

SEPARATE OPINION OF JUDGE SEPÚLVEDA-AMOR

I find myself in full agreement with most of the reasoning of the Court in the present Judgment. The same is true of almost all the conclusions reached by the Court in the Operative Clause of the Judgment. However, as regards the legality of Nicaragua's imposition of visa requirements, the Court has, in my opinion, failed to take account of Nicaragua's legitimate interest in border and immigration control and to clarify accordingly the extent of Nicaragua's regulatory powers to that effect. I further consider that the Court's reasoning as regards Costa Rica's claim relating to subsistence fishing is based on a weak legal foundation which might undermine the acceptance of the Court's finding by the Parties.

I. Border control as a legitimate purpose

1. The Court has concluded that "Nicaragua has the power to regulate the exercise by Costa Rica of its right to freedom of navigation under the 1858 Treaty". It adds an important qualification: such right "is not unlimited"; it is subject to the "rights and obligations of the Parties" (Judgment, paragraph 87).

2. According to the Court, the exercise of Nicaragua's regulatory power must meet certain requirements. Obviously, it must be consistent with the terms of the Treaty. It further has to be non-discriminatory and reasonable. The purpose of the regulation must be legitimate and "it must only subject the activity to certain rules *without rendering impossible or substantially impeding the exercise of the right of free navigation* (Judgment, paragraph 87; emphasis added).

3. As regards the burden of proof in respect of Costa Rica's claims of unlawful action based on the alleged unreasonableness of Nicaragua's exercise of its regulatory power, the Court has clearly stated that it is for Costa Rica to establish points of facts supporting such claims:

"The Court notes that Costa Rica, in support of its claim of unlawful action, advances points of fact about unreasonableness by referring to the allegedly disproportionate impact of the regulations. The Court recalls that in terms of well established general principle it is for Costa Rica to establish those points (cf. *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment of 3 February 2009, para. 68, and cases cited there). Further, a court examining the reasonableness of a regulation must recognize that the regulator, in this case the State with sovereignty over the river, has the primary responsibility for assessing the need for regulation and for choosing, on the basis of its knowledge of the situation, the measure that it deems most appropriate to meet that need. It will not be enough in a challenge to a regulation simply to assert in a general way that it is unreasonable. Concrete and specific facts will be required to persuade a court to come to that conclusion." (Judgment, paragraph 101.)

4. Nicaragua, as the State entitled to exercise sovereignty over the San Juan river, has the "primary responsibility for assessing the need for regulation and for choosing . . . the measure that it deems most appropriate to meet that need". This is a principle which the Court itself has stated that it must respect when examining the reasonableness of Nicaragua's regulations, taking into account "[c]oncrete and specific facts" (Judgment, paragraph 101). All these issues become particularly relevant for the Judgment at the section where the Court considers the visa requirement and the power of Nicaragua to impose immigration controls.

5. On the requirement to stop and identify, the Court has indicated that "Nicaragua, as sovereign, has the right to know the identity of those entering its territory and also to know that they have left" (Judgment, paragraph 104). The Court also considers that "it has been established that the number of tourists on the river has increased over the years the requirement [to stop and

identify] has been in force” (Judgment, paragraph 106). The Court concludes that the requirement is lawful and that Costa Rica did not show that it was unreasonable

6. According to the Court, Nicaragua’s requirement to obtain departure clearance certificates serves a legitimate purpose. Additionally, it “does not appear to have imposed any significant impediment on the exercise of Costa Rica’s freedom of navigation”; Costa Rica has not shown “a single case where navigation has been impeded by an arbitrary refusal of a certificate” (Judgment, paragraph 109).

7. The requirement to fly Nicaragua’s flag under certain circumstances “cannot in any respect be considered an impediment to the exercise of the freedom of navigation of Costa Rican vessels”. Moreover, the Court notes that it “has not been presented with any evidence that Costa Rican vessels have been prevented from navigation on the San Juan river as a result of Nicaragua’s flag requirement” (Judgment, paragraph 132).

