SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. PROLEGOMENA

1. I have concurred, with my vote, for the adoption today, 08 November 2019, of the present Judgment of the International Court of Justice (ICJ), wherein it dismisses the preliminary objections raised before it in the present case of *Application of the Convention for the Suppression of the Financing of Terrorism and of the Convention on the Elimination of All Forms of Racial Discrimination* (Ukraine *versus* Russian Federation). In an earlier case (of 2011) concerning also the *Application of the Convention on the Elimination of All Forms of Racial Discrimination* (*CERD* — Georgia *versus* Russian Federation), as the ICJ decided to uphold one of the four preliminary objections (the second) raised by the Respondent, thus finding itself without jurisdiction, I appended a lengthy Dissenting Opinion to the Judgment (of 01.04.2011), in support of the ICJ's jurisdiction for the reasons which I carefully examined.

2. Eight years later, I find that some of the reflections that I developed therein remain relevant for the consideration of the present case as well. I proceed thus to recall them, in relation to the *cas d'espèce* as well, singling out some points. I find it necessary to do so in the present Separate Opinion, as I reach the same decision of the ICJ to dismiss all preliminary objections in

the present case, on the basis of a distinct reasoning in respect of the selected points, which, in my perception, require further attention on the part of the Court.

3. I shall focus on the following points: a) basis of jurisdiction: its importance for the protection of the vulnerable under U.N. human rights Conventions; b) the *rationale* of the compromissory clause of the CERD Convention (Article 22); c) the *rationale* of the local remedies rule in the international safeguard of human rights: protection and redress, rather than exhaustion; d) the relevance of jurisdiction in face of the need to secure protection to those in situations of vulnerability; e) concluding considerations. After examination of the whole matter at issue, the way will then be paved for the presentation, in an epilogue, of a recapitulation of all the points that I sustain in the present Separate Opinion.

II. Basis of Jurisdiction: Its Importance for the Protection of the Vulnerable under U.N. Human Rights Conventions

4. In the decision the ICJ has just taken today, in the case concerning the *Application of the CERD Convention* (Ukraine *versus* Russian Federation), the Court moved a step forward in relation to its earlier decision in the case of *Application of the CERD Convention* (Georgia *versus* Russian Federation, 2011); yet, it has not succeeded in freeing itself from the outdated and unfounded view of ascribing utmost importance to State consent in relation to its own jurisdiction. Once again, the ICJ, keeping in mind Article 22 of the CERD Convention[1] (cf. *infra*), stated that "its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them" (para. 33).

5. This being so, I deem it necessary to recall here that, contrary to the Court's majority and in my firm support of the ICJ's jurisdiction in the earlier case of *Application of the CERD Convention* (Georgia *versus* Russian Federation, 2011), I warned in my Dissenting Opinion that the *rationale* of human rights Conventions cannot be overlooked by the ICJ's "mechanical and reiterated search for State consent", continued in time and placed above the "fundamental values" underlying those Conventions (paras. 140 and 202). In my understanding, human rights and values stand well above a State's "will" or "interests" (paras. 139 and 194), and access to justice is not conditioned by any requirement of "prior negotiations" (para. 138).

6. I further held, in my Dissenting Opinion, that one cannot keep on approaching the Court's jurisdiction as from an outdated voluntarist outlook privileging State consent, as done almost one century ago (para. 44). In our times, human rights Conventions go beyond the strict inter-State dimension, so as to ensure the safeguard of the rights of the human person, in light of the principle *pro persona humana*, *pro victima* (para. 72). There is need to endeavours, — I proceeded, — to secure the progressive development of international law (para. 45), attentive to the relevance of compulsory jurisdiction for the realization of justice (paras. 60, 65, 68 and 141).

7. Moreover, I drew attention to the importance of keeping in mind the vulnerability or defencelessness of the members of the victimized segments of the population (para. 146), as shown in that case by the human tragedy surrounding the victims and their need for justice (paras. 163-165 and 208). Those in situations of vulnerability or adversity stood in need of a higher standard of protection, not conditioned by State "consent" (para. 162).

[1] In addition to Article 24(1) of the Convention for the Suppression of the Financing of Terrorism (ICSFT).

8. These pitiless situations, — and not the old notions of State's "will" or "interests", — required far more attention (paras. 196 and 199). After all, — I concluded on this issue, — the realization of justice under a human rights Convention like CERD can only be achieved taking due account and properly valuing the sufferings and needs of protection of the members of the victimized segments of the population (paras. 194 and 209).

9. May I here add that attention to the need to preserve human beings from their own violence and propensity to destruction has been constant in human history and thinking[2], until current times[3], at times focusing attention on certain historical occurrences[4]. Already in antiquity, there were endeavours in search of the *recta ratio*[5] (as in the writings of Cicero, and in the *Letters to Lucilius* of Seneca), as the search of the perfection of reason. The exponents of the school of thinking of stoicism (Seneca, Epictetus, Marco Aurelio) always valued the use of *reason*, seeking the correct attitude in face of the fragility of human life, dedicating particular attention to the ethical questions.

10. In face of the presence of evil, there have been advices given which have maintained their perennial value along the centuries. For example, the words of Seneca's *On Anger*, dated from the year 49 A.D., seem to have been written nowadays:

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[2] For an aetiology of evil in the historical evolution of human thinking, cf. A.-D. Sertillanges, *Le problème du mal*, Paris, Aubier/Éd. Montaigne, 1948, pp. 5-412; A.J. Toynbee, *Civilization on Trial*, Oxford/N.Y., OUP, 1948, pp. 3-263; A.J. Toynbee, *Guerra y Civilización* (1952), Madrid/Buenos Aires, Alianza/Emecé Eds., 1984 (reed.), pp. 7-169; S. Weil, *Force et malheur* (1933), Bordeaux, Éd. La Tempête, 2019 (reed.), pp. 21-50, and cf. pp. 197-209; S. Weil, *L'agonie d'une civilisation* (1943), Saint Clément de Rivière, Éd. Fata Morgana, 2017 (reed.), pp. 9-51; S. Weil, *Oeuvres* (1929-1943), Paris, Gallimard, 1999 (reed.), pp. 449-462 and 503-507; R. Rolland and S. Zweig, *Correspondence (1910-1919)*, Paris, Éd. A. Michel, 2014, pp. 73-622; S. Zweig, *Seuls les vivants créent le monde* (1914-1918), Paris, Éd. R. Laffont, 2018, pp. 25-160; A. Schweitzer, *Pilgrimage to Humanity* (1961), N.Y., Philosophical Library Ed., 1961, pp. 1-106; and cf., subsequently, e.g., G. Bataille, *La littérature et le mal* (1957), Paris, Gallimard, 2016 (reed.), pp. 9-201; F. Alberoni, *Las Razones del Bien y del Mal*, Mexico, Ed. Gedisa, 1988, pp. 9-196; P. Ricoeur, *Le mal - Un défi à la philosophie et à la théologie*, 3rd ed., Geneva, Ed. Labor et Fides, 2004, pp. 19-65; P. Ricoeur, *A Simbólica do Mal*, Lisbon, Edic. 70, 2017, pp. 17-375; C. Crignon (coord.), *Le mal*, Paris, Flammarion, 2000, pp. 11-232; M. Buber, *Imágenes del Bien y del Mal*, Buenos Aires, Ed. Lilmod, 2006, pp. 11-227; among others.

