the ICJ. The provisional measures of protection already ordered by the ICJ on 23.07.2018 remain in force, so as to secure the safeguard of the rights protected under Articles 2, 4, 5, 6 and 7 of the CERD Convention and the corresponding obligations. This was duly requested by Qatar, as acknowledged by the ICJ's Order of 23.07.2018¹. There is a clear distinction in the positions upheld by the two contending parties.

6. Qatar has been attentive in its endeavours to sustain a clear link between the provisional measures of protection requested and the rights invoked under the CERD Convention (para. 56), and the ICJ held that "a link exists between the rights whose protection is being sought and the provisional measures being requested by Qatar" (para. 59). In effect, in its original *Application* (of 11.06.2018), Qatar asserts rights under Articles 2, 4, 5, 6 and 7 of the CERD Convention and under the customary international law principle of non-discrimination (para. 58).

7. For its part, the UAE does not invoke acts appearing to amount to racial discrimination as defined in Article 1 of CERD Convention, which would then concern the rights under Articles 2, 4, 5, 6 and 7 of CERD Convention. The UAE's *Request* thus appears unrelated to the claims made by Qatar as to the merits phase, and does not concern rights under the CERD Convention which may subsequently be adjudged by the Court. It can clearly be seen that the UAE's *Request* of provisional measures does not invoke rights to be protected under CERD Convention, but simply alleges a violation of the compromissory clause (Article 22) of the CERD Convention.

8. In the *cas d'espèce* on the *Application of the CERD Convention*, unlike the present *Request* of the UAE, the previous *Request* of Qatar of provisional measures has raised the need of protection of some rights set forth in the CERD Convention, under Articles 2, 4, 5, 6 and 7². There is thus no link between the measures presently requested by the UAE and the subject-matter of the

¹ Paragraphs 2, 20, 21, 26, 45, 50, 52, 54, 56, 58 and 67.

² Qatar's *Request* of 11.06.2018, para. 12.

dispute, which concerns the protection of some human rights of Qataris under the CERD Convention. This deserves attention on the part of the ICJ.

III. THE PROBLEM OF THE ABSENCE OF LINK IN THE PRESENT REQUEST.

9. In effect, the faculty of the ICJ to indicate provisional measures under Article 41 of the Statute aims at the preservation of the rights invoked by the parties in the *cas d'espèce*, pending its decision on the merits thereof. Accordingly, the ICJ, in its recent Order of Provisional Measures of 19.04.2017, in the case of the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the U.N. Convention on the Elimination of All Forms of Racial Discrimination* (Ukraine versus Russian Federation), has held that it

“must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible. (...)”

A link must therefore exist between the rights whose protection is sought and the provisional measures being requested” (paras. 63-64).

10. In the present case opposing Qatar to the UAE, concerning also the *Application of the CERD Convention*, although the subject-matter of the dispute concerns the interpretation and the application of substantive obligations under the CERD Convention, the request for the indication of provisional measures filed by the UAE does not allege that Qatar violated any substantive rights set forth under the CERD Convention. The request of the UAE therefore does not establish the existence of a link between the rights whose protection is sought and the provisional measures requested.

IV. THE PROBLEM OF INCONSISTENCIES, IN THE PRESENT REQUEST, AS TO THE CERD CONVENTION AND AS TO THE CERD COMMITTEE.

11. It should not pass unnoticed that arguments that have been presented to the Court in the present *Request* of provisional measures disclose certain inconsistencies, which pertain to the rights (under the CERD Convention) to be protected, as well as to proceedings before the CERD Committee. May I thus briefly consider such inconsistencies, recalling at first that the Court's Order of 23.07.2018 aims at the safeguard of some rights under the CERD Convention duly identified in the previous Qatar's *Request*.

1. Inconsistencies in the Request as to the ICJ's Order of 23.07.2018, in Respect of the CERD Convention.

12. Contrariwise, the present request by the UAE does not correspond to the human rights protected under the CERD Convention; it does not even refer to them. Moreover, it is permeated with inconsistencies, in relation to distinct points. To start with, it appears inconsistent to request the ICJ - as the UAE does - to order provisional measures by extending its *prima facie* jurisdiction and, at the same time, to object to its jurisdiction *ratione materiae*.