8. From the preceding paragraphs it becomes clear that the Court has consistently adopted a line of reasoning which closely follows the general principles outlined in paragraph 101 of the Judgment, i.e., in all of these cases the Court has examined whether a requirement imposed by Nicaragua entails a substantial impediment to the exercise of Costa Rica’s right of free navigation, and whether the burden of proof has been met by Costa Rica. The Court answers both questions in the negative. But then there is a sudden inconsistency when the Court examines the imposition of a visa requirement on those persons who may benefit from Costa Rica’s right of free navigation.

9. First, the Court recognizes that “[t]he power of a State to issue or refuse visas is a practical expression of the prerogative which each State has to control entry by non-nationals into its territory” (Judgment, paragraph 113).

10. Then the Court itself recalls the “[c]oncrete and specific facts”, that are “required to persuade a court to come to [the] conclusion” that a specific regulation is unreasonable (Judgment, paragraph 101). These concrete and specific facts indicate, according to the Court,

“that in fact the number of tourists travelling on the river in Costa Rican vessels has increased in the period these requirements have been in force (see paragraph 99 above). Further, Costa Rica has provided no evidence of arbitrary refusals of visas to tourists and Nicaragua points out that it does not require nationals from countries which are the source of most of the tourists visiting the San Juan to obtain visas. Furthermore, it makes exceptions for residents of Costa Rican riparian communities and Costa Rican merchants who regularly use the river.” (Judgment, paragraph 116.)

11. It is clear that, in the light of what the Court has stated, these “[c]oncrete and specific facts” cannot lead to the conclusion that, by imposing a visa requirement, Nicaragua is rendering impossible or is substantially impeding the exercise of Costa Rica’s right of free navigation. The requirement serves a legitimate purpose, notably the purpose of border and immigration control, and it is not discriminatory. Costa Rica has not produced any evidence establishing the unreasonable or discriminatory character of Nicaragua’s visa requirement nor does the Court rely on such evidence in the Judgement.

12. Surprisingly enough, the Court, recalling that “the power of a State to issue or refuse a visa entails discretion”, reaches the conclusion that

“Nicaragua may not impose a visa requirement on those persons who . . . may benefit from Costa Rica’s right of free navigation. If that benefit is denied, the freedom of navigation would be hindered. In these circumstances, an imposition of a visa requirement is a breach of the Treaty right.” (Judgment, paragraph 115.)

No explanation is provided by the Court as to why the freedom of navigation will be hindered if a person benefiting from Costa Rica's entitlement to free navigation is required to obtain a visa from the State which has sovereignty over the waters of the San Juan river.

13. The Judgment does not specify why non-Costa Ricans are also entitled to benefit from free navigation (Judgment, paragraph 114) without complying with the requirements established by the State which has exclusive dominion and full sovereignty over the waters of the San Juan river. To attribute the benefit of the right of free navigation to all foreign nationals, whatever may be the purpose of their voyage on the waters of the San Juan river and whatever may be their State of origin, must be considered as contrary to the principle the Court itself has established in the Judgment: "The power of a State to issue or refuse visas is a practical expression of the prerogative which each State has to control entry by non-nationals into its territory." (Judgment, paragraph 113.) Surely Nicaragua cannot be barred from exercising its power to regulate the entry of foreign nationals into its territory.

14. The prohibition to enact any visa requirements for foreign nationals traversing the waters of the San Juan river may involve a risk for the public safety of Nicaragua, since there would be no immigration control when entering the land territory of Nicaragua from the waters of the San Juan river.

15. A consequence of extending the right of free navigation to all foreign nationals travelling on the San Juan river, without any further requirements, would be to force Nicaragua to establish a number of immigration posts all along the left bank of the San Juan river in the area where Costa Rica exercises its right of free navigation, although even that measure will not necessarily prevent illegal entries from the river into Nicaragua's land territory by non-Costa Ricans benefiting from a right legally attributed only to Costa Rica and to Costa Rican nationals.

