SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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I. Introduction

1. In its previous Order, of 16 July 2013, in the present case opposing Costa Rica to Nicaragua, in which the International Court of Justice [ICJ] refrained from indicating new provisional measures of protection, I presented a dissenting opinion expressing the foundations of my personal position on the matter; today, 22 November 2013, as the Court has now decided to order new provisional measures of protection in the case concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, I have concurred with my vote to the adoption of the present Order. As there are still a couple of points which appear to me deserving of closer attention, I feel thus obliged to leave on the records the reflections which form the present separate opinion, wherein I care — under the merciless pressure of time — to address those points and to lay the foundation of my personal position thereon.

2. To start with, I deem it appropriate to extract, from the corresponding *dossier* of the present case, the submissions of the Parties which seem to me

particularly pertinent for the consideration of the new factual situation brought to the attention of the Court. I shall then move onto the juridico-epistemological level, so as to focus on the questions of the configuration of the autonomous legal régime (as I perceive and conceive it) of provisional measures of protection. In doing so, I shall address the task of international tribunals, and a reassuring jurisprudential construction (2000-2013). I shall, in sequence, overview the ongoing construction of an autonomous legal régime of provisional measures of protection. The way will then be paved for the presentation of my final considerations on the matter.

II. Submissions of the Parties in the Course of the Present Proceedings

1. Submissions in the Written Phase

3. May I start at the factual level. In its new request for provisional measures lodged with the Court on 24 September 2013, Costa Rica stated that this new request was "an independent request based on new facts" (para. 4). After invoking its rights to territorial sovereignty and integrity, and to non-interference with its land and environmentally-protected areas (paras. 21-22), Costa Rica asked the Court for four provisional measures, transcribed in paragraph 15 of the present Order. The *next* facts brought to the Court's attention in the present request for new provisional measures in the *cas d'espèce* concerning *Certain Activities Carried Out by Nicaragua in the Border Area*, are in fact, all of them, subsequent to the Court's previous Orders in the present case (of 8 March 2011 and 16 July 2013), and pertain to the construction of two *"caños"*, and the existence of a Nicaraguan military encampment, allegedly in the "disputed territory".

4. Costa Rica argued that the new dredging and dumping activities allegedly conducted by Nicaragua were affecting the disputed territory and its ecology (paras. 2 and 10-11). For its part, in a diplomatic Note of 18 September 2013, Nicaragua opposed those contentions, arguing that, in its previous Order of 16 July 2013, the ICJ determined that the provisional measures previously indicated (on 8 March 2011) could not be modified, as Costa Rica had not demonstrated urgency nor risk of irreparable harm (pp. 1-2).

5. The present proceedings concerning *Certain Activities Carried Out by Nicaragua in the Border Area* have demonstrated the importance of holding public sittings of the ICJ, in the matter of provisional measures, for the clarification of a given factual situation. After all, to the effect of the adoption of its Orders on such matters, the ICJ gathers prima facie — rather than substantial — evidence *(summaria cognitio)*, and then renders

a *binding* decision, as its provisional measures are endowed with a conventional basis (Article 41 of its Statute).

2. First Round of Oral Arguments

6. It was, in effect, in the oral proceedings (rather than in the written phase) that the two contending Parties found the occasion to present to the ICJ their submissions in a more elaborate way. The public hearings of 14-17 October 2013 were in my view essential for the clarification of the position of the Parties as to the newly requested provisional measures of protection lodged with the Court. I shall next review such submissions, and then proceed to a general assessment of them.

7. In the first round of oral arguments, Costa Rica argued that, despite the provisional measures of protection indicated by the Court in its Order of 8 March 2011[1], and its concerns expressed in its Order of 16 July 2013, "Nicaragua continues to send groups of Nicaraguan nationals to the disputed area", and, furthermore, "it is engaged in the construction of two new *caños* in the northern part of Isla Portillos", with a "real risk" of creating "a fait accompli involving irreparable damage", before the case is finally settled by the ICJ[2]. There has thus been, Costa Rica proceeded, an "egregious breach" of the provisional measures[3]. Costa Rica then stated that

> "[s]ince that time, work on the Pastora first *caño* has been continued, including by more than 10,000 Sandinista youth who have been officially brought to the area to further Nicaragua's policies. (. . .) Nicaraguan personnel have been in the disputed territory carrying out dredging and other works, as late as 18 September 2013"[4].

