SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. *Prolegomena*: Some Introductory Considerations in Historical Perspective

1. I have voted in support of the present Order of provisional measures of protection, in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)* [hereinafter *Application of the Convention against Genocide*], which has just been adopted by the International Court of Justice (ICJ), significantly by unanimity. The provisional measures just ordered are intended to bring the necessary protection to human beings who have been suffering for a long time in a situation of extreme vulnerability.

2. Once again, in the *cas d'espèce*, the ICJ is seized of a case on the basis of the 1948 Convention against Genocide. Looking back in time, when the Convention was adopted, on 9 December 1948, on the eve of the adoption of the Universal Declaration of Human Rights (on 10 December 1948), the ICJ, established in June 1945, was still in its initial years. Shortly afterwards, the ICJ was already called upon to pronounce on the matter, still in the very early years of its existence, when it delivered, on 28 May 1951, its Advisory Opinion on *Reservations to the Convention against Genocide*.

3. Several years passed until the ICJ became seized of successive contentious cases specifically on the basis of the Convention against Genocide, especially in respect of the victims of wars and of devastation in the Balkans in the last decade of the twentieth century (case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* [hereinafter *Application of the Convention against Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*], *Judgment, I.C.J. Reports 2007 (I)*, and case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*).

4. There have also been occasions in which the ICJ addressed the Convention against Genocide together with other United Nations conventions (on human rights): this occurred, e.g., in the ICJ's Judgment of 3 February 2006 (on jurisdiction and admissibility) in the case of *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)* (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, paras. 27 *et seq.*). In that decision, the ICJ acknowledged the universality of the Convention against Genocide and the importance of the principles underlying the Convention (para. 64); it referred to the norms contained in the substantive provisions of the Convention as being *jus cogens*, creating rights and obligations *erga omnes (ibid.)*.

5. Yet, in that same Judgment, when the ICJ turned to its own jurisdiction, and pursued a voluntarist outlook, it was attentive to the consent of States (paras. 78, 125 and 127). This was unfortunate, as it deprived the Court to develop further its own reasoning in a matter of such importance. This is a point which I shall retake later (cf. Parts V-VI, *infra*). In my own perception, human conscience stands above the will of States. In this understanding, I shall present my separate opinion, identifying, at first, the points to be examined in sequence.

6. They are the following ones: *(a)* provisional measures of protection in ICJ cases under the Convention against Genocide; *(b)* international fact-finding: relevant passages of UN reports of the Independent International Fact-Finding Mission on Myanmar, and of the UN Special Rapporteur on Human Rights in Myanmar; *(c)* provisional measures of protection and the imperative of overcoming the extreme vulnerability of victims, encompassing the legacy of the Second World Conference on Human Rights (1993) in its attention to human vulnerability, and international case law and the need of properly addressing human vulnerability; *(d)* the great relevance of the safeguard of fundamental rights by provisional measures of protection, in the domain of *jus cogens*, under the Convention against Genocide and the corresponding customary international law. The way is then paved for the presentation of an epilogue.

II. Provisional Measures of Protection in ICJ Cases under the Convention against Genocide

7. The presence of the invocation of the Convention against Genocide before the ICJ, time and time again, discloses its great importance, given the timeless and most regrettable presence of violence and cruelty in human relations. Yet, the occasions have been rare when the ICJ has been called upon to decide on requests for provisional measures of protection on the basis of the Convention against Genocide *(Application of*

the Convention against Genocide (Bosnia and Herzegovina v. *Yugoslavia (Serbia and Montenegro))* in 1993, and now of *Application of the Convention against Genocide*, as I shall consider in sequence.

1. Provisional Measures in the First Case on the Application of the Convention against Genocide (Bosnia and Herzgovina *v.* Yugoslavia (Serbia and Montenegro))

8. In the first case before the ICJ on the *Application of the Convention against Genocide*, following the original request for provisional measures by Bosnia and Herzegovina, the ICJ adopted its Order of 8 April 1993, and, following the second request for additional provisional measures, the ICJ adopted its Order of 13 September 1993. In the first Order, of 8 April 1993, the ICJ held that it has prima facie jurisdiction under Article IX of the Convention against Genocide, and can thus consider indicating provisional measures protecting rights under the Convention. It then stressed that, under Article I of the Convention against Genocide, all States parties have undertaken the duty to prevent and punish genocide as a crime under international law[1].

9. As there was a grave risk of acts of genocide being committed, the ICJ issued two provisional measures relating to the Convention against Genocide, whereby Yugoslavia should promptly: *(a)* take all measures within its power to prevent the commission of the crime of genocide; and *(b)* ensure that any military or organizations and persons under its control, direction or influence do not commit any acts of genocide, of conspiracy to commit genocide, of incitement to commit genocide, or of complicity in genocide (para. 52A). Moreover, the ICJ issued a more general provisional measure, whereby both Parties should take no action, and ensure that no action is taken, that may aggravate or extend the existing dispute, or make it more difficult to reach a solution (para. 52B).

10. Subsequently, in its Order of 13 September 1993, the ICJ found that the development of the situation in Bosnia and Herzegovina justified consideration of the second request; while Bosnia and Herzegovina attempted to expand the bases of the Court's prima facie jurisdiction beyond the Convention against Genocide, the ICJ once again held that its jurisdiction is based on Article IX of the Convention. It then proceeded to examine the new request keeping in mind the provisional measures of protection it had already ordered five months earlier.

[1] Bosnia and Herzegovina and Yugoslavia had thus a clear duty to take all measures to prevent any acts of genocide (irrespective of whether any past acts were legally imputable to them).

11. The Court found that the ten additional provisional measures just requested by Bosnia and Herzegovina do not concern the protection of disputed rights which might form the basis of a judgment in the exercise of the Court's jurisdiction under Article IX of the Convention against Genocide. The ICJ reasserted that the two Parties were already under a clear obligation to do all in their power to prevent the commission of any acts of genocide (under the Convention itself), and, furthermore, to ensure that no action was taken to aggravate or extend the existing dispute (as it determined in the provisional measures indicated in its previous Order of 8 April 1993).

12. As the ICJ was not satisfied with the situation as it remained, it found that it required, instead of additional measures, the prompt and effective compliance with the existing provisional measures indicated by its Order of 8 April 1993. In the same Order of 13 September 1993, the ICJ reiterated the undertaking to prevent and punish genocide contained in Article I of the Convention against Genocide, and the recognition thereunder that the crime of genocide, whether committed in time of peace or in time of war, "shocks the conscience of mankind", results in "great losses to humanity", and goes against "the spirit and aims of the United Nations", as promptly stated in General Assembly resolution 96 (I) of 11 December 1946 (paras. 50-51).

2. *Provisional Measures in the Present Case on the* Application of the Convention against Genocide

13. The present case now before the ICJ, opposing The Gambia to Myanmar, is a new occasion of requested provisional measures of protection before the ICJ, again concerning the Application of the Convention against Genocide. The Applicant State, as will be seen next (Parts III and IV), refers to international fact-finding, comprising UN Mission's Reports (2018 and 2019) and reports of the UN Special Rapporteur on Human Rights in Myanmar (2018 and 2019).

14. An account of their contents will pave the way for an examination of provisional measures of protection and the imperative of overcoming the extreme vulnerability of victims (Part IV) in the present separate opinion. It is significant that the needed protection of persons and groups in extreme vulnerability is attracting the attention of the United Nations, by the work of its Human Rights Council *(infra)* as well as of the ICJ, in the present request of provisional measures of protection. This is, in my perception, a matter of great concern in the contemporary law of nations as a whole.

