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INTRODUCTORY NOTE TO ALLEGED VIOLATIONS OF THE 1955 TREATY OF AMITY, ECONOMIC RELATIONS, AND CONSULAR RIGHTS (ISLAMIC REPUBLIC OF IRAN V. UNITED STATES OF AMERICA): REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES (I.C.J.)

BY ELENA CHACHKO*

[October 3, 2018]

Introduction

On October 3, 2018, the International Court of Justice (ICJ) issued a unanimous order indicating limited provisional measures against the United States. Iran initiated the case, *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. United States)*,[1] after the United States announced its decision to withdraw from the Joint Comprehensive Plan of Action (JCPOA) and revoke related sanctions relief for Iran.[2] While the ICJ found that it had prima facie jurisdiction to hear the case—contrary to the U.S. position—the provisional measures it granted fell significantly short of the relief Iran sought. The Court also hinted that it might accept a significant element of the U.S. jurisdictional objection at the merits stage of the case.

Background

In May 2018, the United States announced its withdrawal from the JCPOA. The 2015 landmark agreement between Iran, the five permanent members of the United Nations Security Council, Germany, and the European Union imposed certain restrictions on Iran's nuclear program in return for international and bilateral sanctions relief.[3] The United States further announced its intention to re-impose bilateral U.S. sanctions lifted under the JCPOA by November 2018. In response, Iran turned to the ICJ. Tehran requested that the Court indicate provisional measures preventing the United States from re-imposing sanctions.

Since the United States withdrew from compulsory ICJ jurisdiction in 1986, Iran cited the 1955 Iran-U.S. bilateral Treaty of Amity, Economic Relations, and Consular Rights as the basis for the Court's jurisdiction.[4] Iran relied on Article XXI(2) of the Treaty of Amity, which grants the ICJ jurisdiction over disputes concerning the "interpretation or application" of the Treaty "not satisfactorily adjusted by diplomacy." Iran argued that it would incur substantial economic harm as a result of the reinstatement of U.S. sanctions. It contended that the United States therefore violated the following provisions of the Treaty of Amity: Article IV(1) (fair and equitable treatment of nationals and companies and their property); Article VII(1) (no restrictions on transfers of funds to or from the territories of the parties); Articles VIII(1), (2), and IX(2) (favorable and reciprocal treatment of imports and exports); and Article X(1) ("[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation").

The United States disputed the Court's jurisdiction under the Treaty of Amity. First, it argued that Iran's claims arise under the JCPOA, which has its own dispute resolution mechanism and never purported to grant jurisdiction to the ICJ. Second, the United States invoked Article XX(1) of the Treaty of Amity, which provides that the Treaty "shall not preclude the application of measures" necessary to protect the parties' "essential security interests," as well as measures "relating to fissionable materials." The United States argued that its withdrawal from the JCPOA and subsequent re-instatement of sanctions were necessary to protect U.S. national security and prevent nuclear proliferation. Consequently, the Treaty of Amity did not apply to these measures, and the ICJ lacked jurisdiction. Finally, the United States argued that Iran failed to pursue a diplomatic solution, thereby failing to meet the adjustment-through-diplomacy requirement of the Treaty of Amity compromissory clause.

It is noteworthy that both the United States and Iran have relied on the Treaty of Amity in past litigation before the ICJ despite the termination of the diplomatic relationship between the two countries after 1979. In *United States Diplomatic and Consular Staff in Tehran*,[5] decided in 1980, it was the United States that invoked the Treaty of Amity against Iran, successfully arguing that Iran had violated its obligations under the Treaty by failing to

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protect U.S. diplomatic and consular staff during the Iran hostage crisis. In 1996, the ICJ accepted jurisdiction in the *Oil Platforms* case *(Iran v. United States of America)* based on Article X(1) of the Treaty of Amity, which addresses freedom of commerce.[6] Another case in which Iran similarly relies on the Treaty of Amity as the basis for the ICJ's jurisdiction, *Certain Iranian Assets (Iran v. United States of America)*, is currently pending before the ICJ. Iran instituted those proceedings largely over the execution of judgments against Iranian property within U.S. jurisdiction. Among other claims based on the Treaty of Amity, Iran argues that the United States violated the international law of state immunity.[7]

The Order

Under ICJ doctrine, a request for the indication of provisional measures must meet three conditions. The requesting party must demonstrate that the Court has prime facie jurisdiction. That party must also establish that the rights they claim are at least plausible and linked to the requested measures, and that there is a real and imminent risk that denying provisional measures would result in irreparable prejudice.

The ICJ first concluded that it had prima facie jurisdiction to hear the case. The Court found that the applicability of the national security exception in Article XX(1) of the Treaty of Amity is a question for the merits stage of the case. Since Article XXI(2) of the Treaty of Amity grants the ICJ jurisdiction over disputes concerning the "interpretation or application" of the Treaty, the very need to examine whether the national security exception applies is sufficient for the Court to accept jurisdiction. That being said, the Court strongly implied that a significant portion of the re-imposed U.S. nuclear sanctions is covered by the national security exception.[8] In addition, the ICJ concluded that the Treaty of Amity compromissory clause does not require negotiations as a precondition for the Court's jurisdiction.

The Court then turned to assessing the plausibility of the rights asserted by Iran and the link between those rights and the measures sought. While the Court found that at least some of Iran's claims might be covered by the national security exception, it held that certain claims would not be—in particular, Iran's claims regarding the impact of sanctions on trade in humanitarian goods and the safety of civil aviation. This includes medications and medical devices, foodstuffs, and maintenance and supporting services for civil aviation.

During the proceedings, the United States indicated that it already has a system of humanitarian exemptions in place, including for safety in civil aviation.[9] It also provided assurances that it would "use its best endeavours" to ensure that humanitarian and civil aviation safety issues receive "full and expedited consideration."[10] Nevertheless, the ICJ found that the aspirational nature of these assurances necessitated the Court's intervention.

Finally, the Court construed "irreparable prejudice" as a danger to health and life resulting from the restoration of sanctions.[11] It concluded that the restriction of commerce in humanitarian products and services is capable of causing such damage. This is a fairly constrained view of "irreparable prejudice," focusing on serious risk to the health and lives of individuals rather than the interests of the state of Iran as such and the economic damage it would suffer due to the U.S. withdrawal from the JCPOA.

In light of the foregoing, the Court indicated provisional measures requiring the United States to remove any impediments resulting from re-imposed JCPOA sanctions to the free export to Iran of humanitarian goods and services to ensure civil aviation safety. The Court also ordered the parties to commit to "the non-aggravation of their dispute."

In response to the decision, the United States immediately announced its decision to terminate the Treaty of Amity. At the same time, U.S. Secretary of State Mike Pompeo underscored that exceptions and licensing policies for humanitarian-related transactions that had been in place irrespective of the ICJ's order would remain in effect.[12] According to Article XXIII(3) of the Treaty of Amity, either party may terminate the Treaty by giving one year's written notice. This step is unlikely to affect the two cases involving Iran and the United States currently pending before the Court.

Implications

The provisional relief the ICJ granted to Iran fell far short of what Iran sought, namely, preventing the United States from reinstating nuclear sanctions altogether. The practical consequences of the provisional measures are limited

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given that the United States already had a system of humanitarian exemptions in its Iran nuclear sanctions regime, the Order notwithstanding. Furthermore, the Order does not bode well for Iran's case with a view to the merits. The ICJ seemed willing to accept that the Treaty of Amity's national security exception applies to the vast majority of the nuclear sanctions re-imposed by the United States. This signal from the Court also strengthens the U.S. position in *Certain Iranian Assets*, where the United States similarly argues that the Treaty of Amity's national security exception applies to a significant portion of the measures Iran challenges. The ICJ recently accepted jurisdiction in that case on the basis of the Treaty of Amity, but it excluded any claims under the international law of state immunity—a major component of Iran's argument.[14] While the ICJ is likely to accept jurisdiction in the nuclear sanctions case as it did in *Certain Iranian Assets*, both the Order and the *Certain Iranian Assets* judgment shifted the pendulum in these cases toward the U.S. position going into the merits.

ENDNOTES

1 Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.), Order (Oct. 3, 2018), https://www.icj-cij.org/files/case-related/175/175-20181003-ORD-01-00-EN.pdf [hereinafter Order]. For further analysis of the case, see Elena Chachko, *Treaties and Irrelevance: Understanding Iran's Suit Against the U.S. for Reimposing Nuclear Sanctions*, LAWFARE (July 26, 2018), https://www.lawfareblog.com/treaties-and-irrelevance-understanding-irans-suit-against-us-reimposing-nuclear-sanctions; Elena Chachko, *What to Make of the ICJ's Provisional Measures in Iran v. U.S. (Nuclear Sanctions Case)*, LAWFARE (Oct. 4, 2018), https://www.lawfareblog.com/what-make-icjs-provisional-measures-iran-v-us-nuclear-sanctions-case; Lawrence Hill-Cawthorne, *The ICJ's Provisional Measures Order in Alleged Violations of the 1955 Treaty (Iran v United States)*, EJIL: TALK! (Oct. 3, 2018), https://perma.cc/8TSZ-B8Z7.

2 Remarks by President Trump on the Joint Comprehensive Plan of Action, THE WHITE HOUSE (May 8, 2018), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-joint-comprehensive-plan-action/.

3 The full text of the JCPOA was annexed to S.C. Res. 2231 (July 20, 2015).

4 Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, Aug. 15, 1955, 8 UST 899, TIAS 3853, 284 UNTS 93.

5 United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 ICJ REP. 3 (May 24).

6 Oil Platforms (Iran v. U.S.), Preliminary Objection, Judgment, 1996 ICJ REP. 803 (Dec. 12).

7 *See* Elena Chachko, *Iran Sues the U.S. in the ICJ—Preliminary Thoughts*, LAWFARE (June 18, 2016), https://www.lawfareblog.com/iran-sues-us-icj-—preliminary-thoughts.

8 Order, *supra* note 1, ¶¶ 68–70.

9 *Id.* ¶ 86.

10 *Id.* ¶ 92.

11 *Id.* ¶ 91.

12 Remarks by Michael R. Pompeo, Secretary of State, U.S. DEP'T OF STATE (Oct. 3, 2018), https://www.state.gov/secretary/remarks/2018/10/286417.htm.

13 Certain Iranian Assets (Iran v. U.S.), Preliminary Objections Submitted by the United States of America (May 1, 2017), https://www.icj-cij.org/files/case-related/164/164-20170501-WRI-01-00-EN.pdf.

14 Certain Iranian Assets (Iran v. U.S.), Judgment (Feb. 13, 2019), https://www.icj-cij.org/files/case-related/164/164-20190213-JUD-01-00-EN.pdf.

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[October 3, 2018]

INTERNATIONAL COURT OF JUSTICE

2018
3 October
General List
No. 175

YEAR 2018

3 October 2018

ALLEGED VIOLATIONS OF THE 1955 TREATY OF AMITY, ECONOMIC RELATIONS, AND CONSULAR RIGHTS

(ISLAMIC REPUBLIC OF IRAN *v.* UNITED STATES OF AMERICA)

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

ORDER

Present: *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.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Articles 41 and 48 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court,

Makes the following Order:

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Whereas:

1. On 16 July 2018, the Islamic Republic of Iran (hereinafter referred to as "Iran") filed in the Registry of the Court an Application instituting proceedings against the United States of America (hereinafter referred to as the "United States") with regard to alleged violations of the Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States of America, which was signed at Tehran on 15 August 1955 and entered into force on 16 June 1957 (hereinafter the "Treaty of Amity" or the "1955 Treaty").

2. At the end of its Application, Iran requests the Court to adjudge, order and declare that:

> "a. The USA, through the 8 May and announced further sanctions referred to in the present Application, with respect to Iran, Iranian nationals and companies, has breached its obligations to Iran under Articles IV (1), VII (1), VIII (1), VIII (2), IX (2) and X (1) of the Treaty of Amity;
>
> b. The USA shall, by means of its own choosing, terminate the 8 May sanctions without delay;
>
> c. The USA shall immediately terminate its threats with respect to the announced further sanctions referred to in the present Application;
>
> d. The USA shall ensure that no steps shall be taken to circumvent the decision to be given by the Court in the present case and will give a guarantee of non-repetition of its violations of the Treaty of Amity;
>
> e. The USA shall fully compensate Iran for the violation of its international legal obligations in an amount to be determined by the Court at a subsequent stage of the proceedings. Iran reserves the right to submit and present to the Court in due course a precise evaluation of the compensation owed by the USA."

3. In its Application, Iran seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article XXI, paragraph 2, of the 1955 Treaty.

4. On 16 July 2018, Iran also submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

5. At the end of its Request for the indication of provisional measures, Iran

> "in its own right and as *parens patriae* of its nationals respectfully requests that, pending final judgment in this case, the Court indicate:
>
> a. That the USA shall immediately take all measures at its disposal to ensure the suspension of the implementation and enforcement of all of the 8 May sanctions, including the extraterritorial sanctions, and refrain from imposing or threatening announced further sanctions and measures which might aggravate or extend the dispute submitted to the Court;
>
> b. That the USA shall immediately allow the full implementation of transactions already licensed, generally or specifically, particularly for the sale or leasing of passenger aircraft, aircraft spare parts and equipment;
>
> c. That the USA shall, within 3 months, report to the Court the action it has taken in pursuance of subparagraphs (a) and (b);
>
> d. That the USA shall assure Iranian, US and non-US nationals and companies that it will comply with the Order of the Court, and 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;
>
> e. That the USA shall refrain from taking any other measure that might prejudice the rights of Iran and Iranian nationals and companies under the Treaty of Amity with respect to any decision this Court might render on the merits."

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6. The Registrar immediately communicated to the Government of the United States the Application, in accordance with Article 40, paragraph 2, of the Statute of the Court, and the Request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing of the Application and the Request by Iran.

7. Pending the notification provided for by Article 40, paragraph 3, of the Statute by transmission of the printed bilingual text of the Application to the Members of the United Nations through the Secretary-General, the Registrar informed those States of the filing of the Application and the Request.

8. By letters dated 18 July 2018, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of its Rules, the Court had fixed 27, 28, 29 and 30 August 2018 as the dates for the oral proceedings on the Request for the indication of provisional measures.

9. On 18 July 2018, the Registrar informed both Parties that the Member of the Court of the nationality of the United States, referring to Article 24, paragraph 1, of the Statute, had notified the President of the Court of her intention not to participate in the decision of the case. Pursuant to Article 31 of the Statute and Article 37, paragraph 1, of the Rules of Court, the United States chose Mr. Charles Brower to sit as judge *ad hoc* in the case.

10. Since the Court included upon the Bench no judge of Iranian nationality, Iran proceeded to exercise the right conferred upon it by Article 31 of the Statute to choose a judge *ad hoc* to sit in the case; it chose Mr. Djamchid Momtaz.

11. On 23 July 2018, the President of the Court, acting in conformity with Article 74, paragraph 4, of the Rules of Court, addressed an urgent communication to the Secretary of State of the United States, calling upon the Government of the United States "to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects". A copy of that letter was transmitted to the Agent of Iran.

12. By a letter dated 27 July 2018, the Agent of the United States informed the Court that her Government "strongly object[ed] to Iran's Application on a number of grounds, and consider[ed] that the Court manifestly lack[ed] jurisdiction in respect of this case". She noted, in particular, that "[a]ll the elements of Iran's Application and Request for Provisional Measures [arose] from the Joint Comprehensive Plan of Action", which does not have a compromissory clause conferring jurisdiction on the International Court of Justice. The Agent further stated that "matters of which Iran complain[ed] [were] also outside the scope of the Treaty of Amity [of 1955] and beyond the limited jurisdictional grant provided by Article XXI (2), read in conjunction with Article XX (1), of the Treaty".

13. At the public hearings, oral observations on the Request for the indication of provisional measures were presented by:

On behalf of Iran:	Mr. Mohsen Mohebi,
	Mr. Alain Pellet,
	Mr. Sean Aughey,
	Mr. Samuel Wordsworth,
	Mr. Jean-Marc Thouvenin.
On behalf of the United States:	Ms Jennifer G. Newstead,
	Mr. Donald Earl Childress III,
	Ms Lisa J. Grosh,
	Sir Daniel Bethlehem.

14. At the end of its second round of oral observations, Iran asked the Court to indicate the following provisional measures:

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"(a) the United States shall immediately take all measures at its disposal to ensure the suspension of the implementation and enforcement of all of the 8 May sanctions, including the extraterritorial sanctions, and refrain from imposing or threatening announced further sanctions and measures which might aggravate or extend the dispute submitted to the Court;

(b) the United States shall immediately allow the full implementation of transactions already licensed, generally or specifically, particularly for the sale or leasing of passenger aircraft, aircraft spare parts and equipment;

(c) the United States shall, within 3 months, report to the Court the action it has taken in pursuance of subparagraphs (a) and (b);

(d) the United States shall assure Iranian, U.S. and non-U.S. nationals and companies that it will comply with the Order of the Court, and shall cease any and all statements or actions that would dissuade U.S. and non-U.S. persons and entities from engaging or continuing to engage economically with Iran and Iranian nationals or companies;

(e) the United States shall refrain from taking any other measure that might prejudice the rights of Iran and Iranian nationals and companies under the 1955 Treaty of Amity with respect to any decision this Court might render on the merits."

15. At the end of its second round of oral observations, the United States requested the Court to "reject the request for provisional measures filed by the Islamic Republic of Iran".

*

* *

I. FACTUAL BACKGROUND

16. Starting in 2006, the Security Council of the United Nations adopted a number of resolutions (1696 (2006), 1737 (2007), 1747 (2007), 1803 (2008), 1835 (2008) and 1929 (2010)), following reports by the International Atomic Energy Agency (hereinafter "IAEA") which were critical of Iran's compliance with its obligations under the Treaty on the Non-Proliferation of Nuclear Weapons (ratified by Iran in 1970), calling upon Iran to cease some of its nuclear activities. The Security Council also imposed sanctions in order to ensure compliance. Various States imposed additional "sanctions" on Iran.