8. After the Court's Order of 8 March 2011, Costa Rica proceeded, Nicaragua "changed the existing situation by occupying the territory", and continuing "to send government personnel and, in particular, the head of the works, Commander Pastora, as well as numerous contingents of Nicaraguans who, by the Respondent's own admission, are engaging in so-called 'environmental' activities"[5]. In Costa Rica's perception, "Nicaragua has resorted to a piece of 'sophistry'", namely, that the

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[1] *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.

[2] Compte rendu (CR) 2013/24, p. 14, para. 8.

[3] Costa Rica added that, moreover, Nicaragua announced, "at the very last moment", that "it had withdrawn from the disputed territory, though without admitting it had ever been there (. . .) in the first place" (*ibid.*, p. 34, para. 1).

[4] *Ibid.*, p. 36, para. 7, and cf. p. 44, para. 32.

[5] *Ibid.*, p. 54, para. 24.

provisional measures ordered by the ICJ "prevented Nicaraguan personnel, but not citizens, from entering the disputed territory and planting trees"[6]. And Costa Rica added that:

> "Nicaragua has undertaken action on that territory on a major scale, with dredgers and chainsaws, which it has taken several weeks to carry out. It is thus not sufficient to remind the Parties of the existing obligation not to send personnel, but it is necessary to order a measure requiring the cessation of all canalization, dredging or other works in the disputed territory, and that no further works should be carried out in the future. It also requires that Nicaragua be ordered to dismantle all infrastructure on the territory and to refrain from introducing any more *pendente lite*. The same applies to the equipment used to carry out the works of canalization. (. . .) [T]he provisional measures of 2011 are incapable of preventing canalization or other works being continued or resumed."[7]

9. Nicaragua retorted that Costa Rica also violated the Court's Order "by overflights and visits to the disputed area" without fulfilling its requirements, and by the construction of the road "running along 160 km of the border of Nicaragua and Costa Rica and along the margin of the greater part of the San Juan River (. . .) without any environmental impact assessment and without any notice to Nicaragua"[8]. Nicaragua then denied that 10,000 members of the Guardabarranco group had been in the territory in dispute, as alleged by Costa Rica; there were only "small groups of youngsters" visiting "the place for a short period of time"; they "have not performed any work on the *caño*", and they caused no damages to the disputed territory[9].

10. Nicaragua then added that Mr. E. Pastora "was wrong" in claiming (in a television interview in a news programme) that his works of "clearing or constructing *caños*" at the mouth of the San Juan River were conducted "in areas not covered by the Court's Order"[10]. Nicaragua observed that it "had not authorized any dredging or *caño* clearing activities in the disputed area", to comply "fully" with the Court's Order of 8 March 2011. And Nicaragua added:

> "Mr. Pastora himself knew that this was Nicaragua's policy. In the television interview (. . .) he insisted repeatedly that his actions were

[6] CR 2013/24, pp. 59-60, para. 37.
[7] *Ibid.*, pp. 55-56, paras. 28-29.
[8] CR 2013/25, pp. 9-10, paras. 6-7.
[9] *Ibid.*, pp. 12-13, paras. 20-22.
[10] In its clarification, it was "plain to Nicaragua from Mr. Pastora's indication of the location of his activities that they were inside the disputed territory, as defined in the Order" (*ibid.*, p. 22, para. 17).

> consistent with the Court's Order, as he understood it. Of course, he was wrong; and this does not exonerate Nicaragua of responsibility for his behaviour. Nicaragua has never said otherwise. But it does explain what happened. (. . .) There was no intention by Nicaragua to change the natural course of the San Juan River. What happened was that Mr. Pastora exceeded his mandate, and engaged in activities in the disputed area because he had an erroneous understanding of the Court's Order, specifically in regard to what constituted the disputed area, which was different from Nicaragua's understanding, and which Nicaragua did not appreciate, until 18 September [2013]. Since that date, when it learned of his activities, Nicaragua has not denied that they occurred or that they were inconsistent with the Court's Order. To the contrary, what Nicaragua contends, what it has consistently contended, is that it did not instruct or intend for Mr. Pastora to conduct any activities in the disputed area. They were the result of a misunderstanding, not a conspiracy."[11]

11. Nicaragua further added that it had not intended to send Mr. E. Pastora "into the disputed area", but only "to clean up the river and the channels in Nicaragua's undisputed waters. It accepts responsibility for his mistaken and unauthorized actions in the disputed area, and has taken concrete steps to prevent their recurrence"[12]. Yet, it went on, the problem now raised before the ICJ is not whether Nicaragua is responsible for the acts *ultra vires* of Mr. E. Pastora; it is a distinct one[13].