[3] Cf., e.g., N. Dubos (coord.), *Le mal extrême - La guerre civile vue par les philosophes*, Paris, CNRS Éd., 2010, pp. V-XXI and 1-361; H. Bouchilloux, *Qu'est-ce que le mal?*, 2nd ed., Paris, Éd. J. Vrin, 2010, pp. 7-124; J. Waller, *Becoming Evil - How Ordinary People Commit Genocide and Mass Killing*, 2nd ed., Oxford, OUP, 2007, pp. 3-330; L. Svendsen, *A Philosophy of Evil*, 2nd ed., Champaign, Dalkey Archive Press, 2011, pp. 17-282; S. Baron-Cohen, *The Science of Evil - On Empathy and the Origins of Cruelty*, N.Y., Basic Books Ed., 2012, pp. 1-194; D.J. Goldhagen, *Worse than War - Genocide, Eliminationism, and the Ongoing Assault on Humanity*, London, Abacus, 2012 (reed.), pp. 3-628; É. Barnavi, *Dix thèses sur la guerre*, Paris, Flammarion, 2014, pp. 7-137; S. Neiman, *Evil in Modern Thought - An Alternative History of Philosophy*, Princeton/Oxford, Princeton University Press, 2015, pp. 1-359; [Various Authors,] *Le sarcasme du mal - Histoire de la cruauté de la Renaissance à nos jours* (eds. F. Chauvaud, A. Rauch and M. Tsikounas), Rennes, Presses Universitaires de Rennes, 2016, pp. 9-356; F.-X. Putallaz, *Le mal*, Paris, Éd. Cerf, 2017, pp. 7-185; L. Devillairs, *Être quelqu'un de bien - Philosophie du bien et du mal*, Paris, PUF, 2019, pp. 9-217; among others.

[4] Cf., e.g., J. de Romilly, *La Grèce antique contre la violence*, Paris, Éd. de Fallois, 2000, pp. 7-214; K. Mann, *Contre la barbarie* (1925-1948), Paris, Éd. Phébus, 2009 (reed.), pp. 19-436; C.G. Jung, *Aspects du drame contemporain*, Geneva/Paris, Libr. Univ. Georg/Éds. Colonne Vendôme, 1948, pp. 71-233; K. Jaspers, *The Question of German Guilt* (1947), N.Y., Fordham University Press, 2000 (reed.), pp. 1-117; H. Arendt, *Compreensão e Política e Outros Ensaios* (1930-1954), Lisbon, Antropos/Relógio d'Água Ed., 2001, pp. 41-287, esp. pp. 61-75; H. Arendt, *Responsabilité et jugement*, Paris, Éd. Payot & Rivages, 2009 (reed.), pp. 57-359; S. Sontag, *Regarding the Pain of Others*, London, Penguin Books, 2004 (reed.), pp. 3-113; R. Muchembled, *Une histoire de la violence - De la fin du Moyen Âge à nos jours*, Paris, Éd. du Seuil, 2008, pp. 7-460; Ph. Spencer, *Genocide since 1945*, London/N.Y., Routledge, 2012, pp. 1-142; J.-J. Becker, *Comment meurent les civilisations*, Paris, Vendémiaire Éd., 2013, pp. 5-182; D. Muchnik, *La Humanidad frente a la Barbarie - Reflexiones sobre la Guerra, la Muerte y la Supervivencia*, Buenos Aires, Ariel, 2017, pp. 13-194; among others.

[5] And virtue itself was at times described as *recta ratio*.

"There is nothing more dangerous than animosity: it is anger that breeds this. Nothing is more deadly than war (…); it repudiates human nature, (…) while it incites hatred (…) to do harm. (…) [O]ne may learn (…): how much evil is inherent in anger when it has at its service all the power of extremely powerful men (…).

(…) [O]ne should take into account the boundaries of our human condition, if we are to be fair judges of all that happens (…). Let us grant to our soul that peace which will be provided by constant study of beneficial instruction, by noble actions, and a mind fixed on desire only for what is honourable.

(…) The benefits of life are not to be squandered (…). (…) Fate stands above our heads and numbers our days as they go by, drawing nearer and nearer to us (…). Let us rather spend the brief span we have left in rest and peace (…). [L]et us behave as men should; let us not be a cause of fear or danger to anyone (…)"[6].

III. The Rationale of the Compromissory Clause of the CERD Convention (Article 22)

11. Keeping in mind the importance of the basis of jurisdiction for the protection of vulnerable persons under U.N. human rights Conventions, I shall now turn to my considerations on the *rationale* of the compromissory clause of the CERD Convention (Article 22), as related to the *justiciables*' right of access to justice. This is a key point that I have been addressing within the ICJ along this last decade. Once again, in the present Separate Opinion, I shall stress the need and relevance of a proper understanding of the compromissory clause within a victim-oriented human rights Convention, like CERD.

1. Compromissory Clause and the *Justiciables*' Right of Access to Justice

12. In effect, along the years, the ICJ has unfortunately been experiencing an unnecessary difficulty in understanding the *rationale* of a compromissory clause within a human rights Convention. May I recall that, in the aforementioned earlier case of the *Application of the CERD Convention* (Georgia *versus* Russian Federation, Judgment of 01.04.2011), I found it necessary to present my strong and extensive Dissenting Opinion furthermore sustaining that the ICJ's strict interpretation of its compromissory clause (Article 22) of the CERD Convention was mistaken: in my understanding — I explained — compromissory clauses such as that of Article 22 of the CERD Convention are directly linked to the *justiciables*' *right of access to justice* itself, under human rights treaties (para. 207).

13. In that case, the ICJ should, in my understanding, have dismissed the preliminary objections, by means of the interpretation of the compromissory clause in the light of the CERD Convention as a whole, keeping in mind its legal nature, its material content, and its object and purpose (paras. 64-78), mainly to protect the *justiciables* in situation of particular vulnerability (para. 185). Only in this way it would secure the CERD Convention's proper effects, to the benefit of human beings in need of protection (para. 78).

14. In that decision of 2011, the ICJ, in declaring itself without competence to proceed to the examination of the claim as to the merits, in my understanding failed to value, from the correct humanist perspective, the sufferings and needs of protection of the victimized population (*summum jus, summa injuria*) (paras. 145-166). Human rights Conventions are essentially victim-oriented,

[6] Seneca, *On Anger* (*circa* 49 A.D.), book 3, parts 5, 13, 26 and 41-43.

and can only be properly interpreted and applied from a humanist outlook, and not at all from a State-centric and voluntarist one.

15. In my aforementioned Dissenting Opinion I further sustained that the compromissory clause (Article 22) of the CERD Convention ought to be interpreted bearing in mind the nature and material content of that Convention, besides its object and purpose, as a human rights treaty (paras. 64-118), and I underlined the pressing need of the realization of justice on the basis of that compromissory clause; I thus disagreed with the voluntarist and restrictive posture assumed by the Court's majority in the *cas d'espèce* (paras. 1-214).

16. In the present case of *Ukraine versus Russian Federation* (2019), the ICJ once again reiterated its finding in the case of *Georgia versus Russian Federation* (2011) that the phrase any dispute which is "not settled by negotiation or by the procedures expressly provided for in this Convention" sets up procedural "preconditions" to be fulfilled by the Parties for the Court to be validly seized (para. 106).