13. Moreover, the UAE's request, on the basis of the ICJ's jurisdiction under Article 22 of the CERD Convention, should concern a dispute arising out of the interpretation or the application of the CERD Convention. Yet, it does not address the safeguard of the human rights set forth in the CERD Convention; its request appears thus to fall outside the scope of the CERD Convention.

14. In its *Request*, the UAE, while pretending to pursue the interests of Qatari citizens (paras. 8, 11 and 23(ii)), asks the Court to order Qatar to withdraw its submission before the CERD Committee and "terminate consideration thereof by the CERD Committee" (para. 74(i)). In its *oral arguments* before the ICJ, Qatar sustains that it is contradictory to allege that participating in such procedure would aggravate the dispute³, and adds that what it seeks is the settlement of the dispute through the procedure of the CERD Committee⁴.

15. Qatar contends that the UAE incurs into contradictions in alleging that "Qatar must exhaust the CERD procedures before coming to the Court", and, at the same time, requesting that the Court "order Qatar to put an end to the very procedures that it says must be exhausted as a prerequisite to the Court's jurisdiction"⁵. Qatar furthermore recalls that, during the proceedings with respect to the provisional measures that it requested in July 2018, the UAE referred to the CERD Committee as "the principal custodian of the Convention" and stated that it is "compulsory to refer to the Committee in all events"⁶. The UAE has thus raised contradictory arguments in respect of Qatar's request of provisional measures in 2018, and in respect of its own present request in 2019.

2. Inconsistencies in the Request as to the ICJ's Order of 23.07.2018, in Respect of the CERD Committee.

16. During the proceedings relating to the first request of provisional measures presented by Qatar, the UAE notably raised the argument that Qatar should have exhausted the procedure before the CERD Committee before seizing the Court; it argued that, in its view, seizing both at the same time would be incompatible with the *electa una via* principle and the *lis pendens* exception⁷.

17. On this point, in its Order of 23.07.2018, the ICJ stated that it was not necessary "to decide whether any *electa una via* principle or *lis pendens* exception [were] applicable in the present situation" (para. 39). Yet, the UAE again raises a similar argument in its own present request of provisional measures, arguing that Qatar has "created a *lis pendens*" constituting "an abuse of the CERD dispute resolution mechanism" (para. 41), with a risk of "conflicting" decisions (para. 42).

18. May it be recalled that, on 08.03.2018, Qatar filed a communication with the CERD Committee under Article 11 of the CERD Convention⁸. After the ICJ's Order of 23.07.2018, Qatar has lodged a new communication with the CERD Committee on 29.10.2018, in application of Article 11(2) of the CERD Convention, as it has considered the UAE "unwilling to engage

³ ICJ, doc. CR 2019/6, of 08.05.2019, p. 25, para. 46.

⁴ ICJ, doc. CR 2019/6, of 08.05.2019, p. 12, para. 8.

⁵ ICJ, doc. CR 2019/6, of 08.05.2019, p. 34, para. 28.

⁶ ICJ, doc. CR 2019/6, of 08.05.2019, p. 12, para. 9.

⁷ Cf. ICJ's Order of 23.07.2018, para. 35.

⁸ Qatar's communication, in UAE's *Request*, Annex 20.

constructively with [it] to settle the matter”⁹. It does not seem that this would depart from, or contradict, the ICJ’s Order of 23.07.2018.

V. RELEVANCE AND PERSISTENCE OF PROVISIONAL MEASURES OF PROTECTION IN CONTINUING SITUATIONS.

19. In the present case of *Application of the CERD Convention (Qatar versus UAE)*, the relevance of the provisional measures of protection in force since the ICJ’s Order of 23.07.2018 is underlined by the consideration of a *continuing situation* affecting some human rights under the CERD Convention. I have addressed this point in my previous Separate Opinion appended to that Order, and I deem it appropriate to retake the matter here.

