

CR 2013/27

International Court  
of Justice

Cour internationale  
de Justice

THE HAGUE

LA HAYE

YEAR 2013

*Public sitting*

*held on Thursday 17 October 2013, at 10 a.m., at the Peace Palace,*

*President Tomka presiding,*

*in the cases concerning 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)*

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VERBATIM RECORD

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ANNÉE 2013

*Audience publique*

*tenue le jeudi 17 octobre 2013, à 10 heures, au Palais de la Paix,*

*sous la présidence de M. Tomka, président,*

*dans les affaires relatives à Certaines activités menées par le Nicaragua dans la région  
frontalière (Costa Rica c. Nicaragua) et Construction d'une route au Costa Rica  
le long du fleuve San Juan (Nicaragua c. Costa Rica)*

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COMPTE RENDU

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*Present:*      President Tomka  
                 Vice-President Sepúlveda-Amor  
                 Judges Keith  
                         Bennouna  
                         Skotnikov  
                         Cañado Trindade  
                         Yusuf  
                         Greenwood  
                         Xue  
                         Donoghue  
                         Gaja  
                         Sebutinde  
                         Bhandari  
Judges *ad hoc* Guillaume  
                         Dugard  
  
                 Registrar Couvreur

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*Présents* : M. Tomka, président  
M. Sepúlveda-Amor, vice-président  
MM. Keith  
Bennouna  
Skotnikov  
Caçado Trindade  
Yusuf  
Greenwood  
Mmes Xue  
Donoghue  
M. Gaja  
Mme Sebutinde  
M. Bhandari, juges  
MM. Guillaume  
Dugard, juges *ad hoc*  
  
M. Couvreur, greffier

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***The Government of Costa Rica is represented by:***

H.E. Mr. Edgar Ugalde Álvarez, Ambassador of Costa Rica to the Organization of American States, Washington D.C.,

*as Agent;*

H.E. Mr. Jorge Urbina, Ambassador of Costa Rica to the Kingdom of the Netherlands,

*as Co-Agent;*

Mr. Sergio Ugalde, Special Adviser to the Ministry of Foreign Affairs and Worship of Costa Rica, Member of the Permanent Court of Arbitration,

*as Co-Agent, Counsel and Advocate;*

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Mr. Gustavo Campos, Minister Counsellor and Consul General of Costa Rica to the Kingdom of the Netherlands,

Ms Ana Marcela Calderón, Minister Counsellor at the Costa Rican Embassy in the Kingdom of the Netherlands,

*as Advisers.*

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*comme conseillers.*

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*comme conseils adjoints.*

Mr. PRESIDENT: Please be seated. The sitting is now open and the Court meets to hear the second round of oral observations of Nicaragua on the Request for the indication of provisional measures filed by Costa Rica.

Judge Owada, for reasons explained to me, is not able to sit today. I now invite Mr. Reichler to open the presentation by Nicaragua. You have the floor, Sir.

Mr. REICHLER:

**THE FACTS ARE STILL THE FACTS**

1. Mr. President, Members of the Court, Costa Rica is a great country. Both Nicaragua and Costa Rica are great countries.

2. But they squabble frequently. Maybe to the Court, it looks like they have a hard time agreeing on anything. They have sued each other four times in this Court, with each one initiating two cases. I think that is a record; probably one that will never be broken by any other pair of neighbours.

3. Nature, in its inscrutable wisdom, has seen fit to lay them down alongside each other. Whether they like it or not, they are in permanent wedlock. Maybe they need a marriage counsellor. What they do *not* need, and of this I am certain, is a bunch of divorce lawyers driving even deeper wedges between them by whispering in their ears, or shouting in public, how unfaithful the other one is.

4. Mr. President, we defended Nicaragua vigorously on Tuesday, and we responded strongly to Costa Rica's arguments. But no one from the Nicaraguan side accused Costa Rica of bad faith, of lying to the Court, or withholding evidence. Just because we are fighting over a swamp does *not* mean we have to behave like we live in one. We, counsel, need to join together, in looking for ways to bring these two great countries together, instead of adding fuel to the fire.

5. Professor Crawford's tone, yesterday, was more measured and his volume was lowered but his message was exactly the same: Nicaragua cannot be trusted and its assurances cannot be accepted. This remains their main argument — really, the only argument they have left — for provisional measures.



In the second round, Costa Rica offered new evidence, not previously presented, in the form of a satellite photo of the disputed area taken on 5 October. It is not the custom in this Court for new evidence to be presented at *this* stage of the oral hearings. However, Nicaragua did not object. Contrary to what Professor Crawford insinuated, Nicaragua does not want to keep material evidence from the Court. We want the Court to have any and all evidence that it might find helpful.

6. And we consider that the Court *might* find the satellite photo of 5 October helpful. Let us look at what it shows [tab 19]:

7. First, it shows no evidence of current activity in this area. Even Costa Rica's own counsel recognize that there are no dredgers or other equipment<sup>1</sup>. There are no personnel performing any works. This is consistent with the documentary evidence that we reviewed on Tuesday. Pursuant to President Ortega's order of 21 September, all work on the *caños* and the beach stopped, and all personnel and equipment were removed. Nicaragua stands by that evidence. The new satellite photo does not contradict it, or even throw it into doubt. The photo, in comparison with earlier ones, shows that work was performed after 18 September. It does *not* show that it was performed after Mr. Pastora received President Ortega's order to stop, a few days later.

8. Second, there is a trench on the beach that comes close to, but does not reach the Caribbean Sea. This is a graphic depiction of what we already know. In his report of 10 October, Dr. Thorne, Costa Rica's expert, wrote:

“A narrow trench with a wide entrance has been dug into the beach between the natural lagoon that is currently the northern terminus of the eastern *caño* and the Caribbean Sea, starting near the shore of the lagoon and extending back through the beach towards the Caribbean Sea. The trench does not yet reach the Caribbean Sea.”<sup>2</sup>

Dr. Thorne also wrote that the trench “could be extended to achieve this with very little difficulty”<sup>3</sup>. His description of the situation is as if he had *seen* the 5 October satellite photo, because what he says in his report is just what the photo shows.

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<sup>1</sup>CR 2013/26, para. 17 (Crawford).

<sup>2</sup>Thorne Report, para. 4.1 (*g*).

<sup>3</sup>*Ibid.*, para. 4.7.

9. I do not know if this picture is worth a thousand words, but Dr. Thorne already said the same thing in the 66 I just read. Nicaragua has never challenged the evidence that the trench was dug, that it almost reaches the sea, and that it could be extended there without significant effort. To the contrary, it has straightforwardly acknowledged all of this.

10. What we argued was that the undisputed evidence showed three things. One, that all work on the trench stopped after the order of President Ortega. Two, that the work stopped *before* the trench was completed, and *before* it connected the *caño* to the sea. And three, that, even according to Professor Thorne's report and that of the University of Costa Rica—which Nicaragua considers to exaggerate the risks—there was *no* risk of irreparable harm to the San Juan River or its environs, unless and until the *caño* and the sea were connected. Nicaragua stands on that evidence as well. And, again, Costa Rica's counsel introduced nothing, yesterday, to contradict it.

11. In fact, the new satellite photo confirms what Nicaragua said in all respects. Above all, it shows that the work on the trench stopped abruptly, shortly before it reached the sea. Obviously, this was in response to the order that the work be stopped. It also demonstrates Nicaragua's good faith. As Professor Crawford said yesterday, it would not have taken much time or effort to finish the job<sup>4</sup>. If Nicaragua were as sinister as my friend suggests, it could readily have presented Costa Rica, and the Court with a *fait accompli*. But that did not happen.

12. Professor Crawford asked Monday for Mr. Pastora's instructions at the time he embarked on his work in the disputed area — prior to his receipt of President Ortega's order of 21 September. On Tuesday, we put them in Nicaragua's judges' folder, at tab 6, and blew them up on the screen. Yesterday he wanted the 2011 instructions applicable to Mr. Pastora<sup>5</sup>. They are dated 9 March 2011, one day after the Court's Order:

“Pursuant to instructions from the Nicaraguan Army Chief of Staff regarding the implementation of the resolution issued by the International Court of Justice on 8 March 2011 . . . [that is, one day prior]

1. It is prohibited to carry out operations, patrols, or any type of presence in the territory defined by the International Court of Justice as Disputed Territory, located

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<sup>4</sup>CR 2013/26, para. 9 (Crawford).

<sup>5</sup>CR 2013/26, paras. 12-13 (Crawford).

north of the disputed channel, bordered on the west by the right bank of the San Juan de Nicaragua River . . . and on the east by Harbour Head Lagoon . . . ”

13. Nicaragua previously provided this military order to the Court and to Costa Rica on 6 August — it can be found at tab 20 of today’s judges’ folder. Mr. Pastora *must* have complied with it, at least between March 2011 and August 2013, because Costa Rica never complained about his activities during that two-and-a-half year period, which he spent dredging along the San Juan River and in channels on the Nicaraguan side.

14. Professor Crawford asked why Nicaragua ordered the trench to be dug: what was its intent?<sup>6</sup> That is a bit like asking “why did you beat your spouse?”. When you ask *why* something was done, you assume that it was. But Nicaragua did not order, or instruct, or plan for the trench to be dug. What *was* Nicaragua’s intent in regard to the trench? It had none. It never ordered or authorized the activity. Nor did it even want this particular work to be done.

15. In fact, the trench along with the *caño* are *harmful* to Nicaragua, or, at least, they would have been, if the river were connected to the Sea by these works. Nicaragua does not need, or want, that connection to be made. Mr. President, you cannot drive from Managua, or any other city or town in Nicaragua, to the village of San Juan de Nicaragua on the Caribbean coast. There is a small airport, but the main means of transportation is by boat. The river is already very low, and impassable during the dry season except by canoe. Remember, 90 per cent. of the river flows into the Colorado River, in Costa Rica, upstream from here. That is why Nicaragua is so concerned about Costa Rica’s construction of highway 1856, and the large quantity of sediments it contributes to the river, which build up and make navigation even more difficult downstream. If what remains of the San Juan River were diverted into and through the eastern *caño*, there would eventually be nothing but mud downstream of the *caño*. It would be completely impassable there, all year round. San Juan del Norte would be cut off from the rest of Nicaragua.

16. That is why, Mr. President, Nicaragua would be very happy to have the trench filled up, and the beach returned to the way it was before Mr. Pastora started working there. Ambassador Argüello will discuss how the refilling of the trench might take place.

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<sup>6</sup>CR 2013/26, para. 33 (Crawford).