17. On my part, just as I explained in my Dissenting Opinion attached to the ICJ Judgment of eight years ago in the aforementioned case opposing Georgia to the Russian Federation (2011), I keep on sustaining that Article 22 of the CERD Convention does not provide that "preconditions" should be fulfilled for seizing the ICJ (para. 92). As I then stressed, Article 22 of the CERD Convention, taking into account the object and purpose of the Convention, "a *victim-oriented* human rights treaty", should have led the ICJ to interpret it as not setting forth any procedural "precondition" (paras. 92-96).

18. As to the present Judgment of the ICJ in the case of *Ukraine versus Russian Federation* (2019), I can live — not entirely pleased — with its finding that the "preconditions" set forth in Article 22 are not "cumulative", as such characterization would not be reasonable in respect of the relevant CERD provisions; the "cumulative" approach creates an unnecessary obstacle to access to justice, and the ICJ itself ponders that this would not be reasonable (para. 110). Although I do not agree with the view that Article 22 of the CERD Convention sets out "preconditions" (*supra*), as the Court's majority here interprets rather distinctly that "preconditions" are alternative (not at all cumulative), I can then live with that, to the extent that it preserves the ICJ's jurisdiction.

19. In the present case of *Application of the ICSFT and the CERD Conventions*, the ICJ, in addressing what it considers the "preconditions" under Article 22 of the CERD Convention, rightly concluded that Article 22 "must also be interpreted in light of the object and purpose of the Convention" (para. 111, and cf. also para. 112). In this respect, I go further than the ICJ. The due attention to the object and purpose of a human rights Convention like CERD also calls, in my understanding, for a proper understanding of the relevance of the basis of jurisdiction under human rights Conventions (Article 22 of CERD), as I have already pointed out, with fundamental human rights and values standing well above a misguided search for State "consent" (paras. 4-10, *supra*).

20. After all, the approach (of alternatives) adopted by the ICJ in the *cas d'espèce* is confirmed by the nature and substance of the CERD Convention, a *victim-oriented* human rights treaty. To attempt to consider that the "preconditions" would be "cumulative" would be contrary to the object and purpose of the CERD Convention, as I warned in my Dissenting Opinion (para. 96) in the previous ICJ decision in the case of *Georgia versus Russian Federation* (2011). And as I further stated in my Dissenting Opinion in that earlier case of *Application of the CERD Convention* (Georgia *versus* Russian Federation),

> "with regard to the question whether the previous engagement in negotiations and recourse to the procedures expressly provided for in the CERD Convention (referred to in Article 22) are cumulative or alternative, the conjunction 'or' indicates that the draftsmen of the CERD Convention clearly considered 'negotiation' or 'the procedures expressly provided for in this Convention' as *alternatives*. The Court could well — and should — have discarded any doubts that could persist on this point; instead, it deliberately preferred to abstain from pronouncing (para. 183) on this aspect of the controversy raised before it. Instead of clarifying the point, of saying what the law is *(juris dictio)*, it felt there was 'no need' to do so" (para. 116).

21. In the present case of *Ukraine versus Russian Federation* (2019), once again, throughout the arguments of the parties on preliminary objections submitted to the ICJ, attention has been concentrated on Article 22 of the CERD Convention[7], from two distinct approaches. Thus, in the *Preliminary Objections* it submitted, the Russian Federation presents its view that the requirements contained in Article 22 are *cumulative,* requiring Ukraine to have exhausted negotiations *and* to have attempted to resolve the dispute using the special procedures provided for in the CERD Convention itself (paras. 373-410)[8]. Russia further refers to four other human rights Conventions[9], arguing that the compromissory clauses found in them are similar to that in the CERD Convention, and that the cumulative requirements are to be complied with by the applicant State before seizing the ICJ (paras. 404-410).

22. For its part, Ukraine, in its *Written Statement*, firmly contests this view, holding that Article 22 of the CERD Convention does not contain preconditions, there being a misconstruction in reading Article 22 as requiring a dispute to be referred to the CERD Committee after negotiations have failed and before seizing the ICJ. Ukraine relies on the ordinary meaning of the disjunctive word 'or' in interpreting Article 22 of the CERD Convention, indicating alternatives (para. 314). To Ukraine, this is the most natural reading and the ordinary meaning of Article 22 (para. 315).

23. Ukraine contends that the CERD Committee procedures referred to in Article 22 are voluntary and not mandatory, and the respondent State's interpretation of it would deprive the compromissory clause of effect; moreover, Article 11 concerns only the application of the Convention. Ukraine adds that if the draftsmen of the CERD Convention had intended the ICJ's jurisdiction to be contingent upon the use of the CERD Committee procedures, they would have addressed such conditions in Part II and not in Part III of the Convention (paras. 316-323).

24. According to Ukraine, the drafting history of Article 22, and the object and purpose of the CERD Convention (the prompt elimination of racial discrimination), support the conclusion that Article 22 does not require recourse to the CERD Convention inter-State complaints procedure (paras. 324-327). In considering the ICJ's treatment of Article 22 of the CERD Convention in the

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[7] Which reads as follows:

> - "Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement".

[8] On its view of the "cumulative meaning" of Article 22, cf. also paras. 376, 378 and 387-403.

[9] Namely, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), Convention for the Protection of All Persons from Enforced Disappearance (CED), and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

earlier case of *Georgia versus Russian Federation* (paras. 341-348), Ukraine submits that the better interpretation of Article 22 (para. 346) is to read it as creating no "precondition" to the ICJ's jurisdiction to hear disputes concerning the interpretation or application of the CERD Convention.

2. Compromissory Clause Within a Victim-Oriented Human Rights Convention

25. On my part, may I recall that, in my Dissenting Opinion in the earlier Judgment of the ICJ (of 01.04.2011) in the case of *Georgia versus Russian Federation*, I sustained the understanding that Article 22 of the CERD Convention does not set up "preconditions" for the ICJ to be seized (para. 92); this is in conformity with the object and purpose of the Convention, "a *victim-oriented*" human rights treaty (para. 96). As I clearly explained in my Dissenting Opinion of eight years ago,

> "In effect, Article 22 is located in Part III of the CERD Convention, dealing with the settlement of disputes concerning the interpretation and application of the Convention as a whole. Article 11, located in Part II of the CERD Convention, establishes a special complaints procedure, which is not mandatory. The location of Article 22 in a part of the Convention distinct from that which governs the functioning of the Committee (Part II) is thus not without relevance, and should not pass unnoticed. A brief analysis of the special complaints procedure contained in Article 11 of the CERD Convention indicates that Article 22 of the CERD Convention is not to be read as requiring prior 'exhaustion' of the procedures set forth in Articles 11 and 12 of the CERD Convention, as an alleged 'precondition' to the Court's jurisdiction.
>
> It may be recalled that Article 11(1) of the CERD Convention establishes a distinct procedure that allows a State party to bring to the attention of the CERD Committee its concerns as to acts or omissions of another State party. The language provides that a State party 'may' (not 'shall') invoke this procedure if it wishes to do so; this makes it clear that it is not required to refer to this procedure for any further purpose. The language is clearly not mandatory, and this is not the only indication to this effect.
>
> It is noteworthy, moreover, that Article 11(2) of the CERD Convention, which deals with the right to return to the CERD Committee 'if the matter is not adjusted', is subject to two procedural conditions, namely: *(a)* the right must be exercised within six months from the receipt by the receiving State of the initial communication to the Committee; and *(b)* the Committee must have determined that the matter has not been adjusted to the satisfaction of both Parties, either by bilateral negotiations or by any other procedure open to them. In case these two conditions were not met, the State concerned could not go back to the CERD Committee.
>
> This confirms that, when the draftsmen of the CERD Convention considered it necessary to establish a procedural condition, they clearly did so, leaving no margin or room for further interpretation or doubts. If no such condition was clearly set forth, it could not at all be simply inferred, as that would not be in conformity with the nature and substance of the CERD Convention, a *victim-oriented* human rights treaty, and would clearly militate against the fulfilment of its object and purpose. This discloses the ordinary meaning of Article 22 of the CERD Convention" (paras. 93-96)[10].

