INTERNATIONAL COURT OF JUSTICE

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Press Release

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Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)

Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)

The Court finds that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to modify the measures indicated in the Order of 8 March 2011 and reaffirms those measures

THE HAGUE, 25 July 2013. By an Order of 16 July 2013, the International Court of Justice (ICJ), the principal judicial organ of the United Nations, ruled on the requests submitted by Costa Rica and Nicaragua, respectively, for the modification of the provisional measures indicated by the Court on 8 March 2011 in the case concerning Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), (hereinafter "the Costa Rica v. Nicaragua case").

In its Order of 16 July 2013, the Court found, by fifteen votes to two, "that the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power to modify the measures indicated in the Order of 8 March 2011". It "[r]eaffirm[ed]", unanimously, the provisional measures indicated in that Order, in particular the requirement that the Parties "shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve".

Reasoning of the Court

The Court first recalls that, by its Order of 8 March 2011 made in the Costa Rica v. Nicaragua case, it had indicated, amongst other things, that "[e]ach Party shall refrain from sending to, or maintaining in the disputed territory, including the caño, any personnel, whether civilian, police or security" and that "Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the caño, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated" (para. 3).

In its Order of 16 July 2013, the Court sets out the modifications requested by Costa Rica and by Nicaragua, and notes that each of the Parties asked it to reject the other's request (paras. 12 to 15).

The Court further recalls that, in order to rule on those requests, it must determine whether the conditions set forth in Article 76, paragraph 1, of the Rules of Court have been fulfilled. That paragraph reads as follows: "At the request of a party the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification." (Para. 16.)

Costa Rica's request

In the first place, Costa Rica complains of "Nicaragua's sending to the disputed area . . . and maintaining thereon large numbers of persons" and, secondly, of the "activities undertaken by those persons affecting that territory and its ecology". In Costa Rica's view, these actions, which have occurred since the Court decided to indicate provisional measures, create a new situation necessitating the modification of the Order of 8 March 2011, in the form of further provisional measures, in particular so as to prevent the presence of any individual in the disputed territory other than civilian personnel sent by Costa Rica and charged with the protection of the environment (para. 19).

Nicaragua maintains that the persons referred to by Costa Rica are not part of the Government of Nicaragua, but young people, members of a private movement (the Guardabarranco Environmental Movement), who are present in the said territory in order to undertake environmental conservation activities (para. 24).

Decision of the Court on Costa Rica's request

In its Order of 16 July 2013, the Court regards it as having been established that, since the rendering of its Order of 8 March 2011, organized groups of persons, whose presence was not contemplated when it made its decision to indicate provisional measures, are regularly staying in the disputed territory. It considers that this fact does indeed constitute, in the present case, a change in the situation within the meaning of Article 76 of the Rules of Court (para. 25).

The Court then examines whether that change in the situation is such as to justify the modification of the Order of 2011. It states that such a modification is subject to the same general conditions as those governing the indication of provisional measures (Article 41 of the Statute of the Court). The Court recalls in this respect that it may only indicate provisional measures if irreparable prejudice may be caused to rights which are the subject of dispute in judicial proceedings and that that power must be exercised only if there is urgency, in the sense that there is a real and imminent risk that such prejudice may be caused before the Court has given its final decision (para. 30).

After setting out the arguments of the Parties concerning these various points, the Court considers "that, as matters stand, it has not been demonstrated sufficiently that there is a risk of irreparable prejudice to the rights claimed by Costa Rica". It states that "[t]he facts put forward by Costa Rica, whether the presence of Nicaraguan nationals or the activities which they are carrying out in the disputed territory, do not appear, in the present circumstances as they are known to the Court, to be such as to cause irreparable harm to 'its right to sovereignty, to territorial integrity, and to non-interference with its lands'". Nor, the Court continues, "does the evidence included in the case file establish the existence of a proven risk of irreparable damage to the environment". Moreover, the Court "does not see, in the facts as they have been reported to it, the evidence of urgency that would justify the indication of further provisional measures" (paras. 32-35).

Consequently, the Court considers that, "despite the change that has occurred in the situation, the conditions have not been fulfilled for it to modify the measures that it indicated in its Order of 8 March 2011" (para. 36).

