

CR 2015/4

International Court
of Justice

Cour internationale
de Justice

THE HAGUE

LA HAYE

YEAR 2015

Public sitting

held on Wednesday 15 April 2015, at 10 a.m., at the Peace Palace,

President Abraham presiding,

*in the cases concerning Certain Activities carried out by Nicaragua in the Border Area
(Costa Rica v. Nicaragua); Construction of a Road in Costa Rica
along the San Juan River (Nicaragua v. Costa Rica)*

VERBATIM RECORD

ANNÉE 2015

Audience publique

tenue le mercredi 15 avril 2015, à 10 heures, au Palais de la Paix,

sous la présidence de M. Abraham, président,

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

COMPTE RENDU

Present: President Abraham
 Vice-President Yusuf
 Judges Owada
 Tomka
 Bennouna
 Cançado Trindade
 Greenwood
 Xue
 Donoghue
 Gaja
 Sebutinde
 Bhandari
 Robinson
 Gevorgian
Judges *ad hoc* Guillaume
 Dugard

 Registrar Couvreur

Présents : M. Abraham, président
M. Yusuf, vice-président
MM. Owada
Tomka
Bennouna
Caçado Trindade
Greenwood
Mmes Xue
Donoghue
M. Gaja
Mme Sebutinde
MM. Bhandari
Robinson
Gevorgian, juges
MM. Guillaume
Dugard, juges *ad hoc*

M. Couvreur, greffier

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Le PRESIDENT : Veuillez vous asseoir. L'audience est ouverte. La Cour se réunit ce matin pour entendre la suite et la fin du premier tour de plaidoiries du Costa Rica. Je donne la parole à Madame Del Mar.

Ms DEL MAR:

Violations of Costa Rica's navigational right

A Introduction

1. Mr. President, Members of the Court, it is an honour to appear before you for the first time on behalf of Costa Rica. It is my task to address Nicaragua's violations of Costa Rica's perpetual right of free navigation on the San Juan. In its Memorial, Costa Rica asked the Court to adjudge and declare that Nicaragua had infringed its right¹. I will catalogue the various ways by which Nicaragua has done so.

2. Costa Rica was entitled to expect that the Court's Judgment of 13 July 2009 in the case concerning *Navigational and Related Rights* would bring an end to Nicaragua's attempts to prevent Costa Rica from exercising its right of free navigation on the San Juan. The Court's 2009 Judgment set out in terms the content and scope of Costa Rica's navigational right under the 1858 Treaty of Limits, interpreted in light of other obligations binding on both States². Costa Rica had anticipated that the 2009 Judgment would provide a foundation on which the two countries might build a new relationship characterized by goodwill and co-operation. Regrettably this has not proved to be the case.

3. In breach of its obligations under the 1858 Treaty of Limits, and the Court's 2009 Judgment, Nicaragua has obstructed Costa Rica from exercising its right of free navigation in three principal respects:

(a) first, by enacting legislation that in effect defines the right out of existence for all functional purposes;

¹*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* ("Certain Activities"), Memorial of Costa Rica (MCR), Vol. I, pp. 299-300, para. 7.7. See also *Certain Activities, Application instituting proceedings*, 18 Nov. 2010, p. 26, para. 41 (f).

²*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, I.C.J. Reports 2009*, p. 233, para. 36.

- (b) second, by harassing private Costa Rican citizens navigating on the San Juan; and
- (c) third, by preventing Costa Rican personnel carrying out works in accordance with the provisional measures indicated by the Court.

4. Mr. President, almost as soon as the Court handed down the 2009 Judgment, Nicaragua began pursuing the same course of conduct that led Costa Rica to initiate those earlier proceedings in 2005. Contrary to the 2009 Judgment³, Nicaragua continued to impose charges on Costa Rican vessels and their passengers for navigating on the San Juan. Costa Rica was forced to issue a formal protest note to Nicaragua less than a fortnight after the Court rendered its 2009 Judgment⁴. These were not isolated incidents. Nicaragua has repeatedly breached its obligations since the handing down of the Court's 2009 Judgment until now: a period of almost six years.

B. Breach No. 1: Nicaraguan Decree N° 79-2009 and Regulatory Norms

5. I turn to the first category of breaches. Regulations were enacted by the President of Nicaragua in the form of Decree No. 79-2009, and Regulatory Norms; they were published in the official Gazette on 1 October 2009⁵. They are at tab 8 of the judges' folder. The Decree is set out on the first four pages, followed by the Regulatory Norms. Superficially, it appears that Nicaragua has simply regulated navigation, only along that part of the San Juan where — to use the expression employed by the 1858 Treaty of Limits — “*navigation is common*”⁶. The practical effect of these instruments, however, is death by regulation. The regulations are entirely unsuited to the people who need to use the River.

³*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (“*Navigational and Related Rights*”), *Judgment, I.C.J. Reports 2009*, p. 271, para. 156 (2) (c).

⁴Dispute concerning the *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (“*Construction of a Road*”), Rejoinder of Costa Rica (RCR), Vol. IV, Ann. 16, Note from Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, 27 July 2009, ref. DM-543-09. See also *ibid.*, Ann. 17, Note from Acting Minister for Foreign Affairs and Worship of Costa Rica to the Acting Minister for Foreign Affairs of Nicaragua, 21 Aug. 2009, ref. DVM-176-09; and *ibid.*, Ann. 18, Note from Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, 7 Sept. 2009, ref. DM-674-09.

⁵*Construction of a Road*, Counter-Memorial of Costa Rica (CMCR), Vol. III, Ann. 26, Nicaraguan Decree No. 79-2009 “*Creation of the Inter-Institutional Commission to Develop and Implement the Regulations regarding Navigation on the San Juan River, specifically where the International Court of Justice Grants Limited Navigation Rights to the Republic of Costa Rica*”. The Spanish original was published in (185) *La Gaceta* pp. 5577-5590, available on the website of the Nicaraguan Government at http://www.cancilleria.gob.ni/diferendos/Gaceta_RegRSJNCR.pdf.

⁶*Certain Activities*, MCR, Vol. II, Ann. 1, p. 11, Costa Rica-Nicaragua Treaty of Limits (Cañas-Jerez), San José, 15 Apr. 1858 (“1858 Treaty of Limits”), Art. VI.

6. The Nicaraguan Decree and Regulatory Norms must have the characteristics stipulated by the Court in the 2009 Judgment. They must:

- “(1) only subject the activity to certain rules without rendering impossible or substantially impeding the exercise of the right of free navigation;
- (2) be consistent with the terms of the [1858] Treaty [of Limits] . . . ;
- (3) have a legitimate purpose . . . ;
- (4) not be discriminatory . . . ; [and]
- (5) not be unreasonable, which means that [their] negative impact on the exercise of the right in question must not be manifestly excessive when measured against the protection afforded to the purpose invoked”⁷.

7. Mr. President, the Court specified these characteristics in the specific context of the San Juan. That context is important. The boats used on the San Juan look like this. This is a boat belonging to a Costa Rican family⁸. They also look like this. This is a photograph taken from Nicaragua’s White Book, published in November 2010⁹. It shows a Nicaraguan boat. They also look like this. This is a photograph from an article in the Nicaraguan press dated 5 April 2011. It shows another Nicaraguan boat¹⁰. They also look like this. This is a photograph from an article in the Nicaraguan press from 2012. It shows a boat used by contingents of Nicaraguans who travelled to the disputed territory¹¹. They also look like this. This is a photograph from ~~April~~ 2014¹². It is another Nicaraguan boat alongside Costa Rican territory.

8. I turn now to the regulations themselves. Nicaragua’s Regulatory Norms require Costa Rican vessels to have certain characteristics, which are completely at odds with the characteristics of boats that actually use the San Juan, and they are unreasonable to impose. These include the

⁷*Navigational and Related Rights, Judgment, I.C.J. Reports 2009*, pp. 249-250, para. 87.

⁸*Navigational and Related Rights, CRM*, 29 August 2006, photograph opposite p. 66 entitled ‘A family on the Costa Rican bank of the San Juan (near La Tigra) with their boat’.

⁹*Certain Activities*, CMN, Vol. II, Ann. 26, “Complete Nicaragua White Book, San Juan de Nicaragua River, The Truths That Costa Rica Hides”, 26 Nov. 2010, p. 475.

¹⁰Letter from Costa Rica to the Court, 8 Apr. 2011, ref. ECRPB 029-11, Ann. CR1, *La Prensa* (Nicaragua), “Ejército facilita cobertura a JS 19 de Julio en Río San Juan”, 5 Apr. 2011.

¹¹Letter from Costa Rica to the Court, 3 July 2012, ref. ECRPB-025-12, Ann. CR11, *El 19 Digital* (Nicaragua), “Harbour Head, synonymous with national sovereignty”, 15 Feb. 2012.

¹²Letter from Costa Rica to the Court, 21 Nov. 2014, ref. 116-2014, Ann. CR9, letter from Costa Rica to Nicaragua, 13 Nov. 2014, ref. DM-AM-0716-14, Annex of photographic evidence, photo dated 16 Oct. 2014.

requirements that vessels have at least two exits or emergency escapes¹³; at least one toilet¹⁴; a radio transmitter¹⁵; a hardtop cabin; a central corridor; individual chairs with backrests; compartments for hand luggage storage; and, curtains on the sides¹⁶. These regulations purport to apply to vessels on the San Juan, like the ones I showed you. They render it impossible for Costa Rican vessels to comply.

9. There is also an assumption made in the Regulatory Norms that all vessels will have navigational lights¹⁷. This is an unreasonable assumption in view of the fact that Nicaragua has limited the time of day during which Costa Rican vessels may navigate the river to daylight hours¹⁸.

10. The Decree specifically prohibits Costa Rican vessels from navigating with “any type of cargo or merchandise” if they cannot demonstrate through “established documentation” that the transit is for a commercial purpose¹⁹. The Regulatory Norms require documentary proof of the “legality” of the merchandise on board a Costa Rican vessel²⁰. A Costa Rican riparian must thus produce documentary proof that the sack of beans he purchased in Sarapiquí to sell onto members of his riparian community is “legal” in order to be allowed to exercise the right of free navigation. For merchandise that is usually sold without documentation or in small quantities, this is unreasonable.

11. The Decree is discriminatory. It is clear from Article 2 of the Regulatory Norms that the regulations are targeted at Costa Rican navigation specifically²¹. Article 4 of the Decree only applies to Costa Rican vessels. It specifically prohibits the navigation of Costa Rican vessels on

¹³*Construction of a Road*, CMCR, Vol. III, Ann. 26, p. 91, Regulatory Norms, Art.17 (4).

¹⁴*Ibid.*, Regulatory Norms, Art. 17 (5) and (6).

¹⁵~~See~~ *Construction of a Road*, CMCR, Vol. III, Ann. 26, p. 92, Nicaraguan Decree No. 79-2009, Art. 20.

¹⁶*Ibid.*, Ann. 26, p. 98, Regulatory Norms, Art. 48 (2).

