DISSENTING OPINION OF JUDGE CANÇADO TRINDADE

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I. *PROLEGOMENA*

1. I regret not to be able to concur with the decision taken by the majority of the Court (first resolutory point) not to indicate *new* provisional measures in the *cas d'espèce*. My perception is that the Court majority's reasoning and decision, *data venia*, suffer from an ineluctable incongruence: having admitted that there is a change in the situation (paras. 25, 31 and 36), it extracts no consequence therefrom, as in its view "the conditions have not been fulfilled" for it to modify the measures it indicated in its previous Order of 8 March 2011 (para. 36). In limiting itself to simply reaffirming its previous provisional measures, it expresses its concerns at the new situation created in the disputed area (para. 37), with the presence therein no longer of personnel (whether civilian, police or security), but rather of "organized groups" of individuals.

2. My position is, *a contrario sensu*, that the changing circumstances surrounding the present cases (joined), opposing Costa Rica to Nicaragua and vice versa, concerning, respectively, *Certain Activities Carried Out by Nicaragua in the Border Area*, and the *Construction of a Road in Costa Rica along the San Juan River*, require from the International Court of Justice (ICJ), in the light of the relevant provisions of its *interna corporis*[1], the exercise of its powers to indicate *new* provisional measures in order to face the *new* situation, which is one of urgency and of probability of irreparable harm, in the form of bodily injury or death of the persons staying in the disputed area.

3. 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 the present dissenting opinion, the foundations of my position on the matter. I thus take the care to examine herein its aspects, as to the facts and as to the law. I shall start by reviewing the concomitant new requests of additional provisional measures of protection on the part of Costa Rica as well as Nicaragua, and the position taken by them, in their respective requests, as to the purported expansion of provisional measures of protection. After reviewing the technical missions *in loco* pursuant to the 1971 Ramsar Convention, I shall consider the requisites of urgency, and risk or probability of harm (in the form of bodily injury or death, of the persons staying in the disputed area), before proceeding to a general assessment of the requests of Costa Rica and of Nicaragua.

4. I shall then turn my attention to the aspects of the matter as to the law, as I perceive them, namely: *(a)* the effects of provisional measures of protection beyond the strict territorialist outlook; *(b)* the beneficiaries of provisional measures of protection, beyond the traditional inter-State dimension; and *(c)* the effects of provisional measures of protection

[1] Article 76 (1) of the Rules of Court, in addition to Article 41 of its Statute.

beyond the traditional inter-State dimension. The way will then be paved for my considerations on the proper exercise of the international judicial function (in the present domain of provisional measures) in the form of a rebuttal of so-called "judicial self-restraint", or *l'art de ne rien faire*. Last but not least, I shall present my concluding reflections towards an *autonomous legal regime* of provisional measures of protection.

II. Provisional Measures of Protection: The Concomitant New Requests by Costa Rica and Nicaragua

5. May it be recalled, to start with, that, on 18 November 2010, the International Court of Justice (ICJ) was seised of a request by Costa Rica for the indication of provisional measures in the case, opposing it to Nicaragua, concerning *Certain Activities Carried Out by Nicaragua in the Border Area*. After the holding of public hearings, the ICJ issued its Order on provisional measures of protection, of 8 March 2011, whereby it determined that

> "(1) Each Party shall refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security;
>
> (2) Notwithstanding point (1) above, Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect;
>
> (3) Each Party shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve;
>
> (4) Each Party shall inform the Court as to its compliance with the above provisional measures."[2]

Shortly afterwards, on 21 December 2011, Nicaragua filed a case against Costa Rica with the ICJ, concerning the *Construction of a Road in Costa Rica along the San Juan River*. Subsequently, by its Order of 17 April 2013, the ICJ decided to join the proceedings in the two cases.

6. One month later, on 23 May 2013, Costa Rica filed a request[3] for the modification of the aforementioned Order of provisional measures of 8 March 2011. Nicaragua was invited to present written observations

[2] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, pp. 27-28.

[3] Request by Costa Rica for the Modification of the Court's Order Indicating Provisional Measures, doc. of 23 May 2013 [hereinafter "request by Costa Rica"].

concerning Costa Rica's request[4]. On the stipulated date (14 June 2013), Nicaragua submitted its written observations on Costa Rica's request, and presented its own request for the modification of the same Order of 8 March 2011[5]. Costa Rica, for its part, submitted (on 20 June 2013) its own written observations on Nicaragua's request, within the stipulated time-limit by the Court[6].

7. The Court thus had before it two requests (Costa Rica's and Nicaragua's) and the pieces it needed to proceed to its deliberation on the matter. It should not pass unnoticed that, since the Court issued its Order of provisional measures of 8 March 2011, there have been 16 communications submitted by the Parties to the Court in relation to compliance with the Order[7]. This discloses the importance ascribed by both contending Parties, Costa Rica and Nicaragua, to the provisional measures of protection in the two respective cases, the proceedings of which having been joined by the ICJ[8].

III. Technical Missions *in Loco* Pursuant to the Ramsar Convention

8. The Convention on Wetlands of International Importance Especially as Waterfowl Habitat (known as the Ramsar Convention, adopted in Ramsar, Iran, in 1971, and entered into force on 21 December 1975)[9] states in its preamble that "the conservation of wetlands and their flora and fauna can be ensured by combining far-sighted national policies with co-ordinated international action". Both Costa Rica and Nicaragua are parties to it[10]. In its Order of 8 March 2011[11], the Court pointed out that, pursuant to Article 2 of the Ramsar Convention, Costa Rica has designated the "Humedal Caribe Noreste" wetland "for inclusion in [the] List of Wetlands of International Importance (. . .) maintained by the [continuing] bureau" established by the Convention, while Nicaragua has pro-

[4] On 24 May 2013.

[5] Written observations of Nicaragua and Request by Nicaragua for the Modification of the Order in Light of the Joinder of the Proceedings in the Two Cases, doc. of 14 June 2013 [hereinafter "written observations of Nicaragua"].

[6] Written observations of Costa Rica on Nicaragua's Request for the Modification of the Court's Order Indicating Provisional Measures in the Costa Rica *v.* Nicaragua case, doc. of 20 June 2013 [hereinafter "written observations of Costa Rica"].

[7] Parties' communications to the Court in 2011, 2012 and 2013.

[8] Pursuant to the Court's two Orders of 17 April 2013.

[9] Cf. *United Nations Treaty Series (UNTS)*, Vol. 996, No. I-14583, p. 245. The text of the Ramsar Convention was amended by the Protocol of 3 December 1982 and the amendments of 28 May 1987.

[10] Costa Rica has been a party to it since 27 April 1992, and Nicaragua since 30 November 1997. The Convention counts today (early July 2013), on 168 States Parties.

[11] Cf. *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 6.

ceeded likewise in respect of the "Refugio de Vida Silvestre Río San Juan" wetland, of which Harbor Head Lagoon is part (para. 79).

9. Furthermore, the Court, having acknowledged that the disputed area is situated in the "Humedal Caribe Noreste" wetland, in respect of which Costa Rica bears obligations under the Ramsar Convention, further considered that,

> "pending delivery of the Judgment on the merits, Costa Rica must be in a position to avoid irreparable prejudice being caused to the part of that wetland where that territory is situated ; (. . .) for that purpose Costa Rica must be able to dispatch civilian personnel charged with the protection of the environment to the said territory, including the *caño*, but only in so far as it is necessary to ensure that no such prejudice be caused ; and (. . .) Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect" (para. 80).

