SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

TABLE OF CONTENTS

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I. *Prolegomena*

1. I have accompanied the majority in voting in favour of the adoption today, 16 December 2015, of the present Judgment of the International Court of Justice (ICJ) in the two joined cases of *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and of the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*. Yet, there are certain points ensuing from the Court's decision which, though not dwelt upon at depth by the Court in its reasoning, are in my view endowed with importance, related as they are to the proper exercise of the international judicial function. I feel thus obliged to dwell upon them, in the present separate opinion, nourishing the hope that the considerations that follow may be useful for the handling of this matter by the ICJ in future cases.

2. I start drawing attention to the manifestations, in the *cas d'espèce*, of the preventive dimension in contemporary international law. I then turn attention to the key point, which I have been sustaining in the adjudication of successive cases in this Court, namely, that of the conformation of the *autonomous legal regime* of provisional measures of protection, in the course of their evolution (after their transposition from comparative domestic procedural law into international law). Next, I consider the widening of the scope of protection by means of provisional measures, and the breach of these latter as an autonomous breach, engaging State responsibility by itself. I then proceed to examine the determination by the ICJ of breaches of obligations under provisional measures of protection.

3. In sequence, I present a plea for the prompt determination by the Court of breaches of provisional measures of protection. My next line of consideration is on the supervision of compliance with provisional measures of protection. Following that, I examine the interrelationship between the breach of provisional measures and the duty of reparation (in its distinct forms) for damages. I then turn attention to due diligence, and the interrelatedness between the principle of prevention and the precautionary principle. Next, I purport to detect the path towards the progressive development of provisional measures of protection. Last but not least, I present, in an epilogue, my final considerations on the matter, in the form of a recapitulation of the main points sustained herein, in the course of the present separate opinion.

II. Manifestations of the Preventive Dimension in Contemporary International Law

4. May I begin by observing that the two joined cases of *Certain Activities Carried Out by Nicaragua in the Border Area* and of the *Construction of a Road in Costa Rica along the San Juan River* bring to the fore the relevance of the *preventive dimension* in contemporary international law, as reflected in the present Judgment, of 16 December 2015, in the finding

and legal consequences of breaches of provisional measures of protection (in the *Certain Activities* case), as well as in the acknowledgment of the obligation of conducting an environmental impact assessment (EIA) (in the *Construction of a Road* case as well). This preventive dimension grows in importance in the framework of regimes of protection (such as those, e.g., of the human person, and of the environment). Moreover, it brings us particularly close to general principles of law. Such preventive dimension stands out clearly in the succession of the Court's Orders of provisional measures of protection of 8 March 2011, 16 July 2013 and 22 November 2013[1].

5. The question of the non-compliance with, or of breaches of, the aforementioned Orders of provisional measures of protection, was carefully addressed by the two contending Parties in the course not only of the Court's proceedings pertaining to such Orders[2], but also in the course of its proceedings (written and oral phases) as to the merits of the *Certain Activities* case. Concern with the issue of non-compliance with, or breaches of the Court's Order of 8 March 2011, for example, was in effect expressed in Costa Rica's Memorial[3] — a whole chapter — as well as in its oral arguments[4]; Nicaragua, likewise, devoted a chapter of its Counter-Memorial[5], as well as its oral arguments[6], to the issue. The same concern was expressed, in respect of the Court's subsequent Order on provisional measures of 16 July 2013 — and of events following it — in the oral arguments of Costa Rica[7] and of Nicaragua[8]. Again, in respect of the Court's third Order on provisional measures, of 22 November 2013, reference can further be made to the oral arguments of both Costa Rica[9] and Nicaragua[10].

III. The Autonomous Legal Regime of Provisional Measures of Protection

6. The *autonomous legal regime* of provisional measures of protection has been quite discernible to me: I have been drawing attention to it, in

[1] Reference can further be made to the Court's subsequent Order of 13 December 2013.

[2] Cf., as to Costa Rica's oral arguments, CR 2013/24, of 14 October 2013, pp. 12-61; and CR 2013/26, of 16 October 2013, pp. 8-35; and, as to Nicaragua's oral arguments, CR 2013/25, of 15 October 2013, pp. 8-57; and CR 2013/27, of 17 October 2013, pp. 8-44.

[3] Cf. Memorial, Chapter VI, paras. 6.1-6.63.

[4] Cf. CR 2015/2, of 14 April 2015, pp. 17 and 23-25; CR 2015/4, of 15 April 2015, pp. 23-32; and CR 2015/14, of 28 April 2015, pp. 39-42 and 65-66.

[5] Cf. Counter-Memorial, Chapter 7, paras. 7.4-7.46.

[6] Cf. CR 2015/5, of 16 April 2015, p. 18; CR 2015/7, of 17 April 2015, pp. 46-50; and CR 2015/15, of 29 April 2015, pp. 43-44.

[7] Cf. CR 2015/2, of 14 April 2015, pp. 24-25; CR 2015/4, of 15 April 2015, pp. 31-32.

[8] Cf. CR 2015/7, of 17 April 2015, pp. 48-50.

[9] Cf. CR 2015/4, of 15 April 2015, pp. 31-34; and CR 2015/14, of 28 April 2015, pp. 65-66.

[10] Cf. CR 2015/7, of 17 April 2015, pp. 41-45.

the way I conceive such autonomous legal regime, in successive dissenting and individual opinions in this Court. The present Judgment of the ICJ in the two joined cases of *Certain Activities* and of the *Construction of a Road* is a proper occasion to dwell further upon it. The Court has duly considered the submissions of the Parties, Costa Rica and Nicaragua (Judgment, paras. 121-129), and has found that the respondent State incurred into a breach of the obligations under its Order on provisional measures of protection of 8 March 2011 by the excavation of two *caños* in 2013 and the establishment of a military presence in the disputed territory (*ibid.*, paras. 127 and 129, and resolutory point No. 3 of the *dispositif*). The ICJ has pointed out that the respondent State itself had acknowledged, in the course of the oral hearings, that "the excavation of the second and third *caños* represented an infringement of its obligations under the 2011 Order" (*ibid.*, para. 125)[11].

1. The Evolution of Provisional Measures of Protection

7. There are, as from this finding of the Court of a breach of provisional measures in the *cas d'espèce*, several points that come to my mind, all relating to what I have been conceptualizing, along the years, as the autonomous legal regime of provisional measures of protection[12]. This regime can be better appreciated if we consider provisional measures in their historical evolution. May I recall that, in their origins, in domestic procedural law doctrine of over a century ago, provisional measures were considered, and evolved, in order to safeguard the effectiveness of the jurisdictional function itself.

