DISSENTING OPINION OF JUDGE CANÇADO TRINDADE

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1. I regret not to be able to concur with the decision taken by the majority of the Court not to indicate provisional measures in the *cas d'espèce*, for having considered that the circumstances presented to it were not such as to require the exercise of its power under Article 41 of the Statute to that end. My position is, *a contrario sensu*, that the circumstances surrounding the present case fully meet the preconditions for the indication of provisional measures, and that the International Court of Justice could and should thereby have indicated them. Given the high importance that I attach to the issues raised in the present Order, I feel obliged to present and leave on the records, in this dissenting opinion, the foundations of my position on the matter.

I. Preliminary Observations

2. To this end, I shall concentrate my reasoning on successive and interrelated points, but not without first recalling that the present case is the first case lodged with the Court on the basis of the 1984 United Nations Convention against Torture. And it was on the basis of this highly relevant Convention (Article 30), which bears witness to the significant development of contemporary international law, that the Court found, in the present Order, that it indeed had *prima facie* jurisdiction (paras. 54-55 of the Order) to examine the request lodged with it for the indication of provisional measures. As the Order of the Court does not, in my view, reflect all the points that I deem relevant to the proper consideration of the issues raised by such request, I feel it is my duty to address those points, in a logical sequence, in support of my dissenting position.

3. I shall thus focus my reasoning on the following points: *(a)* the transposition of provisional measures onto the international legal procedure; *(b)* the juridical nature and effects of provisional measures of the ICJ; *(c)* the overcoming of the strictly inter-State dimension in the acknowledgment of the rights to be preserved; *(d)* the rationale of the purported aims of provisional measures of the ICJ; *(e)* the saga of the victims of the Habré régime in their persistent struggle against impunity (encompassing the historical record of the case, and the issue of justiciability in the long search for justice); *(f)* the time of human beings and the time of human justice (comprising the *décalage* to be bridged, the determination of urgency, and the determination of the probability of irreparable damage); *(g)* legal nature, content and effects of the right to be preserved; *(h)* provisional measures to be indicated (comprehending time and the imperativeness of the realization of justice), and *(i)* the required indication of provisional measures in the present case.

4. The way will thus be paved for extracting the lesson of the present case at this stage (provisional measures for the realization of justice), and for at last presenting my concluding observations on the matter. With these preliminary observations in mind, I shall

thus proceed to dwell upon each of the points identified for the development of my reasoning, as the foundation of my dissenting position in relation to the decision taken by the majority of the Court.

II. Provisional Measures: Their Transposition onto the International Legal Procedure

5. In approaching provisional measures, one has, first of all, to bear in mind the historical transposition of such measures from the domestic legal systems to the international legal order. In fact, the precautionary measures of internal procedural law inspired the provisional measures[1] which developed subsequently in the ambit of international procedural law, to the extent of contributing decisively to affirm the autonomy of the precautionary legal action[2]. However, this whole doctrinal construction did not succeed 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.

6. May it be recalled that, at the level of the domestic legal order, the precautionary process evolved in order to safeguard the effectiveness of the jurisdictional function itself. The precautionary legal action turned in its origins to aim at guaranteeing, rather than the subjective right *per se*, the jurisdictional activity itself. Precautionary measures reached the international level (in the international arbitral and judicial practice)[3], in spite of the distinct structure of this latter, when compared with the domestic law level.

7. The transposition of the provisional measures from the domestic to the international legal order — always in face of the probability or imminence of an "irreparable damage", and the concern or necessity to secure the "future realization of a given juridical situation" — had the effect of expanding the domain of international jurisdiction, with the consequent reduction of the so-called "reserved domain" of the State[4]. This trans-

[1] The notable example of the contribution of the Italian procedural law doctrine of the first half of the twentieth century (e.g., the well-known works by G. Chiovenda, *Istituzioni di Diritto Processuale Civile*, Naples, 1936; P. Calamandrei, *Introduzione allo Studio Sistematico dei Provvedimenti Cautelare*, Padua, 1936; and F. Carnelutti, *Diritto e Processo*, Naples, 1958) may here be recalled.

[2] As a *tertium genus*, parallel to the legal actions as to the merits and of execution.

[3] 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. 649-761 and cf. pp. 758-759.

[4] P. Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, Paris, Libr. Rec. Sirey, 1931, pp. 14-15, 174, 186, 188 and cf. pp. 6-7 and 61-62.

position faced difficulties[5], but, throughout the years, the erosion of the concept of "reserved domain" (or "exclusive national competence") of the State became evident, to what the international judicial practice itself, also in the present domain, contributed.

III. The Juridical Nature and Effects of Provisional Measures of the ICJ

8. Article 41 of the Statute of the ICJ — and of its predecessor, the Permanent Court of International Justice (PCIJ) — in fact sets forth the power of the Hague Court to "indicate" provisional measures. The verb utilized generated a wide doctrinal debate as to its binding character, which did not hinder the development of a vast case law (of the PCIJ and the ICJ) on the matter[6]. Yet, given the lack of precision which persisted for years as to the legal effects of the indication of provisional measures by the ICJ, uncertainties were generated, in theory and practice, on the matter, which lasted for more than five decades, affecting compliance with them[7].

9. Despite the growing case law on provisional measures of the ICJ[8], one had to wait for more than half a century until, in the Judgment of

[5] As illustrated, e.g., by the Iranian reaction to provisional measures indicated by the ICJ in the case of the *Anglo-Iranian Oil Company (United Kingdom* v. *Iran), I.C.J. Reports 1951*, on 5 July 1951; cf. account in: M. S. Rajan, *United Nations and Domestic Jurisdiction*, Bombay/Calcutta/Madras, Orient Longmans, 1958, pp. 399 and 442, note 2.

[6] Cf. J. Sztucki, *Interim Measures in the Hague Court — An Attempt at a Scrutiny*, Deventer, Kluwer, 1983, pp. 35-60 and 270-280; J. B. Elkind, *Interim Protection — A Functional Approach*, The Hague, Nijhoff, 1981, pp. 88-152; and, for jurisdictional aspects, cf. L. Daniele, *Le Misure Cautelari nel Processo dinanzi alla Corte Internazionale di Giustizia*, Milano, Giuffrè, 1993, pp. 5-183; B. H. Oxman, "Jurisdiction and the Power to Indicate Provisional Measures", in *The International Court of Justice at a Crossroads* (ed. L. F. Damrosch), Dobbs Ferry/NY, ASIL/Transnational Publs., 1987, pp. 323-354.

[7] Cf., e.g., K. Oellers-Frahm, "Anmerkungen zur einstweiligen Anordnung des Internationalen Gerichtshofs im Fall Bosnien-Herzegowina gegen Jugoslawien (Serbien und Montenegro) vom 8 April 1993", 53 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1993) pp. 638-656; E. Robert, "La protection consulaire des nationaux en péril? Les ordonnances en indication de mesures conservatoires rendues par la Cour internationale de Justice dans les affaires *Breard (Paraguay c. Etats-Unis)* et *LaGrand (Allemagne c. Etats-Unis)*", 31 *Revue belge de droit international* (1998) pp. 413-449, esp. pp. 441 and 448; J. G. Merrills, "Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice", 44 *International and Comparative Law Quarterly* (1995), pp. 137-139, and cf. pp. 90-146.

[8] Cf. S. Rosenne, *Provisional Measures in International Law*, Oxford, Oxford University Press, 2005, pp. 22-44, 122-123, 138-141, 174-180 and 189-213; A. G. Koroma, "Provisional Measures in Disputes between African States before the International

27 June 2001, the ICJ found at last the occasion to clarify that provisional measures indicated by it were binding. In that Judgment, concerning the two LaGrand brothers, opposing Germany to the United States, the ICJ reviewed the preparatory work of Article 41 of its Statute (in its French and English versions, paras. 104-107), and, bearing in mind Article 33 (4) of the 1969 Vienna Convention on the Law of Treaties (para. 101), found that the object and purpose of Article 41 of its Statute were to preserve its own ability to fulfil its function of peaceful settlement of international disputes, which implied that provisional measures should be binding (paras. 102-109).

10. Furthermore, orders of provisional measures were "decisions" of the Court, which, in the terms of Article 94 (1) of the United Nations Charter, States were bound to comply with (para. 108). The binding character of provisional measures of the ICJ — brought into line with the position upheld in other contemporary international jurisdictions — ensued from this understanding by the ICJ of Article 41 of its Statute, in combination with Article 94 (1) of the United Nations Charter; this has now become *res interpretata*, paving the way for developments hopefully to take place in the years to come in this respect. In any case, long-standing uncertainties surrounding the matter are at last now to be put aside.

11. What, in fact, would be the point of *deciding* on the indication of provisional measures, and of issuing orders on them, after gathering *prima facie* — rather than substantial — evidence *(summaria cognitio)* in documents as well as public hearings, if they were not to have binding effect? What would be the point of denying them such effect if what was aimed at, without prejudice to the merits of the *cas d'espèce*, was precisely to preserve the integrity of the rights at stake? Such uncertainties nowadays belong to the past; it is now reckoned that they were not contributing to the evolution of the preventive dimension of the peaceful settlement of international disputes lodged with an international tribunal such as the ICJ.

12. In the past, despite the prevailing uncertainties which then surrounded the matter, international case law nevertheless sought to clarify the *juridical nature* of provisional measures, of an essentially preventive character, indicated or granted without prejudice to the final decision as to the merits of the respective cases. Such measures came to be indicated or ordered by contemporary interna-

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Court of Justice", in *L'ordre juridique international, un système en quête d'équité et d'universalité — Liber Amicorum G. Abi-Saab* (eds. L. Boisson de Chazournes and V. Gowlland-Debbas), The Hague, Nijhoff, 2001, pp. 591-602; K. Oellers-Frahm, "Article 41", in *The Statute of the International Court of Justice — A Commentary* (eds. A. Zimmermann *et alii*), Oxford, Oxford University Press, 2006, pp. 923-966.

tional[9], as well as national[10], tribunals. Their generalized use at both national and international levels has led a contemporary doctrinal trend to consider such measures as equivalent to a true *general principle of law*, common to virtually all national legal systems, and endorsed by the practice of national, arbitral, and international tribunals[11].