3. Second Round of Oral Arguments

12. In the second round of oral arguments, Costa Rica began by stating that "Mr. Pastora and the National Port Authority were organs of the Nicaraguan State", with "actual authority" (at least until 22 September 2013) "to carry out the works in the disputed territory"[14]. Costa Rica stressed that

> "[t]he only evidence on the record is the specific authorization for Mr. Pastora and the National Port Authority to carry out the project for the 'Improvement of Navigation on the San Juan de Nicaragua River'. We heard nothing about *ultra vires* action on the previous request."[15]

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[11] CR 2013/25, pp. 22-23, paras. 20-21.
[12] *Ibid.*, pp. 28-29, paras. 42-43.
[13] *Ibid.*, pp. 50-51, paras. 21-22.
[14] Costa Rica added that, following the Court's Order of 8 March 2011, "they were never prohibited from doing so by any Nicaraguan instruction in evidence" (CR 2013/26, p. 12, para. 12).
[15] *Ibid.*, p. 12, para. 13.

Costa Rica then added that:

> "Nicaragua now finally accepts that its personnel were constructing and dredging the *caños* (. . .), its personnel have entered the disputed territory in breach of [the Court's] Order and carried out activities there. It finally accepts that its army, camped in close and convenient proximity to the lagoon at the end of the eastern *caño*, must have known of it. It accepts that it is responsible for the acts of Mr. Pastora, its government delegate, and it is responsible for the acts of its government department, the National Port Authority. These reluctant concessions can hardly be considered timely: they finally came yesterday, 36 days after we wrote to protest, 36 days after we provided the co-ordinates of the new *caños.* But Nicaragua has still not admitted that its Mr. Pastora, his dredgers and the National Port Authority personnel were authorized to go there in the first place. (. . .) [T]hey had ostensible authority to do so, and there is nothing in the evidentiary record to suggest otherwise."[16]

13. Moreover, Costa Rica retorted that "the construction of the new *caños*" could not be portrayed as a "simple blunder". It insisted on its argument pertaining to the presence of "the Sandinista youths" in the "disputed area", stating that there was evidence to this effect. Thus, its Note to Nicaragua of 16 September 2013 "not only protested the construction of new *caños*, but it pointed out that the Nicaraguan media reported on 9 September that some 10,000 youths had already visited the area"[17]. Costa Rica further stated that "Nicaragua admitted that it has breached the 2011 Order"; yet, it has provided "no evidence (. . .) about the present state of the *caño*, its depth, its carrying capacity, its length"[18]. To Costa Rica,

> "Nicaragua's belated explanations (. . .) do not provide sufficient protection of Costa Rica's rights. (. . .) Yesterday Nicaragua told [the ICJ] that it had breached [its] 2011 Order. (. . .) the measures Costa Rica requests are urgently needed to prevent irreparable prejudice to its rights. (. . .) Costa Rica merely asks the Court to exercise its power to preserve and protect Costa Rica's rights; rights which are at imminent risk of being irreparably harmed."[19]

14. For its part, Nicaragua, at the second round of oral arguments, began by stating that "Mr. Pastora did what he did, and Nicaragua does not deny responsibility for his actions. (. . .) The evidence shows that Nicaragua did not 'send' Mr. Pastora to the disputed area, or 'maintain'

[16] CR 2013/26, pp. 20-21, para. 43, and cf. paras. 40 and 46.
[17] *Ibid.*, p. 22, para. 47.
[18] *Ibid.*, p. 22, para. 48.
[19] *Ibid.*, p. 34, para. 3.

him there, as prohibited by the first operative paragraph of the Court's March 2011 Order"[20]. And Nicaragua added that

> "It is notable that Costa Rica's request for new provisional measures does not complain about the presence of this military camp, which is in plain sight. (. . .) This is offered as evidence that a crew of workmen was clearing *caños* in the wetland, not that Nicaragua is unlawfully (. . .) maintaining a small military camp on the beach. There is no mention of the military camp anywhere in Costa Rica's request."[21]

15. As to the works carried out under the direction of Mr. E. Pastora — which Costa Rica alleges were undertaken in the "contested territory" — Nicaragua argues that, in requesting

