230. ALLEGED VIOLATIONS OF THE 1955 TREATY OF AMITY, ECONOMIC RELATIONS, AND CONSULAR RIGHTS (ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA) [PROVISIONAL MEASURES]

Order of 3 October 2018

On 3 October 2018, the International Court of Justice issued an Order on the Request for the indication of provisional measures submitted by Iran in the case concerning *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America)*. In its Order, the Court indicated various provisional measures.

The Court was composed as follows: President Yusuf; Vice-President Xue; Judges Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Bhandari, Robinson, Crawford, Gevorgian, Salam, Iwasawa; Judges *ad hoc* Brower, Momtaz; Registrar Couvreur.

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Procedural context (paras. 1-15)

The Court begins by recalling that, on 16 July 2018, Iran instituted proceedings against the United States with regard to alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States (hereinafter the "Treaty of Amity" or the "1955 Treaty"). The same day, Iran also submitted a Request for the indication of provisional measures aimed at preserving its rights under the 1955 Treaty, pending the Court's final decision in the case.

I. Factual background (paras. 16-23)

The Court then sets out the factual background of the case. It notes in this regard that, on 8 May 2018, the President of the United States issued a National Security Presidential Memorandum announcing the end of its participation in the Joint Comprehensive Plan of Action (JCPOA) — an agreement on Iran's nuclear programme reached on 14 July 2015 by Iran, the five permanent members of the United Nations Security Council, plus Germany and the European Union — and directing the reimposition, with regard to Iran, of "sanctions lifted or waived in connection with the JCPOA". In the Memorandum, the President indicated in particular that Iran had publicly declared that it would deny the International Atomic Energy Agency access to military sites, and that, in 2016, Iran had twice violated the JCPOA's heavy-water stockpile limits. It was announced that "sanctions" would be reimposed in two steps. Upon expiry of a first wind-down period of 90 days, ending on 6 August 2018, the United States would reimpose a certain number of "sanctions" concerning, in particular, financial transactions, trade in metals, the importation of Iranian-origin carpets and foodstuffs, and the export of commercial passenger aircraft and related

parts. Following a second wind-down period of 180 days, ending on 4 November 2018, the United States would reimpose additional "sanctions".

Thus, on 6 August 2018, the President of the United States issued Executive Order 13846 "Reimposing Certain Sanctions" on Iran and Iranian nationals. In particular, Section 1 concerns "Blocking Sanctions Relating to Support for the Government of Iran's Purchase or Acquisition of U.S. Bank Notes or Precious Metals; Certain Iranian Persons; and Iran's Energy, Shipping, and Shipbuilding Sectors and Port Operators". Section 2 concerns "Correspondent and Payable-Through Account Sanctions Relating to Iran's Automotive Sector; Certain Iranian Persons; and Trade in Iranian Petroleum, Petroleum Products; and Petrochemical Products". Sections 3, 4 and 5 provide for the modalities of "'Menu-based' Sanctions Relating to Iran's Automotive Sector and Trade in Iranian Petroleum, Petroleum Products, and Petrochemical Products". Section 6 concerns "Sanctions Relating to the Iranian Rial". Section 7 relates to "Sanctions with Respect to the Diversion of Goods Intended for the People of Iran, the Transfer of Goods or Technologies to Iran that are Likely to be Used to Commit Human Rights Abuses, and Censorship". Section 8 relates to "Entities Owned or Controlled by a United States Person and Established or Maintained Outside the United States". Earlier Executive Orders implementing United States commitments under the JCPOA are revoked in Section 9. Section 2 *(e)* of Executive Order 13846 provides that certain subsections of Section 3 shall not apply with respect to any person for conducting or facilitating a transaction for the provision (including any sale) of agricultural commodities, food, medicine or medical devices to Iran.

II. Prima facie jurisdiction (paras. 24-52)

The Court first observes that it may indicate provisional measures only if the provisions relied on by the Applicant appear, prima facie, to afford a basis on which its jurisdiction could be founded; it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. The Court notes that, in the present case, Iran seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article XXI, paragraph 2, of the 1955 Treaty[1]. The Court must first determine whether it has prima facie jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

1. Existence of a dispute as to the interpretation or application of the Treaty of Amity (paras. 27-44)

The Court notes that Article XXI, paragraph 2, of the 1955 Treaty makes the jurisdiction of the Court conditional on the existence of a dispute as to the interpretation or application of the Treaty. The Court must therefore verify prima facie two different requirements, namely whether there exists a dispute between the Parties and whether this dispute concerns the "interpretation or application" of the 1955 Treaty. The Court observes that, in the present case, while the Parties do not contest that a dispute exists, they differ on the question whether this dispute relates to the "interpretation or

[1] Article XXI, paragraph 2, of the 1955 Treaty reads as follows:

> "Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means."

application" of the 1955 Treaty. In order to determine whether that is the case, the Court must ascertain whether the acts complained of by the Applicant are prima facie capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court could have jurisdiction *ratione materiae* to entertain.

