CASE OF *APPEAL RELATING TO THE JURISDICTION OF THE ICAO COUNCIL UNDER ARTICLE 84 OF THE CONVENTION ON INTERNATIONAL CIVIL AVIATION* (BAHRAIN, EGYPT, SAUDI ARABIA AND UNITED ARAB EMIRATES [UAE] *VERSUS* QATAR) JUDGMENT OF 14 JULY 2020)

SEPARATE OPINION OF JUDGE A. A. CANÇADO TRINDADE

I. *Prolegomena*: Initial Considerations

1. I have accompanied the majority of the International Court of Justice (ICJ), in voting in support of the adoption today, 14 July 2020, of its present Judgments, dismissing the appeals raised by the applicant States in the present correlated cases of *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (Bahrain, Egypt, Saudi Arabia and United Arab Emirates [UAE] *versus* Qatar) ("ICAOA"), and of *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement* (Bahrain, Egypt, and UAE *versus* Qatar) ("ICAOB").

2. I arrive likewise at the conclusions of the ICJ set forth in the *dispositif* of the two present Judgments (*ICAOA*, para. 126; and *ICAOB*, para. 127), also for the dismissal of all appeals raised by the applicant States. This does not mean that my own reasoning coincides entirely with that of the ICJ in the handling of all successive points in the two present cases in this respect. This being so, I feel obliged to present my current Separate Opinion, in order to express my own position in relation to one of the arguments raised by the appellant States, in the two present cases of *ICAOA* and *ICAOB*, namely, the argument concerning the so-called "countermeasures".

3. May I initially recall, at this preliminary stage, that, in general terms, the appellant States in both cases base their first ground of appeal, as to the alleged lack of jurisdiction of the ICAO Council, on the argument that the airspace restrictions adopted by them were taken as lawful "countermeasures" in response to Qatar's alleged prior breaches of obligations arising under customary international law, as well as of resolutions of the Security Council, and the Riyadh Agreements. The appellant States further claim that, in their view, "countermeasures" constitute a circumstance precluding wrongfulness under general international law, having been, to them, specially recognized under the Riyadh Agreements.

4. The appellant States further contends that the disagreement submitted by Qatar to the ICAO Council would require the Council to adjudicate upon matters falling outside its jurisdiction, in a forum that is not properly equipped to hear the matters at issue. They argue that their objection is to be distinguished from the earlier case concerning the *Appeal Relating to the Jurisdiction of the ICAO Council* (India *versus* Pakistan, Judgment of 18.08.1972) because in the present case the invocation of "countermeasures" has taken the dispute outside the scope of civil aviation and the respective treaties (the Chicago Convention in the ICAOA case and the IASTA Agreement in the ICAOB case).

5. In the present Separate Opinion, I shall at first address "countermeasures" in breach of the foundations of the law of nations, and State responsibility. In sequence, I shall survey the lengthy and strong criticisms of "countermeasures" presented in the corresponding debates of both the U.N. International Law Commission, as well as of the VI Committee of the U.N. General Assembly (parts III and IV). Following that, I shall focus on the prevalence of the imperative of judicial settlement over the State's "will". I shall then present my own reflections, first, on international legal thinking and the prevalence of human conscience (*recta ratio*) over the

"will"; secondly, on the universal juridical conscience in the rejection of voluntarism and "countermeasures"; and thirdly, on law and justice interrelated, with general principles of law in the foundations of the new *jus gentium*. The way shall then be paved for the presentation of my final considerations, in an epilogue, with the points dealt with herein.

6. The two cases *ICAOA* and *ICAOB* are interrelated, as their presentation and arguments indicate. The two joint *Applications Instituting Proceedings*, received by the ICJ on 04.07.2018, contain appeals against two decisions rendered by the Council of the International Civil Aviation Organization (the "ICAO Council") on 29.06.2018. The first case, of *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (ICAOA), was presented, as already indicated, by Bahrain, Egypt, Saudi Arabia, and the UAE, to constitute an appeal against the decision rendered by the ICAO Council in the proceedings initiated by Qatar against these four States, which were initiated on the basis of Article 84 of the Convention on International Civil Aviation (the "Chicago Convention"). In these proceedings before the ICAO Council, Qatar claimed that the decisions of the four States (the airspace restrictions) violated the Chicago Convention.

7. The dispute between the Parties is mainly focused on whether the ICAO Council had jurisdiction to decide on the applications submitted by Qatar on alleged violations of the Chicago Convention (ICAOA) or the IASTA (ICAOB), and alternatively, whether the applications submitted by Qatar are admissible. As I have already pointed out, in both cases *ICAOA* and *ICAOB* I have selected one point raised by the appellant States, namely, that of so-called "countermeasures", so as to examine herein their lack of legal foundations and their negative effects on the law of nations and State responsibility.

II. "COUNTERMEASURES" IN BREACH OF THE FOUNDATIONS OF THE LAW OF NATIONS, AND STATE RESPONSIBILITY

8. The appellant States, as just seen, have decided to rely *inter alia* on "countermeasures", bringing to the fore an unfortunate initiative taken by the U.N. International Law Commission (ILC) in its prolonged discussions on the matter in the nineties and until 2001 (*infra*). This having been so, I feel bound to begin my own considerations of "countermeasures" in breach of the foundations of the law of nations, and of State responsibility, and to present, in sequence, the criticisms of "countermeasures" in corresponding debates of the U.N. ILC, as well as of the VI Committee of the U.N. General Assembly.

9. In effect, the ILC consumed many years of its work on the elaboration and adoption of its *Articles on State Responsibility* (2001), which disclosed also some resistance to certain innovations not in accordance with the foundations of the law of nations. Such was the case – as I warned in my General Course delivered at the Hague Academy of International Law in 2005 – of the space occupied, in the elaboration of those Articles,

> by so-called "countermeasures" (Articles 22 and 49-54), in comparison with the much more succinct space devoted to serious breaches of obligations under peremptory norms of general international law (Articles 40-41). *Ubi societas, ibi jus*. It should not pass unnoticed that countermeasures (...) ha[ve] now been taken to the centre of the domain of State responsibility without originally and intrinsically belonging to it. Countermeasures are reminiscent of the old practice of retaliation, and, – whether one wishes to admit it or not, – they rely upon force rather than conscience. Recourse to them discloses the insufficient degree of development of the treatment of State responsibility.

10. In this respect, there have been warnings as to resort to "countermeasures": as the international legal order is based upon justice rather than force, it has been criticized that to confer a high standing to "countermeasures" in the domain of State responsibility is "to elevate to a position of high dignity one of [international] society's least dignified and least sociable aspects", thus condemning that society "to be what it is". Other criticisms have emanated from lucid trends of international legal doctrine.

11. It has been recalled, e.g., that resort to "countermeasures" in practice ensues mainly from the domain of "the reciprocity of State interests" rather than principles, disclosing clear risks of retaliation, which are to be avoided.

Judicial control of "countermeasures" was contemplated by ILC's *rapporteur* G. Arangio-Ruiz, in his seventh *Report* (of 1995), stressing the need of an institutionalized reaction – within the ambit of the United Nations – of the "organized international community", – and the idea of a neutral control of "countermeasures" remained alive.

12. I have recalled such criticisms in my aforementioned General Course delivered at the Hague Academy of International Law (2005), and I have further warned that

> [T]he much larger space occupied by "countermeasures" than by other truly fundamental aspects of State responsibility in the 2001 ILC Articles on the subject discloses an apparent lack of confidence in the role of law for attaining justice; the greater emphasis is therein shifted to coercive means – envisaged as "legal" ones – rather than on conscience and the prevalence of *opinio juris communis*.
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> Yet, in a domain of International Law endowed with a specificity of its own, such as the International Law of Human Rights, the overall picture is rather different. This is a domain which has rendered possible a re-encounter with the very foundations of the international responsibility of States. Herein attention is correctly focused on Law rather than force, on conscience rather than "will", to the greater effectiveness of public international law itself.

13. These criticisms have called for further attention to the matter, in particular to the step backward taken by the insertion of "countermeasures" in the 2001 Articles on State Responsibility (cf. *infra*). Such insertion took place despite the successive and strong criticisms of "countermeasures" in the prolonged debates on the matter, of the U.N. ILC as well as of the VI Committee of the U.N. General Assembly (*infra*). I much regret that "countermeasures" have been raised by the appellant States in the present two cases (of ICAOA and ICAOB); all the mistakes of the past in the raising and stating of the point, with all its legal consequences, should not be forgotten in the present, at least by those of us who believe in international law and work for its prevalence.