8. They thus emerged, in the domestic legal systems, in the form of a *precautionary legal action (mesure conservatoire/acción cautelar/ação cautelar)*, aiming at guaranteeing, not directly subjective rights *per se*, but rather the jurisdictional process itself. They had not yet freed themselves

[11] In the oral hearing of 16 April 2015, the Agent of the respondent State asserted that "Nicaragua deeply regrets the actions following the 2011 Order on provisional measures that led the Court to determine, in November 2013, that a new Order was required"; CR 2015/5, of 16 April 2015, p. 8, para. 42. On the following day counsel recalled this (CR 2015/7, of 17 April 2015, p. 45, para. 14), and again it did so in the hearing of 29 April 2015, adding that there was thus "no need for future remedial measures"; CR 2015/15, of 29 April 2015, p. 44, paras. 23-24.

[12] Cf. A. A. Cançado Trindade, *Evolution du droit international au droit des gens — L'accès des particuliers à la justice internationale: le regard d'un juge*, Paris, Pedone, 2008, pp. 64-70; 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, Cedri/CEU/Thomson Reuters, 2012, pp. 99-117; A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, 3rd ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013, Chapters V and XXI (provisional measures), pp. 47-52 and 177-186; 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.

from a certain juridical formalism, conveying the impression of taking the legal process as an end in itself, rather than as a means for the realization of justice. With the gradual transposition of provisional measures from domestic into international law level, they came to be increasingly resorted to, in face of the most diverse circumstances disclosing the probability or imminence of an irreparable damage, to be prevented or avoided.

9. Their transposition into international legal procedure, and the increasing recourse to them within the framework of domains of protection (e.g., of the human person or of the environment), had the effect, in my perception, of enlarging the scope of international jurisdiction, and of refining their conceptualization. International case law on provisional measures of protection expanded considerably over the last three decades, making it clear to the contending parties that they are to abstain from any action which may aggravate the dispute *pendente lite*, or may have a prejudicial effect on the compliance with the subsequent judgment as to the merits.

10. Their rationale stood out clearer, turning to the protection of rights, of the equality of arms *(égalité des armes)*, and not only of the legal process itself. Over the last three decades, provisional measures of protection have freed themselves from the juridical formalism of the procedural doctrine of over a century ago, and have, in my perception, come closer to reaching their plenitude. They have become endowed with a character, more than precautionary, truly *tutelary*. When their basic requisites — of gravity and urgency, and the needed prevention of irreparable harm — are met, they have been ordered, in the light of the needs of protection, and have thus conformed a true *jurisdictional guarantee of a preventive character*.

11. For many years I have been insisting on this particular point. To recall but one example, already by the turn of the century, in another international jurisdiction, in my concurring opinion appended to the Order of 25 May 1999 of the Inter-American Court of Human Rights (IACtHR) in the case of *James et al.*, concerning Trinidad and Tobago, I deemed it fit to draw attention to the configuration, in provisional measures of protection of our times, of a true *jurisdictional guarantee of a preventive character* (para. 10). I further drew attention to the inherent power or *faculté* of an international tribunal to determine the *scope* of the provisional measures that it decided to order (para. 7). All this comes to reinforce the preventive dimension, proper of those measures.

12. In the case of the ICJ (like in that of the IACtHR), such provisional measures do have a conventional basis (Article 41 of the ICJ's Statute). But even if an international tribunal does not count on such a conventional basis, it has, in my understanding, inherent powers to indicate such measures, so as to secure the sound administration of justice *(la bonne administration de la justice)*. Contemporary international tribunals have the *compétence de la compétence (Kompetenz-Kompetenz)* in the

domain of provisional measures as well, so as to safeguard the respective rights of the contending parties in the course of the legal process. The grant of those measures is a significant manifestation of the preventive dimension in contemporary international law.

2. The Conformation of Their Autonomous Legal Regime

13. In effect, the evolution of provisional measures in recent years has, in my perception, made very clear that they operate within an autonomous legal regime of their own, encompassing their juridical nature, the rights and obligations at issue, their legal effects, and the duty of compliance with them. It is now the duty of contemporary international tribunals to elaborate on such autonomous legal regime, and to extract the legal consequences ensuing therefrom. In order to do so, it is necessary, in my understanding, to keep in mind — may I reiterate — their juridical nature, the rights to be preserved and the corresponding obligations in their wide scope, and their legal effects (cf. *infra*).

14. In my 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)*, wherein the Court decided not to indicate or order provisional measures, I pondered that provisional measures of protection have lately much evolved, and appear nowadays as being "endowed with a character, more than precautionary, truly *tutelary*" (*I.C.J. Reports 2009*, p. 170, para. 13). Their development — I added — has led the Court gradually to overcome the strictly inter-State outlook in the acknowledgment of the rights to be preserved (*ibid.*, p. 174, para. 21, p. 175, para. 25 and p. 190, para. 72). Such rights to be protected by provisional measures have encompassed, in the *cas d'espèce*, the *right to the realization of justice*, — i.e., the right to see to it that justice is done, — "ineluctably linked to the rule of law at both national and international levels" (*ibid.*, pp. 196-197, paras. 92-95 and p. 199, para. 101).

15. Four years later, in my dissenting opinion in the Court's Order (of 16 July 2013) in the joined cases of *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*, wherein the Court simply reaffirmed a previous Order (of 8 March 2011) and decided not to indicate or order new provisional measures or modify the previous Order, I drew attention to the overcoming of the inter-State outlook in the present domain of provisional measures (*I.C.J. Reports 2013*, p. 261, para. 49), given that they came to extend protection also to the human person (*ibid.*, pp. 257-258, paras. 39-42). I further warned that non-compliance with provisional measures of protection amounts to a breach of an international obligation, engaging State responsibility *per se* (*ibid.*, p. 267-268, paras. 70-72). Provisional measures have an *autonomous legal regime* of their own, I concluded, and they have grown in importance — with their preventive

dimension underlined by their juridical nature — "in respect of regimes of *protection*, such as those of the human person as well as of the environment" (*I.C.J. Reports 2013*, pp. 268-269, paras. 73 and 75).