17. On 14 July 2015, China, France, Germany, the Russian Federation, the United Kingdom and the United States, with the High Representative of the European Union for Foreign Affairs and Security Policy and the Islamic Republic of Iran, adopted a long-term Joint Comprehensive Plan of Action (hereinafter the "JCPOA" or the "Plan") concerning the nuclear programme of Iran. The declared purpose of that Plan was to ensure the exclusively peaceful nature of Iran's nuclear programme and to produce "the comprehensive lifting of all UN Security Council sanctions as well as multilateral and national sanctions related to Iran's nuclear programme, including steps on access in areas of trade, technology, finance and energy". A Joint Commission was established to monitor the implementation of the JCPOA. The IAEA was requested to monitor and verify the implementation of the voluntary nuclear-related measures, as detailed in the relevant section of the JCPOA.

18. On 20 July 2015, the Security Council of the United Nations adopted resolution 2231 (2015), whereby it endorsed the JCPOA and urged its "full implementation on the timetable established in the JCPOA" (para. 1). In the same resolution, the Security Council provided, in particular, for the termination under certain conditions of provisions of previous Security Council resolutions on the Iranian nuclear issue (paras. 7-9) and set out measures of implementation of the JCPOA (paras. 16-20). The text of the JCPOA is contained in Annex A to Security Council resolution 2231 (2015).

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19. On 16 January 2016, the President of the United States issued Executive Order 13716 revoking or amending a certain number of earlier Executive Orders on nuclear-related "sanctions" imposed on Iran or Iranian nationals.

20. On 8 May 2018, the President of the United States issued a National Security Presidential Memorandum announcing the end of the participation of the United States in the JCPOA and directing the reimposition of "sanctions lifted or waived in connection with the JCPOA". In the Memorandum, the President of the United States indicated that "Iranian or Iran-backed forces have gone on the march in Syria, Iraq, and Yemen, and continue to control parts of Lebanon and Gaza". He further stated that Iran had publicly declared that it would deny the IAEA access to military sites and that, in 2016, Iran had twice violated the JCPOA's heavy-water stockpile limits. The Presidential Memorandum determined that it was in the national interest of the United States to reimpose sanctions "as expeditiously as possible", and "in no case later than 180 days" from the date of the Memorandum. The Memorandum further specified, *inter alia*, that the Secretary of State and the Secretary of the Treasury were to prepare any necessary executive actions to "re-impose sanctions lifted by Executive Order 13716 of January 16, 2016"; to prepare to re-list persons removed, in connection with the JCPOA, from any relevant "sanctions lists", as appropriate; to revise relevant "sanctions regulations"; and to issue limited waivers during the wind-down period, as appropriate.

21. Simultaneously, the United States Department of the Treasury Office of Foreign Assets Control 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".

22. 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.

23. 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

1. General introduction

24. The Court 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, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case (see, for example, *Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 236, para. 15).

25. 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 Treaty of Amity (see paragraph 3 above). 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.

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26. Article XXI, paragraph 2, of the 1955 Treaty provides that:

> "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."

2. EXISTENCE OF A DISPUTE AS TO THE INTERPRETATION OR APPLICATION OF THE TREATY OF AMITY

27. 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 that there exists a dispute between the Parties and that this dispute concerns the "interpretation or application" of the 1955 Treaty.

28. As the Court has repeatedly noted, a dispute between States exists where they hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations (see *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 115, para. 22, citing *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50). The claim of one party must be "positively opposed" by the other (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328).

29. The Court observes that, in the present case, the Parties do not contest that a dispute exists. They differ, however, on the question whether this dispute relates to the "interpretation or application" of the 1955 Treaty.

30. In order to determine whether the dispute between the Parties concerns the "interpretation or application" of the 1955 Treaty, the Court cannot limit itself to noting that one of the Parties maintains that the Treaty applies, while the other denies it (cf. *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1159, para. 47). Rather it 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.

31. Iran contends that the dispute between the Parties concerns the "interpretation or application" of the Treaty of Amity. It maintains that the dispute relates to violations by the United States of its obligations under, in particular, Article IV, paragraph 1 (fair and equitable treatment), Article VII, paragraph 1 (prohibition of restrictions on making of payments, remittances, and other transfers of funds), Article VIII, paragraphs 1 and 2 (granting of most favoured nation treatment for the importation or exportation of products in certain matters), Article IX, paragraphs 2 (granting of national or most-favoured nation treatment of nationals and companies with respect to importation or exportation) and 3 (prohibition of discriminatory measures with regard to the ability of importers or exporters to obtain marine insurance), and Article X, paragraph 1 (freedom of commerce), of the 1955 Treaty. Iran explains that these violations result from the decision of the United States of 8 May 2018 to "re-impose and enforce sanctions" that the United States had previously decided to lift in connection with the JCPOA, as well as from the announcement by the President of the United States that "further sanctions" would be imposed. According to Iran, the Plan itself constitutes merely the context in which the "sanctions" were taken. It insists that the decision of the United States to withdraw from the JCPOA is not the subject-matter of the dispute referred to the Court.

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32. With regard to Article XX, paragraph 1, of the 1955 Treaty, which sets out a list of measures the application of which is not precluded by the Treaty, Iran contends that this provision does not exclude that a dispute as to these measures may concern the "interpretation or application" of the Treaty. Iran argues that such a dispute can arise regarding the application of Article XX, paragraph 1, and can relate to the lawfulness of measures purportedly adopted thereunder. Accordingly, Iran claims, the Court may have jurisdiction over a dispute regarding those measures. Iran recalls that, in its 1996 Judgment on the preliminary objection in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America)*, the Court already found that the 1955 Treaty does not contain any "provision expressly excluding certain matters from the jurisdiction of the Court". Iran further recalls that the Court found that Article XX, paragraph 1, subparagraph *(d)*, which provides that the 1955 Treaty shall not preclude the application of measures necessary, *inter alia*, to protect a Party's essential security interests, did not restrict its jurisdiction in that case, but was confined to affording the Parties a possible defence on the merits to be used should the occasion arise (*I.C.J. Reports 1996 (II)*, p. 811, para. 20). Iran contends that there is no reason in the present case for the Court to depart from its earlier findings, according to which the provisions of Article XX of the 1955 Treaty envisage exceptions to the substantive obligations contained in other Articles of the Treaty rather than to the Court's jurisdiction under Article XXI, paragraph 2, thereof.

33. Iran further argues that, in any event, the "sanctions" announced on 8 May 2018 do not fall under the exceptions contained in Article XX, paragraph 1, subparagraphs *(b)* and *(d)*, of the 1955 Treaty, invoked by the United States. With regard to Article XX, paragraph 1, subparagraph *(b)*, which does not preclude the application of measures "relating to fissionable materials, the radio-active by-products thereof, or the sources thereof", Iran maintains that the "sanctions" do not, in point of fact, relate to fissionable materials and do not concern the sources or by-products thereof. Iran notes that none of the transactions targeted by the "sanctions" concerns those materials. With regard to the exception in Article XX, paragraph 1, subparagraph *(d)*, Iran State invoking it, the provision must be applied in accordance with that State's obligation of good faith. That State must establish that the measures were indeed "necessary to protect its essential security interests". Iran further points out that the allegations made by the United States as to Iran's nuclear-related activities are contradicted by extensive documentation from the Joint Commission and the IAEA. Iran therefore maintains that the United States has not been able to establish that the measures were "necessary to protect its essential security interests".

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34. The United States asserts that the dispute between the Parties does not relate to the "interpretation or application" of the 1955 Treaty. In this regard, the United States first argues that the dispute arose within the framework of, and is exclusively related to, the JCPOA. Secondly, it maintains that the measures announced on 8 May 2018, which constitute the alleged violations of the 1955 Treaty, are covered, in any event, by the exceptions listed in Article XX, paragraph 1, of that Treaty, in particular in subparagraphs *(b)* and *(d)*, and that therefore the dispute falls outside the material scope of the 1955 Treaty.

35. The United States contends that the JCPOA is a distinct multilateral instrument and contains no compromissory clause providing for the jurisdiction of the Court. The United States argues that the decision announced on 8 May 2018 was taken in light of Iran's conduct after the adoption of the JCPOA and was based on national security concerns with respect to specific elements of the Plan. According to the United States, the JCPOA provides for a different mechanism for the settlement of a dispute, which "in text and structure necessarily excludes consent to the jurisdiction of [the] Court in favour of the resolution of the dispute through political channels".

36. With regard to the scope of Article XX, paragraph 1, of the 1955 Treaty, the United States maintains that this Article provides that the Treaty shall not preclude the "application" of the measures enumerated therein and that, as a result, the compromissory clause concerning any dispute about the "interpretation or application" of the Treaty "does not operate with respect to such excluded measures". The United States contends that Article XX, paragraph 1, of the 1955 Treaty is thus an express provision excluding certain measures from the scope of the Treaty and considers that this provision excludes the jurisdiction of the Court over Iran's claims in the present case. In view of this, the United States concludes that there can be no dispute as to the "interpretation or application" of the Treaty with regard to those measures and that, accordingly, the Court has no prima facie jurisdiction.

37. More specifically, with regard to the exception contained in Article XX, paragraph 1, subparagraph *(b)*, relating to fissionable materials, the United States submits that the flexibly worded text leaves considerable space for the full range of measures that might be developed and adopted to control and prevent proliferation of sensitive nuclear materials. The United States contends that the "sanctions" announced on 8 May 2018 are aimed at addressing the shortcomings of the JCPOA in this respect. As to Article XX, paragraph 1, subparagraph *(d)*, the United States considers that it grants "wide discretion" to the invoking State. According to the United States, the reimposition of the nuclear-related economic "sanctions" that were lifted pursuant to the JCPOA is based on a core national security decision, as set out in the Presidential Memorandum of 8 May 2018, and falls within the "essential security" provision.

* *

38. 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 (cf. *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 811-812, para. 21). In general terms, certain acts may fall within the ambit of more than one legal instrument and a dispute relating to those acts may relate to the "interpretation or application" of more than one treaty or other instrument. 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.

39. 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.

40. The Court also notes that, while Iran contests the conformity of the measures adopted with several provisions of the 1955 Treaty, the United States expressly relies on Article XX, paragraph 1, of that Treaty. Subparagraphs *(b)* and *(d)* of that provision read as follows:

> "The present Treaty shall not preclude the application of measures:
>
> . . . . . .
>
> *(b)* relating to fissionable materials, the radioactive by-products thereof, or the sources thereof;
>
> . . . . . .
>
> *(d)* 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."

41. As the Court has had the opportunity to observe in the *Oil Platforms* case, the 1955 Treaty contains no provision expressly excluding certain matters from its jurisdiction. The Court took the view that Article XX, paragraph 1, subparagraph *(d)*, did "not restrict its jurisdiction" in that case. It considered instead that that provision was "confined to affording the Parties a possible defence on the merits to be used should the occasion arise" (see *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 811, para. 20).

42. 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. 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 (see also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222).

43. The Court 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

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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.

44. 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.

3. The issue of satisfactory adjustment by diplomacy under Article XXI, paragraph 2, of the Treaty of Amity

45. 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". In addition, Article XXI, paragraph 2, states that any dispute relating to the interpretation or application of the Treaty shall be submitted to the Court, "unless the [Parties] agree to settlement by some other pacific means". The Court notes that neither Party contends that they have agreed to settlement by any other peaceful means.

* *

46. Iran argues that, with regard to the provision contained in Article XXI, paragraph 2, of the 1955 Treaty that the dispute must not have been "satisfactorily adjusted by diplomacy" before being submitted to the Court, it is sufficient for the Court to take note of the fact that this is the case. It recalls that the Court has already ruled that, in contrast to compromissory clauses contained in other treaties which are differently worded, Article XXI, paragraph 2, of the 1955 Treaty sets out a purely objective condition: the non-resolution of the dispute by diplomatic means.

47. In addition, Iran points out that it sent two Notes Verbales to the Embassy of Switzerland in Tehran (Foreign Interests Section), which serves as the channel of communication between the Governments of the Parties, on 11 June 2018 and 19 June 2018 respectively. Iran observes that, in its Note Verbale of 11 June 2018, it stated, in particular, that the "unilateral sanctions of the United States against Iran [were] in violation of US international obligations [and entail] the international responsibility" of the United States. It underlines that its Note Verbale of 19 June 2018 included an express reference to the obligations of the United States contained in the 1955 Treaty; that Note not only called upon the United States to take all necessary measures to cease immediately its breach of international obligations but also stated that, should the United States not revoke its decision of 8 May 2018 not later than 25 June 2018, Iran would "exercise its legal rights under applicable rules of international law". Iran adds that, contrary to what the United States contends, it is rather unlikely that it did not receive the second Note Verbale until a month later, and after the filing of Iran's Application, since the channel of communication between the two States has usually worked properly. Iran asserts that none of these Notes Verbales ever received a response from the United States, which confirms that the dispute between the two States has not been settled by diplomatic means.

48. Iran maintains that it has fully demonstrated that the dispute has not been "satisfactorily adjusted by diplomacy" within the meaning of Article XXI, paragraph 2, of the 1955 Treaty.

*

49. The United States disagrees with that position. In particular, it claims that an applicant may only bring a claim under Article XXI, paragraph 2, following a genuine attempt to negotiate on the subject-matter of the dispute with the objective of settling the dispute by diplomatic means. The United States further contends that the negotiations must relate to the subject-matter of the Treaty invoked by the Applicant. According to the United States, Iran never afforded the United States an adequate opportunity to consult on alleged violations of the Treaty nor attempted to resolve their claims through diplomacy. The United States observes, in particular, that, of the two Notes Verbales adduced by Iran, only the Note of 19 June 2018 mentions the Treaty and that, moreover, this Note was not received by the United States until 19 July 2018, i.e. after Iran's filing of its Application. In any event, the United States considers that the Iranian Notes Verbales do not constitute a genuine attempt to negotiate, since they did not "suggest a

meeting . . . propose when or how to meet, and [did] not even ask the United States to respond". It adds that, at the highest political levels, the United States "stands ready to engage with Iran in response to a genuine initiative to address the issues of acute concern to the United States".

* *

50. The Court recalls that Article XXI, paragraph 2, of the 1955 Treaty is not phrased in terms similar to those used in certain compromissory clauses of other treaties, which, for instance, impose a legal obligation to negotiate prior to the seisin of the Court (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 130, para. 148). Instead, the terms of Article XXI, paragraph 2, of the 1955 Treaty are descriptive in character and focus on the fact that the dispute must not have been "satisfactorily adjusted by diplomacy". Thus, there is no need for the Court 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 (see *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, pp. 210-211, para. 107).

51. In the present case, the communications sent by the Government of Iran to the Embassy of Switzerland (Foreign Interests Section) in Tehran (see paragraph 47) 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.

4. Conclusion as to prima facie jurisdiction

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

53. The power of the Court 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 (see, for example, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 126, para. 63).

54. At this stage of the proceedings, the Court is thus not called upon to determine definitively whether the rights which Iran wishes to see preserved exist; it need only decide whether the rights claimed by Iran on the merits and which it is seeking to preserve, pending the final decision of the Court, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested (*ibid.*, p. 126, para. 64).

* *

55. Iran contends that the rights it seeks to protect under the 1955 Treaty are plausible in so far as they are grounded in a possible interpretation and in a natural reading of the Treaty. In addition, Iran argues that the evidence before the Court establishes that the "sanctions" reimposed following the decision of the United States of 8 May 2018 constitute a violation of Iran's rights under the Treaty.

56. In particular, Iran invokes Article IV, paragraph 1, of the 1955 Treaty, which provides for the fair and equitable treatment for Iranian nationals and companies as well as for their property and enterprises, prohibits unreasonable or discriminatory measures that would impair the legally acquired rights (including contractual rights) and

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interests of Iranian nationals and companies, and requires the United States to ensure that the lawful contractual rights of Iranian nationals and companies are afforded effective means of enforcement. According to Iran, the "sanctions", such as those contained in Section 1 (ii) of Executive Order 13846 of 6 August 2018, which are to be applied in the event that any person provides material assistance, sponsors, or provides financial, material or technological support for, or goods or services in support of, among others the National Iranian Oil Company and the Central Bank of Iran after 5 November 2018, are incompatible with the rights of Iran under Article IV, paragraph 1.

57. Iran further observes that Article VII, paragraph 1, of the 1955 Treaty prohibits restrictions on the making of payments, remittances, and other transfers of funds to or from the territory of Iran. Iran notes that the "sanctions", notably the "sanctions" on the purchase or acquisition of US dollar banknotes and the sanctions on significant transactions related to the purchase or sale of Iranian rial, plainly entail the imposition of restrictions on the making of payments, remittances, and other transfers to or from Iran.

58. Iran moreover points out that Article VIII, paragraph 1, requires the United States to accord to Iranian products, and to products destined for export to Iran, treatment no less favourable than that accorded to like products of or destined for export to any third country. According to Iran, Article VIII, paragraph 2, prohibits the United States from imposing restrictions or prohibitions on the import of any Iranian product or on the export of any product to Iran, unless the import or export of the like product from or to all third countries is similarly restricted or prohibited. Iran contends that the revocation of the relevant licences and authorizations which allowed entities to engage in the sale and export to Iran of, among other things, commercial aircraft and related parts and services, as well as the importation of Iranian foodstuffs and carpets to the United States, "plainly interfere[s] with the import and export of Iranian and US products" between the two territories.