¹⁷*Ibid.*, Ann. 26, p. 93, Regulatory Norms, Art. 24 (3).

¹⁸*Ibid.*, Ann. 26, p. 86, Nicaraguan Decree No. 79-2009, Art. 6, para. 2; *ibid.*, p. 92, Regulatory Norms, Art. 19. See also *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 261, paras. 125-126.

¹⁹*Construction of a Road*, CMCR, Vol. III, Ann. 26, p. 85; Nicaraguan Decree No. 79-2009, Art. 4 (f). See also *ibid.*, p. 90, Regulatory Norms, Art. 10 (10).

²⁰*Ibid.*, Ann. 26, p. 90; Regulatory Norms, Arts. 10 (10) and 13 (11).

²¹*Ibid.*, Ann. 26, p. 87; Regulatory Norms, Art. 2.

the San Juan which, for example, harm the environment and ecosystem of the river, as well as so-called casino boats and hotel boats²².

12. The Decree imposes a general prohibition on Costa Rican public vessels navigating the San Juan without the authorization of the Nicaraguan authorities²³. This prohibition is contrary to both the Cleveland Award and the Court's 2009 Judgment. The Cleveland Award expressly recognizes navigation of vessels of the revenue service²⁴. The Court's 2009 Judgment does not draw a distinction between public and private vessels in the exercise of the right of navigation for the purposes of commerce²⁵. It is also contrary to the right of navigation by Costa Rican public vessels, as set out in the Court's 2009 Judgment²⁶.

13. The Decree prohibits the mooring of vessels carrying passengers or tourists, which do not have the authorization of Nicaragua²⁷. This is contrary to Article VI of the 1858 Treaty of Limits, which provides in relevant part that: "The vessels of both countries shall have the power to land indiscriminately on either side of the river, at the portion thereof where the navigation is common."²⁸ In the 2009 Judgment, the Court stated that Article VI: "confers a right on the vessels of each Party to land on the bank of the other"²⁹.

14. Finally, there is no basis for requiring individuals or corporations engaged in tourism in Costa Rica, and simply transiting along the San Juan, to register with the Nicaraguan National Registry of Tourism, or to sign agreements with Nicaraguan tourism companies³⁰. This

²²*Construction of a Road*, CMCR, Vol. III, Ann. 26, p. 86; Nicaraguan Decree No. 79-2009, Arts. 4 (i) and (j).

²³*Ibid.*, pp. 84-85, Arts 3 (b), para. 5, and 4 (a). See also *Construction of a Road*, CMCR, Vol. III, Ann. 26, p. 86; Nicaraguan Decree No. 79-2009, Art. 4 (j); *ibid.*, p. 99, Regulatory Norms, Art. 70 (1).

²⁴*Certain Activities*, MCR, Vol. II, Ann. 7, p. 52, Second Article of the Award of the Arbitrator, the President of the United States, upon the validity of the Treaty of Limits of 1858 between Nicaragua and Costa Rica (Cleveland Award), reprinted United Nations, *Reports of International Arbitral Awards*, Vol. XXVIII (2006), Washington, D.C., 22 March 1888, p. 209.

²⁵*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, *I.C.J. Reports 2009*, p. 247, para. 80.

²⁶*Ibid.*, p. 270, para. 156 (1) (g); p. 246, para. 79; and p. 248, para. 84.

²⁷*Construction of a Road*, CMCR, Vol. III, Ann. 26, p. 85; Nicaraguan Decree No. 79-2009, Art. 4 (e); and *ibid.*, p. 92; Regulatory Norms, Art. 18 (2).

²⁸*Certain Activities*, MCR, Vol. II, Ann. 1, p. 11; 1858 Treaty of Limits, Art. VI.

²⁹*Navigational and Related Rights*, Judgment, *I.C.J. Reports 2009*, p. 260, para. 122.

³⁰*Construction of a Road*, CMCR, Vol. III, Ann. 26, p. 99; Regulatory Norms, Art. 67.

requirement is contrary to the Costa Rican right of free navigation under Article VI of the Treaty of Limits, which the Court unanimously held includes the transport of tourists³¹.

15. Mr. President, in addition to those provisions of the Decree and Regulatory Norms that I have just discussed, which are unlawful, there are others which by reason of the broad powers they confer on the military personnel who man the Nicaraguan checkpoints, give rise to abuses of power in practice.

16. In order to depart from a checkpoint, a Costa Rican vessel must be issued with a “clearance”³². However, a “clearance” may be withheld on any number of grounds, including:

- (a) if there is an “incomplete presentation” of a long shopping list of documents, including a certificate of insurance³³, which must cover items such as burial costs³⁴;
- (b) if the vessel’s crew is “incomplete or unsatisfactory”, whatever that means³⁵;
- (c) if the vessel does not have “signs”³⁶; and
- (d) if documents demonstrating that the vessel is a commercial vessel are not presented³⁷.

17. Costa Rica’s concerns about abuse of these wide-ranging discretionary powers are well grounded. The Nicaraguan Army personnel manning the checkpoints arbitrarily refuse vessels to exercise the Costa Rican right of free navigation on the San Juan.

C. Breach No. 2: Harassment of private Costa Rican citizens

18. That brings me to the second category of violations committed by Nicaragua: the harassment of private Costa Rican citizens navigating on the San Juan.

19. As I have already mentioned, in violation of the Court’s 2009 Judgment³⁸, Nicaragua has continued to impose charges on Costa Rican vessels and their passengers.

³¹*Navigational and Related Rights, Judgment, I.C.J. Reports 2009*, p. 269, para. 156 (c).

³²*Construction of a Road*, CMCR, Vol. III, Ann.26, p. 90; Regulatory Norms, Art. 11.

³³*Ibid.*; Regulatory Norms, Art. 14 (1).

³⁴*Ibid.*, p. 91; Regulatory Norms, Art. 16 (f).

³⁵*Ibid.*, p. 90; Regulatory Norms, Art. 14 (4).

³⁶*Ibid.*, p. 91; Regulatory Norms, Art. 14 (9).

³⁷*Construction of a Road*, CMCR, Vol. III, Ann. 26, p. 91; Regulatory Norms, Article 14 (13).

³⁸*Navigational and Related Rights, Judgment, I.C.J. Reports 2009*, p. 271, para. 156 (2) (c).

20. For example, three private Costa Rican individuals reported that, on 18 September 2010, whilst navigating the San Juan in the direction of Delta Costa Rica, they were charged a so-called departure tax in the sum of one thousand colones at the Nicaraguan army post at Boca Sarapiquí. On their return journey, they were forced to pay the so-called departure tax a second time³⁹.

21. In October 2010, journalists from Costa Rica travelling on a paid boat trip were detained by Nicaragua soldiers at a checkpoint on the San Juan, and prevented from navigating on the river, on the pretence that they required a special permit, which they were told they should have obtained from a different army post⁴⁰. They were also told by the Nicaraguan soldiers that if they attempted to navigate the San Juan again, their personal safety would not be assured⁴¹.

22. More recently, on 26 June 2014, a Costa Rican citizen paid a boat to transport individuals to his property, located close to the San Juan. Upon arrival at the Nicaraguan army post at Boca San Carlos, the Costa Rican passengers were made to disembark with their belongings, and were detained. They were interrogated. The Nicaraguan officials demanded that the Costa Rican passengers produce a *carne de trabajo* (a working licence), which is not a document that is available in Costa Rica. The group were prohibited from navigating the San Juan⁴².

23. Mr. President, the Costa Rican rights at issue are not only exercisable by navigation for the purposes of commerce. As the Court declared in its 2009 Judgment, it is also exercisable by private individuals who live along the Costa Rican bank of the San Juan to meet their essential needs of everyday life⁴³. Many of these individuals live in isolated riparian communities. The

³⁹*Construction of a Road*, RCR, Vol. IV, Ann. 71, Note from the Chief of Post, Police Delegation of Sarapiquí, Costa Rica, to the Regional Director of the Fourth Region-Heredia, Costa Rica, 27 Sept. 2010, ref. 1571-2010-DPS.

⁴⁰*Certain Activities*, MCR, Vol. I, p. 291, para. 6.56.

⁴¹*Ibid.* See also *Certain Activities*, MCR, Vol. II, Anns. 27 and 28, Affidavits of Franklin Gutierrez Mayorga and Jeffrey Prendas Arias.

⁴²*Construction of a Road*, RCR, Vol. IV, Ann. 33, Note from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, 24 July 2014, ref. DM-0373-14. See also *ibid.*, Ann. 62, Affidavit of Mr. Victor Julio Vargas Hernandez, recorded by Notary Public, Mr. Gustavo Arguello Hidalgo, Deed No. 177-9; *ibid.*, Ann. 63, Affidavit of Mr. William Vargas Jimenez, recorded by Notary Public, Mr. Gustavo Arguello Hidalgo, Deed No. 178-9; *ibid.*, Ann. 64, Affidavit of Ms Mayela Vargas Arce, recorded by Notary Public, Mr. Gustavo Arguello Hidalgo, Deed No. 179-9; *ibid.*, Ann. 65, Affidavit of Ms Gabriela Vanessa Lopez Gomez, recorded by Notary Public, Mr. Gustavo Arguello Hidalgo, Deed No. 189; *ibid.*, Ann. 66, Affidavit of Mr. Claudio Arce Rojas, recorded by Notary Public, Mr. Gustavo Arguello Hidalgo, Deed No. 181-9; and *ibid.*, Ann. 68 *La Nación*, "Costa Ricans denounce mistreatment and detentions in the northern border", 3 August 2014.

⁴³*Navigational and Related Rights, Judgment, I.C.J. Reports 2009*, p. 270, para. 156 (1) (f).

Court recognized that these individuals navigate the San Juan in order, for example, to travel to and from school or for medical care⁴⁴.

24. On 2 February 2013, a young Costa Rican farmer and his uncle, who both live in properties adjacent to the River, attempted to navigate the San Juan for this purpose. When they stopped at a checkpoint, they were detained for approximately three hours, without any explanation. During this period of detention, a Nicaraguan soldier forced the young man to remove his trousers for ten minutes, whilst the contents of his wallet were checked. The same Nicaraguan soldier told the young man that he and his uncle would be freed on condition that they purchased food and soft drinks for the Nicaraguan soldiers stationed at the post. He was forced to do so, using his own money⁴⁵.

25. A Costa Rican primary school has been forced to close down because Nicaragua prevented the sole teacher from travelling to and from school on the San Juan⁴⁶. Eight primary school students — including five Nicaraguan nationals — were unable to resume classes in 2011 because the Nicaraguan Army demanded that their teacher produce a letter of authorization from the Nicaraguan capital, which he was unable to do. The sketch-map on your screens shows where Costa Rica had to relocate the school⁴⁷.

D. Breach No. 3: Preventing Costa Rican personnel from carrying out works in accordance with provisional measures indicated by the Court

26. I turn to the third and final category of violations committed by Nicaragua: the prevention of Costa Rican personnel from navigating on the San Juan in order to carry out works in accordance with provisional measures indicated by the Court. In the Order of 8 March 2011, you indicated that “Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*”⁴⁸.