13. It is not my intention to dwell on this aspect of the matter here, but rather to draw attention onto a specific point, before moving on to other aspects relating to the consideration of the *cas d'espèce*, in so far as the present request for provisional measures is concerned. In international legal procedures pertaining to the safeguard of human rights, provisional measures go much further in the matter of protection, revealing an unprecedented scope, and determining the effectiveness of the right of individual petition itself at an international level; it becomes clear that they here protect individual rights and appear endowed with a character, more than precautionary, truly *tutelary*[12].

14. In the inter-State *contentieux*, the power of a tribunal like the ICJ to indicate provisional measures of protection in a case pending of decision aims at *preserving the equilibrium* between the respective rights of the contending parties[13], avoiding an irreparable damage to the rights in litigation in a judicial process[14]. Overcoming the formalism

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[9] Cf. R. Bernhardt (ed.), *Interim Measures Indicated by International Courts*, Berlin/Heidelberg, Springer-Verlag, 1994, pp. 1-152.

[10] Cf. E. García de Enterria, *La Batalla por las Medidas Cautelares*, 2nd [enlarged] ed., Madrid, Civitas, 1995, pp. 25-385.

[11] In the sense of Art. 38 (1) *(c)* of the Statute of the ICJ; cf. 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.

[12] 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), Brussels, Bruylant/Nemesis, 2005, pp. 145-163, and in 4 *Revista do Instituto Brasileiro de Direitos Humanos* (2003) pp. 13-25; and cf., in general, A. Saccucci, *Le Misure Provvisorie nella Protezione Internazionale dei Diritti Umani*, Turin, Giappichelli Ed., 2006, pp. 103-241 and 447-507.

[13] Cf. 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 Hans Wehberg* (eds. W. Schätzel and H.-J. Schlochauer), Frankfurt a/M, 1956, pp. 152-171.

[14] This has been pointed out by the ICJ, for example, in the case of *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 16, para. 21, and p. 34, para. 22; in the case of *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 19, para. 36; and, subsequently, e.g., in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v.

of the international procedural law of the past, it can nowadays be safely acknowledged that compliance with provisional measures of protection has a direct bearing upon the rights invoked by the contending parties, which, in circumstances such as that of the present case of *Belgium* v. *Senegal*, have a direct relationship with the legitimate expectations of thousands of human beings.

IV. The Overcoming of the Strictly Inter-State Dimension in the Acknowledgment of the Rights to be Preserved

15. In the international litigation before this Court, only States, as contending parties, can request provisional measures. Yet, in recent years, such requests have invoked rights which go beyond the strictly inter-State dimension. In the triad *Breard/LaGrand/Avena* cases, provisional measures were requested to prevent an irreparable damage also to the right to life of the convicted persons (stay of execution), in the circumstances of their cases. In its Order of 9 April 1998 in the *Breard* case (*Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*)[15], the Court took note of the requesting State's invocation of the right to life and, in particular, of Article 6 of the United Nations Covenant on Civil and Political Rights (para. 8), and indicated that A. F. Breard, a Paraguayan national, was not to be executed pending the final decision in the proceedings of the case (resolutory point I).

16. In the following year, in its Order of 3 March 1999 in the *LaGrand (Germany* v. *United States of America)*[16] case, the ICJ again took cognizance of the requesting State's argument likewise invoking the right to life and Article 6 of the same United Nations Covenant (para. 8), and indicated that W. LaGrand, a German national, was not to be executed pending the final decision in the proceedings of the case (resolutory point I). Likewise, in its Order of 5 February 2003 in the case of *Avena*

United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984, pp. 179 and 182, paras. 24 and 32; and in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Provisional Measures, Order of 8 April 1993* and *Order of 13 September 1993, I.C.J. Reports 1993*, p. 19, para. 34, and p. 342, para. 35, respectively. And cf., e.g., the cases of the *Frontier Dispute (Burkina Faso/Republic of Mali), Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, p. 3; of the *Aegean Sea Continental Shelf (Greece* v. *Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 3; of the *Nuclear Tests (Australia* v. *France)* and *Nuclear Tests (New Zealand* v. *France), Order of 13 July 1973, I.C.J. Reports 1973*; of the *Trial of Pakistani Prisoners of War (Pakistan* v. *India), I.C.J. Reports 1973*, among others.

[15] *Provisional Measures, I.C.J. Reports 1998*, p. 248.
[16] *I.C.J. Reports 1999 (I)*, p. 9.

and Other Mexican Nationals (Mexico v. *United States of America)* [17], the ICJ took note of the requesting State's argument on the basis of the recognition by international law of "the sanctity of human life", and its invocation of Article 6 of the same United Nations Covenant, and again indicated that C. R. Fierro Reyna, R. Moreno Ramos, and O. Torres Aguilera, three Mexican nationals, were not to be executed pending final judgment in the proceedings of the case (resolutory point I *(a)*).

17. The ultimate beneficiaries were meant to be the individuals concerned, and to that end the requesting States advanced their arguments to obtain the Court's orders of provisional measures. On earlier occasions, the ICJ was likewise concerned with the protection of human life, in distinct contexts. Thus, two decades earlier, in its Order of 15 December 1979, in the *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)* [18] case, the Court took into account the State's arguments to protect the life, freedom and personal security of its nationals (diplomatic and consular staff in Tehran, para. 37), and indicated provisional measures of protection of those rights (resolutory point I (A)), after referring to the "obligations impératives" under the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations (para. 41), and pondering that

> "la persistance de la situation qui fait l'objet de la requête expose les êtres humains concernés à des privations, à un sort pénible et angoissant et même à des dangers pour leur vie et leur santé et par conséquent à une possibilité sérieuse de préjudice irréparable" (para. 42).

18. Half a decade later, in its Order of 10 May 1984, in the *Nicaragua* v. *United States* case [19], the ICJ indicated provisional measures (resolutory point B (2)) after taking note of the requesting State's argument calling for protection of the rights to life, to freedom and to personal security of Nicaraguan citizens (para. 32). Shortly afterwards, in its celebrated Order of 10 January 1986 in the *Frontier Dispute (Burkina Faso/ Republic of Mali)* [20] case, duly complied with by the contending parties, the Court's Chamber took note of the concern expressed by the parties with the personal integrity and safety of those persons who were in the zone under dispute (paras. 6 and 21). One decade later, in its Order of 15 March 1996 in the case of the *Land and Maritime Boundary between*

[17] *I.C.J. Reports 2003*, p. 77.
[18] *I.C.J. Reports 1979*, p. 7.
[19] Case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), I.C.J. Reports 1984*, p. 169.
[20] *I.C.J. Reports 1986*, p. 3.

Cameroon and Nigeria (Cameroon v. *Nigeria)* [21], the Court took note of the requesting State's warning that continuing armed clashes in the region were notably causing "irremediable loss of life as well as human suffering and substantial material damage" (para. 19); in deciding to order provisional measures, the ICJ pondered that

> "it is clear from the submissions of both Parties to the Court that there were military incidents and that they caused suffering, occasioned fatalities — of both military and civilian personnel — while causing others to be wounded or unaccounted for, as well as causing major material damage . . . the rights at issue in these proceedings are sovereign rights which the Parties claim over territory, and . . . these rights also concern persons . . . the events that have given rise to the request, and more especially the killing of persons, have caused irreparable damage to the rights that the Parties may have over the Peninsula . . . persons in the disputed area and, as a consequence, the rights of the Parties within that area are exposed to serious risk of further irreparable damage" (paras. 38-39 and 42).

19. Another order illustrative of the overcoming of the strictly inter-State dimension in the acknowledgement of the rights to be preserved by means of provisional measures pertains to the case of *Armed Activities on the Territory of the Congo* [22], opposing this latter to Uganda. In its Order of 1 July 2000 in this case, the ICJ took into account the requesting State's denunciation of alleged "human rights violations" — invoking international instruments for their protection (paras. 4-5 and 18-19) — and of its plea for protection for its inhabitants (para. 31) as well as for its own "rights to respect for the rules of international humanitarian law and for the instruments relating to the protection of human rights" (para. 40). The Court, recognizing the pressing need to indicate provisional measures of protection (paras. 43-44), found that it was "not disputed that grave and repeated violations of human rights and international humanitarian law, including massacres and other atrocities, have been committed on the territory of the Democratic Republic of the Congo" (para. 42). The Court, accordingly, ordered both parties *inter alia* to "take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law" (resolutory point 3).

20. In its Order of 8 April 1993 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of*

[21] *I.C.J. Reports 1996 (I)*, p. 13.
[22] *I.C.J. Reports 2000*, p. 111.

Genocide (Bosnia and Herzegovina v. *Yugoslavia)*[23], the Court, after finding "a grave risk" to human life, indicated provisional measures, and recalled General Assembly resolution 96 (I) of 11 December 1946 (referred to in its own Advisory Opinion of 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*) to the effect that the crime of genocide "shocks the conscience of mankind, results in great losses to humanity . . . and is contrary to moral law and to the spirit and aims of the United Nations" (para. 49). In the subsequent Order of 13 September 1993 in the same case[24], the Court raised again its concern for the protection of human rights and the rights of peoples (para. 38). And in its recent Order of 15 October 2008 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*[25], the ICJ once again disclosed its concern for the preservation of human life and personal integrity (paras. 122 and 142-143).

21. From the survey above it can be seen that, over the last three decades, the ICJ has gradually overcome the strictly inter-State outlook in the acknowledgment of the rights to be preserved by means of its orders of provisional measures of protection. Nostalgics of the past, entrapped in their own dogmatism, can hardly deny that, nowadays, States litigating before this Court, despite its inter-State contentious procedure, have conceded that they have no longer the monopoly of the rights to be preserved, and, much to their credit, they recognize so, in pleading before this Court on behalf also of individuals, their nationals, or even in a larger framework, their inhabitants.