> "the withdrawal of the small Nicaraguan detachment stationed on the left bank, Costa Rica is modifying the very definition of the 'disputed territory' (. . .). [T]his constitutes a new claim, which cannot be made at this stage: it is the Application which defines the limits of the case (. . .). Costa Rica cannot today go back on what it wrote in order to enlarge the scope of its Application by surreptitiously redefining its territorial scope."[22]

Yet, it conceded that:

> "Nicaragua was 'perhaps' responsible for the actions of Mr. Pastora. (. . .) [E]ven if he is not minister, but only treated as a senior government official, Mr. Pastora does exercise official duties; (. . .) the work on the canals (. . .) is, without any doubt, incompatible with the terms of your Order of 2011; and these terms (. . .) are legally binding on the Parties."[23]

4. General Assessment

16. The point which was object of most submissions of the Parties *(supra)* during the oral hearings of 14-17 October 2013 was the dredging and dumping works undertaken, allegedly by Nicaragua, after June 2013, in the construction of the two *"caños"* in the disputed area. In its own assessment, the Court found, in the present Order, that, in the new situation thus created in the "disputed territory", the requisites of urgency and real and imminent risk of "irreparable prejudice" are present therein (paras. 49-50), requiring from it new provisional measures of protection.

[20] CR 2013/27, p. 13, para. 22.
[21] *Ibid.*, p. 17, para. 36.
[22] *Ibid.*, p. 31, para. 13.
[23] *Ibid.*, p. 33, para. 18.

17. The dredging operations for the construction of the two *"caños"*, the Court added, "were carried out by a group of [Nicaraguan] nationals led by Mr. Pastora", who was officially appointed "to carry out this project" (para. 45). In carrying out such construction and the digging of the trench, they have caused "a change in the situation in the disputed territory", after its recent Order of 16 July 2013 (para. 44). The Court then decided to indicate the new provisional measures contained in the Order it has just adopted today, 22 November 2013.

18. As to the other point which was the object of submissions of the Parties, concerning the Nicaraguan military encampment in the area, it appears from the arguments of the Parties during the oral hearings held in October 2013[24], and from the complementing evidence which the Parties submitted to the Court (photographs and satellite images), that a Nicaraguan military encampment indeed exists in the region, and after the Court's previous Order of 8 March 2011. As to its location, the contending Parties submitted arguments as to its presence within "disputed territory"[25], as defined by the Court's Order of 8 March 2011[26].

19. The evidence submitted to the Court, however, led to its finding that the military encampment is indeed located within the "disputed territory", as the Court has concluded in the present Order (para. 46); the Court added that the "ongoing presence of this encampment" is confirmed by recent satellite images and [a] photograph (para. 46). Recalling, in this respect, that the previous Order of 8 March 2011 determined that the Parties ought to "refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security" (para. 86 (1)), it has become undisputable that the presence of the Nicaraguan military encampment in the disputed territory, after the Order of 8 March 2011, is in clear breach of that Order.

III. The Configuration of the Autonomous Legal Régime of Provisional Measures of Protection

1. The Task of International Tribunals

20. The new facts of the present case *(supra)* bring to the fore, in a prominent way, the issue of the necessary *compliance* with provisional mea-

[24] CR 2013/26, pp. 19-20, paras. 35-39 (Costa Rica); CR 2013/25, p. 29, paras. 43-44 (Nicaragua); and CR 2013/27, pp. 16-17, paras. 35-37 (Nicaragua).

[25] The Court defined the "disputed territory" as "the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea and the Harbor Head Lagoon" (Order, para. 55).

[26] While Costa Rica claimed that the encampment is within the "disputed territory" as defined by the Court, Nicaragua contended that Costa Rica did not complain about the camps until the first day of the hearings, and that, in any event, the encampment is not located within the "disputed territory" as defined by the Court. Cf., e.g., doc. CR 2013/25, p. 29, paras. 43-44, and cf. also doc. CR 2013/27, pp. 16-17, paras. 35-37.

sures of protection. This issue can be properly addressed, in my understanding, within the framework of what I behold as the *autonomous* legal régime of those measures. To embark on this task, I move from the factual context onto my considerations at the juridico-epistemological level. Preliminarily, I deem it fit to point out that, it has been in the era of contemporary international tribunals that provisional measures of protection have seen the light of day, and have flourished, in international legal procedure.