The Court considers that the fact that the dispute between the Parties arose in connection with and in the context of the decision of the United States to withdraw from the JCPOA does not in and of itself exclude the possibility that the dispute relates to the interpretation or application of the Treaty of Amity. In its view, to the extent that the measures adopted by the United States following its decision to withdraw from the JCPOA might constitute violations of certain obligations under the 1955 Treaty, such measures relate to the interpretation or application of that instrument. The Court also observes that the JCPOA does not grant exclusive competence to the dispute settlement mechanism it establishes with respect to measures adopted in its context and which may fall under the jurisdiction of another dispute settlement mechanism. Therefore, the Court considers that the JCPOA and its dispute settlement mechanism do not remove the measures complained of from the material scope of the Treaty of Amity nor exclude the applicability of its compromissory clause.

The Court observes that Article XX, paragraph 1, defines a limited number of instances in which, notwithstanding the provisions of the Treaty, the Parties may apply certain measures. This includes measures relating to "fissionable materials, the radioactive by-products thereof, or the sources thereof" (subparagraph *(b)*). It also includes measures "necessary to fulfill the obligations of a High Contracting Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests" (subparagraph *(d)*). The Court considers that whether and to what extent those exceptions have lawfully been relied on by the Respondent in the present case is a matter which is subject to judicial examination and, hence, forms an integral part of the material scope of the Court's jurisdiction as to the "interpretation or application" of the Treaty under Article XXI, paragraph 2.

The Court further considers that the 1955 Treaty contains rules providing for freedom of trade and commerce between the United States and Iran, including specific rules prohibiting restrictions on the import and export of products originating from the two countries, as well as rules relating to the payment and transfer of funds between them. In the Court's view, measures adopted by the United States, for example, the revocation of licences and authorizations granted for certain commercial transactions between Iran and the United States, the ban on trade of certain items, and limitations to financial activities, might be regarded as relating to certain rights and obligations of the Parties to that Treaty. The Court is therefore satisfied that at least the aforementioned measures which were complained of by Iran are indeed prima facie capable of falling within the material scope of the 1955 Treaty.

The Court finds that the above-mentioned elements are sufficient at this stage to establish that the dispute between the Parties relates to the interpretation or application of the Treaty of Amity.

2. The issue of satisfactory adjustment by diplomacy under Article XXI, paragraph 2, of the Treaty of Amity (paras. 45-51)

The Court recalls that, under the terms of Article XXI, paragraph 2, of the 1955 Treaty, the dispute submitted to it must not have been "satisfactorily adjusted by diplomacy". The Court concludes from the wording of this provision that there is no need for it to examine whether formal negotiations have been engaged in or whether the lack of diplomatic adjustment is due to the conduct of one party or the other. It is sufficient for the Court to satisfy itself that the dispute was not satisfactorily adjusted by diplomacy before being submitted to it.

In the present case, the communications sent by the Government of Iran to the Embassy of Switzerland (Foreign Interests Section) in Tehran on 11 and 19 June 2018 did not prompt any response from the United States, and there is no evidence in the case file of any direct exchange on this matter between the Parties. As a consequence, the Court notes that the dispute had not been satisfactorily adjusted by diplomacy, within the meaning of Article XXI, paragraph 2, of the 1955 Treaty, prior to the filing of the Application on 16 July 2018.

3. Conclusion as to prima facie jurisdiction (para. 52)

In light of the foregoing, the Court concludes that, prima facie, it has jurisdiction pursuant to Article XXI, paragraph 2, of the 1955 Treaty to deal with the case, to the extent that the dispute between the Parties relates to the "interpretation or application" of the said Treaty.

III. The rights whose protection is sought and the measures requested (paras. 53-76)

The Court recalls that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights of the parties in a given case, pending its final decision. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible.

The Court notes that, under the provisions of the 1955 Treaty, both contracting Parties enjoy a number of rights with regard to financial transactions, the import and export of products to and from each other's territory, the treatment of nationals and companies of the Parties and, more generally, freedom of commerce and navigation. The Court further notes that the United States does not, as such, contest that Iran holds these rights under the 1955 Treaty, or that the measures adopted are capable of affecting these rights. Instead, the United States claims that Article XX, paragraph 1, of the 1955 Treaty, entitles it to apply certain measures, *inter alia*, to protect its essential security interests, and argues that the plausibility of the alleged rights of Iran must be assessed in light of the plausibility of the rights of the United States.