17. Professor Crawford says it is “not credible” that Mr. Pastora took it upon himself to clear the two *caños*, but that is just argument<sup>7</sup>. The evidence shows otherwise. I reviewed it in detail Tuesday. I will not repeat it. I will only remind the Court very quickly of three elements, which have not been contradicted by any evidence offered by Costa Rica.

18. First, the instructions given to Mr. Pastora in July 2013 by the National Port Company were to perform suction dredging to prevent or relieve the effects of flooding, caused by heavy rains, on the riverine population and the airport, which are on the Nicaragua side. He was not instructed to cross onto the right bank of the river, into the disputed area, which was still forbidden by the army’s order of 9 March 2011. That order is the second element. Third, as soon as President Ortega found out that Mr. Pastora was operating in the disputed area, he ordered him to stop immediately. Costa Rica has not presented evidence to call any of these well-documented facts into question.

19. Professor Crawford put forward nine propositions, and then drew two conclusions. I have already addressed some of them. So I will respond without repeating myself.

20. Proposition One: that Nicaragua constructed the *caños*<sup>8</sup>. This is where Professor Crawford argues that Nicaragua “sent” Mr. Pastora into the disputed area to clear or construct the *caños*, that “people were sent by Nicaragua,” and that it is “not credible” that Mr. Pastora acted without, or contrary to, the Government’s instruction<sup>9</sup>. This is *argument*, not evidence, and it is based on Professor Crawford’s penchant for attributing only evil motives to Nicaragua. It is not based on facts. The evidence shows, as I have said, that Nicaragua did *not* send Mr. Pastora to the disputed area, and that, quite to the contrary, he went there against the Government’s wishes and was stopped as soon as the highest authorities in Managua found out what he was doing. There is no contrary evidence and no reason to disbelieve Nicaragua or the documents. It is Professor Crawford’s argument that is “not credible”.

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<sup>7</sup>CR 2013/26, para. 33 (Crawford).

<sup>8</sup>*Ibid.*, paras. 9-11 (Crawford).

<sup>9</sup>*Ibid.*, paras. 9, 11 (Crawford).

21. Proposition Two: that those constructing the *caños* had ostensible authority to do so<sup>10</sup>. If this is a legal point, Nicaragua does not disagree, but that is not the issue in the present phase of the case. If it is intended as a point of fact, we refer the Court again to the army order of 9 March 2011 prohibiting all entry and activity in the disputed area, and the instructions Mr. Pastora received from the National Port Company in July 2013. He was not commissioned by higher authority to construct *caños* in the disputed area, ostensibly or otherwise.

22. Proposition Three: that *Nicaragua* has breached the 2011 Order by constructing the *caños*<sup>11</sup>. Mr. President, Mr. Pastora did what he did, and Nicaragua does not deny responsibility for his actions. The army order of 9 March 2011, issued in direct response to the Court's Order and which remains in effect to this day, shows Nicaragua's intention to comply with the Court Order. So does President Ortega's instruction of 21 September, to which Mr. Pastora adhered. The evidence shows that Nicaragua did not "send" Mr. Pastora to the disputed area, or "maintain" him there, as prohibited by the first operative paragraph of the Court's March 2011 Order. To the contrary, the President of the Republic removed him as soon as he could.

23. Proposition Four: that the risk of irreparable prejudice is even more serious than first thought<sup>12</sup>. This is hyperbole. More serious than who first thought? Not, apparently, Costa Rica's expert, Dr. Thorne. As I pointed *out*, he was well aware on 10 October, when he wrote his report, that the trench on the beach nearly reached the sea and "could be extended to the sea with very little difficulty, thus opening the eastern *caño* to the Caribbean<sup>13</sup>.

24. The most that could be said about Costa Rica's new evidence is that, based on additional digging after the 18 September photos were taken, the trench could be extended to the sea with even less difficulty than Dr. Thorne anticipated. But the fact remains, as verified by the new photo, that the trench does *not* reach the sea, does *not* open the *caño* to the sea, and does *not* provide a short cut or any other kind of channel for water flowing along the Rio San Juan. Thus, there is still no risk of irreparable harm. Professor McCaffrey will say more about this.

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<sup>10</sup>CR 2013/26, paras. 12-13 (Crawford).

<sup>11</sup>CR 2013/26, paras. 14-16 (Crawford).

<sup>12</sup>CR 2013/26, paras. 17-23 (Crawford).

<sup>13</sup>Thorne Report, paras. 5.1 (*d*) & (*e*).

25. Proposition Five: that Costa Rica's expert evidence is unchallenged<sup>14</sup>. Since this evidence relates to irreparable harm, I will leave it to Professor McCaffrey to respond.

26. Proposition Six: that the uncontested expert evidence is not unsupported assertion<sup>15</sup>. Again, this relates to irreparable harm and will be covered by Professor McCaffrey.

27. Professor Crawford's Proposition Seven: that Nicaragua has failed to inform the Court of material facts<sup>16</sup>. Mr. President, this is another of Professor Crawford's unjustified attacks on Nicaragua's good faith. It is an extremely serious charge and it is most unfair.

28. What evidence is Nicaragua alleged to have withheld? According to Professor Crawford, "Nicaragua let an out of date picture of the *caño* rest before you without comment."<sup>17</sup> Presumably his reference is to the aerial photos Costa Rica took on 18 September. Those, the latest photos in the record until yesterday, clearly show the two *caños* that are the subject of Costa Rica's request, the presence of a dredger, and the existence of the trench along the beach. They show everything that Mr. Pastora and his crew were doing in the area. The relevant facts are uncontested: Mr. Pastora and his crew dug a trench along the beach; the work on it was stopped after he received President Ortega's order; at the time the work was stopped, the trench did not reach the sea, although a connection could easily have been made with little work. These are the material facts pertaining to the trench. Nicaragua acknowledged all of them in the documents and arguments it presented to the Court. It has held nothing back. There is nothing to hold back.

29. Nicaragua had no incentive, or even means, to conceal anything. How is it possible to hide a trench on an open expanse of beach? On 24 September, after receiving and reviewing Costa Rica's Request and its annexes, Nicaragua saw that Costa Rica had been regularly taking aerial photographs and collecting satellite photos showing Mr. Pastora's works between 5 and 18 September. It naturally assumed that Costa Rica would continue doing so, especially now that it had decided to go to the Court. So, even Nicaragua were as diabolical as Professor Crawford

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<sup>14</sup>CR 2013/26, paras. 17-23 (Crawford).

<sup>15</sup>CR 2013/26, paras. 26-32 (Crawford).

<sup>16</sup>CR 2013/26, para. 33 (Crawford).

<sup>17</sup>*Ibid.*

suggests, why would it foolishly try to conceal evidence of what was in plain view, especially the plain view of Costa Rica, which had been actively surveilling the area?

30. If there is anything misleading, Mr. President, it is the labelling Costa Rica put on the photo from yesterday. [graphic] At the top, it says “*Newly Excavated Trench.*” The implication is that Nicaragua was continuing to dig the trench right up to 5 October. Professor Crawford even made that accusation. But that is not true, and the photo does not justify this label, or support Professor Crawford’s charge. The photo provides no basis for believing that any digging was done after President Ortega’s order was received. Nicaragua could just as easily suggest — but I want to make clear it does not — that Costa Rica is withholding evidence, including satellite and other photos from late September, which it undoubtedly possesses, that would show that the digging had already stopped. It would be surprising if they had not taken any photos during that period. But we prefer simply to deal with the evidence, rather than to trade accusations.

31. The 5 October satellite photo — which Nicaragua never had, never obtained, never saw, and therefore never withheld — makes graphically clear how close the trench comes to the sea. But it does not change anything material. What has Nicaragua withheld? That more work was done on the *caño* and the trench after 18 September? Nicaragua itself said so. That the *caño* is wider and the trench longer than they were on 18 September? That follows inevitably from the fact that work continued until the President’s Order stopped it. There is nothing in this photo, or any other, that Nicaragua would have any reason to hide. [graphic down]. Where then does this new photo, this *smoking gun*, get them? If it was offered to show irreparable injury, it does not. It shows the opposite. True, the distance between the trench and the sea is not great, but there is still no connection, without which, their expert says, there can be no irreversible harm. If they offered it to show Nicaragua is dishonest or hiding evidence, it fails there too.

32. Professor Crawford accuses Nicaragua of hiding its intentions, which, he said, are laid bare by the 5 October photo. *Res ipsa loquitur*. “Come clean,” he demanded of Nicaragua, as if it were not<sup>18</sup>. Well, it may be that Mr. Pastora intended to connect the river to the sea. We do not

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<sup>18</sup>CR 2013/26, para. 33 (Crawford).

know why else he would dig the trench. If those were intentions, they are just as obvious from the 18 September photos — which also depict the trench — as from the one submitted yesterday.

33. But these were never Nicaragua's intentions. Those intentions are reflected in the Army's order of 9 March 2011, the National Port Company's instructions to Mr. Pastora in July 2013 and, most emphatically, in President Ortega's order to him on 21 September, that he stop his activities and leave the disputed area. What was Mr. Pastora *thinking* when he undertook these works? At the time, Nicaragua did not know. It may be responsible for his actions, but not for his thoughts.

34. Proposition Eight: that the *caño* exists<sup>19</sup>. It does, although, as Professor McCaffrey will explain, it will not exist for long. The silting from the river will find its way into the *caño* and eventually fill it with mud, to the point where it dries up. In its present state, unconnected to the sea, it cannot cause the Rio San Juan to change course, or otherwise cause irreversible harm. This is confirmed by Professor Thorne's report.

35. Proposition Nine: that Nicaragua's northern military encampment is on the disputed territory<sup>20</sup>. If it is, this is because Costa Rica, this week for the very first time, has disputed it. On Tuesday, we showed you three Costa Rican maps, all taken from their Memorial in this case, which show the beach in this area, as distinguished from the wetlands, as belonging to Nicaragua<sup>21</sup>. This tiny camp has been in the same place for almost two years, and Costa Rica has been well aware of its existence all along. They have a lookout tower and antennae on their side of Harbor Head Lagoon, and they conduct frequent surveillance of the area, including periodic overflights of Nicaragua's territory, which Nicaragua has protested on numerous occasions and documented for the Court. They have never before complained about the camp. There has been no suggestion by Costa Rica that the few soldiers stationed there have ever caused any harm to the wetlands. They are there to watch the coast, to keep an eye out for drug traffickers and smugglers who infest the area, transporting their illicit cargo by small boat.

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<sup>19</sup>CR 2013/26, para. 34 (Crawford).

<sup>20</sup>CR 2013/26, paras. 35-39 (Crawford).