21. It was indeed with the advent of international tribunals that the conditions were met to move ahead with provisional measures, in the pursuit of the realization of justice, to the benefit of the *justiciables* in distinct domains of international law. In the historical trajectory of international tribunals, there are antecedents disclosing that, even at an early stage, one purported to ascribe *obligatory* character to provisional measures indicated or ordered by them. This is pointed out, for example, in a pioneering study on the matter by Paul Guggenheim, given to the public in 1931[27]. Yet, progress in this respect has been very slow: for example, it has taken more than half a century for the ICJ to reach the obvious conclusion, in 2001, that provisional measures are, under its Statute[28], binding.

22. Yet, since the beginning of the evolution of provisional measures of protection in international legal procedure, the issue of compliance with them was already present, but was not sufficiently studied and cultivated, and, after several decades, there still remains nowadays much to be studied and cultivated in this matter. Already in the days of the Permanent Court of International Justice (PCIJ), there were indications that provisional measures were meant to be obligatory, in particular those ordered by the PCIJ and other international tribunals (such as the old Central American Court of Justice)[29]; already in the era of the League of Nations, those measures were meant to have *legal effects*[30].

23. In his early study, Paul Guggenheim lucidly drew attention to the importance of provisional measures of protection, ultimately, to the progressive development of international law itself[31]. Writing in 1931, the learned author warned that one of the points to be solved in the future, was *to secure compliance with, and the faithful execution of*, those provisional measures[32]. And the learned author added, with insight, as to the consequences of breach of provisional measures, that

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[27] Cf. P. Guggenheim, *Les mesures provisoires de procédure internationale et leur influence sur le développement du droit des gens*, Paris, Rec. Sirey, 1931, p. 177.

[28] I.e., endowed with a conventional basis (Art. 41).

[29] Cf., in this sense, P. Guggenheim, *op. cit. supra* note 27, pp. 24-25, 71-72, 177 and 187, and cf. p. 33.

[30] *Ibid.*, p. 58.

[31] Cf. *ibid.*, pp. 195-196.

[32] As "today, international law, most often, does not yet have the means to secure compliance with its orders or, at the very least, to supervise the execution of orders issued by its collective bodies" (*ibid.*, p. 175, and cf. p. 59).

"[s]ooner or later, the case law of the Permanent Court of International Justice or of competent tribunals will assuredly succeed in gaining acceptance of the fact that non-compliance with provisional measures ordered by such courts, must, by reason of the harm caused (regardless of the fault, or otherwise, of the author), have the effect in law of giving rise to a right to reparation.

. . . . . .

[I]n my view, the responsibility ultimately incumbent upon those members [of the international community itself] cannot be replaced by provisional measures of the collective bodies established by them. Nevertheless, the major 'final' decisions of international life – whether political or legal – are themselves, in the end, also provisional, in keeping with the adage, so profoundly true: 'Il n'y a que le provisoire qui dure' (only the provisional endures)."[33]

24. As I pointed out almost one decade ago, the gradual conceptualization of the *autonomous* international responsibility in respect of provisional measures of protection owes much to the expansion of those measures at international level in our times, calling for the configuration of a legal régime of their own[34], thanks to the operation of contemporary international tribunals. In our days, there is indeed a growing attention to the importance of provisional measures of protection in expert writing[35], but advances in case law remain rather slow, as international tribunals have not yet elaborated on their *autonomous legal régime*, nor have they so far extracted the legal consequences of non-compliance with those measures. But at least the issue has been identified for forthcoming developments, hopefully.

2. A Reassuring Jurisprudential Construction (2000-2013)

25. And there have, however, been some endeavours clearly to this effect. Within the ICJ, for example, in my dissenting opinion in the

[33] P. Guggenheim, *op. cit. supra* note 27, pp. 197-198 *[translation by the Registry]*.

[34] Cf. A. A. Cançado Trindade, "Les mesures provisoires de protection dans la jurisprudence de la Cour interaméricaine des droits de l'homme", *Mesures conservatoires et droits fondamentaux* (eds. G. Cohen Jonathan and J.-F. Flauss), Brussels, Bruylant/Nemesis, 2005, pp. 145-163.