59. Iran also considers that Article IX, paragraph 2, requires the United States to accord Iranian nationals and companies treatment no less favourable than that accorded to nationals and companies of any third country with respect to all matters relating to import and export. Iran contends that the "sanctions", such as imposing restrictions on foreign individuals and companies which import from or export to Iran, in fact single it out for the least favourable treatment, targeting the Iranian financial, banking, shipping and oil sectors.

60. Iran further claims that Article IX, paragraph 3, prohibits any measure of a discriminatory nature that hinders or prevents Iranian importers and exporters from obtaining marine insurance from United States companies. It argues that the United States reintroduced "sanctions" on persons who provide underwriting services or reinsurance for the National Iranian Oil Company or the National Iranian Tanker Company, thereby interfering with Iran's right under that Article.

61. Finally, Iran alleges that the "sanctions" infringe its rights under Article X, paragraph 1, of the Treaty of Amity, which guarantees the freedom of commerce and navigation between the territories of the two contracting Parties. With regard to its right to freedom of commerce, Iran argues, in particular, that the term "commerce" is to be understood in a broad sense and that any act which would impede freedom of commerce is prohibited. Iran argues that multiple elements of the United States "sanctions" have a direct or indirect impact on individual acts of commerce.

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62. The United States, for its part, contends that Iran does not plausibly have any rights with respect to the measures announced on 8 May 2018. First, the United States reiterates that Iran's asserted rights in fact arise from the JCPOA and relate to benefits it received under that instrument. The United States argues that Iran's Application makes clear that its case exclusively concerns the United States' sovereign decision to cease participation in the JCPOA. The United States contends that Iran cannot demonstrate that its rights plausibly arise from the Treaty of Amity. According to the United States, the alleged violation is the United States' decision to withdraw from the JCPOA and the relief that Iran is claiming is "a restoration of the benefits . . . received under the JCPOA".

63. Secondly, the United States claims that the plausibility of Iran's rights under the 1955 Treaty cannot be established because the measures complained of are lawful by virtue of Article XX, paragraph 1, of the 1955 Treaty. In the view of the United States, the fact that the Treaty of Amity excludes measures under Article XX, paragraph 1, from the scope of the Parties' obligations should lead the Court to find that Iran's claims are "not sufficiently serious" on

the merits. It maintains, in particular, that the treaty rights claimed by Iran are expressly limited by the exceptions granted to the United States to take measures "relating to fissionable materials" (subparagraph *(b)*) or "necessary to protect its essential security interests" (subparagraph *(d)*). The United States therefore concludes that, also in this respect, Iran's asserted rights are not plausible.

* *

64. The Court observes at the outset that the claims set out in the Application of Iran make reference solely to alleged violations of the 1955 Treaty; they do not refer to any provisions of the JCPOA.

65. Under the provisions of the 1955 Treaty invoked by Iran, 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.

66. Article IV, paragraph 1, Article VII, paragraph 1, Article VIII, paragraphs 1 and 2, Article IX, paragraphs 2 and 3, and Article X, paragraph 1, of the 1955 Treaty, invoked by Iran, read as follows:

Article IV

> 1. Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws.

. . . . . .

Article VII

> 1. Neither High Contracting Party shall apply restrictions on the making of payments, remittances, and other transfers of funds to or from the territories of the other High Contracting Party, except *(a)* to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people, or *(b)* in the case of a member of the International Monetary Fund, restrictions specifically approved by the Fund.

. . . . . .

Article VIII

> 1. Each High Contracting Party shall accord to products of the other High Contracting Party, from whatever place and by whatever type of carrier arriving, and to products destined for exportation to the territories of such other High Contracting Party, by whatever route and by whatever type of carrier, treatment no less favorable than that accorded like products of or destined for exportation to any third country, in all matters relating to: *(a)* duties, other charges, regulations and formalities, on or in connection with importation and exportation; and *(b)* internal taxation, sale, distribution, storage and use. The same rule shall apply with respect to the international transfer of payments for imports and exports.
>
> 2. Neither High Contracting Party shall impose restrictions or prohibitions on the importation of any product of the other High Contracting Party or on the exportation of any product to the territories of the other High Contracting Party, unless the importation of the like product of, or the exportation of the like product to, all third countries is similarly restricted or prohibited.

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Article IX

. . . . . .

2. Nationals and companies of either High Contracting Party shall be accorded treatment no less favorable than that accorded nationals and companies of the other High Contracting Party, or of any third country, with respect to all matters relating to importation and exportation.

3. Neither High Contracting Party shall impose any measure of a discriminatory nature that hinders or prevents the importer or exporter of products of either country from obtaining marine insurance on such products in companies of either High Contracting Party.

. . . . . .

Article X

1. Between the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

67. 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 (see paragraph 66 above).

68. 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.

69. 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)*.

70. In light of the foregoing, the Court concludes that, at the present 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.

* *

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

* *

72. Iran maintains that there is a clear link between all the measures requested and its rights under the 1955 Treaty. In particular, Iran states that it requests five provisional measures aimed at ensuring that the United States will take no action that would further prejudice Iran's treaty rights. According to Iran, the first measure requested is directly linked to all of the rights invoked by Iran under the 1955 Treaty, the second measure requested would

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protect the rights invoked by Iran under Articles IV, VIII and X, and the third measure requested is intended to ensure the effectiveness of the first two measures. Iran contends that the fourth measure requested is aimed at generating the confidence necessary to protect Iran's rights under the Treaty from further prejudice due to the "chilling effect" of the "sanctions" and the announcement by the United States of further "sanctions". Finally, Iran argues that the fifth measure requested is a standard clause providing further protection of Iran's rights from actions taking place before a final decision by the Court. Iran also contends that the measures requested are different from the claims of Iran on the merits, in so far as they are aimed at suspending the "sanctions" and not at terminating them.

*

73. The United States notes that the measures requested are not sufficiently linked to the rights whose protection is sought. In particular, it argues that Iran requests, in effect, the restoration of "sanctions" relief provided for by the JCPOA and the issuance of numerous specific waivers and licences. The United States argues that Iran has not provided any basis for the Court to conclude that the measures requested, namely the restoration of the JCPOA relief, "would vindicate those rights", in light of the exceptions under Article XX, paragraph 1, protecting the United States' right to take measures to address matters of national security.

* *

74. 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 requests that the United States must refrain from taking any other measure that might prejudice the rights of Iran and Iranian nationals under the 1955 Treaty.

75. The Court has already found that at least some of the rights asserted by Iran under the 1955 Treaty are plausible (see paragraphs 69-70 above). 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.

76. 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

77. The Court, pursuant to Article 41 of its Statute, 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 (see, for example, *Jadhav (India* v. *Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, p. 243, para. 49), or when the alleged disregard of such rights may entail irreparable consequences.

78. 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 (*ibid.*, para. 50). 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 (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1169, para. 90). The Court must therefore consider whether such a risk exists at this stage of the proceedings.

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79. The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of the Treaty of Amity, but to determine whether the circumstances require the indication of provisional measures for the protection of rights under this instrument. It cannot at this stage make definitive findings of fact, and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the Request for the indication of provisional measures.

* *

80. Iran asserts that there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision. It considers that some of the measures taken by the United States are already causing and will continue to cause irreparable prejudice to these rights. In this regard, Iran notes that such prejudice has already taken place since 8 May 2018 and that the United States has made it known that it is "determined to cause even greater prejudice" to Iran, its companies and its nationals in the near future. Iran recalls that, on 6 August 2018, the President of the United States issued Executive Order 13846 entitled "Reimposing Certain Sanctions With Respect to Iran", which entered into force on 7 August 2018. It explains that this Executive Order aims, *inter alia*, at "reimposing sanctions on Iran's automotive sector and on its trade in gold and precious metals, as well as sanctions related to the Iranian rial", and expanding the scope of "sanctions" that were in effect prior to 16 January 2016.

81. According to Iran, the United States' measures create an imminent risk of irreparable prejudice to airline safety and security. It notes that contracts concluded in the aviation sector between United States and Iranian companies have already been cancelled or adversely affected as a direct result of these measures, leaving Iran's commercial airlines and civil passengers with an ageing fleet, limited access to maintenance information, services and spare parts. Iran is of the view that, by preventing Iranian airlines from renewing their already old airline fleets, purchasing spare parts and other necessary equipment and services, training pilots to international standards or using foreign airport services, the lives of Iranian passengers and crew, and other customers of Iranian airlines will be placed in danger. Therefore, according to Iran, if nothing is done to prevent the United States from giving full effect to its measures, the situation could lead to "irreparable human damages" notwithstanding the existence of a procedure for applying for specific licences under the United States safety of flight licensing policy. Iran further alleges that the measures taken by the United States create an imminent risk to the health of Iranians. With respect to humanitarian goods, it claims that, despite the exemption under the United States law, the current system makes it impossible for Iran to import urgently needed supplies. With respect to healthcare, it observes that, despite the exemption under the United States law for medicines, chemicals for the production of medicines and medical supplies, access to medicines, including life-saving medicines, treatment for chronic disease or preventive care, and medical equipment for the Iranian people have become restricted because the United States' measures have deeply affected the delivery and availability of these supplies.

82. Iran further refers to the United States' measures scheduled for 4 November 2018, which would "considerably tighten the screws on Iran" and "amplify[] the prejudice to its rights under the Treaty of Amity". Iran also observes that it is impossible for the Court to deliver its final decision before 4 November 2018, the date after which all the United States' nuclear-related measures that had been lifted or waived in connection with the JCPOA will be reimposed in full effect.

83. Iran asserts that the official announcement by the United States of 8 May 2018 is producing irreparable damage to the whole Iranian economy, both generally and to key sectors, such as the automotive industry, the oil and gas industry, civil aviation and the banking and financial system. It contends that, since the decision was made public, multiple United States and foreign companies and nationals have announced their withdrawal from activities in Iran, including the termination of their contractual relations with Iranian companies and nationals, which the United States could not restore even if ordered to do so by the Court.

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84. The United States, for its part, contends that there is no urgency, in the sense that there is no real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision. It

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observes that the measures that were announced on 8 May 2018 are not new measures but, rather, the reimposition of "sanctions" that had previously been in place. Therefore, according to the United States, there cannot be urgency now if there was no urgency when the said measures were first taken.

85. The United States asserts that Iran cannot satisfy the requirements of irreparable prejudice for a number of reasons. As a general matter, it considers that the Applicant has not provided sufficient evidence to prove a risk of irreparable harm to Iranians, Iranian companies and Iran itself. It adds that there could be multiple causes to which the economic stagnation and difficulties in Iran can be attributed, including mismanagement by the Iranian Government. It is also of the view that, if there was a risk of prejudice, it could not be irreparable because economic harm can be repaired. In any event, the United States maintains that it is difficult to assess the specific impact of its measures on the Iranian economy, especially since the European Union has recently stated that it would intensify its efforts at maintaining economic relations with Iran.

86. With respect to the alleged risk of irreparable prejudice caused to airline safety, the United States claims that it has maintained a licensing policy providing for a case-by-case issuance of licences to ensure the safety of civil aviation and the safe operation of United States-origin commercial passenger aircraft. It further asserts that, following the reimposition of the remaining "sanctions", after the expiry of the second wind-down period on 4 November 2018, the United States will continue to consider licence applications regarding civil aircraft spare parts and equipment where there is a safety concern. With respect to the alleged risk of irreparable prejudice caused to health, the United States contends that it has maintained broad authorizations and exceptions to allow for humanitarian-related activity. It adds that the United States has a long standing policy to authorize exports to Iran of humanitarian goods, including agricultural commodities, medicines, medical devices, and replacement parts for such devices. The United States also claims to have licensed non-governmental organizations to provide a range of services to or in Iran, including in connection with activities related to humanitarian projects. It further affirms that it has taken specific steps to mitigate the impact of its measures on the Iranian people. In addition to the humanitarian-related authorizations and exceptions, the United States asserts that a series of United States statutes, executive orders and regulations provide explicit exceptions making it clear that third-State nationals who engage in humanitarian-related activity will not be exposed to United States "sanctions". It specifies that all of these measures have remained intact following the reimposition of "sanctions" after the expiry of the first wind-down period on 6 August 2018, and that they will remain in place following the reimposition of the remaining "sanctions" after the expiry of the second wind-down period on 4 November 2018.

87. The United States finally claims that the provisional measures Iran requests would, if indicated, cause irreparable prejudice to the sovereign rights of the United States to pursue its policy towards Iran, and, in accordance with Article XX, paragraph 1, of the Treaty of Amity, to take measures that it considers necessary to protect its essential security interests. In this regard, the Respondent points out that the issue is not simply whether the rights of the Applicant are in danger of irreparable prejudice but also the impact of the requested measures on the rights of the Respondent. It is of the view that Article 41 of the Statute requires the Court to take account of the rights of the respondent by weighing up those rights against the claimed rights of the applicant.

* *

88. The Court notes that the decision announced on 8 May 2018 appears to have already had an impact on 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.

89. 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.

90. The Court considers that certain rights of Iran under the 1955 Treaty invoked in these proceedings that it has found 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; 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.

91. 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.

92. The Court notes that, during the oral proceedings, the United States offered assurances that the United States 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.

93. 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.

94. The indication by the Court of provisional measures responding to humanitarian needs would not cause irreparable prejudice to any rights invoked by the United States.

V. CONCLUSION AND MEASURES TO BE ADOPTED

95. 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 (see paragraphs 70 and 75 above).

96. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested. Article 75, paragraph 2, of the Rules of Court specifically refers to this power of the Court. The Court has already exercised this power on several occasions in the past (see, for example, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018*, para. 73; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 139, para. 100).

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97. 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.

98. 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.

99. The Court recalls that Iran has requested that it indicate measures aimed at ensuring the non-aggravation of the 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 (see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018*, para. 76; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 139, para. 103). 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.

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100. The Court reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.

*

* *

101. 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. It leaves unaffected the right of the Governments of the Islamic Republic of Iran and the United States of America to submit arguments in respect of those questions.

*

* *

102. 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

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(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.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this third day of October, two thousand and eighteen, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Islamic Republic of Iran and the Government of the United States of America, respectively.

(Signed) Abdulqawi Ahmed YUSUF, President.

(Signed) Philippe COUVREUR, Registrar.

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.

(Initialled) A.A.Y.

(Initialled) Ph.C.

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SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. *PROLEGOMENA.*

1. I have concurred, with my vote, for the adoption by unanimity, by the International Court of Justice (ICJ), of the present Order of today, 03 October 2018, indicating Provisional Measures of Protection in the case of *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights [Treaty of Amity]* (Islamic Republic of Iran [Iran] *versus* United States of America [United States or U.S.]). Iran has sought to found the ICJ's jurisdiction on Article XXI(2) of the Treaty and Article 36(1) of the ICJ Statute, and, in requesting provisional measures, it has referred to Article 41 of the ICJ Statute and Articles 73-75 of the Rules of Court.

2. In the present Order, the ICJ, having found that it has *prima facie* jurisdiction pursuant to Article XXI(2) of the 1955 Treaty (para. 52), has rightly ordered, with my support, the provisional measures of protection set forth in the *dispositif* (para. 102). Additionally, I attribute great importance to some related issues in the *cas d'espèce*, that in my perception underlie the present perception should not pass unexplored.

3. I feel thus obliged to leave on the records, in the present Separate Opinion, the identification of such issues and the foundations of my own personal position thereon. I do so, once again under the merciless pressure of time, moved by a sense of duty in the exercise of the international judicial function, even more so as some of the lessons I extract from the matter forming the object of the present decision of the Court are not sufficiently dealt with in the Court's reasoning in the present Order.

4. My reflections as developed in the present Separate Opinion address, above all and at length, key points pertaining to provisional measures of protection. Before I turn to my own examination of them, I deem it fit to start with my initial considerations of a hermeneutical and axiological nature, dwelling upon three points which are 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*

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jurisdiction; and c) the prevalence of the imperative of the realization of justice over the invocation of "national security interests".

5. My following considerations, focused on provisional measures of protection, are, at a time, conceptual and epistemological, juridical and philosophical, always attentive to human values. I shall develop my reflections in a logical sequence. 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 human vulnerability.

6. The second part of my 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. The way will then be paved, last but not least, for the presentation, in an epilogue, of a recapitulation of the key points of the position I sustain in the present Separate Opinion.

II. INTERNATIONAL PEACE: TREATIES AS LIVING INSTRUMENTS, IN THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW.

7. Treaties are living instruments, and the 1955 Treaty of Amity (between Iran and the U.S.) is no exception to that. This understanding finds support in the ICJ's *jurisprudence constante*. In the course of this last decade, for example, in the case concerning *Navigational and Related Rights* (Costa Rica *versus* Nicaragua, Judgment of 13.07.2009), the Court explained that "evolutionary interpretation" refers to

> "situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used or some of them - a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" (para. 64).

8. The ICJ then concluded that Costa Rica's freedom of navigation (which includes "commerce") must be understood based on the circumstances in which the Treaty has to be applied, and "and not necessarily their original meaning. (. . .) [I]t is the present meaning which must be accepted for purposes of applying the Treaty" (para. 70).

9. In particular, the basis for an evolutionary approach to treaty interpretation stems from Article 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT), providing for the "general rule of interpretation". Article 31(1) is the starting-point, requiring that a treaty be interpreted in good faith in accordance with "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

10. Article 31(3)(c) of the VCLT provides that treaties must be interpreted in the light of "any relevant rules of international law applicable in the relations between the parties". The VCLT (Articles 31(1) and 31(3)(c)) is seen as permitting an evolutionary approach in interpreting and applying a treaty like the aforementioned 1955 Treaty of Amity.