The Court notes that the rights whose preservation is sought by Iran appear to be based on a possible interpretation of the 1955 Treaty and on the prima facie evidence of the relevant facts. Further, in the Court's view, some of the measures announced on 8 May 2018 and partly implemented by Executive Order 13846 of 6 August 2018, such

as the revocation of licences granted for the import of products from Iran, the limitation of financial transactions and the prohibition of commercial activities, appear to be capable of affecting some of the rights invoked by Iran under certain provisions of the 1955 Treaty.

However, in assessing the plausibility of the rights asserted by Iran under the 1955 Treaty, the Court must also take into account the invocation by the United States of Article XX, paragraph 1, subparagraphs *(b)* and *(d)*, of the Treaty. The Court need not carry out at this stage of the proceedings a full assessment of the respective rights of the Parties under the 1955 Treaty. However, the Court considers that, in so far as the measures complained of by Iran could relate "to fissionable materials, the radio-active by-products thereof, or the sources thereof", or could be "necessary to protect … essential security interests" of the United States, the application of Article XX, paragraph 1, subparagraphs *(b)* or *(d)*, might affect at least some of the rights invoked by Iran under the Treaty of Amity.

Nonetheless, the Court is of the view that other rights asserted by Iran under the 1955 Treaty would not be so affected. In particular, Iran's rights relating to the importation and purchase of goods required for humanitarian needs, and to the safety of civil aviation, cannot plausibly be considered to give rise to the invocation of Article XX, paragraph 1, subparagraphs *(b)* or *(d)*.

In light of the foregoing, the Court concludes that, at this stage of the proceedings, some of the rights asserted by Iran under the 1955 Treaty are plausible in so far as they relate to the importation and purchase of goods required for humanitarian needs, such as (i) medicines and medical devices, and (ii) foodstuffs and agricultural commodities, as well as goods and services required for the safety of civil aviation, such as (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft.

The Court then turns to the issue of the link between the rights claimed and the provisional measures requested.

The Court recalls that Iran has requested the suspension of the implementation and enforcement of all measures announced on 8 May 2018 and the full implementation of transactions already licensed. Iran has further requested the Court to order that the United States must, within three months, report on the action taken with regard to those measures and assure "Iranian, US and non-US nationals and companies that it will comply with the Order of the Court" and that it "shall cease any and all statements or actions that would dissuade US and non-US persons and entities from engaging or continuing to engage economically with Iran and Iranian nationals or companies". Finally, Iran has requested that the United States refrain from taking any other measure that might prejudice the rights of Iran and Iranian nationals under the 1955 Treaty.

The Court has already found that at least some of the rights asserted by Iran under the 1955 Treaty are plausible. It recalls that this is the case with respect to the asserted rights of Iran, in so far as they relate to the importation and purchase of goods required for humanitarian needs, such as (i) medicines and medical devices, and (ii) foodstuffs and agricultural commodities, as well as goods and services required for the safety of civil aviation, such as (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and safety-related inspections)

necessary for civil aircraft. In the view of the Court, certain aspects of the measures requested by Iran aimed at ensuring freedom of trade and commerce, particularly in the above-mentioned goods and services, may be considered to be linked to those plausible rights whose protection is being sought.

The Court concludes, therefore, that a link exists between some of the rights whose protection is being sought and certain aspects of the provisional measures being requested by Iran.

IV. Risk of irreparable prejudice and urgency (paras. 77-94)

The Court recalls that it has the power to indicate provisional measures when there is a risk that irreparable prejudice could be caused to rights which are the subject of judicial proceedings, or when the alleged disregard of such rights may entail irreparable consequences. However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision on the case.

The Court notes that the decision announced on 8 May 2018 appears to have already had an impact on the import and export of products originating from the two countries as well as on the payments and transfer of funds between them, and that its consequences are of a continuing nature. The Court notes that, as of 6 August 2018, contracts concluded before the imposition of measures involving a commitment on the part of Iranian airline companies to purchase spare parts from United States companies (or from foreign companies selling spare parts partly constituted of United States components) appear to have been cancelled or adversely affected. In addition, companies providing maintenance for Iranian aviation companies have been prevented from doing so when it involved the installation or replacement of components produced under United States licences.