[35] Cf., *inter alia*, e.g., [Various Authors], *Le contentieux de l'urgence et l'urgence dans le contentieux devant les juridictions internationales: regards croisés* (eds. H. Ruiz Fabri and J.-M. Sorel), Paris, Pedone, 2003, pp. 7-180 and 205-210; A. A. Cançado Trindade, "La Expansión y la Consolidación de las Medidas Provisionales de Protección en la Jurisdicción Internacional Contemporánea", *Retos de la Jurisdicción Internacional* (eds. S. Sanz Caballero and R. Abril Stoffels), Cizur Menor (Navarra), Civitas/Thomson Reuters, 2012, pp. 99-117; T. Treves, "Mesures conservatoires et obligations environnementales — Tribunal international du droit de la mer et Cour internationale de Justice", *ibid.*, pp. 119-137; and cf., for a general study, Eva Rieter, *Preventing Irreparable Harm — Provisional Measures in International Human Rights Adjudication*, Maastricht, Intersentia, 2010, pp. 3-1109.

Court's Order (of 28 May 2009) in the case of *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, in which the Court refrained from indicating the requested provisional measures of protection, I deemed it fit to examine, *inter alia*, the transposition of such measures from legal proceedings in comparative domestic procedural law onto the international legal procedure (paras. 5-7) and their juridical nature and effects (paras. 8-13). I then drew attention to the relevance of *compliance* with provisional measures of protection, which has "a direct bearing upon the rights invoked by the contending parties" (para. 14).

26. In reality, depending on the rights which are at stake, provisional measures may assume a character, more than precautionary, truly *tutelary*, directly related, as they are, to the realization of justice itself. In that same dissenting opinion I pondered that, this being so, provisional measures of protection, "with their preventive dimension, can indeed contribute to the development of international law" (para. 94). For that to happen, there remains a long way to go, in the refinement of their autonomous legal régime, as I have further pointed out on earlier occasions.

27. It is necessary, to start with, to bear in mind the advances already achieved in international case law in this respect. One decade ago, in 2000, I had the occasion, in another international jurisdiction, to dwell upon the *legal nature* of provisional measures of protection[36]. Half a decade later the time seemed ripe, on the basis of the experience accumulated on the matter, to dwell upon the *autonomous legal régime* of those measures[37]. Thus, in the case of the *Community of Peace of San José of Apartadó* (provisional measures of 2 February 2006), I stated that

> "[p]rovisional measures of protection bring about obligations for the States at issue, which are distinguished from the obligations which emanate from the judgments as to the merits of the respective cases. There are effectively obligations emanated from provisional measures of protection *per se*. They are entirely distinct from the obligations which eventually ensue from a judgment as to the merits (and also, reparations) in the *cas d'espèce*. This means that provisional measures of protection constitute a juridical institute endowed with an *autonomy* of its own, what, in turn, reveals the high relevance of the *preventive* dimension (. . .). Provisional measures of protection, endowed

[36] Cf. Inter-American Court of Human Rights [IACtHR], case of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic* v. *Dominican Republic* (provisional measures of 18 August 2000), concurring opinion of Judge Cançado Trindade, paras 13-25.

[37] Cf. IACtHR, case of *Eloísa Barrios and Others* v. *Venezuela* (provisional measures of 29 June 2005), concurring opinion of Judge Cançado Trindade, paras. 4-11; IACtHR, case of *Eloísa Barrios and Others* v. *Venezuela* (provisional measures of 22 September 2005), concurring opinion of Judge Cançado Trindade, paras. 2-9; IACtHR, case of the *Children and Adolescents Deprived of Their Freedom in the 'Complex of Tatuapé' of FEBEM* v. *Brazil* (decision of 17 November 2005), concurring opinion of Judge Cançado Trindade, paras. 1-10.

> as they are with autonomy, have a legal régime of their own, and non-compliance with them generates the responsibility of the State, has legal consequences, besides singling out the central position of the victim (of such non-compliance), without prejudice to the examination and resolution of the concrete case as to the merits." [38]

28. One has here in mind, of course, provisional measures of protection endowed with a *conventional* basis, and ordered or indicated by international tribunals. The figure of the "injured party" may thus also appear, in my perception, in the realm of provisional measures of protection, in case of non-compliance with them. Accordingly, non-compliance with, or breach of, such measures, engages autonomously the international responsibility of the State at issue, within the domain of provisional measures of protection [39], irrespective of the subsequent judgments as to the merits of the concrete cases. Hence the utmost importance of compliance with those measures [40], for the realization of justice itself.