22. They are not thereby exercising diplomatic protection, as they argue in a much wider conceptual framework. The ICJ, in its turn — whether nostalgics of the past like it or not — has, on certain occasions, issued orders of provisional measures in which it has expressly placed the rights of the human person beside the rights of States (cf. *supra*). This calls for a reassessment of the contemporary international legal order itself, with greater attention focused on one of the constituent elements of States, their population, and its needs of protection, even by means of the operation of an inter-State mechanism.

23. Facts tend to come before the norms, requiring of these latter the aptitude to cover new situations they are meant to regulate, with due attention to superior values[26]. Before this Court, States keep on holding the monopoly of *jus standi*, as well as *locus standi in judicio*, in so far as

[23] *I.C.J. Reports 1993*, p. 3.
[24] *Ibid.*, p. 322.
[25] *I.C.J. Reports 2008*, p. 353.
[26] Cf., *inter alia*, G. Morin, *La révolte du droit contre le code — la révision nécessaire des concepts juridiques*, Paris, Libr. Rec. Sirey, 1945, pp. 2, 6-7 and 109-115.

requests for provisional measures are concerned, but this has not proved incompatible with the preservation of the rights of the human person, together with those of States. The ultimate beneficiaries of the rights to be thereby preserved have been, not seldom and ultimately, human beings, alongside the States wherein they live. Reversely, requesting States themselves have, in their arguments before this Court, gone beyond the strictly inter-State outlook of the past, in invoking principles and norms of the international law of human rights and of international humanitarian law, to safeguard the fundamental rights of the human person.

24. In so far as material or substantive law is concerned, the inter-State structure of litigation before this Court has not been an unsurmountable obstacle to such vindication of observance of principles and norms of international human rights law and international humanitarian law, as requests for provisional measures of protection before this Court have not purported to limit themselves to the preservation of the rights of States.

25. As one of the constitutive elements of these latter — and a most prominent one — is their population, it comes as no surprise that provisional measures indicated in successive orders of the ICJ have transcended the artificial inter-State dimension of the past, and have come to preserve also rights whose ultimate subjects *(titulaires)* are the human beings. This reassuring development admits no steps backwards, as it has taken place to fulfil a basic need and aspiration not only of States, but of the contemporary international community as a whole.

V. The Rationale of the Purported Aims of Provisional Measures of the ICJ

26. Over the last decades, in its orders of provisional measures pursuant to Article 41 of its Statute, the ICJ has to a large extent based its reasoning either on the need to avoid or prevent an imminent and irreparable harm to the rights of the contending parties (including the rights of the human person), or, more comprehensively, on the need to avoid or prevent the aggravation of the situation which would be bound to affect or harm irreparably the rights of the parties. Yet, the rationale of such orders of the Court does not need to limit or exhaust itself in a reasoning of the kind.

27. Once again, facts tend to come before the norms, and much will depend on the nature and content of the rights to be preserved. In the present case concerning questions relating to the obligation to prosecute or extradite, such right pertains, in my view, to the *realization of justice*. The Court's reasoning is bound, accordingly, to reflect the purported end of preservation of this right. In the distinct contexts of other cases, the

ICJ has already disclosed its attention to the imperative of the realization of justice.

28. Thus, in its Order of 10 January 1986 in the case of the *Frontier Dispute (Burkina Faso/Republic of Mali)* [27], the Court's Chamber indicated provisional measures in order not to aggravate the situation, aware that such measures were to contribute to "assurer la bonne administration de la justice" and to prevent "la destruction d'éléments de preuve pertinents" to its own decision (paras. 19-20). The preservation of evidence relevant for the decision on the case was also the concern of the Court, as expressly stated in its Order of 15 March 1996 (para. 42), in the case of the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)* [28].

29. Thus, in the case law itself of the ICJ there are already elements disclosing the concern of the Court, when issuing orders of provisional measures, *to strive towards achieving a good administration of justice*. In the present Order of the Court in the case concerning *Questions relating to the Obligation to Prosecute or Extradite*, the *right to the realization of justice* assumes a central place, and a paramount importance, and becomes thus deserving of particular attention. I shall retake this point later on, in this dissenting opinion, after reviewing the historical record of the present case, and the situation of impunity which has prevailed for almost two decades, which, in my view, do have a direct bearing on the requirements of urgency and risk of irreparable harm to the right to be preserved, for the purpose of consideration of the present request for provisional measures lodged with this Court.

VI. The Saga of the Victims of the Habré Régime in their Persistent Struggle against Impunity

30. In the oral hearings before this Court, *both* Belgium and Senegal saw it fit to recall the atrocities of the Habré régime (1982-1990), wherefrom the *cas d'espèce* emerges. In its pleading of 6 April 2009, Belgium referred to the findings of the Chadian Truth Commission, as to the loss of human life as well as to the 54,000 political detainees between 1982 and 1990 [29]. Significantly, Senegal dwelt even further upon those findings, in its pleadings of 8 April 2009: it added that, besides those 54,000 political detainees, there were approximately 40,000 fatal victims in the period of the Habré régime, bringing the total to "au moins 94 000 victimes directes ou leurs ayant-droits" who are "susceptibles d'être concernés par le procès de M. Hissène Habré" [30].

[27] *I.C.J. Reports 1986*, p. 3.
[28] *I.C.J. Reports 1996 (I)*, p. 13.
[29] CR 2009/8, pp. 18-19.
[30] CR 2009/11, p. 10.

31. It should not pass unnoticed that both Parties, Belgium and Senegal, referred to those sombre figures in the course of the proceedings concerning provisional measures. In the circumstances of the present case, it is, in fact, ineluctable to dwell upon the atrocities of the Habré régime, for addressing the issue of the right to be preserved by provisional measures of the ICJ. It is commendable that both Parties, Senegal and Belgium, reckoned that gravity of the case and the human tragedy it amounts to, in a strictly inter-State procedure before this Court. The States concerned themselves made a point of acknowledging the human dimension of the present *contentieux* between them.

1. The Historical Record of the Case

32. The facts wherefrom the present case originates are, in fact, of public and notorious knowledge, being documented, e.g., in the Report of the Chadian Truth Commission (of 7 May 1992)[31], which covered the period of the régime of former President Hissein Habré (from 7 June 1982 to 1 December 1990). Both Belgium and Senegal referred to them. The Truth Commission, after the investigation it undertook, reported the crimes systematically committed against the physical and mental integrity of persons and their possessions (Part I) during the period at issue, and determined a grim record of more than 40,000 persons murdered, over 80,000 orphans, over 54,000 persons arbitrarily detained, and 200,000 persons made destitute and deprived of moral and material support. The Commission made it clear that this was the result of a systematic pattern of State-perpetrated arbitrary detentions, torture, infra-human conditions of detention, summary or arbitrary or extra-judicial executions, successive massacres or mass executions, occultation of mortal remains, destruction of villages, persecutions, forced eviction and plundering[32].

33. The Report further investigated the misappropriation of public funds (Part II), and elucidated that the Habré régime deliberately terrorized the population. The pillars of the State-conducted repression, according to the Truth Commission, were the political police (the Directorate of Documentation and Security — DDS) and the Presidential Investigation Service (SIP), added to the State party. The Commission added that the communication between the terrifying DDS and the President was direct, with no intermediaries. The "State-policies" devised, at the highest level of the Executive, according to the Truth Commission, were carried out

[31] The "Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories" was created by the Government of Chad's decree No. 014/P.CE/CJ/90, of 29 December 1990.

[32] Cf. "Chad: Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, His Accomplices and/or Accessories" [Done in Ndjamena, 7 May 1992], in: *Transitional Justice* (ed. N. J. Kritz), Vol. III, Washington DC, US Institute of Peace Press, 1995, pp. 51-93.

with "predisposition", cruelty and "contempt for human life"[33]. The executions were "ordered directly" by the President[34]. The objects collected by plundering were taken directly to the office of the President[35].

34. In sum, Habré's régime, according to the Chadian Truth Commission, amounted to an eight-year reign of State terror, with people mourning their dead in complete defencelessness, in an abominable distortion of the ends of the State, and with impunity for such crimes prevailing to this day. The Report of the Chadian Truth Commission was but the beginning of the saga of the victims of the atrocities perpetrated during the Habré régime (1982-1990) in Chad. Their search for justice has followed a long path, at both national and international levels.

2. The Issue of Justiciability in the Long Search for Justice

35. The issue of justiciability for the grave violations perpetrated during the Habré régime, starting with the right to be preserved in the *cas d'espèce*, has a distinct dimension. In the oral arguments before this Court, Belgium argued, on 6 April 2009, that its implication in the present case "trouve son origine dans une plainte déposée à Bruxelles, avec constitution de partie civile devant un juge d'instruction, le 30 novembre 2000, par un ressortissant belge d'origine tchadienne"[36]. Furthermore — Belgium added — it was not in Belgium but in Senegal that the first complaints against Mr. H. Habré were presented, in January 2000, without success, as

> "la Chambre d'accusation de la Cour d'appel de Dakar avait annulé le procès-verbal d'inculpation délivré par le juge d'instruction sénégalais qui inculpait M. Hissène Habré pour complicité de crimes contre l'humanité, d'actes de torture et de barbarie"[37].