III. International Fact-Finding: Relevant Passages of UN Reports of the Independent International Fact-Finding Mission on Myanmar

15. On 11 November 2019, The Gambia submitted an Application to the ICJ instituting proceedings against Myanmar concerning alleged violations of the 1948 Convention against Genocide, and requesting the indication of provisional measures of protection, in accordance with Article 41 of the ICJ Statute and Articles 73, 74, and 75 of the Rules of Court. In its Application, The Gambia describes "a brutal and continuing campaign of sweeping genocidal acts and measures, imposed by Myanmar against members of the Rohingya group, intended to destroy the group in whole or in part", in violation of the Convention against Genocide (para. 114). The Gambia, as a State party to the Convention, submits that provisional measures are necessary to protect against further irreparable harm the rights of the Rohingya group under the Convention (para. 115)[2].

16. The aforementioned Application by The Gambia in the *cas d'espèce,* on alleged acts of genocide against the Rohingya people in Myanmar, includes references to: *(a)* two reports by the Independent International Fact-Finding Mission on Myanmar, which provide evidence of intent of genocide against the Rohingya population in Myanmar; and *(b)* three reports by the Special Rapporteur of the Human Rights Council on the Situation of Human Rights in Myanmar, which provide evidence of continuing discrimination and potential genocide against the Rohingya population in Myanmar. May I summarize the relevant passages of them.

17. The Independent International Fact-Finding Mission on Myanmar was established by the UN Human Rights Council (resolution 34/22). The Mission found consistent patterns of grave violations of human rights in Kachin, Rakhine and Shan States in Myanmar, in addition to grave violations of international humanitarian law, including the deliberate targeting of civilians. The Mission further found that these violations were committed mainly by Myanmar security forces. The Mission also noted a pervasive situation of impunity at domestic level, as well as a lack of co-operation from the Government of Myanmar with the Mission, and recommended that the impetus for accountability must come from the international community.

18. Throughout its Application instituting proceedings, The Gambia refers to reports (of 2018 and 2019) of the Independent International Fact-Finding Mission on Myanmar, stating that their findings are "espe-

[2] And cf. also paras. 113 *et seq.*

cially significant" (para. 10). It refers primarily to two detailed reports on the findings of the Mission, namely, the *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar* (of 17 September 2018)[3] and the report of 16 September 2019[4].

19. The Gambia's Application refers, furthermore, to the condensed report presented to the UN Human Rights Council on 12 September 2018[5]. The aforementioned consolidated reports submitted to the UN Human Rights Council, of 12 September 2018[6] of 8 August 2019[7], in addition to the extensive detailed findings of 16 September 2019 (cf. *infra*), all cited by The Gambia in its Application, contain passages deserving particular attention, which I proceed to summarize in sequence.

1. Mission's Report on Myanmar of 12 September 2018

20. In considering allegations of grave violations of human rights, the 2018 UN Fact-Finding Mission Report focuses on three emblematic situations, namely: the crisis in Rakhine State; the hostilities in Kachin and Shan States; and the infringement on the exercise of fundamental freedoms and the issue of hate speech (para. 15). As to the crisis in Rakhine State, the Mission states that the Government of Myanmar has implemented policies and practices over decades which have steadily marginalized the Rohingya people, and led to their "extreme vulnerability", resulting in "a continuing situation of severe, systemic and institutionalized oppression from birth to death" (para. 20).

21. The Mission Report outlines as a cornerstone of this oppression of the Rohingya their lack of legal status (para. 21), their restrictions to food, health and education[8], disclosing "a looming catastrophe for decades" (para. 22). It then refers to "[o]ther discriminatory restrictions",

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[3] Application instituting proceedings, paras. 10-12, and cf. note 11, citing UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar* (17 September 2018), UN doc. A/HRC/39/CRP.2.

[4] Application instituting proceedings, paras. 13-14, and cf. note 21, citing UN Human Rights Council, *Detailed Findings of the Independent International Fact-Finding Mission on Myanmar* (16 September 2019), UN doc. A/HRC/42/CRP.5.

[5] Application instituting proceedings, paras. 10 *et seq.* and note 11; citing UN Human Rights Council, *Report. . .*, *op. cit. infra* note 6.

[6] UN Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (12 September 2018), UN doc. A/HRC/39/64 [2018 Mission Report].

[7] UN Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar* (8 August 2019), UN doc. A/HRC/42/50 [2019 Mission Report].

[8] Their degree of malnutrition witnessed in northern Rakhine State being "alarming" (para. 23).

such as those to freedom of movement, to marriage authorization, to reproduction, and to birth registration (para. 23).

22. The Mission, moreover, addresses grave violations of human rights which took place during the outbreak of violence in 2012, as well as during the "clearance operations" of 2017 (paras. 24-54). In relation to Kachin and Shan States, the Report notes that similar patterns of conduct by security forces (Tatmadaw soldiers and others) were witnessed, including violations against ethnic and religious minorities committed with persecutory intent (paras. 55-70).

23. The Report further dwells upon the continuing systematic oppression of the Rohingya in Myanmar, with persisting violence and restrictive policies on the Rohingya (paras. 49-51), including unlawful killings and torture of civilians (against men, women and children — paras. 60-61). Moreover, it also refers to the systematic appropriation of vacated Rohingya land (para. 50), sexual violence (para. 62) and forced labour (paras. 60-61 and 63-64).

24. The 2018 Mission Report further addresses hate speech, noting dehumanizing and stigmatizing language against the Rohingya and Muslims in general, used by extremist Buddhist groups, which has been condoned and mirrored by the Myanmar authorities themselves (para. 73). The 2018 Mission Report determines, as hallmarks of Tatmadaw operations (paras. 75-82), the following ones: *(a)* the targeting of civilians (paras. 76-78); *(b)* sexual violence as a recurrent feature (para. 79); *(c)* exclusionary rhetoric and systematic discriminatory policies against the Rohingya (paras. 80-81); *(d)* and impunity within the Tatmadaw and in Myanmar more generally (paras. 82, 95-98 and 100).

25. The Mission finds, on the basis of the information it has collected, that it has reasonable grounds to conclude that serious crimes under international law have been committed, considering separately genocide, crimes against humanity, and war crimes (paras. 83-89). As to genocide (paras. 84-87), the Report suggests that the crimes in Rakhine State and the manner whereby they were perpetrated are similar in nature, gravity and scope to facts which have allowed genocidal intent to be established in other contexts (paras. 85-86)[9].

26. Furthermore, the Mission states that the primary perpetrator of grave violations of human rights and of crimes under international law, in relation to the facts at issue, was the Tatmadaw, with the contribution of

[9] It concludes that there is sufficient information to warrant the investigation and prosecution of senior officials for genocide (para. 87).

civilian authorities by way of inaction, denial of wrongdoing, blocking independent investigation, and destroying evidence (paras. 90-94)[10]. Successive paragraphs refer to evidence relating to alleged genocide against the Rohingya people.

