

# “Vulnerability” versus “Plausibility”: Righting or Wronging the Regime of Provisional Measures? Reflections on ICJ, *Ukraine v. Russian Federation*, Order of 19 April 2017

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The ICJ [order of 19 April 2017](#) in the case *Application of the international convention for the suppression of the financing of terrorism and the international convention on the elimination of all forms of racial discrimination (Ukraine v. Russian Federation)* seeks to safeguard the interests of ethnic minorities in Crimea, and to protect the victims of armed conflict in the eastern regions of Ukraine.

As [Iryna Marchuk](#) reported on this blog, the ICJ indicated provisional measures only on the basis of the CERD but not on the basis of ICSFT. The Court notably obliged the Russian Federation to refrain from constraining the representative body of the Crimean Tartars and to ensure the availability of education in Ukrainian language in Crimea (para. 102). The Court also “reminds” both parties of the Minsk Agreement on the Donetsk and Luhansk regions, and “expects” them to work towards its full implementation (para. 104).

Has the Court hereby, once again (and maybe *contre gré*), acted as a protector of human rights and minorities more than a the quintessential inter-state dispute settlement body? And does this tell us anything about the relative importance of *individual rights* over inter-state obligations in the web of international law? The two buzz words “plausibility of (state) rights” versus “human vulnerability”, juxtaposed by Judge Cançado Trindade in his [separate opinion](#) (esp. in paras 36 *et seq*) ever insinuates a possible conflict between two paradigms. This blog explores the dualism of the states’ international legal status and individual international law-based rights, and the opportunities and risks of the “humanisation” of international law, manifest in these proceedings.

## The plausibility of rights – but whose rights?

The prerequisites for a provisional measure of the ICJ are, first, its *prima facie* jurisdiction, second, the plausibility of the rights whose protection is sought, and third, the risk of irreparable prejudice and urgency. (And because [Art. 41](#) of the ICJ-Statute grants the power to indicate provisional measures to the Court only “if it considers that circumstances so require”, the Court must in addition examine whether the issuance of such an order is “appropriate” – which it did *en passant* in the order of 19 April 2017, para. 99). One question in the proceedings *Ukraine v. Russian Federation* was *whose* rights must be made plausible by the plaintiff and which degree of showing this requires.

In our contemporary international legal system, the rights flowing from international treaties or custom are not inevitably and exclusively state rights. They may also be granted to individual human beings, by virtue of a concrete legal regime. But is this not identical as saying that individuals are protected by international law, and that they are the ultimate beneficiaries of the international legal order? Most observers and the majority of states today probably agree that the contemporary international legal order rests on two foundational principles, the principle of state sovereignty/non-intervention on the one side, and the principle of humanity or human dignity on the other side. The controversies are (“only”) about the relative thickness or importance of these two pillars, how to resolve conflicts between both (e.g. in constellations of humanitarian intervention or for overcoming the immunity of state officials in judicial prosecutions for gross human rights violations). Besides, there are philosophical debates about the ultimate rationale of state sovereignty; whether this is the existence of the state as an indispensable factor of order, stability and thus of intra-state peace, or whether the state should be seen as purely instrumental for the well-being of humans. The answers given on those debates co-determine the relative weight accorded to the two principles, sovereignty and humanity, in situations where they point in opposite directions or stand in conflict. It seems that the current climate in international relations tends (again) to accord a greater importance to state sovereignty than during the two decades from the collapse of the socialist block in 1990 until the 2011 military intervention in Libya, conducted (abusively in the eyes of many observers) under the heading of “responsibility to protect”.

The basic question which surfaced in *Ukraine v. Russian Federation*, and which found its technical expression in the controversy between the Court’s majority and Judge Cançado Trindade over the plausibility-test is related to that fundamental duality of the international legal system. The duality finds one expression in the seemingly very technical question whose *rights* are protected by a given treaty: the contracting states’ rights or individual human beings’ rights, or both?

## Individual treaty-based rights irreversibly harmed: The LaGrand case

Surely, the proceedings between Ukraine and Russia are not the first time this question surfaced. The most prominent case

is the [LaGrand case](#) (Germany v. USA), decided on the merits in 2001. Here, a core legal question was whether the Vienna Convention on Consular Relations accorded only state rights or whether the provision at stake, [Article 36 paragraph 1 lit. b\)](#) also generated a right of individuals who are nationals of the sending state. The Court famously interpreted that provision, based on its plain wording, but probably against the state parties' original intents. It decided "that Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person" (ICJ, *LaGrand*, para. 77).

That case is also a sad illustration of the rationale and relevance of provisional measures. The purpose of provisional measures is to prevent the nullification of the legal positions at issue in the case by prohibiting the defendant from creating *fait accompli* before the Court has decided on the merits of the claim. In the *LaGrand* case, the United States had disregarded the ICJ order of provisional measures to stay the execution of the brothers *LaGrand* and had moved on to execute them. A more drastic instance of producing an irreversible harm can hardly be imagined.