Nicaragua's request

Considering that Costa Rica's request is "unsustainable", Nicaragua submits its own request for the modification or adaptation of the Order of 8 March 2011. It considers that there has been a change in the factual and legal situations in question as a result of, first, the construction of a 160-km long road along the right bank of the San Juan River and, second, the joinder, by the Court, of the proceedings in the two cases. Consequently, Nicaragua asks the Court to modify its Order of 8 March 2011, in particular to allow both Parties (and not only Costa Rica) to dispatch civilian personnel charged with the protection of the environment to the disputed territory (para. 21).

For its part, Costa Rica asserts that no part of the road in question is in the disputed area and considers that the joinder of the proceedings in the case concerning the Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), introduced by Nicaragua on 21 December 2011 (hereinafter "the Nicaragua v. Costa Rica case"), "does not mean that there is now one proceeding which should be the subject of joint orders". Consequently, it asks the Court to reject Nicaragua's request (para. 22).

Decision of the Court on Nicaragua's request

After examining Nicaragua's first argument, the Court first recalls that, in the Nicaragua v. Costa Rica case, on 19 December 2012, Nicaragua had asked the Court to examine proprio motu whether the circumstances of the case required the indication of provisional measures, and that the Court was of the view that, in March 2013, this was not the case. In addition, the Court finds that the construction of the road, which is at the centre of the Nicaragua v. Costa Rica case, does not have any bearing on the situation addressed in the Order made on 8 March 2011 in the Costa Rica v. Nicaragua case (paras. 26-27).

With regard to Nicaragua's second argument, the Court considers that the joinder of proceedings in the two cases has also not brought about a change in the situation. It explains that that joinder is a procedural step which does not have the effect of rendering applicable ipso facto, to the facts underlying the Nicaragua v. Costa Rica case, the measures prescribed with respect to a specific and separate situation in the first case (para. 28).

The Court therefore considers that Nicaragua may not rely upon a change in the situation within the meaning of Article 76 of the Rules of Court in order to found its request for the modification of the Order of 8 March 2011 (para. 29).

Conclusion of the Order

After examining the requests of the Parties and finding that it could not accede to them, the Court notes nevertheless that "the presence of organized groups of Nicaraguan nationals in the disputed area carries the risk of incidents which might aggravate the present dispute". It adds that that situation is "exacerbated by the limited size of the area and the numbers of Nicaraguan nationals who are regularly present there", and wishes to express "its concerns in this regard" (para. 37).

The Court thus considers it necessary to reaffirm the measures that it indicated in its Order of 8 March 2011, in particular the requirement that the Parties "shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve". It notes that "the actions thus referred to may consist of either acts or omissions". It reminds the Parties once again that "these measures have binding effect . . . and therefore create international legal obligations which each [of them] is required to comply with" (para. 38).

Finally, the Court underlines that its Order of 16 July 2013 is without prejudice as to any finding on the merits concerning the Parties' compliance with its Order of 8 March 2011 (para. 39).

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Composition of the Court

The Court was composed as follows: President Tomka; Vice-President Sepúlveda-Amor; Judges Owada, Abraham, Keith, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, Xue, Donoghue, Gaja, Sebutinde, Bhandari; Judges ad hoc Guillaume, Dugard; Registrar Couvreur.

Judge Cançado Trindade and Judge ad hoc Dugard have appended their dissenting opinions to the Order of the Court. A summary of those opinions is annexed to this press release.

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Full text of the Order and history of the proceedings

The full text of the Order is available on the Court's website in the documentation for each case, under the heading "Contentious cases".

It is recalled that the proceedings in the Costa Rica v. Nicaragua case and in the Nicaragua v. Costa Rica case were joined by the Court on 17 April 2013 "in conformity with the principle of the sound administration of justice and with the need for judicial economy". The history of those proceedings can be found in paragraphs 1 to 11 of the Order of 16 July 2013.

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The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. It was established by the United Nations Charter in June 1945 and began its activities in April 1946. The seat of the Court is at the Peace Palace in The Hague (Netherlands). Of the six principal organs of the United Nations, it is the only one not located in New York. The Court has a twofold role: first, to settle, in accordance with international law, legal disputes submitted to it by States (its judgments have binding force and are without appeal for the parties concerned); and, second, to give advisory opinions on legal questions referred to it by duly authorized United Nations organs and agencies of the system. The Court is composed of 15 judges elected for a nine-year term by the General Assembly and the Security Council of the United Nations. Independent of the United Nations Secretariat, it is assisted by a Registry, its own international secretariat, whose activities are both judicial and diplomatic, as well as administrative. The official languages of the Court are French and English. Also known as the "World Court", it is the only court of a universal character with general jurisdiction.