10. In this line of reasoning, the Court ordered, in the resolutory point (2) of the *dispositif* of its aforementioned Order, that :

> "Notwithstanding point (1) above, Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated ; Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect."

Thus, it stems from the Court's Order of 8 March 2011, that, pursuant to the Ramsar Convention (cf. Article 3 (2)[12]), Costa Rica has a duty thereunder to monitor the disputed area which forms part of a protected wetland registered by Costa Rica under the Ramsar Convention.

[12] Article 3 (2) of the Ramsar Convention stipulates that :

> "Each Contracting Party shall arrange to be informed at the earliest possible time if the ecological character of any wetland in its territory and included in the List has changed, is changing or is likely to change as the result of technological developments, pollution or other human interference. Information on such changes shall be passed without delay to the organization or government responsible for the continuing bureau duties specified in Article 8."

11. According to those communications submitted to the ICJ, there have been three technical visits, conducted by Costa Rica in the disputed area[13], in accordance with the Order (resolutory point (2), *supra*). The *first visit in loco* took place in April 2011[14], in order to determine the situation of the wetland and to take "those actions deemed necessary with the aim of avoiding an irreparable damage to the wetlands indicated by the Court in its providence"[15]. It is reported that the mission acknowledged "the valuable technical work accomplished at the site during the day of 5 April, which allowed them to gather the technical elements necessary in order to determine the actual condition of the wetland". It is also stated that "because of the lack of security measures to guarantee the personal safety of the experts as a result of actions outside the control of the Government of Costa Rica, the decision was taken not to return to the ground area and only use the over flight option to compliment the information"[16].

12. This joint Ramsar-Costa Rica first visit included members of the Technical Advisory Mission of the Secretariat of the Ramsar Convention and Costa Rican civilian technicians in charge of the protection of the environment[17]. Costa Rica further alleges that, during this visit, Costa Rican personnel and members of the Ramsar Mission were "aggressively harassed by Nicaraguan protestors and journalists". The mission acknowledged "the valuable technical work" accomplished on 5 April 2011, which enabled them to gather the technical elements necessary "in order to determine the actual condition of the wetland". Yet, "because of the lack of security measures to guarantee the personal safety of the experts as a result of actions outside the control of the Government of Costa Rica", Costa Rica adds, "the decision was taken not to return to the ground area"[18].

13. The *second visit in loco* took place in January 2012. Costa Rica informed the Court that its purpose was to "continue the assessment of the conditions of that wetland in order to avoid irreparable damage"[19]. Costa Rica claims that the visit formed "part of the action plan proposed to the Secretariat of the Ramsar Convention, and agreed to by the Secretariat"[20].

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[13] Nicaragua's communication to the Court of 7 April 2011 ; Costa Rica's communication to the Court of 11 April 2011 ; Costa Rica's communication to the Court of 13 April 2011 ; Costa Rica's communication to the Court of 30 January 2012 ; Costa Rica's communication to the Court of 1 March 2013.

[14] Nicaragua's communication to the Court of 7 April 2011 ; Costa Rica's communication to the Court of 11 April 2011, and Costa Rica's communication to the Court of 13 April 2011.

[15] Nicaragua's communication to the Court of 7 April 2011.

[16] Costa Rica's communication to the Court of 13 April 2011 ; there was the correspondence "Minutes, Co-ordination Meeting, Advisory Technical Mission of the Secretariat of the Ramsar Convention and Representatives of the Ministry for the Environment, Energy and Telecommunications".

[17] Nicaragua's communication to the Court of 7 April 2011.

[18] Costa Rica's communication to the Court of 13 April 2011.

[19] Costa Rica's communication to the Court of 30 January 2012.

[20] *Ibid.*

14. The *third visit* occurred in March 2013, Costa Rica having informed the Court that its civilian personnel charged with the protection of the environment were to conduct a visit on site. It further communicated to the Court two correspondences, whereby Costa Rica informed the Ramsar Convention Secretariat and Nicaragua of this site visit[21]. And it also reported that this third technical site visit was "carried out in accordance with the Working Plan" contained in the report presented by Costa Rica to the Ramsar Secretariat on 28 October 2011, which was approved by the Ramsar Secretariat in a note dated 7 November 2011. The stated purpose of the visit was to "avoid irreparable prejudice to that part of the northeast Caribbean Wetland"[22].

IV. The Position of the Parties as to the Purported Expansion of Provisional Measures: The Request of Costa Rica

15. In its request of 23 May 2013 to "modify" the Order of provisional measures of 8 March 2011, Costa Rica calls for three new measures to be added to it, namely, to order:

> "(1) the immediate and unconditional withdrawal of all Nicaraguan persons from the Area indicated by the Court in its Order on provisional measures of 8 March 2011;
>
> (2) that both Parties take all necessary measures to prevent any person (other than the persons whose presence is authorized by paragraph 86 (2) of the Order) coming from their respective territory from accessing the area indicated by the Court in its Order on provisional measures of 8 March 2011; and
>
> (3) That each Party shall inform the Court as to its compliance with the above provisional measures within two weeks of the issue of the modified Order."[23]

16. It is, in fact, in my perception, a request for an *expansion* of provisional measures of protection. Costa Rica contends that its request is prompted by "Nicaragua's sending to the area indicated by the Court in its Order [. . .] and maintaining thereon large numbers of persons, and by the activities undertaken by these persons affecting that territory and its ecology" (para. 2). It adds that there is a change in the situation (para. 4), in the light of Article 76 (2) of the Rules of

[21] Costa Rica's communication to the Court of 1 March 2013.
[22] *Ibid.*
[23] Request by Costa Rica.

Court[24]. Costa Rica further claims that the presence of Nicaraguan nationals in the disputed area causes a risk of irremediable harm in the form of bodily injury or death (paras. 18-19). Costa Rica at last contends that there is urgency, since in its view there is a real risk that, without such modification of the Court's Order, action prejudicial to Costa Rica's rights will occur before the Court renders its decision on the merits (paras. 18-20).

17. Costa Rica purports to explain further its requested new provisional measures. It alleges that Nicaragua sponsors the continuous presence, in the disputed area, of a large number of Nicaraguan nationals, by its operation of an "academic" programme whereby they are sent thereto to carry out activities. In the annexes to its request, Costa Rica refers to press reports on the matter, and adds that it has kept the Court informed about these activities, has formally protested to Nicaragua against them, and has exhausted all efforts to resolve the dispute by diplomatic means, which have failed. Costa Rica claims that the activities at issue have consisted in: *(a)* deliberately interfering with a site visit; *(b)* carrying out works in an attempt to keep the artificial *caño* open; *(c)* engaging in uncontrolled planting of trees in the area; *(d)* raising of cattle in the area; and *(e)* erecting fences in the area to the north of, and alongside, the *caño* (paras. 4-9)[25]. This presence of Nicaraguan nationals in the disputed area, and their described activities thereon, are, in Costa Rica's view, in breach of the Court's Order, and create a new situation, requiring the "modification" of the Court's Order (paras. 10-14) — in the sense of the expansion of the provisional measures of protection.