<sup>21</sup>Nicaragua judges' folders (day 1), tab 11.



36. It is notable that Costa Rica's Request for New Provisional Measures does not complain about the presence of this military camp, which is in plain sight. [Tab 22] At tab 22, you can find a satellite photo depicted in paragraph 4 of Costa Rica's 23 September Request. Costa Rica points to the spot on the beach, and says, quote: "Location of Nicaragua tents, pile of felled trees and lookout tower."<sup>22</sup> This is offered as evidence that a crew of workmen was clearing *caños* in the wetland, not that Nicaragua is unlawfully — in violation of the Court's Order or otherwise — maintaining a small military camp on the beach. There is no mention of the military camp anywhere in Costa Rica's Request.

37. Apparently, it did not occur to Costa Rica to complain about it until this week, in Mr. Ugalde's presentation on Monday. If Costa Rica is now, for the first time, claiming sovereignty over the beach, then this is a new claim. The beach was not part of their original claim and, as such, should be considered as covered by the Court's Order of 8 March 2011. Nicaragua submits that there is no factual or legal basis for the Court to disturb the status quo. Professor Pellet will discuss the legal aspects.

38. I turn next, and last, to Professor Crawford's two conclusions. His first conclusion, as we might have expected, is that Nicaragua cannot be trusted and its assurances should not be accepted by the Court<sup>23</sup>. This is the same message Professor Crawford delivered on Monday, to which I responded Tuesday. I do not need to cover that ground again. But Professor Crawford made some new charges of dishonesty by Nicaragua yesterday, to which I *will* respond.

39. First new charge: that Nicaragua carried out substantial work through 5 October and tried to hide it<sup>24</sup>. The evidence does not show this. It shows that digging of the trench on the beach continued after 18 September. Nicaragua has never said otherwise. It has acknowledged that work on the *caño* and the trench continued through the time Mr. Pastora received President Ortega's order that he stop. The 5 October satellite photo does not show that the work continued past that time. Or that Nicaragua acted in bad faith.

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<sup>22</sup>Provisional Measures Request, Attachment PM-9.

<sup>23</sup>CR 2013/26, paras. 42-50 (Crawford).

<sup>24</sup>CR 2013/26, para. 44 (Crawford).

40. Second new charge: that the Nicaraguan army knew about Mr. Pastora's activities and approved of them<sup>25</sup>. The South Military Detachment Headquarters is in San Carlos, at the opposite end of the San Juan River, more than 180 km from the disputed area where Mr. Pastora was operating. Nicaragua acknowledges that Mr. Pastora was observed by the few soldiers at the beach encampment, and probably by others conducting regular patrols along the San Juan River, and that they did not interfere with him. They might have assumed, like Professor Crawford, that Mr. Pastora was authorized to be there. But, as we have shown, he was not. There is no evidence that senior military personnel, or any other government officials, authorized or approved Mr. Pastora's activities in the disputed area.

41. Third new charge: This is actually a revised old charge. That Nicaragua's acceptance of the facts is reluctant and untimely<sup>26</sup>. Neither is true. Professor Crawford now agrees that it was appropriate, after Costa Rica filed its Request for new provisional measures on 23 September, for Nicaragua to address its response to the Court, rather than to Costa Rica directly<sup>27</sup>. But he does not accept that Nicaragua needed until 10 October to do so. He counted 26 days from 16 September<sup>28</sup>. But he overstates the time, because there are only 17 days between 23 September, when Costa Rica filed its Request, and 10 October, when Nicaragua sent its Response to the Court. My friend questioned why it would take so long to "assemble the legal team"<sup>29</sup>. Ambassador Argüello will answer him, and show that Nicaragua moved as quickly as possible to answer Costa Rica's charges and submit its answer to the Court, with all relevant documents attached. After yesterday, Costa Rica may wish to reconsider raising the subject of the untimely submission of documents.

42. In addition to these charges, Professor Crawford amplified on two from Monday, on his central theme that Nicaragua violated its assurances to the Court before and will do it again<sup>30</sup>. He pointed again to the photo of Nicaraguan soldiers in the disputed area taken on 19 January 2011,

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<sup>25</sup>CR 2013/26, para. 43 (Crawford).

<sup>26</sup>CR 2013/26, para. 43 (Crawford).

<sup>27</sup>CR 2013/26, para. 5 (Crawford).

<sup>28</sup>*Ibid.*

<sup>29</sup>*Ibid.*

<sup>30</sup>CR 2013/26, para. 45 (Crawford).

one day after Nicaragua told the Court that all Nicaraguan military personnel had been removed<sup>31</sup>. But he did not dispute what I said Tuesday, that they had been withdrawn within a few days of the photo, and no troops had returned to the area. Yes, Nicaragua's statement on 18 January was a bit premature. But this is not evidence that Nicaragua violated its assurances to the Court, let alone that it is a serial violator. The larger truth is that Nicaragua did remove all its troops promptly, as it assured the Court it would, and that it has honoured its word to keep them out of the disputed area ever since.

43. Professor Crawford apologized to the Court for failing to provide any evidence Monday in support of his charge that Nicaragua sent 10,000 Sandinista youth to perform work on the first *caño*<sup>32</sup>. He sought to atone for this omission by submitting a copy of a digital news article<sup>33</sup>. But his statement still has no support. The press article, which hardly qualifies as admissible evidence, says nothing about anyone working on the *caño* in the disputed area. And Ambassador Argüello already explained that the number of people refers to the young environmentalists who have performed volunteer work along the entire length of the San Juan River, not in the disputed area. The very same information, in an almost identical and equally unreliable news article, was attached to Costa Rica's request for modification of the Court's Order of 8 March 2011. The Court determined that the evidence presented then did not show any irreparable harm, and declined to modify its Order. In other words, there is nothing new here. Professor Crawford has still produced no evidence to support his charge. He has produced *no* evidence that Nicaragua cannot be trusted, or that its assurances cannot be accepted. This basis for Costa Rica's provisional measures request is non-existent.

44. Finally, I come to Professor Crawford's second, and last conclusion, that *if* Nicaragua has breached the Court's Order of March 2011, *then* there is a risk of harm and Costa Rica is entitled to return to the status quo<sup>34</sup>. He called this a legal matter, and cited me as authority that he is frequently right on the law. Mr. President, I do not take back the compliment I paid to my friend,

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<sup>31</sup>CR 2013/26, para. 46 (Crawford).

<sup>32</sup>CR 2013/26, para. 47 (Crawford).

<sup>33</sup>CR 2013/26, para. 47 (Crawford).

<sup>34</sup>CR 2013/26, para. 51 (Crawford).

but Professor Pellet is usually right on the law and he disagrees. Moreover, the factual predicates for Professor Crawford's legal conclusion do not exist. Costa Rica has not demonstrated the need for any of its requested measures. There is certainly none for the first two. It is undisputed that the prohibited activities in the disputed area have been terminated, and that all associated personnel and equipment have been removed. Professor Kohen helpfully clarified that the first two measures seek no more than this. They are therefore unnecessary and superfluous. That leaves only the third measure, for remediation — of what? As long as there is no connection to the sea, there is no risk of irreparable harm, according to their own expert witness. And, as we have seen, there is no such connection. There are thus *no* grounds for *any* of the provisional measures Costa Rica has requested.

45. However, if the remediation Costa Rica desires is the filling of the trench on the beach or even the building of a sand berm, to assure that the *caño* will never reach the sea, then the two Parties are in agreement on what needs to be done, even if they disagree on whether Costa Rica has justified its Request for new provisional measures. Nicaragua is ready, willing and able to eliminate the trench. Ambassador Argüello will elaborate. Maybe it is possible to save this marriage after all. Maybe this time they will take “yes” for an answer. If not, we have confidence that the Court will find a way to help both Parties reach an accommodation.

46. Mr. President, Members of the Court, it has been an honour for me to appear before you in these hearings. I thank you again for your patience and kind attention. And I ask you to please call Professor McCaffrey to the podium.

The PRESIDENT: Thank you very much, Mr. Reichler. Certainly I will give the floor to Professor McCaffrey, but before doing that, Judge Greenwood would like to seek a clarification — an answer to a matter which you have raised in this morning's presentation. And you may provide the answer immediately, or if you may wish to consult the Agent. I will give you the floor, later on perhaps, after the presentation by Professor Pellet — or the Agent himself can clarify the matter. Judge Greenwood, you have the floor.

Judge GREENWOOD: Thank you, President. I just want to seek clarification about two aspects of the order that appears at tab 20 of the judges' folder. The first is that the order is

obviously from the Army of Nicaragua, but it appears to be addressed to a military unit. Would counsel for Nicaragua please clarify the way in which this document is applicable to Mr. Pastora, and to the National Port Authority? The second clarification concerns a matter that is probably just a reflection of the way the translation of the document has been printed out. I want to know whether the date of 9 March 2011, at the end of the bold-lettered passage, relates to the date of the order, or the date of the Presidential Decree 79/2009. Thank you.

The PRESIDENT: Thank you, Mr. Reichler. So, as I said earlier, you can provide clarification now or later on during this morning's hearing.

Mr. REICHLER: Well, I think it is always best for counsel to consult with the Agent before providing an answer. I appreciate the questions. We will answer them later.

The PRESIDENT: Certainly. Thank you. I now call on Professor McCaffrey, please.

Mr. McCAFFREY:

#### **NO THREAT OF IRREPARABLE HARM**

Thank you, Mr. President. Mr. President, distinguished Members of the Court, good morning. My task today is to respond to Costa Rica's argument that the so-called "eastern *caño*" poses a risk of irreparable harm. I will be brief, because despite the fact that Costa Rica introduced new evidence yesterday, the situation has not changed materially since my last intervention.

1. Mr. President, Members of the Court, yesterday Professor Crawford showed an image dated 5 October purporting to show a widening and lengthening of the "ditch" at the seaward end of the so-called "eastern *caño*". As I have mentioned, this was new evidence, submitted in the second round of the hearings, which is unusual, to say the least.

2. Costa Rica says the "eastern *caño*" entails a threat of irreparable harm and that the 5 October image proves this. Professor Crawford yesterday addressed "the question of risk of irreparable harm". In doing so, he rather remarkably offered testimony, not even on his own behalf, but on behalf of Costa Rica's expert, Professor Thorne, who was not present. As Professor Crawford tells it, Dr. Thorne stated the view that

“the increasing wet season runoff from the catchment is likely *now* — that is, over the coming weeks — to raise the elevation of the water surface in the river compared to that in the sea, creating the gradient necessary to drive the flow through the *caño* with sufficient force to scour its bed and enlarge the ditch through the beach”<sup>35</sup>.