27. The Report addresses the systematic oppression of the Rohingya through governmental policies implemented over decades, including restrictions on citizenship, freedom of movement, marriage authorization, reproduction, and birth registration (paras. 20-23). In devoting attention to the escalation of violence in 2012 (paras. 24-30), it singles out, in particular: *(a)* the plan to instigate violence and amplify tensions through a campaign of hate and dehumanization of the Rohingya (para. 25); *(b)* the complicity of Myanmar security forces through inaction or active participation in the violence against the Rohingya (para. 26); *(c)* displacement, and restrictions on freedom of movement, on the right to education and on the right to vote (paras. 29-30).

28. The 2018 Mission Report then dwells upon the "clearance operations" conducted by Myanmar security forces against the Rohingya in 2017 (paras. 31-54), including, in particular: *(a)* the disproportionate and targeted attacks on the Rohingya villages (para. 33), and the *modus operandi* of these targeted attacks (para. 34); *(b)* the level of pre-planning and design of the attacks (paras. 35, 43, 45-46, 48 and 53); *(c)* the violence being perpetrated by Myanmar security forces, with the participation of some male civilians of different ethnic groups (paras. 52-53); *(d)* the indiscriminate killing (paras. 36-37 and 39-41); *(e)* the sexual violence (paras. 36 and 38-39); *(f)* the widespread targeted destruction of Rohingya-populated areas (para. 42).

2. Mission's Report on Myanmar of 8 August 2019

29. The 2019 Mission Report proceeds to the consolidation of its findings on conflict-related human rights issues in Rakhine, Chin, Shan and Kachin States, with a view to its handover to the Independent Investigative Mechanisms for Myanmar; it also provides an update on the situation of the Rohingya (paras. 76-94). The Mission notes that, despite mass displacement of the Rohingya people, some 600,000 Rohingya are estimated to remain in Rakhine State in Myanmar, and continue to be subjected to discriminatory policies, including segregation and restricted movement, deprivation of citizenship, physical attacks, arbitrary arrests, and other violations of their human rights (para. 76).

30. The Mission focuses its discussion on movement restrictions as "one of the clearest indicators of their chronic persecution", noting that such restrictions have tightened since the violence perpetrated in 2012, as

[10] Cf., in relation to civilian authorities, para. 93.

well as the ways in which the movement restrictions affect access by the Rohingya to economic, social and cultural rights (such as health services, education, and livelihoods) (paras. 77-78 and 80). The Mission also addresses internment camps, wherein some 126,000 Rohingya were still living, subject to appalling conditions, with no foreseeable plan for relocation (para. 82).

31. The Mission adds that the Government of Myanmar appears to be continuing its plan to keep the Rohingya off their lands and further to segregate them, according to satellite imagery and witness testimony about the construction of new camps for displaced Rohingya refugees (para. 84). The Mission further notes the continued discrimination with respect to citizenship laws and forcing Rohingya to accept national verification cards through threat and intimidation (paras. 86-87).

32. The Mission's update Report indicates that the situation of the Rohingya remains largely unchanged, and warns, as to genocide, that it has reasonable grounds to conclude that there is a strong inference of genocidal intent on the part of the State, that there is a serious risk of recurrence of genocidal actions, and that Myanmar is failing in its obligations to prevent, investigate, and enact legislation to criminalize and punish genocide (paras. 89-90).

33. The Report refers to evidence relating to the alleged genocide against the Rohingya people, encompassing: *(a)* ongoing chronic persecution measures, including movement restrictions affecting the Rohingya's access to economic, social, and cultural rights (paras. 76-81); *(b)* internment camps for displaced Rohingya, with the Government of Myanmar continuing its plan to keep the Rohingya off their lands and segregated (paras. 82-84); *(c)* forced labour, including Rohingya being forced to build new camps for the displaced Rohingya (para. 88); *(d)* continued discrimination with respect to citizenship laws and forcing Rohingya to accept national verification cards through threat and intimidation (paras. 86-87).

34. The Mission concludes that the situation of the Rohingya remains largely unchanged and the Myanmar Government's acts "continue to be part of a widespread and systematic attack that amounts to persecution and other crimes against humanity against the Rohingya in Rakhine State" (para. 89). It adds that

> "the Mission also has reasonable grounds to conclude that there is a strong inference of genocidal intent on the part of the State, that there is a serious risk that genocidal actions may recur, and that Myanmar is failing in its obligation to prevent genocide, to investigate genocide,

and to enact effective legislation criminalizing and punishing genocide" (para. 90).

3. Mission's "Detailed Findings" on Myanmar of 16 September 2019

35. Shortly after its Report of 8 August 2019, the Mission submitted to the UN Human Rights Council the extensive "detailed findings" on Myanmar, of 16 September 2019, as a complementary factual information (in 190 pages)[11]. The document starts with a summary of the forms of grave violations incurred into (para. 2), the determination of State responsibility (paras. 45 and 58-59) and the need of reparations (paras. 42-43). The "detailed findings" cover violence in distinct forms (including beatings), torture and cruel treatment, forced labour (paras. 190-194), deprivation of food and of humanitarian relief (paras. 172-175)[12], as well as deprivation of health and of land (paras. 139-140).

36. According to the document, violence also encompassed forced displacement of persons and human trafficking (para. 589), as well as other war crimes, amidst humiliation or degradation (para. 192). It stressed the prohibition of torture as one of *jus cogens*, as a peremptory norm of customary international law (para. 389). Those grave breaches, — it warned, — disclosed the need of assertion of State responsibility, keeping in mind the continuity of the intent of genocide (paras. 230, 233, 238, 667 and 669).

37. The document devoted particular attention to the endeavours of the UN Mission (reports of 2018-2019) to infer the "genocidal intent under the rules of State responsibility" on the part of the State of Myanmar (para. 223, and cf. para. 220). In the words of the "detailed findings",

> "The Mission has identified seven indicators from which it inferred genocidal intent to destroy the Rohingya people as such, all based on the consideration of indicators of genocidal intent in international case law: first, the Tatmadaw's extreme brutality during its attacks on the Rohingya; second, the organized nature of the Tatmadaw's destruction; third, the enormity and nature of the sexual violence perpetrated against women and girls during the 'clearances operations'; fourth, the insulting, derogatory, racist and exclusionary utterances of Myanmar officials and others prior, during and after the 'clearance operations'; fifth, the existence of discriminatory plans and policies, such as the Citizenship Law and the NVC process, as well as the Government's efforts to clear, raze, confiscate and build on land in a

[11] See note 4 *supra*.

[12] It stressed the need of humanitarian relief to be extended to the most vulnerable victims (para. 633).

manner that sought to change the demographic and ethnic composition of Rakhine State, the goal being to reduce the proportion of Rohingya; sixth, the Government's tolerance for public rhetoric of hatred and contempt for the Rohingya; and seventh, the State's failure to investigate and prosecute gross violations of international human rights law and serious violations of international humanitarian law, both as they were occurring and after they occurred. These seven indicators also allow the Mission to infer that the State did not object and in fact endorsed the Tatmadaw's 'clearance operations' and the manner in which they were conducted.

Every one of these indicators is linked to the acts or omissions of Myanmar State organs, including the military, other security forces, ministries, legislative bodies, the UEHRD and other civilian institutions. Collectively they demonstrate a pattern of conduct that infers genocidal intent on the part of the State to destroy the Rohingya, in whole or in part, as a group. For reasons explained in its 2018 Report, there is no reasonable conclusion to draw, other than the inference of genocidal intent, from the State's pattern of conduct." (Paras. 224-225.)