18. In its written observations, Nicaragua, in turn, retorts that Costa Rica's request, in its view, is "groundless", as there has been no change in the situation that would call for a "modification" of the Court's Order in the way described by Costa Rica, and it has not breached the provisional measures indicated by the Court (paras. 1-3). Nicaragua adds that the presence of private individuals is not a new issue under the

[24] Article 76 of the Rules of Court reads as follows:

"1. At the request of a party the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification.

2. Any application by a party proposing such a revocation or modification shall specify the change in the situation considered to be relevant.

3. Before taking any decision under paragraph 1 of this Article the Court shall afford the parties an opportunity of presenting their observations on the subject."

[25] Costa Rica further recalls that Nicaragua maintains the position that the Court's Order does not prevent private citizens from accessing the area and carrying activities thereon; in its Counter-Memorial, Nicaragua recognizes the presence of its nationals in the area. Costa Rica controverts Nicaragua's views (Request by Costa Rica, paras. 10-14).

Court's Order (para. 13). And as to the presence of members of the Guardabarranco Environment Movement referred to by Costa Rica, Nicaragua claims that Costa Rica did not ask, in its request for the indication of provisional measures, for the withdrawal of private individuals, and adds that the members of the Guardabarranco Environment Movement are "private individuals", as conceded by Costa Rica; it alleges that they are neither part of the Nicaraguan Government, nor are they acting under Nicaragua's control (paras. 6-14).

19. In its written observations on Nicaragua's request, Costa Rica reiterates its perceived change in the situation, pointing out that Nicaragua does not deny, in its own written observations, that it is sponsoring, sending and maintaining large number of persons in the area (para. 7). In Costa Rica's view, the unlawful presence of Nicaraguan nationals in the area is not in dispute. Costa Rica then claims that this is a new situation that did not exist at the time of the oral hearings on provisional measures, as then only *military* personnel were in the area; the Court did not implicitly recognize in its Order of 8 March 2011 that private individuals could enter, remain on, and carry out unsupervised, unpoliced activities in the area. Costa Rica maintains that the presence of Nicaraguan nationals in the area is unlawful, and increases the risk of incidents likely to cause irremediable harm[26].

V. Urgency and Risk of Harm in the Form of Bodily Injury or Death

20. In its Order of provisional measures of protection of 8 March 2011 the ICJ, recalling the competing claims over the disputed area and Nicaragua's intention to carry out thereon, "if only occasionally", certain activities, noted, in paragraph 75, the ensuing risk of irremediable harm in the form of bodily injury or death. The Court stated that such situation created

> "an imminent risk of irreparable prejudice to Costa Rica's claimed title to sovereignty over the said territory and to the rights deriving therefrom; (. . .) this situation moreover gives rise to a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death" (para. 75).

Under these circumstances, the Court decided that provisional measures should be indicated[27].

[26] Written observations of Costa Rica, paras. 25-29.

[27] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, pp. 24-25, para. 76.

21. The ICJ thus took into account the risk of incidents likely to cause irremediable harm in the form of bodily injury or death, and then ordered the requested measures. From the arguments more recently submitted to the Court, it seems that similar concerns about a risk of incidents that could cause irremediable harm in the form of bodily injury or death call for additional provisional measures to be adopted by the Court. To this effect, Costa Rica claims that the presence of Nicaraguan nationals in the disputed territory poses the risk of such irremediable harm[28]. In its request, Costa Rica sustains that there is "a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death" (para. 18); in particular, it links the presence of Nicaraguan nationals in the disputed area to the risk of irremediable harm in the form of bodily injury or death, and it adds that there is "real urgency". There is, furthermore, in its view, "a serious threat to its internationally-protected wetlands and forests" *(ibid.)*.

22. In its written observations, Costa Rica also argues that there is urgency. Costa Rica links the urgency of the situation to the "real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death" in the disputed area (para. 29), and stresses this risk (paras. 25 and 28). Costa Rica asserts that, pursuant to the Court's Order, it has prevented its police force and residents from entering the area, while Nicaragua has refused to ensure that people from its territory do not enter the area, and continues to maintain therein a constant presence of "substantial numbers of Nicaraguan persons". Costa Rica then submits that "[t]here is a real risk that, without a modification of the Court's Order of 8 March 2011, action prejudicial to the rights of Costa Rica will occur before the Court has the opportunity to render its final decision on the questions for determination set out in the Application" (para. 19).

23. For its part, in its written observations Nicaragua retorts that, after three technical visits to the site, Costa Rica has in its view failed to demonstrate the existence of any "serious threat" to the disputed territory, or any "incidents liable to cause irremediable harm in the form of bodily injury or death" (para. 37). It adds that Costa Rica first made such assertions in its Memorial, but they had been rebutted by Nicaragua in its Counter-Memorial. Thus, Nicaragua denies any urgency in the situation, and adds that Costa Rica's new allegations could be more properly addressed in the merits phase. Nicaragua claims that, since the Order, it has acted with due diligence to ensure that the area remains free of Nicaraguan personnel; as to the presence in the area of members of the Guardabarranco Environment Movement referred to by Costa Rica,

[28] Request by Costa Rica, paras. 18-20; it further alleges that there have lately been incidents in the area, where Nicaraguan nationals have subjected Costa Rican environmental personnel to harassment and verbal abuse, posing a risk of incidents that might cause bodily injury or death.

Nicaragua argues that Costa Rica had not asked, in its earlier request for the indication of provisional measures, for the withdrawal of "private individuals" (paras. 6-14).

VI. The Position of the Parties as to the Purported Expansion of Provisional Measures: The Request of Nicaragua

24. On 14 June 2013, Nicaragua submitted its written observations on Costa Rica's request, and made its own request for modification of the Court's Order[29] on the basis of an alleged new factual situation, that is, the construction of a 160-km-long road along the San Juan River and the joinder of the proceedings. Nicaragua argues, in its written observations and request, that, despite its call on Costa Rica for halting the construction without an appropriate transboundary environmental impact assessment, Costa Rica announced that the work is about to be restarted. Nicaragua argues that the construction of the road has resulted in increased sedimentation and pollution of the river, adverse impact on water quality, aquatic life, navigation and other general uses of the river by the population (paras. 43-46).

25. Nicaragua further argues that the Court's Order of 8 March 2011 should be adjusted to take into account the "harmful environmental effect of the works in and along the San Juan River on the fragile fluvial ecosystem (including protected nature preserves in and along the river)", which cover the area in dispute located at the mouth of the river. Nicaragua also refers to the UNITAR/UNOSAT report observing that the area in dispute is being affected by the accumulation of fluvial sediments including those of bank erosion, attributable in part by sediments transmitted to the river by the road construction activities. Nicaragua maintains that the Order should be adjusted to take this into account. Both Parties should

[29] Nicaragua requests that the provisional measure ordered by the Court in resolutory point (2) be modified to read:

> "Notwithstanding point (1) above, both Parties may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; both Parties shall consult in regard to these actions and use their best endeavours to find common solutions with the other Party in this respect."