36. Senegal, for its part, contended before this Court, also on 6 April 2009, that the origin of the present case is found in the lodging, on 25 January 2000, with the *juge d'instruction* of a complaint (by Mr. S. Guengueng and seven other petitioners) against Mr. H. Habré, of crimes against humanity, torture, barbaric acts, discrimination, killings and forced disappearances; the eight petitioners claimed to have been victims of crimes against humanity and acts of torture in Chad,

[33] *Op. cit. supra* note 32, pp. 58 and 61. The DDS received assistance from foreign States (p. 64), and promptly attained the objective pursued, to terrorize the population (pp. 66 and 88), with a "proliferation of detention centres throughout the country" (p. 72).
[34] *Ibid.*, p. 77.
[35] *Ibid.*, p. 81.
[36] CR 2009/8, p. 17.
[37] *Ibid.*, p. 19.

between June 1982 and December 1990[38]. Three years earlier, in 1987, Senegal had ratified the 1984 United Nations Convention against Torture[39].

37. In its oral arguments before this Court, Senegal recalled the endeavours by the two groups of victims of the atrocities of the Habré régime in their search for justice:

> "Alors que la Cour de cassation sénégalaise examinait encore l'affaire, une autre plainte a été déposée, en Belgique, par un autre groupe de victimes tchadiennes ou d'origine tchadienne, dont M. Aganaye qui a porté plainte le 20 novembre 2000.
>
> Ce groupe de victimes était différent de celui qui avait porté plainte à Dakar mais les deux groupes bénéficiaient des mêmes soutiens . . .
>
> Au Sénégal, le 20 mars 2001, la Cour de cassation . . . a rejeté le pourvoi formé par les victimes tchadiennes du groupe Guengueng. Elle a jugé qu'aucun texte de procédure ne donnait une compétence universelle aux juridictions sénégalaises pour connaître des faits dénoncés sur le fondement de la Convention de 1984 contre la torture."[40]

38. Belgium conceded that Senegal has lately modified its legislation (Penal Code and Code of Criminal Procedure), in February 2007, introducing therein the principle of universal jurisdiction for the repression of genocide, war crimes and crimes against humanity[41]. In the meantime, however, on 18 April 2001, — as Senegal itself saw it fit to recall before this Court — the group of victims headed by Mr. Guengueng seized the United Nations Committee against Torture, established by Article 17 of the United Nations Convention against Torture[42].

39. It should not pass unnoticed that years have lapsed till the rights of the victims of the reported repression of the Habré régime became justiciable at domestic law level, and even more time has lapsed — almost two decades — till they were vindicated under the United Nations Convention against Torture, and now in the inter-State procedure before this Court. This discloses that the time of human justice is surely not the time of human beings (cf. *infra*). Moreover, if there are today rights invoked by States in connection with the atrocities of the Habré régime, this is due to the *initiative of the victims themselves*, before national tribunals (in Senegal and Belgium), and subsequently before the United Nations Committee against

[38] CR 2009/9, pp. 10 and 23. The petitioners were members of the "Association des victimes des crimes et répressions politiques au Tchad" (AVCRP), established in 1991; *ibid.*, p. 10.
[39] As recalled by Senegal itself before this Court; *ibid.*, p. 23.
[40] *Ibid.*, p. 24.
[41] CR 2009/8, p. 20.
[42] CR 2009/9, p. 24.

Torture, with the course of facts leading to the lodging of the present case now with this Court.

40. Grave violations of human rights are thus at the origin of the present inter-State *contentieux* before the ICJ, and it is significant — and much to the credit of Senegal and Belgium — that the contending Parties have not attempted to controvert this in their oral arguments before this Court. Senegal, in addition, in its pleadings of 6 April 2009, expressly referred to the *victims* of the Habré régime who are seeking justice (cf. *supra*). The *right of States* invoked before the ICJ in the present case under the 1984 Convention against Torture emerges as from the *rights of human beings* victimized by repression and cruelty of an oppressive régime. This case reveals that the human dimension of the rights of States themselves can under certain circumstances become undeniable.

41. Once the United Nations Committee against Torture was seized, in 2001, of the *S. Guengueng et alii* case, concerning Senegal, it issued an interim or provisional measure requesting the State party not to expel Mr. H. Habré and "to take all necessary measures to prevent him from leaving the territory, other than under an extradition procedure", and the Committee found that the State party concerned acceded to such request[43]. Half a decade later, in its decision of 17 May 2006 in the case of *Suleymane Guengueng et alii* v. *Senegal*, the United Nations Committee against Torture found *inter alia* (already at that time, eight years ago) that "the reasonable time within which the State Party should have complied" with the obligation under Article 5 (2) of the United Nations Convention against Torture "has been considerably exceeded"[44]. It added that the objective of Article 7 of the Convention was "to prevent any act of torture from going unpunished"[45], and concluded that there had been breaches of both provisions, Articles 7 and 5 (2) of the Convention against Torture[46].

42. Not only the United Nations Committee against Torture, as supervisory organ of the corresponding Convention, but also a regional international organization, the African Union, were engaged in the struggle against impunity in the present case concerning questions relating to the obligation to prosecute or extradite now before the ICJ. In fact, both Belgium[47] and Senegal[48] expressly acknowledged, in their oral arguments before this Court, the contribution of the African Union to the principle of universal jurisdiction in the context of the *cas d'espèce*.

43. As Senegal transmitted the "*Hissène Habré* case" to the African Union in January 2006, this latter established a Committee of Eminent

[43] United Nations, doc. CAT/C/36/D/181/2001, 19 May 2006, p. 2, para. 1 (3).
[44] *Ibid.*, p. 15, para. 9 (5).
[45] *Ibid.*, p. 15, para. 9 (7).
[46] *Ibid.*, p. 16, paras. 9 (9), 9 (11) and 9 (12).
[47] CR 2009/8, pp. 41-42.
[48] CR 2009/9, p. 27.

African Jurists to examine it (Decision 103 (VI)). In its Report to the Assembly of Heads of State and Government of the African Union (2006), the Committee *inter alia* recommended, in July 2006, that

> "Tous les Etats africains devraient s'assurer que chacun adhère complètement à la Convention contre la torture et au Protocole additionnel afin de permettre l'application de la Convention sur l'ensemble du Continent. Les déclarations pertinentes prévues à l'article 22 doivent aussi être faites pour offrir une protection réelle des droits des citoyens. Cette adhésion est aussi importante pour la prévention de la torture . . .
>
> Tous les Etats doivent prendre des mesures nécessaires pour adopter des lois sur ces crimes et intégrer la Convention contre la torture dans leur législation interne." [49]

44. On the basis of that Report, the Assembly of the African Union, by its Decision 127 (VII), mandated Senegal "to prosecute and ensure that Hissène Habré is tried, on behalf of Africa, by a competent Senegalese court with guarantees for fair trial" [50]. The controversy between Belgium and Senegal, in their oral arguments before the ICJ on 7 and 8 April 2009, then focused on a very specific issue, namely: while Belgium argued that "Senegal only regards itself as under an obligation not to release Mr. Habré because of the mandate given to it by the African Union, not because of its obligations owed to Belgium under the Torture Convention" [51], Senegal, in turn, recalled, in reply, that

> "il n'a jamais considéré que l'obligation de juger Hissène Habré trouve sa source dans la décision de l'Union Africaine et . . . il s'est toujours référé à la Convention de 1984 au moment d'apporter les modifications nécessaires à sa législation afin de rendre possible le procès envisagé" [52].

45. It should not pass unnoticed that the "*Hissène Habré* case" has been brought to the attention of yet another instance of the United Nations, namely, the Working Group on the Universal Periodic Review (UPR) of the United Nations Human Rights Council. A compilation prepared for that Working Group by the Office of the United Nations High Commissioner for Human Rights [53], as well as a draft Report

[49] African Union, *Rapport du Comité d'éminents juristes africains sur l'affaire Hissène Habré*, 2006, p. 5, paras. 36-37.
[50] African Union, *Decisions and Declarations*, Banjul, July 2006, Decision 127 (VII), p. 1, para. 5 (ii).
[51] CR 2009/10, p. 23.
[52] CR 2009/11, p. 14.
[53] United Nations Human Rights Council, doc. A/HRC/WG.6/4/SEN/2, 18 December 2008, p. 7, para. 27.

(of February 2009) of the Working Group itself[54], contain express references to the case, in the framework of the struggle against impunity. Yet, despite all this, the surviving victims of the atrocities of the Habré régime keep on waiting for justice. Hope is the last one to vanish.

VII. The Time of Human Beings and the Time of Human Justice

1. The Décalage *to be Bridged*

46. The time of human beings surely does not appear to be the time of human justice. The time of human beings is not long *(vita brevis)*, at least not long enough for the full realization of their project of life. The brevity of human life has been commented upon time and time again, throughout the centuries; in his *De Brevitate Vitae*[55], Seneca pondered that, except for but a few, most people in his times departed from life while they were still preparing to live[56]. Yet, the time of human justice is prolonged, not seldom much further than that of human life, seeming to make abstraction of the vulnerability and briefness of this latter, even in face of adversities and injustices. The time of human justice seems, in sum, to make abstraction of the time human beings count on for the fulfilment of their needs and aspirations.

47. Chronological time is surely not the same as biological time. The time of the succession of events does not equate with the time of the briefness of human life. *Tempus fugit*. For its part, biological time is not the same as psychological time either. Surviving victims of cruelty lose, in moments of deep pain and humiliation, all they could expect of life; the young lose in a few moments their innocence forever, the elderly suddenly lose their confidence in fellow human beings, not to speak of institutions. Their lives become deprived of meaning, and all that is left is their hope in human justice. Yet, the time of human justice does not appear to be the time of human beings.

48. For those victimized, the passing of time without justice is painful, as it is time leading to despair. Victims of torture are only left with that hope in human justice. The devastating effects of torture have been denounced likewise time and time again, and international tribunals should not appear indifferent to that.

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[54] United Nations Human Rights Council, doc. A/HRC/WG.6/4/L.10, 11 February 2009, pp. 7, 12, 15, 16 and 21, paras. 31, 63, 79, 92 and 98 (5), respectively.

[55] Written sometime between the years 49 and 62.