20. May I recall, in this respect, that in my previous Separate Opinion I have pondered, *inter alia*, that

“In effect, the *continuing situation* in breach of human rights is a point which has had an incidence in other cases before the ICJ as well, at distinct stages of the proceedings. May I briefly recall here three examples, along the last decade. In the case concerning the *Obligation to Prosecute or Extradite (Belgium versus Senegal)*, as the ICJ in its Order of 28.05.2009 decided not to indicate provisional measures, I appended thereto a Dissenting Opinion, wherein - as already pointed out (para. 79, *supra*) - I drew attention to the *décalage* to be bridged between the time of human beings and the time of human justice (paras. 35-64).

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

In the case on *Jurisdictional Immunities of the State (Germany versus Italy)*, as the ICJ, in its Order of 06.07.2010 found the counter-claim of Italy inadmissible, once again I appended thereto a Dissenting Opinion, wherein I examined at depth the notion of ‘*continuing situation*’ in the factual context of the *cas d’espèce*, as debated between the contending parties (paras. 55-59 and 92-100). My Dissenting Opinion encompassed the origins of a ‘continuing situation’ in international legal doctrine (paras. 60-64); the configuration of a ‘continuing situation’ in international litigation and case-law (paras. 65-83); the configuration of a ‘continuing situation’ in international legal conceptualization at normative level (paras. 84-91).

And, once again, I warned against the pitfalls of State voluntarism (paras. 101-123). Suffice it here only to refer to my lengthy reflections on the notion of ‘continuing situation’ in the case on *Jurisdictional Immunities of the State*, as I see no need to reiterate them *expressis verbis* herein. What cannot pass unnoticed is that a *continuing situation* in breach of human rights has had an incidence at distinct stages of the proceedings before the ICJ: in addition to decisions - as just seen - on provisional measures and counter-claim (*supra*), it has also been addressed in decision as to the merits” (paras. 89-92).

⁹ Qatar’s *Note Verbale* to the CERD Committee, in UAE’s *Request*, Annex 21.

21. May I add, in the present Separate Opinion, that I further addressed the matter at issue in my extensive Dissenting Opinion (paras. 17 and 301) in the ICJ's Judgment (of 03.02.2012) in the same case of *Jurisdictional Immunities of the State*¹⁰, just as I did also in my Separate Opinion (paras. 165-168) in the aforementioned case of the *Obligation to Prosecute or Extradite* (merits, Judgment of 20.07.2012).

22. Furthermore, there have been other occasions when I addressed the importance of provisional measures of protection in respect of human rights Conventions. May I also refer, e.g., to my Separate Opinion in the case of *A.S. Diallo* (Guinea *versus* D.R. Congo, merits, Judgment of 30.11.2010), wherein I dedicated a part of it (IX) to the notion of "continuing situation", with the projection of human rights violations in time¹¹ (paras. 189-199).

23. Shortly afterwards, in the ICJ's Judgment on reparations (of 19.06.2012) in the same case of *A.S. Diallo*, I appended a new Separate Opinion, wherein I drew attention to the "centrality of the victims" singling out their pressing need of rehabilitation (para. 83). And I added:

"(...) Restorative justice has made great advances in the last decades, due to the evolution of the International Law of Human Rights, humanizing the law of nations (the *droit des gens*). (...) The universal juridical conscience seems to be at last awakening as to the need to honour the victims of human rights abuses and to restore their dignity.

Rehabilitation of the victims acquires a crucial importance in cases of grave violations of their right to personal integrity. In effect, there have been cases where medical and psychological assistance to the victims has been ordered (...). Such measures have intended to overcome the extreme vulnerability of victims, and to restore their identity and integrity. Rehabilitation of the victims mitigates their suffering and that of their next of kin, thus irradiating itself into their social *milieu*.

Rehabilitation, discarding the apparent indifference of their social *milieu*, helps the victims to recuperate their self-esteem and their capacity to live in harmony with the others. Rehabilitation nourishes the victims' hope in a minimum of social justice. (...) In sum, rehabilitation restores one's faith in human justice" (paras. 83-85).