### Focus in individual rights in ICJ-proceedings due to jurisdictional constraints

Even in the current climate of statism, the ICJ has often been forced to focus on possible individual rights embodied in an inter-state treaty simply as a side-effect of the otherwise lacking jurisdiction. It is somewhat ironic that the proceeding *Ukraine v. Russian Federation* could go forward only on the basis of the jurisdictional clauses in two specific treaties, one of which is a human rights treaty.

The question is whether the "individualisation" of the dispute, resulting from the application of the CERD to it, is a wrong turn, artificially forced onto the proceedings for reasons of jurisdiction alone, or whether it is actually the proper direction the Court (and international law more generally) should take? Are the real issues here the annexation of Crimea and the *de facto* occupation of Eastern Ukraine – in other words, the loss of territory of a sovereign state? Or are the real issues the discrimination against ethnic Ukrainians and Tartars in Crimea, and the suffering of the populations in the war in Eastern Ukraine?

Of course, it is to some extent both. The question remains which legal consequences flow from the duality. Here we are not asking about the trade-off needed in constellations of outright conflict between the two poles (as manifest in humanitarian intervention/responsibility to protect), but rather what happens when two regimes, e.g. the "statist" system of provisional measures in an inter-state proceeding and the "humanist" anti-discrimination law point roughly in the same direction. The different rationales and different basic concepts might lead to frictions.

### The practical relevance of the "humanisation" in the case at hand

Only hard core statist deny that human rights treaties such as the CERD generate real individual rights and not only inter-state rights and obligations to the benefit of protected persons. The more interesting treaty for the purpose of this blog is the ICSFT. Is it a pure suppression convention in the sense that it generates only state obligations to adopt national measures including criminal laws to suppress the financing of terrorism? Or does it contain a direct state obligation to desist from financing terrorism? And – relevant to my question – does it generate *rights* of victims of terrorism, e.g. the passengers of the downed Malaysian Aircraft and their heirs, opposable against a state sponsor of terrorism? Such rights might be rights of effective protection against terrorist acts which would be violated by financing the latter.

This question might at first sight appear as purely academic. But the proceedings *Ukraine v. Russian Federation* show that the answer may in fact have a practical legal consequence. Its tangibility and salience becomes apparent in the controversy between the majority and Judge Cançado Trindade, albeit in a muddled way. The Brazilian member of the Court (on the ICJ since 2008) has, as a scholar and as a judge (already on the Inter-American Court of Human Rights) pursued a radical agenda of placing the individual human being in the centre of international law, and has to that end *inter alia* invented the *in dubio pro hominem*-guideline for the interpretation of international legal texts.

Cançado Trindade now in *Ukraine v. Russian Federation* suggested replacing the Court's plausibility test with a test of "vulnerability". According to Cançado Trindade, the international legal order has been more and more "humanised" and does acknowledge that individual is the ultimate normative point of reference. I personally share this normative belief. But I do not think that this requires us to abandon the plausibility test. Nor does it necessarily mean that the ICSFT generates individual rights. What "humanisation" does mean is that we have to examine a given international regime closely to identify whether it embodies individual rights. Importantly, these rights may also be rights "beyond" human rights, i.e. "ordinary" or "simple" individual international rights, such as the right to be informed about the possibility to get in touch with one's consular office (at stake in *LaGrand*), or the rights under the [Geneva Refugee Convention](#) and Protocol to obtain identity papers (Article 27 Refugee Convention), travel documents (Article 28), or asset transfers (Article 30), or a labourer's right under a labour convention, or an investor's right to fair and equitable treatment under a BIT.

Cançado Trindade is right, I think, in criticising the majority's overly narrow notion of plausibility which led it to the refusal of a provisional measure relating to the ICSFT. The ICSFT obliges states, *inter alia*, to cooperate in preventing terrorist

offences (Art. 18 in conjunction with Art. 2 of the [ICSFT](#)). One of the offences is the provision or collection of funds “with the intention that they should be sent or in the knowledge that they are to be used” for terrorist activities (Art. 2 paragraph 1, *chapeau* of ICSFT).

By asking Ukraine to make plausible even the elements of “intention” or “knowledge” (of individuals), the Court in para. 75 of its order of 19 April 2017 almost asks the impossible. And it does mix up elements of the international crime which would be committed by an individual, and elements of state responsibility of Russia.

If “plausibility” were substituted with “vulnerability”, as Judge Cançado Trindade suggested, this would potentially lead to a more generous indication of a provisional order. Had the vulnerability of the humans in Eastern Ukraine and Crimea been the yardstick, then probably measures based on the ICFT would not have been denied by the Court.

However, to be legally consistent and on ground of the law as it stands, the Court’s strictness at this point could not be mitigated by simply skipping the test of plausibility. But indeed, the “vulnerability” of the victims of international terrorism, as “plausibly” committed in the regions of Eastern Ukraine, can and should be taken into account when examining whether violations of provisions of the ICSFT are plausible and whether there is a danger of irreparable harm *to them* (not only to Ukraine as a state).