3. Thus, we were given not one, but two new pieces of ostensible evidence by Professor Crawford at yesterday’s hearing, which Nicaragua saw and heard for the first time during that hearing. The first, the satellite image, is something we would have liked very much to have our expert examine. Professor Crawford asked, “Where is [Dr. Kondolf]?” It would have been rather difficult to summon him during the hearing yesterday to examine this image. Unfortunately, Professor Kondolf was not here to do so. When Costa Rica presented Dr. Thorne’s report to the Court last Thursday evening, less than two working days before the hearing was scheduled to begin, Professor Kondolf was traveling in Asia. Given the short notice Nicaragua was provided for the need for his expert input during the hearing, Dr. Kondolf was unable to participate, which brings me to the second new piece of evidence.

4. This second new piece of would-be evidence, which is not even hearsay but rather a mere assertion of counsel, should have come directly from Dr. Thorne, preferably on the witness stand here in the Great Hall of Justice but, at very least, in the form of a written report. Then Nicaragua would have had an opportunity to test his opinions and to clarify what the conditions would have to be for what he stated to occur. But while Costa Rica had earlier said he would be “available”, there was no sign of him yesterday. It is Nicaragua that should ask, “Where was Dr. Thorne?”

5. However, since Professor Crawford has as much as invited Nicaragua to reciprocate and introduce expert evidence — in this case, of Dr. Kondolf — in the second round of pleadings, we have done so. You will find Dr. Kondolf’s brief report at tab 23 of your judges’ folders<sup>36</sup>.

6. Mr. President, Members of the Court, let me focus on the issue of the risk of irreparable harm. First, allow me to quote briefly from Dr. Kondolf’s report, at page 2. He states as follows:

“The removal of vegetation associated with clearing of the *caños* is small in comparison to natural variability and change that occurs in the delta. The concerns raised about ‘irreversible harm’ from the *caños* capturing the flow of the Río San Juan and thereby shortening the river are exaggerated.”<sup>37</sup>

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<sup>35</sup>CR 2013/26, p. 15, para. 22 (Crawford).

<sup>36</sup>Potential ecosystem impacts of changes at the mouth of the Río San Juan, G. Mathias Kondolf, Ph.D., 16 Oct. 2013.

<sup>37</sup>*Ibid.*, p. 2.

7. Mr. President, I turn next to Costa Rica's new evidence from yesterday, and I would make two points here. [Slide: tab 24] First, Professor Crawford said that the 5 October image — which is now on your screens and at tab 24 of your judges' folders — this image showed that “a new entrance to the *caño* has been created”<sup>38</sup>. In fact, whatever is there does not appear to be new; it can already be seen on the 14 September image. If there is a new entrance — or any entrance, for that matter — it is miniscule; certainly not like what would be necessary to divert the entire flow of the river from its existing channel. One does not have to be an expert to see that. The downstream “entrance”, as it were, to the extent there is one, is at such an angle to the flow that, as a matter of common sense, it would not be suited to attract the flow of the river into the *caño*. In any event, the eastern *caño* is virtually perpendicular — virtually — to the river, which would not in itself encourage flow to enter it.

8. And second, it does not take an expert to realize that no matter what is done to the ditch at the seaward end of this *caño*, in order for water to flow *out* of the *caño* into the sea, it must first flow *into* the *caño* from the river. As I will discuss presently, under current conditions, including the small island that is visible, blocking the *caño*'s entrance, and *the* very narrow opening, as is clearly visible from Costa Rica's own 5 October image, it seems highly unlikely that sufficient water would flow from the river — if any would flow at all — *into* the *caño* to trigger the process of scouring that would be necessary for the river to enlarge the *caño* and carve its route to the sea. Costa Rica admitted as much when we were told that *if* the barrier island at the *caño*'s intake were removed, there would be a chance that water from the river might enter it. But, Mr. President, that is not going to happen, since work there has stopped. That little if any water is presently flowing from the river into the eastern *caño* is obvious from the sharp contrast in the colour of the water as between the river and the *caño*. And certainly no self-diversion of the San Juan has occurred through the original *caño*, where conditions are arguably more favourable to such a change, as I will discuss shortly.

9. Finally, I would recall our observation on Tuesday, that Costa Rica based its entire technical argument about the river changing course and flowing into the eastern *caño* on the

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<sup>38</sup>CR 2013/26, p. 14, para. 21 (Crawford).

condition that the channel work would have to be completed and connected to the sea. Costa Rica has produced no evidence that changes that premise. The channel remains unconnected to the sea. Professor Thorne's report makes this foundational assumption emphatically clear. At paragraph 4.7 of his report, he states:

“For substantive flows to pass through either of the 2013 *caños* they need to be open to the Caribbean Sea at their downstream ends. In the case of the eastern *caño*, [he continues] the trench already dug part way across the beach could be extended to achieve this with little difficulty.” (Emphasis added.)

It is only “[o]nce the trench is completed” that the danger he identifies even becomes possible.

10. Mr. President, nothing Costa Rica said yesterday can or does change that premise. Yet, the unmistakable fact is that the channel remains unconnected to the ocean. Indeed, not only is the downstream end of the *caño* not “open to the Caribbean Sea”, as you can plainly see from the image Costa Rica belatedly introduced yesterday, but the upstream end of the ditch across the beach also appears to have sand piled across the point where it meets the *caño*. The assumption on which Costa Rica's technical case is built is not satisfied. The risk is therefore not real. And since the work has stopped, there is no chance of its becoming real. [Slide: tab 24 off]

11. Mr. President, there is also a more general point. To recapitulate, Costa Rica says the eastern *caño* may capture the flow of the San Juan River, which will result in irreparable harm to its rights. In considering that assertion, it would be well to recall that Costa Rica made the same argument about the original *caño*, of which it complained in the *Certain Activities* case. In the original provisional measures hearings in that case, Costa Rica also made ~~the~~ argument and showed photos purporting to demonstrate the calamities that would ensue if work on that *caño* were not halted and the terrain restored — namely, that the *caño* would, by virtue of its location, attract the flow of the San Juan River, which would break through the barrier beach that separates the Harbor Head Lagoon from the sea, all resulting in a change of the river's course<sup>39</sup>.

12. But then work was stopped on this *caño*. What happened? Did the river change course? No. [Tab 25 on screen.] In fact, Costa Rica in its Memorial on the merits — from which the image on the screen (and at tab 25 of your folders) was taken — later recognized that the original *caño*

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<sup>39</sup>CR 2011/1, para. 41, p. 67, available at: <http://www.icj-cij.org/docket/files/150/16282.pdf>.



had again become “heavily-silted” with substantially reduced water flows<sup>40</sup>, precisely as happens to the *caños* in this entire area without the maintenance necessary to keep them clear and passable. [Tab 25 off; tab 26 on screen.] **And** what you now see on the screen (and at tab 26) is a comparison by Dr. Kondolf of the original *caño* in November 2010 and September 2013 (on the right), showing the rapid regrowth of vegetation during that relatively short period. This of course applies to the eastern *caño* as well, this phenomenon. [Tab 26 off.]

13. Mr. President, Members of the Court, there is no reason to believe the situation with respect to the so-called “eastern *caño*” is any different from that of the original *caño*. Work on it has stopped. The climatological and hydrographic conditions are virtually the same as those relating to the original *caño*. The opening from the river into the eastern *caño* appears smaller than that from the river into the original *caño* and, as mentioned earlier, the downstream *and* upstream ends of the ditch across the beach are blocked. Thus, as I have said, there is no reason to believe that anything like the catastrophic consequences, about which Costa Rica’s counsel have raised such great alarm, will in fact ensue.

14. Mr. President, distinguished Members of the Court, that concludes my brief presentation. Thank you for your kind attention. Mr. President, I would ask that you now call my friend and colleague, Professor Alain Pellet, to the podium. Thank you.

The PRESIDENT: Thank you very much, Professor McCaffrey. Maintenant je passe la parole à Monsieur le professeur Alain Pellet. Vous avez la parole, Monsieur.

M. PELLET : Merci, Monsieur le président.

#### LA FONCTION DES MESURES CONSERVATOIRES

1. Monsieur le président, Mesdames et Messieurs de la Cour, l’objet de mon intervention de ce matin est d’examiner la demande du Costa Rica à la lumière du rôle que jouent — ou que devraient jouer — les mesures conservatoires dans l’affaire qui nous occupe. Même si je suis «professeur dans l’âme», je m’interdis de donner des cours à la Cour qui, cela va sans dire, n’en a pas besoin... Il ne s’agit donc pas de disserter dans l’abstrait sur cette — ou ces — fonction(s) des

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<sup>40</sup>MCR, figure 1.34, caption, p. I-51.

mesures conservatoires, mais de montrer qu'en l'espèce l'Etat demandeur essaie d'obtenir beaucoup plus que ce que la Cour pourrait lui accorder à ce stade de l'affaire.

2. Délaisant le plan à la française, je le ferai en quatre points, selon le schéma de plaidoiries affectionné par James Crawford :

- 1) une demande en indication de mesures conservatoires ne saurait être pour l'Etat qui les demande l'occasion de s'adjuger un avantage quelconque sur le fond de l'affaire ;
- 2) elle ne saurait en particulier préjuger les limites d'un territoire contesté ou son appartenance à l'une ou l'autre des Parties ;
- 3) un Etat ne pourrait pas davantage, par le biais d'une telle demande, ou de sa modification, ou de la formulation de nouvelles demandes, modifier le champ de sa requête initiale ;
- 4) la Cour ne pourrait pas non plus, évidemment, préjuger, dans une ordonnance en indication de mesures conservatoires, la responsabilité de la Partie défenderesse.

C'est pourtant à tout cela qu'aboutiraient les mesures conservatoires que le Costa Rica vous prie d'indiquer.

**1. Une demande en indication de mesures conservatoires ne saurait être l'occasion pour l'Etat qui les demande de s'adjuger un avantage quelconque sur le fond de l'affaire**

3. D'abord, Monsieur le président, si vous le voulez bien, la question de principe : une demande en indication de mesures conservatoires ne saurait être l'occasion pour l'Etat qui la formule de s'adjuger un avantage quelconque sur le fond de l'affaire.

4. La jurisprudence de la Cour est bien établie en ce sens :

«aucune action *pendente lite* émanant d'un Etat partie à un différend avec un autre Etat devant la Cour «ne saurait exercer une influence quelconque sur l'état de droit qu'il incombe à la Cour de définir» ... et ... cette action ne saurait améliorer sa position juridique vis-à-vis de cet autre Etat»<sup>41</sup>.