24. More recently, in the case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia), the ICJ dismissed the case in its restrictive Judgment of 03.02.2015, to which I have appended an extensive Dissenting Opinion; once again, I addressed therein, *inter alia*, the problem of *continuing* violations of human rights, in distinct forms, such as, e.g., missing persons in enforced disappearances (paras. 292-293, 298-302, 314-316 and 535), victims of torture and inhuman treatment (paras. 317-320, 470 and 534).

¹⁰ For a case-study, cf. A.A. Cançado Trindade, *La Protección de la Persona Humana frente a los Crímenes Internacionales y la Invocación Indebida de Inmunidades Estatales*, Fortaleza/Brazil, IBDH/IIDH/SLADI, 2013, pp. 5-305.

¹¹ The griefs suffered by the victim *extended in time*, in breach of the relevant provisions of human rights treaties (the U.N. Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights) as well as Article 36(1)(b) of the Vienna Convention on Consular Relations. The victim's griefs, surrounded by arbitrariness on the part of State authorities, amounted to a wrongful *continuing situation*, marked by the prolonged lack of access to justice.

25. In that Dissenting Opinion, moreover, I have deemed it fit to warn, *inter alia*, that despite the endeavours of human thinking, along history, to provide an explanation for evil,

“it has not been able to rid humankind of it. (...) Whenever individuals purport to subject their fellow human beings to their ‘will’, placing this latter above conscience, evil is bound to manifest itself. In one of the most learned writings on the problem of evil, R.P. Sertillanges ponders that the awareness of evil and the anguish emanated therefrom have marked presence in all civilizations. The ensuing threat to the future of human kind has accounted for the continuous presence of that concern throughout the history of human thinking¹²” (para. 473)¹³.

26. As I have already pointed out, in another aforementioned Dissenting Opinion that I presented, in the case of *Jurisdictional Immunities of the State* (para. 21, *supra*), a *continuing situation* affecting or in breach of human rights has had an incidence at distinct stages of the proceedings before the ICJ, namely, in provisional measures (like in the present case of the *Application of the CERD Convention*, twice already), as well as in counter-claims, merits, and reparations.

VI. RELEVANCE OF PROVISIONAL MEASURES OF PROTECTION OF RIGHTS OF PERSONS IN SITUATIONS OF VULNERABILITY.

27. A *continuing situation* affecting human rights under the CERD Convention - duly stressed by Qatar in its own *Request* which led to the ICJ’s Order of 23.07.2018 - leads to the *continuing vulnerability* of victimized human beings, or potential victims. Under the CERD Convention and other human rights treaties, attention is focused on human beings affected, - not on their States, nor on strictly inter-State relations.

28. On the occasion of the proceedings of the previous Order in the *cas d’espèce*, such continuing situation of human vulnerability - related to rights protected under the CERD Convention - was properly addressed by Qatar but not by the UAE, as I pointed out in my previous Separate Opinion (paras. 35-36 and 44-46). The aim is - I continued - to set up “a higher standard of protection, under the CERD Convention, of individuals in a continuing situation of great vulnerability” (para. 64). And I added:

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

¹² R.P. Sertillanges, *Le problème du mal - l’histoire*, Paris, Aubier, 1948, pp. 5-412.

¹³ For a case-study, cf. A.A. Cançado Trindade, *A Responsabilidade do Estado sob a Convenção contra o Genocídio: Em Defesa da Dignidade Humana*, Fortaleza/Brazil, IBDH/IIDH, 2015, pp. 9-265;

29. Hence the provisional measures of protection which were ordered by the ICJ last 23.07.2018, which remain in force, so as to safeguard some of the rights protected under the CERD Convention. The present *Request* by the UAE, - unlike the previous *Request* by Qatar, - does not refer to those rights. The question of human vulnerability counts on the attention of both contending parties in the present proceedings, but in distinct factual contexts addressed by the UAE and Qatar.

30. Qatar keeps on invoking the protection of rights under the CERD Convention. But, in the case of the position of the UAE, it does not relate vulnerability to the rights safeguarded under the CERD Convention. The UAE's present *Request* cannot thus be dealt with by the ICJ in the same way as the previous *Request* by Qatar. Hence the distinct decisions of the Court as to one request and the other. The important point is that the provisional measures of protection indicated in the ICJ's Order of last 23.07.2018 remain in force, to the benefit of human beings protected under the CERD Convention in respect of some rights (under Articles 2, 4, 5, 6 and 7).