IV. The Ongoing Construction of an Autonomous Legal Régime of Provisional Measures of Protection

29. In the previous Court's Order of 16 July 2013, where it refrained from indicating the requested provisional measures of protection, I presented a dissenting opinion wherein, *inter alia*, I sought to demonstrate the need to proceed in the conceptual construction of an *autonomous legal régime* of provisional measures of protection (paras. 69-76). To that end, I pondered that

> "[c]ompliance 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

[38] IACtHR, case of the *Community of Peace of San José of Apartadó* v. *Colombia* (provisional measures of 2 February 2006), concurring opinion of Judge Cançado Trindade, paras. 6-7, and cf. also paras. 4 and 8-10; and cf., to the same effect, IACtHR, case of the *Communities of Jiguamiandó and Curbaradó* v. *Colombia* (provisional measures of 7 February 2006), concurring opinion of Judge Cançado Trindade, paras. 6-7, and cf. also paras. 4 and 8-11.

[39] Cf. also, in this sense, IACtHR, case of the *Prisons of Mendoza* v. *Argentina* (provisional measures of 30 March 2006), concurring opinion of Judge Cançado Trindade, paras. 11-12; IACtHR, case of the *Prison of Araraquara* v. *Brazil* (provisional measures of 30 September 2006), concurring opinion of Judge Cançado Trindade, paras. 24-25.

[40] Cf. in this sense, IACtHR, case of the *Communities of Jiguamiandó and Curbaradó* v. *Colombia* (provisional measures of 15 March 2005), concurring opinion of Judge Cançado Trindade, paras. 4 and 10; case of the *Community of Peace of San José of Apartadó* v. *Colombia* (provisional measures of 15 March 2005), concurring opinion of Judge Cançado Trindade, paras. 4 and 10; case of the *Indigenous People of Sarayaku* v. *Ecuador* (provisional measures of 6 July 2004), concurring opinion of Judge Cançado Trindade, paras. 2 and 30.

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.

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

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 régime 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." (Paras. 70-72.)

30. This is, after all, I then proceeded, a matter of much importance for the progressive development of international law (para. 74). A related aspect to be kept in mind, I continued, is

"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[41], as well as national[42], tribunals[43]. Soon the recourse to provisional measures of protection,

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

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

[43] 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.

> 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[44]. This grows in importance in respect of régimes of *protection*, such as those of the human person as well as of the environment. The clarification of the juridical nature of provisional measures is, however, 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 régime*. (. . .)
>
> In effect, the notion of victim (or of potential victim[45]), 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 régime, as I conceive it. There is, in my perception, pressing need nowadays to refine and to develop conceptually this autonomous legal régime — 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." (Paras. 73 and 75.)

31. By means of the construction of the propounded autonomous legal régime of provisional measures of protection, I added, contemporary international tribunals can

> "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." (Para. 76.)

The contribution of contemporary international tribunals to the conceptualization of the legal régime of provisional measures of protection

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[44] Paul Guggenheim, *op. cit. supra* note 27, pp. 15, 174, 186, 188 and cf. pp. 6-7 and 61-62.

[45] 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.

has been taking place, is ongoing; yet, there is still much to be done and there remains a long way to go, in the perennial search for the realization of justice.

V. Final Considerations

32. In the domain of provisional measures of protection, the ICJ has recently moved forward, in ordering provisional measures, 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) to the effect of the withdrawal of military personnel from a provisional demilitarized zone that it defined in the Order itself (para. 62). In my separate opinion appended to it, I dwelt upon the relation between time and law (paras. 3-42), and the *legal effects* of the aforementioned measures in connection with the importance of prevention of irreparable harm for the protection of people in territory, and of cultural and spiritual heritage, altogether (paras. 64-70, 82-94 and 96-117). There is thus reason for hope that, on the basis of this precedent, the Court will keep on advancing in the present domain of provisional measures of protection, to the benefit of the *justiciables*.

33. In the present Order that it has just adopted today, 22 November 2013, the Court finds that there has indeed been "a change in the situation in the disputed territory" (para. 44) since it adopted its last Order (of 16 July 2013). Accordingly, the Court, in the present Order, decided, at last, that three earlier provisional measures (indicated in the Order of 8 March 2011) "must be reinforced and supplemented" (para. 55), especially concerning, in addition, the presence of private individuals in the "disputed territory" (para. 56). However, in its previous Order of 16 July 2013 concerning the Parties' requests for modification of the Court's Order of 8 March 2011, the Court did not find, on the basis of the facts presented to it, any "evidence of urgency that would justify the indication of further provisional measures"; the Court thus decided — with my dissent — that it had then not yet been sufficiently demonstrated that there was a risk of irreparable prejudice to the rights claimed by Costa Rica[46].