11. Article I of the 1955 Treaty contains its object and purpose (a firm and enduring peace and friendship between the parties). Significantly, the object and purpose of that Treaty has likewise been addressed by the ICJ in earlier cases, so as to assist in its interpretation. Thus, in the case concerning *U.S. Diplomatic and Consular Staff in Tehran* (United States *versus* Iran, Judgment of 24.05.1980), the ICJ stated that

> "The very purpose of a treaty of amity, and indeed of a treaty of establishment, is to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory. It is precisely when difficulties arise that the treaty assumes its greatest importance, and the whole object of Article XXI(2) of the 1955 Treaty was to establish the means for arriving at a

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> friendly settlement of such difficulties by the Court or by other peaceful means. It would, therefore, be incompatible with the whole purpose of the 1955 Treaty if recourse to the Court under Article XXI(2), were now to be found not to be open to the parties precisely at the moment when such recourse was most needed" (para. 54).

12. Subsequently, in the case concerning *Oil Platforms* (Iran *versus* U.S., preliminary objection, Judgment of 12.12.1996), the ICJ confirmed the weight given to Article I when applying and interpreting the 1955 Treaty of Amity, pointing out that it considered that "the objective of peace and friendship proclaimed in Article I of the Treaty of 1955 is such as to throw light on the interpretation of the other Treaty provisions" (para. 31). The ICJ then added:

> "The Court cannot lose sight of the fact that Article I states in general terms that there shall be firm and enduring peace and sincere friendship between the Parties. The spirit and intent set out in this Article animate and give meaning to the entire Treaty and must, in case of doubt, incline the Court to the construction which seems more in consonance with its overall objective of achieving friendly relations over the entire range of activities covered by the Treaty" (para. 52).

13. The Court thus found that Article I of the 1955 Treaty of Amity allows it to undertake an evolutionary interpretation of the relevant provisions of the Treaty. Later on, still in the same case concerning *Oil Platforms* (Iran *versus* U.S., merits, Judgment of 06.11.2003), the ICJ, after again referring to Article 31(3)(c) of the 1969 VCLT, confirmed/stated that the application of the "relevant rules of international law" relating to the question of unlawful use of force thus formed "an integral part" of the task entrusted to it, by Article XXI(2), of interpretation of the 1955 Treaty of Amity (para. 41). This Treaty is not frozen in time; it is to be interpreted, as the ICJ itself makes it clear, taking into account also factors extending beyond the text itself of the 1955 Treaty.

III. PROVISIONAL MEASURES: THE EXISTENCE OF THE COURT'S *PRIMA FACIE* JURISDICTION.

14. In the present Order of provisional measures of protection, the ICJ has rightly found that it has jurisdiction *prima facie* to indicate them. The basic object and purpose of the 1955 Treaty of Amity were duly taken into account, as on an earlier occasion (the aforementioned case of *Oil Platforms*, preliminary objection, Judgment of 12.12.1996, para. 52). The present dispute on the *Alleged Violations of the 1955 Treaty of Amity*, lodged with the Court for peaceful settlement, falls within the scope of the Treaty of Amity of 1955 in respect of provisional measures.

15. On other earlier occasions in recent months, the Court, at the stage of provisional measures, has repeatedly stated, as to its findings on jurisdiction *prima facie* only, that it does not need to "satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case" (case of *Jadhav*, opposing India to Pakistan, 2017; and case of the *Application of the CERD Convention*, opposing Qatar to the United Arab Emirates [UAE], 2018)[1]. In the present Order in the case of the *Alleged Violations of the 1955 Treaty of Amity*, opposing Iran to the United States, the ICJ upholds the same position (para. 24).

16. Even in face of allegations of "national security interests" (as in the *cas d'espèce*, opposing Iran to the United States), the ICJ, to the effect of ordering provisional measures of protection, is the guardian of its own Statute (Article 41) and *interna corporis*, on the basis of which it takes its decision, in its mission (common to all contemporary international tribunals) of realization of justice[2] (cf. *infra*). The present case, opposing Iran to the United States, is not the only example to this effect.

17. It should not pass unnoticed that, in the case of the *Seizure and Detention of Certain Documents and Data* (Timor-Leste *versus* Australia, provisional measures, Order of 03.03.2014), the ICJ, irrespective of the respondent State's considerations of "national security", ordered provisional measures (paras. 45-46 and 55). Subsequently, in another case of the *Application of the CERD Convention* (Ukraine *versus* Russian Federation, provisional measures, Order of 19.04.2017), the ICJ did the same (paras. 93 and 106).

18. And shortly afterwards, in the aforementioned case of *Jadhav* (India *versus* Pakistan, provisional measures, Order of 18.05.2017), once again the same took place, irrespective of invocation of "national security" (paras. 23 and

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61). As can be seen, the decision taken by the ICJ in the present Order is in conformity with its *jurisprudence constante* in respect of provisional measures: the imperative of the interim protection that such measures afford prevails over allegations or strategies of national interest or security.

19. The ICJ's jurisprudence on the matter has, to start with, given expression to the essence of *prima facie* jurisdiction, since its origins: it may be exercised irrespective of the "will" of the contending parties, and even if the Court is not yet sure as to its jurisdiction on the merits; *prima facie* jurisdiction[3] is not conditioned by this latter, as pointed out by its denomination itself. To the aforementioned jurisprudential development as a whole, I can add the gradual understanding of the *raison d'être* of jurisdiction *prima facie* in respect of provisional measures of protection, also on the part of a more lucid trend of international legal doctrine.

20. In this respect, may I recall the observations of two jurists of whom I keep a good memory: one of them drew attention to the *prima facie* jurisdiction autonomous from the jurisdiction on the merits, and pondered that *prima facie* jurisdiction in respect of provisional measures "would appear to be exercisable even when the Court has doubts about its jurisdiction over the merits, a very low threshold"[4]; and the other observed that

> "le pouvoir d'indiquer des mesures conservatoires n'a pas pour base la volonté des parties au litige. Il a pour fondement l'article 41 du Statut. (. . .) [C']est parce qu'elle reçoit ce pouvoir de son Statut que la Cour peut indiquer de telles mesures (. . .). (. . .) En résumé et en conclusion, le pouvoir d'indiquer des mesures conservatoires résulte de l'article 41 du Statut"[5].

IV. THE PREVALENCE OF THE IMPERATIVE OF THE REALIZATION OF JUSTICE OVER THE INVOCATION OF "NATIONAL SECURITY INTERESTS".

21. The case-law of the ICJ that I have just referred to has, on successive occasions, been to the effect of the Court's ordering of provisional measures of protection, on the basis of its Statute (Article 41) and *interna corporis*, irrespective of the invocation, by the respondent States, of "national security interests". With its findings of *prima facie* jurisdiction, the ICJ has done so, whenever necessary, attentive to the imperative of the realization of justice.

22. The case of the *Seizure and Detention of Certain Documents and Data* (2014-2015) calls for further attention in this respect: besides the aforementioned ICJ's Order of 03.03.2014, the Court subsequently adopted its additional Order of 22.04.2015 (modified provisional measures indicated). I have appended a Separate Opinion to each of those two Orders, dealing with the point at issue, which has now appeared again in the present case of the *Alleged Violations of the 1955 Treaty of Amity*.

23. In my Separate Opinion in the Court's Order of 03.03.2014 in the case of the *Seizure and Detention of Certain Documents and Data*, after examining the answers that Timor-Leste and Australia provided to my question (as to the "measures of alleged national security") that I put to them in the Court's public sitting of 21.01.2014 (paras. 33-36), I pondered that such invocation of alleged "national security" cannot be made the concern of the Court, which

> "has before itself general principles of international law (. . .), and cannot be obfuscated by allegations of 'national security' (. . .). In any case, an international tribunal cannot pay lip-service to allegations of 'national security' made by one of the parties in the course of legal proceedings" (para. 38).

24. I stressed that allegations of the kind "cannot at all interfere" with the Court's work of "judicial settlement" of a controversy brought before it (paras. 41 and 43). I then recalled that,

> "throughout the drafting of the 1970 U.N. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1964-1970), the need was felt to make it clear that stronger States cannot impose their will upon the weak, and that *de facto* inequalities among States cannot affect the weaker in the vindication of their rights. The principle of the juridical equality of States gave expression to this concern, embodying the *idée de justice*, emanated from the universal juridical conscience" (para. 45).

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25. I then concluded that general principles of international law, such as the juridical equality of States (enshrined into Article 2(1) of the U.N. Charter), encompassing the equality of arms (*égalité des armes*) and the due process of law, cannot be undermined by allegations of "national security"; the basic principle of the juridical equality of States, "embodying the *idée de justice*, is to prevail" (paras. 67-68).

26. 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" (paras. 64 and 66). My position, in the realm of provisional measures of protection, has been a consistently anti-voluntarist one[6]. Conscience stands above the "will".

27. Subsequently, in my Separate Opinion in the Court's Order of 22.04.2015 in the same case of the *Seizure and Detention of Certain Documents and Data*, I went on to sustain that also in the present domain, the ICJ is master of its own jurisdiction. Within the *autonomous legal regime* of provisional measures of protection the Court can thus "take a more proactive posture (under Article 75(1) and (2) of its Rules), in the light also of the principle of the juridical equality of States", remaining attentive to the *legal nature* and the *effects* of such provisional measures (paras. 3-4 and 7, and cf. paras 5-6). And I concluded that

> "(. . .) Advances in this domain cannot be achieved in pursuance of a voluntarist conception of international law in general, and of international legal procedure in particular. The requirements of objective justice stand above the options of litigation strategies. (. . .)
>
> And the Court is fully entitled to decide thereon [on provisional measures], without waiting for the manifestations of the 'will' of a contending State party. It is human conscience, standing above the 'will', that accounts for the progressive development of international law. *Ex conscientia jus oritur*" (paras. 11 and 13).

V. TRANSPOSITION OF PROVISIONAL MEASURES OF PROTECTION FROM COMPARATIVE DOMESTIC PROCEDURAL LAW ONTO INTERNATIONAL LEGAL PROCEDURE.

28. May I now turn to my own examination, in particular, of the distinct aspects of provisional measures of protection to be taken into account. In effect, I have been conceptualizing, along the years, in my Individual Opinions and writings, what I have been calling the *autonomous legal regime* of provisional measures of protection[7], - during this last decade on successive occasions here in the ICJ, and in earlier years in the Inter-American Court of Human Rights (IACtHR). As I have been dedicating myself considerably to the evolution of provisional measures of protection in contemporary international law, I feel obliged to retake the examination of the matter in logical sequence, now in the factual context of the present case of *Alleged Violations of the 1955 Treaty of Amity*.

29. The first point to be considered to the effect of the gradual consolidation of such autonomous legal regime is the historical transposition of provisional measures from the domestic legal systems to the international legal order, with all its implications. I addressed this point in my Dissenting Opinion (paras. 5-7) in the case of *Questions Relating to the Obligation to Prosecute or to Extradite* (Belgium *versus* Senegal, Order of 28.05.2009), as well as in my Separate Opinion (para. 64) in the case of the *Temple of Préah Vihéar* (Cambodia *versus* Thailand, Order of 18.07.2011).

30. I singled out therein that *precautionary* measures of comparative domestic procedural law inspired *provisional* measures in international procedural law. This conceptualization still needed to free itself from a certain juridical formalism, leaving at times the impression of taking the process as an end in itself, rather than as a means for the realization of justice. In the domestic legal order, the precautionary process sought to safeguard the effectiveness of the jurisdictional function itself, rather than the subjective right *per se*.

31. The transposition of provisional measures from the domestic to the international legal order (in international arbitral and judicial practice) had the effect of expanding the domain of international jurisdiction[8]. In effect, in international law, it is the *raison d'être* of provisional measures of protection to prevent and avoid irreparable harm in situations of gravity (with imminence of an irreparable harm) and urgency. Provisional measures are *anticipatory* in nature, disclosing the preventive dimension of the safeguard of rights. Law itself is anticipatory in this domain.

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VI. JURIDICAL NATURE OF PROVISIONAL MEASURES OF PROTECTION.

32. Shortly afterwards, in my Dissenting Opinion (paras. 38 and 73) in the (merged) cases of *Construction of a Road in Costa Rica along the San Juan River* and of *Certain Activities Carried out by Nicaragua in the Border Area* (Nicaragua *versus* Costa Rica, and Costa Rica *versus* Nicaragua, Order of 16.07.2013), I pointed out that, as time went on, the growing case-law of distinct international tribunals on provisional measures sought to clarify their *juridical nature*, while stressing their essentially preventive character. In face of the likelihood or probability of *irreparable harm* and the *urgency* of a situation, whenever provisional measures were ordered to protect rights of a growing number of people (or as in cases concerning armed conflicts), they have appeared endowed with a character, more than precautionary, truly *tutelary*, besides safeguarding the rights at stake[9].

33. In my following Separate Opinion (paras. 25-26) in the case of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua, Order of 12.11.2013), I have again recalled the transposition of provisional measures of protection from legal proceedings in comparative domestic procedural law onto the international legal procedure (cf. *supra*), and their juridical nature and effects. In evolving from *precautionary* to *tutelary*, - I further pondered, - they contribute to the progressive development of international law, being directly related to the realization of justice itself[10].

34. Later on, as the ICJ pronounced again on the merged cases of *Certain Activities Carried out by Nicaragua in the Border Area* and of *Construction of a Road in Costa Rica along the San Juan River* (this time its Judgment of 16.12.2015), I presented a new Separate Opinion, wherein I stressed (paras. 7-9) that the aforementioned evolution of provisional measures of protection turned attention from the legal process itself to the subjective rights *per se*, thus freeing themselves from the juridical formalism of the past. After all, such formalism conveyed the impression of taking the legal process as an end in itself, rather than as a means for the realization of justice.

VII. THE EVOLUTION OF PROVISIONAL MEASURES OF PROTECTION.

35. The *rationale* of provisional measures stood out clearer: they were no longer seen as a *precautionary legal action* (*mesure conservatoire* / *acción cautelar,* - as in the domestic legal systems), but rather as a jurisdictional guarantee of subjective rights, thus being truly *tutelary*, and coming closer to reaching their plenitude. I added that, when their basic requisites, - of gravity and urgency, and the needed prevention of irreparable harm, - are met, 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.*

36. Subsequently, I have retaken the examination of the matter in my Separate Opinion (paras. 4 and 74-76) in the case of *Application of the Convention for the Suppression of the Financing of Terrorism [ICSFT] and of the Convention on the Elimination of All Forms of Racial Discrimination [CERD]* (Ukraine *versus* Russian Federation, Order of 19.04.2017). I summarized the component elements of the autonomous legal regime of provisional measures of protection, observing that

> "Such legal regime is configured 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. 74).

37. I then observed that the claimed rights to be protected in the *cas d'espèce* encompassed "the fundamental rights of human beings, such as the right to life, the right to personal security and integrity, the right not to be forcefully displaced or evacuated from one's home" (para. 75). And I added 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. 76).

38. More recently, in my Concurring Opinion (paras. 24-25) in the case of *Jadhav* (India *versus* Pakistan, Order of 18.05.2017), I have reiterated my understanding that provisional measures of protection are endowed with a juridical autonomy of their own, as sustained in my Individual Opinions in successive cases within the ICJ (and, earlier

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on, within the IACtHR)[11], thus contributing to its conceptual elaboration in the jurisprudential construction on the matter. I have recalled that I soon identified

> "the component elements of such autonomous legal regime, namely: the rights to be protected, the obligations proper to provisional measures of protection; the prompt determination of responsibility (in case of non-compliance), with its legal consequences; the presence of the victim (or potential victim, already at this stage), and the duty of reparations for damages" (para. 24)[12].

39. I have then drawn attention, in the same Concurring Opinion in the *Jadhav* case, to the presence of rights of States and of individuals together in the proceedings in contentious cases before the ICJ, despite their keeping on being strictly inter-State ones (by attachment to an outdated dogma of the past). I added that this in no way impedes that the beneficiaries of protection in given circumstances are the human beings themselves, individually or in groups (para. 25).

40. I had pointed this out also, e.g., in my Dissenting Opinion in the case concerning *Questions Relating to the Obligation to Prosecute or to Extradite* (Order of 28.05.2009), and in my Separate Opinion in the case of *Application of the ICSFT Convention and of the CERD Convention* (Order of 19.04.2017)[13] (cf. *supra*). The evolution here examined is to be approached within a wider conceptual framework.

41. The needed conformation of the *autonomous legal regime* of provisional measures of protection[14] is a significant point that I have been consistently sustaining in several (more than twenty) of my Individual Opinions, successively within two international jurisdictions, in the period 2000-2018[15]. One of the aspects I have been singling out - including in my aforementioned Dissenting Opinion in an ICJ's Order (of 16.07.2013) at an early stage of the handling of two merged cases opposing two Central American States, and very recently in my Separate Opinion (paras. 74-77, 82, 89-93, and 102) in the case of the *Application of the Convention on the Elimination of All Forms of Racial Discrimination* (CERD - Qatar *versus* UAE, Order of 23.07.2018), - has been that the notion of victim (or of *potential* victim[16]), or injured party, can emerge also in the context proper to provisional measures of protection, irrespective of the decision as to the merits of the case[17].

VIII. PROVISIONAL MEASURES OF PROTECTION AND THE PREVENTIVE DIMENSION OF INTERNATIONAL LAW.

42. The moving towards the consolidation of the autonomous legal regime of provisional measures of protection, in my perception, gradually enhances the preventive dimension of international law. In doing so, contemporary international tribunals give a relevant contribution to the avoidance or prevention of irreparable harm in situations of urgency, to the ultimate benefit of human beings, and to secure due compliance with the ordered provisional measures of protection[18].

43. The anticipatory or preventive character of provisional measures of protection has brought to the fore the temporal dimension in their application. In effect, provisional measures have, in recent years, been extending protection to growing numbers of persons in situations of vulnerability (*potential* victims), transformed into a true jurisdictional *guarantee* of a preventive character[19].