[56] Seneca, *La Brevità della Vita (De Brevitate Vitae)*, 23rd ed., Milan, RCS, 2008, pp. 40-41, Chap. I-1:

> *"i giorni a noi concessi scorrono così veloci e travolgenti che, eccetto pochissimi, gli altri sono abbandonati dalla vita proprio mentre si preparano a vivere — tam rapide dati nobis temporis spatia decurrant, adeo ut exceptis admodum paucis ceteros in ipso vitae apparatu vita destituat".*

In an eloquent personal account, for example, it was warned that

> "Whoever was tortured, stays tortured. Torture is ineradicably burned into him, even when no clinically objective traces can be detected . . . The person who has survived torture and whose pains are starting to subside (before they flare up again) experiences an ephemeral peace that is conducive to thinking . . . If from the experience of torture any knowledge at all remains that goes beyond the plain nightmarish, it is that of a great amazement and a foreignness in the world that cannot be compensated by any sort of subsequent human communication . . .
>
> Whoever has succumbed to torture can no longer feel at home in the world . . . Trust in the world . . . collapsed in part at the first blow . . . will not be regained."[57]

49. It is imperative to reduce or bridge the *décalage* between the time of victimized human beings and the time of human justice. This is indeed imperative, also bearing in mind that torture and other atrocities should not at all have taken place, and are not at all to take place again, and further keeping in mind their absolute and peremptory prohibition in any circumstances whatsoever — a prohibition of *jus cogens* — in contemporary international law (cf. *infra*). This has, in my view, a direct bearing on the issue of the indication of provisional measures.

2. The Determination of Urgency

50. It is pressing and imperative to reduce or bridge the gap between the time of human justice and the time of human beings. In my understanding, for the purposes of deciding whether to indicate provisional measures, the *urgency* of a situation cannot be measured mechanically in all cases, nor leniently in any case. May it be recalled that the term "urgent" derives from Latin "urgens/urgentis" (participle of *urgere*), meaning what is necessary to be done promptly, and, *a fortiori*, what is indispensable and can-

[57] J. Améry, *At the Mind's Limits*, Bloomington, Indiana Univ. Press, 1980 [re-ed.], pp. 34 and 38-40. And J. Améry, *Par-delà le crime et le châtiment*, Arles, Actes Sud/Babel, 2005 [re-ed.], pp. 83-84, 92 and 94-96:

> "Celui qui a été torturé reste un torturé. La torture est marquée dans sa chair au fer rouge, même lorsque aucune trace cliniquement objective n'y est plus repérable ... Celui qui vient de réchapper de la torture et dont la douleur se calme (avant de reprendre de plus belle) se sent gagné par une sorte de paix éphémère, propice à la réflexion ... Si ce qui reste de l'expérience de la torture peut jamais être autre chose qu'une impression de cauchemar, alors c'est un immense étonnement, et c'est aussi le sentiment d'être devenu étranger au monde, état profond qu'aucune forme de communication ultérieure avec les hommes ne pourra compenser ...
>
> Celui qui a été soumis à la torture est désormais incapable de se sentir chez soi dans le monde ... La confiance dans le monde qu'ébranle déjà le premier coup reçu ... est irrécupérable."

not be prescinded from. The term "urgency" has its roots in late Latin (XVI and XVII centuries) *urgentia*, meaning "the state, condition, or fact of being urgent", or "pressing importance", or else "imperativeness" [58]. As to the law, *urgency* means the pressing need and relevance of compliance with legal precepts and obligations [59]. In this same sense, related to imperativeness, urgency means the "caractère d'un état de fait susceptible d'entraîner, s'il n'y est porté remède à bref délai, un préjudice irréparable, *sans cependant qu'il y ait nécessairement péril imminent*" [60].

51. *Urgency* thus relates to measures that ought to be promptly taken, in the context of a given situation, so as to avoid further delays which may bring about additional prejudice, or, indeed, irreparable harm (cf. *infra*). The determination of urgency, in my understanding, is thus not amenable to reliance on an abstract definition of the term, applicable uniformly to all cases; on the contrary, it ought to be determined in relation to the legal nature and content of the right to be preserved, and in the light of the particular circumstances of each case, as, for the purposes of the indication of provisional measures of protection, it is further linked to other elements, such as the probability of irreparable harm.

52. Furthermore, for the purposes of deciding whether to indicate provisional measures, the *urgency* of a situation cannot be measured in a way which appears disconnected from the human drama underlying the situation at issue; it is to be measured and determined in the light of the circumstances of each case and of the nature of the right to be preserved. *Urgency* is determined not in relation to time spans of legal procedures in force at domestic and international levels, but rather in relation to the legitimate expectations of the subjects of originally violated rights, those who are justiciable, and taking into account the time of human beings, which is not the same as the time of human justice.

53. In ascertaining urgency, it may further reasonably be asked: urgent to whom? To the "administrators" or "operators" of justice, anywhere? Most likely not, as, in all latitudes, they are used to the time of human justice, which is not the time of human beings. To the victims? Certainly yes, as their time *(vita brevis)* is not the time of human justice. If abstraction is made of the time of human beings, and of the human drama underlying a situation such as that of the present case, justice is bound to fail.

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[58] *Apud Oxford English Dictionary* (online), www.oed.com, entry from 2nd ed. (1989), Oxford, Oxford University Press, with latest additions of March 2009, item I (1) *(a)*; emphasis added.

[59] *Apud* Real Academia Española (R.A.E.), *Diccionario de la Lengua Española*, 21st ed., Madrid, 1992, p. 2050.

[60] G. Cornu/Association Henri Capitant, *Vocabulaire juridique*, 8th ed., Paris, Quadrige/PUF, 2008 [reprint], p. 946; emphasis added.

54. The *urgency* of a situation becomes evident not only, e.g., when convicted individuals are about to be executed, as in the triad *Breard/LaGrand/Avena* cases, or when a growing number of people are about to be murdered, as in cases concerning armed conflicts[61]. The urgency of a situation can be determined by reference *to action as well as omission*. The urgency of a situation becomes manifest also when people endure a lifetime of impunity, seeking in vain for the realization of justice at domestic and international levels.

55. In the present documented case concerning the search for justice for the reported atrocities of the Habré régime, it is of public and notorious knowledge that people — in a considerable number — have already been murdered, and a long time ago, as a result of a State-planified and executed policy of repression in Chad. But the right to be now preserved is, however, of a distinct nature: it is the *right to the realization of justice*, which finds expression in the corresponding obligations set forth in Articles 5 (2) and 7 (1) of the 1984 United Nations Convention against Torture.

56. Irrespective of the arguments advanced by the contending Parties, this Court holds the faculty of an entirely free appreciation of the character of *urgency* of the situation brought to its knowledge and decision. In the present case concerning questions relating to the obligation to prosecute or extradite, the present-day home surveillance of Mr. H. Habré in Senegal is *only one* of the aspects of the situation before the Court (cf. paras. 82-83, *infra*), and not the determining one, as the Court seemed to believe, for the decision whether to indicate provisional measures. The crucial factor here is, in my view, the endurance by the victims of the ungrateful passing of time throughout their long search, in vain, for human justice to date.

57. The full text of the Report of the Chadian Truth Commission, adopted in N'Djamena on 7 May 1992, and published in book form shortly afterwards[62], was accompanied by the documental and testimonial evidence obtained by the Commission, including declarations from surviving victims. It related the forms of torture and arbitrary detentions perpetrated[63], and included a section on the "volonté délibérée d'exterminer les prétendus opposants au régime"[64], and

[61] Such as the cases, before this Court, of the *Frontier Dispute (Burkina Faso/Republic of Mali)*, the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, and the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*.

[62] Cf. Ministère tchadien de la justice, *Rapport de la commission d'enquête nationale — Les crimes et détournements de l'ex-président Habré et de ses complices*, Paris, L'Harmattan, 1993, pp. 5-269.

[63] Cf. *ibid*., pp. 38-43.

assessed the systematic violence of the Habré régime in the following terms:

> "Le régime de Hissein Habré a été une véritable hécatombe pour le peuple tchadien; des milliers de personnes ont trouvé la mort, des milliers d'autres ont souffert dans leur âme et dans leur corps et continuent d'en souffrir . . .
>
> Jamais dans l'histoire du Tchad il n'y a eu autant de morts. Jamais il n'y a eu autant de victimes innocentes. Au début de ses travaux, la Commission d'enquête pensait avoir affaire, au pire des cas, à des massacres, mais plus elle avançait dans ses investigations, plus l'étendue du désastre s'agrandissait pour aboutir finalement au constat qu'il s'agissait plutôt d'une extermination . . . La machine à tuer ne faisait aucune différence entre hommes, femmes et enfants." [65]

58. Impunity has ever since prevailed, almost two decades later, despite the aforementioned endeavours in search of justice on the part of the Chadian Truth Commission, the United Nations Committee against Torture, the African Union, the United Nations Human Rights Council, the United Nations High Commissioner for Human Rights, and the step taken by Senegal itself to modify its Penal Code and Code of Criminal Procedure. The surviving victims, notwithstanding, are still in search of justice. Many of them have passed away in the course of their search. One of the surviving victims has declared last year that they "have been fighting for 18 years to bring Hissène Habré to justice, and time is running out. Unless Senegal takes action soon, there will not be any victims left at the trial." [66] This is yet another illustration of the fact that the time of human justice is not the time of human beings.

59. Time is inherent to law, to its interpretation and application in relation to all situations and relations it regulates. The lapse of time, since the occurrence of the documented facts, does not, in my understanding, render the matter at issue less urgent or less relevant; quite on the contrary, it renders the situation to be settled *more urgent*, and the prolonged delays amount to an *aggravating* circumstance. The prevalence of impunity in the passage of time renders the realization of justice more and more urgent. In the context of impunity, urgency increases, rather than decreases, with the passing of time.

3. The Determination of the Probability of Irreparable Damage

60. The right to be preserved by provisional measures in the present case is the *right to the realization of justice*. It finds expression in the corresponding obligations *erga omnes partes* set forth in the 1984 United

[64] *Ibid.*, pp. 51-54.