The third measure ordered by the Court should be modified to read as follows:

> "Each Party shall refrain from any action, which might aggravate or extend the dispute before the Court in either of the joined cases or make it more difficult to resolve, and will take those actions necessary for avoiding such aggravation or extension of the dispute before the Court."

be precluded from undertaking any activities that unilaterally increase the "accumulation of fluvial sediments" in the area (paras. 47-52).

26. As to the joinder of proceedings (cf. *supra*), Nicaragua claims that the Order should be made applicable to the two joined cases, in relation to all activities by either Party that might harm the environment in the area, in order not to aggravate the dispute. Nicaragua recalls a list of urgent measures to prevent further damages to the river which it described in its Memorial in the case concerning the *Construction of a Road in Costa Rica along the San Juan River*: reducing the rate and frequency of road fill failure, slumps and landslides; eliminating or significantly reducing the risk of future erosion and sediment delivery at all stream crossings along route 1856; immediately reducing road surface erosion and sediment delivery; controlling surface erosion and resultant sediment delivery from bare soil areas (paras. 47-52).

27. For its part, in its written observations on Nicaragua's request, Costa Rica argues that the request at issue must be rejected on a number of reasons (para. 6). First, the Court had explicitly held that "Costa Rica's claim to title over Isla Portillos was 'plausible'", whereas it had made "no such finding with respect to Nicaragua" (paras. 7-10). Secondly, the Court had explicitly held that Costa Rica "must be able to dispatch civilian personnel charged with the protection of the environment" to the area, whereas it made no such indication for Nicaragua (paras. 11-13). Thirdly, only Costa Rica, and not Nicaragua, has an obligation to monitor the area forming part of a protected wetland registered by Costa Rica under the Ramsar Convention (paras. 14-18). Fourthly, Costa Rica adds that the basis for the Court's Order was that neither Party should send persons to the area or maintain them there (paras. 19-21).

28. Fifthly, Costa Rica further claims that the sponsoring of activities calculated to change the *status quo* of the area is completely inconsistent with the provisional measures actually indicated by the Court and with the whole object and purpose of provisional measures in general (paras. 22-24). Sixthly, Nicaragua's proposed modification implies the possibility of concomitant exercise of public environmental activities by two different States in the same area, increasing the risk of serious incidents (paras. 25-29). Seventhly, Costa Rica argues that Nicaragua's proposed deletion of the Ramsar Secretariat from the provisional measure (second resolutory point of the Order) is an attempt to vitiate the role of that supervisory organ in supporting Costa Rica in the environmental recovery process of the disputed area in line with the Ramsar Convention, to which Nicaragua is also a party (paras. 30-31). Finally, Costa Rica

claims that the case concerning the *Construction of a Road in Costa Rica along the San Juan River*, as well as the joinder of proceedings of this case with those of the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, in its view are not valid reasons to modify the previous provisional measure and to authorize the presence of Nicaraguan personnel charged with the protection of the environment in the area (paras. 32-33)[30].

VII. General Assessment of the Requests of Costa Rica and of Nicaragua

1. Costa Rica's Request

29. In support of its request, Costa Rica recalls that, at the time of the public hearings preceding the previous Order of the ICJ on provisional measures, it claimed that Nicaraguan personnel should leave the disputed area, as it then appeared that only military personnel was present therein. At that time, it did not seem that there was a concern with the presence of "private individuals". Indeed, it appears that there is a change in the situation. In its written observations, Nicaragua does not seem to object to this assertion by Costa Rica, as it claims that Costa Rica did not request at that time, provisional measures in respect of the withdrawal of "private individuals" from the area (cf. para. 11).

30. The situation, as it appears today, from the evidence and the arguments submitted to the Court, is that "private individuals", holding Nicaraguan flags, are present in the disputed area. Again, in its written observations, Nicaragua does not seem to contest this fact (cf. paras. 11-14)[31]. It thus appears that there is indeed a change in the situation. The change seems to lie in the fact that, at the time of the issuance of the Court's Order of 8 March 2011, there seemed to be no Nicaraguan private citizens in the disputed area, but only the presence of Nicaraguan military personnel. The fact that the Court mentioned in the operative paragraphs of the Order the withdrawal of Nicaraguan personnel, reflects the situation as it stood at the time of the adoption of its Order of 8 March 2011.

[30] Costa Rica further argues that the proper avenue for Nicaragua to proceed with its request for the indication of provisional measures in the case it lodged with the Court is by way of a new Application for the indication of provisional measures, and not by asking for a modification of the Court's Order of 8 March 2011 (paras. 34-39). Costa Rica adds that the mitigation works for the protection of the environment that it is undertaking on the road (entirely on Costa Rican territory) are an issue for the merits phase of the proceedings in the case lodged by Nicaragua, not to be dealt with by way of a request for modification of the Court's Order of 8 March 2011 (paras. 40-41).

[31] And cf. also written observations of Costa Rica, para. 26.

31. It does not necessarily mean that the Court, by using the word "personnel", was thereby allowing the presence of any and all Nicaraguan persons other than civilian, security or police personnel. Accordingly, the presence of private individuals in the disputed area does not seem to be in line with the objective of safeguarding "Costa Rica's claimed title to sovereignty over the said territory and to the rights deriving therefrom" or avoiding "incidents liable to cause irremediable harm in the form of bodily injury or death", in the line of its reasoning in paragraph 75 of the Order of 8 March 2011.

32. Thus, on the basis of the foregoing, the presence of private individuals in the disputed area amounts to a change in the original situation, as presented to the Court in the public hearings on provisional measures which preceded its Order of 8 March 2011. The presence of "private individuals" does not seem to be in line with the reasoning of the Court, nor with the objectives of the provisional measures it indicated, in its Order of 8 March 2011.

33. It seems uncontested that there are currently Nicaraguan nationals present in the disputed area, conforming a new situation posing a risk of incidents in the disputed area. With the change in the situation now created (on the basis of the documents and arguments presented to the Court), there appears to be a risk of irremediable harm in the form of bodily injury or death (in the terms of paragraph 75 of its Order of 8 March 2011) that would warrant a "modification" — or, more precisely, an expansion — of the Order, so as to avoid that risk. It further appears that there is urgency, in view of a further risk of damage to the disputed area.

2. Nicaragua's Request

34. The questions that Nicaragua raises in its request for "modification" or expansion of the Court's previous Order of 8 March 2011, are centred on important points. In fact, the relevance of the construction of the road to the examination of the *whole* dispute between the Parties has been recognized by the Court in the previous Order on the joinder of proceedings, of 17 April 2013, wherein the Court stated that :

> "A decision to join the proceedings will allow the Court to address simultaneously the totality of the various interrelated and contested issues raised by the Parties, including any questions of fact or law that are common to the disputes presented. In the view of the Court, hearing and deciding the two cases together will have significant advantages. The Court does not expect any undue delay in rendering its Judgment in the two cases." (Para. 17.)

35. Be that as it may, the construction of the road, albeit an important question, does not appear to be a matter to be treated in an Order for the "modification" or expansion of a previous Order of provisional measures (of 8 March 2011). The Court does not seem to be satisfied that the construction of the road, as allegedly an entirely new issue, is endowed with urgency, so as to be treated in the form of a new provisional measure. May it be recalled that Nicaragua brought this issue before the Court on 21 December 2011, when it lodged the case concerning the *Construction of a Road in Costa Rica along the San Juan River* with the Court.