III. CRITICISMS OF "COUNTERMEASURES" IN CORRESPONDING DEBATES OF THE U.N. INTERNATIONAL LAW COMMISSION

14. Strong criticisms of "countermeasures" were formulated in successive debates of the U.N. ILC itself, in the period of 1992-2001, centered on the issue. Thus, one of the ILC members, Mr. Jiuyong Shi (China), took a categorical position against them, warning as to the "impropriety" of the concept of "countermeasures" under general international law; to him, States allegedly "injured" which took "countermeasures" were "often themselves the wrongdoing States". Thus, for Mr. J. Shi, the application of reprisals or countermeasures disclosed the outcome of the relationship between "powerful" States and "weak and small" States which were "unable to assert their rights under international law.

15. For that reason, many small States regarded "the concept of reprisals or countermeasures as synonymous with aggression or intervention, whether armed or unarmed". "Countermeasures", – he added, – were "controversial" and should not be included in the law of State responsibility, being "certainly" to "the advantage of the more powerful States". Instead of reflecting general rules of international law, – Mr. J. Shi concluded, – "countermeasures" remained "controversial", reflecting "simply power relationships", and should then "be excluded from the topic of State responsibility".

16. Another ILC member who took likewise a categorical position against "countermeasures" was Mr. Carlos Calero Rodrigues (Brazil), who strongly criticized them; he warned that, if the ILC "was to be faithful to its duty of contributing to the progressive development of international law, it must try to establish limits to countermeasures in order to correct some of the more glaring injustices to which their broad application might give rise". He advocated the "clear and unrestricted" prohibition of "countermeasures", which "should not be considered legitimate" in threatening the territorial integrity or independence of the State against which they were applied; such "extreme coercion", – he added, – "should not be allowed".

17. Mr. C. Calero Rodrigues stressed his own "faithfulness to the traditional Latin American position on that matter", and reasserted his own "endorsement of a strict prohibition of countermeasures which endangered the territorial integrity or political independence of a State". He was firm in further warning that "countermeasures should not infringe on fundamental human rights, diplomatic relations, the rules of *jus cogens* or the rights of third States".

18. Within the ILC, as it can be seen, there were those aforementioned members who remained strongly opposed to the initiative of inserting into the Draft Articles a reference to so-called "countermeasures" all the time (*supra*). In addition, there were those members who were critical of them from the start, though ending up not opposing their insertion into Article 50 (2) of the Draft Articles. As to these latter, one ILC member, Mr. Awn Al-Khasawneh (Jordan), warned that States resorting to "countermeasures" "took the law into their own hands", forgetful of the rule of law at the international legal level. To him, "countermeasures" raised the "likelihood of abuse, largely because of power disparities among States"; furthermore, there is the "punitive" function and intent of "countermeasures".

19. Another ILC member, Mr. Pemmaraju Sreenivasa Rao (India), also warned that "countermeasures" reflected the position of the "stronger party", and one should have a care not to transpose such political "power relationships" into the domain of the law; moreover, "punitive reprisals or countermeasures" should be expressly prohibited. This point, originally made by him in 1992, was subsequently taken again by him at the ILC, in 1996, when he expressly stated his "complete disagreement" with chapter III of the draft Articles on the controversial "countermeasures". The ILC ended up with "an unsupportable, contradictory and unjustified regime for countermeasures"; after all, he added, "[n]o State should be encouraged to decide unilaterally to take the law into its own hands, no matter how real the provocation to which it reacted".

20. It seemed "advisable" to Mr. P. Sreenivasa Rao "to refer expressly to the provisions of the [U.N.] Charter which dealt with the non-use of force and the different methods for the peaceful settlement of disputes". In conclusion, he identified the "trouble with the existing wording", namely: "if the State accused of the internationally wrongful act defaulted, the injured State would be free to act as it saw fit, and that was tantamount to making the law of the strongest prevail. It would be preferable if the dispute settlement procedure that had been initiated continued to apply".

21. In the ILC's debates of two years earlier, Mr. John de Saram (Sri Lanka) pointed out that even when considering "countermeasures", attention should be turned to multilateral (or even bilateral) treaties, as from the U.N. Charter, in the light of their provisions on "peaceful settlement of disputes". Even when this latter is not achieved, – he added, —endeavors should be undertaken to avoid "chaos" resulting from "the taking by individuals States of countermeasures in an uncoordinated manner".

22. Shortly afterward at the ILC, Mr. Václav Mikulka (Czech Republic) pondered, as to the "consequences of State crimes", that "priority should be given to the collective response of the international community", so as to avoid "countermeasures"; in his view, it would here be desirable for the ILC "to establish the regime of responsibility for State crimes". The ILC members also counted, in mid-1994, on the intervention of their guest speaker, Mr. Chengyuan Tang, Secretary-General of the Asian-African Legal Consultative Committee (AALCC), who acknowledged the concern expressed at the ILC as to the formulation of a "regime of unilateral countermeasures" with its "inherent danger of abuse", as to the "recourse to reprisals", as well as to a "resort to unlawful or disproportionate countermeasures".

23. Subsequently, in the ILC's debates, Mr. Peter Kabatsi (Uganda) made clear that he was "totally opposed to legalizing unilateral self-help at the international level by one State against another, as that would only serve the interests of the strong against the weak and the rich against the poor". He added that Chapter III of the draft Articles contained passages that, if retained, "would further aggravate the situation of the State against which the countermeasures were directed". Likewise, there were those ILC members who criticized strongly "countermeasures", though not opposing them until the end, despite the negative effects of the resort to them.

24. One of those ILC members (Mr. Julio Barboza) wrote thoughtfully later (in 2003) that "countermeasures" amounting to reprisals faced the prohibition found in General Assembly resolution 2625(XXX). Prevalence was acknowledged to the obligations of protection of the human person, in the International Law of Human Rights and International Humanitarian Law. There is no point at all, – he added, – in "countermeasures", in cases lodged with an international tribunal, which can anyway order provisional measures of protection before delivering its decision on the merits; to resort to "countermeasures" without a test of their legality is a "step backward".

25. This critical point was in effect made also in the remaining debates (in 2000-2001) of ILC members on the matter. Thus, in 2000, Mr. Maurice Kamto (Cameroon) pointed out that he had kept his reservations to "countermeasures", for being "a step backward at a time when the trend was in the opposite direction, towards the regulation of international relations through dispute settlement machinery, including judicial machinery"; this was, in his view, a wrong step taken by the ILC, as there was no basis in general customary law for "countermeasures", being a wrongful resort to sanctions. To him, it should be kept in mind that countermeasures were unduly devised in the late 1970s and early 1980s, considerably weakening the Security Council's authority and expanding "private justice".

26. For his part, on the same occasion in the ILC, Mr. C. John R. Dugard (South Africa) pondered that international lawyers disliked "countermeasures" and reprisals as they were "primitive and lacked the means for law enforcement"; so-called "reciprocal countermeasures" were thus to be rejected. He further warned that "[m]ost countermeasures inevitably had some adverse impact on some human rights, particularly in the social and economic field". Shortly afterward, Mr. Nabil Elaraby (Egypt) also criticized countermeasures for being "highly controversial", and for underlining the "imbalance" and widening "the gap between rich and powerful States and the rest", having thus been "used and abused" in the contemporary world. In the following year of 2001, Mr. James Kateka (Tanzania) likewise declared that he "remained opposed" to countermeasures, as "they continued to be a threat to small and weak States and gave the more powerful States another weapon".

27. At the final stage of consideration of the Draft Articles on State Responsibility, the ILC counted on relevant comments received from States (at the original request from the U.N. General Assembly), reproduced in its *Yearbook* (1998 and 2001). In 1998, Mexico and Argentina presented their criticisms of the inclusion of "countermeasures" thereon. Denmark, on behalf of the Nordic countries, stated that "there is no room for countermeasures where a mandatory system of dispute settlement exists as between the conflicting parties". And the Czech Republic held that "countermeasures are not considered to constitute a 'right' per se of an injured State".