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<sup>41</sup> *Passage par le Grand-Belt (Finlande c. Danemark), mesures conservatoires, ordonnance du 29 juillet 1991, C.I.J. Recueil 1991, p. 19, par. 32, citant Statut juridique du territoire du sud-est du Groënland, ordonnances des 2 et 3 août 1932, C.P.J.I. série A/B n° 48, p. 287.*

Et, plus généralement, toute décision rendue sur une demande en indication de mesures conservatoires «ne doit préjuger aucune question relative au fond de l'affaire portée devant la [Cour et] doit laisser intacts les droits des parties à cet égard»<sup>42</sup>.

5. Il est peut-être un peu simplificateur de dire que les contentieux qui sont soumis à la Cour sont de deux sortes ; mais, vu de Sirius, on peut considérer que vous êtes saisis, d'une part, de litiges territoriaux ou frontaliers — qu'ils soient terrestres ou maritimes — et, d'autre part, de différends relatifs à la responsabilité des Parties — et votre jurisprudence *LaGrand*, qui, à tort ou à raison, a reconnu le caractère obligatoire — en tout cas possiblement obligatoire — des ordonnances en indication de mesures conservatoires a fait que les deux sont souvent entremêlés — et c'est le cas de notre affaire puisque ce que l'on peut appeler les «sur-contre-mesures» demandées par le Costa Rica constituent un méli-mélo de demandes territoriales et en responsabilité liées (en apparence au moins) non pas à la requête initiale, mais au non-respect des mesures conservatoires indiquées par la Cour le 8 mars 2011.

## **2. Une demande en indication de mesures conservatoires ne saurait préjuger les limites d'un territoire contesté ou son appartenance à l'une ou l'autre des Parties**

6. J'en arrive à mon deuxième point, Monsieur le président. Dans sa demande en indication de mesures conservatoires comme dans ses plaidoiries de lundi dernier, le Costa Rica désignait le territoire contesté comme «le territoire costa-ricien» — «the Costa Rican territory» — on trouve l'expression quatre fois dans la demande<sup>43</sup> et pas moins de quinze fois dans les plaidoiries<sup>44</sup>. Ses représentants se sont abstenus de reprendre cette terminologie dans leurs présentations d'hier — ils ont raison : comme je l'ai fait remarquer mardi, c'est mettre la charrue avant les bœufs et postuler

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<sup>42</sup> *Différend frontalier (Burkina Faso/République du Mali), mesures conservatoires, ordonnance du 10 janvier 1986, C.I.J. Recueil 1986*, p. 11, par. 30, voir aussi par. 29. Voir également : *Usine de Chorzów, ordonnance du 21 novembre 1927, C.P.J.I. série A n° 12*, p. 10 ; *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 10 mai 1984, C.I.J. Recueil 1984*, p. 182, par. 31 ; *Passage par le Grand-Belt (Finlande c. Danemark), mesures conservatoires, ordonnance du 29 juillet 1991, C.I.J. Recueil 1991*, p. 19, par. 32 ou *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro)), mesures conservatoires, ordonnances des 8 avril et 13 septembre 1993, C.I.J. Recueil 1993*, respectivement p. 22, par. 44 et p. 347, par. 48 ou *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), mesures conservatoires, ordonnance du 15 mars 1996, C.I.J. Recueil 1996 (I)*, p. 23, par. 43.

<sup>43</sup> Requête du Costa Rica, 23 septembre 2013, par. 2, 6, 14 et 23.

<sup>44</sup> CR 2013/24, p. 14, par. 1 et 2, p. 15, par. 4 et 6, p. 16, par. 9 (agent), p. 17, par. 2, p. 18, par. 3, p. 20, par. 10, p. 22, par. 18, p. 24, par. 23 (Ugalde), p. 37, par. 4 (Crawford), p. 51, par. 13, p. 54, par. 22, p. 55, par. 24 et p. 61, par. 39 (Kohen).

ce qu'il leur appartient de prouver<sup>45</sup>. Aussi longtemps que la Cour n'a pas tranché au fond, ce que nos amis costa-riens appellent «Isla Portillos» est un territoire contesté. Chacune des Parties le considère comme sien ; l'une et l'autre sont tenues de n'y agir que dans la mesure compatible avec l'ordonnance de 2011.

7. Il en résulte au moins trois conséquences :

- d'une part, il ne saurait être question «d'empêcher de nouvelles atteintes à l'intégrité territoriale du Costa Rica» («to prevent further breaches of Costa Rica's territorial integrity»<sup>46</sup>) ; il s'agit seulement de déterminer à laquelle des deux Parties appartient le territoire contesté. Au surplus, je relève que la Cour a toujours été réticente pour mêler contentieux territorial et contentieux de la responsabilité<sup>47</sup>, or c'est à cela que le Costa Rica l'invite et ceci dès le stade des mesures conservatoires ;
- d'autre part, si les travaux menés sous la direction de M. Pastora sont illicites, ce n'est pas parce qu'ils l'ont été «en territoire costa-ricien» mais parce que — et dans la mesure où — ils l'ont été dans le «territoire contesté» en contravention avec les dispositions de l'ordonnance de 2011 ;
- enfin, la troisième demande du Costa Rica, quel que soit le sort que vous lui réserveriez, Mesdames et Messieurs les juges, doit être interprétée comme strictement limitée au territoire contesté ; les alentours («surrounding areas») des *caños* sont — et sont exclusivement — ceux qui se trouvent sur le territoire litigieux ; si une «remise en état» était jugée nécessaire, elle doit se limiter à ce territoire, à l'exclusion de toute action dans le territoire appartenant au Nicaragua.

8. Et je rappelle à cet égard, Monsieur le président, que le fleuve San Juan fait partie du territoire nicaraguayen. C'est ce pays et lui seul qui possède «le *dominium* et l'*imperium* exclusifs sur les eaux du fleuve San Juan depuis son origine dans le lac jusqu'à son embouchure dans

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<sup>45</sup> CR 2013/25, p. 12, par. 46 (Pellet).

<sup>46</sup> Demande en indication de mesures conservatoires, 23 septembre 2013, p. 14, par. 27.

<sup>47</sup> Voir *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria ; Guinée équatoriale (intervenante))*, arrêt, C.I.J. Recueil 2002, p. 451-452, par. 313-315 ; ou *Différend territorial et maritime (Nicaragua c. Colombie)*, arrêt du 19 novembre 2012, par. 250.

l'océan Atlantique»<sup>48</sup>, avec comme *seule* limite l'obligation de respecter le droit du Costa Rica «de libre navigation sur le fleuve San Juan à des fins de commerce», obligation que vous avez interprétée par votre arrêt du 13 juillet 2009 dans l'affaire du «San Juan»<sup>49</sup>. Le Nicaragua n'entend pas se départir des droits, par ailleurs exclusifs, découlant de sa souveraineté sur le fleuve.

9. Le Costa Rica s'en indigne et tente de vous faire partager cette indignation en prétendant que «la seule manière» d'accéder à la zone des deux *caños* serait «d'utiliser le fleuve San Juan pour atteindre la zone des deux nouveaux canaux. Il s'agit pratiquement», affirme le professeur Kohen, «de la seule manière d'y accéder, compte tenu de la nature du terrain, qui rend difficile, voire impossible, d'arriver par voie terrestre ou même par hélicoptère. [Il s'agit] de permettre d'accéder à la région par voie aquatique, en vue d'effectuer ces travaux, sans préjuger des positions des Parties *pendente lite*. Et je me demande, par ailleurs, quel serait le problème que poserait au Nicaragua la présence de ces navires sur le San Juan ?»<sup>50</sup>. Le procédé est facile ; la réponse l'est aussi :

— en droit, une telle demande n'a aucune justification : la Cour ne saurait, par le biais de l'indication de mesures conservatoires, porter atteinte à l'indiscutable souveraineté territoriale du Nicaragua sur le San Juan (indiscutable mais apparemment toujours discutée puisque le Costa Rica revient sans cesse à la charge sur ce point...). La Cour l'a dit à plusieurs reprises : dans le cadre de contentieux territoriaux ou frontaliers, elle ne peut ni ne doit préjuger au stade des mesures conservatoires «l'existence ou la valeur des droits souverains revendiqués par [l'une ou l'autre des parties] sur le territoire dont il s'agit»<sup>51</sup> ni l'existence ou le tracé d'une ligne quelconque<sup>52</sup> ;

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<sup>48</sup> Article VI du traité de limites (Jerez-Cañas) du 15 avril 1858 conclu entre le Nicaragua et le Costa Rica (CRM, annexe 1, vol. II, p. 11). Texte espagnol original : «el dominio y sumo imperio sobre las aguas del río de San Juan desde su salida del Lago, hasta su desembocadura en el Atlántico».

<sup>49</sup> *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, arrêt, C.I.J. Recueil 2009, p. 269, par. 156, point 1) a) du dispositif.

<sup>50</sup> CR 2013/26, p. 28-29, par. 15 (Kohen). Voir aussi CR 2013/24, p. 58-59, par. 32 (Kohen).

<sup>51</sup> *Statut juridique du territoire du sud-est du Groënland, ordonnance du 3 août 1932, C.P.J.I. série A/B n° 48*, p. 285 ; voir aussi *Différend frontalier (Burkina Faso/République du Mali), mesures conservatoires, ordonnance du 10 janvier 1986, C.I.J. Recueil 1986*, p. 19, par. 17 ; ou *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), mesures conservatoires, ordonnance du 15 mars 1996, C.I.J. Recueil 1996 (I)*, p. 22, par. 40.

<sup>52</sup> *Différend frontalier (Burkina Faso/République du Mali), mesures conservatoires, ordonnance du 10 janvier 1986, C.I.J. Recueil 1986*, p. 11, par. 28-30.

— c'est tout aussi facile de répondre à M. Kohen en fait, car il n'est tout simplement pas exact de dire qu'il «s'agit pratiquement ... de la seule manière» d'accéder à la zone en question<sup>53</sup>.