44. Hence the autonomy of the international responsibility that non-compliance with them promptly generates, - another component element of the legal regime of their own (cf. *supra*). Consideration of the matter also brings to the fore the general principles of law, always of great relevance[20], as well as the common mission of contemporary international tribunals of realization of justice as from an essentially humanist outlook[21].

IX. PROVISIONAL MEASURES OF PROTECTION AND CONTINUING SITUATIONS OF HUMAN VULNERABILITY.

45. Still in my aforementioned Separate Opinion in the case of the *Application of the CERD Convention* (Qatar versus UAE, Order of 23.07.2018) I have drawn attention to the fact that there have been requests to the ICJ of provisional measures of protection, like in the *cas d'espèce*, which were intended to put an end to a *continuing situation* of vulnerability of the affected persons (potential victims). Earlier on, there was a *continuing situation* of lack of access to justice of the victims of the Hissène Habré regime (1982-1990) in Chad, in the case concerning the *Obligation to Prosecute or Extradite* (Belgium *versus* Senegal, Order of 2009 - cf. *supra*).

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46. In the case on *Jurisdictional Immunities of the State* (Germany *versus* Italy), as the ICJ, in its Order of 06.07.2010 found the counter-claim of Italy inadmissible, once again I appended thereto a Dissenting Opinion, wherein I examined at depth the notion of "*continuing situation*", the origins of a "continuing situation" in international legal doctrine, its configuration in international litigation and case-law as well as in international legal conceptualization at normative level.

47. Moreover, a *continuing situation* in breach of human rights has had an incidence at distinct stages of the proceedings before the ICJ: in addition to decisions on provisional measures and counter-claim (*supra*), it has also been addressed in decisions as to the merits. For example, the factual context of the case of *A.S. Diallo* (Guinea *versus* D. R. Congo, merits, Judgment of 30.11.2010) disclosed a *continuing situation* of breaches of Mr. A.S. Diallo's individual rights in the period extending from 1988 to 1996, marked by the prolonged lack of access to justice.

48. In the present case of *Alleged Violations of the 1955 Treaty of Amity*, the issue of a continuing situation marked presence again, though not much dwelt upon by the contending parties in the course of the present proceedings on provisional measures of protection. Yet, at one moment of such proceedings, in the public hearings of 27.08.2018, counsel for the applicant State has stated that the ICJ has been seized of a "*fait illicite continu*" which, in case it persists, can "perpetuate and widen the harm"[22].

49. The ICJ, for its part, in the Order of Provisional Measures of Protection it has just adopted in the *cas d'espèce*, has pondered that the sanctions imposed by the respondent State as from 08.05. 2018 appear to have already had an impact and consequences of a "continuing nature" (para. 89). The "situation resulting" therefrom, - it added, - "is ongoing" and "there is no prospect of improvement" (para. 94). Hence the needed provisional measures of protection that the Court has just indicated in the present Order.

50. This is not my first Separate Opinion wherein I address the relevance of provisional measures of protection in continuing situations of vulnerability. Very recently I have examined this aspect at depth, in my Separate Opinion (paras. 82-93) in the case of *Application of the CERD Convention* (Qatar *versus* UAE, Order of 23.07.2018); suffice it to refer to it herein. In respect to human vulnerability in the present domain, may I now move on to my humanitarian considerations.

X. HUMAN VULNERABILITY: HUMANITARIAN CONSIDERATIONS.

51. In the domain of provisional measures of protection, human vulnerability assumes particular importance. I have drawn attention to this relevant point in my Separate Opinion (paras. 12-44 and 62-67) in the aforementioned case of the *Application of the ICSFT Convention and of the CERD Convention* (Ukraine *versus* Russian Federation, Order of 19.04.2017), as well as in in my Separate Opinion (paras. 68-73) in the also aforementioned case of the *Application of the* CERD *Convention* (Qatar *versus* UAE, Order of 23.07.2018).

52. In historical perspective, there have always been, along the centuries, thinkers warning against the vulnerability of human beings in face of extreme violence and destruction. May I recall that, in ancient Greece, for example, this concern marked presence in the tragedies written by Aeschylus, Sophocles and Euripides, singling out cruelty, human vulnerability and loneliness. The tragedian Euripides, for example, proceeded to the denunciation of the devastation and human suffering caused by war. In one of his latest tragedies, *Helen* (412 b.C.), for example, the chorus sang:

> "All of you are mad, all who win glory in war
> by stabbing and thrusting with spears,
> clumsily trying to resolve your troubles in death.
> If the contest of blood is the judge, there will never
> be an end to the conflicts between cities, between humans.(. . .)
> [Y]ou cause sufferings upon sufferings.
> in a miserable, lamentable welter of catastrophe"[23].

53. Ancient Greek tragedies kept on being performed, and even rewritten by successive authors, throughout the centuries. Of all Greek tragedies, the one probably most rewritten and performed in different times has been

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Sophocles's *Antigone* (442-441 b.C.), for having been perceived by successive authors along the centuries as portraying the persisting tension between *raison d'État* and dictates of justice in the line of jusnaturalist thinking. Antigone was guided by her conscience (in caring to bury her deceased brother Polynices, and thus determining her tragic destiny), while the despotic ruler Creon was moved by his will in the exercise of power.

54. The prevalence of human conscience over the will, of jusnaturalism over legal positivism, marked presence [was advanced] in Euripides's tragedy *Hecuba* (424 b.C.) as well. Hecuba, turned non-citizen and enslaved, appeals to natural law, rather than positive law, to surpass cruelty not hindered by a positivist outlook. Both Sophocles's *Antigone* (*supra*) and Euripides's *Hecuba* claim the primacy of natural law over unjust decree and revenge. For her part, in a moment of her lamentation/plea, Hecuba asserts/pleas that

> "we slaves are weak. But the gods and
> the principle of law that rules them are strong.
> Upon this moral law the world depends;
> through it the gods exist, by it we live,
> distinguishing clearly good and evil"[24].

55. Athenian tragedies have survived from ancient times to nowadays, along the centuries. From the XIIIth. to the XIXth. centuries, the vulnerability of human beings in face of human cruelty and destruction (as portrayed by ancient Greek tragedians), became the object of continuing attention of theologians and philosophers. It should not pass unnoticed that many concepts of the law of nations appeared first in theology, then moving onto *jus gentium* (*droit des gens*) at the time of its "founding fathers" (in the XVIth. and XVIIth. centuries).

56. Some points of their reflections (constructed in the realms of theology, philosophy and literature) were carefully systematized, in the early XXth. century, by A.-D. Sertillanges, in his masterful anthology *Les vertus théologales* (vols. I-III, 1913). Thinkers of those centuries revealed awareness that, given the brief time of each one's life in this world, and the fact that we do not know where we came from nor where we are going to, everyone should avoid evil and search for good[25].

57. It is the conscience of the sense of human dignity that leads to the good, prevailing over evil. As we cannot remain imprisoned by the *raison d'État*, we keep in mind the principles that account for the advances of civilization. The slow evolution of humankind as a whole counts on human conscience and basic principles, as well as the ideal of justice[26]. One cannot impose suffering upon foreigners, or vulnerable persons. Revenge is to be discarded, and one is to care about the others in a universal scale, for the sake of the unity of human kind, in the line of natural law thinking[27].

58. In effect, the lessons from the ancient Greek tragedies have remained topical and perennial to date. Some 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[28]. In the XIXth. century, for example, L. Tolstoy, - always sensitive to conscience against injustice and evil[29], - warned, through one of his characters, in his classic *Anna Karenina* (1877-1878), that

> "On the one hand war is such a bestial, cruel and terrible affair, that no single man (. . .) can take on himself personally the responsibility for beginning a war. It can only be done by a Government, which is summoned to it and is brought to it inevitably. On the other hand, by law and by common sense, in the affairs of State and especially in the matter of war, citizens renounce their personal will"[30].

59. For his part, F. Dostoevsky, in his classic *The Karamazov Brothers* (1879-1880), warned that "the idea of the service of humanity, of brotherly love and the solidarity of mankind, is more and more dying out in the world, and indeed this idea is sometimes treated with derision"[31]. Both L. Tolstoy and F. Dostoevsky, among others, were sensitive to, and warned against, the infliction of human suffering. In effect, the concern with human cruelty has remained present throughout the centuries. Despite warnings of the kind, lessons have not been learned from the past.

60. The human capacity for devastation or destruction has become unlimited in the XXth. and XXIst. centuries (with weapons of mass destruction, in particular nuclear weapons). The decades along the whole XXth. century,

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added to the first two decades of the XXIst. century, have been the time of successive genocides, crimes against humanity, massacres and atrocities of all kinds, with millions of fatal victims, as never before in human history. But this does not need to lead to despair, as it has also been the time of the growth of international justice, with the endeavours of contemporary international tribunals to adjudicate cases pertaining to those evil actions[32].

61. 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.

62. I have addressed this issue at length in my three extensive Dissenting Opinions in the recent Judgments of the ICJ (of 05.10.2016) in the three cases on *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament* (Marshall Islands *versus* United Kingdom, India and Pakistan). I devoted one part (VIII) of my three Dissenting Opinions to the consideration of the fact that the presence of evil has marked human existence along the centuries.

63. 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 - such as mass extermination of innocent or vulnerable and defenceless people, - 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.

64. In effect, I have pointed out, in my three Dissenting Opinions in the aforementioned cases on *Obligations of Nuclear Disarmament*, that, ever since the eruption of the nuclear age in August 1945, some of the world's great thinkers have been inquiring whether humankind has a future (paras. 93-101), and have been drawing attention to the imperative of respect for life and the relevance of humanist values (paras. 102-114). Also in international legal doctrine there have been those who have been stressing the needed prevalence of human conscience, the universal juridical conscience, over State voluntarism (paras. 115-118). After reviewing their writings and reflections, I reiterated my own position, that I have been upholding for years, 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. 119).

XI. BEYOND THE STRICT INTER-STATE OUTLOOK: ATTENTION TO PEOPLES AND INDIVIDUALS.

65. The present ICJ's Order of Provisional Measures of Protection in the case of *Alleged Violations of the 1955 Treaty of Amity* is not the first one to consider, together with State rights, also rights of individuals. Earlier on, for example, in my Separate Opinion in the case of *Application of the ICSFT Convention and of the CERD Convention* (Ukraine *versus* Russian Federation, Order of 19.04.2017), I dedicated one part (VIII) of it to the protection by means of provisional measures of the human person, beyond the strict inter-State dimension (paras. 56-61). Shortly afterwards, in my Separate Opinion in the case of *Jadhav* (India *versus* Pakistan, Order of 18.05.2017), I devoted one of its parts (III) to the presence of rights of States and of individuals together (paras. 12-15).

66. In effect, nowadays one cannot behold only States, but also - and mainly - peoples and human beings, for whom States were created. The "founding fathers" of the law of nations (*droit des gens*), from the XVIth. century onwards, duly kept them in mind[33]. In the XXth. century, writing during the II world war (1939-1944), and keeping in mind "totalitarian" State policies at the time, J. Maritain sustained, in the line of natural law thinking, that the human person with conscience transcends the State, and has the right to take decisions concerning his or her own destiny[34].

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67. In his conceptualization of personalism, he warned that the problem of human evil is thus to keep on being studied at a greater depth. To him, evil actions are connected with *voluntas*, and can only be resisted and condemned in conformity with *recta ratio*. Ancient Greek thinkers (cf. *supra*) were already aware that a life of reflection is more valuable or superior to only active life; and still during the time of the II world war (in 1944), J. Maritain was calling for a new era of a needed and integral humanism[35]. I have addressed this particular point also in another international jurisdiction[36].

68. As to contemporary law of nations (after the II world war), may it be recalled that the 1945 U.N. Charter itself, as adopted in one of the rare moments - if not glimpses - of lucidity in the XXth. century, - followed three years later by the 1948 Universal Declaration of Human Rights, - proclaimed, in its preamble, the determination of "the *peoples* of the United Nations" to "*save succeeding generations* from the scourge of war", and, to that end, to "live together in peace with each other as good neighbours". The draftsmen of the U.N. Charter made a point of making it refer to peoples - rather than States - of the United Nations. The U.N. Charter, as from the moment of its adoption, surpassed the strictly reductionist inter-State outlook[37].

69. As to the *cas d'espèce*, it should not pass unnoticed that the 1955 Treaty of Amity 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))[38].

XII. CONTINUING RISK OF IRREPARABLE HARM.

70. In the *cas d'espèce*, extra-territorial sanctions again imposed by the United States upon Iran, as from 06.08.2018, with its withdrawal from the JCPOA (in addition to further sanctions to take effect as from 04.11.2018) *already* have an impact on Iran's position at international level and on its economic situation and that of its nationals and Iranian companies. As reported to the Court in the course of the present proceedings, the investments they made risk being worthless and the value of their currency has *already* dropped significantly[39], foreign companies have announced the termination of their commercial activities in the country[40], where unemployment is *already* very high[41].

71. Iranian nationals are at risk of being in an increasingly difficult situation, as their economic condition continues to worsen, given the sanctions imposed by the United States, and will further deteriorate as further sanctions are soon (next November) to be applied. This means that the ability of the Iranian people to access simple products and services is at stake, such as their ability to buy food and essential living products[42], and to access medication and health services[43]. There is here a continuing and growing risk of irreparable harm.

XIII. CONTINUING SITUATION AFFECTING RIGHTS AND THE IRRELEVANCE OF THE TEST OF THEIR SO-CALLED "PLAUSIBILITY".

72. In the present Separate Opinion, I have already related provisional measures of protection to continuing situations of vulnerability (part IX), and have then proceeded to develop humanitarian considerations on human vulnerability (part X) (cf. *supra*). In this respect, there is still another aspect to be here considered. In the present case of *Alleged Violations of the 1955 Treaty of Amity*, there is a continuing situation (of application of sanctions) affecting State and individuals' rights.

73. In a continuing situation of the kind, the rights affected (under the 1955 Treaty of Amity) are certain and clear, and, in my perception, to label them "plausible" has no sense. Even more so when the persons affected remain in a continuing situation of human vulnerability. This is not the first time that I express this concern. In my Separate Opinion in the ICJ's recent Order of Provisional Measures of Protection (of 23.07.2018), I have warned that

> "The test of so-called 'plausibility' of rights is, in my perception, an unfortunate invention - a recent one - of the majority of the ICJ. (. . .)

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> It appears that each one feels free to interpret so-called 'plausibility' of rights in the way one feels like; this may be due to the fact that the Court's majority itself has not elaborated on what such 'plausibility' means. To invoke 'plausibility' as a new 'precondition', creating undue difficulties for the granting of provisional measures of protection in relation to a *continuing situation*, is misleading, it renders a disservice to the realization of justice" (paras. 57 and 59).

74. Earlier on, in my Separate Opinion in the case of *Application of the ICSFT Convention and of the CERD Convention* (Ukraine *versus* Russian Federation, Order of 19.04.2017), attentive to the "utmost vulnerability of victims" (paras. 27-35) and "the tragedy of human vulnerability" (paras. 62-67), I have strongly criticized the uncertainties of the test of so-called "plausibility" (paras. 37-41), sustaining that, instead of it, it is continuing human vulnerability that paves safely the way for the indication of provisional measures of protection (paras. 36 and 42-44).

75. Following that, also in my Separate Opinion in the case of *Jadhav* (India *versus* Pakistan, Order of 18.05.2017), I have pondered that "[t]he 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. This is true not only for the stage of the merits of the case at issue, but also for the stage of provisional measures of protection, endowed with a juridical autonomy of their own" (para. 19).

76. In the light of the considerations above, may I here point out, once again, that there was no need for the Court to refer vaguely to "plausibility" or "plausible" rights, in its present Order of provisional measures of protection[44]. The superficiality of such characterization is evident to me, as the rights to be protected here, by means of provisional measures, are quite clear (under the 1955 Treaty), rather than "plausible". It is this certainty, rather than so-called "plausibility", that should have oriented the ICJ to indicate the provisional measures determined in the present Order.

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

XIV. CONSIDERATIONS ON INTERNATIONAL SECURITY AND URGENCY OF THE SITUATION.

78. In their oral pleadings before the Court in the present case of *Alleged Violations of the 1955 Treaty of Amity*, the contending parties focused their arguments on submissions relating to the U.S. measures to reimpose sanctions upon Iran (after withdrawal from the JCPOA): in the pleadings, on the one hand the United States sought to ground them on so-called interests and concerns of national security[45], while Iran opposed itself to those "nuclear-related" sanctions allegedly ensuing from national "interests", invoking their harmful effects upon itself and its nationals and its own IAEA commitments[46].

79. In effect, the whole matter brought before the Court in the present proceedings is to be examined bearing in mind international security. Its handling, pertaining to nuclear weapons, is a concern of the international community as a whole. It thus seems rather odd that, in the circumstances of the *cas d'espèce*, international security, though mentioned in Iran's *Request for Provisional Measures* (p. 4, para. 10), passed virtually unexplored by the two contending parties in their oral arguments during the public hearings before the ICJ.

80. The Joint Comprehensive Plan of Action (JCPOA) has been endorsed by U.N. Security Council resolution 2231, of 20.07.2015 (Annex A). That resolution affirms, *inter alia*, that the safeguards of the International Atomic Energy Agency (IAEA), as a "fundamental component of nuclear non-proliferation", contribute to the strengthening of the "collective security" of States[47]. In its operative part, Security Council resolution 2231 (2015) restates the concern of previous resolutions of the Security Council not to harm "individuals and entities"[48].

81. International security cannot at all pass unnoticed here. Moreover, Security Council resolution 2231(2015) further refers to principles of international law and the rights and under the 1968 Treaty on the Non-Proliferation of Nuclear Weapons [NPT] "and other relevant instruments" (para. 27). Among these latter, the international community counts today also on the Treaty on the Prohibition of Nuclear Weapons, adopted on 07.07.2017, and opened to signature at the United Nations on 20.09.2017.