28. Later on, in 2001, China criticized the reference to "countermeasures", and called for "appropriate restrictions on their use". Japan, for its part, likewise warned as to the risk of abuse of "countermeasures", and fully shared "the concern expressed by quite a few States in the VI Committee on the risk of the abuse of countermeasures", which needed "substantial and procedural restrictions". Mexico, for its part, much regretted the decision of inclusion of "countermeasures" into the Draft under consideration, which "would open the way to abuse" which "could aggravate an existing conflict"; the result could be "extremely risky, especially for the weakest States", and such risks should be minimized, avoiding their use "for punitive purposes".

29. Argentina was likewise critical, warning against "the exceptional nature of countermeasures", and the need "to minimize the possibility of abuses". Shortly after the adoption of the ILC's Articles on State Responsibility (2001), the *rapporteur*, Mr. James Crawford, in the commentaries he published, observed critically that the chapter containing countermeasures "was the most controversial aspect of the provisional text adopted in 2000. Concerns were expressed at various levels" (e.g., in relation to the implementation of State responsibility; in respect of obligations not subject to countermeasures; and by reference to the so-called "collective" countermeasures). After recalling that at least one State (Greece) argued that "countermeasures should be prohibited entirely", he added that "the ILC did not endorse that position".

IV. CRITICISMS OF "COUNTER-MEASURES" IN CORRESPONDING DEBATES OF THE VI COMMITTEE OF THE U.N. GENERAL ASSEMBLY

30. Criticisms of countermeasures were, furthermore, firmly expressed in the parallel and corresponding debates of successive sessions (1992-2000) of the VI Committee of the U.N. General Assembly. Thus, e.g., in the debates of 04.11.1992 of the VI Committee, the Delegate of Indonesia (Mr. Abdul Nasier) warned that "countermeasures generally tended to be punitive"; in particular, "armed countermeasures were contrary" to Article 2 (3) and (4) of the U.N. Charter, and, "[a]ccordingly, countermeasures had no place in the law on State responsibility".

31. Other criticisms along the years of debates on the matter in the VI Committee were firmly formulated and sustained by the Cuban Delegation. Thus, in the debates of 05.11.1992, the Delegate of Cuba (Ms. Olga Valdés) warned that in resorting to "reprisals or countermeasures", powerful or rich countries "easily enjoy an advantage over weak or poor countries". She added that they contain "the seeds of aggression", being moreover surrounded by uncertainty; accordingly, they are not desirable in international law.

32. The Cuban Delegation insisted on its position against "countermeasures". Thus, subsequently, in the debates of the VI Committee of 04.12.2000, the Delegate of Cuba (Ms. Soraya Álvarez Núñez) opposed "countermeasures" are being "most controversial", and as amounting to "armed reprisals", involving "collective sanctions or collective interventions". She added that such reprisals "tended to aggravate disputes between States" by resorting to "the wrongful use of force". Such politically motivated tactic was "in violation of the principles of the Charter of the United Nations and [of] international law".

33. There were other strong criticisms by States' representatives of "countermeasures" in the work of the VI Committee of the General Assembly. Thus, e.g., in its debates of 04.11.1993 on the matter, the Delegate of Mexico (Mr. J. Gómez Robledo) warned that "the imposition of unilateral sanctions by one or more States" in reaction to the conduct of another State was a breach of international law, that "might exacerbate international conflicts", and thus all provisions or references to "countermeasures should be deleted".

34. There were other manifestations of criticism of, and opposition to, "countermeasures", in the prolonged debates of the VI Committee of the General Assembly on the matter. For example, in the debates of 13.11.2000, the Delegate of India (Mr. Prem Gupta) strongly criticized that resort of "States to take countermeasures was open to serious abuse", and thus the point should be excluded "altogether from the scope of State responsibility, leaving issues concerning such measures to be dealt with under general international law, especially under the Charter of the United Nations".

35. He added that "countermeasures" were "merely sanctions under another name", which "should not be used to punish a State". The Delegate of India stressed that there was a duty to keep in mind "their humanitarian consequences and the need to protect civilian populations from their adverse effects"; in his understanding, "countermeasures could not be taken and, if taken, must be immediately suspended, if an internationally wrongful act had ceased or if the dispute had been submitted to a court or tribunal with authority to hand down binding decisions".

36. On his part, the Delegate of Pakistan (Mr. Akhtar Ali Kazi) was likewise critical: in the debates of the VI Committee of 05.11.1992, for example, he warned that opinions within the ILC were "divided as to whether provisions on countermeasures should be included in the draft", given the difficulties surrounding them deriving from the "the disparities in the size, power, and level of development of States". "Countermeasures", – he continued, – gave an advantage to "powerful or rich" States over "weak or poor" States; these latter required "particular attention" in the context of "countermeasures", "in order to prevent the regime from becoming a tool of power politics".

37. In the same debates of the VI Committee of 05.11.1992, strong criticisms were also proffered by the Delegate of Algeria (Mr. Sidi Abed), who began by warning that so-called "countermeasures" originated from the practice of "the most powerful" States. "Countermeasures" thus required, – he added, – "the most careful safeguards", taking into account the "*de facto* inequalities between

States" so as to avoid a "questionable" practice leading to "abuses", and to remedy a "situation when the rules of international law were violated".

38. As seen above (parts III and IV), "countermeasures" were heavily criticized throughout the whole preparatory work of the corresponding provisions of the ILC's Draft Articles on State Responsibility. It is somehow surprising and regrettable that, despite all the firm criticisms against them, they counted on supporters for their inclusion in those Draft Articles, without any juridical grounds; it is likewise surprising and regrettable that the ICJ itself referred to "countermeasures" in its Judgment of 25.09.1997 in the case of *Gabčíkovo-Nagymaros Project* (Hungary *versus* Slovakia, paras. 82-85), and again referred to it in the present Judgments of the ICJ of today in the two cases of *ICAOA* and *ICAOB* (para. 49 of both Judgments).

V. THE PREVALENCE OF THE IMPERATIVE OF JUDICIAL SETTLEMENT OVER THE STATE'S "WILL"

39. There were further criticisms to the initiative of consideration of so-called "countermeasures" (cf. *infra*). There are other points to take here into account, e.g., there were, on the other hand, those who, in superficially favoring "countermeasures", appeared clearly oblivious of the earlier lessons of true jurists on the importance of the realization of justice. Once again, in the present case, the ICJ reiterates its view that jurisdiction is based on State consent, which I have always opposed within the Court: in my perception, human conscience stands above *voluntas*.

1. Further Criticisms of So-Called "Countermeasures"

40. Further criticisms of the controversial initiative of considering "countermeasures" were promptly raised from distinct sources. In the mid-nineties (in 1994), e.g., it was timely warned that "[u]nilateral countermeasures" were, "without doubt, extremely difficult and perhaps even dangerous to codify", remaining always "prone to abuse on the part of the strong against the weak". Even a narrative study (of 2000) of the ILC draft, shortly before its adoption, did not prescind from acknowledging "the controversial issue of countermeasures", and the fact that "several members" of the ILC "continued to voice concern that smaller States may suffer the abuse of countermeasures by powerful States".

41. Still earlier (also in 1994), another criticism was advanced recalling that "many [ILC] members shared the concern expressed forcefully by the special *rapporteur* that the unilateral character of countermeasures opens up the possibility of their abuse, especially (but not only) by powerful States". It was then recalled that the ILC, in its *Report* of 1993, criticized that unilateral "countermeasures" were to "the detriment of the principles of equality and justice"; furthermore, they let the deciding State to exercise coercion, to which those in favor of "compulsory dispute settlement" were clearly opposed, focusing on the "common interest" of preventing "their illicit and arbitrary use".

2. Earlier Lessons on the Importance of the Realization of Justice

42. Moreover, may I here add that it is to keep in mind likewise some lessons from a more distant past, identified by learned international jurists, in a distinct and wider horizon. Thus, to recall one early example, in his thoughtful book *La Justice Internationale*, published in 1924, four years after the adoption of the Statute of the old Permanent Court of International Justice (PCIJ), Nicolas Politis, in recalling the historical development from private justice to public justice, advocated for the evolution, at an international level, from optional to compulsory jurisdiction.

43. Subsequently, at the earlier years of the new era of the ICJ, in 1952, A. Truyol y Serra firmly criticized legal positivism, and stressed the importance of general principles of international law, based upon natural law, for the interpretation and application of the norms of the international legal order, thus assuring the realization of justice. He invoked earlier writings, e.g., of A. Verdross, and stressed the relevance of *recta ratio*, for securing what he identified as the universality of the new international law.