[65] *Op. cit. supra* note 62, p. 68, and cf. p. 239.

[66] United Nations High Commissioner for Refugees (UNHCR) — Refworld, "United Nations Decision on Hissène Habré Flouted", www.unhcr.org/refworld/docid/48358a6ac.html, 16 May 2008, p. 1.

Nations Convention against Torture, such as the taking of measures to establish jurisdiction (Article 5) over crimes referred to in Article 4 of the Convention, and the one enshrined into the principle *aut dedere aut judicare* (Article 7). The several years of impunity following the pattern of systematic State-planified crimes, perpetrated — according to the Chadian Truth Commission — by State agents in Chad in 1982-1990, render the situation, in my view, endowed with the elements of gravity and urgency, as prerequisites for the indication of provisional measures. The passing of time with impunity renders the gravity of the situation even greater, and stresses more forcefully the urgency to make justice prevail.

61. The other prerequisite for the indication of provisional measures is likewise present in the situation at issue. The right to the realization of justice is a right *erga omnes partes* under the United Nations Convention against Torture, which corresponds to the aforementioned obligations. The subjects *(titulaires)* of this right are all the States parties to that Convention, amongst which are Belgium and Senegal. But the ultimate beneficiaries of that right are not the States, are not abstract entities, but rather human beings, of flesh and bones, of body and soul, who, like everyone, grow old and die. To overlook this fact amounts to wander in a Vattelian dream world of a strictly inter-State society which is long past.

62. Each time a surviving victim of torture, waiting for justice, dies without having attained it, there is an (additional) irreparable harm. The prevailing impunity to date amounts in fact to a *continuing* situation of irreparable harm. Further delays in the *cas d'espèce* bring about the probability of further or growing irreparable harm. The original violations of rights of the human person which led to the invocation, at inter-State level, of the present right to be preserved — the right to the realization of justice — cannot be neglected or ignored.

63. Furthermore, the nature of the right to be preserved, and the circumstances surrounding it, do have a bearing on a decision of indication of provisional measures. As to the obligations corresponding to that right to be preserved, the segment *aut judicare* of the enunciation of the principle of universal jurisdiction, *aut dedere aut judicare*, forbids undue delays in the realization of justice. Such undue delays bring about an irreparable damage to those who seek justice in vain; furthermore, they frustrate and obstruct the fulfilment of the object and purpose of the United Nations Convention against Torture, to the point of conforming a breach of this latter[67].

64. In the present case concerning questions relating to the obligation to prosecute or extradite, there is, in my view, no room for doubt that the elements of *urgency* and of the *probability of irreparable harm* are present, and clearly so. These latter do not allow reasoning in the

[67] Cf., to this effect, A. Boulesbaa, *The United Nations Convention on Torture and the Prospects for Enforcement*, The Hague, Nijhoff, 1999, p. 227.

abstract. The assumption of the absence of urgency of the present decision of the Court's majority requires demonstration. The ICJ should, thereby, in my view, have indicated provisional measures, in the faithful exercise of its functions, so as to seek to ensure the prompt realization of justice in the *cas d'espèce*.

VIII. Legal Nature, Content and Effects of the Right to be Preserved

65. In the course of the summary proceedings in the present case, the contending Parties, Belgium and Senegal, had the opportunity to dwell upon the nature and legal effects of the right to be preserved, in the course of the public hearings of 6 to 8 April 2009 before the Court and thereafter[68]. They repeatedly referred to their own obligations as States parties to the 1984 United Nations Convention against Torture. The Court itself, in the present Order, based its *prima facie* jurisdiction on Article 30 of that Convention (paras. 53-54 of the Order).

66. In the present case, the right to the realization of justice has come to the fore as a result of the original violation of the absolute prohibition of torture, a prohibition of *jus cogens*, in the years of the Habré régime in Chad (1982-1990). In fact, an international régime against torture, forced disappearances, and summary or extra-judicial, executions has been conformed along more than two decades, on the basis of the absolute prohibition (one of *jus cogens*) also of those crimes. Consideration of this issue as a whole goes beyond the purposes of the present dissenting opinion, but, in so far as the absolute prohibition of torture, in particular, is concerned, I shall not omit to recall that the 1984 United Nations Convention against Torture is accompanied by the 1985 Inter-American Convention against Torture and the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Moreover, to the work undertaken by the international supervisory

[68] Thereafter, in virtue of the following question I saw it fit to put to both parties at the [end] of the public sitting of 8 April 2009, namely —

> "For the purposes of a proper understanding of the *rights* to be preserved (under Art. 41 of the Statute of the Court), are there rights corresponding to the obligations set forth in Art. 7 (1), in combination with Art. 5 (2), of the 1984 United Nations Convention against Torture and, if so, what are their *legal nature, content* and *effects*? Who are the *subjects* of those rights, States having nationals affected, or all States Parties to the aforementioned Convention? Whom are such rights opposable to, only the States concerned in a concrete case, or any State Party to the aforementioned Convention?"

Belgium and Senegal forwarded two letters each to the ICJ, in which they presented their views in response to that question (ICJ, letter from Belgium of 15 April 2009, pp. 1-6; ICJ, letter from Senegal of 15 April 2009, p. 3; ICJ, letter from Belgium of 20 April 2009, p. 1; ICJ, letter from Senegal of 20 April 2009, pp. 1-3).

organs of those three Conventions, one may add the work of the extra-conventional mechanisms of the United Nations in this same domain.

67. Furthermore, there is a remarkable jurisprudential construction of two contemporary international tribunals on the *jus cogens* prohibition of torture, namely, that of the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) and that of the Inter-American Court of Human Rights (IACtHR). The former, in the case of the *Prosecutor* v. *Furundzija* (Judgment of 10 December 1998, IT-95-17/1-T), sustained that the absolute prohibition of torture has the character of a norm of *jus cogens*, and added that the application of the principle of universal jurisdiction in respect of torture ensues from the *jus cogens* prohibition of this latter (paras. 137-139, 144, 156 and 160). The IACtHR, for its part, in its judgments in the cases *Cantoral Benavides* v. *Peru* (18 August 2000, paras. 95 and 102-103) and *Maritza Urrutia* v. *Guatemala* (27 November 2003, paras. 89 and 92), asserted the absolute prohibition of torture — belonging to the domain of *jus cogens* — even under the most difficult circumstances[69]. This position has become its *jurisprudence constante* to date.

68. Accountability for breaches of norms of *jus cogens* is ineluctable. The facts wherefrom the right to be preserved in the *cas d'espèce* emerged were violations of *jus cogens*. Thus, the realization of justice grows in importance. The 1984 United Nations Convention against Torture sets forth the obligations for States parties to establish jurisdiction over the offence of torture (Article 5) and to prosecute or to extradite the offenders (Article 7). These are obligations *erga omnes partes*, binding not only the contending Parties, but all States parties to the Convention, which are further committed to its *collective guarantee*. Likewise, *all States parties* have the corresponding right, on the basis of the Convention, to see to it that these obligations are duly complied with.

69. The States parties are entitled by the Convention to exercise such right *erga omnes partes*. Such right is thus opposable to each of the States parties to the Convention. The relevance of this Convention, and the nature and effects of the right to be preserved and the obligations it stipulates, giving expression to the principle of universal jurisdiction *(aut dedere aut judicare)*, are not reflected in the considerations that motivate the decision of the majority of the Court in the present Order. They

[69] Such as — it exemplified — under war, threat of war, "struggle against terrorism", state of emergency, domestic conflicts or other public calamities. Also in this sense, its Judgment in the case of the *Brothers Gómez Paquiyauri* v. *Peru* (Judgment of 8 July 2004, paras. 111-112, cf. www.corteidh.or.cr/docs/casos/articulos/seriec_110_ing.pdf).

deserved, in my perception, much greater weight in the consideration of the prerequisites for the indication of provisional measures.

70. Had this occurred, the decision reached in the present Order of the Court would have been different. If customary international law were to be brought into the picture, one would be before a right corresponding to obligations *erga omnes*, disclosing a wider horizon, not circumscribed to the States parties to the United Nations Convention against Torture. It is not my intention to embark on this aspect of the matter in the present dissenting opinion, but only to draw attention to one specific point, deserving of attention here, as the issue did not pass unnoticed in the public sitting of the Court of 7 April 2009[70] in the present case.

71. The consolidation of *erga omnes* obligations of protection, ensuing from the imperative norms of international law, in my understanding overcomes the pattern erected in the past upon the autonomy of the will of the State, which can no longer be invoked or pursued in view of the existence of norms of *jus cogens*. These latter transcend the law of treaties, and encompass nowadays the domain of State responsibility. Those obligations, in their turn, clearly transcend the individual consent of States, heralding the advent of the international legal order of our times, committed to the prevalence of superior common values, in the ongoing construction of the international law for humankind.

72. Obligations *erga omnes* cannot properly be approached from a strictly inter-State perspective, which would no longer reflect the essence of the contemporary international legal order. Those obligations disclose not only a *horizontal* dimension, as they are owed to the international community as a whole (a point overworked in expert writing), but also, in my perception, a *vertical* dimension, as compliance with them is required not only from organs and agents of the public power, but also from natural persons *(simples particuliers)*, in their inter-individual relations (a point insufficiently examined in expert writing to date). A proper understanding of the scope of those obligations, and due compliance with them, can help to rid the world of violence and repression, such as those which, in the present case, victimized thousands of persons in the years of the Habré régime in Chad (1982-1990).

73. There could hardly be better examples of a mechanism for the application of the obligations *erga omnes* of protection (at least in the relations of the States parties *inter se*) than the methods of supervision provided for by the human rights treaties themselves, such as the 1984 United Nations Convention against Torture, for the exercise of the *collective guarantee* of the protected rights. In the present case, the right to be preserved is the right to the realization of justice, which corresponds

[70] Cf. CR 2009/10, pp. 14-15.

to those obligations *erga omnes partes*. Had the ICJ issued the requested provisional measures, it would have taken upon itself the task or role of guarantor of the collective guarantee of the United Nations Convention against Torture.