34. Yet, the presence of private individuals in the disputed territory already configured a change in the situation, by the time the Order of 16 July 2003 was adopted; the Court should *then*, four months ago, have modified the earlier Order of 8 March 2011, by means of its Order of 16 July 2003, so as expressly to provide for the prohibition not only of

[46] When Costa Rica requested (on 23 May 2013) it to do so alleging that there were private Nicaraguan nationals present in the disputed territory (cf. para. 35).

the presence of personnel, but also of incursion of private individuals as well into the disputed territory. By then, last July, in my perception there had already occurred a change in the situation in the disputed territory, disclosing urgency and the risk of irreparable harm, thus calling for the ordering of *new* provisional measures.

35. Indeed, the new, changed situation had already been clearly formed by the time the ICJ was called to issue its Order of 16 July 2013; the earlier Order of 8 March 2011, having referred only to "personnel", had become too narrow. In the Order of 16 July 2013 the Court took note of the presence of Nicaraguan private individuals in the disputed area as an aggravating circumstance, yet it did nothing concrete about it. Only now, in the present Order of 22 November 2013, it has done so, in order to prevent the deterioration of the situation. The Court has at last clarified that the disputed area is to be free of *all* persons, comprising personnel and private individuals (apart from the remediation work to be promptly done in the eastern *caño*).

36. So, only with the worsening of the situation (with the dredging and construction of the two new *caños*) in the disputed territory, the Court reconsidered its previous "self-restrained" approach. This worsening of the situation once again demonstrates that the worst possible posture that an international tribunal can take is that of judicial inactivism. Fortunately the Court has now taken a distinct stand. This time, four months later, the provisional measures just indicated or ordered today (22 November 2013) by the Court address both *personnel* and *private persons*, to be kept all away from the disputed territory (resolutory points 2 (C) and (D)); they also order the cessation of any dredging and other activities in the disputed territory (resolutory point 2 (A)), in addition to what I perceive as remediation work in respect of the eastern *caño* (resolutory point 2 (B)).

37. The two contending Parties do not actually controvert the responsibility for non-compliance (cf. *supra*) with the Court's earlier Order of 8 March 2011[47]. The only point surrounded by some controversy is that of the *attribution* of responsibility (cf. *supra*) for such non-compliance. To me, this point is clear, as responsibility for non-compliance is necessarily accompanied by the attribution of that responsibility to the State concerned. There is an autonomous breach of a conventional obligation (concerning provisional measures), without prejudice to what will later be decided by the Court as to the merits.

38. Had the Court last July, on the occasion of the adoption of its Order of 16 July 2013, indicated or ordered the provisional measures of

[47] Admitted by the respondent State itself, as pointed out by the Court in the present Order (cf. CR 2013/27, p. 33, para. 18, and CR 2013/25, pp. 22-23, paras. 20-21, transcribed *supra*).

protection requested, probably the present situation in the disputed territory (created in the last four months) would not have arisen. Be that as it may, this new situation has been created, and the Court now, in the Order of today (22 November 2013), has just taken the right decision to order the present provisional measures of protection. Better late — and still in time — than never.

39. In any case, in the handling of the present controversy between two States which share the long-standing and respectable Latin American tradition in international legal doctrine, the ICJ has been provided with the occasion to dwell at greater depth upon the legal nature and effects of provisional measures, endowed with a relevant preventive dimension. The Court could have gone further than it did, in its analysis of this legal issue, — an analysis which does not need to be deferred to the merits. The present case reveals an *additional* ground of responsibility (irrespective of any decision on the merits), for non-compliance with provisional measures.

40. The *legal effects* of these latter, without prejudice to the subsequent decision of the Court as to the merits of the case, can be more appropriately examined within the framework of the *autonomous* legal régime of provisional measures of protection. Non-compliance with such measures entails an *additional* ground of responsibility; the task ahead of us is to extract the consequences ensuing therefrom. The day this is done, an additional service will be rendered to the cause of the realization of justice at international level.

(*Signed*) Antônio Augusto CANÇADO TRINDADE.