44. Still, in the evolving years of the era of the ICJ, Maurice Bourquin pondered, in 1960, that an international dispute may be lodged

with an international tribunal once it comes into existence, irrespectively of any insistence on further exhaustion of diplomatic means or initiatives. Recourse to judicial settlement is attentive to the existence of a disagreement between the parties as to points of law or fact. The existence of the dispute is already established in being submitted to the international tribunal, to "l'empire du droit", even if its object is not necessarily set up in "a clear and definitive manner".

3. Human Conscience above *Voluntas*

45. The Judgment of the ICJ in the present case of *ICAOA* contains several cross-references (in paras. 67, 88, 90, and 93) to its own decisions (Order of 15.10.2008, and Judgment on preliminary objections of 01.04.2011) in the case of *Application of the CERD Convention* (Georgia *versus* Russian Federation). The ICJ reiterates, in the present Judgment, its understanding that "jurisdiction is based on consent" (para. 55). Within the ICJ, I have always expressed my strong criticism of this misunderstanding.

46. May I here recall that in my Dissenting Opinion in the case of *Application of the CERD Convention* (Judgment of 01.04.2011), I firmly criticized the ICJ's majority for reaching, as one of its conclusions, the view that Article 22 of the CERD Convention "imposes preconditions" to be complied with (paras. 142 and 148) before a State could refer a dispute to the ICJ thereunder. In my Dissenting Opinion, I then pondered:

> The fact is that there is no conclusive indication to that effect in the *travaux préparatoires* of the CERD Convention, nor is there any statement as to the existence of a resolutory obligation incumbent upon States Parties, to do all they can to settle their disputes previously by negotiation before they can seize the ICJ. Resort to negotiation was generally referred to as a factual *effort* or *attempt* only, rather than as a resolutory obligation (para. 101).

47. I then added that the position of the ICJ's majority in the *cas d'espèce*, as to Article 22 of the CERD Convention, in my perception, "does not stand"; in this connection, I recalled that, in the *travaux préparatoires* of the CERD Convention, there were clearly those "who were sensitive to the regulation of social relations under the CERD Convention, and who favored possible recourse to the ICJ without 'preconditions'" (para. 107).

48. I next recalled that, at an earlier stage of proceedings in the case of the *Application of the CERD Convention* (Georgia *versus* Russian Federation, Provisional Measures of Protection, Order of 15.10.2008), the ICJ held that Article 22 of that Convention does not suggest that formal negotiations thereunder would constitute "preconditions" to be fulfilled before the seising of the ICJ; despite this timely clarification made by the ICJ itself in its Order of 15.10.2008, in its subsequent Judgment (Preliminary Objections, of 01.04.2011) in the same case, – I warned in my Dissenting Opinion, – it "was incomprehensibly made dead letter by the Court itself (para. 129), which thus ran against and deconstructed its own *res interpretata*" (paras. 112 and 114).

49. I expressed regret as to the outcome of the ICJ's decision in the case of the *Application of the CERD Convention* (01.04.2011), with "the ineluctable consequence of inaptly and wrongfully giving pride of place to State consent, even above the fundamental values at stake, underlying the CERD Convention, which call for the realization of justice" (para. 202). I then again warned that the ICJ "cannot keep on privileging State consent above everything, time and time again, even after such consent has already been given by States at the time of ratification" of human rights Conventions (para. 205).

50. It is further to be kept in mind, – I proceeded, – the "humanist optics" whereby "the *justiciable* are, ultimately, the human beings concerned" (well in keeping with the creation itself of the PCIJ and the ICJ); thus, "to erect a mandatory 'precondition' of prior negotiations for the exercise of the Court's jurisdiction amounts to erecting, in my view, a groundless and most regrettable obstacle to justice" (para. 208). And I then at last pondered, on this particular issue, that

> The Court cannot remain a hostage of State consent. It cannot keep displaying an instinctive and continuing search for State consent, (...) to the point of losing sight of the imperative of realization of justice. The moment State consent is manifested is when the State concerned decides to become a party to a treaty, – such as the human rights treaty in the present case, the CERD Convention. The hermeneutics

> and proper application of that treaty cannot be continuously subjected to a recurring search for State consent. This would unduly render the letter of the treaty dead, and human rights treaties are meant to be living instruments, let alone their spirit.
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> (…) As this [tragedy] persists, being seemingly proper to the human condition, the need also persists to *alleviate* human suffering, by means of the *realization of justice*. This latter is an imperative which the World Court is to keep in mind. This goal – the realization of justice – can hardly be attained from a strict State-centered voluntarist perspective, and a recurring search for State consent. This Court cannot, in my view, keep on paying lip service to what it assumes as representing the State's "intentions" or "will". (…)
>
> In the present Judgment, the Court entirely missed this point: it rather embarked on the usual exaltation of State consent, labeled, in paragraph 110, as 'the fundamental principle of consent'. I do not at all subscribe to its view, as, in my understanding, consent is not "fundamental", it is not even a "principle". What is 'fundamental', i.e., what lays in the *foundations* of this Court, since its creation, is the imperative of the *realization of justice*, by means of compulsory jurisdiction. State consent is but a rule to be observed in the exercise of compulsory jurisdiction for the realization of justice. It is a means, not an end, it is a procedural requirement, not an element of treaty interpretation; it surely does not belong to the domain of the *prima principia*. This is what I have been endeavoring to demonstrate in the present Dissenting Opinion (paras. 198, 209, and 211).

51. The awareness of the importance of the imperative of judicial settlement of international disputes for the realization of justice and its prevalence over the State's "will", found support in international legal thinking as from the beginning of the era of international tribunals (cf. *supra*). Furthermore, international law, since its historical origins, has been a law of nations, a *droit des gens*, and not a strictly inter-State law; the human person was considered from the start as a subject of law. In effect, the historical process of the *humanization* of the law of nations has stressed the relevance of the international legal titularity of the human being, the centrality of which corresponds to the new *ethos* of our times.

52. The fidelity to the original lessons and legacy of the "founding fathers" of the law of nations (part VI, *infra*) accounts for the reconstruction and evolution of the *jus gentium* in our times, in conformity with the *recta ratio*, as a new and truly *universal law of humankind*. It is thus more sensitive to the identification and realization of superior common values and goals, concerning humankind as a whole. The historical trajectory of the new *jus gentium* of our times calls for our attention, keeping in mind the factual context of the two present cases (ICAOA and ICAOB) before the ICJ.

53. Before turning to the examination of this historical formation and development of the new *jus gentium*, may I here recall that in the present cases of *ICAOA* and *ICAOB*, the appellant States have asserted (in their second ground of appeal) that the ICAO Council "erred in fact and law in rejecting [their] first preliminary objection in respect of the competence of the ICAO Council". The appellant States have thus requested the Court to adjudge that the Council did not have jurisdiction to entertain Qatar's application submitted to the ICAO Council.

VI. INTERNATIONAL LEGAL THINKING AND THE PREVALENCE OF HUMAN CONSCIENCE (*RECTA RATIO*) OVER THE "WILL"

54. Keeping all this in mind, may I now recall here that the identification of *recta ratio* flourished in this historical humanization of the law of nations as from the writings of its "founding fathers" at the XVIth. and XVIIth. centuries, focusing the emerging new *jus gentium* in the realm of natural law. This evolution found inspiration in the much earlier scholastic philosophy of this outlook, in particular in the Aristotelian-stoic-thomist conception of *recta ratio* and justice, which conceived human beings as endowed with intrinsic dignity. The *recta ratio* came to be seen as indispensable to the prevalence of the law of nations itself. It was Cicero who effectively formulated the best-known characterization of *recta ratio*, even if its roots go back to the thinking of ancient Greeks (Plato and Aristotle), corresponding to its *orthos* logos.

55. In conformity with the principles of *recta ratio*, each subject of law is to behave with justice, as such principles emanate from human

conscience, asserting the ineluctable relationship between law and ethics. Natural law reflects the dictates of *recta ratio*, where justice has its foundations. In his ancient time, M.T. Cicero attributed (in *De Republica*, book III, ch. XXII, para. 33) to *recta ratio* perennial validity, extending to all nations in all epochs. In his well-known *De Legibus* (*On the Laws*, book II, *circa* 51-43 b.C.), he pondered that nothing was "more destructive" than "the use of violence in public affairs". Cicero left a relevant legacy to the "founding fathers" of the law of nations, in situating the *recta ratio* in the foundations of the *jus gentium* itself.