38. The "detailed findings", furthermore, revealed a temporal perspective of the grave breaches: it pointed out that, even before the occurrences of violence against the Rohingya in 2012 and 2016-2017, leading to the forced displacement and exodus of those victimized: there were other periods of violence — it added — such as the military operations in 1977, which led some 200,000 Rohingya to flee to Bangladesh; this again happened in 1992 (amidst killings, torture, rape and other violations), which led 260,000 Rohingya to flee to Bangladesh (paras. 202-205 and 214-215).

39. Still in this temporal perspective, the document identified in the 1982 Citizenship Law of Myanmar as discriminatory against the Rohingya people, denying them citizenship and other "fundamental rights", causing them "great physical or mental suffering" constituting "crime against humanity" (paras. 101-106 and 216). It added that there was need of further investigation of the facts, so as to render justice (para. 226), given the grave violations committed mainly by the Tatmadaw (the Myanmar military) of the international law of human rights and international humanitarian law (para. 457), as well as of the United Nations Convention on the Rights of the Child (para. 527).

40. Over the last decades those violations have established a level of continuing oppression against the Rohingya rendering their life in Myanmar unbearable. They had to face the denial of their rights, and even of legal status and identity. State-sanctioned laws and policies "occurred in the context of State-sanctioned discriminatory rhetoric", with "institutionalized oppression" amounting to persecution (para. 210). The attacks against "Myanmar's Rohingya population" were undertaken with "genocidal intent", and ever since the Mission's 2018 Report "the situation of the 600,000 Rohingya remaining in Myanmar is worse after another year of living under deplorable conditions" (paras. 212-213).

IV. International Fact-Finding: Reports of the UN Special Rapporteur on Human Rights in Myanmar

41. In its Application, The Gambia further notes that the UN Human Rights Council's Special Rapporteur on the Situation of Human Rights in Myanmar (Ms Yanghee Lee) has carried out extensive fact-finding on Myanmar's campaign against the Rohingya[13]. The Special Rapporteur, in addition to her statements made at the UN Human Rights Council, also submitted reports to it, on the situation of human rights in Myanmar, including a recent report presented on 30 August 2019[14]. Two of her earlier reports (of 2 May 2019[15] and 20 August 2018[16]) are also of particular interest in relation to allegations of genocide against the Government of Myanmar.

1. Report of the Special Rapporteur on the Situation of Human Rights in Myanmar (of 30 August 2019)

42. In her Report of 30 August 2019, the Special Rapporteur on the Situation of Human Rights in Myanmar, referring to armed conflict and violence, addresses reports of ongoing violent attacks against the Rohing-

[13] It cites her statement at the thirty-seventh session of the Human Rights Council on 12 March 2018; Application instituting proceedings, para. 7 and note 4.

[14] UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar — Yanghee Lee* (30 August 2019), UN doc. A/74/342 [August 2019 Report of the Special Rapporteur].

[15] UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar — Yanghee Lee* (2 May 2019), UN doc. A/HRC/40/68.

[16] UN Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar — Yanghee Lee* (20 August 2018), UN doc. A/73/332.

yas (and property) in the context of the conflict with the Arakan Army in Rakhine State (para. 40). She observes that living conditions for the Rohingya in northern Rakhine State "remain dreadful", with continuing reports of beatings, killings and the burning of houses and rice stores *(ibid.)*.

43. She outlines the need to conduct policies "in a rights-based manner", and to put an end to the root-causes of forced displacement of persons (para. 44). Moreover, as to internally displaced persons, the Special Rapporteur points out that, in central Rakhine State, "128,000 Rohingya and Kaman people remain interned in camps where they have lived in squalid conditions since 2012", with restrictions on their freedom of movement (para. 45).

44. The Special Rapporteur (Ms Yanghee Lee) then warns that, if the process being pursued continues, it will result in the permanent segregation of displaced Rohingya and Kaman communities in Rakhine (para. 45). As to Rohingya refugees, she expresses her view that "Myanmar has entirely failed to dismantle the system of persecution under which the Rohingya in Rakhine continue to live. While this situation persists, it is not safe or sustainable for refugees to return" (para. 54)[17].

2. Report of the Special Rapporteur on the Situation of Human Rights in Myanmar (of 2 May 2019)

45. Earlier on, in her Report of 2 May 2019, the Special Rapporteur notes that the campaign to impose national verification cards on the Rohingya is continuing unabated, and the Rohingya are still required to apply for permission to leave their villages in accordance with existing restrictions on their movement (para. 34). Furthermore, in relation to Rohingya refugees, the Special Rapporteur observes that the conditions for voluntary, safe, dignified and sustainable returns do not exist, despite the Governments of Bangladesh and Myanmar having agreed to begin repatriation in mid-November 2018 (para. 43).

46. She addresses the overcrowded conditions for the Rohingya refugees in Bangladesh, as well as the fear of refugees of forced repatriation following the aforementioned agreement between the Governments of Bangladesh and Myanmar (paras. 41-43). The Special Rapporteur (Ms Yanghee Lee) further notes that this planned repatriation has caused high levels of fear and anxiety among the refugee population at the prospect of forced return,

[17] Furthermore, she expresses concern that national verification cards will be issued to Rohingya returnees after their biometric data is collected, noting the possibility that any biometric data collected could be used to place further controls on Rohingya who return to Myanmar (para. 55).

leading some refugees to go into hiding or even attempt to take their own lives to avoid forced return to Myanmar (para. 43).

47. And, as to institutionalized hate speech, she expresses alarm at its pervasive nature, particularly due to the use of hate speech by senior governmental officials (para. 51). She warns that "hate speech and misinformation" have come from "public institutions linked to the military" (para. 53) and calls for definitely avoiding to teach children ideas promoting "racial superiority and communal disharmony", removing "all incendiary passages from all textbooks" (para. 52).

3. Report of the Special Rapporteur on the Situation of Human Rights in Myanmar (of 20 August 2018)

48. Even earlier, in her Report of 20 August 2018, the Special Rapporteur condemns the widespread and systematic violations of the international law of human rights and international humanitarian law committed by the Tatmadaw against the Rohingya population in Myanmar for decades, with particular attention to the armed conflict and situations of violence from March 2018 (para. 36). She declares that there is "credible information" that the 33rd and 99th Light Infantry Divisions of the Tatmadaw were among those responsible for perpetrating "extreme violence against the Rohingya population in northern Rakhine State" (as from 25 August 2017) (para. 37), including massacres involving "the killings of many men, women and children, beatings, rapes and the burning of houses" (paras. 38-39)[18].

49. The Special Rapporteur (Ms Yanghee Lee) specifically addresses sexual violence, stating that "the widespread threat and use of sexual violence" was part of the "Tatmadaw's strategy of humiliating, terrorizing and collectively punishing the Rohingya community" and forcing them "to flee and prevent their return" (para. 48). She also expresses concern in relation to the dire living conditions in the internment camps, given the continuing violence and discrimination against the Rohingya in Rakhine State, as well as in relation to its intended closure of the camps to hasten the return of displaced persons to their places of origin (paras. 52-53).

50. The Special Rapporteur's concern also encompasses the ongoing discrimination in citizenship laws in Myanmar, with the lack of citizenship status of the Rohingya people in Myanmar, and the lack of recognition of refugee status for the Rohingya people in Bangladesh (paras. 58-60 and 62). She notes that, according to statements from newly arrived Rohingya refugees in Cox's Bazar, conditions for the Rohingya in Rakhine State have

[18] Citing Amnesty International, "We Will Destroy Everything: Military Responsibility for Crimes against Humanity in Rakhine State" (27 June 2018).