36. Moreover, the joinder of the proceedings of the cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area* and the *Construction of a Road in Costa Rica along the San Juan River*, does not appear by itself to support a "modification" of the Order of 8 March 2011. This Order was based on the situation as then argued by the Parties, concerning the disputed area. It rested upon an assessment by the ICJ that the situation, as presented to it, gave rise to "a real and present risk of incidents liable to cause irremediable harm in the form of bodily injury or death"; on this basis, the Court decided to indicate the provisional measures of protection appropriate to that situation.

37. Thus, the joinder of proceedings in the two aforementioned cases does not amount to a change of the situation, as presented to the Court at the time of the hearings that led to the adoption of its Order of 8 March 2011; nor does it seem to amount to a new fact that would warrant a "modification" of that Order. Keeping in mind the foregoing, and acknowledging that the questions raised by Nicaragua concerning the construction of the road along the San Juan River are relevant, the best course to take is to deal with them in the merits phase of the case concerning the *Construction of a Road in Costa Rica along the San Juan River*.

VIII. Effects of Provisional Measures of Protection beyond the Strict Territorialist Outlook

38. The factual context before the Court takes us beyond the traditional outlook of State territorial sovereignty. The concerns expressed before the Court encompass living conditions of people in their natural habitat, and the required environmental protection. International case law on the matter (of distinct international tribunals) has so far sought to clarify the *juridical nature* of provisional measures, stressing its essentially preventive character. In effect, the likelihood or probability of *irreparable damage*, and the *urgency* of a situation, become evident when, e.g., a growing number of people are about to be injured or murdered, as in cases concerning armed conflicts (cf. *infra*). Whenever ordered provisional

measures protect rights of individuals, they appear endowed with a character, more than precautionary, truly *tutelary*[32], besides preserving the parties' (States') rights at stake[33].

39. The circumstances of certain cases before the Court have led this latter, in its decisions on provisional measures, to shift its attention on to the *protection of people* in territory (e.g., the case of the *Frontier Dispute (Burkina Faso/Republic of Mali)*, 1986; the case of the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria)*, 1996; the case of *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, 2000; the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, 2008 — cf. *infra*). In those decisions, among others, the ICJ became attentive *also* to the fate of *persons*.

40. The ICJ thus looked (moved) beyond the strict territorialist outlook. The fact is that, in successive cases lodged with the Court, the beneficiaries of provisional measures of protection are identified well beyond the traditional inter-State dimension. The present cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, and the *Construction of a Road in Costa Rica along the San Juan River*, provide yet new illustrations to this effect, in so far as the persons currently found in the disputed area are concerned.

41. It should not pass unnoticed that provisional measures of protection have lately invited the Court to move its reasoning beyond the strict territorialist approach, as I observed in my separate opinion in the recent Order of the Court of provisional measures of protection in the case of the *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand)* (*Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, p. 537) [hereinafter *Request for Interpretation*] after

[32] 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; A. Saccucci, *Le Misure Provvisorie nella Protezione Internazionale dei Diritii Umani*, Torino, Giappichelli Ed., 2006, pp. 103-241 and 447-507.

[33] 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.

dwelling upon the relationship between time and law, I moved to considerations pertaining to space and law, relating (territorial) space to the human element of statehood: the population (paras. 43-44 and 62-63). International law in a way endeavours to be *anticipatory* in the regulation of social facts, so as to avoid disorder and chaos, as well as irreparable harm; we are here before the *raison d'être* of provisional measures of protection, i.e., to prevent and avoid irreparable harm in situations of gravity and urgency. Endowed with a notorious preventive character, they are anticipatory in nature, looking forward in time; they thus disclose the preventive dimension of the safeguard of rights (para. 64).

42. In my separate opinion, I sustained that there was epistemologically no impossibility or inadequacy for provisional measures, of the kind of the ones indicated in that Order, to extend protection — as they should — also to human life, as well as to cultural and spiritual world heritage. In fact, the reassuring effects of the provisional measures indicated in that recent Order of the ICJ were precisely that they extended protection not only to the territorial zone at issue, but also, by asserting the prohibition of the use or threat of force — pursuant to a fundamental principle of international law — to the life and personal integrity of human beings who live or happen to be in that zone or near it, as well as to the Temple of Preah Vihear itself, situated in the aforementioned zone, and all that the Temple represents (para. 66).

43. I then added, in my separate opinion in the case of the *Request for Interpretation* (provisional measures), that the Court should be prepared, in our days, to give proper weight to the *human factor* (para. 97), thus *bringing people and territory together*; and I pondered that:

> "Not everything can be subsumed under territorial sovereignty. The fundamental human right to life is not at all subsumed under State sovereignty. The human right not to be forcefully displaced or evacuated from one's home is not to be equated with territorial sovereignty. The Court needs to adjust its conceptual framework and its language to the new needs of protection, when it decides to indicate or order the provisional measures requested from it.
>
> If we add, to the aforementioned, the protection of cultural and spiritual world heritage (cf. *supra*), for the purposes of provisional measures, the resulting picture will appear even more complex, and the strict territorialist approach even more unsatisfactory. The *human factor* is the most prominent one here. It shows how multifaceted, in these circumstances, the protection provided by provisional measures can be. It goes well beyond State territorial sovereignty, *bringing territory, people and human values together.*" (*I.C.J. Reports 2011 (II)*, pp. 599-600, paras. 99-100.)

IX. The Beneficiaries of Provisional Measures of Protection, beyond the Traditional Inter-State Dimension

44. In the international litigation before the ICJ, 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[34]. In successive cases, 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 of protection, in distinct contexts. Thus, in its Order of 15 December 1979, in the *Hostages* case (*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. 7) the Court took into account the State's arguments to protect the life, freedom and personal security of its nationals (para. 37), and indicated provisional measures of protection of those rights (resolutory point I (A)), after referring to the *"imperatives obligations"* under the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations (para. 41), and pondering that

> "continuance of the situation the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus to a serious possibility of irreparable harm" (para. 42).

45. Half a decade later, in its Order of 10 May 1984, in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* (*I.C.J. Reports 1984*, p. 169), 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)* (*I.C.J. Reports 1986*, p. 3), 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 Cameroon and Nigeria (Cameroon* v. *Nigeria)* (*I.C.J. Reports 1996 (I)*, p. 58), the Court took note of the requesting State's warning that continuing armed clashes in the region

[34] In the triad *Breard/LaGrand/Avena* cases, for example, provisional measures were requested to prevent an irreparable damage to the right to life of the convicted persons (stay of execution), in the circumstances of their cases (cf. provisional measures in the Court's Orders of 9 April 1998, 3 March 1999, and 5 February 2003, respectively).

were notably causing "irremediable loss of life as well as human suffering and substantial material damage" (para. 19).

46. In deciding to order provisional measures, the ICJ pondered that the rights at stake were not only claimed State rights, but *also* rights of the *persons* concerned (paras. 38-39 and 42). In fact, in the circumstances of that case, the victimization of human beings resulting from armed conflicts of greater intensity, I would say that the purpose of the provisional measures was to extend protection *mainly to persons*. 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 (Democratic Republic of the Congo* v. *Uganda)* (*I.C.J. Reports 2000*, p. 111). 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).