56. The classical *jus gentium* of Roman law, in transcending with the passing of time its origins of private law, was wholly transformed, in associating itself with the emerging law of nations, – to what decisively contributed the writings of the "founding fathers" of this latter, particularly those of F. Vitoria, F. Suárez, A. Gentili, H. Grotius, C. Bynkershoek, S. Pufendorf and C. Wolff, among others. The new *jus gentium*, as from the XVIth. and XVIIth. centuries came to be associated with humankind itself, engaged in securing its unity and in attending its needs and aspirations, in conformity with an essentially universalist conception.

57. The *jus communicationis* of F. de Vitoria, e.g., was conceived as a law for all human beings. Thus, already in the XVIth. and XVIIth. centuries, to F. de Vitoria and F. Suárez the emerging State was not an exclusive subject of the law of nations, which comprised moreover peoples and individuals; humankind was taken into account even before the emerging States. The international legal order was *necessary* rather than "voluntary", with *recta ratio* in its foundations.

58. It may here be recalled that, in the XVIth. century, in his well-acclaimed *Relecciones Teológicas* (1538-1539), F. de Vitoria sustained, as to the legal order, that the international community (*totus orbis*) has primacy over the "will" of each individual State; furthermore, it is coextensive with humankind itself. The new *jus gentium* secured the unity of *societas gentium* and provided the foundations – emanating from a *lex praeceptiva* of natural law – for the *totus orbis*, susceptible of being found by the *recta ratio* inherent to humankind. The way was thus paved for a universal *jus gentium*, for the apprehension by reason of *jus gentium* as a true *jus necessarium*, transcending the limitations of the *jus voluntarium*.

59. From the whole work of F. de Vitoria, and in particular, from his *Relectio De Indis Prior*, the conception emerged of a *jus gentium* entirely emancipated from its origin of private law – in Roman Law, – endowed with a humanist vision, at a universal level. Furthermore, reparation for violations of human rights came to reflect an international need assisted by the law of nations, in conformity with the *recta ratio*, with the same principles of justice applying to emerging States as well as to individuals or peoples forming them. In echoing likewise the universalist vision of the law of nations, A. Gentili (author of *De Jure Belli*, 1598), sustained, at the end of the XVIth. century, that it is the Law that regulates the relationship between the members of the universal *societas gentium*.

60. In the XVIIth. century, in the vision of Francisco Suárez (author of *De Legibus ac Deo Legislatore*, 1612), the subjects of law (emerging States and others) needed a universal legal system to regulate their relations as members of the universal community. The new *jus gentium* is formed by the uses and customs common to humankind, being conformed by natural reason for the humankind as a whole as a universal law. F. Suárez also drew attention to the precepts of *jus gentium* encompassing equity and justice, in the whole harmony with natural law, wherefrom its norms emanate disclosing its truly universal character.

61. The contribution of F. de Vitoria and F. Suárez, from the Spanish theological school to the consolidation of the new *jus gentium* was clear. On his part, F. de Vitoria sought to adapt the Thomist thinking to the historical reality of the XVIth. century, while F. Suárez presented a formulation of the matter which paved the way for the work of H. Grotius. One and the other, F. de Vitoria and F. Suárez, set up the bases of the law of universal application (*commune omnibus gentibus*), of law for humankind as a whole.

62. In the conception of *jus gentium* of H. Grotius (*De Jure Belli ac Pacis*, 1625), it is made clear that the State is not an end in itself, but a means to secure the social order, and to perfect civil society which "comprises the whole of humankind" . The State is to pursue the common good, respectful of the rights of human beings; in his view, the *raison d'État* has limits, and the rights of individuals can be

protected against their own State. The writings of H. Grotius make it clear that one cannot pretend to base the international community itself on the *voluntas* of each State individually.

63. H. Grotius sustained that international relations were subject to the legal norms, and not to the *raison d'État*, which is incompatible with the existence itself of the international community: this latter cannot prescind from Law. In this line of thinking, Samuel Pufendorf (author of *De Jure Naturae et Gentium*, 1672) likewise identified natural law itself with *recta ratio*. On his turn, Christian Wolff (author of *Jus Gentium Methodo Scientifica Pertractatum*, 1749), pondered that, as individuals have to promote the common good, the State has, on its turn, the correlative duty to seek its perfection.

64. Following that, the personification of the powerful State, inspired in the legal philosophy of G.W.F. Hegel, had unfortunately a most regrettable influence upon international law by the end of the XIXth century and in the first decades of the XXth. century. Regrettably, the universal outlook and the legacy of the "founding fathers" of international law (*supra*) were discarded by the emergence of legal positivism, endowing States with a "will" of their own and reducing the rights of human beings to those "granted" by States.

65. Voluntarist positivism, grounded on the consent or "will" of States, became the predominant criterion, denying *jus standi* to human beings, and envisaging a strictly inter-State law, no longer *above* but *between* sovereign States. It resisted the ideal of the emancipation of human beings and their recognition as subjects of international law, keeping them under the absolute control of the State. Yet, the idea of the absolute State sovereignty (with which legal positivism aligned itself, ineluctably subservient to power), which led to the irresponsibility and the alleged omnipotence of the State, not impeding the successive atrocities committed by it against human beings, with the passing of time became entirely groundless, as the disastrous consequences of such distortion had become widely known.

66. The truth is that, from the "founding fathers" of the law of nations grounded on the *recta ratio* until our times, the jusnaturalist thinking in international law has never faded away; it overcame all crises, in its perennial reaction of human conscience against successive atrocities committed against human beings, which regrettably counted on the subservience and cowardice of legal positivism. It could be argued that the contemporary world is entirely distinct from that of the epoch of the "founding fathers" of the law of nations, who supported a *civitas maxima* ruled by the *droit des gens*.

67. Even if one has two distinct world scenarios (no one would contest it), there is no way to deny that the human aspiration remains the same, namely, that of the construction of an international legal order applicable both to States (and international organizations) as well as to individuals, pursuant to certain universal standards of justice, and concerning humankind as a whole. As from the initial influence of the thinking of F. de Vitoria (*supra*), a "continuing revival" of natural law, which has never faded away, has been constantly identified. Rather than being a return to classical natural law, it is a reassertion or restoration of a standard of justice, whereby positive law is reconsidered, – bearing in mind the conservationist view and the degeneration of legal positivism attached to the *status quo*, in its typical subservience to power.

68. The "continuing revival" of natural law strengthens the safeguard of the universality of the rights inherent to all human beings, – overcoming self-contained positive norms, deprived of universality for varying from one social *milieu* to another. Those universal rights stand against the arbitrary manifestations of State power, in acknowledgment of the importance of fundamental principles of international law, which have so much been influencing the evolution, along with more than the last seven decades, of the International Law of Human Rights.

69. To rescue and sustain nowadays the legacy of the evolving *jus gentium* – as I have been caring to do already for years, – amounts to keep on safeguarding the universalist conception of international law, turned to the unsafe world wherein we live. It remains essential to keep in mind the objective and necessary international law, emanating from the *recta ratio*, giving expression to universal values, and advancing a wide conception of international legal personality (including human beings, and humankind as a whole); this can render viable to address more adequately the problems facing the *jus gentium* of our times, the international law for humankind.

70. States cannot discriminate or tolerate situations to the detriment of migrants (even the undocumented ones), and ought to secure access to justice to any person, irrespective of his or her migratory status, as well as to oppose successive and systematic restrictions. Contemporary international law counts on the mechanisms of protection of human beings in situations of adversity (International Law of Human Rights, International Humanitarian Law, International Law of Refugees) as well as the operation of the Law of International Organizations. Moreover, it counts on the multiple international tribunals, engaged in the realization of justice. The advances of the international legal order correspond to the awareness of human conscience to the need for realization of the common good and justice.

71. Awareness of, and respect for, the fundamental principles of international law are essential for the prevalence of rights. The positivists mistakenly identified the principles with the norms emanating therefrom, indulging into the confusion between what it is (*Sein*) and what it should be (*Sollen*). They opted for a static vision of the world, entirely ignoring its temporal dimension; moreover, they isolated Law from other areas of human knowledge. Regrettably, positivists and "realists" are numerous today, which accounts for the worrisome decline in the cultivation of the knowledge of Law. They remain oblivious of the fact that the use of force projects itself, leading to the decomposition of the social tissue, and to the grave violations of human rights and International Humanitarian Law, – opening wounds which will require generations to heal.