16. Shortly afterwards, in my subsequent separate opinion in the Court's following Order on provisional measures (of 22 November 2013) in the same two joined cases opposing the two Central American countries, Nicaragua and Costa Rica, wherein the Court decided to indicate or order new provisional measures, I observed that the duty of compliance with provisional measures of protection outlines their *autonomous legal regime* (*ibid.*, pp. 379-380, paras. 23-24). Provisional measures — I proceeded — generate *per se* obligations, irrespective of, or independently from, those ensuing from the Court's Judgments on the merits or on reparations (*ibid.*, pp. 382-383, para. 29). I insisted that provisional measures of protection, in their evolution, have become, more than precautionary, truly *tutelary* (*ibid.*, p. 381, para. 26), and I then added, moving into their effects, that non-compliance with provisional measures of protection engages autonomously the international responsibility of the State (*ibid.*, p. 380, para. 24 and p. 387, paras. 39-40). Such non-compliance 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" (*ibid.*, p. 386, para. 37).

IV. Provisional Measures: The Enlargement of the Scope of Protection

17. In the present Judgment in the two joined cases of *Certain Activities* and of the *Construction of a Road*, the Court has found, in Section III.C concerning the *Certain Activities* case, that the excavation of the second and the third *caños* and the establishment of a military presence in the disputed territory breached the obligations of the provisional measures of protection it had ordered (on 8 March 2011), and constituted "a violation of the territorial sovereignty" of the applicant State (Judgment, para. 129). Beyond that, provisional measures, in my perception, do widen the scope of protection; it is not only a matter of State sovereignty. Protection extends to the environment, and the right to life; their safeguard is also necessary to avoid aggravating the dispute or rendering it more difficult to resolve (*ibid.*, cf. para. 123).

18. The enlargement, by provisional measures, of the scope of protection, is deserving of attention and praise. It is reassuring that prevention and precaution have found their place in the conceptual universe of the law of nations, the *droit des gens*, — and a prominent place in international environmental law. It could not have been otherwise. From the days of the UN Conference on Environment and Development (Rio de Janeiro, 1992) up to the present, this has occurred amidst the

acknowledgment of risks and the limitations of human knowledge. Prevention and precaution have enforced each other, and the new awareness of their need has paved the way to the aforementioned expansion of provisional measures of protection along the last three decades.

19. It is not casually that they came to be conceived as precautionary measures *(mesures provisoires/medidas cautelares)*, prevention and precaution underlying them all. Precaution, in effect, takes prevention further, in face of the uncertainty of risks, so as to avoid irreparable damages. And here, again, in the domain of provisional measures of protection, the relationship between international law and time becomes manifest. The inter-temporal dimension is here ineluctable, overcoming the constraints of legal positivism. International law endeavours to be *anticipatory* in the regulation of social facts, so as to avoid irreparable harm; provisional measures of protection expand the protection they pursue, as a true international *jurisdictional guarantee* of a preventive character[13].

20. In order to avoid irreparable harm, one cannot remain closed in the fugacious present, but rather look back in time and learn the lessons of the past, as much as, at the same time, look into the future, to see how to avoid irreparable harm. We live — or survive — surrounded by uncertainties, which call for precaution. As Seneca warned in his *De Brevitate Vitae* (circa 49 AD), it is wise to keep in mind all times — past, present and future — together: time past, by recollection; time present, by making the best use of it; and time future, by anticipating whatever one can, and thus making one's life meaningful, safer and longer[14]. In his late years, in his *Letters to Lucilius* (circa 62-64 AD), Seneca, in his Stoic search for some means of reconciliation with the frailty of human nature, stated: "We are tormented alike by what is past and what is to come. (. . .) [M]emory brings back the agony of fear while foresight brings it on prematurely. No one confines his unhappiness to the present."[15]

21. Back to our times, in this twenty-first century, in yet another case before this Court, in 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)*, the ICJ, in its Order on provisional measures of protection of 18 July 2011, took the unprecedented and correct decision to order, *inter alia*, the creation of a provisional "demilitarized zone" around the Temple and in the proximities of the border between the two countries, which contributed to put an end to the armed

[13] Cf., in this sense, A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, 2nd rev. ed., Leiden/The Hague, Nijhoff/Hague Academy of International Law, 2013, pp. 40-47.

[14] L. A. Seneca, *On the Shortness of Life (De Brevitate Vitae)* [circa 49 AD], Part XV.

[15] L. A. Seneca, "Letter V", *Letters to Lucilius* [circa 62-64 AD].

hostilities around the Temple in the border region between Cambodia and Thailand. In my separate opinion appended to that Order, I supported the Court's correct decision, which, in my understanding, extended protection not only to the territory at issue, but also to the populations living thereon, as well as to the monuments comprising the Temple which, by decision of UNESCO (of 2008), integrate the cultural and spiritual world heritage (*I.C.J. Reports 2011 (II)*, pp. 588-598, paras. 66-95).

22. In the same separate opinion, I dwelt upon the temporal dimension in international law, this latter being also *anticipatory* in the regulation of social facts (*ibid.*, p. 588, paras. 64-65). In the context of the *cas d'espèce*, provisional measures rightly extended protection also to cultural or spiritual heritage, upholding a universal value (*ibid.*, p. 598, para. 93). They brought "*territory, people and human values together*", well beyond State territorial sovereignty (*ibid.*, p. 600, para. 100), — as shown by the establishment, in the Order, of the aforementioned demilitarized zone (*ibid.*, p. 607, para. 117). I further observed that rights of States and rights of individuals evolve *pari passu* in contemporary *jus gentium*, and added: "Cultural and spiritual heritage appears more closely related to a *human context*, rather than to the traditional State-centric context; it appears to transcend the purely inter-State dimension (. . .)" (*Ibid.*, p. 606, para. 113.)

23. Beyond the classic territorialist outlook is the "human factor"; protection by means of provisional measures extended itself to local populations as well as to the cultural and spiritual world heritage (*ibid.*, pp. 598-606, paras. 96-113), in the light of the *principle of humanity*, orienting the *societas gentium* towards the realization of the common good (*ibid.*, p. 606, paras. 114-115 and p. 607, para. 117). After all, I added, one cannot consider territory (whereon hostilities were taking place) in isolation (as in the past), making abstraction of the population (or the local populations), which form the most precious component of statehood. One is to consider people on territory (cf. *ibid.*, p. 589, para. 67, p. 594, para. 81, p. 599, para. 97, p. 600, para. 100 and p. 606, para. 114), I concluded, there being epistemologically no inadequacy to extend protection, by means of provisional measures, also to human life and cultural and spiritual world heritage.