Furthermore, the Court notes that, while the importation of foodstuffs, medical supplies and equipment is in principle exempted from the United States' measures, it appears to have become more difficult in practice, since the announcement of the measures by the United States, for Iran, Iranian companies and nationals to obtain such imported foodstuffs, supplies and equipment. In this regard, the Court observes that, as a result of the measures, certain foreign banks have withdrawn from financing agreements or suspended co-operation with Iranian banks. Some of these banks also refuse to accept transfers or to provide corresponding services. It follows that it has become difficult if not impossible for Iran, Iranian companies and nationals to engage in international financial transactions that would allow them to purchase items not covered, in principle, by the measures, such as foodstuffs, medical supplies and medical equipment.

The Court considers that certain rights of Iran under the 1955 Treaty invoked in these proceedings, which it has found to be plausible, are of such a nature that disregard of them may entail irreparable consequences. This is the case in particular for those rights relating to the importation and purchase of goods required for humanitarian needs, such as (i) medicines and medical devices, (ii) foodstuffs and agricultural

commodities, and goods and services required for the safety of civil aviation, such as (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft.

The Court is of the view that a prejudice can be considered as irreparable when the persons concerned are exposed to danger to health and life. In its opinion, the measures adopted by the United States have the potential to endanger civil aviation safety in Iran and the lives of its users to the extent that they prevent Iranian airlines from acquiring spare parts and other necessary equipment, as well as from accessing associated services (including warranty, maintenance, repair services and safety-related inspections) necessary for civil aircraft. The Court further considers that restrictions on the importation and purchase of goods required for humanitarian needs, such as foodstuffs and medicines, including life-saving medicines, treatment for chronic disease or preventive care, and medical equipment, may have a serious detrimental impact on the health and lives of individuals on the territory of Iran.

The Court notes that, during the oral proceedings, the United States offered assurances that its Department of State would "use its best endeavours" to ensure that "humanitarian or safety of flight-related concerns which arise following the reimposition of the United States sanctions" receive "full and expedited consideration by the Department of the Treasury or other relevant decision-making agencies". While appreciating these assurances, the Court considers nonetheless that, in so far as they are limited to an expression of best endeavours and to co-operation between departments and other decision-making agencies, the said assurances are not adequate to address fully the humanitarian and safety concerns raised by the Applicant. Therefore, the Court is of the view that there remains a risk that the measures adopted by the United States, as set out above, may entail irreparable consequences.

The Court further notes that the situation resulting from the measures adopted by the United States, following the announcement of 8 May 2018, is ongoing, and that there is, at present, little prospect of improvement. Moreover, the Court considers that there is urgency, taking into account the imminent implementation by the United States of an additional set of measures scheduled for after 4 November 2018.

V. Conclusion and measures to be adopted (paras. 95-101)

The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by Iran, as identified above. In the present case, having examined the terms of the provisional measures requested by Iran and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

The Court considers that the United States, in accordance with its obligations under the 1955 Treaty, must remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of Iran of goods required for humanitarian needs, such as (i) medicines and medical devices, and (ii) foodstuffs and agricultural commodities, as well as goods and services required for the safety of civil aviation, such as (iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and safety-related

inspections) necessary for civil aircraft. To this end, the United States must ensure that licences and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to the goods and services referred to above.

The Court recalls that Iran has requested that it indicate measures aimed at ensuring the non-aggravation of its dispute with the United States. When indicating provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require. In this case, having considered all the circumstances, in addition to the specific measures it has decided to take, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of their dispute.

Moreover, the Court reaffirms that its orders on provisional measures have binding effect and create international legal obligations for any party to whom the provisional measures are addressed. It further notes that the decision given in the present proceedings in no way prejudges the question of the jurisdiction of the Court to deal with the merits of the case or any questions relating to the admissibility of the Application or to the merits themselves.

VI. Operative clause (para. 102)

The full text of the final paragraph of the Order reads as follows:

"For these reasons,

The Court,

Indicates the following provisional measures:

(1) Unanimously,

The United States of America, in accordance with its obligations under the 1955 Treaty of Amity, Economic Relations, and Consular Rights, shall remove, by means of its choosing, any impediments arising from the measures announced on 8 May 2018 to the free exportation to the territory of the Islamic Republic of Iran of

(i) medicines and medical devices;

(ii) foodstuffs and agricultural commodities; and

(iii) spare parts, equipment and associated services (including warranty, maintenance, repair services and inspections) necessary for the safety of civil aviation;

(2) Unanimously,

The United States of America shall ensure that licences and necessary authorizations are granted and that payments and other transfers of funds are not subject to any restriction in so far as they relate to the goods and services referred to in point (1);

(3) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

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Judge Cançado Trindade appends a separate opinion to the Order of the Court; Judge *ad hoc* Momtaz appends a declaration to the Order of the Court.