72. One cannot simply resort to violence utilizing its own methods. Legal positivism and "realism" have regrettably been invariably subservient to power, unable to understand and accept the profound transformations of contemporary international law in seeking the realization of the imperatives of justice. Whenever their minimization prevailed the results have been disastrous. The emancipation of human persons *vis-à-vis* their own State and the emancipation of peoples in the law of nations have occurred before the lack of awareness of legal positivists and "realists", who wrongly pretended that the reality over which they worked was permanent and unavoidable; what actually occurred was that with perplexity before the changes, they had to move from one historical moment to another one, entirely different.

73. In my perception, their basic mistake has been their minimization of the *principles*, which lie on the foundations of any legal system (national and international), and which inform and conform the new legal order in the search for the realization of justice. May I here recall that, as Jacques Maritain rightly warned already in 1940, the temporal dimension of social facts and the imperatives of ethics and justice, together with the general principles of law (the principles of natural law) are to be kept in mind, so as to construct a new international legal order in opposition to violence and the use of force.

74. Voluntarist positivism was unable to explain the process of the formation of the norms of general international law. And "realists" focused themselves only on the conduct of States (even when unlawful) as a "permanent factor", – as criticized by Hersch Lauterpacht, – which led them soon to "disapprove" the idea of collective security, early in the era of the United Nations; they could only see interests and advantages, and did not seem to believe in human reason, in *recta ratio*, not even in the capacity of human beings to extract lessons from historical experience.

VII. THE UNIVERSAL JURIDICAL CONSCIENCE IN THE REJECTION OF VOLUNTARISM AND "COUNTERMEASURES"

75. For those who dedicate themselves to the law of nations, it has become evident that one can only properly approach its foundations and validity as from *universal juridical conscience*, in conformity with the *recta ratio*. In my understanding, the true jusinternationalist thinking conceives international law as being endowed with its own intrinsic value and being thus certainly superior to a simple "voluntary" law. It derives its authority from the *recta ratio* itself (*est dictatum rectae rationis*), which has always called for a truly universal law of nations.

76. As just seen (part VI, *supra*), the evolution itself of the law of nations has disclosed the prevalence of human conscience (*recta ratio*) over the "will" (*supra*). By contrast, legal positivism statically focused rather on the "will" of States. Humankind as a subject of international law cannot at all be restrictively

visualized from the optics of States only; definitively, what imposes itself is to recognize the limits of States as from the optics of humankind, this latter likewise being a subject of contemporary international law.

77. It is clear that human conscience stands well above the "will". The emergence, formation, development, and expansion of the law of nations (*droit des gens*) are grounded on the *recta ratio* and are guided by general principles of law and human values. Law and justice are interrelated, they evolve together. It is regrettable that the great majority of practitioners in international law overvalue the "will" of the contending parties, without realizing the importance of fundamental principles and superior human values.

78. Voluntarism and positivism have by themselves rendered a disservice to international law. So-called "countermeasures" are an example of deconstruction ensuing therefrom, which should not appeal in legal practice. It is regrettable that, in the present proceedings, as seen (*supra*), the appellant States invoked "countermeasures" in both cases of *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (*ICAOA* case), as well as of *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement* (*ICAOB* case), – an initiative that could and should have been avoided and is not to be repeated.

VIII. LAW AND JUSTICE INTERRELATED: GENERAL PRINCIPLES OF LAW IN THE FOUNDATIONS OF THE NEW *JUS GENTIUM*

79. In sequence, there are some remaining interrelated points to be here addressed, so as to complement the present considerations, namely: first, basic considerations of humanity in the *corpus juris gentium*; secondly, human suffering and the need of protection to victims; and thirdly, the interrelationship between law and justice orienting jurisprudential construction. After all, to the jurist is reserved a role of crucial importance in the current strengthening of the construction, in conformity with the *recta ratio*, of the new *jus gentium* of our times, the *universal law of humankind*.

1. Basic Considerations of Humanity in the *Corpus Juris Gentium*

80. In a historical perspective, as seen, two (legal) reasonings can be perceived: one, attentive to principles and values, to the ineluctable interrelationship between law and justice; the other, attentive to authority and imposition or control, to the ineluctable relationship between law and power. The law of nations, with the *Leitmotiv* I have identified for so many years, conforms a *corpus juris gentium* nowadays orienting law and justice together to the satisfaction of the needs and aspirations of human beings, of peoples, and humankind as a whole. On the basis of the experience accumulated in recent decades, there is no reason for limitation to positive (international) law. The international community cannot prescind from universal values.

81. The traditional inter-State outlook of international law has surely been overcome, with the expansion of international legal personality encompassing nowadays, besides States, international organizations, individuals and peoples, as well as humankind. The conditions are thus met for keeping on advancing the construction of a new *jus gentium*, keeping in mind the social needs and aspirations of the international community (*civitas maxima gentium*), of humankind as a whole, so as to provide responses to fulfill them. Moreover, it is essential to acknowledge the importance of fundamental principles of international law, in light of the universal conception of the law of nations.

82. Contemporary international law bears witness of legitimate concern of the international community as a whole with the conditions of living of peoples everywhere. This new *jus gentium* of our days contains basic considerations of humanity in the whole *corpus juris* of contemporary international law, reflecting the humanization of this latter. This evolution, in the lines of the continued universalization and humanization of the law of nations, is faithful to the thinking of the "founding fathers" of the discipline (*supra*), attentive nowadays to the needs and aspirations of the international community, and humankind as a whole.

2. Human Suffering and the Need of Protection to Victims

83. The evolving law of nations cannot make abstraction of human cruelty, as it has to extend protection to those victimized by injustice and human suffering. In this connection, may I recall that, in the mid-XXth. century, shortly after the II world war, a learned historian, A. J. Toynbee observed that the works of artists and academicians "outlive the deeds of businessmen, soldiers, and statesmen", and further pondered that

> (...) The ghosts of Agamemnon and Pericles haunt the living world of today by the grace of the magic words of Homer and Thucydides (...). The experience that we were having in our world now had been experienced by Thucydides in his world already. (...) The prophets, through their own experience, anticipated Aeschylus' discovery that learning comes through suffering – a discovery which we, in our time and circumstances, have been making too. (...) Civilizations rise and fall and, in falling, give rise to others (...).

84. Warning that "the atom bomb and our many other new lethal weapons are capable, in another war, of wiping out not merely the belligerents but the whole of the human race", A.J. Toynbee added that

> (...) In each of (...) civilizations, mankind (...) is trying to rise above mere humanity (...) towards some higher kind of spiritual life. (...) The goal (...) has never been reached by any human society. It has, perhaps, been reached by individual men and women. (...) But if there have been a few transfigured men and women, there has never been such a thing as a civilized society. Civilization, as we know it, is a movement and not a condition, a voyage, and not a harbor. No known civilization has ever reached the goal of civilization yet. (...).

85. A. J. Toynbee then regretted that "contradictions and paradoxes in the life of the world" at that time looked like "symptoms of serious social and spiritual sickness". And he concluded that "man's only dangers (...) have come from the man himself"; after all, the truth facing us is that "in this world, we do learn by suffering", and that "life in this world is not an end in itself and by itself". Such were his words in 1948, as a learned and sensitive historian. By that time the law of nations was already engaged in assuring the vindication of the rights of human beings also at the international level.

86. In effect, in the same year of 1948, – may I here recall, – the law of nations itself expressed concern for humankind, as exemplified by the adoption, successively, in that same year, e.g., of the OAS American Declaration of the Rights and Duties of Man (adopted on 02.05.1948), of the U.N. Convention against Genocide (adopted on 09.12.1948), and of the U.N. Universal Declaration of Human Rights (adopted on 10.12.1948). The International Law of Human Rights was, at last, seeing the light of the day, enhancing the position of human beings and their inherent rights in the *corpus juris gentium* from those historical moments onwards.