> "worsened significantly since before the violence of August 2017 as a result of heightened movement restrictions, lack of access to livelihoods, education, health and basic services, and ongoing violence, intimidation and extortion by security forces" (para. 61).

51. Furthermore, discriminatory laws, including those relating to freedom of movement, family registration, marriage and birth, remain in place (para. 61). The Special Rapporteur notes that pressure by security forces for the Rohingya to accept national verification cards has led to violence (para. 62). As to the destruction of Rohingya villages, the Special Rapporteur notes that bases for security forces, reception and transit centres for repatriation and model villages — which have historically been used to encourage the resettlement of Buddhists to Rakhine State, displacing the Muslim population, — have been built on land that was previously home to the Rohingya (para. 63).

52. The Special Rapporteur comes to the conclusion that the aforementioned situation in Myanmar calls for accountability, and "[j]ustice and the right of victims to reparation should not be contingent on any political or economic interest", keeping in mind that "there can be no genuine or meaningful accountability unless the victims' concerns are addressed" (para. 73). To that effect, she presents a series of recommendations (paras. 75-80).

V. Provisional Measures of Protection and the Imperative of Overcoming the Extreme Vulnerability of Victims

53. The UN reports above reviewed give accounts of great suffering on the part of the numerous victims of the tragedy in Myanmar; further to those who were killed or died, the surviving ones remain in a situation of extreme vulnerability. I ascribe considerable importance to human vulnerability, to which I have always been attentive, and I shall address this point further in the following paragraphs of the present Part V of the separate opinion.

54. The provisional measures of protection just ordered by the ICJ in the *cas d'espèce* aim to safeguard the fundamental rights of the surviving victims The suffering of victims has marked presence in the writings of thinkers along the centuries. May I here recall that, in the mid-twentieth century, Cecília Meireles observed, in her poem *"Os Mortos/The Ones Who Died"* (1945):

> *"Creio que o morto ainda tinha chorado, depois da morte:*
> *enquanto os pensamentos se desagregavam,*
> *depois de o coração se acostumar de ter parado. (. . .)*

Creio que o morto chorou depois da morte.
Chorou por não ter sido outro. (. . .)

Mas sobre seus olhos havia uns outros, mais infelizes,
que estavam vendo, e entendendo, e continuavam sem nada.
Sem esperança de lágrima.
Recuados para um mundo sem vibração.
Tão incapazes de sentir que se via o tempo de sua morte.
Antiga morte já entrada em esquecimento.
Já de lágrimas secas."

["I believe that the one who died had still cried, after death:
while the thoughts disaggregated themselves,
after the heart gets used to having stopped. (. . .)

I believe the one who died cried after death.
Cried for not having been someone else. (. . .)

But over his eyes there were some others, more unfortunate ones,
who were seeing, and understanding, and remained without anything.
Without hope of a tear.
Moved back into a world without vibration.
So incapable of feeling that one was seeing the time of their death.
Ancient death already entered into oblivion.
Already of dry tears."] *[My own translation.]*

1. The Legacy of the Second World Conference on Human Rights (1993), in Its Attention to Human Vulnerability

55. May I now turn to another issue of particular importance here. In the course of the work of the Second World Conference on Human Rights (Vienna, 1993), — as I recall in my memories of it, — special attention was turned to vulnerable persons and groups in great need of protection, so as to overcome their defencelessness[19]. There was stress on the need of positive measures and obligations to this effect[20]. The Second World Conference on Human Rights left an important legacy, as found in its final document, the Vienna Declaration and Programme of

[19] A. A. Cançado Trindade, *A Proteção dos Vulneráveis como Legado da II Conferência Mundial de Direitos Humanos (1993-2013)*, Fortaleza/Brazil, IBDH/IIDH/SLADI, 2014, pp. 59, 65, 73, 93 and 103-104.

[20] *Ibid.*, p. 76; emphasis was given to the 1948 Universal Declaration of Human Rights (*ibid.*, p. 97, note 151), and the universal juridical conscience was acknowledged as the ultimate material source of the law of nations, of all law (*ibid.*, p. 106).

Action, — of which I keep a very good memory, having participated in the work of its Drafting Committee.

56. One of the key points of the 1993 Declaration and Programme of Action was its special attentiveness to discriminated or disadvantaged persons, to vulnerable persons and groups, to the poor and the socially excluded, in sum, to all those in greater need of protection[21]. It was not surprising that the 1993 World Conference was particularly attentive, *inter alia*, to the condition of vulnerable groups and persons, — as the issue which was already under the attention of United Nations organs.

57. In effect, due to the endeavours of international supervisory organs at global and regional levels, numerous lives had been spared, reparations for damages had been awarded, legislative measures had been adopted or modified for the sake of protection, wrongful administrative practices had to the same effect been terminated[22]. Its legacy as a whole is to be kept in mind nowadays[23], given the subsequent and current occurrence of atrocities against human beings.

58. In the adjudication by the ICJ of recent cases pertaining to human violence affecting vulnerable victims, I have deemed it fit to focus on the legacy of the Second World Conference on Human Rights in relation to the vulnerability of the victims. Thus, in my three extensive dissenting opinions in the three cases of the *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Judgments of 10 May 2016 — cf. *infra*), in my firm support of that universal obligation I drew attention to the focus on "attention on vulnerable segments of the populations" and the concern with "meeting basic human needs" (para. 124).

59. I added that a basic concern of the Second World Conference on Human Rights

> "as I have pointed out on distinct occasions along the last two decades[24] — can be found in the recognition of the legitimacy of the

[21] United Nations, *Vienna Declaration and Programme of Action*, New York, 1993, pp. 25-71. As it became clear that human rights permeate all areas of human activity, the incorporation of the human rights dimension in all programmes and activities of the United Nations was propounded in the Vienna Conference.

[22] In addition, national democratic institutions had been strengthened, and positive measures and educational programmes had been adopted.

[23] Cf. A. A. Cançado Trindade, "The International Law of Human Rights Two Decades after the Second World Conference on Human Rights in Vienna in 1993", *The Realization of Human Rights: When Theory Meets Practice — Studies in Honour of Leo Zwaak* (eds. Y. Haeck *et al.*), Cambridge/Antwerp/Portland, Intersentia, 2013, pp. 15-39.

[24] A. A. Cançado Trindade, *A Proteção dos Vulneráveis*, *op. cit. supra* note 19, 2014, pp. 13-356; A. A. Cançado Trindade, "Sustainable Human Development and Conditions of

> concern of the international community as a whole with the conditions of living of all human beings everywhere. The placing of the well-being of peoples and human beings, of the improvement of their conditions of living, at the centre of the concerns of the international community, is remindful of the historical origins of the *droit des gens*."[25] (Para. 125.)

60. Moreover, I have retaken my considerations on the matter in my subsequent separate opinion in the ICJ's Order (of 19 April 2017) in the case of the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation)*, wherein I have stressed the relevance of provisional measures of protection in a situation of a strong adversity and sufferings of the victimized persons. I have proceeded, in this new and long separate opinion, to elucidate a series of issues, some of which raised also now in the *cas d'espèce*.