[10] I added that the *travaux préparatoires* of the CERD Convention do not support or confirm the conclusion of the Court's majority (paras. 97-109), and that resort to negotiation was generally referred to as a factual effort or attempt only, rather than as a resolutory obligation (para. 101).

26. Moreover, from the standpoint of the *justiciables*, a compromissory clause such as that of Article 22 of the CERD Convention is directly related to their access to justice; the realization of justice thereunder can hardly be attained from a strict State-centered voluntarist perspective, and a recurring search for State "consent". As I further sustained in that Dissenting Opinion,

> "In my understanding, consent is not 'fundamental', it is not even a 'principle'. What is 'fundamental', i.e., what lays in the *foundations* of this Court, since its creation, is the imperative of the *realization of justice*, by means of compulsory jurisdiction. State consent is but a rule to be observed in the exercise of compulsory jurisdiction for the realization of justice. It is a means, not an end, it is a procedural requirement, not an element of treaty interpretation; it surely does not belong to the domain of the *prima principia*. (…)
>
> Fundamental principles are those of *pacta sunt servanda*, of equality and non-discrimination (at substantive law level), of equality of arms (*égalité des armes* - at procedural law level). Fundamental principle is, furthermore, that of humanity (permeating the whole *corpus juris* of International Human Rights Law, International Humanitarian Law, and International Refugee Law). Fundamental principle is, moreover, that of the dignity of the human person (laying a foundation of International Human Rights Law). (…)
>
> These are some of the true *prima principia*, which confer to the international legal order its ineluctable axiological dimension. These are some of the true *prima principia*, which reveal the values which inspire the *corpus juris* of the international legal order, and which, ultimately, provide its foundations themselves" (paras. 211-213).

27. In sum, in my aforementioned Dissenting Opinion of 2011, I firmly disagreed with the Court's majority in the *cas d'espèce*, and I stressed that Article 22 of the CERD Convention does not establish "preconditions" to the Court's jurisdiction; neither the ordinary meaning of Article 22, nor its drafting history, would support any such formal "preconditions" to the ICJ's jurisdiction. Article 22 refers only to "alternatives", pursuant to a teleological approach, ensuring and rendering effective human rights protection under the CERD Convention (para. 116). Article 22 must therefore be interpreted in a manner that is conducive to ensuring human rights protection. To this effect, the ICJ is to construe the options contained in Article 22 as alternatives, and not at all as "preconditions".

28. As I have already pointed out, in its present Judgment in the case of *Ukraine versus Russian Federation* (2019), the ICJ does not reiterate the strict outlook that it adopted in the earlier case of *Georgia versus Russian Federation* (2011), also under the CERD Convention, and does not sustain any of the corresponding preliminary objections; it correctly dismisses them. Yet, I find it necessary to reiterate my dissenting reflections of 2011 at this end of the present decade (2019), so as to keep on contributing to achieve a proper understanding of the *rationale* of the compromissory clause of the CERD Convention (Article 22) as well as of other U.N. human rights Conventions.

IV. *RATIONALE* OF THE LOCAL REMEDIES RULE IN INTERNATIONAL HUMAN RIGHTS PROTECTION: PROTECTION AND REDRESS, RATHER THAN EXHAUSTION

29. May I turn to the next selected point to consider, namely, that of the *rationale* of the local remedies rule under human rights Conventions. Once again, the point is raised in respect of the CERD Convention. I shall first review the undue invocation of the rule in the recent case of *Application of the CERD Convention* (Qatar *versus* UAE, 2018). Then, I shall proceed to consider

the undue invocation of the rule in the present case of *Application of the CERD Convention*, opposing Ukraine to the Russian Federation. I shall then examine the overriding importance of redress.

1. Undue Invocation of the Rule, in the Case of *Application of the CERD Convention*, Opposing Qatar to UAE

30. Moving now to the other point, this is not the first time that I deem it necessary to warn against the inadequacy of the invocation of the local remedies rule in an inter-State case before the ICJ pertaining to the *Application of the CERD Convention*. In a recent case of the kind, opposing Qatar to UAE, for example, I appended a Separate Opinion to the ICJ's Order of 23.07.2018, where I began by finding entirely inadequate and regrettable the invocation of the rule of exhaustion of local remedies at the early stage of a request for provisional measures of protection, and not on admissibility (para. 48).

31. And I added that the incidence of the local remedies rule in human rights protection is certainly distinct from its application in the practice of diplomatic protection of nationals abroad, there being nothing to hinder the application of that rule with greater or lesser rigour in such different domains (para. 49). And I then pondered that

> "Its *rationale* is quite distinct in the two contexts. In the domain of the safeguard of the rights of the human person, attention is focused on the need to secure the faithful realization of the object and purpose of human rights treaties, and on the need of effectiveness of local remedies; attention is focused, in sum, on the needs of protection. The *rationale* of the local remedies rule in the context of diplomatic protection is entirely distinct, focusing on the process of exhaustion of such remedies.
>
> Local remedies, in turn, form an integral part of the very system of international human rights protection, the emphasis falling on the element of *redress* rather than on the process of exhaustion. The local remedies rule bears witness of the interaction between international law and domestic law in the present context of protection[11]. We are here before a *droit de protection*, with a specificity of its own, fundamentally victim-oriented, concerned with the rights of individual human beings rather than of States. Such rights are accompanied by obligations of States.
>
> Generally recognized rules of international law (which the formulation of the local remedies rule in human rights treaties refers to), besides following an evolution of their own in the distinct contexts in which they apply, necessarily undergo, when inserted in human rights treaties, a certain degree of adjustment or adaptation, dictated by the special character of the object and purpose of those treaties and by the widely recognized specificity of the international protection of human rights" (paras. 50-52).

32. In my same Separate Opinion in the case of *Application of the CERD Convention* (Qatar *versus* UAE), I further pointed out that, in its handling of successive cases under the CERD Convention, for example, the Committee on the Elimination of Racial Discrimination (CERD Committee) has deemed it necessary to single out that petitioners are only required to

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

exhaust local remedies which are *effective* in the circumstances of the *cas d'espèce* (paras. 53-54). And I concluded, on this point, that

> "The local remedies rule has a *rationale* of its own under human rights treaties; this cannot be distorted by the invocation of the handling of inter-State cases in the exercise of diplomatic protection, where the local remedies rule has an entirely distinct *rationale*. The former stresses *redress*, the latter outlines *exhaustion*. One cannot deprive a human rights Convention of its *effet utile* by using the distinct *rationale* of the rule in diplomatic protection.
>
> Contemporary international tribunals share the common mission of realization of justice. There is here a fundamental unity of conception and mission. International human rights tribunals, created by Conventions at regional levels, operate within the conceptual framework of the *universality* of human rights. International human rights tribunals have been faithful to the rationale of effectiveness of local remedies and redress[12]. There is in this respect a *complementarity* in outlook between mechanisms of dispute-settlement at U.N. and regional levels, all operating under the conceptualized universality of the rights inherent to the human person" (paras. 55-56).