⁴⁴*Navigational and Related Rights, Judgment, I.C.J. Reports 2009*, p. 246, para. 78.

⁴⁵*Construction of a Road*, RCR, Vol. IV, Ann. 67, Affidavit of Mr. Ruben Francisco Valerio Arroyo, recorded by Notary Public, Mr. Gustavo Arguëllo Hidalgo, Deed no. 194-9. See also *ibid.*, Ann. 69: La Nación, “He demanded that I pull down my pants”, 3 Aug. 2014.

⁴⁶*Certain Activities*, MCR, Vol. I, p. 292, para. 6.58 ; *ibid.*, Vol. III, Ann. 121, La Nación, “Nica Army impedes teacher access to Isla Calero, 16 February 2011”; *ibid.*, Ann. 122, La Nación (Costa Rica), “MEP will relocate the school located in Isla Calero”, 17 Feb. 2011.

⁴⁷*Certain Activities*, MCR, Vol. I, p. 294, sketch-map 6.2.

⁴⁸*Certain Activities, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I)*, p. 27, para. 86 (2).

27. It appears that Nicaragua considers that Costa Rican personnel have no right to navigate the San Juan to prevent irreparable prejudice being caused to that part of the wetland located in the disputed territory. One reason given by Nicaragua is that such a voyage by Costa Rican personnel would amount to navigation “for scientific purposes”⁴⁹. It is thus apparent that, at the very least, Nicaragua entirely misunderstands Costa Rica’s right to navigate the San Juan “for the purposes of commerce”. That applies to the navigation itself, and not the activity to be performed at the final destination. A group of passengers may plan to have a picnic when they arrive at their final destination. That does not detract from their navigation being for the purposes of commerce, if they pay to be transported⁵⁰. Your 2009 Judgment is very clear about this. At paragraph 71 you held:

“ . . . the Court finds that the right of free navigation in question applies to the transport of persons . . . This is the case if the carrier engages in the activity for profit-making purposes. A decisive consideration in this respect is whether a price (other than a token price) is paid to the carrier . . . by the passengers or on their behalf. If so, then the carrier’s activity is commercial in nature and the navigation in question must be regarded as ‘for the purposes of commerce’ within the meaning of Article VI [of the 1858 Treaty of Limits].⁵¹”

28. In the specific case of Costa Rican personnel charged with the protection of the environment, if the owner of a private boat is paid to transport them, for a profit, as passengers along that part of the San Juan where Costa Rica has navigational rights⁵², this is navigation for “commercial purposes”, which “includes the transport of passengers”⁵³.

29. On 18 September 2013 Nicaragua prevented Costa Rican personnel charged with the protection of the environment, who were being transported on a hired private vessel, from navigating the San Juan to carry out measures to prevent irreparable harm to the disputed territory⁵⁴.

⁴⁹*Construction of a Road*, CMCR, Ann. 48, Note from the Minister for Foreign Affairs and Worship of Costa Rica, to the Minister for Foreign Affairs of Nicaragua, 5 March 2013, ref. MRE/DM-AJ/129/03/13.

⁵⁰*Navigational and Related Rights, Judgment, I.C.J. Reports 2009*, p. 269, para. 156 (1) (b)

⁵¹*Ibid.*, p. 244, para. 71.

⁵²*Construction of a Road*, RCR, Vol. IV, Ann. 20, Note from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign affairs of Nicaragua, 20 March 2013, ref. DM-AM-161-13.

⁵³*Navigational and Related Rights, Judgment, I.C.J. Reports 2009*, p. 269, para. 156 (1) (b).

⁵⁴*Construction of a Road*, RCR, Vol. IV, Ann. 23, Note from the Acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, 24 Sep. 2013, ref. DM-D VM-550-2013.

30. Nicaragua continued to prevent Costa Rican personnel from travelling to the disputed territory to carry out works to prevent irreparable harm even after the Court indicated new provisional measures in the Order of 22 November 2013. By paragraph 59 (E) of that Order, you indicated the following provisional measure:

“Following consultation with the Secretariat of the Ramsar Convention and after giving Nicaragua prior notice, Costa Rica may take appropriate measures related to the two new *caños*, to the extent necessary to prevent irreparable prejudice to the environment of the disputed territory.”⁵⁵

31. In line with this provisional measure, following consultation with the Secretariat of the Ramsar Convention and after giving Nicaragua prior notice, Costa Rica has attempted many times to navigate the San Juan in order to carry out the work of filling in the “eastern *caño*” to prevent the irreparable harm being caused.

32. On 10 December 2013 Nicaragua prevented Costa Rican personnel from navigating the San Juan by means of a private vessel to reach the disputed territory⁵⁶. The reason invoked by Nicaragua on this occasion was an alleged requirement for Costa Rica to co-ordinate with Nicaragua, and that Costa Rican personnel could enter the disputed territory only with technical experts from Ramsar⁵⁷. The relevant provisional measures indicated by the Court in March 2011 and November 2013 are plainly worded. In both Orders, the Court required Costa Rica to consult with Ramsar, and give Nicaragua prior notice. In neither Order are the Costa Rica personnel required to co-ordinate with Nicaragua, or to be accompanied by Ramsar technicians.

33. Costa Rica needed to transport materials and equipment to the disputed area to carry out works to prevent irreparable prejudice⁵⁸. Whilst individuals can, with difficulty, access the

⁵⁵*Construction of a Road, Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 370, para. 59 (E).

⁵⁶*Construction of a Road*, RCR, Vol. IV, Ann. 27, Note from the Minister for Foreign Affairs of Nicaragua to the Minister for Foreign Affairs and Worship of Costa Rica, 10 Dec. 2013, ref. DM-AM-685-13.

⁵⁷*Ibid.*

⁵⁸Letter from the Republic of Costa Rica to the Court, 22 Aug. 2014, ref. ECRPB-090-2014, p. 1.

disputed area by foot⁵⁹, it is not feasible to transport materials and equipment on foot. There is no road infrastructure permitting access by land using vehicles⁶⁰.

34. In view of Nicaragua's concerted attempts to prevent Costa Rica from navigating the San Juan, and given the time and cost of mounting such operations, Costa Rica reached an agreement with Nicaragua whereby Nicaragua would not obstruct Costa Rican navigation on the San Juan in order to reach the area of the "eastern *caño*", to carry out measures to prevent irreparable damage. This agreement was reached on a without prejudice basis. Both Costa Rica and Nicaragua informed the Court of this agreement⁶¹. However, in spite of this agreement, Nicaragua then prevented Costa Rican personnel from navigating on the San Juan on 12 November 2014 on the implausible basis that this "had not been approved by the Court"⁶².

35. Although Costa Rica had given prior notice⁶³, Nicaragua again prevented Costa Rican personnel from navigating the San Juan on 5 December 2014. Costa Rica had intended to transport a first batch of materials to start building the dykes described in Costa Rica's work plan, previously approved by the Ramsar Secretariat and communicated to the Court⁶⁴. This time, Nicaragua's reason for preventing Costa Rica from navigating the San Juan was a newly thought up requirement that the Parties first hold a technical meeting⁶⁵. When Costa Rica attempted to

⁵⁹Costa Rica's first Report on compliance with provisional measures, letter from Costa Rica to the Court, 21 Feb. 2014, ref. ECRB-0-12, Ann. CR-6, Letter from Minister Castillo Barrantes, Costa Rica, to Minister Santos López, Nicaragua, 19 Dec. 2013, ref. DM-AM-705-13.

⁶⁰Costa Rica's third Report on compliance with provisional measures of 22 Aug. 2014, letter from Costa Rica to the Court, 22 Aug. 2014, ref. ECRPB-090-2014, p. 3, para. 7.

⁶¹Letter to the Court from Nicaragua, 23 Sep. 2014, ref. HOL-EMB-124; Letter to the Court from Costa Rica, 25 Sep. 2014, ref. ECRPB-103-14. See, also, Costa Rica's fourth Report on compliance with provisional measures of 21 Nov. 2014, letter from Costa Rica to the Court, ref. 116-2014, p. 2, paras. 6 and 7.

⁶²See Costa Rica's fourth Report on compliance with provisional measures of 21 Nov. 2014, letter from Costa Rica to the Court, ref. 116-2014, Ann. CR-2, Costa Rica, MINAE, "Log of notification of entry by water through San Juan River to the territory declared in dispute by the International Court of Justice", 12 Nov. 2014. See, also, *ibid.*, Ann. CR-3, Diplomatic Note from Nicaraguan Minister for Foreign Affairs to Costa Rican Minister for Foreign Affairs and Worship, 11 Nov. 2014, ref. MRE-DMDGAJST-456-11-14; and *ibid.*, Ann. CR-4, Diplomatic Note from Costa Rican Minister for Foreign Affairs and Worship to Nicaraguan Minister for Foreign Affairs, 14 Nov. 2014, ref. DM-AM-0718-14.

⁶³Costa Rica's fifth Report on compliance with provisional measures of 20 Feb. 2015, letter from Costa Rica to the Court, ref. ECRPB-020-2015, Ann. CR-1, Diplomatic Note from the Costa Rican Minister for Foreign Affairs and Worship to the Nicaraguan Minister for Foreign Affairs, 2 Dec. 2014, ref. DM-AM-0774-11-14.

⁶⁴Costa Rica's fifth Report on compliance with provisional measures of 20 Feb. 2015, letter from Costa Rica to the Court, ref. ECRPB-020-2015, p. 2, para. 7.

⁶⁵*Ibid.*, Ann. CR-2, Diplomatic Note from the Nicaraguan Minister for Foreign Affairs to the Costa Rican Minister for Foreign Affairs and Worship, 2 Dec. 2014, ref. MRE/DM/677/12/14. See, also, *ibid.*, Ann. CR-3, Diplomatic Note from the Costa Rican Minister for Foreign Affairs and Worship to the Nicaraguan Minister for Foreign Affairs, 4 Dec. 2014, ref. DM-AM-0789-14.

transport sand bags on the San Juan to commence works to close the eastern *caño*, this was refused by Nicaraguan military and immigration personnel on the basis that there was no letter from Nicaragua's Minister or Vice-Minister for Foreign Affairs authorizing their navigation⁶⁶.

36. Costa Rica agreed to hold a technical meeting with Nicaragua on 17 December 2014 at the facilities of the Nicaraguan Army at the Delta, with a view to obtaining an assurance from Nicaragua that Costa Rica could navigate the San Juan for the purpose of travelling to the disputed territory to prevent irreparable harm⁶⁷. Nicaragua agreed to the date and time proposed by Costa Rica for the meeting, but requested that Costa Rica comply with Nicaraguan Decree No. 79-2009, which I addressed earlier. Nicaragua also stated that it should be able to verify whether the measures Costa Rica would take to close the eastern *caño* complied with the Court's Order of November 2013⁶⁸. Costa Rica rejected the conditions Nicaragua sought to impose, but nevertheless agreed to participate in the meeting⁶⁹.