V. Breach of Provisional Measures of Protection as an Autonomous Breach, Engaging State Responsibility by Itself

24. The breach of a provisional measure of protection is *additional* to the breach which comes, or may come, later to be determined as to the merits of the case at issue. The factual context may be the same, but State responsibility is engaged not only with the occurrence and determination of a breach of an international obligation as to the merits, but also earlier

on, with the occurrence and determination of a breach of an obligation under an Order of provisional measures of protection. The latter is an autonomous breach. State responsibility is thus engaged time and time again, in respect of the breaches of obligations as to provisional measures (prevention) and as to the merits.

25. The breach of a provisional measure of protection is an autonomous breach, added to the one which comes, or may come, later to be determined as to the merits. As such, it can be promptly determined, with its legal consequences, without any need to wait for the conclusion of the proceedings as to the merits. Although in the Order of 22 November 2013 the Court did not expressly determine the occurrence of a breach of the earlier Order of 8 March 2011, it implicitly held so, in reiterating the earlier Order and indicating new provisional measures. In my view, the Court should have done so already in its Order of 16 July 2013, as explained in my dissenting opinion appended thereto.

VI. The International Court of Justice's Determination of Breaches of Obligations under Provisional Measures of Protection

26. In its practice, the ICJ has come to determine, on a few occasions so far, breaches of obligations under provisional measures of protection it had ordered; it has done so at the end of the proceedings as to the merits of the corresponding cases. This has occurred, until the Judgment the Court has just delivered today, 16 December 2015, in the joined cases of *Certain Activities* and of the *Construction of a Road*, in its Judgments as to the merits in the three cases of *LaGrand* (of 27 June 2001), of *Armed Activities on the Territory of the Congo* (of 19 December 2005), and of the *Bosnian Genocide* (of 26 February 2007).

27. Earlier on, in the case of the *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)*, the ICJ stated that its Order on provisional measures of 15 December 1979 had been either "rejected" or "ignored" by the authorities of the respondent State (*Judgment, I.C.J. Reports 1980*, p. 35, para. 75 and p. 43, para. 93); the Court expressed its concern with the aggravation of the "tension between the two countries" (*ibid.*, p. 43, para. 93), but, in the *dispositif* of the Judgment, it did not expressly assert that the aforementioned Order on provisional measures had been breached. No consequences from non-compliance with its provisional measures were drawn by the Court.

28. The ICJ only started doing so in the course of the last 15 years, i.e., in the twenty-first century — although, in my view, nothing hindered it from doing so well before, in earlier cases. Thus, in its Judgment of 27 June 2001 in the *LaGrand* case *(Germany* v. *United States)*, the ICJ, after holding that its Order on provisional measures of 3 March 1999 had not been complied with (*I.C.J. Reports 2001*, p. 508, para. 115), stated, in resolutory point No. 5 of the *dispositif*, that the respondent State had

breached the obligation incumbent upon it under the aforementioned Order on provisional measures. Yet, once again the Court did not draw any consequences from the conduct in breach of its provisional measures.

29. Four years later, in its Judgment of 19 December 2005 in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, the ICJ, dwelling again on the matter, first recalled its finding that the respondent State was "responsible for acts in violation of international human rights law and international humanitarian law carried out by its military forces" in the territory of the Democratic Republic of the Congo (*I.C.J. Reports 2005*, p. 258, para. 264), committed in the period between the issue of its Order on provisional measures (of 1 July 2000) and the withdrawal of Ugandan troops in June 2003. Turning to its Order on provisional measures adopted half a decade earlier, the ICJ found that the respondent State had not complied with it *(ibid.)*, and reiterated its finding in resolutory point No. 7 of the *dispositif*.

30. Another case of determination by the ICJ of a breach of its Orders on provisional measures of protection was that of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* : the Court held so in its Judgment of 26 February 2007, while the Orders on provisional measures had been adopted 14 years earlier, on 8 April 1993 and 13 September 1993. They were intended to cease the atrocities that were already being perpetrated. The Court found, only in its Judgment of 2007 (*I.C.J. Reports 2007 (I)*, p. 231, para. 456), that the respondent State had failed to "take all measures within its power to prevent commission of the crime of genocide", as indicated in its Order of 8 April 1993 (*I.C.J. Reports 1993*, p. 24, para. 52.A (1)) and reaffirmed in its Order of 13 September 1993, nor did it comply with the measure of ensuring that "any (. . .) organizations and persons which may be subject to its (. . .) influence (. . .) do not commit any acts of genocide", as also indicated in its Order of 8 April 1993 (para. 52.A (2)) and reiterated in its Order of 13 September 1993[16].

31. Two years after the first Order (of 8 April 1993), the UN safe-area of Srebrenica collapsed, and the mass killings of July 1995 in Srebrenica occurred, in flagrant breach of the provisional measures ordered by the ICJ. In the meantime, the proceedings in the case before the ICJ prolonged in time: as to preliminary objections until 1996; as to counterclaims until 1997, and again until 2001; and as to the merits until 2007.

[16] Bosnia and Herzegovina promptly brought the matter before the UN Security Council. To have the Court's Orders enforced; the Security Council promptly adopted its resolution 819 (of 16 April 1993), which, after expressly invoking the ICJ's Order of 8 April 1993), ordered the immediate cessation of the armed attacks and several other measures to protect persons in Srebrenica and its surrounding areas.

Over these years, much criticism was expressed in expert writing that the manifest breaches of the ICJ's Orders of provisional measures of protection of 1993 *(supra)* passed for a long time without determination, and without any legal consequences.

32. As to the ICJ's Judgment on the merits of the aforementioned case of *Application of the Genocide Convention* (2007), the Court was requested by the applicant State to hold the respondent State to be under an obligation to provide "symbolic compensation" (*I.C.J. Reports 2007 (I)*, p. 231, para. 458) for the massacres at Srebrenica in July 1995. The Court, however, considered that, for the purposes of reparation, the respondent State's non-compliance with its Orders of 8 April 1993 and 13 September 1993 "is an aspect of, or merges with, its breaches of the substantive obligations of prevention and punishment laid upon it by the Convention" (*ibid.*, p. 236, para. 469). Thus, instead of ordering symbolic compensation, the Court deemed it fit to "include in the operative clause of the present Judgment, by way of satisfaction, a declaration that the Respondent has failed to comply with the Court's Orders indicating provisional measures" *(ibid.)*.