16. From the Court's perspective, "Nicaragua may not impose a visa requirement on those persons who . . . may benefit from Costa Rica's right of free navigation. If that benefit is denied, the freedom of navigation would be hindered." (Judgment, paragraph 115.) This finding is not consistent with the Court's reasoning in previous paragraphs of the Judgment and it is certainly not based on the "[c]oncrete and specific facts" which, according to the Court, are required to persuade a court to reach such conclusion. The reasoning of the Court does not provide any hard facts which could endorse its argument that Nicaragua would prohibit free navigation by exercising its discretionary power to issue visas. In this respect, the Court should have taken into account that, in its written or oral proceedings, Costa Rica has not submitted any evidence of cases where free navigation had been impeded by an arbitrary refusal to grant a visa. Evidence provided by Nicaragua and not contradicted by Costa Rica shows that

"Costa Rica's tourism traffic on the San Juan River increased by more than 350 per cent between 1998, when Costa Rica says Nicaragua first began to systematically deny her rights on the San Juan River, and 2004, the year before this lawsuit began" [CR 2009/7, pp. 45-46, para. 21 (Reichler); see also CR 2009/5, p. 25, para. 44 (Reichler); RN, para. 4.33, table 1; and RN, Vol. II, Ann. 71].

Costa Rica's allegation that the visa requirement has "practically destroyed Costa Rican commercial transportation of tourists" on the San Juan river (RCR, p. 159, para. 4.12 (iii)) has not been proven.

17. The Court concludes in its Judgment that Nicaragua "may not require persons travelling on Costa Rican vessels which are exercising their freedom of navigation on the river to obtain visas" (Judgment, paragraph 117). But Nicaragua can invoke certain conventional rights, enshrined in regional and multilateral treaties, which provide a legal basis for the imposition of visa requirements and which will enable Nicaragua to regulate immigration and border control on the waters of the San Juan river under certain clearly defined circumstances.

18. The American Convention on Human Rights (1969) and the International Covenant on Civil and Political Rights (1966), to which both Costa Rica and Nicaragua are parties, provide a similar language in regulating freedom of movement and residence: “Every person *lawfully* in the territory of a State party has the right to move about it and to reside in it *subject to the provisions of the law.*” These rights may be “restricted only pursuant to a law to the extent necessary . . . to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others” (American Convention, Article 22, see also Article 12 of the Covenant on Civil and Political Rights). Any of these conditions could give rise to a justified imposition of visas by Nicaragua.

19. If Nicaragua strictly follows the terms prescribed in the Convention and in the Covenant, by enacting in a legal instrument the requirements for foreign nationals to obtain a visa, determining in which circumstances it will impose restrictions on the issuing of a visa (national security, public safety, public order, public morals, public health, etc.), it will not be in breach of any international obligation.

II. Legal basis of subsistence fishing

20. The Court concludes in its Judgment that Costa Rica has a customary right to subsistence fishing. The Court’s reasoning in the present case is not in accordance with its previous findings on the recognition of rules of customary international law. It will be difficult to find a precedent which corresponds with what the Court has determined in the present case. In paragraph 141 of the Judgment, the Court provides as follows:

“The Court observes that the practice [of subsistence fishing], by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record. For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant.” (Judgment, paragraph 141.)

These are the grounds on which the Court concludes that there is a customary right. An undocumented practice by a community of fishermen in a remote area. A practice which in previous times has not been claimed by Costa Rica as a right to which it is entitled. A practice which has not been objected to by Nicaragua — “the failure of Nicaragua to deny the existence of a right” — in circumstances where the existence of a right has not been claimed, let alone proven.

21. Costa Rica has not presented to the Court, at any time previous to the submission of its Memorial, evidence of a legal claim by which it would consider subsistence fishing on the right bank of the San Juan river as a right appertaining to it. Even Costa Rica’s Application instituting these proceedings does not include such a claim.