The ICJ, a court open only to States for contentious proceedings, and to certain organs and institutions of the United Nations system for advisory proceedings, should not be confused with the other — mostly criminal — judicial institutions based in The Hague and adjacent areas, such as the

International Criminal Tribunal for the former Yugoslavia (ICTY, an ad hoc court created by the Security Council), the International Criminal Court (ICC, the first permanent international criminal court, established by treaty, which does not belong to the United Nations system), the Special Tribunal for Lebanon (STL, an independent judicial body composed of Lebanese and international judges, which is not a United Nations tribunal and does not form part of the Lebanese judicial system), or the Permanent Court of Arbitration (PCA, an independent institution which assists in the establishment of arbitral tribunals and facilitates their work, in accordance with the Hague Convention of 1899).

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Dissenting opinion of Judge Cançado Trindade

1. In his Dissenting Opinion, composed of 12 parts, Judge Cançado Trindade states that he cannot concur with the decision taken by the majority of the Court (first resolutory point) not to indicate new provisional measures in the cas d'espèce, as, in his perception, the Court majority's reasoning and decision "suffer from an ineluctable incongruence": having admitted that there is a change in the situation, it extracts no consequence therefrom, as in its view "the conditions" had "not been fulfilled" for it to modify the measures it indicated in its previous Order of 08.03.2011. In limiting itself to simply reaffirming its previous provisional measures, yet it expresses its "concerns" at the new situation created in the disputed area, with the presence therein no longer of personnel (whether civilian, police or security), but rather of "organized groups" of individuals, or any "private individuals".

2. Judge Cançado Trindade´s position is, a contrario sensu, that the changing circumstances surrounding the present cases (joined), opposing Costa Rica to Nicaragua and vice-versa, concerning, respectively, Certain Activities Carried out by Nicaragua in the Border Area, and the Construction of a Road in Costa Rica along the San Juan River, require from the ICJ, in the light of the relevant provisions of its interna corporis (Article 41 of the Statute and Article 76(1) of the Rules of Court), the exercise of its powers to indicate new provisional measures in order to face the new situation, which is one of urgency and of probability of irreparable harm, in the form of bodily injury or death of the persons staying in the disputed area.

3. He thus feels bound, and cares, to leave on the records the foundations of his own personal position thereon. His reflections, developed in the present Dissenting Opinion, pertain — as he indicates in part I — to considerations as to the facts and as to the law. He reviews the concomitant new requests of additional provisional measures of protection on the part of Costa Rica as well as Nicaragua, and the position taken by them, in their respective requests, as to the purported expansion of provisional measures of protection (part II). After reviewing the three technical missions in loco pursuant to the 1971 Ramsar Convention (part III), Judge Cançado Trindade considers the requisites of urgency, and risk or probability of harm (in the form of bodily injury or death, of the persons staying in the disputed area — part V), before proceeding to a general assessment of the requests of Costa Rica (part IV) and of Nicaragua (part VI).

4. The joinder of proceedings in the two aforementioned 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 does not amount to a change of the situation, for the purposes of provisional measures; be that as it may, the relevant questions raised by Nicaragua are bound to be dealt with by the ICJ in the merits phase of the latter case (para. 37). There is, however, — he proceeds, — a change in the situation (part VII) in respect of the Court's Order of 08.03.2011, in that provisional measures at that time were keeping in mind the presence in the disputed area of "personnel" (whether civilian, security of police), whereas now the presence therein is of "organized groups" of individuals (Nicaraguan nationals). This amounts to a new situation, endowed with urgency, in face of the probability of incidents causing "irremediable harm in the form of bodily injury or death" (paras. 30-31), — to recall the language of paragraph 75 of the Court's Order of 08.03.2011. The Court, thus, should, — in his understanding, — have ordered new provisional measures of protection (para. 33).