2. Undue Invocation of the Rule, in the Case of *Application of the CERD Convention*[13], Opposing Ukraine to Russian Federation

33. In its Judgment in the present case opposing Ukraine to the Russian Federation, the ICJ, in the part of it relating to the CERD Convention, rightly dismissed the preliminary objection of alleged non-exhaustion of local remedies. In its submission, the Russian Federation intended to widen its scope (p. 223, para. 447) so as to cover any claim under the CERD Convention, — in the light of its Articles 11(3) and 14(7)(a), — including inter-State claims (p. 224, paras. 448-449).

34. Ukraine, for its part, contested the applicability of the local remedies rule in this context, and held that this rule applied only in claims by a State on behalf of specific individuals or entities; in the present case, however, — Ukraine added, — its claims under the CERD Convention related to "a broad pattern of conduct" by the respondent State resulting in breaches of its obligations under the CERD Convention (p. 199, para. 373).

35. As to my own position on the matter at issue, it is clear from the wording of Article 11(3) of the CERD Convention that the local remedies rule only applies to procedures before the CERD Committee. More specifically, it is only when the dispute is brought before the CERD Committee for the second time, because the matter is not adjusted to the satisfaction of both parties, that the Committee will ascertain that local remedies have been exhausted in the case at issue.

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

[13] Besides the Convention for the Suppression of the Financing of Terrorism (ICSFT).

36. This is in contrast with the respondent State's argument of drawing the relevance of the wording in Articles 11(3) and 14(7)(a) of the CERD Convention, which cannot be sustained[14]. On the contrary, Article 22 of the CERD Convention, as the compromissory clause on the basis of which the ICJ is seized, makes no mention of a requirement to exhaust local remedies prior to seizing the Court. In effect, Article 22 is to interpreted in a way conducive to ensuring human rights protection, and thus provides alternative (not cumulative) options.

37. In the present case, Ukraine, instead of protecting nationals, complains of an alleged internationally wrongful act of the respondent State against it, in breach of the CERD Convention. As such, it cannot be litigated in domestic courts of another State, and the local remedies rule does not apply. Ukraine is thus correct in pointing to the impossibility of bringing such a case in the respondent State's domestic courts.

38. It is clear that individual rights are here also at stake, and human rights treaties such as the CERD Convention protect them to the benefit of the human persons concerned. But a breach of the CERD Convention also entails the commission of an internationally wrongful act by a State, and here the Convention's enforcement does not require the application of the rule of exhaustion of local remedies. In the *cas d'espèce*, Ukraine points out that it does bring its claim on behalf of the individuals concerned, but rather in its own right; as a result, the respondent State's preliminary objection of alleged non-exhaustion of local remedies does not stand, and has been rightly dismissed by the ICJ.

3. The Overriding Importance of Redress

39. In any case, the ultimate beneficiaries of the application of the CERD Convention, among other human rights treaties, are the human beings protected by them, even in an inter-State claim thereunder, as the present one. It is necessary to keep in mind that the fundamental rights of human beings stand well above the States, which were historically created to secure those rights. After all, States exist for human beings, and not *vice-versa*.

40. The prevalence of human beings over States marked presence in the writings of the "founding fathers" of the law of nations, already attentive to the need of redress for the harm done to the human person. This concern marks presence in the writings of the "founding fathers" of the XVIth. century, namely: Francisco de Vitoria (Second *Relectio* - *De Indis*, 1538-1539)[15]; Juan de la Peña (*De Bello contra Insulanos*, 1545); Bartolomé de Las Casas (*De Regia Potestate*, 1571); Juan Roa Dávila (*De Regnorum Justitia*, 1591); and Alberico Gentili (*De Jure Belli*, 1598).

41. Attention to the need of redress is likewise present in the writings of the "founding fathers" of the following XVIIth. century, namely: Juan Zapata y Sandoval (*De Justitia Distributiva et Acceptione Personarum ei Opposita Disceptatio*, 1609); Francisco Suárez (*De Legibus ac Deo Legislatore*, 1612); Hugo Grotius (*De Jure Belli ac Pacis*, 1625, book II, ch. 17);

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[14] The respondent State's invocation of those provisions is linked to its unsustainable view that Article 22 of the CERD Convention contains cumulative requirements to be fulfilled for the Court to have jurisdiction over the case.

[15] Already in his pioneering writings, F. de Vitoria conceived the law of nations (*droit des gens*) as regulating an international community (*totus orbis*) comprising human beings organized socially in emerging States and conforming humanity; the reparation of violations of their rights reflected an international necessity addressed by the law of nations (*droit des gens*), with the same principles of *justice* applying likewise to States and individuals and peoples conforming them. Cf. A.A. Cançado Trindade, "*Totus Orbis*: A Visão Universalista e Pluralista do *Jus Gentium*: Sentido e Atualidade da Obra de Francisco de Vitoria", 24 *Revista da Academia Brasileira de Letras Jurídicas* - Rio de Janeiro (2008) n. 32, pp. 197-212.

and Samuel Pufendorf (*Elementorum Jurisprudentiae Universalis - Libri Duo*, 1672; and *On the Duty of Man and Citizen According to Natural Law*, 1673); and is also present in the writings of other thinkers of the XVIIIth. century. This is to be kept in mind.

42. The *rationale* of the local remedies rule in human rights protection discloses the overriding importance of the element of *redress*, the provision of which being a matter of *ordre public*; what ultimately matters is the redress obtained for the wrongs complained of, and not the mechanical exhaustion of local remedies. The incidence of the local remedies rule in human rights protection is certainly distinct from its application in diplomatic protection; as those two contexts are also distinct, there is nothing to hinder the application of that rule with lesser or greater rigour in such different situations[16].

43. This *law of protection* of the rights of the human person, within the framework of which international and domestic law appear in constant *interaction*, is inspired by common superior values: this goes *pari passu* with an increasing emphasis on the State's duty to provide effective local remedies. In sum, as I have been pointing out along the years,

> "local remedies form an integral part of the very system of international human rights protection, the emphasis falling on the element of redress rather than on the process of exhaustion. The local remedies rule bears witness to the interaction between international law and domestic law in the present domain of protection, applying only when those remedies are indeed effective and capable to provide redress. We are here before a *droit de protection*, with a specificity of its own, fundamentally *victim-oriented*, concerned with the rights of individual human beings rather than of States. Generally recognized rules of international law (which the formulation of the local remedies rule in human rights treaties refers to), besides following an evolution of their own in the distinct contexts in which they apply, necessarily undergo, when inserted in human rights treaties, a certain degree of adjustment or adaptation, dictated by the special character of the object and purpose of those treaties and by the widely recognized specificity of the international protection of human rights"[17].

V. The Relevance of Jurisdiction in Face of the Need to Secure Protection to Those in Situations of Vulnerability

44. My considerations in the present Separate Opinion leave it clear that there are aggravating circumstances which increase the need to secure protection to those directly affected by them. This is another point which cannot pass here unnoticed. The factual context of the present case of *Application of the ICSFT and the CERD Conventions* discloses that those who seek protection find themselves in utmost vulnerability, if not defenselessness, and, in addition, in need to safeguard themselves against arbitrariness. The ICJ cannot, and does not, make abstraction of such increased need of protection.

1. Protection in Face of Vulnerability

45. In effect, even in an earlier stage of the handling of the *cas d'espèce*, I have appended a Separate Opinion to the ICJ's Order (of 19.04.2017) on Provisional Measures of Protection,

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[16] A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, pp. 101, 103 and 105.