### **Improper “righting” of international legal regimes?**

To conclude, I would like to reflect on the merits and drawbacks of reading into some provisions of specific international treaties *individual* rights, besides state rights. This type of interpretation has been denounced as an improper “righting” or a “rightsification” of international regimes. The term “righting” was coined in the debate about the co-applicability of human rights law and international humanitarian law, notably in the law of occupation. It has been argued that the application of human rights in armed conflict or occupation does not protect victims better, may even lead to a less protective proportionality analysis, generates legal insecurity due to the vagueness of human rights, and does not do justice to the structural inequality of populations affected (see Aeyal Gross, [The Writing on the Wall: Rethinking the International Law of Occupation](#), CUP 2017, chapter 5). These arguments are relevant for the situation of Eastern Ukraine which is considered by many as a veiled and indirect occupation by Russia.

The criticism shining up in the talk against “righting” forms part of a broader critique of rights. Just as rights in the post-Kantian sense are the legal paradigm of modernity, the critique of and farewell to rights is a hallmark of postmodernity. Notably human rights have recently been declared superfluous or even counterproductive, and their “twilight” (Eric Posner, [The Twilight of Human Rights Law](#), OUP 2014) or even “end” (Costas Douzinas, [The End of Human Rights: Critical Legal Thought at the Turn of the Century](#), Hart 2000) has been announced, both from the law-and-economics perspective and from the critical legal scholars’ point of view. In the face of such rights-scepticism coming from *both* ends of the academic spectrum, it makes sense to briefly recall the added value of individual rights for human beings (and for other vulnerable beings such as animals), next to and on top of the traditional legal position of states in international law.

I submit that the various strands of critique of the rights discourse usefully point to drawbacks and dangers of rights, but that they are in part exaggerated, confused, or flawed. For example, the reproach that the “rights talk” risks to lose sight of the importance of shouldering responsibilities is one-sided. Empirically, in our contemporary societies, no general shift from responsibilities to rights is occurring. Conceptually, rights also engender responsibilities, and are no opposite of those.

Importantly, rights critics do not distinguish between the supposed problem of inflationary recourse to rights in general and specifically the proliferation of human rights. Human rights are a subgroup of especially important rights of high quality that enjoy stronger legal and moral protection. And indeed, their inflation is a problem. It can be countered by acknowledging ordinary individual, more global administrative law-type of rights directed against states and international organisations, flowing from international law.

Thirdly, critics do not properly distinguish between individual public rights direct against the state and rights directed against private persons, in the form of rights flowing from private law (contracts, torts, and so on). Within personal relationships, the invocation of rights may weaken human bonds, undermine trust, and prevent personal closeness. But these concerns are irrelevant for rights directed against political, public institutions, notably states. Finally, the criticism of rights has been mainly formulated with a view to national societies and within the framework of a mature, highly differentiated domestic legal system, and has its merit there. But the exaggeration of individual rights seems much less an issue on the level of international law where rights (of human beings) are anyway still the exception and sparse. Notably the democratic objection that an excessive focus on actionable (constitutionally guaranteed) rights weakens the democratic political process is almost totally beside the point for the international legal system, because law-making here is not democratic anyway. The same observation is true for the critics’ critique of depolitization and technocracy. Legal rights, especially human rights, can be and should best be conceived as being not above or beyond politics, but as being political themselves. Moreover, on the international level, genuinely political processes (in the sense of deliberation about the common good of a society, using the mode of arguing and persuasion) – as opposed to diplomacy (in the sense of pursuing national interests

in the mode of bargaining and package deals) – are anyway rare. But the relative lack of politization is not mainly owed to any exaggerated focus on rights but to other factors. It does not surprise me that the various types of critique of rights obviously fail to convince ordinary political and social actors. In fact, in the practice of states, governments, activists, and individual victims themselves, the attraction and the pull of rights is unbroken. Apparently, rights resonate in the layperson's sphere. I claim that, generally speaking, the prestige of rights is justified, mainly for three reasons. First, rights trigger an obligation to justify their curtailment. Second, they have more weight in a balancing exercise against countervailing interests. Third, rights have an overshooting tendency and the obligations flowing from rights are indeterminate.

Related to the added value of the rights' dynamism over time as illustrated by the case-law on human rights is another added value, and that is the juris-generative quality of rights. Having rights is a generalized legal capacity, whereas being the beneficiary of the obligations of others breaks down into a series of selective points of protection only. Also, the idea of having "rights" has a moral overtone which might inspire a dynamic interpretation and evolution of the law. For all the reasons, having legal rights, for example under Geneva Convention IV, offers a stronger protection than the concrete and selective obligations to accord persons a specific treatment under international law. The legal position created through legal rights is – as a matter of principle – stronger than protecting human and other vulnerable living beings by rebound. And I think that this is a good thing.