VII. THE LONGSTANDING IMPORTANCE OF THE FUNDAMENTAL PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION.

31. In that previous Order, the ICJ has noted that Articles 2, 4, 5, 6 and 7 of the CERD Convention "are intended to protect individuals from racial discrimination", and hence the incidence also of Article 1 of the Convention (para. 52). The issue of continuing human vulnerability is not the only one that has not sufficiently received the needed attention in the present proceedings in respect - as I see them - of some of the rights protected under the CERD Convention.

32. In effect, the fundamental principle of equality and non-discrimination is of the utmost importance in the present context. Yet, this fundamental principle has received much more attention in the proceedings pertaining to the previous Order of the ICJ (of 23.07.2018, as to Qatar's *Request*), than in the current proceedings (as to the UAE's *Request*). In its practice, the CERD Committee has understandably been particularly attentive to the prohibition of discriminatory measures against members of vulnerable groups (such as, e.g., migrants).

33. This can be said also of the practice of other Committees under U.N. human rights Conventions, e.g., the Human Rights Committee, the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee against Torture (CAT), among others¹⁴. In cases pertaining to the protection of human rights, the ICJ has been attentive to the work and decisions of such U.N. Committees.

34. For example, in its Judgment of 20.07.2012 (merits) in the aforementioned case of the *Obligation to Prosecute or Extradite*, the ICJ duly took note of a decision (of 17.05.2006) of the CAT Committee on a complaint filed with it by several Chadian nationals (*S. Guengueng et alii*) against Hissène Habré for crimes committed in Chad during his violent regime there (para. 27). There is thus nothing to hinder the ICJ to take into account decisions of U.N. Committees under human rights Conventions, so as to secure protection for the rights thereunder.

¹⁴ E.g., the Committee on the Rights of the Child, the Committee on the Rights of Persons with Disabilities, the Committee on Enforced Disappearances.

35. The fundamental principle of equality and non-discrimination, and the prohibition of arbitrariness, constitute a point which cannot be overlooked, in time and space. After all, in the relations between human beings and public power, arbitrariness is a problem which has marked presence, and has been a source of concern, everywhere along the history of humankind. Hence the permanent need to protect human beings against discrimination and arbitrariness.

36. This is yet another point which I deem it sufficient to refer to in the present Separate Opinion, as I have already addressed it at length in my previous Separate Opinion appended to the ICJ's Order of provisional measures of protection of 23.07.2018, in the *cas d'espèce* of the *Application of the CERD Convention* (parts III-IV, paras. 9-32). After all, the idea of human equality, underlying the conception of the unity of the human kind, has marked its presence since the historical origins of the law of nations up to the present (paras. 11-12).

37. In recent years, the principle of equality and non-discrimination, and the prohibition of arbitrariness, have also marked presence in international case-law, including that of the ICJ (as I have pointed out, e.g., in my Separate Opinion in the ICJ's Judgments on the case of *A.S. Diallo*, merits, 2010, and reparations, 2012 [Guinea versus D.R. Congo]; in my Separate Opinion in the ICJ's Advisory Opinion on the *Declaration of Independence of Kosovo*, 2010; in my Dissenting Opinion in the case of the *Application of the CERD Convention*, 2011 [Georgia versus Russian Federation]; in my Separate Opinion in the ICJ's Advisory Opinion on *Judgment of the ILO Administrative Tribunal on a Complaint against IFAD*, 2012; in my Dissenting Opinion in the case of the *Application of the Convention against Genocide*, 2015 [Croatia versus Serbia]; in my three Dissenting Opinions in the three cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*, 2016 [Marshall Islands versus United Kingdom, India and Pakistan]¹⁵; and in my Separate Opinion in the ICJ's very recent Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, of 25.02.2019).