33. The ICJ then found, in resolutory point No. 7 of the *dispositif*, that the respondent State had "violated its obligations to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995". It took 14 years for the Court to determine the breach of its provisional measures of protection in the *cas d'espèce*. In my understanding, there was no need to wait such a long time to determine the breach of such measures; on the contrary, they should have been promptly determined by the ICJ, with all its legal consequences. This tragic case shows that we are still in the infancy of the development of the legal regime of provisional measures of protection in contemporary international law. A proper understanding of the *autonomous legal regime* of those measures may foster their development at conceptual level.

VII. A Plea for the Prompt Determination of Breaches of Provisional Measures of Protection: Some Reflections

34. In the *cas d'espèce*, the breaches of provisional measures have been determined by the Court within a reasonably short lapse of time, — unlike in the case of *Armed Activities on the Territory of the Congo* (half a decade later) and in the *Bosnian Genocide* case (almost one and a half decades later). In the *cas d'espèce*, the damages caused by the breaches of provisional measures have not been irreparable — unlike in the *LaGrand* case — and with their determination by the Court in the present Judgment their effects can be made to cease. This brings to the fore, in my

perception, an important point related to the autonomous legal regime of provisional measures of protection.

35. In effect, in my understanding, the determination of a breach of a provisional measure of protection is not — should not — be conditioned by the completion of subsequent proceedings as to the merits of the case at issue. The legal effects of a breach of a provisional measure of protection should in my view be promptly determined, with all its legal consequences. In this way, its anticipatory rationale would be better served. There is no room for raising here alleged difficulties as to evidence, as for the ordering of provisional measures of protection, and the determination of non-compliance with them, it suffices to rely on prima facie evidence *(commencement de preuve)*. And it could not be otherwise.

36. Furthermore, the rights that one seeks to protect under provisional measures are not necessarily the same as those vindicated on the merits, as shown in the case of the *Temple of Preah Vihear* (cf. *supra*). Likewise, the obligations (of prevention) are new or additional ones, in relation to those ensuing from the judgment on the merits. There is yet another point which I deem it fit to single out here, namely, contemporary international tribunals have, in my understanding, an inherent power or *faculté* to order provisional measures of protection, whenever needed, and to determine, *ex officio*, the occurrence of a breach of provisional measures, with its legal consequences. Having pointed this out, my concern here is now turned to a distinct, and very concrete point.

37. The fact that, in its practice, the ICJ has only indicated provisional measures *at the request* of a State party, in my view does not mean that it cannot order such measures *sponte sua*, *ex officio*. The ICJ Statute endows the Court with "the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party" (Art. 41 (1)). The Rules of Court provide for request by a party for the indication of provisional measures (Art. 73 (1)); yet they add that, irrespective of such request, the Court may indicate provisional measures that, in its view, "are in whole or in part other than those requested" (Art. 75 (2)).

38. For example, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the ICJ indicated, in its Order of 15 March 1996 (*I.C.J. Reports 1996 (I)*, p. 18, para. 20 and pp. 24-25, para. 49), provisional measures that were distinct from, and broader than, those requested by the applicant State[17]. It expressly stated, in that Order, that it was entitled to do so, that it had the power to indicate measures

[17] The Court then found, six years later, in its Judgment of 10 October 2002, that the applicant State had not established that there had been a breach by the respondent State (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 453, para. 322) of the provisional measures indicated in its Order of 15 March 1996.

"in whole or in part other than those requested/*totalement ou partiellement différentes de celles qui sont sollicitées*" (*I.C.J. Reports 1996 (I)*, p. 24, para. 48). Furthermore, the Rules of Court provide that "The Court may at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties" (Art. 75 (1)). The Rules of Court moreover set forth that it "may request information from the parties on any matter connected with the implementation of any provisional measures it has indicated" (Art. 78).

39. The Court, thus, is not conditioned by what a party, or the parties, request(s), nor — in my view — even by the existence of the request itself. Here, in the realm of provisional measures of protection, once again the constraints of voluntarist legal positivism are, in my view, overcome[18]. The Court is not limited to what the contending parties want (in the terms they express their wish), or so request. The Court is not an arbitral tribunal, it stands above the will of the contending parties. This is an important point that I have been making on successive occasions within the ICJ, in its work of international adjudication.

40. In effect, there have lately been cases lodged with it, where the ICJ has been called upon to reason beyond the inter-State dimension, not being limited by the contentions or interests of the litigating States: this is the point I deemed it fit to stress in my separate opinion in the Court's Judgment (merits) of 30 November 2010 in the case of *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)* (*I.C.J. Reports 2010 (II)*, p. 806, paras. 227-228). Earlier on, in the Court's Order (provisional measures) of 28 May 2009 in the case of *Questions Relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, I stated, in my dissenting opinion appended thereto, that the Court is not to relinquish its jurisdiction in respect of provisional measures of protection in face of what appears to be the professed intentions of the parties; on the contrary, the Court is to assume the role of guarantor of compliance with conventional obligations, beyond the professed intention or will of the parties (*I.C.J. Reports 2009*, p. 195, para. 88).

41. In the same line of thinking, in the ICJ's Judgment (preliminary objections) of 1 April 2011 in the case concerning the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation)*, I asserted, in my dissenting opinion appended thereto, that the ICJ cannot "keep on embarking on a literal or grammatical and static interpretation of the terms of compromissory clauses" enshrined in human rights treaties (such as the

[18] For my criticisms of the voluntarist conception of international law, cf. A. A. Cançado Trindade, "The Voluntarist Conception of International Law: A Re-Assessment", 59 *Revue de droit international de sciences diplomatiques et politiques*, Sottile (1981), pp. 201-240.

CERD Convention), "drawing 'preconditions' therefrom for the exercise of its jurisdiction, in an attitude remindful of traditional international arbitral practice" (*I.C.J. Reports 2011 (I)*, p. 320, para. 206). On the contrary, I added, "[w]hen human rights treaties are at stake, there is need, in my perception, to overcome the force of inertia, and to assert and develop the compulsory jurisdiction of the ICJ on the basis of the compromissory clauses contained in those treaties" *(ibid.)*.

42. The Court — may I reiterate — is not an arbitral tribunal, it stands above the will of the contending parties. It is not conditioned by requests or professed intentions of the contending parties. It has an inherent power or *faculté* to proceed promptly to the determination of a breach of provisional measures, in the interests of the sound administration of justice. And *recta ratio* guides the sound administration of justice *(la bonne administration de la justice)*. *Recta ratio* stands above the will. It guides international adjudication and secures its contribution to the rule of law *(prééminence du droit)* at international level.