5. Judge Cançado Trindade then turns his attention to the aspects of the matter as to the law, namely: a) the effects of provisional measures of protection beyond the strict territorialist outlook; b) the beneficiaries of provisional measures of protection, beyond the traditional inter-State dimension; and c) the effects of provisional measures of protection beyond the traditional inter-State dimension. As to the first of these three points (the effects of provisional measures of protection beyond the strict territorialist outlook), he ponders that the factual context before the ICJ

"takes us beyond the traditional outlook of State territorial sovereignty" (part VIII). He adds that the concerns expressed before the ICJ encompass

> "living conditions of people in their natural habitat, and the required environmental protection. International case-law on the matter (of distinct international tribunals) has so far sought to clarify the juridical nature of provisional measures, stressing its essentially preventive character. (...) Whenever ordered provisional measures protect rights of individuals, they appear endowed with a character, more than precautionary, truly tutelary, besides preserving the parties' (States') rights at stake" (para. 38).

6. Judge Cançado Trindade recalls that the circumstances of certain cases before the ICJ have led this latter, in its decisions on provisional measures, to shift its attention on to the protection of people in territory (e.g., the case of the Frontier Dispute, Burkina Faso versus Mali, 1986; the case of the Land and Maritime Boundary, Cameroon versus Nigeria, 1996; the case of Armed Activities on the Territory of the Congo, D.R. Congo versus Uganda, 2000; the case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination, Georgia versus Russia, 2008 — cf. infra). In those decisions, among others, — he stresses, — the ICJ became attentive also to the fate of persons, — thus moving beyond the strict territorialist outlook (paras. 39-40).

7. He further recalls that, lately, the ICJ has again moved its reasoning beyond the strict territorialist approach in its recent Order of the Court of provisional measures of protection (of 18.07.2011) in the case of the Temple of Preah Vihear (Cambodia versus Thailand). International law — he continues — "in a way endeavours to be anticipatory in the regulation of social facts, so as to avoid disorder and chaos, as well as irreparable harm"; we are here before the raison d'être of provisional measures of protection, i.e., to prevent and avoid irreparable harm in situations of gravity and urgency. Endowed with a notorious preventive character, they are anticipatory in nature, looking forward in time; they thus disclose the preventive dimension of the safeguard of rights (para. 41).

8. Judge Cançado Trindade next recalls that, in his Separate Opinion in the Court's recent Order in the case of the Temple of Preah Vihear, he has sustained that there is epistemologically no impossibility or inadequacy for provisional measures, of the kind of the ones indicated in that Order, to extend protection — as they should — also to human life, as well as to cultural and spiritual world heritage. In fact, the reassuring effects of the provisional measures indicated in that recent Order of the ICJ have been precisely that they have extended protection not only to the territorial zone at issue, but also to the life and personal integrity of human beings who live or happen to be in that zone or near it, as well as to the Temple of Preah Vihear itself, situated in the aforementioned zone, and all that the Temple represents (para. 42). That Court's Order has thus brought people and territory together, since, in the warning of Judge Cançado Trindade,

> "[n]ot everything can be subsumed under territorial sovereignty. The fundamental human right to life is not at all subsumed under State sovereignty. [...] The Court needs to adjust its conceptual framework and its language to the new needs of protection, when it decides to indicate or order the Provisional Measures requested from it." (para. 43).

9. Moving to the next point of his analysis (namely, the beneficiaries of provisional measures of protection, beyond the traditional inter-State dimension — part IX), he observes that, although in the international litigation before the ICJ, only States, as contending parties, can request provisional measures, yet, in recent years, in successive cases, the ultimate beneficiaries were meant to be the individuals concerned, — and to that end the requesting States advanced their arguments in order to obtain the Court's Orders of provisional measures of protection, in distinct contexts (para. 44).

10. He refers, as examples, to the Order of 15.12.1979, in the Hostages case (United States versus Iran); the Order of 10.05.1984, in the Nicaragua versus United States case; the Order of 10.01.1986 in the Frontier Dispute case (Burkina Faso versus Mali**)**; the Order of 15.03.1996 in the case of the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon versus Nigeria); the Order of 01.07.2000, case of Armed Activities on the Territory of the Congo; the Order of 08.04.1993 in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina versus Yugoslavia); the Order of 15.10.2008 in the case concerning the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia versus Russia) (paras. 44-48).