IX. Provisional Measures to be Indicated

1. Time and the Imperativeness of the Realization of Justice

74. The *passing* of time, and its effects, constitute possibly the greatest enigma or mystery surrounding human existence, which has defied human thinking, in distinct domains of human knowledge, for centuries. The domain of law is no exception to that: the passing of time has, not surprisingly, raised issues which continue to defy legal thinking as to the proper interpretation and application of law. In my understanding, time is to be made to operate to secure the realization of justice, and surely not to suggest its impossibility (for alleged lack of material or financial resources), or to impose legal inaction or even oblivion (e.g., prescription, in other contexts). The universal juridical conscience has evolved so as no longer to admit obstacles, in space or in time, to the investigation and sanction of grave violations of human rights and of international humanitarian law.

75. The exercise of universal jurisdiction purports to overcome past obstacles in space. One is, furthermore, to bridge the gap between the time of human beings and the time of human justice, so as to overcome obstacles in time. It is the gravity of human rights violations, of the crimes perpetrated, that admits no prolonged extension in time of the impunity of the perpetrators, so as to honour the memory of the fatal victims and to bring relief to the surviving ones and their relatives. In my understanding, even more significant than retribution is the judicial recognition of human suffering[71], and only the realization of justice can *alleviate* the suffering of the victims caused by the irreparable damage of torture.

76. To that end, time is necessarily short, such as human life, and the indefinite prolongation of time in the realization of justice is an aggravating circumstance. It goes without saying that oblivion cannot be imposed, as, in the domain of Law, it would amount to an obstruction of justice. The investigation and sanction of grave violations of human rights brings the past into the present, to render the latter bearable, once the responsibility for the atrocities occurred in the past are properly determined. Surviving victims and their relatives can thus earn their

[71] The right to be herein preserved, the right to justice, is inextricably linked to [non-pecuniary] reparation.

future. Impunity is unacceptable in our times; imposed oblivion is overwhelmed by memory, rendering the future possible.

77. The *décalage* between the time of human beings and the time of human justice is to be reduced. Without the realization of justice, without the right to the Law *(le droit au Droit)*, there is no legal system at all, neither at domestic, nor at international, level. In the meantime, with the persistence of impunity in the present case concerning *Questions relating to the Obligation to Prosecute or Extradite*, the *passing* of time will continue hurting people, much more than it normally does, in particular those victimized by the absence of human justice. The time of this latter is not the time of human beings.

2. The Required Indication of Provisional Measures in the Present Case

78. In the light of the aforementioned, the decision taken by the Court's majority, not to indicate provisional measures in the present case, can be severely questioned. The Court based its *prima facie* jurisdiction, in the present Order, on the United Nations Convention against Torture (Article 30); in my view, the prerequisites were present for the indication of provisional measures, and, even if the Court were not fully satisfied with the arguments of the parties, it is not limited or constrained by such arguments.

79. In its own case law, the Court, invoking the principle *jura novit curia*, has clarified that it is not bound to confine its consideration of the case at issue to the pleas or the materials formally submitted to it by the parties. It has so warned, e.g., in its Judgments in the cases of *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland),* (*Merits, Judgment, I.C.J. Reports 1974*, p. 181, paras. 17-18), and of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America),* (*Merits, Judgment, I.C.J. Reports 1986*, pp. 24-25, paras. 29-30). In sum, the Court is the *master of its own jurisdiction*, and it is empowered to indicate any provisional measures it deems necessary in a case, irrespective of the arguments of the parties, or even in the absence of such arguments.

80. That the Court is not restricted by the arguments of the parties, is further confirmed by Article 75 (1) and (2) of the Rules of Court[72], which expressly entitles it to indicate, *motu proprio*, provisional measures that it

[72] Art. 75 (1) of the Rules of Court sets forth that "the Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties". And Art. 75 (2) determines that "when a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request".

regards as necessary, even if they are wholly or in part distinct from those that are requested. A decision of the ICJ indicating provisional measures in the present case, as I herein sustain, would have set up a remarkable precedent in the long search for justice in the theory and practice of international law. After all, this is the first case lodged with the ICJ on the basis of the 1984 United Nations Convention against Torture, which, on its turn, is "the first human rights treaty incorporating the principle of universal jurisdiction as an international obligation of all States Parties without any precondition other than the presence of the alleged torturer" [73].

81. The Court has made use of its prerogatives under Article 75 on some previous occasions. Examples are provided by its orders of provisional measures, invoking Article 75 (2), in the cases concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)*, (*Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 22, para. 46), the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, (*Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I)*, p. 24, para. 48), the *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, (*Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000*, p. 128, para. 43), and, more lately, the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, (*Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 397, para. 145).

82. That the Court has found it unnecessary to do so in the present case, pertaining to the right to the realization of justice, is a cause of concern to me. After all, there was nothing precluding it from doing so; on the contrary, the prerequisites of urgency and the probability of irreparable harm were and remain in my view present in this case (cf. *supra*), requiring from the Court the indication of provisional measures. Moreover, there subsist, at this stage — and without prejudice to the merits of the case — uncertainties which surround the matter at issue before the Court, despite the amendment in February 2007 of the Senegalese Penal Code and Code of Criminal Procedure.

83. Examples are provided by the prolonged delays apparently due to the alleged high costs of holding the trial of Mr. H. Habré, added to pre-trial measures still to be taken, and the lack of definition of the time still to be consumed before that trial takes place (if it does at all). Despite all that, as the Court's majority did not find it necessary to

[73] M. Nowak, E. McArthur *et al.*, *The United Nations Convention against Torture — A Commentary*, Oxford, Oxford University Press, 2008, p. 316.

indicate provisional measures, the Court can now only hope for the best.

84. This is all the more serious in the light of the nature of the aforementioned *obligations* of the States parties to the United Nations Convention against Torture. Eight years ago, the United Nations Committee against Torture, in the exercise of its functions, decided to issue an interim or provisional measure in the case of *S. Guengueng et alii*, concerning Senegal, to secure the full application of the pertinent provisions of the United Nations Convention against Torture. Yet, despite all that, this Court found that the circumstances, as they now presented themselves to the Court, were not such as to require provisional measures of protection.

85. Much to my regret, as a result of this decision, a precious occasion has been lost by the Court to contribute to the development of contemporary international law in a domain of crucial importance such as that concerning the principle of universal jurisdiction, on the basis of a highly relevant United Nations Convention enshrining a series of obligations ensuing from the domain of *jus cogens*, the 1984 Convention against Torture.

86. Had the Court taken a different view, it could have, and should have, indicated provisional measures to the effect of requiring from the contending parties, *ex abundante cautela*, periodical reports to it, on the basis of Article 78 of the Rules of Court[74], on any measures taken and advances eventually achieved by them towards the realization of justice in the present case (i.e., the holding of the trial of Mr. H. Habré in Senegal). This would also have enhanced the mandate issued by the African Union itself in 2006 *(supra)*. Provisional measures of this kind, with the requirement of reporting, have precedents in the case law of the ICJ itself.

87. May it be recalled that this Court has issued orders of provisional measures, containing such requirement of reporting, and remaining seised of the matter till the delivery of its final judgment, in the cases of *Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland),* (*Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, resolutory point 1 *(f)*), of the *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran),* (*Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, resolutory point 2), of the *Frontier Dispute (Burkina Faso/Republic of Mali),* (*Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986*, resolutory point 2), of *Vienna Convention on Consular Relations (Paraguay* v. *United States*

[74] Art. 78 of the Rules of Court provides that "the Court may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated".

of America), (*Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, resolutory point I), of *LaGrand (Germany* v. *United States of America)*, (*Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, resolutory point I *(a)*), of *Avena and Other Mexican Nationals (Mexico* v. *United States of America)*, (*Provisional Measures, Order of 5 February 2003, I.C.J. Reports 2003*, resolutory point I *(b)*), of the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, (*Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, resolutory point D)[75].

88. This Court should in my view have remained seised of the matter at stake. It should not have relinquished its jurisdiction in the matter of provisional measures, on the ground of its reliance on what may have appeared the professed intentions of the parties, placing itself in a position more akin to that of a conciliator, if not an exspectator. Had the Court done so, it would have assumed the role of the guarantor of the compliance, in the *cas d'espèce*, of the conventional obligations by the States parties to the United Nations Convention against Torture in pursuance of the principle *aut dedere aut judicare*.

89. We are here before the invocation of the principle of universal jurisdiction, grounded on a United Nations Convention which reckons the absolute prohibition of torture, bringing us to the domain of *jus cogens*, a conceptual construction proper of the new *jus gentium* of our times. In my understanding, the obligations set forth by the United Nations Convention against Torture are not simply obligations of conduct or behaviour, but rather indeed obligations of *result*.

90. In so far as provisional measures are concerned, had the ICJ decided to remain seised of the matter at issue, by requesting further periodical information and reports from the contending Parties as to the measures taken to have justice at last done in the concrete case, it would thereby have given its own contribution not only to the settlement of the issue raised before it at this stage, but also, in the fruitful exercise of its functions in the domain of provisional measures of protection, to the realization of justice.

91. This would have appeared to me the right course to have taken, in a decision which could have set up a relevant, if not historical, precedent, in the domain of provisional measures. However, by having proceeded otherwise, and by not indicating these measures, it has now become somewhat difficult to avoid the impression that universal jurisdiction

[75] Cf. also the Court's Order in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* (*Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, pp. 7-8, para. 3).

keeps on having a long past, a refrained present, and an uncertain future.

X. The Lesson of the Present Case at this Stage: Provisional Measures for the Realization of Justice

92. By means of its provisional measures, the ICJ can indeed contribute not only to the preservation of the right to the realization of justice in a given case, but also to the development of the law of nations itself, the new *jus gentium* of our times. All will depend on how provisional measures are approached. My own conception is that, by preserving rights whose subjects are not only States but also human beings, those measures can also contribute to the development of the law of nations *(droit des gens)*.