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82. 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[49]. 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.

83. As to the *cas d'espèce*, there are other elements that have been brought to the fore in the present proceedings before the ICJ, pertaining to international security, that are also to be duly taken into account. First, the U.N. Secretary General (A. Guterres) issued a Statement on 08.05.2018[50], wherein he expresses his deep concern with the decision of the United States to withdraw from the JCPOA and to begin reinstating its sanctions. He stresses the great relevance of the JCPOA for nuclear non-proliferation as well as international peace and security, and calls on other JCPOA participants to keep on abiding fully by their respective commitments thereunder, and on all other member States to keep supporting the agreement[51].

84. Secondly, the IAEA Director General (Y. Amano) also issued a Statement, on 09.05.2018, confirming that, as requested by the U.N. Security Council and authorized by the IAEA Board of Governors in 2015, the IAEA is verifying and monitoring Iran's implementation of its nuclear-related commitments under the JCPOA; he then further confirms that those commitments are being implemented by Iran to date[52].

85. Thirdly, the Governments of France, Germany and the United Kingdom, following the U.S.'s decision to withdraw from the JCPOA, issued a *Press Release* on 08.05.2018, containing their Joint Statement wherein they regret that U.S.'s decision to withdraw, and stress their own continued commitment to the JCPOA. They declare that the JCPOA is binding, recall that it was unanimously endorsed by the Security Council, and urge all sides to commit to its implementation. After noting that Iran has abided by the JCPOA, as confirmed by the IAEA, France, Germany and the United Kingdom urge the United States to stop restricting its implementation, and urge Iran to continue compliance with the agreement, in cooperation with the IAEA[53].

86. And fourthly, - as also mentioned in the present oral pleadings before the ICJ[54], - the U.N. Special *Rapporteur* (I. Jazairy) of the U.N. Office of the High Commissioner on Human Rights (OHCHR) on the "*Negative Impact of the Unilateral Coercive Measures on the Enjoyment of Human Rights*", in addressing the extra-territorial sanctions reimposed against Iran "after the unilateral withdrawal of the United States from the nuclear deal, which had been unanimously adopted by the Security Council with the support of the U.S. itself", stated (*Press Release* of 22.08.2018) that

> "Sanctions must be just, and must not lead to the suffering of innocent people (. . .). The U.N. Charter calls for sanctions to be applied only by the U.N. Security Council (. . .). International sanctions must have a lawful purpose, must be proportional, and must not harm the human rights of ordinary citizens, and none of these criteria is met in this case (. . .). These unjust and harmful sanctions are destroying the economy and currency of Iran, driving millions of people into poverty and making important goods unaffordable"[55].

87. The Special *Rapporteur* further referred to the 1970 U.N. Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, which urges States to settle peacefully their differences through dialogue. Subsequently, in another statement (*Press Release* of 13.09.2018), the Special *Rapporteur* outlined again the "need for differences between States to be resolved through peaceful means as advocated by the U.N. Charter, while avoiding exposing innocent civilians to collective punishment"[56].

88. In his Report of 30.08.2018, the Special *Rapporteur* focused on the "human rights-related aspects" of the U.S. withdrawal from the JCPOA. He pointed out that the JCPOA was endorsed by Security Council resolution 2231(2015), which explicitly stressed that U.N. member States "were obligated under Article 25 of the Charter of the United Nations to accept and carry out the decisions of the Security Council"[57].

89. He recalled that the ICJ's Advisory Opinion (of 21.06.1971) on *Namibia* (para. 116) asserted that when the Security Council adopts a decision under Article 25 of the U.N. Charter, "it is for member States to comply with that

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decision"[58]. And he then examined the consequences of those sanctions, harmful to Iranian nationals, bearing in mind the conventional international legal obligations[59].

90. In the present Order of Provisional Measures in the case of *Alleged Violations of the 1955 Treaty of Amity*, the ICJ has duly taken into account the *humanitarian needs* of the affected population (in paragraphs 70, 89, 91-92 and 98), so as to secure to it medical supplies and devices and equipment for treatment for chronic disease or preventive care, foodstuffs and agricultural commodities, and maintenance services for civil aviation safety (in paragraph 102 *dispositif*, points 1 and 2).

91. Moreover, in the present Separate Opinion, I have already pointed out that, in the present Order in the case of *Alleged Violations of the 1955 Treaty of Amity*, as well as in other Orders in previous cases likewise (cf. part IV, paras. 21-27, *supra*), the ICJ itself has ended up discarding arguments grounded on "national interests", in ordering the needed provisional measures of protection. Yet, in the present Order, - may I add, - the Court should have been far more attentive to international security than to State susceptibilities as to their own "national security" interests or strategies.

92. In the *cas d'espèce*, the Order of provisional measures of protection has all the more reason and necessity, as the case brought to the Court by Iran concerns nuclear weapons (cf. *supra*), and sanctions reapplied to it by the respondent State, after the U.S. withdrawal from the nuclear agreement (JCPOA) at issue. Among the rights for which provisional measures of protection have here been vindicated, and have been duly ordered by the ICJ, are the rights related to human life and human health, which thus pertain to individuals, to human beings.

XV. EPILOGUE: A RECAPITULATION.

93. The matter brought to the Court's attention in the factual context of the request which led to the adoption, by unanimity, of the present Order indicating provisional measures of protection in the case of *Alleged Violations of the 1955 Treaty of Amity* (Iran *versus* United States), requires, as I have endeavoured to demonstrate in the present Separate Opinion, much reflection, from a humanist outlook.

94. The fact that the matter at issue in the *cas d'espèce* is being handled on an inter-State basis, characteristic of the *contentieux* before the ICJ, does not mean that the Court is to reason likewise on a strictly inter-state basis. Not at all. 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.

95. Provisional measures, with their preventive dimension, have been undergoing a significant evolution, moving further towards the consolidation of the *autonomous legal regime* of their own, to the benefit of the *titulaires* of rights (States as well as individuals). With this clarification, may I, last but not least, proceed to a brief recapitulation of the main points I deemed it fit to make, particularly in respect of such provisional measures, in respect of protected rights under the 1955 Treaty of Amity, in the course of the present Separate Opinion.

96. *Primus*: International treaties, encompassing the 1955 Treaty of Amity, are living instruments, understood on the basis of circumstances in which they are to be applied. *Secundus*: In their interpretation and application, their object and purpose are to be kept in mind. Their evolutionary interpretation ensuing therefrom has contributed to the progressive development of international law.

97. *Tertius*: In ordering provisional measures of protection, 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. *Quartus*: This is confirmed by the ICJ's relevant *jurisprudence constante*. *Prima facie* jurisdiction is autonomous from jurisdiction on the merits, as acknowledged also by a more lucid trend of international legal doctrine.

98. *Quintus*: The idea of objective justice and human values stand above facts. As the ICJ case-law reveals, the imperative of the realization of justice prevails over the invocation of "national security" interests or strategies. *Sextus*: The gradual formation of the autonomous legal regime of provisional measures of protection has presented distinct component elements, starting with the transposition of those measures from comparative domestic procedural law onto international legal procedure.

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99. *Septimus*: 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. *Octavus*: 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.

100. *Nonus*: 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. *Decimus*: The ICJ case-law, with the addition of its present Order, reveals the great need and relevance of provisional measures of protection in *continuing situations* of tragic vulnerability of human beings.

101. *Undecimus*: Human vulnerability, - which assumes particular importance in the realm of provisional measures of protection, - has drawn the attention of thinkers along the centuries. Awareness of the dictates of justice (in the line of jusnaturalist thinking) was already present in the writings of ancient Greek tragedians. *Duodecimus*: From ancient times to nowadays, there has been support for the prevalence of human conscience over the will, of jusnaturalism over legal positivism.

102. *Tertius decimus*: The imperatives of *recta ratio*, of the universal juridical conscience, overcome the invocations of *raison d'État*. *Quartus decimus*: The protection, by means of provisional measures, of the human person (individuals and groups in vulnerability), goes beyond the strict inter-State dimension. *Quintus decimus*: The U.N. Charter itself is attentive to "the peoples of the United Nations", surpassing the reductionist inter-State outlook.

103. *Sextus decimus*: 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. *Septimus decimus*: A *continuing situation* of the kind has had an incidence in earlier cases before the ICJ as well. *Duodevicesimus*: In such a *continuing situation*, the rights being affected and requiring protection are clearly known, their being no sense to wonder whether they are "plausible". The test of "plausibility" is here irrelevant.

104. *Undevicesimus:* In the present case, the consideration of the matter brought before the ICJ is to keep in mind international security, as it concerns the international community as a whole. *Vicesimus*: There is a universal obligation of nuclear disarmament. National perceptions cannot lose sight of international security. *Vicesimus primus*: Concerns in this respect have recently been expressed by other States parties to the JCPOA, by the U.N. Secretary General, by the IAEA Director General, by the U.N. OHCHR's Special *Rapporteur*; it is indeed a matter of international concern.

105. *Vicesimus secundus*: In ordering the present provisional measures of protection, the ICJ has duly taken into account the humanitarian needs of the affected population, so as to safeguard the rights related to human life and human health, pertaining to individuals. *Vicesimus tertius*: This is a case, like previous ones before the ICJ, where provisional measures of protection have been ordered in situations of human vulnerability.

106. *Vicesimus quartus*: Such ordering therein of provisional measures of protection can only be properly undertaken from a humanist perspective, thus necessarily avoiding the pitfalls of an outdated and impertinent attachment to State voluntarism. *Vicesimus quintus*: Once again in the present case and always, human beings stand in need, ultimately, of protection against evil, which lies within themselves. *Vicesimus sextus*: In such perspective, the *raison d'humanité* is to prevail over the *raison d'État*. The humanized international law (*droit des gens*) prevails over alleged "national security" interests or strategies.

(Signed) Antônio Augusto CANÇADO TRINDADE

ENDNOTES

1 ICJ, case of *Jadhav* (India *versus* Pakistan), provisional measures, Order of 18.05.2017, para. 15; ICJ, case of the *Application of the Convention on the Elimination of All Forms of Racial Discrimination* (CERD - Qatar *versus* UAE), provisional measures, Order of 23.07.2018, para. 14. - And cf. also, earlier on, ICJ, case of the *Seizure and Detention of Certain Documents and Data* (Timor-Leste *versus* Australia), provisional measures, Order of 03.03.2014, para. 18.

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2 For an examination of the international tribunals' common mission of realization of justice, cf. A.A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, 2nd. rev. ed., Belo Horizonte, Edit. Del Rey, 2017, pp. 11-65, 127-240, 297-428 and 447-456; A.A. Cançado Trindade, "Les tribunaux internationaux et leur mission commune de réalisation de la justice: développements, état actuel et perspectives", 391 *Recueil des Cours de l'Académie de Droit International de La Haye* (2017) pp. 38-101; A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Ed. Ad-Hoc, 2013, pp. 43-185.

3 Cf., e.g., Union Académique Internationale, *Dictionnaire de la Terminologie du Droit International*, Paris, Sirey, 1960, p. 472.

4 S. Rosenne, "Provisional Measures and *Prima Facie* Jurisdiction Revisited", *in Liber Amicorum Judge S. Oda* (eds. n. Ando *et alii*), vol. I, The Hague, Kluwer, 2002, pp. 527 and 540, and cf. pp. 541-542.

5 C. Dominicé, "La compétence *prima facie* de la Cour Internationale de Justice aux fins d'indication de mesures conservatoires", *in ibid*., vol. I, pp. 391 and 394, and cf. p. 393.

6 Cf., to this effect, e.g., my Separate Opinion (paras. 79-80) in the case of the *Application of the ICSFT Convention and of the CERD Convention* (Ukraine *versus* Russian Federation, Order of 19.04.2017 - *infra*). And cf., in the same sense, for my criticisms of the voluntarist conception: A.A. Cançado Trindade, *Le Droit international pour la personne humaine*, Paris, Pédone, 2012, pp. 115-136; A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, op. cit. supra n. (2), pp. 69-77; A. A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça*, 2nd. rev. ed., *op. cit. supra* n. (2), pp. 176-178 and 314-316.

7 Cf. A.A. Cançado Trindade, *Évolution du Droit international au droit des gens - L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pédone, 2008, pp. 64-70; A.A. Cançado Trindade, "La Expansión y la Consolidación de las Medidas Provisionales de Protección en la Jurisdicción Internacional Contemporánea", *in Retos de la Jurisdicción Internacional* (eds. S. Sanz Caballero and R. Abril Stoffels), Cizur Menor/Navarra, Cedri/CEU/Thomson Reuters, 2012, pp. 99-117; A.A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional - Memorias de la Corte Interamericana de Derechos Humanos*, 5th. rev. ed., Belo Horizonte, Edit. Del Rey, 2018, chapters V and XXII (Provisional Measures of Protection), pp. 47-52 and 199-208; A.A. Cançado Trindade, "Les mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme", *in Mesures conservatoires et droits fondamentaux* (eds. G. Cohen-Jonathan and J.-F. Flauss), Bruxelles, Bruylant/Nemesis, 2005, pp. 145-163.

8 P. Guggenheim, « Les mesures conservatoires dans la procédure arbitrale et judiciaire », 40 *Recueil des Cours de l'Académie de Droit International de La Haye* (1932) pp. 649-763, and cf. pp. 758-759; P. Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, Paris, Libr. Rec. Sirey, 1931, pp. 15, 174, 186, 188 and 14-15, and cf. pp. 6-7 and 61-62.

9 Cf. R.St.J. MacDonald, "Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights", 52 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1993) pp. 703-740; A.A. Cançado Trindade, « Les mesures provisoires de protection dans la jurisprudence de la Cour Interaméricaine des Droits de l'Homme », *in Mesures conservatoires et droits fondamentaux* (eds. G. Cohen-Jonathan and J.-F. Flauss), Bruxelles, Bruylant/Nemesis, 2005, pp. 145-163; R. Bernhardt (ed.), *Interim Measures Indicated by International Courts*, Berlin/Heidelberg, Springer-Verlag, 1994, pp. 1-152; A. Saccucci, *Le Misure Provvisorie nella Protezione Internazionale dei Diritii Umani*, Torino, Giappichelli Ed., 2006, pp. 103-241 and 447-507; and cf. also E. Hambro, "The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice", *in Rechtsfragen der Internationalen Organisation - Festschrift für H. Wehberg* (eds. W. Schätzel and H.-J. Schlochauer), Frankfurt a/M, 1956, pp. 152-171. - Provisional measures have been increasingly ordered, in recent years, by international as well as national tribunals; cf. E. García de Enterria, *La Batalla por las Medidas Cautelares*, 2nd. rev. ed., Madrid, Civitas, 1995, pp. 25-385; and L. Collins, "Provisional and Protective Measures in International Litigation", 234 *Recueil des Cours de l'Académie de Droit International de La Haye* (1992) pp. 23, 214 and 234.

10 As I pointed out in another international jurisdiction: cf. A.A. Cançado Trindade, "Preface by the President of the Inter-American Court of Human Rights", *in Compendium of Provisional Measures* (June 1996-June 2000), vol. 2, Series E, San José of Costa Rica, IACtHR, 2000, pp. VII-XVIII, and sources referred to therein.

11 Cf. n. (15), *infra*.

12 In my understanding, rights and obligations concerning provisional measures of protection are not necessarily the same as those pertaining to the merits of the cases, and the configuration of responsibility with all its legal consequences is prompt, without waiting for the decision on the merits of the cases.

13 Cf. also, on the same jurisprudential construction, my Separate Opinion in the case *A.S. Diallo* (Guinea *versus* D.R. Congo, merits, Judgment of 30.11.2010).

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

15 Such Individual Opinions on the matter are reproduced in the collections: a) *Judge A.A. Cançado Trindade - The Construction of a Humanized International Law - A Collection of Individual Opinions (1991-2013)*, vol. I (IACtHR), Leiden, Brill/Nijhoff, 2014, pp. 799-852; vol. II (ICJ), Leiden, Brill/Nijhoff, 2014, pp. 1815-1864; vol. III (ICJ), Leiden, Brill/Nijhoff, 2017, pp. 733-764; and b) *Vers un nouveau jus gentium humanisé - Recueil des Opinions Individuelles du Juge A.A. Cançado Trindade [CIJ]*, Paris, L'Harmattan, 2018, pp. 143-224 and 884-886; and c) *Esencia y Transcendencia del Derecho Internacional de los Derechos Humanos (Votos [del Juez A.A. Cançado Trindade] en la Corte Interamericana de Derechos Humanos, 1991-2008)*, vols. I-III, 2nd. rev. ed., Mexico D.F., Ed. Cám. Dips., 2015, vol. III, pp. 77-399.

16 On the notion of *potential* victims in the framework of the evolution of the notion of victim or the condition of the complainant in the domain of the international protection of human rights, cf. A.A. Cançado Trindade, "Co-Existence and Co-Ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 *Recueil des Cours de l'Académie de Droit International de La Haye* (1987), ch. XI, pp. 243-299, esp. pp. 271-292.

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17 Cf. ICJ, (merged) cases of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River*, Order of 16.07.2013, Dissenting Opinion of Judge Cançado Trindade, para. 75.

18 Cf., to this effect, ICJ, (merged) cases of *Certain Activities Carried out by Nicaragua in the Border Area* (Costa Rica *versus* Nicaragua) and *Construction of a Road in Costa Rica along the San Juan River*, Order of 22.11.2013, Separate Opinion of Judge Cançado Trindade, paras. 20-31 and 40. The right of access to justice, also in the present domain (cf. para. 68, *supra*), is to be understood *lato sensu*, encompassing not only the formal access to a competent tribunal, but also the due process of law (equality of arms), and the faithful compliance with the decision; for a general study, cf. A.A. Cançado Trindade, *El Derecho de Acceso a la Justicia en Su Amplia Dimensión*, 2nd. ed., Santiago de Chile, Ed. Librotecnia, 2012, pp. 79-574; A.A. Cançado Trindade, *The Access of Individuals to International Justice*, Oxford, Oxford University Press, 2011, pp. 1-236.