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Separate opinion of Judge Cançado Trindade

1. In his Separate Opinion, composed of 15 parts, Judge Cançado Trindade begins by pointing out that he has concurred with his vote to the adoption by unanimity by the ICJ of its present Order indicating Provisional Measures of Protection. He adds that, as he attributes great importance to some related issues in the *cas d'espèce*, that in his perception underlie the present decision of the ICJ but are not entirely dealt with in the Court's reasoning, he feels obliged to leave on the records, in the present Separate Opinion, the identification of such issues and the foundations of his personal position thereon.

2. His reflections address mainly key points pertaining to provisional measures of protection (part I). Before turning to his examination of them, he deems it fit to start with his initial considerations of a hermeneutical and axiological nature, dwelling upon three points he regards as also significant in the proper handling of the *cas d'espèce*, namely: *(a)* international peace: treaties as living instruments, in the progressive development of international law; *(b)* provisional measures: the existence of the Court's *prima facie* jurisdiction; and *(c)* the prevalence of the imperative of the realization of justice over the invocation of "national security interests".

3. His following considerations, focused on provisional measures of protection, are, at a time, conceptual and epistemological, juridical and philosophical, always attentive to human values. The first part of them, of a conceptual and epistemological character, comprises: *(a)* transposition of provisional measures of protection from comparative domestic procedural law onto international legal procedure; *(b)* juridical nature of provisional measures of protection; *(c)* the evolution of provisional measures of protection; *(d)* provisional measures of protection and the preventive dimension of international law; and *(e)* provisional measures of protection and continuing situations of vulnerability.

4. The second part of his reflections on provisional measures of protection, of a juridical and philosophical nature, encompasses: *(a)* human vulnerability: humanitarian considerations; *(b)* beyond the strict inter-State outlook: attention to peoples and individuals; *(c)* continuing risk of irreparable harm; *(d)* continuing situation affecting rights and the irrelevance of the test of their so-called "plausibility"; and *(e)* considerations on international security and urgency of the situation. Last but not least,

he presents, in an epilogue, a recapitulation of the key points of the position he sustains in the present Separate Opinion.

5. Judge Cançado Trindade at first observes, as to international peace, that international treaties, encompassing the 1955 Treaty of Amity, are *living* instruments, to be understood on the basis of circumstances in which they are to be applied. This is in accordance with the ICJ's *jurisprudence constante*. This evolutionary approach to treaty interpretation stems from Article 31 of the 1969 Vienna Convention on the Law of Treaties.

6. He adds that, in their interpretation and application, the object and purpose of treaties are to be kept in mind (part II). Their evolutionary interpretation ensuing therefrom has contributed to the progressive development of international law. As to the present case, the object and purpose of the 1955 Treaty (Article I) (a firm and enduring peace and friendship between the parties) have likewise been addressed by the ICJ in earlier cases, so as to assist in its interpretation.

7. In ordering provisional measures of protection — Judge Cançado Trindade proceeds — the ICJ (and other international tribunals), even when faced with allegations of "national security interests", pursues, on the basis of its Statute and *interna corporis*, its mission of realization of justice. This is confirmed by the ICJ's relevant *jurisprudence constante* (part III). *Prima facie* jurisdiction is autonomous from jurisdiction on the merits, as acknowledged also by a more lucid trend of international legal doctrine.

8. There is, in his understanding, the prevalence of the imperative of the realization of justice over the invocation of "national security interests" or strategies (part IV). This is revealed by the case-law of the ICJ itself. In Judge Cançado Trindade's words,

> "The idea of objective justice and human values stands above facts, which *per se* do not generate law-creating effects; *ex conscientia jus oritur*. The imperative of the realization of justice prevails over manifestations of a State's 'will' … My position, in the realm of provisional measures of protection, has been a consistently anti-voluntarist one. Conscience stands above the 'will'" (para. 26).

9. The gradual formation of the *autonomous legal regime* of provisional measures of protection — which Judge Cançado Trindade has been sustaining for many years — has presented distinct component elements, starting with the transposition of those measures from comparative domestic procedural law onto international legal procedure (part V). They have a juridical nature of their own: directly related to the realization of justice itself, provisional measures of protection, being anticipatory in nature, in evolving from *precautionary* to *tutelary*, have been contributing to the progressive development of international law (part VI).