61. It is not my intention to reiterate here all my clarifications made and examined in my separate opinion of almost three years ago. May I just refer briefly here to some of the points I have made on that occasion in the ICJ's decision in that case opposing Ukraine to the Russian Federation. To start with, I have examined the treatment of human vulnerability — including cases of extreme vulnerability — in the case law of contemporary international tribunals, such as the ICJ, the Inter-American Court of Human Rights (IACtHR) and the European Court of Human Rights (ECHR) (paras. 12-20).

62. In my examination of such treatment in successive cases, I have pondered, *inter alia*, that

> "It is significant that, in our times, cases pertaining to situations of extreme adversity or vulnerability of human beings have been brought

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Life as a Matter of Legitimate International Concern: The Legacy of the UN World Conferences", *Japan and International Law — Past, Present and Future* (International Symposium to Mark the Centennial of the Japanese Association of International Law), The Hague, Kluwer, 1999, pp. 285-309; A. A. Cançado Trindade, "The Contribution of Recent World Conferences of the United Nations to the Relations between Sustainable Development and Economic, Social and Cultural Rights", *Les hommes et l'environnement: Quels droits pour le vingt-et-unième siècle? — Etudes en hommage à Alexandre Kiss* (eds. M. Prieur and C. Lambrechts), Paris, Ed. Frison-Roche, 1998, pp. 119-146; A. A. Cançado Trindade, "Memória da Conferência Mundial de Direitos Humanos (Vienna, 1993)", 87/90 *Boletim da Sociedade Brasileira de Direito Internacional* (1993-1994), pp. 9-57.

[25] Those conferences acknowledged that human rights do in fact permeate all areas of human activity, and contributed decisively to the re-establishment of the central position of human beings in the conceptual universe of the law of nations *(droit des gens)*. Cf., on the matter, A. A. Cançado Trindade, *Evolution du droit international au droit des gens — L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pedone, 2008, pp. 1-187.

> to the attention of the ICJ as well as other international tribunals. This is, in my perception, a sign of the new paradigm of the *humanized* international law, the new *jus gentium*[26] of our times, sensitive and attentive to the needs of protection of the human person in any circumstances of vulnerability. The case law of international human rights tribunals is particularly illustrative in this respect." (*I.C.J. Reports 2017*, p. 162, para. 17.)

63. In the same case of *Ukraine* v. *Russian Federation*, — I went on, — a worrisome illustration of the urgent need for provisional measures of protection was provided by the continuous indiscriminate shelling of the civilian population from all sides, in densely populated areas (in eastern Ukraine), in breach of the international law of human rights and of international humanitarian law (*ibid.*, pp. 165-166, paras. 27-28). Non-compliance with the needed provisional measures of protection generates the responsibility of the State, with legal consequences (*ibid.*, p. 159, para. 8).

64. The gravity of the situation in the *cas d'espèce*, I proceeded, required provisional measures of protection, oriented by the principle *pro persona humana*, *pro victima* (*ibid.*, pp. 184-185, para. 85). This — I added —

> "requires the ICJ to go beyond the strict inter-State dimension (the one it is used to, attached to a dogma of the past), and to concentrate attention on *victims* (including the potential ones[27]), — be they individuals[28], groups of individuals[29], peoples or humankind[30], as subjects of international law, — and not on inter-State susceptibilities.

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[26] Cf. A. A. Cançado Trindade, *A Humanização do Direito Internacional*, 2nd rev. ed., Belo Horizonte, Edit. Del Rey, 2015, pp. 3-782; A. A. Cançado Trindade, *La Humanización del Derecho Internacional Contemporáneo*, México, Edit. Porrúa/IMDPC, 2013, pp. 1-324; A. A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 7-185.

[27] On the notion of *potential* victims in the framework of the evolution of the notion of victim (or the condition of the complainant) in the domain of the International Law of Human Rights, cf. A. A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des cours de l'Académie de droit international de La Haye* (1987), Chap. XI, pp. 243-299, esp. pp. 271-292.

[28] As I pointed out in my separate opinions of the *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* case (Judgments of 30 November 2010, Merits; and of 19 June 2012, Reparations).

[29] As I sustained in my dissenting and separate opinions in the case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (Order of 28 May 2009, and Judgment of 20 July 2012, respectively), as well as in my dissenting opinion in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)* (Judgment of 3 February 2015).

[30] As I upheld in my three dissenting opinions in *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India) (Marshall Islands* v. *Pakistan) (Marshall Islands* v. *United Kingdom)* (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, p. 255 *et seq.*).

> Human beings in vulnerability are the ultimate beneficiaries of provisional measures of protection, endowed nowadays with a truly *tutelary* character, as true jurisdictional guarantees of preventive character." (*I.C.J. Reports 2017*, p. 185, para. 86.)

65. I then warned that the need of greater attention to human vulnerability was to be carefully faced with full awareness of the pressing need to secure protection to the affected human beings (*ibid.*, pp. 185-186, paras. 87-88). The principle of humanity comes to the fore (*ibid.*, p. 186, para. 90), permeating the whole *corpus juris* of contemporary international law, with "a clear incidence on the protection of persons in situations of great vulnerability. (. . .) Human beings stand in need, ultimately, of protection against evil, which lies within themselves" (*ibid.*, p. 185, para. 91).

2. International Case Law and the Need of Properly Addressing Human Vulnerability

(a) *Support for the relevance of consideration of vulnerability of the victims*

66. The Second World Conference on Human Rights remained faithful to the legacy of the 1948 Universal Declaration of Human Rights and provided responses to new challenges. The warning of the Universal Declaration has been kept in mind, to the effect that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind" (preamble, para. 2). The Declaration further warns that "it is essential, if man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law" (*ibid.*, para. 3). And it asserts that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (*ibid.*, para. 1).

67. International case law is gradually reckoning the need of properly addressing human vulnerability. Within the ICJ, I have been constantly attentive to this needed development. Thus, in my separate opinion in the ICJ's Order of provisional measures of protection (of 18 July 2011) in the case of the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)*, I pointed out that there have been cases where the ICJ, in indicating such measures, like in the *cas d'espèce*, "most significantly went *beyond the inter-State dimension*, in expressing its concern also for *the human persons (les personnes humaines)* in situations of risk, or vulnerability and adversity" (*I.C.J. Reports 2011 (II)*, p. 591, para. 74).

68. In my separate opinion in the ICJ's Judgment (on reparations, of 19 June 2012) in the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*, I pondered that measures adopted for the rehabilitation of those victimized in cases of grave violations of their rights, "have intended to overcome the extreme vulnerability of victims, and to restore their identity and integrity" (*Compensation, Judgment, I.C.J. Reports 2012 (I)*, p. 379, para. 84). Earlier on, in the same case of *Ahmadou Sadio Diallo* (Merits, Judgment of 30 November 2010), I related, in my separate opinion, the pressing need to overcome the situation of vulnerability or even defencelessness of victims to the principle of humanity in its wide dimension (*I.C.J. Reports 2010 (II)*, p. 762, para. 105).

69. On other occasions, likewise, I have addressed the matter in the ICJ: for example, in my dissenting opinion in the case of the *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)*, I drew attention to the increased vulnerability of victimized persons (*Judgment, I.C.J. Reports 2012 (I)*, pp. 243-244, para. 175); and in my separate opinion in the case of the *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, I considered the vulnerability and rehabilitation of victims (*Judgment, I.C.J. Reports 2012 (II)*, p. 555, para. 174). All these ponderations, in addition to others, are duly systematized[31].