19 Cf. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre, S.A. Fabris Ed., 2003, pp. 80-83.

20 Cf., e.g., *inter alia*, A.A. Cançado Trindade, *Princípios do Direito Internacional Contemporâneo,* 2nd. rev. ed., Brasília, FUNAG, 2017, pp. 25-454; A.A. Cançado Trindade, "Foundations of International Law: The Role and Importance of Its Basic Principles", *in XXX Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* (2003), Washington D.C., General Secretariat of the OAS, 2004, pp. 359-415.

21 A.A. Cançado Trindade, *Os Tribunais Internacionais e a Realização da Justiça,* 2nd. rev. ed., *op. cit. supra* n. (2), pp. 29-468; and cf. A.A. Cançado Trindade, *A Visão Humanista da Missão dos Tribunais Internacionais Contemporâneos*, The Hague/Fortaleza, IBDH/IIDH, 2016, pp. 11-283; A.A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, *op. cit. supra* n. (2), pp. 7-185.

22 ICJ, doc. CR 2018/16, of 27.08.2018, p. 76, para. 37.

23 Verses 1151-1155 and 1161-1162. - Earlier on, in another tragedy by Euripides, *Hippolytus* (428 b.C.), the chorus sang:

> "When I think of god's care for man
> it lightens my pain, but understanding,
> concealed by hope, eludes me
> when I see what happens to men and
> what they do.
> From one place then another things
> come and go,
> men's lives shift about, wander here
> and there" (verses 1105-1110).

24 Verses 797-801.

25 Cf. A.-D. Sertillanges, *Les vertus théologales*, vol. I, Paris, Libr. Renouard H. Laurens Édit., 1913, pp. 76-77 and 179.

26 Cf. A.-D. Sertillanges, *Les vertus théologales*, *op. cit. supra* n. (25), vol. I, pp. 180-181; and vol. II, pp. 155 and 170.

27 Cf. A.-D. Sertillanges, *Les vertus théologales*, *op. cit. supra* n. (25), vol. III, pp. 23, 139, 145, 151-154 and 156-157.

28 Cf. G. Steiner, *Tolstoy ou Dostoevsky* [1959], São Paulo, Ed. Perspectiva, 2006, p. 31.

29 Cf. S. Zweig, *Tolstoï* [1939], Paris, Buchet-Chastel, 2017, pp. 19, 76, 81, 88, 188 and 193-195.

30 L. Tolstoy, *Anna Karenina*, [London], Wordsworth Ed., 1999, pp. 793- 794.

31 F. Dostoevsky, *The Karamazov Brothers*, [London], Wordsworth Ed., 2009, p. 347.

32 Cf., e.g., A.A. Cançado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice*, Utrecht, Universiteit Utrecht, 2011, pp. 1-71; A.A. Cançado Trindade, *La Reponsabilidad del Estado en Casos de Masacres - Dificultades y Avances Contemporáneos en la Justicia Internacional*, Mexico, Edit. Porrúa/Escuela Libre de Derecho, 2018, pp.1-104.

33 Cf. A.A. Cançado Trindade, "La Perennidad del Legado de los 'Padres Fundadores' del Derecho Internacional", 13 *Revista Interdisciplinar de Direito da Faculdade de Direito de Valença* (2016) n. 2, pp. 15-43; A.A. Cançado Trindade, "Prefácio: A Visão Universalista e Humanista do Direito das Gentes: Sentido e Atualidade da Obra de Francisco de Vitoria", *in*: Francisco de Vitoria, *Relectiones - Sobre os Índios e sobre o Poder Civil*, Brasília, Edit. Universidade de Brasília / FUNAG, 2016, pp. 19-51.

34 Cf. J. Maritain, *Los Derechos del Hombre y la Ley Natural* [1939-1945], Buenos Aires, Edit. Leviatan, 1982 (reed.), pp. 66, 69 and 79-82; and cf. also J. Maritain, *De Bergson a Santo Tomás de Aquino - Ensayos de Metafísica y Moral* [1944], Buenos Aires, Ed. Club de Lectores, 1983, pp. 213-214, 224 and 248; J. Maritain, *Natural Law - Reflections on Theory and Practice* [1943] (ed. W. Sweet), South Bend/Indiana, St. Augustine's Press, 2001, pp. 8, 20, 23, 25-26, 32-34, 48-49, 51, 54, 63 and 67.

35 Cf. J. Maritain, *Humanisme intégral* [1936], Paris, Aubier, 2000, p. 18, and cf. pp. 37 and 229-232; J. Maritain, *Para una Filosofía de la Persona Humana* [1936], Buenos Aires, Ed. Club de Lectores, 1984, pp. 169, 206-207 and 221.

36 Cf. IACtHR, case of *La Cantuta versus Peru* (Interpretation of Judgment of 30.11.2007), Separate Opinion of Judge A.A. Cançado Trindade, paras. 15-16.

37 Cf. A.A. Cançado Trindade, "[Key-Note Address: Some Reflections on the Justiciability of the Peoples' Right to Peace - Summary]", *in* U.N., *Report of the Office of the High Commissioner for Human Rights on the Outcome of the Expert Workshop on the Right of Peoples to Peace* (2009), doc. A/HRC/14/38. de 17.03.2010, pp. 9-11.

38 It refers as well to "freedom of commerce" (Article X(1)).

39 Iran's *Request for Provisional Measures*, p. 16, para. 36, n. 50.

40 *Ibid*., p. 12, n. 28, n. 38.

41 *Ibid*., p. 11, para. 26, n. 34.

42 *Ibid*., p. 13, para. 30, n. 41.

43 Iran's *Application Instituting Proceedings*, p. 15, para. 37, n. 54.

44 Cf. paras. 54, 68, 69, 70 and 90.

45 Cf., on the part of the United States: ICJ, CR 2018/17, of 28.08.2018, p. 11 paras. 4-5; p. 13 para. 13; p. 17 para. 23; p. 18, paras. 26-27; p. 19, para. 31; p. 20 para. 33; p. 24 para. 6; p. 35 para. 9; p. 37 paras. 17-18; p. 39 paras. 22-23; p. 40 para. 24; p. 48 para. 48; p. 67 paras. 70 and 72; p. 68 para. 73; and cf. also: ICJ, CR 2018/19, of 30.08.2018, p. 18 paras.

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31-32; p. 20 para. 1; p. 26 para. 25; p. 28 para. 29; pp. 37-38 paras. 3, 5 and 8.

46 Cf., on the part of Iran: ICJ, CR 2018/16, of 27.08.2018, p. 21 para. 10; p. 25, paras. 22-23; p. 26 para. 27; p. 50 p. 6; p. 63 para. 34; p. 65 para. 42; pp. 74-75 para. 31; and cf. also: ICJ, CR 2018/18, of 29.08.2018, p. 24 para. 8; p. 25 para. 12; p. 35 para. 1; pp. 36-37 paras. 6-7, 9 and 11-12; p. 38, paras. 12 and 15-16; p. 42 para. 3.

47 Preamble, para. 10.

48 Operative part, paras. 12 and 15, and cf. para. 29.

49 Cf. A.A. Cançado Trindade, *The Universal Obligation of Nuclear Disarmament*, Brasília, FUNAG, 2017, pp. 41-224; A.A. Cançado Trindade, "A Conferência da ONU sobre o Tratado de Proibição de Armas Nucleares", 44 *Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano* (2017), Washington D.C., General Secretariat of the OAS, 2017, pp. 11-49.

50 Cf. *Request for Provisional Measures*, p. 4, para. 10, n. 15.

51 Cf. text of Statement reproduced *in*: *U.N. News*, of 08.05.2018, pp. 1-2.

52 Cf. *Application Instituting Proceedings*, pp. 4-5, paras. 14 and 16, n. 17; ICJ, doc. CR 2018/16, of 27.08.2018, p. 23, para. 16; ICJ, doc. CR 2018/18, of 29.08.2018, p. 20, para. 22.

53 Cf. *JCPOA - Joint Statement by France, Germany and the United Kingdom*, of 08.05.2018, p. 1. - On the indication that the European Union would intensify its efforts to maintain economic relations with Iran, cf. ICJ, doc. CR 2018/17, of 28.08.2018, p. 62, para. 50.

54 Cf. ICJ, doc. CR 2018/16, of 27.08.2018, p. 25, para. 23 n. 8.

55 Statement reproduced *in*: U.N./OHCHR, *Press Release* of 22.08.2018, p. 1.

56 Statement reproduced *in*: U.N./OHCHR, *Press Release* of 13.09.2018, p. 1.

57 U.N./Human Rights Council, *Report of the Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights*, U.N. doc. A/HRC/39/54, of 30.08.2018, p. 10, para. 31.

58 *Ibid*., p. 10, para. 32.

59 Cf. *ibid*., pp. 10-13, paras, 33-34 and 37-39.

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DECLARATION OF JUDGE *AD HOC* MOMTAZ

[Translation]

Security Council resolution 2231 (2015) — Binding effect of the obligations imposed by resolution 2231 (2015) on United Nations Member States — Iran has complied with its commitments under the JCPOA — Unlawfulness of the extraterritorial measures taken by the United States in international law — Sanctions with extraterritorial effect do not fall within the provisions of Article XX, paragraph 1 (d) *of the Treaty of Amity, Economic Relations, and Consular Rights of 15 August 1955 — Mission of the Court as the principal judicial organ of the United Nations in the maintenance of international peace and security.*

1. I voted in favour of the three provisional measures indicated by the Court in the operative part of the Order. However, I fear 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.

2. In point (1) (iii) of paragraph 102, the operative part of the Order, the Court has limited the scope of the first provisional measure to "spare parts, equipment and maintenance services necessary for civil aircraft safety". In my opinion, this measure does not enable Iran to ensure the safety of its civil aviation, and thus to avoid irreparable prejudice being caused to its rights under the Treaty of Amity. As the Court recalled in paragraph 81 of its Order, Iran's fleet of aircraft is one of the oldest in the world. Iran asserted as much during the oral proceedings and this was not contested. 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. I regret that this was not included in the operative part of the Order.

3. As regards the second provisional measure, and in view of the secondary, extraterritorial sanctions of the United States (Order, paras. 74 and 83), 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.

4. While I agree with the reasoning set out in the Court's Order, I nevertheless believe it necessary to examine three questions on which the Court did not rule — at least not at this stage of the proceedings. In my view, these questions are particularly important since the purpose of provisional measures is to prevent the aggravation of a dispute and to protect the rights of the disputing parties pending a decision by the Court on the merits. Moreover, these questions are central to the Court's role as the principal judicial organ of the United Nations, as well as its role in protecting and promoting the purposes and principles of the Charter, including in maintaining international peace and security.

1. The obligations of United Nations Member States under Security Council resolution 2231 (2015)

5. In paragraph 18 of its Order, the Court takes note of Security Council resolution 2231 (2015), but does not elucidate its legal consequences. This resolution, which was adopted unanimously, is part of the factual context in which the dispute submitted to the Court under the Treaty of Amity arose. Although this dispute does not concern the United States' compliance with resolution 2231 (2015) or its withdrawal from the Joint Comprehensive Plan of Action (hereinafter the "JCPOA" or the "Plan"), it could have been avoided had the United States adhered to its commitments under resolution 2231 (2015).

6. Resolution 2231 (2015) does not expressly refer to Chapter VII of the Charter of the United Nations. Nonetheless, the reference in the resolution's preamble to Article 25 of the Charter, and the ten references in its operative part to Article 41, part of Chapter VII of the Charter, prove that it imposes obligations on Member States. The resolution endorsed the JCPOA in its entirety. Regardless of the legal status of the Plan as such, in particular whether it is a binding instrument for the States which concluded it, what is important here is to ascertain whether and to what extent resolution 2231 (2015) imposes binding obligations on all Member States of the Organization, including the United States.

7. First, the Court has had occasion to state the following on the binding effect of resolutions adopted by the Security Council:

> "112. It would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it . . .
>
> 113. . . . Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.
>
> 114. It has also been contended that the relevant Security Council resolutions are couched in exhortatory rather than mandatory language and that, therefore, they do not purport to impose any legal duty on any State nor to affect legally any right of any State. The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, pp. 52-53, paras. 112-114).

8. As a general rule, therefore, the binding effect of Security Council decisions is not limited to those taken under the provisions of Chapter VII (see also, for example, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 192, para. 134). Thus, ascertaining whether a Security Council resolution is binding requires an analysis of the terms used therein, the discussions which led to its adoption and the provisions of the Charter it cites, with a view to determining whether the Security Council intended to establish an obligation for Member States (see, for example, *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 104, para. 32). While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, "the interpretation of Security Council resolutions also require[s] that other factors be taken into account" (*Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 442, para. 94). Thus:

> "The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions." (*Ibid*.)

9. One must therefore examine the language, the object and purpose, and the context of resolution 2231 (2015) to determine its legal effect. As has been recalled, the resolution's preamble provides that "Member States are obligated under Article 25 of the Charter of the United Nations to accept and carry out the Security Council's decisions". In that same preamble, the Security Council made repeated references to the importance of the JCPOA, which "marks a fundamental shift in [the] consideration" of the Iranian nuclear issue, the culmination of diplomatic efforts in the area of non-proliferation which falls squarely within the competence of the Security Council. It also invited all States to cooperate with Iran and underscored the importance of the role of the International Atomic Energy Agency (IAEA) in implementing and monitoring the commitments contained in the Plan and approved in the resolution, with the Security Council, as emphasized by its permanent members following the adoption of the resolution, guaranteeing its implementation.

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10. If the true intention of Security Council was in fact simply to take note of the JCPOA, it could have done so, as it usually does, without appending the entire text of that lengthy instrument to the resolution. Yet that was not the intention with resolution 2231 (2015), in which the Security Council "*[e]ndorses* the JCPOA and *urges* its full implementation on the timetable established [there]in". It is absolutely clear from the opening of the resolution's operative part, immediately preceded by a reference in its preamble to Article 25 of the Charter, that the Security Council intended to establish binding obligations for all Member States, including the United States.

11. An examination of the operative part of the resolution confirms its binding nature. The vast majority of its provisions are preceded by an express reference to Article 41, part of Chapter VII of the Charter. This includes paragraphs 7 to 9, 11 to 13, 16 and 21 to 23. In paragraph 7, for example, the Security Council, "acting under Article 41 of the Charter", decided to lift the sanctions contained in its previous resolutions on the Iranian nuclear issue, i.e. resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010) and 2224 (2015). Other provisions of resolution 2231 (2015), which are not preceded by an express reference to Article 41 of the Charter, are nonetheless binding on the United Nations Member States in so far as they were adopted in accordance with the purposes and principles of the Charter and the provisions of Article 25. As the Court has recalled,

> "when the Security Council adopts a decision under Article 25 in accordance with the Charter, it is for member States to comply with that decision, including those [non-permanent] members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 116).

Last but not least, most of the provisions in resolution 2231 (2015) are addressed to the United Nations Member States. It follows that, in endorsing the JCPOA, resolution 2231 (2015) established binding obligations for all Member States, including the United States.

12. Finally, and although the present proceedings are at a preliminary stage, it is worth examining the validity of the arguments put forward by the United States to justify "the re-imposition of all sanctions that had previously been lifted or waived in connection with the plan" and resolution 2231 (2015). In a Memorandum dated 8 May 2018, the President of the United States observed that "Iran has publicly declared it would deny the International Atomic Energy Agency (IAEA) access to military sites", and that, in 2016, Iran "twice violated the JCPOA's heavy-water stockpile limits" (Order, para. 20). In reality, however, since 16 January 2016, the IAEA has verified and monitored Iran's compliance with its nuclear-related commitments under the JCPOA, a mandate conferred on it by resolution 2231 (2015). In its quarterly reports, the IAEA has confirmed Iran's adherence to its commitments.