43. The Court is entirely free to order the provisional measures that it considers necessary, so as to prevent the aggravation of the dispute or the occurrence of irreparable harm, even if the measures it decides to order are quite different from those requested by the contending parties. The ICJ has in fact done so, not surprisingly, also in relation to situations of armed conflicts; the Court has been faced, in such situations (surrounded by complexity), with the imperative of *protection* of human life. Thus, in its Order on provisional measures of protection of 1 July 2000, in the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, the ICJ, invoking Article 75 (2) of the Rules of Court, once again asserted its power to order measures that are "in whole or in part other than those requested/*totalement ou partiellement différentes de celles qui sont sollicitées*" (*I.C.J. Reports 2000*, p. 128, para. 43).

44. The Court, in my view, after examining the circumstances of the *cas d'espèce*, may proceed to order, *sponte sua*, provisional measures of protection. And it may, in my conception, proceed *motu proprio* — thus avoiding the aggravation of a situation — to determine *ex officio*, the occurrence of a breach of an Order of provisional measures of protection. Keeping in mind the preventive dimension in contemporary international law (cf. *supra*), and the need to prevent further irreparable harm, the Court does not have to wait until the completion of the proceedings as to the merits, especially if such proceedings are unreasonably prolonged, as, e.g., in the case of the *Bosnian Genocide* (cf. *supra*).

VIII. Supervision of Compliance with Provisional Measures of Protection

45. The fact that the ICJ has, so far, very seldom proceeded to the determination of a breach of provisional measures in the subsequent proceedings as to the merits of the respective cases, in my view does not mean

that it cannot do so promptly, by means of another Order on provisional measures. Furthermore, the Court has monitoring powers as to *compliance* with provisional measures. If any unforeseeable circumstance may arise, the ICJ is, in my understanding, endowed with inherent powers or *facultés* to take the decision that ensures compliance with the provisional measures it has ordered, and thus the safeguard of the rights at stake.

46. All the aforesaid enhances the preventive dimension of provisional measures of protection. These latter have experienced a remarkable development in recent years, in contemporary international law on the matter. Such measures now call for further development at conceptual level. They have an autonomous legal regime of their own, which encompasses supervision of compliance with them. The Court is endowed with monitoring powers to this effect. This is yet another element which comes to enforce the rule of law *(prééminence du droit)* at international level.

IX. Breach of Provisional Measures and Reparation for Damages

47. May I now turn to yet another relevant point pertaining to the autonomous legal regime of provisional measures of protection, namely, the legal consequences of the finding of a breach of such provisional measures. In addressing those consequences, the Court is likely to face the need to consider remedies, reparations in their distinct forms, and costs. This point has not passed unperceived in the present Judgment of the ICJ in the two joined cases of *Certain Activities* and of *Construction of a Road*. The Court has addressed reparations in the two joined cases[19].

48. Reparations are here contemplated in all their forms — namely, e.g., compensation, satisfaction, guarantee of non-repetition, among others. In the *cas d'espèce*, the *Certain Activities* case, the ICJ has determined the Respondent's duty of *compensation* for the material damage (Judgment, para. 142); it has further determined that, in the circumstances of the case, given its finding of a breach of provisional measures (by the excavation of the *caños* and the establishment of a military presence in the disputed territory), the declaration by the Court to this effect provides adequate *satisfaction* to the Applicant for the non-material damage (*ibid.*, para. 139), without the need to award costs (*ibid.*, para. 144).

49. The ICJ has found that it has thereby afforded "adequate satisfaction" (*ibid.*, para. 139) to the Applicant, by its declaration, in the *Certain Activities* case[20], of a breach of obligations ensuing from the Order of provisional measures of 8 March 2011. Furthermore, the ICJ indicated new provisional measures in its Order of 22 November 2013, so as to cease the effects of the harmful activities and to remedy that breach. In the joined case of *Construction of a Road*, the ICJ declined to award *com-*

[19] Paragraphs 137-144 and 224-228, respectively.
[20] Paragraphs 127 and 129, and resolutory point No. 3.

pensation (Judgment, para. 226), but determined — even if not here referring specifically to a breach of provisional measures — that its declaration of wrongful conduct for the Respondent's breach of the obligation to conduct an EIA provides adequate *satisfaction* to the Applicant (*ibid.*, para. 224).

50. The grant of this form of reparation (satisfaction) in the two joined cases is necessary and reassuring. The fact that the ICJ did not establish a breach of provisional measures nor did it indicate new provisional measures *already* in its Order of 16 July 2013 (as it should, for the reasons explained in my dissenting opinion appended thereto), and only did so in its subsequent Order of 22 November 2013, gives weight to its decision not to award costs[21]. After all, the prolongation of the proceedings (as to provisional measures)[22] was due to the hesitation of the Court itself. Accordingly, the relevant issue here is, thus, reparation (rather than costs of hearings) for breach of provisional measures of protection.

51. In effect, breach and duty of reparation come together. As I pointed out in my separate opinion in *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment*, the duty of reparation has deep historical roots, going back to the origins of the law of nations, and marking presence in the legacy of the "founding fathers" of our discipline (*I.C.J. Reports 2012 (I)*, pp. 352-355, paras. 14-21). The duty of reparation is widely acknowledged as one of general or customary international law (*ibid.*, p. 356, para. 25). I stressed that

> "The duty of full reparation is the prompt and indispensable complement of an internationally wrongful act, so as to cease all the consequences ensuing therefrom, and to secure respect for the international legal order.
>
> . . . . . .
>
> The breach of international law and the ensuing compliance with the duty of reparation for injuries are two sides of the same coin; they form an *indissoluble whole*.
>
> . . . . . .
>
> [T]he *reparatio* (from the Latin *reparare*, 'to dispose again') ceases all the effects of the breaches of international law (. . .) at issue, and

[21] Paragraph 144 (*Certain Activities* case) of the present Judgment.

[22] After the hearings of 11-13 January 2011 (following Costa Rica's initial request for the indication of provisional measures in the *Certain Activities* case), those of 14-17 October 2013 (following Costa Rica's further request for the indication of provisional measures in the *Certain Activities* case), and those of 5-8 November 2013 (following Nicaragua's request for the indication of provisional measures in the *Construction of a Road* case).