10. En réalité :

- il suffit de jeter un coup d'œil sur une carte pour constater que si l'emplacement en question (celui où se trouvent les *caños*) était difficile à atteindre par la voie terrestre, *quod non*, il pourrait, de toute façon l'être, et très aisément, par la mer — ce qui, il est vrai, obligerait à traverser le fleuve San Juan, qui relève de l'*imperium* et du *dominium* exclusifs du Nicaragua ;
- ce serait un moindre mal, mais ce n'est même pas nécessaire, car la voie terrestre est tout à fait praticable : premièrement, le Costa Rica a établi, dans les environs immédiats des *caños* litigieux, des tours d'observation dont la construction a sans doute demandé l'acheminement d'un matériel plus considérable que ce qui pourrait être nécessaire à la «remédiation» de l'approfondissement de ces *caños* ;
- d'ailleurs, l'affirmation selon laquelle les Costa-Riciens ne pourraient accéder à leur emplacement que par la voie fluviale fait sourire, lorsque l'on constate qu'ils ont produit des photographies des *caños* en question prises à l'évidence depuis la terre ; ou le Costa Rica aurait-il, une nouvelle fois, violé l'interdiction de naviguer sur le fleuve San Juan à des fins autres que des fins de commerce ?
- plus sérieusement, je rappelle que c'est, soi-disant, pour pouvoir accéder aisément au territoire litigieux que le Costa Rica dit avoir construit la route 1856 ; puisqu'il l'a construite, fût-ce illicitement et au mépris de l'ordonnance de la Cour enjoignant les Parties de ne pas aggraver le différend, qu'il l'utilise plutôt que de tenter, une nouvelle fois, de vous convaincre de porter atteinte à la souveraineté territoriale du Nicaragua !

**3. Un Etat ne saurait, par le biais d'une demande en indication de mesures conservatoires, ou de sa modification, ou de la formulation de nouvelles demandes modifier le champ de sa requête initiale**

[Projection : Croquis n° 5, Punta Castilla et le secteur de la baie de San Juan del Norte (MCR, fig. 4.6, p. 154).]

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<sup>53</sup> CR 2013/26, p. 28-29, par. 15 (Kohen).

11. Territoriale ai-je dit ; «territorialement», la demande du 23 septembre dernier est affectée d'un autre vice, dont, je dois dire, nous n'avions pas conscience avant les audiences de cette semaine. Le Costa Rica tente en effet de saisir le prétexte de cette demande pour élargir le champ d'application territoriale de sa demande. Et ceci est mon troisième point.

12. Dans la requête costa-ricienne, ce champ d'application territoriale est défini de manière assez vague<sup>54</sup>. Mais il est très clairement illustré sur la carte, qui est projetée en ce moment et qui figure à la page 154 du mémoire costa-ricien. Elle figure également dans vos dossiers. La limite des prétentions territoriales du Costa Rica y est figurée par un trait bleu suivant la rive droite du San Juan et définie, dans la légende, comme la «limite internationale» (the «international limit»). Et ce schéma correspond en tous points à la définition du territoire litigieux tel qu'il est décrit par l'ordonnance du 8 mars 2011 après que la Cour a confronté les prétentions opposées des Parties. Elle définit ainsi le territoire litigieux :

«la partie septentrionale de Isla Portillos, soit la zone humide d'environ trois kilomètres carrés comprise entre la rive droite du *caño* litigieux, la rive droite du fleuve San Juan lui-même jusqu'à son embouchure dans la mer des Caraïbes et la lagune de Harbor Head»<sup>55</sup>.

13. En demandant le retrait du petit détachement nicaraguayen stationné sur la rive gauche, le Costa Rica modifie la définition même du «territoire contesté» sur laquelle la Cour et le Nicaragua pouvaient légitimement tabler. Comme M<sup>c</sup> Reichler l'a montré il y a quelques instants, ceci constitue une prétention nouvelle qui ne saurait être formulée à ce stade : c'est la requête qui fixe les contours de l'affaire<sup>56</sup> ; c'est sur elle que la Cour s'est fondée lorsqu'elle a indiqué les mesures conservatoires de 2011 ; et en fonction d'elle aussi que le Nicaragua a préparé sa défense et que ses plus hautes autorités ont fixé leur ligne de conduite pour respecter et faire respecter l'ordonnance de la Cour. Le Costa Rica ne peut aujourd'hui s'en dédire pour élargir la portée de sa requête en redéfinissant subrepticement son champ d'application territoriale.

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<sup>54</sup> Voir la demande en indication de mesures conservatoires, p. 14, par. 17-18.

<sup>55</sup> *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua), mesures conservatoires, ordonnance du 8 mars 2011, C.I.J. Recueil 2011 (I), p. 19, par. 55* (les italiques sont de nous).

<sup>56</sup> *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992, p. 266-267, par. 69. Voir aussi Administration du prince von Pless, exception préliminaire, ordonnance du 4 février 1933, C.P.J.I. série A/B n° 52, p. 173 ou Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2003, p. 213-214, par. 117.*

14. Certes, les demandes initiales ne sont pas gravées dans le marbre et il est loisible à l'Etat requérant de les ajuster. Mais, comme vous l'avez rappelé à maintes reprises, «c'est la requête qui indique l'objet du différend ... [et] le mémoire, tout en pouvant éclaircir les termes de la requête, ne peut pas dépasser les limites de la demande qu'elle contient»<sup>57</sup> ; dès lors, «[i]l convient que la demande additionnelle soit implicitement contenue dans la requête ... ou découle «directement de la question qui fait l'objet de cette requête»»<sup>58</sup>. Certes dans tous les précédents que j'ai trouvés — avec l'aide précieuse de mon assistant, Benjamin Samson --, il s'agissait non de mesures conservatoires mais d'exceptions préliminaires ou d'arrêts au fond ; mais cela ne change rien à l'affaire : les droits qui peuvent être préservés par l'indication de mesures conservatoires en vertu de l'article 41 du Statut sont, à l'évidence, ceux qui sont énoncés dans la requête.

15. En apparence, l'objet de la requête costa-ricienne ne change pas de nature du fait de la modification de son champ territorial. Malheureusement, Monsieur le président, cette apparence est trompeuse : comme cela ressort de la définition par la Cour du «territoire litigieux» que j'ai lue toute à l'heure, celui-ci est borné par «la rive droite du fleuve San Juan lui-même jusqu'à son embouchure dans la mer des Caraïbes». En étendant ses prétentions à une partie de la rive gauche, le Costa Rica modifie profondément la portée de ses demandes. La Cour ne saurait l'admettre et il va de soi, à plus forte raison, Mesdames et Messieurs les juges, que vous ne sauriez consacrer par avance, en catimini en quelque sorte, par l'intermédiaire d'une ordonnance en indication de mesures conservatoires, des droits qui ne sont pas même l'objet de la requête et ne sont, par conséquent, pas non plus l'objet du différend !

[Fin de la projection.]

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<sup>57</sup> *Administration du prince von Pless, exception préliminaire, ordonnance du 4 février 1933, C.P.J.I. série A/B n° 52, p. 14 ; ou Société commerciale de Belgique, arrêt, 1939, C.P.J.I. série A/B n° 78, p. 173 ; ou Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), arrêt, C.I.J. Recueil 2010 (II), p. 656, par. 39.*

<sup>58</sup> *Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992, p. 266, par. 67 citant Temple de Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962, p. 36 et Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande), fond, arrêt, C.I.J. Recueil 1974, p. 203, par. 72. Voir aussi Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II), p. 695-696, par. 110 ou Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), arrêt, C.I.J. Recueil 2010, p. 657, par. 41.*



Le PRESIDENT : Monsieur le professeur, je voudrais juste attirer votre attention sur le temps. Je crois qu'il reste environ 18 minutes pour le Nicaragua pour compléter les plaidoiries jusqu'à 11 h 40.

M. PELLET : Je vais essayer de ne pas trop dépasser le temps, Monsieur le président, je me permets de rappeler que la Cour est arrivée un peu en retard ce matin.

Le PRESIDENT : J'ai pris en compte 10 minutes, c'est pourquoi je dis à 11 h 40. Eleven forty.

M. PELLET :

#### **4. La Cour ne peut préjuger, dans une ordonnance en indication de mesures conservatoires la responsabilité de la Partie défenderesse**

16. Monsieur le président, comme je l'ai dit, la Cour ne peut évidemment pas non plus préjuger, dans une ordonnance en indication de mesures conservatoires, la responsabilité de la Partie défenderesse — ce que le Costa Rica lui demande pourtant très ouvertement et obstinément — au point que l'on a eu l'impression, au cours de ses plaidoiries, que la demande du 23 septembre était pour l'Etat demandeur l'occasion d'intenter un procès en responsabilité contre le Nicaragua — pour ne pas dire un procès pénal.

17. Le Nicaragua serait ainsi l'auteur de faits internationalement illicites engageant sa responsabilité.

18. Plus prudent sur ce point que mes collègues, j'avais dit que le Nicaragua était «peut-être» responsable des actions de M. Pastora<sup>59</sup>. Je persiste et signe, Monsieur le président ! Certes :  
— même s'il n'est pas ministre mais seulement assimilé à un directeur d'administration centrale, M. Pastora exerce des fonctions officielles ;  
— les travaux effectués sur les canaux (dont il me semble qu'il reste à prouver qu'il les a creusés ou fait creuser en l'absence de tout canal pré-existant) sont, sans aucun doute, incompatibles avec les indications de votre ordonnance de 2011 ; et  
— ces mesures, jurisprudence *LaGrand* oblige, sont juridiquement obligatoires pour les Parties.

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<sup>59</sup> CR 2013/25, p. 51, par. 22 (Pellet).

*Ergo*, conclut le Costa Rica : le Nicaragua est responsable de ce ou de ces manquements.

19. Alors pourquoi nuancé-je en ajoutant «peut-être» ? Pour trois raisons :

- la première est qu'il faut qu'il n'existe aucune circonstance excluant l'illicéité ;
- la deuxième est qu'il ne suffit pas d'affirmer que les actes de M. Pastora sont attribuables au Nicaragua ; il faut encore savoir à quel titre ils engageraient la responsabilité de celui-ci ; et
- la troisième est que cette discussion est prématurée : il s'agit de questions de fond, qu'il n'appartient pas à la Cour de trancher à ce stade.

20. Je vais reprendre les deux dernières de ces remarques : la première — celle de savoir s'il existe d'éventuelles circonstances excluant ou atténuant la responsabilité — n'appelle pas de remarque à ce stade, sinon peut-être que ce n'est pas sans raison que, par votre ordonnance du 17 avril 2013, vous avez décidé de joindre les affaires relatives à *Certaines activités*, d'une part, et à la *Construction d'une route*, d'autre part. Je ne me placerai pas sur le terrain juridique puisque, comme je l'ai dit, ce n'est pas le moment de discuter de ces questions de responsabilité au fond ; mais je me permets tout de même de relever que le Costa Rica, si prompt à dénoncer la paille dans l'œil du Nicaragua, est obstinément muet sur la poutre qui afflige le sien : la construction de la route n° 1856.