13. One need only refer to the IAEA's 2018 reports to refute the justifications put forward by the United States. First, on the question of access to the sites in Iran, the IAEA has stated that "[t]he Agency has continued to evaluate Iran's declarations under the Additional Protocol, and has conducted complementary accesses under the Additional Protocol to all the sites and locations in Iran which it needed to visit" (*Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015)*, doc. GOV/2018/7 of 23 Feb. 2018, para. 23). In its latest report published on 30 August 2018, the IAEA once again confirmed that it had accessed all the sites and locations in Iran which it needed to visit, and further observed that "[t]imely and proactive cooperation by Iran in providing such access facilitates implementation of the Additional Protocol and enhances confidence" (*Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015)*, doc. GOV/2018/33 of 30 Aug. 2018, para. 24). Moreover, in its report of 25 May 2018, just a few weeks after the statement by the President of the United States announcing the decision to reimpose and aggravate the economic sanctions which had been lifted under the JCPOA, the IAEA confirmed that Iran was continuing to co-operate with the Agency and to comply with its commitments, including on access to the sites (*Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015)*, doc. GOV/2018/24 of 25 May 2018, para. 23). The 30 August 2018 report was also very clear on the subject of heavy-water stockpile limits: during the three-month reporting period, Iran had no more than 130 metric tonnes of

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heavy water, and was thus within the limits set out in paragraph 14 of Annex I to the JCPOA. Regarding Iran's compliance with that commitment in 2016, an examination of the IAEA's reports from that time is again enlightening:

> "2. . . . on 8 November 2016, the Agency verified that Iran's stock of heavy water had reached 130.1 metric tonnes and, in a letter received by the Agency on 9 November 2016, Iran informed the Agency of 'Iran's plan to make preparation for transfer of 5 metric tons of its nuclear grade heavy water' out of Iran.
>
> 3. On 12 November 2016, Iran informed the Agency of its decision to make preparations to transfer an additional six metric tonnes of nuclear grade heavy water out of Iran. On 12 and 13 November 2016, the Agency verified and sealed 11 metric tonnes of nuclear grade heavy water that Iran was preparing for transfer out of Iran.
>
> 4. On 21 November 2016, Iran informed the Agency that the 11 metric tonnes of nuclear grade heavy water had been shipped out of Iran on 19 November 2016.
>
> 5. On 6 December 2016, the Agency verified the quantity of 11 metric tonnes of the nuclear grade heavy water at its destination outside Iran. This transfer of heavy water out of Iran brings Iran's stock of heavy water to below 130 tonnes." (*Verification and monitoring in the Islamic Republic of Iran in light of United Nations Security Council resolution 2231 (2015)*, doc. GOV/INF/2016/13 of 6 Dec. 2016)

14. Finally, it should be noted that since the United States announced its intention to withdraw from the JCPOA and to reimpose its unilateral sanctions, the European Union (EU) has not only confirmed Iran's compliance with its commitments, but also called for resolution 2231 (2015) to be respected, having taken the necessary measures in EU law to protect the rights of EU companies doing legitimate business with Iran:

> "The lifting of nuclear-related sanctions is an essential part of the deal — it aims at having a positive impact not only on trade and economic relations with Iran, but most importantly on the lives of the Iranian people. We are determined to protect European economic operators engaged in legitimate business with Iran, in accordance with EU law and with UN Security Council resolution 2231. This is why the European Union's updated Blocking Statute enters into force on 7 August to protect EU companies doing legitimate business with Iran from the impact of US extra-territorial sanctions." ("Joint statement on the re-imposition of US sanctions due to its withdrawal from the Joint Comprehensive Plan of Action (JCPOA)", Brussels, 6 Aug. 2018, available online on the EU's official website[1].)

2. The unlawfulness of extraterritorial measures adopted by the United States

15. In my opinion, the secondary sanctions announced by the United States on 8 May, for implementation on 6 August and 4 November 2018, also have an extraterritorial scope in that they target nationals and companies of third States continuing to maintain economic relations with Iran. Those sanctions are illegal under international law.

16. First, one must examine the lawfulness of those measures in the light of the principles of the Charter of the United Nations, before considering their compliance with World Trade Organization (WTO) law, which may be regarded as a *lex specialis*. Next, I am not satisfied that the extraterritorial sanctions in question can fall within the scope of Article XX, paragraph 1 *(d)*, of the Treaty of Amity, even prima facie. Nor can they be justified in the light of other similar exceptions in international law, such as that contained in Article XXI of the General Agreement on Tariffs and Trade (GATT).

17. Turning to the first issue, in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the Court analysed the 1956 Treaty of Friendship, Commerce and Navigation concluded between Nicaragua and the United States, which was modelled on the 1955 Treaty of Amity at issue in this case, observing that:

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> "in view of the generally accepted formulations, the principle [of non-intervention] forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones." (*Merits, Judgment, I.C.J. Reports 1986*, p. 108, para. 205).

18. The principle of non-intervention is one of the corollaries of the sovereign equality of States (*ibid*., para. 202). Indeed, it is its first natural consequence. The adoption of such unilateral measures, which openly seek to constrain, dissuade and discourage potentially all third States, their nationals and companies from maintaining trade relations with the primary target of those sanctions, constitutes a violation of the principle of non-intervention enshrined in General Assembly resolution 2625 (XXV). The Court has already had occasion to note the customary status of that principle:

> "The Court has also emphasized the importance to be attached, in other respects, . . . to General Assembly resolution 2625 (XXV) . . . Texts like these, in relation to which the Court has pointed to the *customary content* of certain provisions such as the principles of the non-use of force and *non-intervention*, envisage the relations among States having different political, economic and social systems on the basis of coexistence among their various ideologies; the United States not only voiced no objection to their adoption, but took an active part in bringing it about." (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 133, para. 264; emphasis added.)

19. The unilateral measures taken by the United States against Iran seek strongly to discourage any State and its nationals, and any foreign financial institutions, from maintaining relations with Iran. Indeed, they are similar to the measures imposed by acts of US domestic legislation adopted in 1996, such as the Helms-Burton Act (against Cuba) and the D'Amato-Kennedy Act (against Iran and Libya). As in this case, the scope and effects of the provisions contained in those acts were extraterritorial and led to the adoption of anti-boycott laws by Canada and the EU, whose businesses and nationals were affected (in Canada: the Foreign Extraterritorial Measures Act (FEMA), *Revised Statutes of Canada (RSC)*, Chap. F-29 (1985), amended on 9 Oct. 1996, *RSC*, Chap. 28, reprinted in *International Legal Materials (ILM)*, Vol. 36, Issue 1, p. 111 (1997); in the EU: Council Regulation (EC) No. 2271/96 of 22 Nov. 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, *Official Journal* (L. 309), p. 1, reprinted in *ILM*, Vol. 36, Issue 1, p. 125 (1997)).

20. The aforementioned Helms-Burton Act was also the subject of a long series of General Assembly resolutions[2], the terms of which are very clear. The General Assembly reaffirmed, "among other principles, the sovereign equality of States, *non-intervention and non-interference in their internal affairs and freedom of international trade* and navigation, which are also enshrined in many international legal instruments", and expressed

> "[c]oncer[n] about the continued promulgation and application by Member States of laws and regulations, such as that promulgated on 12 March 1996 known as 'the Helms-Burton Act', *the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation*" (General Assembly resolution 72/4 of 1 Nov. 2017, preamble; emphasis added).

It

> "[r]eiterate[d] its call upon all States to refrain from promulgating and applying laws and measures of the kind referred to in the preamble to the present resolution, in conformity with their obligations under the Charter of the United Nations and international law, which, *inter alia*, reaffirm the freedom of trade and navigation" (*ibid*., para. 2).

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The terms of paragraph 2 are reproduced verbatim in the numerous other resolutions adopted by the General Assembly since 1993, and could easily apply to the sanctions against the nationals and companies of third States set out in sections 2, 3, 5 and 6 of US Executive Order 13846, dated 6 August 2018, reimposing "certain sanctions with respect to Iran [and its nationals]". Juxtaposing the régime of extraterritorial sanctions in question with the above-mentioned jurisprudence of the Court, it is my view that those sanctions serve as a constraint that aims 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.

21. General Assembly resolutions, officially recommendations, may have a normative character through their "content and the conditions of [their] adoption" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 254-255, para. 70). Moreover, "a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule" (*ibid*.). As noted by the Court, "it would not be correct to assume that, because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design" (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 50, para. 105).

22. In addition to the Charter of the United Nations, there may also be doubts as to the compliance of the United States' extraterritorial sanctions with WTO law. First, it is to be noted that Iran is not a member of the WTO; it has had observer status since 26 May 2005. Therefore, while it cannot be said that there has been a breach of WTO law by the United States against Iran, the possibility remains that the measures in question could violate WTO law vis-à-vis any third party and member of that organization maintaining trade relations with Iran. Furthermore, the EU has already voiced its opposition to the sanctions and stated that it would protect European institutions and economic operators by adopting blocking statutes against the United States. It should be added that in today's global economy, it is no longer possible to regard international and economic relations as a group of bilateral dealings. The international economic system is a network and the deterioration of relations between A and B will inevitably have repercussions for all participants. In the WTO system, there is no difference between participant and trading partner. Thus, when State A imposes sanctions against State B with an extraterritorial effect which serves to dissuade State C from trading with State B, and when State C refuses to comply and falls victim to the régime of sanctions, but State D decides to adhere to the régime imposed by A, there is a difference in the way States C and D are treated. This could constitute a violation of the most-favoured-nation principle set out in Article I of GATT. The measures in question also have the effect of curbing the EU's freedom to export to Iran and to import products of Iranian origin. As a result, they may also lead to a violation of Article XI of GATT, which provides for the general elimination of quantitative restrictions.

23. Several measures adopted by US Executive Order 13846 may be described as "secondary boycott measures" intended to target economic actors having trade relations with Iranian nationals or companies, Iran itself being the subject of a primary boycott. Yet the fact that a State imposes restrictions on its nationals or legal entities as part of its foreign policy does not mean, *a contrario*, that it can act without any territorial or personal ties, or prohibit relations between third States.

24. Lastly, it is important to consider whether and to what extent the extraterritorial sanctions of the United States fall within the scope of Article XX, paragraph 1 *(d)*, of the Treaty of Amity. According to that provision, the Treaty

> "shall not preclude the application of measures . . . necessary to fulfil 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".

In its Judgment on the preliminary objection in the *Oil Platforms* case, the Court noted that "the Treaty of 1955 contains no provision expressly excluding certain matters from the jurisdiction of the Court" (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 811, para. 20). The Court then confirmed that Article XX, paragraph 1 *(d)*, of the Treaty of Amity does not bar the Court's jurisdiction, but rather "is confined to affording the Parties a possible defence on the merits" (*ibid*.,

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p. 811, para. 20). The question whether the sanctions fall within the scope of that provision must be considered from two perspectives. First, one must examine whether the measures directly targeting Iran constitute an exception authorized by Article XX, paragraph 1 *(d)*, of the Treaty of Amity, before determining whether the "secondary boycott" measures directed against third States may be covered by the same provision.

25. Article XX opens with the phrase: "The present Treaty shall not preclude". It is, therefore, a "non-prejudice clause", listing the actions which, by their nature, are exceptions which will not upset the operation of the Treaty should one of the parties have recourse to them. As an exception, this provision must be the subject of a restrictive interpretation. Article XX, paragraph 1 *(d)*, naturally splits into two parts. Under the first part, measures "necessary to fulfill . . . obligations . . . for the maintenance or restoration of international peace and security" are permitted. Such measures may be adopted only with the authorization of the Security Council, which has primary responsibility for the maintenance of international peace and security under Article 24 of the Charter, or, in the case of self-defence, with its subsequent consent. The second part authorizes the adoption of measures "necessary to protect [the] essential security interests [of the High Contracting Party]". This second part may appear to be a more general exception, but in my opinion it must be interpreted in an even more restrictive manner. As the Court recalled in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, "whether a measure is necessary to protect the essential security interests of a party is not . . . purely a question for the subjective judgment of the party" (*Merits, Judgment, I.C.J. Reports 1986*, p. 141, para. 282.). States are entitled to provide for their security and the protection of their essential interests within the limits defined by international law.

26. The question to what extent the United States may make use of the exception provided for by Article XX, paragraph 1 *(d)*, of the Treaty of Amity is closely linked to the possibility of recourse to the security exception set out in Article XXI of GATT. If we juxtapose the two provisions, it is apparent that, under Article XXI of GATT, the General Agreement is not to be construed "to prevent any contracting party from taking any action *which it considers necessary* for the protection of its essential security interests" (emphasis added), while Article XX, paragraph 1 *(d)*, of the Treaty of Amity merely speaks of "measures . . . necessary". In the case *United States of America)*, the Court said the following of a similar clause:

> "That the Court has jurisdiction to determine whether measures taken by one of the Parties fall within such an exception, is also clear *a contrario* from the fact that the text of Article XXI of the Treaty does not employ the wording which was already to be found in Article XXI of the General Agreement on Tariffs and Trade. This provision of GATT, contemplating exceptions to the normal implementation of the General Agreement, stipulates that the Agreement is not to be construed to prevent any contracting party from taking any action which it 'considers necessary for the protection of its essential security interests', in such fields as nuclear fission, arms, etc. The 1956 Treaty, on the contrary, speaks simply of 'necessary' measures, not of those considered by a party to be such" (*Merits, Judgment, I.C.J. Reports 1986*, p. 116, para. 222).

27. In the absence of an interpretation of this provision by the WTO's Dispute Settlement or Appellate Body, particular importance must be attributed to the way in which Article XX, paragraph 1 *(d)*, of the Treaty of Amity is worded compared with Article XXI of GATT. As has just been shown, the Court's jurisprudence confirms that interpretation of the text, which places the emphasis on the term "necessity", in its objective sense, and not the "measures . . . considered by [the] part[ies] to be [necessary]".

28. For all these reasons, I am of the opinion that the unilateral measures taken by the United States against the nationals and companies of third States do not comply prima facie with the principle of non-intervention or WTO law, and that the United States cannot make use of the exceptions provided by Article XX, paragraph 1 *(d)*, of the Treaty of Amity or by Article XXI of GATT.

3. The public order mission of the Court

29. Finally, the dispute in this case not only risks affecting the entire economy, banks and finance, civil aviation security and the humanitarian needs of the Iranian population, it also poses a threat to peace and security in the region. In point (3) of the operative part (Order, para. 102), the Court indicated a provisional measure calling on

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both Parties to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve". This, however, is not sufficient.

30. The heightened tensions between the Parties pose a serious threat to international peace and security. In my opinion, it would have been desirable for the Court to go further. In the hope of achieving a conciliatory climate, the Court, as the principal judicial organ of the United Nations, had a duty immediately to request that the Parties respect their obligations under the Charter of the United Nations and general international law. This power "flows from its responsibility for the safeguarding of international law and from major considerations of public order" (*Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, dissenting opinion of Judge Vereshchetin, p. 209). In so doing, the Court is acting "as an organization functioning within the framework of the United Nations and pursuing the common aim of peace" (*ibid*., dissenting opinion of Judge Weeramantry, p. 198).

31. Under the terms of Article 24 of the Charter, the Security Council has primary responsibility for the maintenance of international peace and security, but it does not have exclusive responsibility. As the Court has recalled on a number of occasions, "[t]he Council has functions of a political nature assigned to it, whereas the Court exercises purely judicial functions. Both organs can therefore perform their separate but complementary functions with respect to the same events" (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 435, para. 95).

32. In practice, the Court and the Security Council have on several occasions been seised of the same dispute posing a threat to international peace and security. This was true of the case concerning the *Aegean Sea Continental Shelf*. Since the Security Council, by its resolution 395 (1976), had already asked the Parties to that dispute "to do everything in their power to reduce the present tensions in the area so that the negotiating process may be facilitated" and called on them "to resume direct negotiations over their differences", the Court did not consider it necessary to indicate provisional measures in its Order, and simply reminded the Parties of the need to comply with that resolution (*Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 12, para. 38).

33. In his separate opinion appended to that Order, Judge Lachs declared that the Court should "readily seize the opportunity of reminding the member States concerned in a dispute referred to it of certain obligations deriving from general international law or flowing from the Charter" (*ibid*., separate opinion of Judge Lachs, p. 20). He further observed that "[t]he pronouncements of the Council did not dispense the Court, an independent judicial organ, from expressing its own view on the serious situation in the disputed area". According to Judge Lachs, the Court, 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" (*ibid*.). This is all the more relevant when, as is the case here, there is no Security Council resolution. In other words, when the Security Council has not had occasion to urge the parties to respect their obligations under the Charter and general international law, it falls to the Court to do so, and to fulfil its role in the maintenance of international peace and security.

34. This lacuna in the Court's Order is all the more striking since Article I of the Treaty of Amity provides that "[t]here shall be firm and enduring peace" between the two contracting parties (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 813, para. 27), some of whose rights were judged plausible prima facie and at imminent risk of irreparable prejudice (Order, paras. 70 and 91). The Court has also had occasion in its jurisprudence to remind the parties, at the provisional measures stage, of their obligations under the Charter, and it is difficult to see why that approach was not taken here. For example, in the case concerning *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)*, the Court reminded the Parties that:

> "the Charter of the United Nations imposes an obligation on all Member States of the United Nations to refrain in their international relations from the threat or use of force against the territorial

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> integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations; whereas the Court further recalls that United Nations Member States are also obliged to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered; and whereas both Parties are obliged, by the Charter and general international law, to respect these fundamental principles of international law" (*Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 554, para. 66).

35. In the words of Robert Kolb, "[t]he principal aim of establishing a court of justice is to contribute to the peaceful resolution of disputes, i.e. to ensure that tensions are diminished and that the dispute is directed towards a rational means of settlement" (R. Kolb, *La Cour international de Justice*, Paris, Pedone, 2013, p. 636 *[translation by the Registry]*). In my view, provisional measures are intended to ease tensions between the parties and to preserve the utility of the proceedings. In indicating provisional measures, the Court cannot lose sight of the fact that it is exercising its exceptional power both to protect the rights of the parties and the integrity of its judicial function, and to safeguard the fundamental nature of its remit to act in the public interest (*ibid*., p. 637).

36. In conclusion, it would have been desirable for the Court to have directly called on the Parties to respect their obligations under the Charter, including the obligations deriving from resolution 2231 (2015) and general international law, not only to avoid an aggravation of the situation but to re-establish and preserve international peace and security in the region.

(Signed) Djamchid MOMTAZ

ENDNOTES

1 https://eeas.europa.eu/headquarters/headquarters-homepage/49141/joint-statement-re-imposition-us-sanctions-due-its-withdrawal-joint-comprehensive-plan-action_en.

2 See the United Nations General Assembly resolutions concerning the "Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba", adopted since 1992: resolutions 47/19 (1992), 48/16 (1993), 49/9 (1994), 50/10 (1995) and 51/17 (1996); 52/10 (1997), 53/4 (1998), 54/21 (1999), 55/20 (2000), 56/9 (2001), 57/11 (2002), 58/7 (2003), 59/11 (2004), 60/12 (2005), 61/11 (2006), 62/3 (2007), 63/7 (2008), 64/6 (2009), 65/6 (2010), 66/6 (2011), 67/4 (2012), 68/8 (2013), 69/5 (2014), 70/5 (2015), 71/5 (2016) and 72/4 (2017).

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