3. THE INTERRELATIONSHIP BETWEEN LAW AND JUSTICE ORIENTING JURISPRUDENTIAL CONSTRUCTION.

87. Along the time, it has remained necessary to avoid the undue and regrettable divorce between *law* and *justice*, which legal positivists had incurred into (*summum jus, summa injuria*). In historical perspective, may I here further recall that, in her times, Simone Weil, in some of her last pages (*Écrits de Londres / Escritos de Londres*, 1943) before her premature death, pointed out that the ancient Greeks, who were not familiar with the notion of *law* (finding no words for it), concentrated thus on *justice*.

88. One decade earlier, Simone Weil had written her book *Réflexions sur les causes de la liberté et de l'oppression sociale* (1934), wherein, after recalling the lessons found in Homer's *Iliad* (VIIIth. century b.C.), then warned that "the essential evil of humankind" ("le mal essentiel de l'humanité") is "la substitution des moyens aux fins"; human history thus distorted, – she proceeded, – becomes subjection ("asservissement"), and such an oppression presents "rien de providentiel", it reflects a struggle for power, wherein construction and destruction are intermingled (pp. 41-43 and 46). S. Weil further pondered that

> Toute société oppressive est cimentée par cette religion du pouvoir, qui fausse tous les rapports sociaux en permettant aux puissants d'ordonner au-delà de ce qu'ils

> peuvent imposer; il n'en est autrement que dans les moments d'effervescence populaire, moments où au contraire tous, esclaves révoltés et maîtres menacés, oublient combien les chaînes de l'oppression sont lourdes et solides.

89. Also in our days, legal positivists do not appear to be aware even of the dangers of the unbalance between *law* and *justice* in their own outlook. They can behold only the first one, – law, – in their characteristic subservience to the established power. The results have been regrettable, if not tragic. All those devoted to international law in its universality feel bound to care constantly that *law and justice* are not at all put apart, they are interrelated and advance together. After all, it is in jusnaturalist thinking that the notion of *justice* has always occupied a central position, orienting *law* as a whole. In my own perception and conception, *justice* is found, in sum, at the beginning of all *law*, being, moreover, its ultimate end.

90. The law of nations can only be properly considered together with its foundations, and its basic principles that permeate its whole *corpus juris*, in line with natural law thinking. This has been sustained, along the decades, e.g., by the most lucid Latin American doctrine of international law, from its earlier manifestations in the XIXth. century, until nowadays at the end of the second decade of the XXIst. century. As I have been sustaining along the years, basic principles give expression to the values and ultimate ends of the international legal order,

> so as to guide it and to protect it against the incongruences of State practice, and to fulfill the needs of the international community itself. The principles referred to, is emanating from the human conscience and not from the "will" of States, give expression to the idea of *objective* justice (in the best line of jusnaturalist thinking), to the benefit of the international community as a whole.

91. In effect, I have been making this point along the years in the case-law of the ICJ. For example, one decade ago, in my lengthy Separate Opinion in the ICJ's Advisory Opinion (of 22.07.2010) on the *Declaration of Independence of Kosovo*, I singled out, *inter alia*, the relevance of the general principles of international law in the framework of the Law of the United Nations, and in relation to the *human ends* of the State (paras. 177-211), leading furthermore to the overcoming of the strictly inter-State paradigm in contemporary international law. I have recently done so again, in my Separate Opinion in the ICJ's Advisory Opinion (of 25.02.2019) on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (para. 292).

92. Likewise, on another occasion, in my extensive Dissenting Opinion in the ICJ's Judgment (of 01.04.2011) in the case concerning the *Application of the Convention on the Elimination of All Forms of Racial Discrimination* (Georgia *versus* Russian Federation), – in which the Court found it had no jurisdiction to examine the application, – I strongly criticized the ICJ's "outdated voluntarist conception" (emphasizing State consent) and drew attention to "the imperatives of the realization of justice at an international level" (para. 44, and cf. para. 127). After addressing the need "to overcome the vicissitudes of the 'will' of States" (paras. 188-189), I stressed the importance of general principles of law and fundamental values, standing well above State consent (para. 194).

93. I further pointed out that the compromissory clause (Article 22) of the aforementioned Convention should have been interpreted by the ICJ taking into account its nature and material content, in addition to the object and purpose of the Convention, as a human rights treaty (paras. 64-118); as it did not do so, it did not contribute to the realization of justice in the *cas d'espèce*. As I warned in my lecture at the Hague Academy of International Law in 2017, "la position fondamentale d'un tribunal international ne peut être que principiste, sans faire de concessions injustifiées au volontarisme des États". And I added that the general principles of international law inform and conform the norms and rules of the law of nations,

> étant une manifestation de la conscience juridique universelle; dans le *jus gentium* en évolution, les considérations fondamentales de l'humanité jouent un rôle de la plus haute importance.

94. More recently, the issue again marked its presence in respect of the interrelationship between law and justice orienting jurisprudential construction. In my extensive Separate Opinion appended to the ICJ's aforementioned Advisory

Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (of 25.02.2019), I have *inter alia* strongly criticized any attempt to limit the meaning and scope of application of general principles of law; I have pondered that

> The addition, in Article 38(1)(c) of the PCIJ/ICJ Statute, to general principles of law, of the qualification 'recognized by civilized nations', was, in my perception, distracted, done without reflection and without a minimal critical spirit, – keeping in mind that in 1920, in 1945, and nowadays, it was and remains impossible to determine which are the 'civilized nations'. No country is to consider itself as essentially 'civilized'; we can only identify the ones which behave in a 'civilized' way for some time, and while they so behave.
>
> In my view, the aforementioned qualification was added to the 'general principles of law' in Article 38 of the Statute of the PCIJ in 1920 by mental lethargy and was maintained in the Statute of the ICJ in 1945, wherein it remains until now (beginning of 2019), by mental inertia, and without a critical spirit. We ought to have some more courage and humility, much needed, in relation to our human condition, given the notorious human propensity to unlimited cruelty. From the ancient Greek tragedies to contemporary ones, human existence has always been surrounded by tragedy. Definitively, there do not exist nations or countries 'civilized' *per se*, but only those which behave in a civilized way for some time, and while they so behave (paras. 293-294).

95. Very recently, in the case of *Application of the Convention for the Suppression of the Financing of Terrorism and of the Convention on the Elimination of All Forms of Racial Discrimination* (preliminary objections, Judgment of 08.11.2019, Ukraine *versus* Russian Federation), I have pointed out, in my Separate Opinion, that

> The prevalence of human beings over States marked presence in the writings of the "founding fathers" of the law of nations, already attentive to the need of redress for the harm done to the human person. This concern mark presence in the writings of the "founding fathers" of the XVIth. century, namely: Francisco de Vitoria (Second *Relectio* – *De Indis*, 1538-1539); Juan de la Peña (*De Bello contra Insulanos*, 1545); Bartolomé de Las Casas (*De Regia Potestate*, 1571); Juan Roa Dávila (*De Regnorum Justitia*, 1591); and Alberico Gentili (*De Jure Belli*, 1598).
>
> Attention to the need of redress is likewise present in the writings of the "founding fathers" of the following XVIIth. century, namely: Juan Zapata y Sandoval (*De Justitia Distributiva et Acceptione Personarum ei Opposita Disceptatio*, 1609); Francisco Suárez (*De Legibus ac Deo Legislatore*, 1612); Hugo Grotius (*De Jure Belli ac Pacis*, 1625, book II, ch. 17); and Samuel Pufendorf (*Elementorum Jurisprudentiae Universalis – Libri Duo*, 1672; and *On the Duty of Man and Citizen According to Natural Law*, 1673); and is also present in the writings of other thinkers of the XVIIIth. century. This is to be kept in mind (paras. 40-41).

96. Nowadays we are fortunate to live in the era of international tribunals, created for the exercise of the common mission of realization of justice. Overcoming an outdated State voluntarist conception, they have been contributing to the expansion of international jurisdiction, responsibility, personality, and capacity, to the benefit of humankind, – as I have been pointing out along the years in successive writings. The advances achieved so far are due to the awareness that human conscience stands above the "will".

97. May I here furthermore recall that, in my understanding, an international tribunal is entitled, besides settling disputes, to state what the law is (*juris dictio*), keeping in mind that contemporary international law applies directly to States, international organizations, peoples, and individuals, as well as humankind. It is necessary to keep in mind that

> Le travail des tribunaux internationaux contemporains peut donc être apprécié de la perspective des *justiciables* eux-mêmes. Dans la quête de leur mission commune, des avancées rassurantes ont été accomplies (...) toujours de la perspective des *justiciables*. Il y a là un développement actuel très significatif, qui émane de l'éveil de la conscience humaine à son importance; et comme je l'ai souligné au fil des ans, la conscience humaine est la source *matérielle* ultime de tout droit. (...)