(b) *Invocation of occurrence of extreme human vulnerability*

70. In the oral proceedings before the ICJ in the *cas d'espèce*, the Applicant State has been attentive to the utter vulnerability of the Rohingya; thus, in the public hearing of 10 December 2019, it referred, in this respect, to the point made by the UN Mission's Report (of 17 September 2018)[32] that their "extreme vulnerability" was "a consequence of State policies and practices implemented over decades"[33]. The Gambia has devoted a whole part of its oral arguments to "The Rohingya's Vulnerability to Continuing Acts of Genocide" (Part IV); in assessing "the situation of the approximately 600,000 Rohingya who remain in Myanmar today" (p. 37, para. 1), it characterized their situation as "one of extreme vulnerability, with ongoing acts of genocide against them, and the grave risk that even more heinous atrocities (. . .) will be inflicted upon them at any time" (*ibid.*, p. 37, para. 2).

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[31] Cf. *Judge A. A. Cançado Trindade — The Construction of a Humanized International Law — A Collection of Individual Opinions (1991-2013)*, Vol. II (International Court of Justice), The Hague/Leiden, Brill/Nijhoff, 2014, pp. 967, 1779-1780, 1685, 1469 and 1597, respectively.

[32] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 458.

[33] CR 2019/18, of 10 December 2019, p. 23, para. 9.

71. Moreover, in referring to occasions in which the ICJ took note of human vulnerability in its own case law (p. 58, paras. 9 and 11), The Gambia has added that in the present case "the Rohingya are not only deprived of their political, social and cultural rights, they are threatened with *massive loss of life itself*, and, striking at the heart of these proceedings, with *loss of their very existence as a group*" (p. 58, para. 11).

72. Invocation of extreme human vulnerability is a key element to be taken into account in a decision concerning provisional measures of protection, in a case like the present one, on the *Application of the Convention against Genocide*. In effect, from time to time, the ICJ has been seized of cases disclosing human cruelty, always present in the history of humankind. For example, in its three Judgments in the three cases of the *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom) (Marshall Islands* v. *India) (Marshall Islands* v. *Pakistan)*, as the Court has found itself — by a split majority — without jurisdiction to adjudicate them, I have appended three strong dissenting opinions thereto.

73. In my three dissents, I have warned of the manifest illegality of nuclear weapons, which constitute a continuing threat to humankind as a whole. I dwelt extensively upon evil and cruelty in human relations, having deemed it fit to devote one part (XVI) of my dissenting opinions to "The Principle of Humanity and the Universalist Approach: *Jus Necessarium* Transcending the Limitations of *Jus Voluntarium*", preceded, *inter alia*, by another part (VIII) on "Human Wickedness: From the Twenty-First Century Back to the Book of *Genesis*".

74. In the earlier parts of my dissents, I recalled the presence in the reasoning of many influential thinkers of the twentieth century (*inter alia*, in the middle of last century, Mahatma Gandhi and Stefan Zweig, among several others in distinct continents) warning against human wickedness with its numerous victims of the atrocities perpetrated at that time and before, and continuing nowadays. And I have stressed, in face of the persistence of human cruelty, the great need for a people-centred approach, keeping in mind the fundamental right to life, with the *raison d'humanité* prevailing over the *raison d'Etat*.

VI. The Utmost Importance of the Safeguard of Fundamental Rights by Provisional Measures of Protection, in the Domain of *Jus Cogens*

1. Fundamental, Rather than "Plausible", Rights

75. The rights protected by the present Order of provisional measures of protection are truly fundamental rights, starting with the right to life,

right to personal integrity, right to health, among others. The ICJ, once again, refers to rights which appear to it "plausible" (e.g., para. 56), as it has become used to, always with my criticisms. In referring to the arguments of the Contending Parties, only in paragraphs 46-47 of the present Order, among others, there appear ten references to "plausible", related to rights, acts, facts, claims, genocidal intent, inferences.

76. There is great need of serious reflection on this superficial use of "plausible", which is devoid of a meaning. I do not intend to reiterate here all the criticisms I have been making on resort to "plausible", whatever that means. May I just recall that, in the course of last year (2018), on more than one occasion I dwelt upon this matter. Thus, in my separate opinion in the case of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates),* I pondered that

> "The test of so-called 'plausibility' of rights is, in my perception, an unfortunate invention — a recent one — of the majority of the ICJ.
>
> . . . . . .
>
> It appears that each one feels free to interpret so-called 'plausibility' of rights in the way one feels like; this may be due to the fact that the Court's majority itself has not elaborated on what such 'plausibility' means. To invoke 'plausibility' as a new 'precondition', creating undue difficulties for the granting of provisional measures of protection in relation to a *continuing situation*, is misleading, it renders a disservice to the realization of justice." (*Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, pp. 456-457, paras. 57 and 59.)

77. In sequence, in the same separate opinion, I deemed it fit to warn, *inter alia*, that

> "The so-called 'plausibility' of rights is surrounded by uncertainties, which are much increased in trying to add to it the so-called 'plausibility' of admissibility, undermining provisional measures of protection as jurisdictional guarantees of a preventive character. It is time to awaken and to concentrate attention on the nature of provisional measures of protection, particularly under human rights treaties, to the benefit of human beings experiencing a *continuing situation* of vulnerability affecting their rights." (*Ibid.*, p. 457, para. 60.)

78. Shortly afterwards, in my separate opinion in the case of *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America)*, I criticized

the unnecessary resort by the ICJ to "plausibility" in a continuing situation of vulnerability, (*Provisional Measures, Order of 3 October 2018 I.C.J. Reports 2018 (II)*, pp. 676-677, paras. 72-76)[34]. I pondered that

> "the avoidance of referring to 'plausibility' would have enhanced the Court's reasoning, rendering it clearer. Particularly in cases, like the present one, where the rights — the protection of which is sought by means of provisional measures — are clearly defined in a treaty, to invoke 'plausibility' makes no sense. The legal profession, in also indulging here in so-called 'plausibility' (whatever that means), is incurring likewise into absurd uncertainties." (*Ibid.*, p. 677, para. 77.)

79. As in the present Order of provisional measures of protection we are really in face of fundamental rights (not "plausible" ones), the basic principle of equality and non-discrimination also marks its presence here. I addressed this point in my aforementioned recent separate opinion in the case of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018* (see para. 76 *supra*), where I pointed out that

> "The advances in respect of the basic principle of equality and non-discrimination at normative and jurisprudential levels[35], 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." (*I.C.J. Reports 2018 (II)*, p. 444, para. 18.)

80. I then drew attention to the sufferings affecting numerous migrants nowadays, and warned that

> "Nothing has been learned from sufferings of past generations; hence the need to remain attached to the goal of the realization of justice, bearing in mind that law and justice go indissociably together. The ICJ has a mission to keep on endeavouring to contribute to a *humanized* law of nations, in the dehumanized world of our days." (*Ibid.*, p. 447, para. 28.)

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[34] As I had earlier done also in my separate opinion in the case of *Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 254, para. 19.

[35] 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.

It is necessary to keep in mind that the principle of equality and non-discrimination lies in the foundations of the rights safeguarded under the Convention against Genocide, and human rights conventions, also by means of provisional measures of protection.