10. When the basic requisites — of gravity and urgency, and the needed prevention of irreparable harm — of provisional measures are met — Judge Cançado Trindade ponders — "they have been ordered (by international tribunals), in the light of the needs of protection, and have thus conformed a true

jurisdictional guarantee of a preventive character" (para. 35). The autonomous legal regime of provisional measures of protection is configured — he recalls,

> "by the *rights* to be protected (not necessarily identical to those vindicated later in the merits stage), by the *obligations* emanating from the provisional measures of protection, generating autonomously State *responsibility*, with its legal consequences, and by the presence of (potential) victims already at the stage of provisional measures of protection" (para. 36).

11. The notion of victim (or of *potential* victim), or injured party, can accordingly emerge also in the context proper to provisional measures of protection, irrespective of the decision as to the merits of the case at issue (part. VII). He adds that

> "the duty of compliance with provisional measures of protection (another element configuring their autonomous legal regime) keeps on calling for further elaboration, as non-compliance with them generates *per se* State responsibility and entails legal consequences" (para. 37).

In his perception, provisional measures have been extending protection to growing numbers of individuals (potential victims) in situations of vulnerability; they have thus been transformed into a true jurisdictional *guarantee* with a preventive character (part VIII).

12. Judge Cançado Trindade then draws attention to a significant point, namely, that the ICJ case-law — to which the present Order is added — reveals the great need and relevance of provisional measures of protection in *continuing situations* of tragic vulnerability of human beings. In the present case, for example, the sanctions imposed by the respondent State as from 8 May 2018 appear to have already had an impact and consequences of a "continuing nature" (part IX). The situation resulting therefrom, is "ongoing" and without prospect of improvement. Hence the needed provisional measures of protection that the Court has just indicated in the present Order (para. 49).

13. Given the continuing situation of human vulnerability, wherein provisional measures of protection assume particular importance, Judge Cançado Trindade moves on to his "humanitarian considerations" (part X). He recalls, in historical perspectives, thinkers warning, along the centuries, against the vulnerability of human beings in face of extreme violence and destruction (such as, e.g., in ancient Greece, the tragedies by Aeschylus, Sophocles and Euripides, singling out cruelty, human vulnerability and loneliness) (paras. 52-55 and 58).

14. In fact, awareness of the dictates of justice (in the line of jusnaturalist thinking) was already present in the writings of ancient Greek tragedians. They nourished the prevalence of human conscience over the will, of jusnaturalism over legal positivism (para. 53), which marked its presence in the *jus gentium* (*droit des gens*) at the time of its "founding fathers" (in the Sixteenth and Seventeenth centuries) (para. 55). From ancient times to nowadays, there has been support for the prevalence of human conscience over the will, of jusnaturalism over legal positivism.

15. After all — he continues — the conscience of the sense of human dignity clarifies that, one "cannot impose suffering upon foreigners, or vulnerable persons" (para. 57). In effect, "the lessons from the ancient Greek tragedies have remained

topical and perennial to date" (para. 58). And Judge Cançado Trindade adds that "[s]ome 24 centuries after they were written and performed, thinkers kept on writing on human suffering in face of cruelty, at times as if being in search of salvation for humankind", in the Nineteenth and Twentieth centuries (paras. 58-59).

16. Yet — he adds — despite their warnings, "lessons have not been learned from the past" (para. 59), as shown by the

> "human capacity for devastation or destruction [that] has become unlimited in the Twentieth and Twenty-first centuries (with weapons of mass destruction, in particular nuclear weapons). (…)
>
> It should not pass unnoticed that human vulnerability here, in relation to the factual context of the present case of *Alleged Violations of the 1955 Treaty of Amity*, encompasses the whole international community, indeed humankind as a whole, in face of the deadliness of nuclear weapons. There is a great need not only of their non-proliferation, but also and ultimately of nuclear disarmament, as a universal obligation. (…)
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> Neither theology, nor psychology, nor philosophy, have succeeded in providing answers or persuasive explanation of the persistence of evil and cruelty in human conduct. The matter has been addressed at length in literature. But the growing capacity of human beings for destruction in our times has, at least, generated a reaction of human conscience against evil actions … in the form of the elaboration and cultivation and enforcement of *responsibility* for all such evil actions. Here international law has a role to play, without prescinding from the inputs of those other branches of human knowledge" (paras. 60-61 and 63).