37. At the meeting, Nicaragua stated that since it did not agree with the works planned by Costa Rica for the closure of the *caño*, it could not "authorize" navigation of the San Juan⁷⁰.

38. In view of the many recent breaches of Costa Rica's right of free navigation, as well as Nicaragua's persistent refusal to abide by the without prejudice agreement between the Parties, Costa Rica carried out appropriate measures to close the eastern *caño*, and thereby prevent irreparable prejudice being caused to the environment on the disputed territory, by transporting equipment and personnel by chartered helicopter. This was addressed by

⁶⁶Costa Rica's fifth Report on compliance with provisional measures of 20 Feb. 2015, letter from Costa Rica to the Court, ref. ECRPB-020-2015, Ann. CR-4, Costa Rica, MINAE, Log of the mission of 5 December 2014 entitled "Log of notification of entry by water through San Juan River to the territory declared in dispute by the International Court of Justice", 5 Dec. 2014.

⁶⁷*Ibid.*, Ann. CR-6, Diplomatic Note from the Costa Rican Minister for Foreign Affairs and Worship to the Nicaraguan Minister for Foreign Affairs, 12 Dec. 2014, ref. DM-AM-0818-14. See also *ibid.*, Ann. CR-5, Diplomatic Note from the Nicaraguan Minister for Foreign Affairs to the Costa Rican Minister for Foreign Affairs and Worship, 5 Dec. 2014, ref. MRE/DM/-AJ/478/12/14.

⁶⁸*Ibid.*, Ann. CR-7, Diplomatic Note from the Nicaraguan Minister for Foreign Affairs to the Costa Rican Minister for Foreign Affairs and Worship, 15 Dec. 2014, ref: MRE/DM-AJ/482/12/14.

⁶⁹*Ibid.*, Ann. CR-8, Diplomatic Note from the Costa Rican Minister for Foreign Affairs and Worship to the Nicaraguan Minister for Foreign Affairs, 16 Dec. 2014, ref. DM-AM-0826-14.

⁷⁰See *ibid.*, CR-9, Diplomatic Note Costa Rica, MINAE, log of the meeting held with Nicaraguan authorities on 17 Dec. 2014 entitled "Log of the meeting held on the premises of the Nicaraguan Army post in the Delta to notify the entry by the San Juan River in order to navigate to the disputed area declared by the International Court of Justice in Isla Portillos, Costa Rica v. Nicaragua", 17 Dec. 2014.

Ambassador Sergio Ugalde yesterday. This was a much more complex and costly exercise than navigation on the San Juan.

E. Conclusion

39. Mr. President, Members of the Court, by preventing Costa Rica from exercising its right of free navigation in the three ways I have described, Nicaragua has breached not only its international obligations under the 1858 Treaty of Limits, but also under your Judgment of 13 July 2009. Further, it has prevented Costa Rica from carrying out works to prevent irreparable harm in accordance with the provisional measures indicated by the Court in the present proceedings, thereby aggravating the dispute.

40. I have given some examples, but these are not isolated incidents of wrongful conduct. Nicaragua's repeated breaches over an almost six-year period since this Court's 2009 Judgment demonstrate a concerted disregard of its international obligations, including those stemming from your Judgment. By seeking at every turn to erect barriers to obstruct Costa Rica from exercising its right, including acting contrary to the Parties' without prejudice agreement, Nicaragua has rendered Costa Rica's right of free navigation devoid of any practical use. Costa Ricans who arrive at a Nicaraguan checkpoint at the start of their journey are at the mercy of the arbitrary decisions made by the Nicaraguan military personnel stationed there, whose primary concern appears to be preventing any exercise of Costa Rica's right of free navigation.

41. Members of the Court, I thank you for your kind attention. Mr. President, I ask you to please call Dr. Parlett.

Le PRESIDENT : Merci. Je donne à présent la parole à Madame Parlett pour la suite des plaidoiries du Costa Rica.

Ms PARLETT:

COMPLIANCE WITH PROVISIONAL MEASURES ORDERS OF THE COURT

A. Introduction

1. Mr. President, Members of the Court, this morning I will address you on Nicaragua's breaches of your binding provisional measures Orders in this case. I will also address Costa Rica's ongoing compliance with those Orders.

B. Nicaragua's breaches of the provisional measures Orders

2. Nicaragua has breached the provisional measures Orders in five ways. First, Nicaragua constructed two new artificial *caños* in the disputed territory in 2013. Second, Nicaragua maintained military camps on the disputed territory, until November 2013. Third, from early 2011 until the end of 2013, Nicaragua sent and maintained its nationals on the disputed territory: large groups of Sandinista Youth, who have caused damage to Costa Rica's territory. Fourth, Nicaragua has aggravated the dispute by its conduct. And finally, Nicaragua has failed to comply with its reporting obligations under the Court's 2013 Order.

1. Nicaragua's construction of second and third artificial *caños* in 2013

3. As Mr. Wordsworth explained yesterday afternoon, sometime between June and September 2013, Nicaragua constructed two new *caños* in the disputed territory. Sometime before February 2013⁷¹ Nicaragua also established a military camp on the beach of the disputed territory⁷². As Mr. Wordsworth mentioned⁷³, although its position changed several times, Nicaragua eventually accepted that the works had been carried out in the disputed territory by a senior

⁷¹See photograph of New Nicaraguan camps in the area indicated by the Court, 5 Feb. 2013, annexed to letter from Costa Rica to the ICJ, ref. ECRPB-016-013, 15 March 2013.

⁷²Cf. Nicaragua's Written Observations on the Request by Costa Rica for the Modification of the Court's Order of 8 March 2011 in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, para. 10, attached to letter from Nicaragua to the ICJ, ref. HOL-EMB-111, 14 June 2013, communicated to Costa Rica under cover of letter from the ICJ to Costa Rica, ref. 142101, 14 June 2013.

⁷³See CR 2105/3, p. 19, para. 35 (Wordsworth). See also Diplomatic Note sent by Samuel Santos López, Minister for Foreign Affairs, Nicaragua, to Enrique Castillo Barrantes, Minister for Foreign Affairs and Worship, Costa Rica, 18 Sep. 2013, ref. MRE/DM/521/09/13, Att. PM-5 to Costa Rica's New Request for Provisional Measures; letter from Nicaragua to the ICJ, ref. HOL-EMB-193, 10 Oct. 2013, p. 2; and letter from Nicaragua to the ICJ, ref. HOL-EMB-197, 11 Oct. 2013 (reference omitted), attached to letter from the ICJ to Costa Rica, ref. 142609, 11 Oct. 2013.

member of the Nicaraguan Government, Mr. Pastora, and that he had been assisted by a Nicaraguan Government department⁷⁴.

4. Nevertheless, Nicaragua continued to disclaim responsibility for the works. It relied on an order — which you will find at tab 14 of your folders — it is an order issued by the Chief of the South Military Detachment of the Army of Nicaragua to the Chief of the San Juan Operations Directorate of the Army of Nicaragua. Nicaragua’s counsel described this as the “2011 instructions applicable to Mr. Pastora”, ordering him not to carry out works in the disputed territory⁷⁵. This order is patently directed to the Nicaraguan Army and the Nicaraguan Army only, and it was described as such by Nicaragua: in its Counter-Memorial, Nicaragua said it was a “military order”⁷⁶, “forbidding military personnel ‘to carry out operations, patrols or any type of presence in the [disputed] territory’”⁷⁷. Nicaragua never described it as an order to Mr. Pastora, to the National Port Authority, or to the Nicaraguan personnel dredging the San Juan River. When Nicaragua was pressed by the Court for an explanation of its new position, it said that the military order was, in practice, “applied by the Army against all Nicaraguan Government Officials”⁷⁸. That is an attempt at an explanation, but it is not supported by any evidence, and indeed it is completely contrary to the fact that Mr. Pastora and Nicaraguan personnel constructed the two new *caños* in the disputed territory. Those works were patently a breach of your 2011 Order⁷⁹.

5. In addition, by failing to provide timely, genuine, accurate and complete information to Costa Rica and to the Court, Nicaragua aggravated the dispute. Indeed, had Nicaragua come clean about these works in September 2013 — when, by its own admission, it knew full well what had

⁷⁴CR 2013/25, p. 11, para. 17 (Argüello); CR 2013/25, p. 21, para. 15 (Reichler); CR 2013/25, p. 22, para. 17 (Reichler); CR 2013/25, p. 24, para. 24 (Reichler); and CR 2013/25, p. 46, para. 12 (Pellet). See also *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 22 November 2013*, I.C.J. Reports 2013, p. 365, para. 45.

⁷⁵CR 2013/25, p. 10, para. 12 (Reichler), referring to Order No. 005 from the Chief of the South Military Detachment for compliance of order from the Chief of staff regarding the implementation of special measures based on provisional measures of protection ordered by the International Court of Justice and maintenance of the anti-drug trafficking plan, rural, security plan and presidential Decree 79/2009 at the San Juan de Nicaragua directorate, 9 March 2011, CMN, Ann. 36, judges’ folder, tab 14.

⁷⁶CMN, para. 7.9.

⁷⁷CMN, para. 7.8.

⁷⁸CR 2013/25, p. 37, para. 7 (Argüello).

⁷⁹*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011*, I.C.J. Reports 2011, p. 27, para. 86 (1). See also *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 22 November 2013*, I.C.J. Reports 2013, p. 367, para. 50 (these activities “are inconsistent with the Court’s Order of 8 March 2011”).

happened⁸⁰ — Costa Rica would not have been compelled to seek a further Order from the Court, as a result of which additional costs were incurred.

2. Nicaragua’s maintenance of military camps on the disputed territory

6. Further, Nicaragua has maintained a continuous presence on the disputed territory, in breach of the binding 2011 Order.

7. In early 2011, Nicaragua maintained a military camp in Isla Portillos, near the site of the first artificial *caño*, after it represented to the Court that it had removed it. As Mr. Wordsworth has noted⁸¹, in the four years since that misrepresentation was made, no satisfactory explanation has been forthcoming as to why and how this incorrect information was given to the Court⁸².

8. And then, by early February 2013⁸³, Nicaragua had established a second camp on the disputed territory, on the beach of Isla Portillos. You can see now on your screens a close-up of that camp, composed of four tents and a look-out tower⁸⁴. At the 2013 provisional measures hearing, Nicaragua confirmed that this was a “Nicaraguan military detachment”⁸⁵. It tried to justify its placement by claiming that it was outside the disputed territory⁸⁶.

9. You defined the disputed territory in your 2011 Order as Isla Portillos, between “the right bank of the disputed *caño*, the right bank of the San Juan River . . . and the Harbor Head Lagoon”⁸⁷. In your 2013 Order, you confirmed that this Nicaraguan military encampment “is located on the beach and close to the line of vegetation, and is therefore situated in the disputed territory”⁸⁸. It was established there by Nicaragua in breach of your 2011 Order.