2. Jus Cogens *under the Convention against Genocide and the Corresponding Customary International Law*

81. As examined in a recent study of the developing international case law on the matter, provisional measures of protection are nowadays endowed with an autonomous legal regime of their own[36], which is of great significance for the protection of fundamental human rights. Such rights remain in the domain of *jus cogens*. This is a point which did not pass unperceived in the oral procedure before the ICJ: in the public hearing of 10 December 2019, the delegation of The Gambia made a reference to such acknowledgment of *jus cogens*[37], an issue which could have been addressed by the ICJ in its present Order.

82. It would not have been the first time, as the issue is present in the ICJ's case law, though it requires nowadays further development. May I just recall, in this respect, the main points addressed by the Court so far. Thus, looking further back in time, in the aforementioned case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Rwanda)* (cf. para. 4, *supra*), the ICJ recognized (in its Judgment on jurisdiction and admissibility, of 3 February 2006) the prohibition of genocide as a peremptory norm of international law (*I.C.J. Reports 2006*, p. 55, para. 64).

83. One decade earlier, in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment)*, the ICJ observed, *inter alia*, that the terms of Article IX of the Convention against Genocide do "not exclude any form of State responsibility" (*I.C.J. Reports 1996 (II)*, p. 616, para. 32). In my understanding, State responsibility and individual criminal responsibility cannot be dissociated in cases of massacres[38].

84. The subsequent case law of the ICJ again addressed the matter, in the aforementioned cases (cf. para. 3, *supra*) of *Application of the Convention against Genocide*, opposing Bosnia and Herzegovina to Serbia and Montenegro (Judgment of 26 February 2007), as well as of *Application of*

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

[37] CR 2019/18, of 10 December 2019, p. 51, para. 7.

[38] On the lessons from the international adjudication of such cases, cf. A. A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice*, Utrecht, Universiteit Utrecht, 2011, pp. 1-71; A. A. Cançado Trindade, *La Responsabilidad del Estado en Casos de Masacres — Dificultades y Avances Contemporáneos en la Justicia Internacional*, Mexico, Edit. Porrúa/Escuela Libre de Derecho, 2018, pp. 1-104.

the Convention against Genocide, opposing Croatia to Serbia (Judgment of 3 February 2015). On both occasions, the treatment of the matter by the Court was incomplete and unsatisfactory.

85. Thus, in its 2007 Judgment, the Court confirmed the applicability of the rules on State responsibility between States in the context of genocide (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 114, para. 167), but not without underlining that in its view the recognition of State responsibility should not be understood as making room for State crimes, thus imposing limitations on the matter (*ibid.*, pp. 114-115, paras. 167-170). And in its 2015 Judgment, the Court briefly referred to *jus cogens* without considering its legal effects (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 47, para. 87).

86. In my dissenting opinion appended thereto, I sustained that grave violations of human rights and of international humanitarian law, and acts of genocide, among other atrocities, are in breach of responsibility and call for reparations to the victims This is in line with the idea of *rectitude* (in conformity with the *recta ratio* of natural law), underlying the conception of law (in distinct legal systems — *Droit*/*Right*/*Recht*/*Direito*/*Derecho*/*Diritto*) as a whole (*ibid.*, p. 311, paras. 318-319).

87. I then added, *inter alia*, that the Convention against Genocide is *people-oriented* (*ibid.*, pp. 374, 376 and 379, paras. 521, 529, 542 and 545), with attention needing to be focused on the segment of the population concerned, in pursuance of a humanist outlook, in the light of the principle of humanity (Part XVIII). The Convention, I further added, calls for care to be turned to the victims, rather than to inter-State susceptibilities (*ibid.*, pp. 367-368, paras. 494-496)[39]. In sum, *jus cogens* is to be properly considered under the Convention against Genocide and the corresponding customary international law.

VII. Epilogue

88. In my understanding, it is necessary to take all the above considerations into account in order to secure the advances in the domain of the autonomous legal regime of provisional measures of protection. As to the *cas d'espèce*, it is significant that the present Order of provisional mea-

[39] For a recent case study, on the basis of my extensive dissenting opinion in this case, cf. A. A. Cançado Trindade, *A Responsabilidade do Estado sob a Convenção contra o Genocídio: Em Defesa da Dignidade Humana*, Fortaleza, IBDH/IIDH, 2015, pp. 9-265.

sures of protection has just been adopted by the ICJ by unanimity. The measures of protection have, in my understanding, been ordered by the ICJ to safeguard the fundamental rights of those who remain, in the tragedy of Myanmar, in a continuing situation of extreme vulnerability, if not defencelessness.

89. Last but not least, may I proceed to a brief recapitulation of the main points I have deemed it fit to make, in the present separate opinion, in respect of provisional measures of protection under the Convention against Genocide. *Primus*: In a case like the present one, the provisions of the Convention conform a Law of protection *(droit de protection)*, oriented towards the safeguard of the fundamental rights of those victimized in a continuing situation of human vulnerability, so as also to secure the prevalence of the rule of law *(la prééminence du droit)*.

90. *Secundus*: The ICJ has, along the years, been giving its contribution to the international case law concerning the Convention against Genocide; yet, the Court's Orders on provisional measures of protection under the Convention have been rather rare, though they play their role of extending protection to the fundamental rights of persons and groups in extreme vulnerability. *Tertius*: In relation to the occurrences in the tragedy in Myanmar, international fact-finding has been undertaken by the reports of the UN Mission on Myanmar (of 2018 and 2019), including "detailed findings", as well as by the reports of the UN Special Rapporteur on Human Rights in Myanmar (of 2018 and 2019).

91. *Quartus*: These successive United Nations reports give account of a *continuing situation* affecting human rights of numerous persons under the Convention against Genocide. *Quintus*: Provisional measures of protection, like the ones indicated in the present Order, are intended to put an end to a continuing situation of extreme vulnerability of the victimized persons. *Sextus*: In a *continuing situation* of the kind, the fundamental rights requiring protection are clearly known, there being no sense to wonder whether they are "plausible". *Septimus*: A *continuing situation* in breach of human rights is a point which has been attracting the attention of the ICJ in recent cases, at distinct stages of the proceedings.

92. *Octavus*: Provisional measures of protection have, in recent years, been protecting growing numbers of persons in situations of extreme vulnerability, having thus been transformed into a true jurisdictional *guarantee* of preventive character. *Nonus*: Extreme human vulnerability is a test more compelling than resort to so-called 'plausibility' of rights for the ordering of provisional measures of protection under the Convention against Genocide.

93. *Decimus*: The legacy of the Second World Conference on Human Rights (Vienna, 1993) has been much contributing to the protection of human beings in situations of great vulnerability. *Undecimus*: Further-

more, international case law, as the *cas d'espèce* shows, can serve the need of properly addressing extreme human vulnerability. *Duodecimus*: It is of the utmost importance the safeguard of fundamental rights by provisional measures of protection, in the domain of *jus cogens*, under the Convention against Genocide and the corresponding customary international law.

94. *Tertius decimus*: There continues to be an advance towards the consolidation of what I have been calling, along the years, the *autonomous legal regime* of provisional measures of protection. *Quartus decimus*: The historical formation of the *corpus juris* of international protection of the rights of the human person has much contributed to a growing awareness of the importance of the prevalence also of the basic principle of equality and non-discrimination. *Quintus decimus*: The present case once again shows that the determination and ordering of provisional measures of protection under the Convention against Genocide, and under human rights conventions, can only be properly undertaken from a humanist perspective, necessarily avoiding the pitfalls of an outdated and impertinent State voluntarist outlook.

(Signed) Antônio Augusto CANÇADO TRINDADE.