22. Costa Rica is not conclusive in its assertions that there is a customary right of subsistence fishing. It says that the practice “has taken on a patina of custom”, unless the opposite can be shown conclusively (RCR, p. 84, para. 3.117). It further argues that the practice of subsistence fishing “coupled with complete lack of application of internal regulations with respect to it and the complete absence of any negative response from Nicaragua, has given rise to a customary local rule” [CR 2009/3, p. 62, para. 41 (Kohen)]. No need for State practice; no need for *opinio juris*, only the lack of protest of Nicaragua to a practice not previously claimed as a right. However, given the absence of such a claim, there is little ground to impose on Nicaragua the duty to protest against the contents of an inexistent claim and, consequently, Costa Rica is not in a position to provide evidence that Nicaragua accepted subsistence fishing as part of its legal obligations.

23. It may well be that Costa Rica itself is not convinced of its argument that the practice of subsistence fishing amounts to a customary rule. Costa Rica alleges that “it is of little consequence

whether we talk about a local custom, acquiescence, tacit agreement, a territorial régime or even the survival of a traditional right dating back to the colonial era which has never been curtailed” [CR 2009/3, p. 62, para. 41 (Kohen)]. It is clear that Costa Rica’s aim is to obtain recognition from the Court that there is a right to subsistence fishing, with not too much of a concern as to the legal basis which supports such a right. It is regrettable that the Court did not resort to a more solid legal foundation when examining Costa Rica’s claim to subsistence fishing.

24. Following the *Asylum* case precedent, Costa Rica must prove that the customary right of subsistence fishing is established in such a manner that it has become binding on the other Party and that the practice of subsistence fishing is the expression of a right appertaining to Costa Rica and a duty incumbent on Nicaragua (*I.C.J. Reports 1950*, pp. 276-277). The principle that the States concerned must act with the conviction that they are conforming to what amounts to a legal obligation has been reiterated by the Court on a number of occasions, one example being the *North Sea Continental Shelf* cases (*I.C.J. Reports 1969*, p. 44).

25. Time is another important element in the process of creation of customary international law. In the present case, Costa Rica’s claim regarding the existence of a customary right of subsistence fishing for the local riparian community on the Costa Rican bank of the San Juan river was made for the first time in its Memorial submitted to the Court on 29 August 2006, i.e., less than three years before the delivery of the Court’s Judgment. To claim the existence of a customary right, created in such a short span of time, clearly contradicts the Court’s previous jurisprudence on the matter; in the *Right of Passage* case, the Court found:

“This practice having continued *over a period extending beyond a century and a quarter* . . . the Court is, in view of all the circumstances of the case, satisfied that *that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation.*” (*I.C.J. Reports 1960*, p. 40; emphasis added.)

26. Similarly, in the *Nicaragua* case, the Court reiterated that in order to establish a rule of customary international law, it “has to direct its attention to the practice and *opinio juris* of States” (*I.C.J. Reports 1986*, p. 97, para. 183). In the present case, the practice of a local community of Costa Rican riparians cannot be equated with the practice of the Costa Rican State as invoked by Costa Rica (Judgment, paragraph 132). The Court has repeatedly indicated the nature of acts which it will take into account in order to determine whether a practice exists, acts which may lead to the creation of a customary right. These acts include administrative measures, legislation, acts of the judiciary and treaties.

27. As regards the requirements of State practice and *opinio juris*, the Court has been subject to criticism in cases where it recognized the existence of such a practice in its findings without providing sufficient support for its claim. In the *Arrest Warrant* case, the Court indicated that it had “carefully examined State practice, including national legislation and those few decisions of national higher courts” (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, p. 24, para. 58). In her dissenting opinion, Judge *ad hoc* Van den Wyngaert was of the view that

“the International Court of Justice, by deciding that incumbent Foreign Ministers enjoy *full* immunity from foreign criminal jurisdiction (Judgment, para. 54), has reached a conclusion which has no basis in positive international law. Before reaching this conclusion, the Court should have satisfied itself of the existence of *usus* and of *opinio juris*. *There is neither State practice nor opinio juris establishing an international custom to this effect.*” (*Ibid.*, p. 151, para. 23; emphasis added).