[17] *Ibid.*, p. 107; and cf. A.A. Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law*, *op. cit. supra* n. (11), 1983, pp. 1-443.

wherein I have dwelt upon the importance of such measures in face of the aggravated human vulnerability and defencelessness of the segments of the population affected (paras. 21-29). As shown in the course of the proceedings, indiscriminate shelling against civilians (in eastern Ukraine) struck and damaged residential buildings, hospitals, schools, kindergartens, ambulances (paras. 30-31), causing physical injuries and imposing limitations on freedom of movement (paras. 32-35).

46. Hence the importance — I proceeded — of due consideration of the test of human vulnerability, insufficiently considered by the ICJ at that stage (paras. 36 and 41-44). I then deemed it fit to recall that

> "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 measures of protection" (para. 48).

47. In effect, this is a consideration to be kept in mind in all stages of the handling of the present case, including the present one on preliminary objections, here duly dismissed. I then stressed that "the vulnerability of victims, with its implications, are (…) clearly acknowledged in contemporary international case-law, of distinct international tribunals" (para. 53). I recalled, e.g., that the European Court of Human Rights (ECtHR), has likewise been seized, since 2015, of two cases of *Ukraine versus Russian Federation* (paras. 60-61), — the matter remaining pending with it[18] to date (November 2019).

48. I then pointed out that the handling of the present case of the *Application of the ICSFT Convention and of the CERD Convention* requires "a humanist outlook", going beyond the strict inter-State dimension, given the great need of protection of those in situations of great vulnerability or even defencelessness (paras. 84 and 86). I added that here "[t]he principle of humanity comes to the fore"; it "permeates the whole *corpus juris* of contemporary international law" with "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" (paras. 90-91).

2. Protection against Arbitrariness

49. In cases of extreme violence like the present one, human beings stand in need of protection against arbitrariness on the part not only of State authorities, but also of other (unidentified) individuals. In a wider horizon, *human beings need protection ultimately against themselves*[19]. Human rights Conventions, like CERD, enable the exercise of protection against arbitrariness, in any circumstances. There is an absolute prohibition of arbitrariness in the *rationale*

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[18] Cf. ECtHR, Press Release ECHR 173(2018), of 09.05.2018, pp. 1-3.

[19] Extreme violence has regrettably accompanied human relations along the centuries. Even those who survived acts of brutality became deeply harmed physically and psychologically by them for the rest of their lives. To recall only one example, of the mid-XXth. century, a survival of the acts of cruelty of the II world war, Elie Wiesel, expressed in his reflections (of 1958-1961) his deep anguish. In referring to "the tragic fate of those who came back, left over, living-dead", he pondered: - "Anyone who has seen what they have seen cannot be like the others, cannot laugh, love, pray, bargain, suffer, have fun, or forget. (…) Something in them shudders and makes you turn your eyes away. These people have been amputated; they haven't lost their legs or eyes but their will and their taste for life. (…) What it comes down to is that man lives while dying, that he represents death to the living, and that's where tragedy begins". E. Wiesel, *The Night Trilogy - Night, Dawn, Day* (1958-1961), N.Y., Hill and Wang, 2008 (reed.), pp. 295-296 and 298.

of those Conventions, in support of the imperative of access to justice *lato sensu*, the *right to the Law* (*le droit au Droit*, *el derecho al Derecho*), to secure the realization of justice even in situations of utmost human vulnerability[20].

50. Fundamental principles of law reveal the *right to the Law* of which are *titulaires* all human beings in need of protection. Those principles do not depend on the State's "will" or "consent", and the inalienable rights under human rights Conventions, like CERD, rest on the foundations of *jus gentium* itself[21]. Human beings in situations of great vulnerability or adversity stand in need of a higher standard of protection under human rights Conventions, like CERD. The Court cannot remain hostage of State "consent" to the point of losing sight of the imperative of realization of justice, also in these situations.

51. After all, the safeguard and prevalence of dignity of the human person, — even amidst utmost vulnerability and facing arbitrariness, — are identified with the end itself of Law. General principles of law conform the *substratum* of the legal order itself, guaranteeing its unity, integrity and cohesion. Such indispensable principles, consubstantial to the international legal order itself, form the *jus necessarium* (not a *jus voluntarium*), prior and superior to the State's "will", and expressing an idea of objective justice, in the line of jusnaturalist thinking.

VI. CONCLUDING CONSIDERATIONS

52. In effect, U.N. human rights Conventions, like CERD, attribute a *central place* to the human person in the domain of protection of rights inherent to her, setting *limits to State voluntarism*, and thus safeguarding their integrity and the primacy of considerations of *ordre public* over the "will" of individual States. May I recall that, in the ICJ Judgment in the case of *Jurisdictional Immunities of the State* (Germany *versus* Italy, with Greece intervening, merits, of 03.02.2012), where the Court upheld the sovereign immunities of Germany in the *cas d'espèce* (originated historically in the crimes of the Third *Reich* in the II world war, in 1943-1945), I presented my extensive Dissenting Opinion (paras. 1-316), strongly opposing the ICJ's voluntarist-positivist approach, based on the "will" of the States; I further singled out that situations of injustice are unsustainable.

53. There have unfortunately been other recent examples to the same effect, wherein I have appended other lengthy Dissenting Opinions[22]. The central place, — may I here reiterate, — as clearly indicated by cases concerning human rights, is that of the human person, and the basic posture is *principiste*, without making undue concessions to State voluntarism. The assertion of an

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[20] Cf. A.A. Cançado Trindade, *El Principio Básico de Igualdad y No-Discriminación: Construcción Jurisprudencial*, Santiago de Chile, Ed. Librotecnia, 2013, pp. 308 and 706-708.

[21] A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 524-525, and cf. pp. 376-380, 383, 386 and 389-390.

[22] For example, in its Judgment (of 03.02.2015) in the case of the *Application of the Convention against Genocide* (Croatia *versus* Serbia), the ICJ held that, while the prohibition of genocide has the character of *jus cogens*, with obligations *erga omnes*, its own jurisdiction is based on consent, on which it depends even when the dispute submitted to it relates to alleged violation of norms having peremptory character. After its own examination of the facts, it decided to reject the Applicant's claim, and once again I appended an extensive Dissenting Opinion (paras. 1-547). Other recent examples to the same effect can be found in the three recent Judgments (of 10.05.2016) of the ICJ in the three cases of *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands *versus* United Kingdom, India and Pakistan). The ICJ decided, by a split-majority, to uphold one of the preliminary objections, grounded on the alleged absence of a dispute between the contending parties, and, thus, not to proceed to the merits of the cases. Once again, I appended three extensive Dissenting Opinions (paras. 1-331) to those three Judgments.

objective law, beyond the "will" of individual States, is, in my perception, a revival of jusnaturalist thinking.

54. After all, the basic foundations of international law, the law of nations (*droit des gens*), emanate ultimately from the human conscience, from the universal juridical conscience, and not from the "will" of individual States. Human rights Conventions, like CERD, are *people-centered* and *victim-oriented* (rather than State-centric), focusing on the protection of human beings, in particular in situations of vulnerability or defenselessness. They acknowledge the need, in the adjudication of cases, to go beyond the strict inter-State outlook, with due attention on the persons concerned in need of protection, in pursuance of a humanist outlook, in the light of the principle of humanity[23].