⁸⁰CR 2013/25, p. 22, para. 17 (Reichler).

⁸¹See CR 2015/3, 14 April 2015, p. 13, paras. 14-15 (Wordsworth).

⁸²Cf. CMN, para. 7.7.

⁸³See photograph of new Nicaraguan camps in the area indicated by the Court, 5 Feb. 2013, annexed to letter from Costa Rica to the ICJ, ref. ECRPB-016-013, 15 Mar. 2013.

⁸⁴Photograph of the disputed territory showing a close-up of the Nicaraguan camp, 18 Sept. 2013, Att. PM-15 to Costa Rica’s request for new provisional measures.

⁸⁵CR 2013/25, p. 29, para. 44 (Reichler).

⁸⁶*Ibid.*

⁸⁷*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011*, p. 19, para. 55.

⁸⁸*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013*, p. 365, para. 46.

3. Nicaragua's sending and maintenance of Sandinista Youth on the disputed territory

10. Nicaragua also sent and maintained organized groups of Nicaraguan nationals on the disputed territory from April 2011 until November 2013, in the form of members of the Sandinista Youth or the "Guardabarranco Environmental Movement"⁸⁹.

11. These organized groups of Nicaraguan nationals established camps on the disputed territory from which they carried out works in that territory⁹⁰. The location of the campsites is now indicated on your screens. By early 2013, more than 6,000 Nicaraguan nationals had entered into the area, with each contingent spending two days training in Nicaragua, followed by eight days in Isla Portillos⁹¹; by September 2013, apparently more than 10,000 had been there⁹². They were sent and maintained on the disputed territory in breach of your 2011 Order. They carried out works there that impacted upon the environment of the disputed territory. They were also accompanied to the disputed territory by Nicaragua's Deputy Minister of the Environment⁹³, and by Nicaraguan "public officials" travelling in a Nicaraguan military helicopter⁹⁴. These visits by Nicaraguan ministers and officials were also in breach of the Court's 2011 Order.

12. On 5 and 6 April 2011, personnel from the Ramsar Secretariat and Costa Rican personnel charged with protection of the environment carried out a site visit to the disputed territory, in accordance with the terms of the Court's 2011 Order⁹⁵. They were met on 5 April by organized groups of Nicaraguan nationals, who protested against the mission and verbally abused the

⁸⁹These groups were only finally removed by Nicaragua after the Court's 2013 Order: see *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 22 November 2013*, I.C.J. Reports 2013, p. 369, para. 59 (2) (D).

⁹⁰MCR, paras. 6.7-6.24.

⁹¹See Nicaraguan press reports from *El 19 Digital*, "Movimiento Guardabarranco, fighting for nature in Nicaragua", 17 Mar. 2013, Ann. CRPM-3 to Costa Rica's request for modification of the Court's Order of 8 Mar. 2011; and *Prensa Latina*, "Movimiento Guardabarranco, fighting for nature in Nicaragua", 17 Mar. 2013, Ann. CRPM-4 to Costa Rica's request for modification of the Court's Order of 8 Mar. 2011. The Nicaraguan Minister of the Environment and Natural Resources confirmed in 2012 that 3,600 Nicaraguan youths had visited the area: see Ministry of the Environment and Natural Resources (Nicaragua), official on-line bulletin, "Diploma on the San Juan River as a Biosphere and National Heritage Reserve is Inaugurated", 2012, Ann. CR18 to letter from Costa Rica to the ICJ, ref. ECRPB-025-12, 3 July 2012.

⁹²See *El 19 Digital*, "10 thousand Nicaraguan environmentalists have visited Harbor Head", 9 Sept. 2013, tab 6 of Costa Rica's judges' folder for provisional measures hearing, 16 Oct. 2013; judges' folder for 14 Apr. 2015, tab 11.

⁹³See *La Jornada* (Nicaragua), "Costa Rican plan to stay, says General Avilés", 6 Apr. 2011, MCR, Ann. 125.

⁹⁴*El Nuevo Diario* (Nicaragua), "Ticos continue inspection, rejected by Nicaragua, in disputed area" and "General Avilés applauds the 'heroic deed' of the 19 July Sandinista Youth", 6 Apr. 2011, MCR, Ann. 126 (a) and Ann. 126 (b).

⁹⁵*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011*, I.C.J. Reports 2011, p. 27, para. 86 (2).

delegates⁹⁶. On 6 April the joint mission attempted to land in Isla Portillos, but were prevented by the Sandinista Youth, and as a result they suspended further ground inspections⁹⁷.

13. It is apparent from statements made by representatives of the Government of Nicaragua that the actions of these groups of Nicaraguan nationals have been carried out under the instructions of Nicaragua, and they have been unreservedly applauded by Nicaragua. At tab 19 of your folders you see some of the evidence establishing Nicaragua's responsibility for sending and maintaining these groups of Nicaraguan nationals, and its responsibility for their activities in the disputed territory.

(a) For example, at the beginning of April 2011, the Nicaraguan Deputy Minister of Natural Resources and the Environment, Roberto Araquistain, travelled with a group of youths to the disputed territory⁹⁸. He said that around 100 of them would greet the Costa Rican environmental personnel and personnel from the Ramsar Secretariat when they landed in Isla Portillos⁹⁹. And, as I have mentioned, the Minister's instructions were carried out: there followed aggressive protests against the presence of the joint mission, resulting in the field work being abandoned¹⁰⁰. Nicaragua has responded to this evidence by saying that the Deputy Minister did not state that the operation was "set up by the Nicaraguan government"¹⁰¹. Well, that only takes Nicaragua so far, it says nothing about the Deputy Minister accompanying these youths to the disputed territory and instructing them to disrupt the joint mission of Ramsar and Costa Rica.

⁹⁶Photograph of Nicaraguan citizens harassing the joint Costa Rica-Ramsar mission, available at <http://www.insidecostarica.com/dailynews/2011/april/07/r1440636331.jpg>; judges' folder, tab 18.

⁹⁷MCR, para. 6.11; see Minutes of the Co-ordination Meeting, Technical Advisory Mission of the Secretariat of the Ramsar Convention and Representative of the Costa Rican Ministry of the Environment, Energy and Telecommunications, 7 Apr. 2011; MCR, Ann. 152, para. 2.

⁹⁸*La Jornada* (Nicaragua), "Costa Rican plan to stay, says General Avilés", 6 Apr. 2011; MCR, Ann. 125.

⁹⁹*Inside Costa Rica* (Costa Rica), "Ramsar Inspects the Area of Conflict Despite Protests by Nicaragua", 6 Apr. 2011; MCR, Ann. 124. See also *La Jornada* (Nicaragua), "Costa Rican plan to stay, says General Avilés", 6 Apr. 2011; MCR, Ann. 125.

¹⁰⁰See photograph of Nicaraguan nationals landing at Isla Portillos during the Joint Environmental mission, 5 Apr. 2011; MCR, Ann. 235; photo of Nicaraguan nationals harassing members of the technical environmental mission, MCR, Ann. 238; Note from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-235-11, 6 Apr. 2011; MCR, Ann. 81; Note from the Permanent Mission of Costa Rica before the United Nations to Permanent Missions to the United Nations and Permanent Observer Missions to the United Nations, ref. ECR-258-2011; MCR, Ann. 76; and Note from the Ambassador to the Kingdom of the Netherlands and Co-Agent of Costa Rica, to the Registrar of the International Court of Justice, ref. ECRPB-029-11, 8 Apr. 2011.

¹⁰¹CMN, para. 7.32.

- (b) Also in early April 2011, President Ortega endorsed the presence of these groups in the disputed territory. He said that these youths had gone there “to face up to what is, in effect, an invasion”. He defended their “right” to defend the wetland, and “their Nicaraguan heritage”¹⁰².
- (c) In May 2011, Rosario Murillo, President Ortega’s wife, who serves as Nicaragua’s Minister of Communication, said “we are very proud of the work that is being done by the Sandinista Youth [and the Guardabarranco Movement] in defence of our environment, of the boys and girls who are right now on the San Juan River”¹⁰³.
- (d) In early 2012, the Nicaraguan Minister of Natural Resources and the Environment, Juana Argeñal, confirmed in official press releases that the youths were studying for a “Diploma” pursuant to a course given by the Nicaraguan Ministry of Natural Resources and the Environment, and that they had been mobilized to carry out works in the area¹⁰⁴.

14. That these large organized groups of Nicaraguan youths were sent and maintained on the disputed territory by Nicaragua is also confirmed by statements given by the youths themselves. Some were interviewed for a video broadcast in Nicaragua in July 2011. An individual identified as head of the 14th Contingent of the Sandinista Youth said: “It’s Commander Daniel Ortega’s initiative. He wants us, as young people involved in the different movements that make up the Sandinista Youth organization, to be defending the sovereignty of our San Juan River.”¹⁰⁵ Another individual in charge of the El Rama contingent of the Sandinista Youth expressed her gratitude to

¹⁰²*El Nuevo Diario* (Nicaragua), “The Army would capture Costa Rican pilots if they land”, 7 Apr. 2011, MCR, Ann. 127.

¹⁰³Website of the Sandinista Youth organization, <http://juventudsandinista.blogia.com/2011/051001-nos-sentimos-muy-orgullosos-del-trabajo-de-la-juventud-sandinista.php>; MCR Ann. 35.

¹⁰⁴Ministry of Foreign Affairs (Nicaragua), Official online bulletin, “Diploma on the San Juan River as a Biosphere and National Heritage Reserve is Inaugurated”, 17 Apr. 2012; Ann. CR13 to letter from Costa Rica to the ICJ, ref. ECRPB-025-12, 3 July 2012; Ministry of the Environment and Natural Resources (Nicaragua), official on-line bulletin, “Receiving a Diploma on Protecting our Wetlands”, 2012; Ann. CR15 to letter from Costa Rica to the ICJ, ref. ECRPB-025-12, 3 July 2012; and Ministry of the Environment and Natural Resources (Nicaragua), official on-line bulletin, “Diploma on the San Juan River as a Biosphere and National Heritage Reserve is Inaugurated”, 2012; Ann. CR18 to letter from Costa Rica to the ICJ, ref. ECRPB-025-12, 3 July 2012.

¹⁰⁵Roberto Salinas G (Director), “The Truth about a Contingent”, video documentary: transcription of audio (extracts), July 2011; MCR Ann. 138, p. 524.

Nicaraguan President Ortega for sponsoring her presence there, saying “it was an opportunity our Commander Daniel was giving us”¹⁰⁶.

15. In your Order of July 2013, you expressed “concerns” about “the presence of organized groups of Nicaraguan nationals” in the disputed territory. You noted that it carried “the risk of incidents which might aggravate the present dispute”¹⁰⁷. Even after this expression of concern, Nicaragua continued to support the work of these groups¹⁰⁸.