11. Judge Cançado Trindade points out that, along the last three decades, the ICJ has gradually overcome the strictly inter-State outlook in the acknowledgement of the rights to be preserved by means of its Orders of provisional measures of protection. And he adds that

> "Nostalgics of the past, clung to their own dogmatism, can hardly deny that, nowadays, States litigating before this Court, despite its inter-State contentious procedure, have conceded that they have no longer the monopoly of the rights to be preserved, and, much to their credit, they recognize so, in pleading before this Court on behalf also of individuals, their nationals and others, or even in a larger framework, its inhabitants.
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> Facts tend to come before the norms, requiring of these latter the aptitude to cover new situations they are meant to regulate, with due attention to superior values. Before this Court, States keep on holding the monopoly of jus standi, as well as locus standi in judicio, in so far as requests for provisional measures are concerned, but this has not proved incompatible with the preservation of the rights of the human person, together with those of States. The ultimate beneficiaries of the rights to be thereby preserved have been, not seldom and ultimately, human beings, alongside the States wherein they live. Provisional measures indicated in successive Orders of the ICJ have transcended the artificial inter-State dimension of the past, and have come to preserve also rights whose ultimate subjects (titulaires) are human beings" (paras. 49-50).

12. Turning to the remaining one of his three points (namely, the effects of provisional measures of protection beyond the traditional inter-State dimension), Judge Cançado Trindade recalls that, in the case concerning Questions Relating to the Obligation to Prosecute or to Extradite (Order of 28.05.2009), wherein the ICJ decided not to indicate provisional measures, he warned, in his extensive Dissenting Opinion, that the basic right at issue pertained to the realization of justice, which assumed a central place in the case, one of a paramount importance, deserving of particular attention. The crucial factor was, — as he stressed in his Dissenting Opinion, — the endurance by the victims of an ungrateful two-decade search for justice, in vain until now, for the reported atrocities of the Habré regime in Chad (para. 51).

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

14. In the cas d'espèce before the Court, — he adds, — the new provisional measures are requested not only in respect of agents of the public power (personnel), but also in respect of individuals (simples particuliers), in order to avoid "harm in the form of bodily injury or death",

well beyond the traditional inter-State dimension (para. 54). Judge Cançado Trindade then concludes on this point that

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

15. Judge Cançado Trindade then focuses his reflections on the proper exercise of the international judicial function in the present domain, and moves on to his rebuttal of so-called "judicial self-restraint", or l'art de ne rien faire (part XI). He stresses that the present Order of the ICJ, — on requests for provisional measures in the cases concerning Certain Activities Carried out by Nicaragua in the Border Area and the Construction of a Road in Costa Rica along the San Juan River, — suffers from "a stark incongruence", as the Court concludes (in respect of Costa Rica's request) that a change in the situation has occurred, as "organized groups of persons", — whose presence was not contemplated when it issued its previous decision to indicate provisional measures, — are now "regularly staying" in the disputed area, yet the Court extracts no consequence therefrom (para. 57).

16. The Court limits itself to say that, despite that change in the situation, in its view the conditions "have not been fulfilled" for it to modify the measures that it indicated in its previous Order of 08.03.2011. In Judge Cançado Trindade's perception, this conclusion simply begs the question. Worse still, as the Court's majority admits in paragraph 36 of the present Order that there indeed is a risk of incidents in the disputed area, and that this new situation "is exacerbated" by the "limited size" of the area and the presence therein of "numbers of Nicaraguan nationals". Thus, contrary to the Court's majority, he sustains that the new situation created in the disputed area clearly calls for new provisional measures, in order to prevent or avoid irreparable harm to the persons concerned and to the environment. The new provisional measures called for by Judge Cançado Trindade would make it clear that each Party should refrain from sending to, or maintaining in, the disputed area, including the caño, not only any personnel (whether civilian, police or security), but also "organized groups" of individuals, or any "private individuals".

17. As a matter of fact, — he adds, — this is not the first time that the Court discloses its unjustified "judicial self-restraint" in respect of provisional measures of protection, even when faced with the presence of the prerequisites of urgency and the probability of irreparable harm. Four years ago, it did so in its Order of 28.05.2009 in the case concerning the Obligation to Prosecute or Extradite (Belgium versus Senegal), wherein it refrained from ordering or indicating the requested provisional measures of protection. Judge Cançado Trindade recalls that, on the occasion, he appended an extensive Dissenting Opinion (paragraphs 1-105) to that Order, seeking to preserve the integrity of the corpus juris of the 1984 U.N. Convention against Torture. Shortly after the Court's Order of 28.05.2009 wherein the ICJ found that the circumstances of the case were, in its view, not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures, there followed a succession of uncertainties, amidst the "emptiness" of the Court's self-imposed "restraint", and "its apparent insensitiveness towards the underlying human values" (paras. 60-61).