17. Judge Cançado Trindade further recalls that, as he has sustained his three Dissenting Opinions in the recent cases on *Obligations of Nuclear Disarmament* (Marshall Islands *versus* United Kingdom, India and Pakistan, Judgments of 05 October 2016), the imperative of respect for life and the relevance of humanist values require more attention. And he then stresses that the needed prevalence of human conscience, the universal juridical conscience, over State voluntarism is much needed, in the sense that

> "it is the universal juridical conscience that is the ultimate material source of international law . . . [O]ne cannot face the new challenges confronting the whole international community keeping in mind only State susceptibilities; such is the case with the obligation to render the world free of nuclear weapons, an imperative of *recta ratio* and not a derivative of the 'will' of States. In effect, to keep hope alive it is necessary to bear always in mind humankind as a whole" (para. 64).

18. Judge Cançado Trindade reiterates that the imperatives of *recta ratio*, of the universal juridical conscience, overcome the invocations of *raison d'État*. Furthermore, the protection, by means of provisional measures, of the human person (individuals and groups in vulnerability), goes beyond the strict inter-State dimension. And he recalls that the 1945 United Nations Charter itself, followed three years later by the 1948 Universal Declaration of Human Rights, is attentive to "the peoples of the United

Nations", surpassing the reductionist inter-State outlook; and proclaims, in its preamble, the determination of "the *peoples* of the United Nations" to "*save succeeding generations* from the scourge of war" (para. 68).

19. In the present case opposing Iran to the United States — he proceeds — the 1955 Treaty of Amity between them refers, *inter alia*, to the obligation of each State Party to care for "the health and welfare of its people" (Article VII (1)); it also addresses the obligations of the two States Parties always to "accord fair and equitable treatment to nationals and companies" of each other, thus refraining from applying "discriminatory measures" (Article IV (1)). Stressing this point, it further refers to the obligation of the two States Parties to accord fair treatment to their "nationals and companies", without discriminatory measures (Article IX (2) (3)). (para. 69).

20. Judge Cançado Trindade further underlines that there is in the *cas d'espèce* a *continuing situation* of risk of irreparable harm, affecting at a time the rights of the applicant State and its nationals (part XII). A *continuing situation* of the kind has had an incidence in earlier cases before the ICJ as well (part XIII); in his Separate Opinion in the case of *Application of the ICSFT Convention and of the CERD Convention* (Ukraine *versus* Russian Federation, Order of 19 April 2017), he emphasized that the continuing "tragedy of human vulnerability" (and not the test of so-called "plausibility") paved the way for the indication of provisional measures of protection (para. 74).

21. He also refers to his Separate Opinion in the case of *Jadhav* (India *versus* Pakistan, Order of 18 May 2017), where he pondered that the right to information on consular assistance is, in the circumstances of the *cas d'espèce*, "inextricably linked to the right to life itself, a fundamental and non-derogable right, rather than a simply 'plausible' one" (para. 75). In such a *continuing situation* as in the *Jadhav* case, the rights being affected and requiring protection "are clearly known, there being no sense to wonder whether they are 'plausible'. The test of 'plausibility' is here irrelevant" (para. 76). In cases, like the present one opposing Iran to the United States, where the rights — the protection of which is sought by means of provisional measures — "are clearly defined in a treaty [the Treaty of Amity of 1955], to invoke 'plausibility' makes no sense" (para. 77).

22. Judge Cançado Trindade then turns to his remaining line of considerations, on international security and urgency of the situation (part XIV). The Joint Comprehensive Plan of Action (JCPOA) was endorsed by United Nations Security Council resolution 2231, of 20 July 2015, which *inter alia* referred to principles of international law and the rights under the 1968 Treaty on the Non-Proliferation of Nuclear Weapons [NPT] "and other relevant instruments". Among these latter — observes Judge Cançado Trindade — the international community counts today also on the 2017 Treaty on the Prohibition of Nuclear Weapons (para. 81). And he adds:

> "This evolution shows that non-proliferation has never been its final stage; beyond it, it is nuclear *disarmament* that can secure the survival of humankind itself as a whole; there is a universal obligation of nuclear disarmament. Nuclear weapons are unethical and unlawful, an affront to humankind. The persistence of modernized arsenals of them in some countries is a cause of great concern and regret of the international

community as a whole. National perceptions cannot lose sight of international security" (para. 82).

23. He advances the view that, in the present case, it is necessary to keep in mind international security, as it concerns the international community as a whole (paras. 78-82). He then recalls that concerns in this respect have recently been expressed by other States parties to the JCPOA, by the United Nations Secretary General, by the IAEA Director General, by the United Nations OHCHR's Special *Rapporteur*; it is indeed a matter of international concern (paras. 83-89).