> provides satisfaction (as a form of reparation) to the victims; by means of the reparations, the law re-establishes the legal order broken by those violations (. . .).
>
> One has to be aware that it has become commonplace in legal circles — as is the conventional wisdom of the legal profession — to repeat that the duty of reparation, conforming a 'secondary obligation', comes after the breach of international law. This is not my conception; when everyone seems to be thinking alike, no one is actually thinking at all. In my own conception, breach and reparation go together, conforming an indissoluble whole: the latter is the indispensable consequence or complement of the former. The duty of reparation is a *fundamental* obligation (. . .). The indissoluble whole that violation and reparation conform admits no disruption (. . .), so as to evade the indispensable consequence of the international breaches incurred into: the reparations due to the victims. (*I.C.J. Reports 2012 (I)*, p. 359, para. 32, p. 360, para. 35 and p. 362, paras. 39-40.)

52. The interrelationship between breach and duty of reparation marks presence also in the realm of the autonomous legal regime of provisional measures of protection. A breach of a provisional measure promptly generates the duty to provide reparation for it. It is important, for provisional measures to achieve their plenitude (within their legal regime), to remain attentive to reparations — in their distinct forms — for their breach. Reparations (to a greater extent than costs) for the autonomous breach of provisional measures of protection are a key element for the consolidation of the autonomous legal regime of provisional measures of protection.

X. Due Diligence, and the Interrelatedness between the Principle of Prevention and the Precautionary Principle

53. Now that I approach the conclusion of the present separate opinion, may I come back to its point of departure, namely, the relevance of the preventive dimension in contemporary international law. Such preventive dimension marks presence in the Judgment the ICJ has just adopted, in the two joined cases of *Certain Activities Carried Out by Nicaragua in the Border Area* and of *Construction of a Road in Costa Rica along the San Juan River*. It is significant that, in the course of the proceedings in the present joined cases, the duty of *due diligence* has been invoked, just as it was in an earlier Latin American case, that of the *Pulp Mills on the River Uruguay* (2010), opposing Argentina to Uruguay.

54. In respect of the *cas d'espèce* (and specifically of the *Construction of a Road* case), it has been asserted that the populations of both countries,

Nicaragua and Costa Rica, "deserve to benefit from the highest possible standards of environmental protection", and that the States of Central America have adopted and applied environmental and related laws to secure "high standards of protection"[23]. Due diligence has thus been duly acknowledged, once again, in a Latin American case before the ICJ. There are other related aspects in the preventive dimension. The duty to conduct an EIA, for example, as determined by the Court in the present Judgment, in the case of the *Construction of a Road* (paras. 153-162), brings to the fore, in my perception, the interrelatedness between the *principle of prevention* and the *precautionary principle*.

55. I had the occasion to dwell upon this particular point in the other aforementioned Latin American case, of half a decade ago, concerning *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*. In my separate opinion appended to the ICJ's Judgment of 20 April 2010 in the *Pulp Mills* case, I pondered that, while the principle of prevention assumes that risks can be objectively assessed so as to avoid damage, the precautionary principle assesses risks in face of uncertainties, taking into account the vulnerability of human beings and the environment, and the possibility of irreversible harm (*I.C.J. Reports 2010 (I)*, pp. 162-163, paras. 72-73).

56. Unlike the positivist belief in the certainties of scientific knowledge — I proceeded — the precautionary principle is geared to the duty of *due diligence*, in face of scientific uncertainties[24]; precaution is thus, nowadays, more than ever, needed (*ibid.*, p. 166, para. 83 and pp. 168-169, para. 89). It is not surprising that some environmental law conventions give expression to both the principle of prevention and the precautionary principle, acknowledging the link between them, providing the foundation of the duty to conduct an EIA (*ibid.*, pp. 170-171, paras. 94-96), as upheld by the ICJ in the joined case of the *Construction of a Road*.

57. In the present Judgment, the Court, recalling its earlier decision in the *Pulp Mills* case, referred in a reiterated way to the requirement of due diligence in order to prevent significant transboundary environmental harm (Judgment, para. 104). It focused on the undertaking of an EIA in the wider realm of general international law (*ibid.*, paras. 104-105). And it then stated that

> "If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obli-

[23] CR 2015/15, of 29 April 2015, pp. 44-45, paras. 26-27 (statement of counsel of Nicaragua).

[24] For a recent reassessment of the precautionary principle, cf. A. A. Cançado Trindade, "Principle 15 — Precaution", *The Rio Declaration on Environment and Development — A Commentary* (ed. J. E. Viñuales), Oxford University Press, 2015, pp. 403-428.

gation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk." (Judgment, para. 104.)

XI. The Path towards the Progressive Development of Provisional Measures of Protection

58. Having pointed that out, the main lesson learned from the adjudication of the *cas d'espèce*, that I deem it fit to leave on the records, in the present separate opinion, under the umbrella of the preventive dimension in contemporary international law, as developed in the preceding paragraphs, pertains to what I conceptualize as the conformation of an *autonomous legal regime* of provisional measures of protection, with all its elements and implications, as related to the Court's finding in the two joined cases.

59. Thus, in my dissenting opinion in the ICJ's Order of 16 July 2013 in *Certain Activities* and *Construction of a Road*, wherein the Court decided not to indicate new provisional measures, nor to modify the provisional measures indicated in its previous Order of 8 March 2011, I asserted, and deem it fit here to reiterate:

> "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.
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> . . . . . .
>
> 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.
>
> . . . . . .

> [T]he matter before the Court calls for a more pro-active posture on its part, 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." (*I.C.J. Reports 2013*, p. 268, para. 72 and pp. 269-270, paras. 75-76.)

60. Provisional measures of protection have grown in importance, and have expanded and have much developed in recent years, particularly in the framework of regimes of protection (such as those, e.g., of the human person and of the environment). Provisional measures of protection have become, more than precautionary, truly *tutelary*, enlarging the scope of protection. The autonomous legal regime of provisional measures of protection, in conclusion, is conformed, in my conception, by the juridical nature of such measures, the rights at issue and the obligations derived therefrom, their legal effects, and the duty of compliance with them, — all running parallel to the proceedings as to the merits of the *cas d'espèce*. It also encompasses the legal consequences ensuing therefrom.

61. The rights protected by provisional measures of protection are not the same as those pertaining to the merits of the case at issue. The obligations ensuing from provisional measures of protection are distinct from, and additional to, the ones that may derive later from the Court's subsequent decision as to the merits. In case of a breach of a provisional measure of protection, the notion of victim of a harm emerges also in the framework of such provisional measures; irreparable damages can, by that breach, occur in the present context of prevention.