21. Deuxième question, celle du fondement de la responsabilité éventuelle du Nicaragua. Que M. Pastora soit un officiel, nommé par décret du président de la République responsable du dragage du San Juan, nous ne le nions nullement. Mais cela ne signifie pas qu'il ait agi dans le cadre ou dans les limites de ses fonctions :

- *primo*, comme le précise le décret de nomination du 10 janvier 2012, M. Pastora est «délégué de la présidence de la République à la commission pour le développement du San Juan»<sup>60</sup>
  - mais, en soi, cela n'implique pas que tous ses actes engagent la responsabilité du Nicaragua ;
- *secundo*, il ne résulte pas du titre de M. Pastora qu'il ait vocation à creuser ou aménager des canaux à bien plaisir sur toute la longueur du fleuve ;

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<sup>60</sup> Dossier des juges du Costa Rica, 14 octobre 2013, onglet n° 24 (Crawford).

- *tertio*, quoi qu'en dise le Costa Rica<sup>61</sup>, les instructions de la présidence (dont dépend M. Pastora) étaient claires ; elles ont été relayées par l'ordre du chef d'état-major des armées, répercuté par le chef du détachement militaire du sud, qu'a également cité mon collègue Paul Reichler — ce document, en date du 9 mars 2011 a fait l'objet de questions de la part de M. le juge Greenwood ;
- au surplus, les réactions immédiates du président de la République, dès qu'il a été avisé du problème, ne laissent aucun doute : une enquête diligente<sup>62</sup>, l'interdiction de poursuivre les travaux, l'ordre clair donné à M. Pastora de se retirer du territoire litigieux (et de ne plus y retourner) aussitôt ces investigations — fort rapides — achevées, ne peuvent laisser le moindre doute sur le fait que celui-ci avait agi *ultra vires*.

22. Ceci étant, je le répète, et c'est mon dernier point : cette discussion sur la responsabilité est prématurée et n'a pratiquement rien à voir avec la demande en indication de mesures conservatoires qui nous réunit aujourd'hui,

«la Cour, dans le contexte de la présente procédure concernant l'indication de mesures conservatoires, doit, conformément à l'article 41 du Statut, examiner si les circonstances portées à son attention exigent l'indication de mesures conservatoires, mais n'est pas habilitée à conclure définitivement sur les faits ou leur imputabilité et ... sa décision doit laisser intact le droit de chacune des Parties de contester les faits allégués contre elle, ainsi que la responsabilité qui lui est imputée quant à ces faits et de faire valoir ses moyens sur le fond»<sup>63</sup>.

23. Notre problème n'est pas l'attribution de la responsabilité internationale au Nicaragua mais la connaissance des agissements de M. Pastora que pouvait avoir le pouvoir central, celui dont la parole fait foi au plan international. Les autorités nicaraguayennes les ignoraient. Cela n'empêche pas, peut-être, que ces agissements engagent la responsabilité du Nicaragua, mais cela suffit à écarter l'accusation de mauvaise foi, si pesante, si déplaisante et si mal fondée, sur laquelle repose toute la thèse de la Partie costa-ricienne.

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<sup>61</sup> Voir, par exemple, CR 2013/24, p. 42-43, par. 25-26 et p. 44, par. 30 (Crawford) et CR 2013/26, p. 12, par. 12-13 (Crawford).

<sup>62</sup> CR 2013/25, p. 50-51, par. 21 (Pellet).

<sup>63</sup> *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro)), mesures conservatoires, ordonnance du 8 avril 1993, C.I.J. Recueil 1993, p. 22, par. 44. Voir aussi Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie (Serbie et Monténégro)), mesures conservatoires, ordonnance du 13 septembre 1993, C.I.J. Recueil 1993, p. 347, par. 48 ou Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), mesures conservatoires, ordonnance du 15 mars 1996, C.I.J. Recueil 1996 (I), p. 23, par. 43.*

24. Plutôt que de saisir la Cour dans la précipitation d'une demande en indication de mesures conservatoires, demande qui a occasionné la lourde et coûteuse procédure qui nous réunit, j'ai le sentiment que le Costa Rica eût été mieux inspiré de «faire de son mieux pour rechercher avec [le Nicaragua] des solutions communes» — comme la troisième mesure que vous avez indiquée dans votre ordonnance du 8 mars 2011 lui en fait l'obligation. Il est d'autant moins excusable que, je le dis avec respect mais regret, cette mesure fait pourtant nettement pencher la balance en sa faveur — peut-être que ce déséquilibre est la raison de sa hardiesse à demander encore plus...

25. Je vous remercie, Monsieur le président.

Le PRESIDENT : Je vous remercie, Monsieur le professeur. I now call on the Agent, unless Mr. Reichler is going to provide clarification? So, as I said, either Mr. Reichler or the Agent. Please, you have the floor, Ambassador.

Mr. ARGÜELLO:

1. Mr. President, distinguished Members of the Court, I will begin my final presentation by responding to the questions put to Nicaragua by two — now three — Members of the Court.

2. In response to Judge Donoghue's question, Nicaragua informs the Court that in accordance with the official information transmitted yesterday<sup>64</sup> and inserted in the judges' folder in tab 28, the equipment shown in Costa Rica's attachments PM-13 and PM-14, is currently stationed at the Sovereignty Camp in the town of San Juan de Nicaragua<sup>65</sup>. The UTM co-ordinates are shown on the map that is in tab 29 of the judges' folders (E 202069, N 211110).

3. In response to Judge Gaja's question, Nicaragua understands that "the beach north of the two new *caños*" to which Judge Gaja refers, is the sand bank, or island, that has always been considered part of Nicaraguan undisputed territory as explained by Mr. Reichler *earlier* this morning.

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<sup>64</sup>See letter from the Executive President of the National Port Authority to the Minister of Foreign Affairs of Nicaragua, Ref: PE-VSM-630-10-2013, 15 Oct. 2013.

<sup>65</sup>Dredge Sovereignty #2.

4. Notwithstanding the above understanding, the response to Judge Gaja's question is in the affirmative. Nicaragua considers itself bound not to undertake activities likely to connect either of the two *caños* with the sea and to prevent any person or group of persons from doing so.

5. This response of Nicaragua is based on its commitment to comply with the Order of the Court of 8 March 2011 that indicated that “[e]ach Party shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve”<sup>66</sup>.

6. The instructions of the President of Nicaragua are not only to withdraw from the area in dispute, but to cease any works in the Delta — that is the general area near the territory in dispute — that might affect the said territory in dispute. The type of works in the area indicated in Judge Gaja's question might affect the territory in dispute, and hence, are prohibited by the President's instructions. As the Court has been informed, these instructions were transmitted by the Port Authority to Mr. Pastora<sup>67</sup>.

7. **A quick** answer to Judge Greenwood's questions *is as follows*. Number one: the Order of March 2011 was issued by the Army and it literally orders all military personnel to stay out of the disputed area. In practice, as the principle authority in this remote area, it was applied by the Army against all Nicaraguan Government officials, the employees, in conformity with the Government's policy *following* the Court's *Order of* 8 March 2011. Mr. Reichler said these instructions were applicable to Mr. Pastora — that is correct. Question number two: the Army's order was issued on 9 March 2011 as Mr. Reichler stated. The Presidential Decree to which reference is made was issued in 2009: you can see that the Presidential Decree bears a number 79/2009 — the latter number is the year of issue.

Mr. President, Members of the Court, the question has been repeatedly asked by Costa Rican counsel as to the purpose of the trenches dug up on the sand bank or island located north of the area in dispute<sup>68</sup>. The reply to this question is the reply to the classic question “*Qui Bono?*”.

8. Mr. Reichler has explained that if this *caño* were to become a canal to the sea, and the waters of the San Juan were diverted to it, then the material loss to Nicaragua would be extreme by

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<sup>66</sup>Order of 8 March 2011.

<sup>67</sup>*Idem*.

<sup>68</sup>CR 2013/26, para. 29 (Kohen).

the parameters of that area: the only town of several thousand inhabitants located in that part of the Caribbean would be practically isolated from the rest of Nicaragua. The presumed benefit would be a new outlet to the sea, leading nowhere and benefiting a little swamp of approximately 35 hectares without any population or permanent structures, to the detriment of the only Nicaraguan town in a radius of nearly 100 kilometres.

9. One further point that apparently has been overlooked. If the river were diverted artificially into a new channel, Nicaragua could not legally claim the accretion of even that insignificant area of 35 hectares. The claims of Nicaragua on this case are not based on artificial channels but on natural and long existing channels.

10. The question then, repeated, would be “*Qui Bono?*”

11. One final point on the trench dug up by hand on the sand bank or island located to the north of the two new *caños*. In spite of the fact that this trench, if completed, would be more damaging for Nicaragua, President Ortega has withheld approval of it being filled back up, in order to avoid further misunderstanding while this case is before the Court. Nonetheless, I am authorized to state that if there is no objection, he will order this trench filled up again. This could be completed in a few days and would involve the use of no more sophisticated equipment than the useful and ubiquitous shovel.

12. Mr. President, Members of the Court, Costa Rican counsel stated that the Court must have remarked how rapidly President Ortega responded to Costa Rica’s protest of 16 September and that in their experience it was unusual for a Nicaraguan Head of State to give such prompt personal attention to a Costa Rican protest, especially since he did this unaided — as Mr. Reichler had testified that President Ortega’s legal team was otherwise engaged<sup>69</sup>.

13. I would point out, that the quick reaction of President Ortega is not unusual in a matter that might be seen to affect the consistent compliance of Nicaragua with the decisions of the Court. Naturally President Ortega did not need the assistance of his international legal team to investigate the claims and give the orders in question putting a stop to all activities that might affect the area in

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<sup>69</sup>CR 2013/26, para. 3 (Crawford).

dispute. This was an internal Government investigation which would have been most unusual if conducted publicly and keeping Costa Rica informed of every step taken.

14. The need for consultations with the international team arose after 24 September when Costa Rica filed with the Court the Request presently under consideration. The highly politicized way Costa Rica handled the situation brought before the Court required repeated consultations with the political authorities in Nicaragua and not only legal consultations.

15. Furthermore, the legal team considered that the steps taken by Nicaragua would convince Costa Rica and the Court; that the requested measures had become a moot point.

16. Unfortunately, the Costa Rican Government decided not to accept as sufficient the measures taken by Nicaragua in order to forestall any aggravation of the situation, and preferred to have these costly hearings.