18. On that occasion, contrary to the Court's majority, he sought to demonstrate that there was manifest urgency in the situation affecting surviving victims of torture, or their close relatives, in respect of their right to the realization of justice under the U.N. Convention against Torture. Yet

the Court "preferred to rely comfortably on an unilateral act of promise (conceptualized in the traditional framework of inter-State relations) made by the respondent State in the course of the legal proceedings before itself". That pledge, in his view, "did not remove the prerequisites of urgency and probability of irreparable harm for the indication of provisional measures, nor did it efface the longstanding sufferings of the Habré regime, in their saga of more than two decades in search of the realization of justice" (para. 62).

19. Yet, the Court took a "passive posture", reduced to that of "a spectator of subsequent events". In effect, following the Court's Order of 28.05.2009, no initiative was taken in the respondent State towards the trial of Mr. Hissène Habré in Senegal; the return to Mr. H. Habré to Chad was announced, as well as his imminent expulsion from Senegal, which was then cancelled in the last minute under public pressure. In Judge Cançado Trindade's perception, the Court "was lucky" that Mr. H. Habré did not escape from his house surveillance in Dakar, and that he was not expelled from Senegal. Instead of "assuming its own control" over the situation, he added,

> "the self-restrained Court preferred to count on the imponderable, on la fortuna. The Court cannot keep on counting on the imponderable, as la fortuna may at any time turn against it. As Sophocles, in his perennial wisdom, warned, through the voices of the chorus of one of his tragedies: count no man happy till he passed the final threshold of his life secure from pain (bodily or spiritual harm)" (para. 63).

20. In today's present Order, the ICJ "has exercised self-restraint once again": this time, after finding that there has been a change in the situation, it has added that the circumstances presented to it, nevertheless, are not such as to require modification of its previous Order of 08.03.2011, which is simply reaffirmed. Moreover, it has seen no urgency in the new situation. The Court's reasoning, in his understanding, "rests on a petitio principii, adducing no persuasive argument to support its decision not to order new provisional measures in face of the new situation"; the ICJ limits itself to reasserting the previous provisional measures, even in addressing a new and distinct situation, which it admits has now changed (para. 64).

21. The Court "unduly establishes" a further test for the indication of provisional measures, rendering it more difficult — or simply avoiding — to order these latter, "at variance with its interna corporis". In his view, the ICJ "does not elaborate on its dictum, nor does it provide any demonstration whatsoever to corroborate its assertion". Its "ineluctable incongruence" lies in the fact that, once it finds that there is a change in the situation, it fails to modify — or rather expand — its previous Order, so as to face the new situation, endowed with the requisite elements of risk (in the form of bodily harm or death, and harm to the environment) and urgency.

22. Once again, the Court, from now on, will "only hope for the best", but not without expressing its "concerns" with regard to the new situation (as it did in paragraph 36 of the present Order), given the ostensible risk and the probability of harm posed by it. In Judge Cançado Trindade's understanding,

> "Instead of remaining preoccupied, the ICJ should have ordered the new provisional measures required by the new situation created in the disputed area. Once again, the Court will nourish the hope that fate is on its side, oblivious of the extreme care with which someone so familiar with human suffering and tragedy like Cicero approached fate, in one of his fragmented reflections. Even so, despite all his awareness, Cicero did not cross over the final threshold of his life secure from pain: at the end of his path, he suffered bodily injuries and violent death..." (para. 66).

23. If the Court expressly recognizes such risk and the probability of irreparable harm, and expresses its "concerns" with this new situation (supra), it is then clear, — he proceeds, — that the provisional measures already ordered should be modified, or expanded, so as to face this new situation. That the Court has not done so, "in face of the likelihood of bodily harm or death of the

individuals staying in the disputed area", is a cause of concern to him, as "the rights at issue — and the corresponding obligations — are beyond the strictly inter-State dimension, and the Court seems not to have valued this as it should" (para. 68).