28. It follows from the foregoing that subsistence fishing, based on a customary right as determined by the Court, has no support in law. Costa Rica’s claim might however be based on other legal foundations which could provide a better ground for the findings of the Court on this

matter, namely the principle of acquired or vested rights. Already the Permanent Court had determined that “the principle of respect for vested rights” is “a principle which ... forms part of generally accepted international law” (*Polish Upper Silesia, P.C.I.J., Series A, No. 7, p. 42*).

29. In the *Land, Island and Maritime Frontier Dispute* case, the Chamber also referred to the concept of acquired rights in the context of the particular situation that it expected to arise following the delimitation of the land boundary in some areas where nationals of one Party would, following the delimitation, find themselves living in the territory of the other, and property rights established under the laws of the one Party would be found to have been granted over land which is part of the territory of the other. The Chamber indicated that it was confident that both Parties would carry out the necessary measures “in full respect for acquired rights, and in a humane and orderly manner” (*I.C.J. Reports 1992, pp. 400-401, para. 66*).

30. Similarly, in the *Cameroon v. Nigeria* case, the Court determined that it is up to the Parties to find a solution when a village previously situated on one side of the boundary has spread beyond it, “with a view to respecting the rights and interests of the local population” (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002, p. 374, para. 123 and p. 370, para. 107*).

31. In the present case, the existence of vested rights or acquired rights by Costa Rican riparians has not been claimed by Costa Rica. Surely the Court could have taken the initiative to explore this legal avenue, explaining the reasons why it regards the argument of acquired rights founded or unfounded. Furthermore, other legal options should have also been taken into account by the Court, in accordance with the express petitions and commitments of the Parties.

32. In the oral proceedings, Costa Rica required the following: “we ask the Court, in its *dispositif*, respectfully, to record and give effect to Nicaragua’s stated position that subsistence fishing by riparians, whether from the Costa Rican bank or from boats on the river, will not be impeded” [CR 2009/6, p. 63, para. 30 (Crawford)].

33. Nicaragua replied to this petition by indicating that while it “does not agree that there is a customary right to fish in her territorial waters, she has absolutely no intention of preventing Costa Rican residents from engaging in subsistence fishing activities” [CR 2009/5, p. 27, para. 48 (Reichler)].

34. The undertaking made by Nicaragua before the Court must be regarded as a legal commitment with a binding character. In the *Nuclear Tests Judgment*, the Court found that

“When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being henceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound . . . is binding.” (*I.C.J. Reports 1974, p. 267, para. 43*.)

35. Similarly, the Court found in a very recent case (*Belgium v. Senegal*) that “Senegal, both *proprio motu* and in response to a question put by a Member of the Court, gave a formal assurance on several occasions during the hearings that it will not allow Mr. Habré to leave its territory before the Court has given its final decision”. Belgium indicated that such a solemn declaration “could be sufficient for Belgium to consider that its Request for the indication of provisional measures no longer had any object, provided that certain conditions were fulfilled”. In the light of these statements, the Court decided that there was no risk of irreparable prejudice to the rights claimed by Belgium (case concerning *Questions Relating to the Obligation to Extradite or Prosecute (Belgium v. Senegal), Provisional measures, Order, 28 May 2009, paras. 69, 71, 72 and 76*).

36. In the present case, the Court could thus have followed its previous jurisprudence by taking note, in the reasoning and in the Operative Clause of the Judgment, of the legal commitment undertaken by Nicaragua during the oral proceedings. By following this legal option, by which it would determine the binding character of the commitment made publicly by Nicaragua before the Court, the Court could have avoided deviating from its own precedents on the nature and substance of customary international law. But it chose a different route, one that will subject the decisions of the Court to disagreement and objections.

(Signed) Bernardo SEPÚLVEDA-AMOR.