55. In the course of the recent public hearings before the ICJ (of June 2019) on preliminary objections in the present case of *Application of the ICSFT and the CERD Conventions*, the contending parties, in addition to their arguments on specific legal points, also addressed the factual context of the *cas d'espèce*. In doing so, occurrences of extreme violence were referred to by Ukraine[24] and the Russian Federation[25] (for example, the indiscriminate shelling victimizing civilians in Eastern Ukraine - Mariupol, Volnovakha, Kramatorsk and Avdiivka). This shows that, in a case like the present one, in my perception, one cannot make abstraction of events of extreme violence in the examination of preliminary objections themselves.

56. The decision of the ICJ, in the present case opposing Ukraine to the Russian Federation, to dismiss the preliminary objections, is in conformity with the *rationale* of human rights Conventions, like CERD, but its reasoning could also have been likewise, if the Court had not once again relied mechanically upon the relevance it is used to attribute to State "consent" (cf. *supra*). Conscience stands above the "will". Human beings, even in the most adverse conditions, stand as subjects of international law, endowed under human rights Conventions with juridical personality together with procedural capacity.

57. This is the position that I have been sustaining for a long time. For example, almost two decades ago I pondered, in another international jurisdiction[26], that

> "The considerable scientific-technological advances of our times has much increased the capacity of the human being to do all that is both good and evil. As to this latter, one cannot deny nowadays the importance and pressing need to devote greater attention to victimization, human suffering, and rehabilitation of the victims, — keeping in mind the current diversification of the sources of violations of human rights. The systematic violations of human rights and the growth of violence (in its multiple forms) in our days and everywhere disclose that, regrettably, the much

[23] For a recent study, cf. A.A. Cançado Trindade, "Reflexiones sobre la Presencia de la Persona Humana en el Contencioso Interestatal ante la Corte Internacional de Justicia: Desarrollos Recientes", 17 *Anuario de los Cursos de Derechos Humanos de Donostia-San Sebastián* - Universidad del País Vasco (2017) pp. 223-271.

[24] Cf. ICJ, doc. CR 2019/10, of 04.06.2019, p. 13, paras. 8-9, and pp. 42-44, paras. 59-62 and 68-71; ICJ, doc. CR 2019/12, of 07.06.2019, p. 32, para. 6, and p. 39, paras. 41-42, and pp. 40-42, paras. 50-54 and 58-59.

[25] Cf. ICJ doc. CR 2019/9, of 03.06.2019, p. 18, paras. 22-23, and pp. 29-31, pp. 39-42; ICJ doc. CR 2019/11, of 06.06.2019, pp. 23-24, paras. 44-48.

[26] The Inter-American Court of Human Rights (IACtHR).

praised material progress (enjoyed, in reality, by very few) has simply not been accompanied *pari pasu* of concomitant advances at spiritual level"[27].

58. Attention is to remain turned to the victimized persons, rather than to inter-State susceptibilities. In my perception, legal positivism has always been subservient to the established power (irrespective of the orientation of this latter), paving the way for decisions that do not realize justice. This cannot be overlooked, in particular in cases under human rights Conventions; law cannot prescind from justice, they come ineluctably together.

59. Cases under U.N. human rights Conventions, like the *cas d'espèce*, call for a reasoning beyond the strict inter-State outlook, and transcending the "will" of States. The voluntarist outlook is unsustainable. Nowadays, more than ever, human beings stand in need of protection from themselves. The basic foundations and the evolution of contemporary *jus gentium* emanates from human conscience, the universal juridical conscience, rather than the inscrutable "will" of States.

60. I have already made the point that the *jus gentium* of our times finds its historical roots in the conception and the ideals of the "founding fathers" of the law of nations along the XVIth. and XVIIth. centuries (cf. paras. 40-41, *supra*). Theirs was, in my own perception, a universalist perspective (the *civitas maxima gentium*),

"outrepassant les relations purement inter-étatiques. Ses fondements sont indépendants de la 'volonté' de ses sujets de droit (États ou autres). Il est en définitive le fruit de la conscience humaine, et s'appuie sur des principes éthiques qui intègrent des valeurs fondamentales partagées par la communauté internationale dans son ensemble et par l'humanité"[28].

61. It may be argued that the world wherein the "founding fathers" lived in the XVIth. and XVIIth. centuries is quite distinct from the world of our times; yet, the ideals and aspirations are recurring for the realization of justice (also at international level). I have considered this point in an address that I delivered in Athens half a decade ago, wherein I pondered that

"Bien que le scénario international contemporain soit entièrement distinct de celui de l'époque des célèbres 'pères fondateurs' du droit international (personne ne peut le nier) qui ont avancé une *civitas maxima* régie par le droit des gens, il y a une aspiration humaine récurrente, transmise de génération en génération au cours des siècles, menant à la construction d'un ordre juridique international applicable à la fois aux États (et organisations internationales) et aux individus, conformément à certains standards universels de justice. Cela explique l'importance, dans ce nouveau *corpus*

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[27] Separate Opinion (para. 23) of Judge Cançado Trindade, in the case of the "*Street Children*" (*Villagrán Morales and Others versus Guatemala*), IACtHR's Judgment (reparations) of 26.05.2001.

[28] A.A. Cançado Trindade, "Le Droit international contemporain et la personne humaine", 120 *Revue générale de Droit international public* (2016) n. 3, p. 501. And, on the perennial legacy of the "founding fathers" of the law of nations, cf. A.A. Cançado Trindade, "La Perennidad del Legado de los 'Padres Fundadores' del Derecho Internacional", 13 *Revista Interdisciplinar de Direito da Faculdade de Direito de Valença* (2016) n. 2, pp. 15-43; A.A. Cançado Trindade, "La Perennidad del Legado de los `Padres Fundadores' del Derecho Internacional", *in Discurso del Acto de Investidura como Doctor Honoris Causa del Profesor A.A. Cançado Trindade*, Madrid, Ed. Universidad Autónoma de Madrid, 20.05.2016, pp. 17-55, esp. pp. 25-26, 38, 42 and 55.

juris de protection, que la personnalité juridique internationale de l'individu a assumé, étant à la fois sujet de droit interne et de droit international"[29].

62. States have humane ends, emanating from *recta ratio*, human conscience, resting on the foundations of *jus gentium*, as propounded by the jusnaturalist vision. The rights inherent to the human person are anterior and superior to the States, thus deauthorizing the archaic positivist dogma which intended to reduce such rights to those "granted" by the States. The State is not an end in itself, it was created for human beings, and conceived to be law-abiding (*état de Droit*), so as to achieve its humane ends.

63. Over nine decades ago, Nicolas Politis had warned that the State is subjected to Law, which has always the same end, namely, "il vise partout l'homme, et rien que l'homme. Cela est tellement évident, qu'il serait inutile d'y insister si les brumes de la souveraineté n'avaient pas obscurci les vérités les plus élémentaires"[30]. Human societies, — he added, — "n'existent que pour assurer à l'homme la possibilité de vivre et de se développer"[31]. There are other related points that can here be added, in the light of the evolution of contemporary international law.

64. Thus, the principle of humanity, with its wide dimension, gives expression to the *raison d'humanité* imposing limits to the *raison d'État*. It identifies itself, in my perception, with the aim of the international legal order, in acknowledging the [relevance of the] rights inherent to the human person. As I have been pointing out within the ICJ[32], the principle of humanity permeates the whole *corpus juris gentium*, enhancing the international protection of the rights of the human person.