24. Last but not least, Judge Cançado Trindade presents, as his concluding reflections, his thesis towards an autonomous legal regime of provisional measures of protection (part XII). He insists on the point he has already made in other cases lodged with the ICJ, as well as in another international jurisdiction (cf. El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos, 2nd. ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013, ch. XXI: "The Preventive Dimension: The Binding Character and the Expansion of Provisional Measures of Protection", pp. 177-186), that "the strictly inter-State dimension has long been surpassed, and appears inappropriate to address obligations under provisional measures of protection" (para. 69). In his understanding, the institute of provisional measures of protection stands in need of a conceptual refinement, in all its aspects.

25. 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 Judge Cançado Trindade's conception, "provisional measures have an autonomous legal regime of their own, disclosing the high relevance of their preventive dimension". Parallel to the Court's (subsequent) decisions on the merits, the international responsibility of a State may be engaged for non-compliance with, or breach of, a provisional measure of protection ordered by the Court (or other international tribunals) (para. 71).

26. His 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, in his view, "the task before this Court, now and in the years to come" (para. 72).

27. The juridical nature of provisional measures, with their preventive dimension, — he adds, — 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, as well as national, tribunals. Soon the recourse to provisional measures of protection, also at international level, had the effect of expanding the domain of international jurisdiction, with the consequent reduction of the so-called "reserved domain" of the State. In his outlook, this "grows in importance in respect of regimes 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 at the initial stage of the evolution of the matter, — to be followed, in our days, in his understanding, by "the elaboration on the legal consequences of non-compliance with those measures", and the conceptual development of what he deems it fit to call "their autonomous legal regime" (para. 73).

28. He points out that what has led him to leave on the records, in the present Dissenting Opinion, his position on the matter, — which he has been sustaining for years, — "is not a lack of confidence in the contending parties complying with them (...) The two contending parties come both from a part of the world, Latin America, with a longstanding and strong tradition in international legal doctrine" (para. 74). Instead, what has led him to leave on the records his dissenting position, is "the Court's self-restraint, and the incongruence of its reasoning", in "a matter of such importance for the progressive development international law". He has thus cared "to take the time and work to leave on the records the present Dissenting Opinion, so as to render a service to our mission of imparting justice" (para. 74).

29. In Judge Cançado Trindade's perception, the notion of victim (or of potential victim), of injured party, can thus, in effect, "emerge also in the context proper to provisional measures of protection", parallel to the merits (and reparations) of the cas d'espèce. Provisional measures of protection generate obligations (of prevention) for the States concerned, which are distinct from the obligations which emanate from the Judgments of the Court as to the merits (and reparations) of the respective cases. This ensues from their autonomous legal regime, as he conceives it. There is, in his 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" (para 75).

30. He has likewise advocated a pro-active posture of the ICJ in respect of provisional measures of protection, in his earlier Dissenting Opinion in the Court's Order of 28.05.2009 in the case of Questions Relating to the Obligation to Prosecute or Extradite (Belgium versus Senegal), where he deemed it fit to recall that the Court is not restricted by the arguments of the Parties, — as confirmed by Article 75(1) and (2) of the Rules of Court, which expressly entitle the ICJ to indicate or order, motu proprio, provisional measures that it regards as necessary, even if they are wholly or in part distinct from those that are requested.

31. A decision of the ICJ indicating provisional measures in the present case, — as he then sustained, — "would have set up a remarkable precedent in the long search for justice in the theory and practice of international law", as this was "the first case lodged with the ICJ on the basis of the 1984 United Nations Convention against Torture", the first human rights treaty incorporating the principle of universal jurisdiction as an international obligation of all States Parties (para. 80 of his Dissenting Opinion in the Court's Order of 28.05.2009).

32. Judge Cançado Trindade concludes that, in this matter, "the worst possible posture would be that of passiveness, if not indifference, that of judicial inactivism" (para. 76). The matter before the ICJ "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" (para. 76).

Dissenting opinion of Judge ad hoc Dugard

The Order of 2011 requiring Parties to refrain from sending personnel into the territory subject to dispute between Costa Rica and Nicaragua prohibits members of the Guardabarranco Environment Movement from entering this territory as they qualify as civilian personnel. Moreover, their presence in the disputed territory is contrary to the object and purpose of the 2011 Order. The access of members of the Guardabarranco Environment Movement to the disputed territory poses a real risk of irreparable prejudice to Costa Rica as the Movement is not an association of youthful environmentalists committed to the scientific study of the environment. It is rather a nationalistic youth movement with a dual purpose, the protection of the environment and the furtherance of Nicaragua's national interest.

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