38. This issue has been properly addressed in the ICJ's prior Order of last 23.07.2018 in the present case of the *Application of the CERD Convention*; I have devoted much attention to it in my Separate Opinion appended thereto, wherein I have warned, *inter alia*, that

“The advances in respect of the basic principle of equality and non-discrimination at normative and jurisprudential levels¹⁶, have not, however, been accompanied by the international legal doctrine, which so far has not dedicated sufficient attention to that fundamental principle; it stands far from guarding proportion to its importance both in theory and practice of Law. This is one of the rare examples of international case-law preceding international legal doctrine, and requiring from it due and greater attention” (para. 18).

39. There remains thus a long way to go. In the present case of the *Application of the CERD Convention*, in pursuance to Qatar's *Request*, the ICJ indicated provisional measures of protection of some rights under the CERD Convention. The present *Request* by the UAE does not provide the Court the occasion to do the same, as it makes no reference to rights protected under the CERD Convention. In dismissing this request, the ICJ could have made it clearer that the provisional

¹⁵ For a case-study, cf. A.A. Cançado Trindade, *The Universal Obligation of Nuclear Disarmament*, Brasília, FUNAG, 2017, pp. 41-224.

¹⁶ To the study of which I have dedicated my extensive book: A.A. Cançado Trindade, *El Principio Básico de Igualdad y No-Discriminación: Construcción Jurisprudencial*, 1st. ed., Santiago de Chile, Ed. Librotecnia, 2013, pp. 39-748.

measures that it has already ordered (on 23.07.2018) remain in force, and are to be complied by the contending parties, to the benefit of human beings protected under the relevant provisions of the CERD Convention (*supra*).

VIII. THE FUNDAMENTAL CHARACTER, RATHER THAN “PLAUSIBILITY”, OF HUMAN RIGHTS PROTECTED UNDER THE CERD CONVENTION.

40. The rights protected under the CERD Convention, in the light of the relevant and basic principle of equality and non-discrimination, are endowed with a fundamental character, with all legal consequences ensuing therefrom. I find it disheartening that, in its reasoning in the present Order, the ICJ once again indulges repeatedly into what it beholds as “plausible rights” (paras. 17, 21, 24, 25 and 26). Fundamental rights protected under the CERD Convention cannot be regarded or labelled as “plausible” or “implausible”: they are fundamental rights.

41. I have been advancing my position in this respect for a long time within this Court. Instead of reiterating here all I have been stating along the years, may I here briefly refer to a couple of very recent examples. In my Separate Opinion appended to the ICJ’s Order of 18.05.2017, in the case of *Jadhav* (India versus Pakistan), e.g., I have devoted a whole part (V) of it to “The Fundamental (Rather than ‘Plausible’) Human Right to Be Protected: Provisional Measures as Jurisdictional Guarantees of a Preventive Character” (paras. 19-23).

42. In my Separate Opinion appended to the ICJ’s Order of 19.04.2017, in the aforementioned case of the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the U.N. Convention on the Elimination of All Forms of Racial Discrimination*, I have likewise dedicated a whole part (V) of it to “The Decisive Test: Human Vulnerability over ‘Plausibility’ of Rights” (paras. 36-44); additionally, recalling the relevant case-law on the matter¹⁷, I have devoted three other parts (III, IV and IX) of it to provisional measures of protection in face of the tragedy of the utmost vulnerability of segments of the population (paras. 12-26, 27-35 and 62-67).

43. And, in the present case of *Application of the CERD Convention*, in the Separate Opinion that I have appended to the ICJ’s previous Order of 23.07.2018, I have also drawn attention to the relevance of the fundamental principle of equality and non-discrimination, and the prohibition of arbitrariness (parts III-IV, paras. 9-21 and 22-32), as well as to the relevance of provisional measures of protection in face of a continuing situation of vulnerability of segments of the population (parts VIII and XI, paras. 68-73 and 82-93). I have pondered, *inter alia*, that

“Human beings in vulnerability are the ultimate beneficiaries of compliance with the ordered provisional measures of protection. However vulnerable, they are subjects of international law. We are here before the new paradigm of the *humanized* international law, the new *jus gentium* of our times, sensitive and attentive to the needs of protection of the human person in any circumstances of vulnerability. This is a point which I have been making in successive Individual Opinions in previous decisions of the ICJ; I feel it sufficient only to refer to them now, with no need to extend further thereon in the present Separate Opinion” (para. 70).