62. In order to avoid or prevent those damages, provisional measures of protection set forth obligations of their own[25], distinct from the obligations emanating later from the respective Judgments as to the merits of the corresponding cases[26]. As I pondered, one decade ago, in another international jurisdiction, an international tribunal has the inherent power or *faculté* to supervise *motu proprio* the compliance or otherwise, on the part of the State concerned, with the provisional measures of protection it ordered; this is "even more necessary and pressing in a situation of extreme gravity and urgency", so as to prevent or avoid irreparable damage[27].

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[25] Cf., in this sense, IACtHR, case of *The Barrios Family* v. *Venezuela*, Order of 29 June 2005, concurring opinion of Judge Cançado Trindade, paras. 5-6.

[26] Cf., in this sense, IACtHR, case of the *Communities of Jiguamiandó and Curbaradó*, concerning Colombia, Order of 7 February 2006, concurring opinion of Judge Cançado Trindade, paras. 5-6.

[27] Cf., in this sense, IACtHR, case of *The Barrios Family* v. *Venezuela*, Order of 22 September 2005, concurring opinion of Judge Cançado Trindade, para. 6.

63. In such circumstances, an international tribunal cannot abstain from exercising its inherent power or *faculté* of supervision of compliance with its own Orders, in the interests of the sound administration of justice *(la bonne administration de la justice)*. Non-compliance with provisional measures of protection amounts to a breach of international obligations deriving from such measures. This being so, the determination of their breach, in my understanding, does not need to wait for the conclusion of the proceedings as to the merits of the case at issue, particularly if such proceedings are unduly prolonged.

64. Furthermore, the determination of their breach is not conditioned by the existence of a request to this effect by the State concerned; the Court, in my view, is fully entitled to proceed promptly to the determination of their breach *sponte sua*, *ex officio*, in the interests of the sound administration of justice *(la bonne administration de la justice)*. The determination of a breach of provisional measures entails legal consequences; this paves the way for the granting of remedies, of distinct forms of reparation, and eventually costs.

65. In the present Judgment of the ICJ in the two joined cases of *Certain Activities* and of *Construction of a Road*, the ICJ was attentive to this point, having found that, by its own determination of a breach of obligations ensuing from the Order of provisional measures of 8 March 2011 — in the *Certain Activities* case[28] — it has afforded "adequate satisfaction" to the applicant State (para. 139). For all the aforesaid, it is high time to refine, at conceptual level, the autonomous legal regime of provisional measures of protection.

66. Such refinement can clarify further this domain of international law marked by prevention and the duty of due diligence, and can thus foster the progressive development of those measures in the contemporary law of nations, faithful to their preventive dimension, to the benefit of all the *justiciables*. The progressive development of provisional measures of protection is a domain in respect of which international case law seems to be preceding legal doctrine, and it is a source of satisfaction to me to endeavour to contribute to that.

XII. Epilogue: A Recapitulation

67. Provisional measures of protection provide, as we can see, a fertile ground for reflection at the juridico-epistemological level. Time and law are here ineluctably joined together, as in other domains of international law. Provisional measures underline the preventive dimension, growing in clarity, in contemporary international law. Provisional measures have undergone a significant evolution, but there remains a long way to go for them to reach their plenitude. In order to endeavour to pave this way,

[28] Paragraphs 127 and 129, and resolutory point No. 3.

may I, last but not least, proceed to a brief recapitulation of the main points I deemed it fit to make, particularly in respect of provisional measures of protection, in the course of the present separate opinion.

68. *Primus*: The preventive dimension in contemporary international law is clearly manifested in the formation of what I conceive as the autonomous legal regime of provisional measures of protection. *Secundus*: Such preventive dimension grows in importance in the framework of regimes of protection (e.g., of the human person and of the environment), bringing us closer to general principles of law. *Tertius*: Provisional measures, historically emerged in comparative domestic law as a precautionary legal action, had their scope enlarged in international jurisdiction, becoming endowed with a tutelary — rather than only precautionary — character, as a true jurisdictional guarantee of a preventive nature. *Quartus*: Prevention and precaution underlie provisional measures, anticipatory in nature, so as to avoid the aggravation of the dispute and irreparable damage.

69. *Quintus*: In the framework of their autonomous legal regime, provisional measures guarantee rights which are not necessarily the same as those invoked in the proceedings as to the merits. *Sextus*: In the framework of their autonomous legal regime, provisional measures generate *per se* obligations, independently from those ensuing from the Court's subsequent judgment on the merits or on reparations. *Septimus*: The Court is fully entitled to order provisional measures of protection, and to order *motu proprio*, any measure which it deems necessary.

70. *Octavus*: The Court is fully entitled to order *motu proprio* provisional measures which are totally or partially different from those requested by the contending parties. *Nonus*: The Court is fully entitled to order further provisional measures *motu proprio*; it does not need to wait for a request by a party to do so. *Decimus*: The Court has inherent powers or *facultés* to supervise *ex officio* compliance with provisional measures of protection and thus to enhance their preventive dimension.

71. *Undecimus*: Non-compliance amounts to an autonomous breach of provisional measures, irrespective of what will later be decided (any other breach) by the Court as to the merits. *Duodecimus*: A breach of a provisional measure of protection engages by itself State responsibility, being additional to any other breach which may come later to be determined by the Court as to the merits. *Tertius decimus*: The notion of victim marks presence also in the realm of provisional measures of protection.

72. *Quartus decimus*: The determination by the Court of a breach of a provisional measure should not be conditioned by the completion of subsequent proceedings as to the merits; the legal effects of such breach should be promptly determined by the Court, in the interests of the sound administration of justice *(la bonne administration de la justice)*. *Quintus decimus*: Contemporary international tribunals have an inherent power

or *faculté* to determine promptly such breach, with all its legal consequences (remedies, satisfaction as a form of reparation, and eventually costs). *Sextus decimus*: The duty to provide reparation (in its distinct forms) is promptly generated by the breach of provisional measures of protection.

73. *Septimus decimus*: The interrelationship between breach and duty of reparation marks presence also in the realm of the autonomous legal regime of provisional measures of protection. *Duodevicesimus*: The autonomous legal regime of their own, with all its elements (cf. *supra*), contributes to the prevalence of the rule of law *(prééminence du droit)* at international level. *Undevicesimus*: Provisional measures of protection have much evolved in recent decades, but there remains a long way to go so as to reach their plenitude. *Vicesimus*: Contemporary international tribunals are to refine the autonomous legal regime of provisional measures of protection, and to foster their progressive development, to the benefit of all the *justiciables*.

(Signed) Antônio Augusto CANÇADO TRINDADE.