17. Mr. President, Members of the Court, in normal circumstances, I would have refrained from making certain comments and unpleasant reminders, but I note the following that might explain Costa Rica's tone and counsel's tone during these hearings. International polls are regularly conducted in order to establish the internal backing of Latin American governments. These are published in the newspapers of the region. In the past few years the Nicaraguan Government has ranked with the top 25 per cent of the most well-considered governments and at present it is in fourth place out of 19 governments polled. The Government of Costa Rica in the past few years has consistently been ranked in the bottom 10 per cent and at present is in the 19th place out of 19<sup>70</sup>.

18. Costa Rican counsel during the two hearings in which they made statements, have surprisingly admonished the Court that if it declines ordering the measures requested by Costa Rica, its authority will be flouted and somehow diminished<sup>71</sup>. The Court does not need any props to maintain its authority. As Mr. Reichler commented, it is the World Court. Period. The Costa Rican Government is the one that needs propping. Granting Costa Rica's request of

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<sup>70</sup>See, e.g., Poll Mitofsky (Mexico) published this month ranks President Daniel Ortega in the 4th place out of the 19 American governments polled and ranks President Chinchilla at the bottom of the list in the 19th place, available at: <http://consulta.mx/web/images/mundo/2013/EvMandatariosCM.pdf>.

<sup>71</sup> CR 2013/26, para. 48 (Crawford).

unnecessary new measures will simply be used by that Government, for its own reasons, to raise further animosity against Nicaragua.

19. Contrary to this Costa Rican stance, as recalled in my first presentation, President Ortega has invited Costa Rica on several occasions to work together towards the conservation of the whole San Juan de Nicaragua River, including the area in dispute<sup>72</sup>.

20. In this spirit, Nicaragua would ask the Court to call on the Parties to engage in a bilateral dialogue in order to facilitate collaboration on any aspect related to the implementation of the Order of 8 March 2011.

Mr. President, I will now place on record Nicaragua's submissions:

#### **FINAL SUBMISSION**

21. In accordance with Article 60 of the Rules of Court and having regard to the Request for the indication of new provisional measures of the Republic of Costa Rica and its oral pleadings, the Republic of Nicaragua respectfully submits that,

— for the reasons explained during these hearings and any other reasons the Court might deem appropriate, the Republic of Nicaragua asks the Court to dismiss the Request for new provisional measures filed by the Republic of Costa Rica.

22. Mr. President, distinguished Members of the Court, to conclude our participation in this stage of oral proceedings, I wish to express, on behalf of the Government of the Republic of Nicaragua, our thanks to you, Mr. President, and each of the distinguished Members of Court, for the attention you have kindly provided to our presentations. May I also offer our thanks to the Court's Registrar, his staff and to the interpreters and translators? Thank you, Mr. President.

The PRESIDENT: Thank you very much, Ambassador. The Court takes note of the final submissions you have just read on behalf of your Government. This brings to an end the presentation of Nicaragua in the course of these hearings. If Costa Rica wishes to comment on answers provided by Nicaragua to questions put by Members of the Court, the Court will meet

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<sup>72</sup>Speech of President Daniel Ortega, 19 July 2011, available at: [http://www.presidencia.gob.ni/index.php?option=com\\_content&view=article&id=367:50-aniversario-de-fundacion-del-fsln&catid=87:julio-2011&Itemid=54&showall=1](http://www.presidencia.gob.ni/index.php?option=com_content&view=article&id=367:50-aniversario-de-fundacion-del-fsln&catid=87:julio-2011&Itemid=54&showall=1).



again a little bit later. Perhaps I will give the floor to the Agent of Costa Rica to inform us whether Costa Rica would like to avail itself of this right.

Mr. ÁLVAREZ: Good morning, Mr. President, Members of the Court. Costa Rica is ready to answer — in an hour, according to your orders.

The PRESIDENT: Thank you very much. So, the Court will meet again at 12.30 p.m. and statements of Costa Rica should be limited to answers provided by Nicaragua. Thank you. This sitting is adjourned.

*The Court adjourned from 11.40 a.m. to 12.35 p.m.*

The PRESIDENT: Please be seated. The Court meets this afternoon, briefly, in order to give the opportunity to Costa Rica to comment on answers provided by Nicaragua to questions from Members of the Court. I invite now Professor Kohen to the podium. Vous avez la parole Monsieur.

Mr. KOHEN: I will speak English this morning.

The PRESIDENT: Certainly, we are a bilingual institution, you may plead in English as well.

Mr. KOHEN: Mr. President, Members of the Court, thank you for providing Costa Rica with the opportunity to comment on Nicaragua's responses to the questions put to it by the Court. Following your instructions, I will comment only on Nicaragua's responses to the judges' questions and of course I will not refer to the new evidence, including scientific evidence, submitted by Nicaragua today.

Mr. President, Members of the Court, I turn to the question asked by Judge Donoghue. Costa Rica accepted that the dredger shown in attachment PM-13 was not in the eastern *caño* on 5 October 2013. Nicaragua now says that the dredgers Sovereignty 1 and Sovereignty 2 are at San Juan de Nicaragua. It says that "both dredgers are under repair in the proximity of the delta".

The Gaspar Garcia dredger, it says, is navigating towards the same place, it gives the exact co-ordinates for these dredgers, stationed at Sovereignty Camp at San Juan de Nicaragua.

You now see the photograph, which is attachment PM-14, referred to by Judge Donoghue's question, on your screens. This photograph includes the Nicaragua military camp. Nicaragua has indicated to you today, that the military camp remains on the beach, and will remain there. The constructions of these two *caños* did not only involve the use of dredgers, there must also have been chainsaws to cut down trees, and shovels to dig the trench. We do not know whether this equipment remains in the Nicaraguan camp, very close to the *caños*.

Now I turn to the question put to Nicaragua by Judge Gaja. Nicaragua's Agent has answered this question in the affirmative. He said that this is because your 2011 Order requires the Parties to refrain from taking any action which may aggravate or extend the dispute before the Court, or make it more difficult to resolve. Therefore, Nicaragua apparently does not consider itself bound not to carry out activities on the beach, because the beach is disputed territory, and it is subject to your Order of 2011, requiring the Parties to refrain from entering the disputed territory with exception of the Costa Rican environmental agents. You define the disputed territory as follows:

“the northern part of Isla Portillos, that is to say, the area of wetland of some 3 square kilometres between the right bank of the disputed *caño*, the right bank of the San Juan River up to its mouth at the Caribbean Sea, under Harbor Head Lagoon (hereinafter ‘the disputed territory’).”

Your Order of 8 March 2011 did not refer to any boundary line between the forest in Isla Portillos and the beach of Isla Portillos. The document Nicaragua submitted to you today — as tab 20 of your folders — with instructions to the army related to the disputed territory, does not distinguish between the beach and the non-existent sandbar, and the rest of Isla Portillos. The instructions were:

“To maintain operations against drug-trafficking and other criminal activities in the disputed territory, operations shall be conducted as provided by the International Court of Justice. In this regard, operations and patrols shall be carried out in the San Juan de Nicaragua River and the Harbour Head Lagoon.”

It does not say that they are to patrol from the beach. Nicaragua is required by the Court's 2011 Order to monitor the disputed territory from its *undisputed* territory. According to Nicaragua

itself, its undisputed territory is the San Juan River and Harbor Head Lagoon; it is not the beach, the beach is disputed territory.

A second point of concern, is that Nicaragua's Agent did not expressly refer to Nicaragua's obligations in respect of private individuals in the disputed territory, to its citizens, or to persons coming from its territory. Only four months ago, Nicaragua said "that it had no obligation to prevent such persons from carrying out activities in the disputed territory".

This is a matter of grave concern to Costa Rica. Consequently, Costa Rica considers that Nicaragua's answer to Judge Gaja's question is absolutely unsatisfactory, in order to prevent activities likely to connect either of the two *caños* with the sea. Costa Rica observes that Nicaragua also stated today, that the military camp is located on what it refers to as "undisputed Nicaraguan territory". However to support this claim, that the beach where the military camps are located, Nicaragua places the satellite co-ordinates that Costa Rica provided to the Court, yesterday, on Costa Rica's sketch-map of 2006, which shows a sandbar. This map, contrary to what counsel of Nicaragua mentioned today, are not from the Memorial of Costa Rica in *this* case, but from the Memorial of Costa Rica in the *Navigational and Related Rights* case.

However, as Costa Rica showed you yesterday — at tabs 4 and 5 of Costa Rica's judges' folder — that sandbar no longer exists. The fact that the sandbar does not exist is confirmed by Nicaragua's 2011 map — shown at tab 29 of Nicaragua's judges' folder — there is no sandbar in front of the part of Isla Portillos in which the canals were constructed.

Furthermore, Costa Rica observes that the Nicaraguan Agent has suggested that Nicaraguan activities in the disputed territory will continue. As he said, that Nicaragua itself would close the trench. Costa Rica cannot accept this, and does not accept that Nicaragua is entitled to continue carrying out activities on the disputed territory.

As Costa Rica has requested, and having regard to the fact that this is an international protected wetland for which Costa Rica is responsible, only Costa Rica can be put in position to carry out remedial works.

Consequently, Costa Rica considers that Nicaragua's answers to the questions are unsatisfactory and aggravates the situation requiring provisional measures, as requested by Costa Rica.

Now I briefly turn to Judge Greenwood's questions. Judge Greenwood asked questions about the military order, which Nicaragua submitted at tab 20 of your folders. Nicaragua now says that, by this order, it forbids Mr. Pastora from carrying out activities in the disputed territory on 9 March 2011. This order is described in Nicaragua's Counter-Memorial as an order forbidding military personnel from carrying out operations, patrols or any type of presence in the disputed territory which, incidentally, it described it as including the beach, as the Court had defined it. It never described it as an order to Mr. Pastora to the national port authority, or to the personnel dredging the San Juan River. This new interpretation, this military order, was advanced by counsel for Nicaragua for the first time today.

This concludes the comments by Costa Rica on Nicaraguan answers to the questions raised by the judges of this Court. I thank you for the opportunity to provide these comments. Thank you very much, Mr. President.

The PRESIDENT: Thank you very much, Professor Kohen, for your comments. I know that you have done so as part of this new digital generation.

This brings to an end the present series of sittings. It remains for me to thank the representatives of both Parties for the assistance they have given to the Court by their oral observations in the course of these four hearings. In accordance with practice, I ask the Agents to remain at the Court's disposal.

The Court will render its Order on the Request for the indication of provisional measures as soon as possible. The date on which this Order will be delivered at a public sitting will be duly communicated to the Agents of the Parties.

Having no other business before it today, the Court now rises.

*The Court rose at 12.45 p.m.*

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