¹⁷ For a recent study, cf. A.A. Cançado Trindade, cf. *O Regime Jurídico Autônomo das Medidas Provisórias de Proteção*, The Hague/Fortaleza, IBDH/IIDH, 2017, pp. 13-348.

44. In effect, continuing human vulnerability has marked permanent presence in human history, drawing attention to the need of protection of vulnerable persons and groups. Awareness of human vulnerability can be clearly found, e.g., in ancient Greek tragedies, which remain so contemporary in our days. Those tragedies contain warnings as to human vulnerability, even more so in situations of violence and armed attacks. For example, Euripides expresses a humanist outlook, his concern with the conflict between might and right, and his disillusionment with so-called “rational” decision-making in relation to armed confrontation (*Children of Heracles*, circa 430 b.C., and, as to extreme violence, *Medea*, 431 b.C.). In the XXIst. century, human vulnerability persists, and seems to increase.

IX. EPILOGUE: A RECAPITULATION.

45. This is the third recent case under the CERD Convention; provisional measures of protection (requested by Qatar) have already been indicated by the ICJ in the *cas d’espèce*, in its previous Order of 23.07.2018, and remain in force. The present case of *Application of the CERD Convention* concerns the rights protected thereunder, which are the rights of human beings, and not rights of States. The present request by the UAE of provisional measures, dismissed by the ICJ, does not invoke any of the human rights protected under the CERD Convention.

46. The ICJ has rightly dismissed the request. In doing so, in the course of the present Order, the Court made references (paras. 16-18, 25-26 and 29) to its previous Order of 23.07.2018. Yet, in my understanding, the Court could have gone further beyond that, in expressly stressing the maintenance of the provisional measures of protection that it had previously ordered, to be duly complied with, given the importance of the human rights safeguarded under the CERD Convention.

47. Keeping this in mind, may I, last but not least, proceed to a brief recapitulation of the main points that I have deemed it fit to make in the course of the present Separate Opinion. *Primus*: In the *cas d’espèce*, provisional measures of protection have already been ordered by the ICJ on 23.07.2018, at the prior request of Qatar, in order to safeguard certain human rights under the CERD Convention. *Secundus*: The UAE’s current request does not even invoke human rights under the CERD Convention. *Tertius*: Moreover, unlike the previous request of Qatar, the present request of the UAE does not set up the existence of a link between the rights whose protection is sought and the provisional measures requested.

48. *Quartus*: The ICJ has thus faced, in the UAE’s request, inconsistencies in respect of the CERD Convention (as to jurisdiction) as well as in respect of the operation of the CERD Committee. Hence the ICJ’s decision to dismiss the present request. *Quintus*: The existence, as in the *cas d’espèce*, of a *continuing situation* affecting some human rights under the CERD Convention underlines the relevance of the provisional measures of protection in force since the ICJ’s Order of 23.07.2018.

49. *Sextus*: Such continuing situation brings to the fore the *continuing vulnerability* of the affected human beings, or potential victims. *Septimus*: The rights safeguarded are the ones invoked by Qatar under the CERD Convention; the UAE, for its part, does not even refer to those rights. *Octavus*: The provisional measures of protection indicated by the ICJ’s Order of 23.07.2018 remain in force. *Nonus*: Provisional measures of protection safeguard rights under U.N. Conventions of human rights, such as the CERD Convention.

50. *Decimus*: The fundamental principle of equality and non-discrimination, and the prohibition of arbitrariness, lying in the foundations of the CERD Convention itself, require particular attention. *Undecimus*: Such attention is already present at normative and jurisprudential levels, but it remains still insufficiently examined by the international legal doctrine, which should become more attentive and devoted to the matter. *Duodecimus*: The provisional measures of protection indicated by the ICJ's Order of 23.07.2018, - may I reiterate, - remain in force and are to be duly complied with.

(Signed) Antônio Augusto CANÇADO TRINDADE.