47. 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", had 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).

48. 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 Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro))* (*I.C.J. Reports 1993*, p. 3) the Court, after finding "a grave risk" to human life, indicated provisional measures[35]. In the subsequent Order of 13 September 1993 in the same case (*ibid.*, p. 325), the Court again expressed its concern for the protection of human rights and the rights of peoples (para. 38). In its subsequent Order of 15 October 2008 in the case

[35] The Court, furthermore, 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" (*I.C.J. Reports 1993*, p. 23, para. 49).

concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)* (*I.C.J. Reports 2008*, p. 412), the ICJ once again disclosed its concern for the preservation of human life and personal integrity (paras. 122 and 142-143).

49. From the survey above it can be seen that, along the last three decades, the ICJ has gradually overcome the strictly inter-State outlook in the acknowledgement of the rights to be preserved by means of its Orders of provisional measures of protection. Nostalgics of the past, clinging to their own dogmatism, can hardly deny that, nowadays, States litigating before this Court, despite its inter-State contentious procedure, have conceded that they no longer have 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.

50. 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[36]. Before this Court, States keep on holding the monopoly of *jus standi*, as well as *locus standi in judicio*, in so far as 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. 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 human beings.

X. Effects of Provisional Measures of Protection beyond the Traditional Inter-State Dimension

51. In the case concerning *Questions relating to the Obligation to Prosecute or to Extradite (Belgium* v. *Senegal)* (*Order of 28 May 2009, I.C.J. Reports 2009*, p. 139), the ICJ decided not to indicate provisional measures. On the occasion, I warned, in my extensive dissenting opinion, that the basic right at issue pertained to the *realization of justice*, which assumed a central place in the case, one of a paramount importance, deserving of particular attention. The strictly inter-State dimension

[36] 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.

seemed to have been overcome in the acknowledgement of the rights to be preserved, in particular as the *search for justice* (the right to the realization of justice) was (and remains to date) at stake. In that case, opposing Belgium to Senegal, the crucial factor was — as I stressed in my dissenting opinion — the endurance by the victims of an ungrateful two-decade search for justice, in vain until now, for the reported atrocities of the Habré regime in Chad (para. 56).

52. I further pointed out in that dissenting opinion (para. 97) that, the fact that the binding character of provisional measures of protection is nowadays beyond question (moving from the pre-history into the history of the matter in the ICJ case law), on the basis of the *res interpretata* of the ICJ itself, 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 still living the infancy of this jurisprudential development. The review of the matter *(supra)* in the present separate opinion indicates that, although some advances have been achieved, there remains a long way to go.

53. The determination of urgency and the probability of irreparable damage are exercises which the ICJ is nowadays used to; yet, although the identification of the legal nature and the material content of the right(s) to be preserved seem not to raise great difficulties, the same cannot be said of the consideration of the *legal effects* and *consequences* of the right at issue, in particular when provisional measures are not indicated or ordered by the Court. We here move to the *effects* of provisional measures of protection, beyond the traditional inter-State dimension. In this respect, there seems to remain still a long way to go.

54. In the *cas d'espèce* before the Court, opposing two Latin American countries, the new provisional measures of protection envisaged in Costa Rica's request seek the protection of individuals against "harm in the form of bodily injury or death" *(supra)*, by making sure that they do not remain in the disputed area; the new provisional measures are requested not only in respect of agents of the public power (personnel), but also in respect of individuals *(simples particuliers)*, well beyond the traditional inter-State dimension.

55. In this connection, the expressions used, by both Nicaragua and Costa Rica, in their arguments presented to the Court, should not pass unnoticed. In its written observations[37], Nicaragua refers to "private individuals" (paras. 11 and 13-14), "private persons" (para. 12), "Nicaraguan nationals" (paras. 16 and 30), and "a group of young people" (para. 29). Costa Rica, for its part, in its request[38] refers to "Nicaraguan nationals" (paras. 7-8, 10-11 and 17-18), "Nicaraguans" (paras. 13-14), "Nicaraguan persons" (paras. 19-21), "individuals" (para. 9), and "citi-

[37] Written observations of Nicaragua.
[38] Request by Costa Rica.

zens" (para. 10); and, in its written observations[39], Costa Rica refers to "Nicaraguan nationals" (paras. 17-18, 25-27 and 29), "Nicaraguans" (para. 28), Nicaraguan "volunteers" (para. 21), "private individuals" (para. 27), and "persons" (paras. 7 and 28). Both Nicaragua and Costa Rica clearly have in mind human beings, of flesh and bones and soul.

56. States are bound to protect all persons under their respective jurisdictions. Provisional measures, with their preventive nature, appear as truly *tutelary*, rather than only precautionary, purporting to protect individuals also against harassment and threats, thus avoiding "harm in the form of bodily injury or death". After all, the beneficiaries of the compliance with, and due performance of, obligations under ordered provisional measures of protection, are not only States, but also human beings. A strictly inter-State outlook does not reflect this important point. The strictly inter-State dimension has long been surpassed, and seems insufficient, if not inadequate, to address obligations under provisional measures of protection.

XI. The Proper Exercise of the International Judicial Function: A Rebuttal of So-Called "Judicial Self-Restraint", or *L'Art de ne Rien Faire*

57. The present Order of the Court, on requests for provisional measures in the cases concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, and the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, suffers from a stark incongruence. The Court reviews the arguments of the Parties, and concludes, in respect of Costa Rica's request, that a change in the situation has occurred, as *"organized groups of persons"* — whose presence was not contemplated when it issued its previous decision to indicate provisional measures — are now "regularly staying in the disputed territory" (para. 25). Though the Court admits a change in the situation, it extracts no consequence therefrom.

58. The Court limits itself to say that, "despite the change that has occurred in the situation", in its view "the conditions have not been fulfilled for it to modify the measures" that it indicated in its previous Order of 8 March 2011 (para. 36). This conclusion simply begs the question. The Court's majority expressly admits that "the presence of organized groups of Nicaraguan nationals in the disputed area" is an aggravating circumstance (para. 37). Yet it does nothing. It further admits that this

[39] Written observations of Costa Rica.

new situation "is exacerbated" (!) by "the limited size of the area and the numbers of Nicaraguan nationals who are regularly present there" (para. 37). Yet it does nothing. Moreover, it admits that incidents may at any time occur. What kind of incidents? Those entailing "bodily injury or death" of the individuals staying there — as warned by the Court itself, already in its previous Order of 8 March 2011 (cf. para. 20, *supra*) — in addition to environmental damage. Yet it does nothing.

59. Contrariwise, it is crystal clear to me that the new situation created in the disputed area in the *cas d'espèce*, endowed with the prerequisites of urgency and probability of irreparable harm, undoubtedly calls for *new provisional measures, in order to prevent or avoid irreparable harm to the persons concerned and to the environment*. These new provisional measures, which the Court's majority failed to adopt, would make it clear that each Party should refrain from sending to, or maintaining in, the disputed area, including the *caño*, not only any personnel (whether civilian, police or security), but also any "organized groups" of individuals, or any "private individuals".