65. Furthermore, the principle of humanity extends itself, in my perception, to conventional and customary international law, having an incidence on all and any circumstances, in particular when persons seeking protection are in situations of great vulnerability or defencelessness. The principle of humanity counts on judicial recognition in a *corpus juris gentium* oriented towards the victims, in the line — as I have already pointed out — of jusnaturalist thinking. Human rights Conventions have enriched this *corpus juris*, conforming a true law of protection (*droit de protection*), well beyond the outdated and strict inter-State dimension.

66. Such conception has thus paved the way to the evolution of the law of nations itself. The imperative of the realization of justice acknowledges that conscience (*recta ratio*), the universal juridical conscience, necessarily stands well above the "will" of States. It is in this understanding that the realization of justice at international level has been assuming a much wider dimension. There is nowadays a vast *corpus juris communis* on matters of concern to the international community as a whole (e.g., those dealt with by U.N. human rights Conventions), overcoming the traditional inter-State paradigm of the international legal order.

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[29] A.A. Cançado Trindade, "L'humanisation du droit international: la personne humaine en tant que sujet du droit des gens / The Humanization of International Law: The Human Person as Subject of the Law of Nations" [Discours de doctorat *honoris causa*], *in TIMH/Hommage à A.A. Cançado Trindade for a Humanized International Law*, Athens, I. Sideris Ed., 01.07.2014, pp. 32-33.

[30] N. Politis, *Les nouvelles tendances du Droit international*, Paris, Libr. Hachette, 1927, pp. 76-78.

[31] *Ibid*., pp. 78-79.

[32] Cf., earlier on, e.g., my Dissenting Opinion in the case of the *Application of the Convention against Genocide* (Judgment of 03.02.2015), paras. 65, 68-69, 84 and 523.

67. In effect, the inter-State mechanism of the *contentieux* before the ICJ cannot be invoked in justification for a strictly inter-State reasoning in cases concerning the safeguard of vulnerable or defenseless human beings. The nature and substance of a case of the kind before the ICJ, on the basis of a human rights Convention like CERD, thus calls for a reasoning going well beyond that strict inter-State dimension, with attention focused on victimized human beings, in pursuance of a humanist outlook.

68. In sum, the law of nations is endowed with universality, with human conscience (*recta ratio*) prevailing over the "will" of States, of all legal subjects. Moreover, the concomitant expansion of international jurisdiction, responsibility, personality and capacity, rescues and enhances the position of the human person as subject of international law. As I have been firmly sustaining along the years, the evolution of contemporary *jus gentium* does not emanate from the inscrutable "will" of the States, but rather from human conscience (*recta ratio*), — the universal juridical conscience as the ultimate *material* source of the law of nations.

VII. EPILOGUE: A RECAPITULATION

69. I deem it fit, at this final stage of my present Separate Opinion in the *cas d'espèce*, to recapitulate briefly, in this epilogue, the points of my own reasoning developed herein, for the sake of clarity, and in order to stress their interrelatedness. *Primus*: The *rationale* of U.N. human rights Conventions, like CERD, cannot be overlooked by a misguided search for State "consent". *Secundus*: Attention is to focus on the relevance of the basis of jurisdiction for the protection of the vulnerable under human rights Conventions.

70. *Tertius*: Human rights Conventions, like CERD, go beyond the outdated inter-State outlook, ascribing a central position to the individual victims, rather than to their States. *Quartus*: In doing so, human rights Conventions, like CERD, are turned to securing the effective protection of the rights of the human person, in light of the principle *pro persona humana*, *pro victima*. *Quintus*: Had the inter-State dimension not been surmounted, not much development would have taken place in the present domain.

71. *Sextus*: Careful account is to be taken of the needs of protection of persons in situations of vulnerability or defencelessness. *Septimus*: The realization of justice, with the judicial recognition of the sufferings of the victims, is an imperative. *Octavus*: The compromissory clause of a victim-oriented human rights Convention, like CERD (Article 22), is related to the *justiciables*' right of access to justice. *Nonus*: This requires a necessary humanist outlook, and not at all a State-centric and voluntarist one.

72. *Decimus*: In the consideration of utmost vulnerability or defencelessness of the human person, the principle of humanity comes to the fore. *Undecimus*: The principle of humanity assumes a clear incidence in the protection of human beings, in particular in situations of vulnerability or defencelessness of those victimized. *Duodecimus*: The principle of humanity, which has met with judicial recognition, permeates human rights Conventions, and the whole *corpus juris* of protection of human beings.

73. *Tertius decimus*: The principle of humanity is in line with the longstanding jusnaturalist thinking (*recta ratio*), - permeating likewise the Law of the United Nations. *Quartus decimus*: General principles of law enshrine common and superior values, shared by the international community as a whole. *Quintus decimus*: Article 22 of the CERD Convention does not set forth "preconditions"; in

any case, the ICJ's jurisdiction is rightly preserved in the *cas d'espèce*, with due attention to be given to the object and purpose of the Convention, as a victim-oriented human rights treaty.

74. *Sextus decimus*: We are here before a law of protection (*droit de protection*), where the local remedies rule has a *rationale* entirely distinct from the one in diplomatic protection: the former stresses *redress*, the latter outlines *exhaustion*. *Septimus decimus*: The prevalence of human beings over States marked presence in the writings of the "founding fathers" of the law of nations (XVIth.-XVIIth. centuries), already attentive to the need of redress for the harm done to the human person.

75. *Duodevicesimus*: Human beings stand in need of protection against evil, they need protection ultimately against themselves. *Undevicesimus*: Furthermore, they stand in need of protection against arbitrariness, hence the importance of the imperative of access to justice *lato sensu*, the *right to the Law* (*le droit au Droit*, *el derecho al Derecho*), to secure the realization of justice also in situations of utmost human vulnerability. *Vicesimus*: Fundamental principles of law conform the *substratum* of the *jus necessarium* (not a *jus voluntarium*) in protection of human beings, expressing an idea of objective justice, in the line of jusnaturalist thinking.

76. *Vicesimus primus*: The basic foundations of the law of nations emanate ultimately from the universal juridical conscience. *Vicesimus secundus*: Human beings are subjects of the law of nations, and attention is to remain turned to the victimized persons, rather than to inter-State susceptibilities. *Vicesimus tertius*: Overcoming the limitations of legal positivism, attention is to focus on the humane ends of States, emanating from *recta ratio*, as propounded by the jusnaturalist vision. *Vicesimus quartus*: Rights inherent to the human person are anterior and superior to the States.

77. *Vicesimus quintus*: The principle of humanity counts on judicial recognition in a *corpus juris gentium* oriented towards the victims, in the line of jusnaturalist thinking. *Vicesimus sextus*: The universal juridical conscience (*recta ratio*) necessarily prevails over the "will" of States. *Vicesimus septimus*: A decision under human rights Conventions, like CERD, calls for a reasoning going well beyond the strict inter-State dimension, with attention turned to victimized human beings, in pursuance of a humanist outlook.

78. *Vicesimus octavus*: The concomitant expansion of international jurisdiction, responsibility, personality and capacity, rescues and enhances the position of the human person as subject of international law. *Vicesimus nonus*: The law of nations is endowed with universality, with human conscience (*recta ratio*) prevailing over the "will" (of any of the subjects of law), as its ultimate *material* source. *Trigesimus*: The prevalence of the universal juridical conscience as the ultimate *material* source of the law of nations points to securing the realization of justice in any circumstances.

(Signed) Antônio Augusto CANÇADO TRINDADE.