24. Judge Cançado Trindade points out that, in ordering the present provisional measures of protection, the ICJ has duly taken into account the *humanitarian needs* of the affected population and individuals, so as to indicate measures in order to safeguard their rights (paras. 90-92). This is a case, like previous ones before the ICJ, where provisional measures of protection have been ordered in situations of human vulnerability. Among the rights for which provisional measures of protection have here been vindicated, and have been duly ordered by the ICJ in the *cas d'espèce* so as to safeguard them, are the rights related to human life and human health, which thus pertain to individuals, to human beings (para. 92).

25. Last but not least, Judge Cançado Trindade then concludes (part XV) that the fact that the matter at issue in the *cas d'espèce* has been handled on an inter-State basis — characteristic of the *contentieux* before the ICJ — does not at all mean that the Court is to reason likewise on a strictly inter-State basis; to him, it is "the nature of a case that will call for a reasoning, so as to reach a solution. The present case of *Alleged Violations of the 1955 Treaty of Amity* concerns not only State rights, but rights of human beings as well" (para. 94).

26. Such ordering of provisional measures of protection by the ICJ can only be properly undertaken from a humanist perspective (para. 93), thus necessarily avoiding the pitfalls of an outdated and impertinent attachment to State voluntarism. Once again — he stresses — "in the present case and always, human beings stand in need, ultimately, of protection against evil, which lies within themselves" (para. 106). In this perspective, "the *raison d'humanité* is to prevail over the *raison d'État*", and "[t]he humanized international law (*droit des gens*) prevails over alleged 'national security' interests or strategies" (para. 106).

Declaration of Judge *ad hoc* Momtaz

Judge *ad hoc* Momtaz states that he voted in favour of the three provisional measures indicated by the Court in paragraph 102 of its Order. However, he fears that the first two provisional measures are not sufficient to protect the rights of Iran as a matter of urgency or to avoid irreparable prejudice being caused to those rights. He is thus of the view that the first provisional measure should also have applied to the purchase of aircraft and to the orders which have already been placed by Iran and which are subject to the sanctions reimposed by the United States. As regards the second provisional measure, Judge *ad hoc* Momtaz believes that it would have been desirable for the Court to request that the United States refrain from taking any measures aimed at discouraging the companies and nationals of third States from maintaining trade

relations with Iran, in particular to enable Iran to purchase new civil aircraft. Although Judge *ad hoc* Momtaz agrees with the reasoning set out in the Court's Order, he raises three questions on which the Court did not rule.

First, Judge *ad hoc* Momtaz considers that Security Council resolution 2231 (2015) forms part of the factual background of the dispute submitted to the Court. That resolution endorsed the Joint Comprehensive Plan of Action (JCPOA) and imposed obligations on all United Nations Member States, including the United States. Moreover, on the basis of reports by the International Atomic Energy Agency (IAEA), which was mandated by the Security Council to verify and monitor Iran's compliance with its nuclear-related commitments under the JCPOA, Judge *ad hoc* Momtaz questions the validity of the arguments put forward by the United States to justify the reimposition of sanctions.

Second, Judge *ad hoc* Momtaz questions the lawfulness of the secondary sanctions adopted by the United States. Those sanctions have an extraterritorial scope and aim to influence directly the choice of sovereign States in formulating their external relations, which constitutes a violation of the fundamental principle of non-intervention, as enshrined in the Charter of the United Nations. Further, Judge *ad hoc* Momtaz considers that those secondary sanctions may also be in violation of the United States' obligations within the framework of the World Trade Organization (WTO). He also takes the view that the United States cannot rely on the exception provided for in Article XX, paragraph 1 *(d)*, of the Treaty of Amity, Economic Relations, and Consular Rights of 15 August 1955, nor that set out in Article XXI of the General Agreement on Tariffs and Trade (GATT).

Third, Judge *ad hoc* Momtaz believes that the provisional measure concerning the non-aggravation of the dispute set out in point (3) of paragraph 102, the operative part of the Court's Order, is not sufficient to hope to achieve a conciliatory climate between the Parties. If, as is the case here, there is no Security Council resolution calling on the parties to a given dispute to comply with international law, it falls to the Court to do so, with a view to re-establishing and preserving international peace and security in the region. The Court, the principal judicial organ of the United Nations, in so doing "does not … arrogate any powers excluded by its Statute when, otherwise than by adjudication, it assists, facilitates or contributes to the peaceful settlement of disputes between States, if offered the occasion at any stage of the proceedings" (*Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, separate opinion of Judge Lachs, p. 20).