> La coexistence, dans le droit international contemporain, de multiples tribunaux internationaux, a considérablement élargi le nombre de *justiciables*, dans toutes les parties du monde, même dans les conditions les plus défavorables (...). L'opération coordonnée et harmonieuse des tribunaux internationaux contemporains est un signe de notre époque, (...) et de l'espoir dans la construction d'un monde avec plus de justice.

98. After all, the foundations of international law emanate clearly from human conscience, the universal juridical conscience, and not from the so-called "will" of individual States. Judicial settlement nowadays extends itself significantly to all domains of contemporary international law, and the present co-existence of international tribunals has considerably enlarged the number of *justiciables* in all parts of the world even under the most adverse conditions, in an essential and indispensable step to the realization of justice at international level.

99. In effect, in its case-law, the ICJ has not yet devoted sufficient attention to the general principles of law; in my perception, it has unduly given much importance to State "consent", an attitude that I have constantly criticized. In my understanding, general principles of law are in the foundations themselves of international law, being essential for the realization of justice. Moreover, in our times, even the difficulties in the labour of the ICJ in given cases ought to be considered in the larger framework, – besides the expansion of the international *jurisdiction*, – of the concomitant expansion of the international legal *personality* as well as of the international *responsibility*, – and the mechanisms of implementation of this latter.

100. Such expansion (of international jurisdiction, legal personality and capacity, and responsibility), characteristic of our times, comes on its part to foster the encouraging historical process in course of the *humanization* of international law. There have been cases with true advances with the necessary overcoming of persisting difficulties, discarding the dogmas of the past. The rights of the human person have been effectively marking presence also in the framework of the ICJ's traditional inter-State *contentieux*.

IX. EPILOGUE: FINAL CONSIDERATIONS.

101. With these considerations in mind, may I now proceed, last but not least, to a brief recapitulation of the main points that I have deemed fit to make, in the present Separate Opinion, in respect of the lack of foundation of so-called "countermeasures", as raised by the appellant States in the cas d'espèce. *Primus*: It may be recalled that, along the nineties, in the several years of its work on the elaboration followed by the adoption of its Articles on State Responsibility (in 2001), the members of the ILC consumed much time facing some resistance to certain innovations inserted into the draft, in particular that of "countermeasures", found by some participants as not being in accordance with the foundations of the law of nations.

102. *Secundus*: The same occurred in the corresponding debates of delegates in the VI Committee of the U.N. General Assembly, likewise critical of "countermeasures". *Tertius*: The awareness of the importance and the prevalence of the imperative of judicial settlement of international disputes, and the support for the imperative of such prevalence over the State's "will", has found support in international legal thinking as from the beginning of the era of international tribunals.

103. *Quartus*: It is important to keep in mind the reflections on international legal thinking and the prevalence of *recta ratio* (human conscience) over the "will". *Quintus*: In the history of international legal thinking, it is important to keep in mind that the identification of *recta ratio* occurred as from the writings of the "founding fathers" of international law at the XVIth. and XVIIth. centuries, in the realm of natural law. *Sextus*: Each subject of law is to behave with justice, in conformity with the principles of *recta ratio*, which emanate from human conscience, asserting the ineluctable relationship between law and ethics.

104. *Septimus*: Natural law reflects the principles of *recta ratio*, where justice has its foundations. *Octavus*: The legal order of the international community (*totus orbis*) has primacy over the "will" of each individual State, being coextensive with humankind itself. *Nonus*: The new *jus gentium*, securing the unity of *societas gentium*, provided the foundations – emanating from a *lex praeceptiva* of natural law

– for the *totus orbis*, capable of being found by the *recta ratio* inherent to humankind.

105. *Decimus*: On the other hand, as from the end of the XIXth. century and in the first decades of the XXth. century, voluntarist positivism, grounded on the consent or "will" of States, envisaged a strictly inter-State law, ineluctably subservient to power, leading to devastating consequences against human beings. *Undecimus*: The present cases (ICAOA and ICAOB) before the ICJ once again show that international adjudication can only be properly undertaken from a humanist perspective, necessarily avoiding the pitfalls of an outdated and impertinent State voluntarist outlook.

106. *Duodecimus*: *Recta ratio* and the jusnaturalist thinking in international law have never faded away until our times, as a perennial reaction of human conscience against the subservience and cowardice of legal positivism and the breaches of the rights of human beings. *Tertius decimus*: The foundations and validity of the law of nations can only be properly approached as from the *universal juridical conscience*, in conformity with the *recta ratio*.

107. *Quartus decimus*: Human conscience stands well above the "will" of States, and the law of nations is grounded by *recta ratio* and guided by general principles of law and human values. *Quintus decimus*: Voluntarism and positivism have rendered a disservice to international law, and "countermeasures" are an unacceptable deconstruction to be avoided. *Sextus decimus*: The universal rights of human beings stand against the arbitrary manifestations of State power, in acknowledgment of the importance of fundamental principles of international law.

108. *Septimus decimus*: Awareness of, and respect for, the fundamental principles of international law are essential for the prevalence of rights; legal positivists mistakenly identified the principles with the norms emanating therefrom. *Duodevicesimus*: Voluntarist positivism was unable to explain the process of formation of the norms of general international law; in effect, the emancipation of human persons *vis-à-vis* their own State as well as of peoples in the law of nations has occurred even before the lack of awareness of legal positivists.

109. *Undevicesimus*: The evolution of the law of nations conforms to a *corpus juris gentium* that has advanced the prevalence of human conscience (*recta ratio*) over the "will" of States. *Vicesimus*: The present cases (ICAOA and ICAOB) before the ICJ leave it clear that so-called "countermeasures" provide no legal ground whatsoever for any legal action. *Vicesimus primus*: It is essential to remain attentive to universal principles and values, to the ineluctable interrelationship between law and justice; the international community cannot prescind from universal principles and values of the law of nations, in light of the universal conception of the *droit des gens*.

110. *Vicesimus secundus*: General principles of law are a manifestation of the universal juridical conscience. *Vicesimus tertius*: The common mission in the work of contemporary international tribunals can be properly appreciated from the perspectives of the *justiciables* themselves. *Vicesimus quartus*: The law of nations orients nowadays law and justice together, to the satisfaction of the needs and aspirations of human beings, of peoples, and humankind as a whole.

111. *Vicesimus quintus*: The rights of the human person have been effectively marking presence also in the framework of the ICJ's traditional inter-State *contentieux*. *Vicesimus sextus*: *Law* and *justice* are interrelated and advance together; after all, it is in jusnaturalist thinking that the notion of *justice* has always occupied a central position, orienting *law* as a whole. *Vicesimus septimus*: The foundations of international law emanate clearly from human conscience, the universal juridical conscience, and not from the so-called "will" of individual States.

112. *Vicesimus octavus*: On the other hand, legal positivists remain unaware even of the dangers of the unbalance between *law* and *justice* in their own outlook, and do not consider the legal effects of their indifference. *Vicesimus nonus*: The ICJ cannot remain a hostage of State consent; it has to make sure that it is the imperative of realization of justice which prevails. *Trigesimus*: The traditional inter-State outlook of international law has surely been overcome, with the expansion of international legal personality encompassing nowadays, besides States, international organizations, individuals, and peoples, as well as humankind.

113. *Trigesimus primus*: Such expansion, characteristic of our times, – encompassing altogether international jurisdiction, legal personality and capacity, and responsibility,

– comes on its part to foster the encouraging historical process in course of the *humanization* of international law. *Trigesimus secundus*: It is important to keep on believing in human reason, in *recta ratio*, and in the capacity of human beings to extract lessons from historical experience, in the permanent endeavours towards the realization of justice.

114. *Trigesimus tertius*: After all, it is further to be kept in mind that fundamental principles of law lie on the very foundations of the international legal system itself, being essential for the realization of justice. *Trigesimus quartus*: The present cases of *ICAOA* and *ICAOB* reveal the importance of the awareness of the historical formation of the law of nations, as well as of the needed faithfulness of the ICJ to the realization of justice, which clearly prevails over the "will" of States.