60. As a matter of fact, this is not the first time that the Court discloses its unjustified "judicial self-restraint" (so praised in traditionally conservative, if not reactionary, segments of the legal profession) in respect of provisional measures of protection, even when faced with the presence of the prerequisites of *urgency* and the *probability of irreparable harm*. Four years ago, it did so in its Order of 28 May 2009 in the case concerning the *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (*I.C.J. Reports 2009*, p. 139), wherein it refrained from ordering or indicating the requested provisional measures of protection.

61. On the occasion, I appended an extensive dissenting opinion (paras. 1-105) to that Order, seeking to preserve the integrity of the *corpus juris* of the 1984 UN Convention against Torture. Shortly after the Court's Order of 28 May 2009 wherein it found that the circumstances of the case were, in its view, not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures, there followed a succession of uncertainties *(infra)*, amidst the emptiness of the Court's self-imposed "restraint", and its apparent insensitiveness towards the underlying human values.

62. On that occasion, contrary to the Court's majority, I sought to demonstrate that there was manifest urgency in the situation affecting surviving victims of torture, or their close relatives, in respect of their right to the realization of justice under the UN Convention against Torture. As I have recently recapitulated[40], the Court preferred to rely com-

[40] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, separate opinion of Judge Cançado Trindade, pp. 518-527, paras. 82-103.

fortably on a unilateral act of promise (conceptualized in the traditional framework of inter-State relations) made by the respondent State in the course of the legal proceedings before itself. That pledge, in my view, did not remove the prerequisites of urgency and probability of irreparable harm for the indication of provisional measures[41], nor did it efface the longstanding sufferings of the Habré regime, in their saga of more than two decades in search of the realization of justice.

63. Yet the Court took a passive posture, reduced to that of a spectator of subsequent events. In effect, following the Court's Order of 28 May 2009, no initiative was taken in the respondent State towards the trial of Mr. Hissène Habré in Senegal ; the return to Mr. H. Habré to Chad was announced, as well as his imminent expulsion from Senegal, which was then cancelled in the last minute under public pressure[42]. The Court was lucky that Mr. H. Habré did not escape from his house surveillance in Dakar, and that he was not expelled from Senegal. Instead of assuming its own control over the situation, the self-restrained Court preferred to count on the imponderable, on *la fortuna*. The Court cannot keep on counting on the imponderable, as *la fortuna* may at any time turn against it. As Sophocles, in his perennial wisdom, warned, through the voices of the chorus of one of his tragedies : count no man happy till he passed the final threshold of his life secure from pain[43] (bodily or spiritual harm).

64. In the present Order that the Court has just adopted today, 16 July 2013, it has exercised self-restraint once again : this time, after finding that there has been a change in the situation, it has added that the circumstances presented to it, nevertheless, are not such as to require modification of its previous Order of 8 March 2011, which is simply reaffirmed. Moreover, it "does not see (. . .) the evidence of urgency" (para. 35). The Court's reasoning rests on a *petitio principii*, adducing no persuasive argument to support its decision not to order new provisional measures in face of the new situation. The Court limits itself to reasserting the previous provisional measures, addressed to a new and distinct situation, which the Court admits has now changed.

65. The Court has preferred to indulge in an unfortunate formalism, limiting itself to add that, despite the change in the situation, "the conditions have not been fulfilled for it to modify the measures that it indicated in its Order of 8 March 2011" (paras. 25, 31, 35-36). This is a *petitio principii*, whereby the Court unduly establishes a further test for the indication of provisional measures, rendering it more difficult — or simply avoiding — to order these latter, at variance with its *interna corporis*. The

[41] Cf. *I.C.J. Reports 2012 (II)*, p. 517, para. 79.
[42] Cf. *ibid.*, pp. 515-516, paras. 73-75.
[43] Sophocles, *Oedipus the King* (circa 429 BC), verse 1684.

Court does not elaborate on its dictum, nor does it provide any demonstration whatsoever to corroborate its assertion. Its ineluctable incongruence lies in the fact that, once it finds that there is a change in the situation, it fails to modify — or rather expand — its previous Order, so as to face the new situation, endowed with the requisite elements of risk (in the form of bodily harm or death, and harm to the environment) and urgency.

66. The ICJ has not adopted new provisional measures in the present Order simply because it did not want to adopt them, for reasons which escape my comprehension. The Court, from now on, will once again only hope for the best, but not without expressing its "concerns" with regard to the new situation (para. 37), given the ostensible risk and the probability of harm posed by it. Instead of remaining preoccupied, the ICJ should have ordered the new provisional measures required by the new situation created in the disputed area. Once again, the Court will nourish the hope that fate is on its side, oblivious of the extreme care with which someone so familiar with human suffering and tragedy like Cicero approached fate, in one of his fragmented reflections[44]. Even so, despite all his awareness, Cicero did not cross over the final threshold of his life secure from pain: at the end of his path, he suffered bodily injuries and a violent death . . .

67. The ICJ, on 8 March 2011, ordered provisional measures not simply because the persons present in the disputed area were personnel (whether civilian, police or security), but also because their presence therein presented a risk to the fragile ecosystem of the disputed area, and a risk of irreparable harm in the form of bodily injury or death (para. 75). The new situation, i.e., the presence of "organized groups" of *private individuals* in the disputed area, discloses in my view new circumstances, which clearly call for the indication of additional provisional measures. The change in the situation, endowed with urgency and the probability of irreparable harm, thus provides a basis for the modification of the Court's previous Order, in the light of the provisions of Article 41 of the Statute and Article 76 (1) of the Rules of Court.

68. Moreover, the Court's reasoning is far from coherent when, at the end of the present Order, it recognizes that the presence of "organized groups" of individuals in the disputed area is liable to create "the risk of incidents which might aggravate the present dispute", taking into account in particular "the limited size of the area" at issue and the "numbers of Nicaraguan nationals" staying there (para. 37). If the Court expressly recognizes such risk, and further expresses its "concerns" with this new situation *(ibid.)*, it is then clear that the provisional measures already ordered

[44] M. T. Cicero, *On Fate (De Fato)* (circa 44 BC), fragments 41-43.

should be modified, or expanded, so as to face this new situation. That the Court has not done so, in face of the likelihood of bodily harm or death of the individuals staying in the disputed area, is a cause of concern to me, as the rights at issue — and the corresponding obligations — are beyond the strictly inter-State dimension, and the Court seems not to have valued this as it should.

XII. Epilogue: Towards an Autonomous Legal Regime of Provisional Measures of Protection

69. I have already made the point that the strictly inter-State dimension has long been surpassed, and appears inappropriate to address obligations under provisional measures of protection; I have done so in other cases taken before the ICJ, as well as in another international jurisdiction[45], and I have deemed it fit to dwell further upon it in the present dissenting opinion *(supra)*. The handling of cases from a strict and exclusively inter-State perspective or dimension, irrespective of their circumstances, no longer reflects the complexity of the contemporary international legal order. In my understanding, the institute of provisional measures of protection stands in need of a conceptual refinement, in all its aspects. This leads me into the last point of the present dissenting opinion, namely, the needed construction of an *autonomous legal regime* of provisional measures of protection, as I perceive it.