93. There is nothing new under the sun; this outlook of the matter, somewhat uncultivated in our days[76], was present in a trend of international legal thinking of the matter which cannot now be forgotten, and which ought to be retaken and further developed in our days. As soon as 1931, for example, Paul Guggenheim pondered with insight that provisional measures are bound to contribute to the development of international law; after all, they do contribute to "rendre justice", to the "réalisation future d'une situation juridique déterminée"[77].

94. One decade earlier, throughout the work of the Advisory Committee of Jurists of drafting (June-July 1920) the Statute of the Hague Court (PCIJ and ICJ), Raul Fernandes sought to enhance provisional measures by proposing enforcement measures (penalties) by the PCIJ[78]. Shortly afterwards, he asserted his commitment to the realization of justice at an international level bearing particularly in mind the principle of the juridical equality of States[79]. Provisional measures, with their preventive dimension, can indeed contribute to the development of international law.

95. For the purposes of provisional measures in the present case, the right to be preserved is ultimately the *right to the realization of justice*, the right to see to it that justice is done (a right of States — before this

[76] It is to be kept in mind, whenever anything is claimed to be novel, that, from time immemorial, it has been warned that whatever appears novel, most likely it is not, it has been reflected upon or expressed before; *Ecclesiastes*, cf. Chap. I-10.

[77] P. Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, *op. cit. supra* note 4, pp. 14-15 and 62.

[78] Cf. Cour Permanente de Justice Internationale, *Procès-verbaux des séances du comité consultatif de juristes (16 juin-24 juillet 1920) avec annexes*, The Hague, Van Langenhuysen Frs., 1920, p. 588 (intervention by R. Fernandes, 20 July 1920).

[79] R. Fernandes, *Le principe de l'égalité juridique des Etats dans l'activité internationale de l'après-guerre*, Geneva, Impr. A. Kundig, 1921, pp. 18-22 and 33.

Court — emerged from the violation of fundamental rights of the human beings concerned, originally victimized by torture). There is in the *cas d'espèce*, in my perception, a risk of (ongoing) irreparable damage, in the form of insufficient action, of further delays[80]. As an old maxim warns, justice delayed is justice denied.

96. It can, in my understanding, be forcefully argued that the denial of access to justice is peremptorily prohibited: without such right, there is simply no legal system at all, at international and national levels. Furthermore, grave violations of human rights, and of international humanitarian law, such as torture, are detrimental not only to the direct and indirect victims, as they directly affect their *social milieu* as a whole. In this framework, the right to the realization of justice appears ineluctably of the utmost relevance. The perpetuation of impunity is corrosive of the whole *social milieu*. There is urgency, in the sense of imperativeness, in the preservation of the right to the realization of justice, by means of provisional measures of protection.

XI. Concluding Observations

97. I come thus to my concluding observations of this dissenting opinion. The fact that the binding character of provisional measures of protection is nowadays beyond question, on the basis of the *res interpretata* of the ICJ itself (cf. paras. 9-11, *supra*), does not mean that we have reached a culminating point in the evolution of the ICJ case law on this matter. Quite on the contrary, I can hardly escape the impression that we are living the infancy of this jurisprudential development. The Court has not yet pronounced on the autonomy of an order of indication of provisional measures; nor has it yet pronounced on the legal consequences of non-compliance with them; nor has it yet pronounced on issues of State responsibility in this very specific context, — apart from the decision on the merits on the corresponding cases. There is thus still a long way to move forward.

98. It has already been argued[81] that, in the present case, the violation of the peremptory prohibition of torture has taken us to the invocation, in the inter-State *contentieux*, of the right to the realization of justice, on the basis of the relevant provisions of the 1984 United Nations Convention against Torture (Articles 7 (1) and 5 (2)). The nature of the right to be preserved, a right *erga omnes partes*, does have a bearing on a decision

[80] May it be recalled that, at domestic law level, in legal procedure, the *periculum in mora*, associated with prolonged and undue delays in the realization of justice, has been a key concept for the determination of precautionary or interim measures.

[81] Para. 40, and cf. paras. 17 and 21-25, *supra*.

to indicate provisional measures. Provisional measures do have a place in the *cas d'espèce*, as the preconditions for them are herein met. Urgency (imperativeness) requires such measures, so as to avoid the probability of further irreparable damage as a result of the prolongation of undue delays in the realization of justice.

99. In the present Order (paras. 47-48) the ICJ found that there appeared to be a *prima facie* continuing dispute between the Parties as to the interpretation and application of the relevant provisions of the United Nations Convention against Torture. In my view, States parties to this Convention have undertaken the obligation to exercise universal jurisdiction (Article 7), in respect of torture, and thus to contribute to the gradual construction of a truly universal international law. There is thus need to go beyond the traditional types of territorial jurisdiction, active and passive personality (nationality) jurisdictions, and protective jurisdiction, in cases of grave violations of human rights and international humanitarian law. One would thus be giving expression to superior legal values shared and upheld by the international community as a whole, as well as responding in particular to its legitimate concern to overcome impunity at national level.

100. This Court has, so far, succinctly and rightly held, in a distinct context, that the prohibition of genocide belongs to the domain of *jus cogens*[82]. We are here in the domain of material or substantive law, as distinguished from, though related to, the conception of obligations *erga omnes*, proper of procedural law (cf. paras. 68-73, *supra*). Although the Court has dwelt mainly upon these latter[83] — still having to extract the consequences of their existence and breach — it has a long way to go in relation to the former — the imperatives of *jus cogens* — if it decides, as

[82] Case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 31-32 and 35, paras. 64 and 78; and case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 110-111, para. 161.

[83] Since its celebrated *obiter dictum* in the case of the *Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, paras. 33-34; and cf., subsequently, case concerning *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, pp. 615-616, para. 31; case concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 29 and 51-52, paras. 54 and 125; case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 104, 110-111 and 120, paras. 147, 161 and 185. And cf. also the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 199, paras. 155-157.

I hope, to embark on the acknowledgment of the gradual expansion of its material content.

101. The present case, even at this stage, appears to me as one of great relevance, as the right to be preserved — the *right to the realization of justice* — is ineluctably linked to the rule of law at both national and international levels. Significantly, due to the awakening of the universal juridical conscience, the matter is nowadays being considered at both levels, and attracting increasing attention, in the agenda of the General Assembly of the United Nations, over the last three years. The United Nations General Assembly has in fact reaffirmed "the need for universal adherence to and implementation of the rule of law at both the national and international levels", as well as its "commitment to an international order based on the rule of law and international law"[84].

102. For its part, earlier on, the old United Nations Commission on Human Rights, in its resolution 2000/43, stressed that "all allegations of torture or other cruel, inhuman or degrading treatment or punishment be promptly and impartially examined by the competent national authority", and that "those who encourage, order, tolerate or perpetrate acts of torture must be held responsible and severely punished" (para. 6). The Commission next called for rehabilitation of the victims (para. 6), and further urged that "States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law" (para. 2).

103. The central dilemma of the matter at issue, facing nowadays not only States, but the legal profession as well, is quite clear to me: either they keep on relying on the traditional types of criminal jurisdiction (cf. para. 99, *supra*), irrespective of the gravity of the offences committed, or else they admit that there are crimes that do indeed shock the conscience of humankind and that render thereby ineluctable the recourse to universal jurisdiction. Either they continue to reason as from the outlook of an international legal order atomized in sovereign units, or else they decide to move closer to the ideal of the *civitas maxima gentium*.

104. According to this latter, above consent (the will), is the right use of reason; it is the *recta ratio* which guides the will of States, and is conducive to the *necessary*, rather than voluntary, law of nations[85], holding all of them together, bound in conscience, in the *civitas maxima*, the legal community of the whole of humankind. This ideal, pursued notably by

[84] General Assembly resolution 63/128 (11 December 2008), on *"The Rule of Law at the National and International Levels"*, fourth preambular paragraph.

[85] Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764 — Series *The Classics of International Law*, ed. J. Brown Scott), *Prolegomena*, p. 2, para. 4.

Christian Wolff in the eighteenth century, has its historical roots in the Stoics in ancient Greece, has survived to date and has been recalled from time to time[86]. It repeals all that shocks the universal juridical conscience. In the conceptual construction of the *civitas maxima gentium*, nations need each other's assistance to repress grave crimes (wherever they may occur) and to promote the common good *(commune bonum promovere)*[87], pursuant to the dictates of the right reason[88].

105. If States and the legal profession opt for this outlook, as I sincerely hope, the principle of universal jurisdiction has to be pursued and applied *universally*, in all corners of the world, without selectivity[89]. In the present case, Senegal has now a rare opportunity, by bringing promptly Mr. H. Habré to trial, to give an example to the world, in compliance with the mandate issued by the African Union in 2006, which is well in keeping with the legal nature, content and effects of the right to be preserved in the *cas d'espèce*, and the corresponding obligations *erga omnes partes* of the United Nations Convention against Torture (Articles 7 (1) and 5 (20)). I dare to nourish the hope that States and the legal profession embark on the right path, for the sake of the development of contemporary international law, as a true law of nations *(droit des gens)*, the new *jus gentium* of our times, that emanates ultimately from human conscience.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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[86] Cf., e.g., over half a century ago, W. Schiffer, *The Legal Community of Mankind*, NY, Columbia University Press, 1954, pp. 63-78.

[87] C. Wolff, *op. cit. supra* note 85, p. 5, paras. 12-13.

[88] *Ibid*., p. 7, para. 21.

[89] As Christian Wolff furthermore upheld in 1764, since all persons are by nature equal, so all nations too are by nature equal one to the other *(gentes etiam omnes natura inter se aequales sunt)*; cf. *ibid*., p. 6, para. 16.