16. Nicaragua makes three attempts to avoid responsibility for these acts.

17. *First*, it says that these large organized groups of Nicaraguans have not committed any internationally wrongful acts¹⁰⁹. But the terms of your 2011 Order are clear: Nicaragua cannot send or maintain civilian personnel on the disputed territory, whether or not they cause harm there.

18. *Second*, it argues that these large groups of Nicaraguans are not “civilian personnel” within the scope of the 2011 Order. It contends that the Order forbids it sending or maintaining only “State staff or employees”¹¹⁰. But the scope of your Order is broad, as is the term “civilian”. It is a general term that covers all persons who are not otherwise members of an identifiable group, such as police, military, or security¹¹¹. And in any event, the individuals at issue here are part of the Sandinista Youth¹¹², part of Nicaragua’s ruling party. As such, they fall within the scope of your 2011 Order.

19. And even if these individuals were not paid a salary from the State, it is apparent that they were State-sponsored. They were accompanied to the disputed territory by Nicaragua’s

¹⁰⁶MCR Ann. 138, p. 525. She went on to explain that the Sandinista Youth was on a mission from Ortega, in the disputed territory, to defend Nicaraguan sovereignty. She said: “we defend it because everything here is ours. As members of the Sandinista Youth we are brave and it doesn’t matter where we have to go to defend our sovereignty, we’ll be there as the Sandinista Youth . . . and we’re always ready and willing to do whatever it takes to carry out the missions that our Commander Daniel Ortega sends us on”: Roberto Salinas G (Director), “The Truth about a Contingent”, video documentary: transcription of audio (extracts), July 2011; MCR, Ann. 138, p. 525.

¹⁰⁷*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 16 July 2013, I.C.J. Reports 2013, p. 240, para. 37.

¹⁰⁸CR 2013/25, p. 14, para. 26 (Argüello), citing Diplomatic Note sent by Samuel Santos López, Minister for Foreign Affairs, Nicaragua to Enrique Castillo Barrantes, Minister for Foreign Affairs and Worship, Costa Rica, ref. MRE-DM-AJ-127-03-13, 5 Mar. 2013, attached to letter from Costa Rica to ICJ, ref. ECRPB-016-13, 15 Mar. 2013.

¹⁰⁹CMN, para. 7.23.

¹¹⁰CMN, para. 7.17-7.18.

¹¹¹See Oxford English Dictionary Online, available at <http://www.oed.com>, cited in MCR, para. 6.31.

¹¹²These individuals have identified themselves as being Sandinista youth (see Roberto Salinas G (Director), “The Truth about a Contingent”, video documentary: transcription of audio (extracts), July 2011; MCR, Ann. 138, p. 525; and Nicaragua acknowledges that “some of them” are members: see CMN, para. 7.14.

Deputy Minister of the Environment¹¹³. They were there under the protection of the Nicaraguan Army¹¹⁴. They were given food and water supplies and access “at all hours” to an emergency boat from the Nicaraguan Health Centre in Greytown¹¹⁵. Of course they were sponsored and maintained by Nicaragua — it is impossible to believe that several thousand young Nicaraguans, unaided, made their way to this remote location and were fed and housed without Nicaraguan logistical support and funding.

20. Nicaragua’s *third* response is to say that the threshold to attribute the acts of private individuals to a State is high, and it is not met in the present case¹¹⁶. But again Nicaragua misses the point: your 2011 Order prohibits Nicaragua from sending and maintaining these groups on the disputed territory. Whether they were sent and maintained is a question of fact, not of attribution.

21. But in any event, the works they carried out in the disputed territory — which are contrary to Costa Rica’s sovereign rights and therefore internationally wrongful — those acts are attributable to Nicaragua, pursuant to the rule reflected in Article 8 of the ILC’s Articles on State Responsibility¹¹⁷. Nicaragua admits that they carried out works in Isla Portillos¹¹⁸, over which Costa Rica is sovereign. They were trained by the Nicaraguan authorities¹¹⁹. The Nicaraguan Ministry of the Environment instructed them in respect of a particular “operation”¹²⁰ — to

¹¹³*La Jornada* (Costa Rica), “Costa Rican plan to stay, says General Avilés”, 6 Apr. 2011; MCR, Ann. 12.

¹¹⁴*El Nuevo Diario* (Nicaragua), “Ticos continue inspection, rejected by Nicaragua, in disputed area” and “General Avilés applauds the ‘heroic deed’ of the 19 July Sandinista Youth”, 6 Apr. 2011; MCR, Ann. 126 (a) and Ann. 126 (b).

¹¹⁵*La Prensa* (Nicaragua), “Army provides support to 19 July Sandinista Youth in River San Juan”, 5 Apr. 2011; MCR, Ann. 123.

¹¹⁶CMN, paras. 7.24-7.31.

¹¹⁷International Law Commission, Report of International Law Commission, Fifty-eighth Session, UN doc. A/CN.4/L.684, 2006, Art. 8; see generally *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, pp. 64-65, para. 115; and *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 208, para. 400.

¹¹⁸See Nicaragua’s Written Observations on the Request by Costa Rica for the Modification of the Court’s Order of 8 March 2011 in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, 14 June 2013, para. 29. See also CR 2013/25, p. 14, para. 22 (Argüello).

¹¹⁹Ministry of Foreign Affairs (Nicaragua), Official online bulletin, “Diploma on the San Juan River as a Biosphere and National Heritage Reserve is Inaugurated”, 17 Apr. 2012, Ann. CR13 to letter from Costa Rica to the ICJ, ref. ECRPB-025-12, 3 July 2012; Ministry of the Environment and Natural Resources (Nicaragua), official on-line bulletin, “Receiving a Diploma on Protecting our Wetlands”, 2012, Ann. CR15 to letter from Costa Rica to the ICJ, ref. ECRPB-025-12, 3 July 2012; and Ministry of the Environment and Natural Resources (Nicaragua), official on-line bulletin, “Diploma on the San Juan River as a Biosphere and National Heritage Reserve is Inaugurated”, 2012, Ann. CR18 to letter from Costa Rica to the ICJ, ref. ECRPB-025-12, 3 July 2012.

¹²⁰See *Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 208, para. 400.

demonstrate against the Joint Environmental Mission of Costa Rica and Ramsar¹²¹. They carried out those instructions¹²². The leaders of these groups have said that they were there at the initiative of Commander Ortega¹²³, that they were carrying out “the missions that [their] Commander Daniel Ortega sen[t] [them] on”¹²⁴. They were acting on the instructions and under the effective control of Nicaragua, and it follows that their conduct is attributable to Nicaragua, and is an additional breach of Costa Rican sovereignty, in addition to their being “sent and maintained” on the disputed territory in breach of your 2011 Order.

22. And further, Nicaragua has an obligation to “take the Court’s [Order] seriously into account”¹²⁵. It follows that Nicaragua owes an obligation of due diligence, which requires it to ensure that no persons under its jurisdiction or control are sent to or maintained in the disputed territory, and not knowingly to permit the presence of any persons in that territory. Nicaragua’s support, encouragement, and even applauding of these groups and of their activities is a breach of this obligation of due diligence.

4. Nicaragua’s aggravation of the dispute

23. Mr. President, Members of the Court, all three Orders in this case oblige both Parties to refrain from any action which might aggravate or extend the dispute before the Court¹²⁶. It is apparent that by its breaches of the Court’s Order — by constructing the artificial *caños* in 2013, by

¹²¹*Inside Costa Rica* (Costa Rica), “Ramsar Inspects the Area of Conflict Despite Protests by Nicaragua”, 6 Apr. 2011; MCR, Ann. 123. See also *La Jornada* (Nicaragua), “Costa Rican plan to stay, says General Avilés”, 6 Apr. 2011; MCR, Ann. 125.

¹²²See photograph of Nicaraguan nationals landing at Isla Portillos during the Joint Environmental mission, 5 Apr. 2011, MCR, Ann. 235; photo of Nicaraguan nationals harassing members of the technical environmental mission, MCR, Ann. 238; Note from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-235-11, 6 Apr. 2011, MCR, Ann. 81; Note from the Permanent Mission of Costa Rica before the United Nations to Permanent Missions to the United Nations and Permanent Observer Missions to the United Nations, ref. ECR-258-2011; MCR Ann. 76; and Note from the Ambassador to the Kingdom of the Netherlands and Co-Agent of Costa Rica, to the Registrar of the International Court of Justice, ref. ECRPB-029-11, 8 Apr. 2011.

¹²³Roberto Salinas G. (Director), “The Truth about a Contingent”, video documentary: transcription of audio (extracts), MCR, Ann. 138, p. 524.

¹²⁴Roberto Salinas G. (Director), “The Truth about a Contingent”, video documentary: transcription of audio (extracts), MCR, Ann. 138, p. 525.

¹²⁵*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 144, para. 289.

¹²⁶*Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011 (I), p. 27, para. 86 (3); *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 16 July 2013, I.C.J. Reports 2013, p. 241, para. 40 (2); and *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 22 November 2013, I.C.J. Reports 2013, p. 369, para 59 (1) (reaffirming the 2011 Order).

maintaining a military camp on the disputed territory until late 2013, and by sending and maintaining the Sandinista Youth on the disputed territory, sponsoring their activities there, and instructing them to impede access to the disputed territory by Costa Rican and Ramsar personnel — by all this conduct, Nicaragua has engaged in actions which have the effect of aggravating and extending the dispute. Further, Nicaragua’s conduct in impeding Costa Rica’s fulfilment of its responsibilities under the Court’s 2013 Order, as Dr. Del Mar has just referred to, is a further aggravation of the dispute.

5. Nicaragua’s failure to comply with reporting obligations

24. Nicaragua has also persistently failed to comply with its reporting obligations, under your 2013 Order. That Order required both States to inform the Court as to their compliance at three-monthly intervals. Costa Rica accordingly submitted five reports on compliance, in a timely manner¹²⁷. In contrast, Nicaragua habitually submitted its reports late¹²⁸. Instead of informing the Court as to compliance with the Orders, Nicaragua used the opportunity to criticize Costa Rica’s measures of compliance¹²⁹, and to produce new and unrelated evidence, which it ought to have submitted using the appropriate procedures under the Court’s Rules¹³⁰. Thus Nicaragua failed to comply with its reporting obligations under the Court’s 2013 Order.

C. Costa Rica’s compliance with the Provisional Measures Orders

25. Nicaragua has raised two issues as to Costa Rica’s compliance with the Court’s Orders on provisional measures. The first relates to Costa Rica dispatching civilian personnel to the disputed territory. Both Orders permit Costa Rica access to the disputed territory for the purposes

¹²⁷See letter from Costa Rica to the ICJ, ref. ECRPB-0-12, 21 Feb. 2014; letter from Costa Rica to the ICJ, ref. ECRPB-070, 21 May 2014; letter from Costa Rica to the ICJ, ref. ECRPB-090-2014, 22 Aug. 2014; letter from Costa Rica to the ICJ, ref. 116-2014, 21 Nov. 2014; and letter from Costa Rica to the ICJ, ref. ECRPB-020-2015, 20 Feb. 2015.