70. Compliance with provisional measures of protection runs parallel to the course of proceedings leading to the Court's subsequent decision on the merits of the cases at issue. Should the Court find, e.g., a breach of international law in its decision on the merits of a given case, and, parallel to that, it further finds non-compliance with its provisional measures, this latter is an *additional* breach of an international obligation. In its work in the present context, the Court still has before itself the task of elaborating on the *legal consequences* of non-compliance with provisional measures, endowed, in my perception, with an autonomy of their own.

71. Provisional measures of protection indicated or ordered by the ICJ (or other international tribunals) generate *per se* obligations for the States

[45] Cf. A. A. Cançado Trindade, *Derecho Internacional de los Derechos Humanos — Esencia y Trascendencia (Votos en la Corte Interamericana de Derechos Humanos, 1991-2006)*, Mexico, Edit. Porrúa/Universidad Iberoamericana, 2007, pp. 925, 935, 947, 952, 958, 974, 977, 981, 985, 991, 1010 and 1014; A. A. Cançado Trindade, *Los Tribunales Internacionales Contemporáneos y la Humanización del Derecho Internacional*, Buenos Aires, Edit. Ad-Hoc, 2013, pp. 22-28, 77-90, 106-113 and 175-179; A. A. Cançado Trindade, "La Humanización del Derecho Internacional y los Límites de la Razón de Estado", 40 *Revista da Faculdade de Direito da Universidade Federal de Minas Gerais* — Belo Horizonte/Brazil (2001), pp. 11-23.

concerned, which are distinct from the obligations which emanate from the Court's (subsequent) judgments on the merits (and on reparations) of the respective cases. In this sense, in my conception, provisional measures have an autonomous legal regime of their own, disclosing the high relevance of their *preventive* dimension. Parallel to the Court's (subsequent) decisions on the merits, the international responsibility of a State may be engaged for non-compliance with, or breach of, a provisional measure of protection ordered by the Court (or other international tribunals).

72. My thesis, in sum, is that provisional measures, endowed with a conventional basis — such as those of the ICJ (under Article 41 of the Statute) — are also endowed with autonomy, have a legal regime of their own, and non-compliance with them generates the responsibility of the State, entails legal consequences, without prejudice of the examination and resolution of the concrete cases as to the merits. This discloses their important preventive dimension, in their wide scope. The proper treatment of this subject-matter is the task before this Court, now and in the years to come.

73. The *juridical nature* of provisional measures, with their preventive dimension, has lately been clarified by a growing case law on the matter, as those measures came to be increasingly indicated or ordered, in recent years, by contemporary international[46], as well as national[47], tribunals[48]. Soon the recourse to provisional measures of protection, also at international level, had the effect of expanding the domain of international jurisdiction, with the consequent reduction of the so-called "reserved domain" of the State[49]. This grows in importance in respect of regimes of *protection*, such as those of the human person[50] as well as of the environment. The clarification of the juridical nature of provisional measures is, how-

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

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

[48] Cf. also 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.

[49] 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.

[50] Cf., e.g., E. R. Rieter, *Preventing Irreparable Harm — Provisional Measures in International Human Rights Adjudication*, Maastricht, Intersentia, 2010, pp. 3-1109; C. Burbano Herrera, *Provisional Measures in the Case Law of the Inter-American Court of Human Rights*, Antwerp, Intersentia, 2010, pp. 1-221; among others. On the needed new mentality, and its benefits, in the present domain of protection, cf., in general [Various Authors], *Le particularisme interaméricain des droits de l'homme* (eds. L. Hennebel and H. Tigroudja), Paris, Pedone, 2009, pp. 3-413.

ever, still the initial stage of the evolution of the matter, — to be followed, in our days, in my understanding, by the elaboration on the *legal consequences* of non-compliance with those measures, and the conceptual development of what I deem it fit to call their *autonomous legal regime*.

74. What leads me to leave on the records, in the present dissenting opinion, my position on the matter — which I have been sustaining for years[51] — is not a lack of confidence in the contending Parties complying with them : I dare to nourish the hope that they will, and the 16 communications (already referred to) that they have submitted to the ICJ, seeking to comply with its Order of 8 March 2011, disclose their awareness and goodwill. The two contending Parties come both from a part of the world, Latin America, with a longstanding and strong tradition in international legal doctrine. What leads me to leave on the records my dissenting position, is the Court's self-restraint, and the incongruence of its reasoning (cf. *supra*), in a matter of such importance for the progressive development of international law. I have cared to take the time and work to leave on the records the present dissenting opinion, so as to render a service to our mission of imparting justice.

75. In effect, the notion of victim (or of *potential* victim[52]), or injured party, can thus emerge also in the context proper to provisional measures of protection, parallel to the merits (and reparations) of the *cas d'espèce*. Provisional measures of protection generate obligations (of prevention) for the States concerned, which are distinct from the obligations which emanate from the judgments of the Court as to the merits (and reparations) of the respective cases. This ensues from their autonomous legal regime, as I conceive it. There is, in my perception, pressing need nowadays to refine and to develop conceptually this autonomous legal regime, focused, in particular, on the contemporary expansion of provisional measures, the means to secure due and prompt compliance with them, and the legal consequences of non-compliance — to the benefit of those protected thereunder.

76. In this matter, the worst possible posture would be that of passiveness, if not indifference, that of judicial inactivism. As I warned in an

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[51] Cf. A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, 2nd ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013 Chap. XXI : "The Preventive Dimension : The Binding Character and the Expansion of Provisional Measures of Protection", pp. 177-186.

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

earlier dissenting opinion (cf. *supra*) and reiterate now in the present one, the matter before the Court calls for a more pro-active posture on its part[53], so as not only to settle the controversies filed with it, but also to tell what the law is *(juris dictio)*, and thus to contribute effectively to the avoidance or prevention of irreparable harm in situations of urgency, to the ultimate benefit of *all* subjects of international law — States as well as groups of individuals, and *simples particuliers*. After all, the human person (living in harmony in her natural habitat) occupies a central place in the new *jus gentium* of our times.

(Signed) Antônio Augusto CANÇADO TRINDADE.

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[53] In likewise advocating such pro-active posture of the Court in respect of provisional measures of protection, in my earlier dissenting opinion in the Court's Order of 28 May 2009 in the case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, I deemed it fit to recall that the Court is not restricted by the arguments of the parties, as confirmed by Article 75 (1) and (2) of the Rules of Court. Article 75 (1) sets forth that "[t]he 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 Article 75 (2) determines that "[w]hen 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." Article 75 (1) and (2) of the Rules of Court — I proceeded in my dissenting opinion — thus expressly entitles it to indicate, *motu proprio*, provisional measures that it 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 sustained — "would have set up a remarkable precedent in the long search for justice in the theory and practice of international law", as this was "the first case lodged with the ICJ on the basis of the 1984 United Nations Convention against Torture", the first human rights treaty incorporating the principle of universal jurisdiction as an international obligation of all States parties (para. 80). And I further recalled (para. 81) that the ICJ has made use of its prerogatives under Article 75 of its Rules on some previous occasions, as illustrated 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-Herzegovina* v. *Yugoslavia)* (*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)* (*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)* (*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)* (*Order of 15 October 2008, I.C.J. Reports 2008*, p. 397, para. 145).