¹²⁸See letter from Nicaragua to the ICJ, ref. HOL-EMB-033, 7 March 2014 (due on 22 Feb. 2014); letter from Nicaragua to the ICJ, ref. HOL-EMB-033, 2 June 2014 (due on 22 May 2014); letter from Nicaragua to the ICJ, ref. HOL-EMB-166, 28 Nov. 2014 (due on 22 Nov. 2014); and letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 March 2015 (due on 22 Feb. 2015).

¹²⁹See for example, letter from Nicaragua to the ICJ, ref. HOL-EMB-033, 7 March 2014, pp. 2-4; letter from Nicaragua to the ICJ, ref. HOL-EMB-033, 2 June 2014, p. 2; letter from Nicaragua to the ICJ, ref. HOL-EMB-166, 28 Nov. 2014, pp. 2-6; and letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 March 2015, pp. 2-8.

¹³⁰See, for example, letter from Nicaragua to the ICJ, ref. HOL-EMB-0035, 9 March 2015, attaching “Project 262-09: Improvement of Navigation in the San Juan de Nicaragua River: Physical-Financial Progress Report Corresponding to 2014” (EPN 2014 Annual Report), 2015.

of preventing irreparable prejudice to the environment of this internationally protected wetland. On each occasion that Costa Rican personnel charged with protection of the environment visited the disputed territory, Costa Rica notified the Court, Ramsar, and Nicaragua of these visits¹³¹. Contrary to Nicaragua's assertions¹³², the Costa Rican Ministry of Public Security did not carry out routine and frequent overflights; nor did Costa Rica send its personnel on "fact-finding" missions there¹³³. Costa Rica acted in full compliance with its obligations under the Court's Orders, and with its obligations of due diligence arising from them.

26. The second complaint made by Nicaragua relates to construction of the road. That is of course a matter for the hearing next week, but the simple point is that in so far as the construction of a road within a State's own territory, in response to an emergency, may give rise to issues of environmental impact assessment and the like, it does not cause the aggravation of a dispute. It merely constitutes a measure entirely internal to the constructing State, and poses no threat of any kind to Nicaragua.

D. Conclusion

27. Mr. President, Members of the Court, for the reasons I have explained, Nicaragua has breached its obligations under your 2011 and 2013 Orders. In defiance of those Orders, Nicaragua

¹³¹See, for example, letter from the acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-DVM-217-2011, 30 March 2011, MCR, Ann. 75; letter from the acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-046-12, 27 Jan. 2012, CMN, Ann. 75; letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-105-13, 28 Feb. 2013, Attachment 1 to letter from Costa Rica to the ICJ, ref. DM-AM-109-13, 28 Feb. 2013; letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-678-13, 6 Dec. 2013, Attachment CR-3 to letter from Costa Rica to the ICJ, ref. ECRPB-0-12, 21 Feb. 2014; letter from the acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-108-14, 7 March 2014, Attachment CR-3 to letter from Costa Rica to the ICJ, ref. ECRPB-070, 21 May 2014; letter from the Acting Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-348-14, 17 July 2014, Attachment 1 to letter from Costa Rica to the ICJ, ref. ECRPB-090-2014, 22 Aug. 2014; letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-0707-14, 7 Nov. 2014, *Road* case, RCR, Ann. 47; letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-0774-11-14, 2 Dec. 2014, Attachment CR-2 to letter from Costa Rica to the ICJ, ref. ECRPB-020-2015, 20 Feb. 2015; and letter from the Minister for Foreign Affairs and Worship of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-0818-14, 12 Dec. 2014, *Road* case, RCR, Ann. 55.

¹³²CMN, paras. 9.47-9.48 and 9.57.

¹³³See, for example, Note Verbale from Costa Rica to Nicaragua, 28 March 2011, Ann. 3 to letter from Costa Rica to the ICJ, ref. ECRPB 029-11, 8 Apr. 2011; and Note from Minister for Foreign Affairs of Costa Rica to the Minister for Foreign Affairs of Nicaragua, ref. DM-AM-146-12, 15 March 2012, Ann. CR1 to letter from Costa Rica to the ICJ, ref. ECRPB-034-12, 29 Aug. 2012 (answering Note from Ministry for Foreign Affairs to Nicaragua to the Minister for Foreign Affairs of Costa Rica, ref. MRE/DM-AJ/116/02/12, 13 Feb. 2012, CMN, Ann. 76, cited in CMN, para. 9.48).

carried out further works in the disputed territory, causing damage. It maintained a military presence on the disputed territory and it sent, maintained, sponsored and instructed large organized groups of Nicaraguan nationals to carry out works there. By all this conduct, Nicaragua has, in addition, aggravated the dispute before the Court.

28. Mr. President, Members of the Court, that concludes my remarks for this morning. And I thank you for your kind attention. Mr. President, I ask that you give the floor to Professor Kohen, to conclude Costa Rica's first round presentation.

Le PRESIDENT : Merci. Je donne la parole au professeur Kohen

M. KOHEN :

Remèdes : une simple constatation n'est pas suffisante

1. Monsieur le président, Mesdames et Messieurs les juges, il m'appartient d'aborder la question de la réparation due au Costa Rica en raison du comportement nicaraguayen. A la fin du second tour, l'agent vous lira les conclusions du Costa Rica. Dans le *petitum*, il fera mention de manière détaillée de l'ensemble des obligations violées par le Nicaragua, que le demandeur vous prie de déclarer. Le Costa Rica considère que dans les circonstances de l'espèce, la simple constatation du caractère costa-ricien du «territoire contesté» et des violations des obligations internationales commises par le Nicaragua, bien que nécessaire, n'est pas suffisante. Ma tâche maintenant consiste à vous présenter les raisons pour lesquelles votre Cour doit aussi décider que le Nicaragua est tenu de réparer les dommages causés, par le moyen de la restitution et de la compensation, d'offrir un type de satisfaction autre que la seule constatation de ses violations par l'arrêt, en sus de donner des garanties de non-répétition.

A. Il ne s'agit pas d'un différend territorial classique mais de l'occupation et de la dégradation d'un territoire étranger

2. Monsieur le président, le Costa Rica relève que, dans le cas des différends frontaliers classiques, votre Cour a établi qu'ils sont réglés par le truchement d'un jugement déclaratif, et non par une décision dans le domaine de la responsabilité, comme vous l'avez notamment précisé dans

l'affaire *Cameroun c. Nigéria*¹³⁴. Dans son contre-mémoire, le Nicaragua vous invite à suivre ce chemin dans la présente affaire¹³⁵. Je relève la contradiction de cette position avec celle que ce même Etat a soutenue dans son *Différend territorial et maritime* contre la Colombie et que vous avez tranchée en 2012. Dans cette affaire, le Nicaragua avait en effet demandé réparation¹³⁶.

3. Votre Cour n'a pas suivi le Nicaragua et il est important de rappeler pourquoi, afin de montrer ensuite les différences avec notre affaire. Je cite votre arrêt du 19 novembre 2012 :

«La Cour fait observer que la demande du Nicaragua est présentée dans le cadre d'une instance concernant une frontière maritime qui n'a jamais été tracée auparavant. Le présent arrêt a pour effet de fixer la frontière maritime entre les deux Parties, le Nicaragua et la Colombie, dans l'ensemble de la zone pertinente. A cet égard, la Cour relève que son arrêt n'attribue pas au Nicaragua la totalité de la zone qu'il revendique et alloue au contraire à la Colombie une partie des espaces maritimes à l'égard desquels le Nicaragua demande une déclaration concernant l'accès aux ressources naturelles. Dans ces conditions, elle estime que la demande du Nicaragua sur ce point [c'est-à-dire la question de la responsabilité] n'est pas fondée.»¹³⁷

4. Mesdames et Messieurs les juges, dans notre affaire la situation est très différente de celles des affaires *Cameroun c. Nigéria* et *Nicaragua c. Colombie*. Dans le cas d'espèce, il ne s'agit pas d'un territoire ou espace qui faisait l'objet d'un différend à propos duquel les parties (individuellement ou collectivement) ont saisi la Cour pour le régler. Il ne s'agit encore moins de tracer une frontière qui n'a jamais auparavant existé. Comme nous l'avons déjà abondamment expliqué, le Nicaragua a occupé un territoire reconnu comme costa-ricien par une sentence arbitrale et a ensuite, seulement, formulé une revendication à son égard. Dans la présente affaire, le Costa Rica a prié la Cour de statuer que, par son comportement, le Nicaragua a violé l'obligation de respecter la souveraineté et l'intégrité territoriales du Costa Rica. Le titre que vous avez choisi pour la présente affaire est, dans cette perspective, très parlant : *Certaines activités menées par le Nicaragua dans la région frontalière*. Il ne s'agit pas du *Différend frontalier (Costa Rica/Nicaragua)* ou de la *Frontière terrestre entre le Costa Rica et le Nicaragua*. Ces

¹³⁴ *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria; Guinée équatoriale (intervenant))*, arrêt, C.I.J. Recueil 2002, p. 452, par. 319. Voir également *Temple de Préah Vihear, fond, arrêt*, C.I.J. Recueil 1962, p. 37.

¹³⁵ *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua)*, CMN, par. 8.6.

¹³⁶ *Différend territorial et maritime (Nicaragua c. Colombie)*, arrêt, C.I.J. Recueil 2012 (II), p. 717, par. 248.

¹³⁷ *Ibid.*, p. 718, par. 250.

activités ont par ailleurs produit des dommages matériels et moraux pour le Costa Rica et ils doivent, comme tels, être réparés.

5. Certes, du fait de la position prise par le Nicaragua, vous devez statuer préalablement sur le fait que le Costa Rica est le souverain du territoire en cause. Si le territoire sur lequel le Nicaragua a mené ses activités est aujourd'hui contesté, cela ne constitue qu'une aggravation supplémentaire de son comportement illicite : il s'agit du rejet de la souveraineté costa-ricienne pourtant déclarée par une sentence arbitrale que le Nicaragua devait respecter. Ce serait grave — et en fait un très mauvais message — de permettre qu'un Etat puisse se libérer de l'obligation de respecter la souveraineté et l'intégrité territoriales des autres Etats, par le biais d'une revendication de la souveraineté du territoire qu'il a préalablement occupé. Car j'insiste : ces *certaines activités* ont été menées par le Nicaragua avant qu'il avance la moindre revendication sur le territoire aujourd'hui objet du différend.

6. Compte tenu de ces circonstances, plusieurs modalités de réparation sont nécessaires dans la présente affaire, mise à part la déclaration quant à la situation juridique que vous allez préalablement établir : il faudra donc, outre une compensation pécuniaire, la restitution et la satisfaction sous une forme autre que la déclaration par la Cour. Je commence par la compensation pécuniaire.

B. Compensation pécuniaire pour les dommages causés

7. Les dommages matériels produits par le Nicaragua sont considérables et avérés. Le Nicaragua ne nie ni les faits ni leur attribution. La construction de trois *caños*, avec la destruction que cela implique, la déforestation d'une autre zone importante du même secteur, l'utilisation de ce secteur pour déposer le sédiment retiré du fleuve constituent autant de dommages matériels indéniables. Le Costa Rica a dû et devra encore investir des sommes considérables pour sa remise en l'état. Il serait tout à fait injuste de faire courir les frais de ces dépenses à l'Etat victime de ce comportement. L'impossibilité d'exercer les droits de libre navigation sur le fleuve San Juan a aussi des conséquences économiques importantes, par exemple dans le besoin d'utiliser d'autres moyens de transport et de communication beaucoup plus onéreux. Le Costa Rica demande à la Cour dans cette phase de l'affaire d'établir l'obligation du Nicaragua de payer une somme d'argent

en compensation pour ces dommages, le montant précis restant à déterminer dans une phase ultérieure¹³⁸.

C. Restitution

8. Je passe maintenant à une autre modalité de réparation nécessaire dans la présente affaire, la restitution. Elle est liée à la violation des droits de libre navigation. Pour les raisons expliquées par M^e Del Mar, le Costa Rica prie la Cour d'ordonner l'abrogation ou la modification du décret n^o 79-2009.

9. Le Nicaragua rejette cette demande au prétexte que votre Cour doit s'abstenir d'émettre des ordres s'imposant aux Etats¹³⁹. Mesdames et Messieurs les juges, votre capacité de décider qu'une partie doit abroger une décision interne lorsqu'elle est en contradiction avec une obligation internationale ne fait aucun doute. C'est ce que vous avez précisément fait, par exemple, dans l'affaire du *Mandat d'arrêt*, dans laquelle vous avez décidé que la Belgique devait mettre à néant le mandat d'arrêt du 11 avril 2000¹⁴⁰. Certes, vous avez dit, comme dans d'autres cas¹⁴¹, que la Belgique devait le faire par les moyens de son choix. Plus récemment, vous avez aussi décidé que le Japon «doit révoquer tout permis, autorisation ou licence déjà délivré dans le cadre de JARPA II»¹⁴². En d'autres termes, vous avez, Mesdames et Messieurs de la Cour, dans l'exercice de votre compétence, toute capacité pour émettre ce genre d'injonction en direction des Etats.

10. Ce que le Costa Rica vous sollicite c'est de dire et juger que le Nicaragua doit révoquer les dispositions de son décret de régulation de la navigation costa-ricienne qui sont contraires à votre arrêt de 2009. Il appartient dans tous les cas au Nicaragua d'y procéder selon les moyens de son choix.

¹³⁸ *Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande)*, fond, arrêt, C.I.J. Recueil 1974, p. 204, par. 76 ; *Affaire du Détroit de Corfou (Royaume-Uni c. Albanie)*, fond, arrêt, C.I.J. Recueil 1949, p. 4 ; *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo)*, indemnisation, arrêt, C.I.J. Recueil 2012 (I), p. 5.

¹³⁹ *Certaines activités*, CMN, par. 8.16.

¹⁴⁰ *Mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique)*, arrêt, C.I.J. Recueil 2002, p. 33, point 3 du dispositif.

¹⁴¹ *LaGrand (Allemagne c. Etats-Unis d'Amérique)*, arrêt, C.I.J. Recueil 2001, p. 513 514, par. 125 ; *Demande en interprétation de l'arrêt du 31 mars 2004 en l'affaire Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique)*, arrêt, C.I.J. Recueil 2009, p. 18, par. 47.

¹⁴² *Chasse à la baleine dans l'Antarctique (Australie c. Japon ; Nouvelle-Zélande (intervenant))*, arrêt du 31 mars 2014, par. 245 et 247, point 7 du dispositif.

D. Des formes de satisfaction appropriées sont aussi nécessaires

11. J'en viens maintenant à la satisfaction. Monsieur le président, Mesdames et Messieurs les juges, par son comportement, le Nicaragua a privé le Costa Rica de l'exercice de sa souveraineté sur la partie nord d'Isla Portillos depuis la fin 2010 jusqu'à aujourd'hui. Le Costa Rica a dû observer comment les forces armées nicaraguayennes demeuraient sur son sol sans son consentement, comment des centaines de ressortissants nicaraguayens se sont installés à Isla Portillos après votre ordonnance du 8 mars 2011 indiquant des mesures conservatoires ; ils y sont restés jusqu'en 2013 en fait, amenant du bétail, accomplissant des tâches prétendument environnementales, hissant le drapeau nicaraguayen ainsi que celui d'un parti politique nicaraguayen¹⁴³. Au moment même de l'occupation du territoire en octobre 2010, le Nicaragua a retiré le drapeau costa-ricien qui se trouvait à Finca Aragón et a installé le sien. Sans surprise, le drapeau costa-ricien n'a même pas été restitué au Costa Rica.

12. Dans son commentaire à l'article 37 sur la responsabilité des Etats, la Commission du droit international constatait que

«[L]a pratique des Etats offre ... de nombreux exemples de demandes de satisfaction lorsque le fait internationalement illicite d'un Etat cause un préjudice immatériel à un autre Etat. Ainsi, il peut s'agir d'outrage à des emblèmes de l'Etat tels que le drapeau national, de violations de la souveraineté ou de l'intégrité territoriale», etc¹⁴⁴.

La CDI mentionnait comme exemples les affaires *Magee*, *Petit vaisseau* et l'affaire qui découlait de l'*Outrage au drapeau français à Berlin en 1920*¹⁴⁵.

13. Dans les présentes circonstances, l'outrage à la souveraineté costa-ricienne, à ses emblèmes, leur mépris même après que votre Cour ait indiqué des mesures conservatoires, ces outrages, Mesdames et Messieurs les juges, ne peuvent pas être satisfaits par une simple déclaration

¹⁴³ MCR, par. 6.22 ; vol. IV, annexe n° 108, *El 19 Digital*, «Costa Rica looking to provoke Nicaragua» ; CMN, par. 7.14, 7.19 ; Demande du Costa Rica tendant à la modification de l'ordonnance en indication de mesures conservatoires rendue par la Cour, 23 mai 2013, par. 11, 12 ; *ibid.*, CRPM-1, Note from Costa Rica to the Secretary General of the United Nations, 14 décembre 2011, réf. DM-AM-663-2011 ; CRPM-2, Note from Costa Rica to Nicaragua, 20 mars 2013, réf. DM-AM-161-13 ; CRMP-3, *El 19 Digital*, «Movimiento Guardabarranco, fighting for nature in Nicaragua», 17 mars 2013 ; CRMP-4, *Prensa Latina*, «Movimiento Guardabarranco, fighting for nature in Nicaragua», 17 mars 2013.

¹⁴⁴ Commission du droit international, «Projet d'articles sur la responsabilité de l'Etat pour fait internationalement illicite et commentaires y relatifs», *Annuaire de la Commission du droit international*, 2001, vol. II, deuxième partie, p. 285, par. 4.

¹⁴⁵ Affaire *Magee (1874)* (*Whiteman, Damages*, vol. I, p. 64), affaire du *Petit Vaisseau (1863)* (*Whiteman, Damages*, 2nd series, vol. III, No. 2564) et l'affaire qui découlait de l'*Outrage au drapeau français à Berlin en 1920* (*C. Eagleton, The Responsibility of States in International Law (New York, New York University Press, 1928)*, p. 186-187). *Ibid.*, note de bas de page 615.

insérée dans le dispositif de votre arrêt. Le non-respect de votre arrêt de 2009 et de vos mesures conservatoires de 2011 et de 2013 montre clairement qu'une simple constatation d'illicéité ne joue aucun rôle, ni dissuasif pour l'une des parties, ni réparateur pour l'autre. Le Costa Rica est confiant que votre Cour saura trouver les moyens de satisfaction adéquats allant au-delà d'un simple constat inscrit dans le dispositif de votre futur arrêt.

Restitution pour le dragage

14. Monsieur le président, l'ambassadeur Sergio Ugalde a démontré que le programme de dragage du Nicaragua est mené dans le but de remodeler la géographie de la partie inférieure du San Juan, au mépris du Costa Rica et en particulier de son fleuve Colorado. Le Costa Rica, sur la base de la sentence *Cleveland* et du droit international général, demande que les opérations de dragage soient suspendues jusqu'à ce que le Nicaragua ait donné la garantie que ces travaux ne modifient pas, ni ne visent à modifier, le débit du fleuve Colorado.

15. Au vu de la position prise par le Nicaragua à l'égard de la sentence *Cleveland*, s'arrogeant le droit de causer des dommages au territoire costaricien¹⁴⁶, ainsi que de ses activités récentes, le Costa Rica prie respectueusement votre Cour d'inclure dans votre décision une déclaration confirmant que, en vertu de la sentence *Cleveland*, le Nicaragua n'a pas le droit d'occuper le territoire du Costa Rica, ni de l'endommager de quelque manière que ce soit, en conduisant ses travaux sur le fleuve San Juan.

16. Le Costa Rica priera également la Cour d'ordonner qu'une étude d'impact environnemental transfrontalier soit menée au sujet des travaux de dragage ; à ce que les résultats de l'étude lui soient transmis avant la reprise du programme de dragage ; et à ce que le Nicaragua fournisse des preuves scientifiques objectives que le projet de dragage en cours n'a pas modifié, ni ne modifiera le débit du fleuve Colorado.

¹⁴⁶ CR 2011/2, p. 26, par. 21 (McCaffery) ; *ibid.*, p. 30, par. 27 c) (McCaffery) ; *ibid.*, p. 56-57, par. 14 (Pellet) ; *ibid.*, p. 59, par. 19 (Pellet) ; *ibid.*, p. 61, par. 24 ; CR 2011/4, p. 32, par. 20 (Pellet).

E. Des garanties de non-répétition s'imposent face à l'absence de respect des décisions précédentes de la Cour

17. Mesdames et Messieurs les juges, nous sommes également obligés de vous demander de décider que le Nicaragua est tenu d'offrir des garanties de non-répétition de son comportement illicite. Dans la précédente affaire *Costa Rica c. Nicaragua*, vous avez dit que :

«si la Cour peut, comme il lui est arrivé de le faire, ordonner à l'Etat responsable d'un comportement internationalement illicite d'offrir à l'Etat lésé des assurances et des garanties de non-répétition, c'est seulement si les circonstances le justifient, ce qu'il lui appartient d'apprécier»¹⁴⁷.

18. Vous avez aussi mentionné, en 2009, qu'«[e]n règle générale, il n'y a pas lieu de supposer que l'Etat dont un acte ou un comportement a été déclaré illicite par la Cour répétera à l'avenir cet acte ou ce comportement, puisque sa bonne foi doit être présumée» et qu'ainsi, il faut des «circonstances spéciales» pour que la Cour ordonne de telles assurances¹⁴⁸.

19. Mesdames et Messieurs de la Cour, nous sommes ici devant une affaire dans laquelle ces circonstances spéciales sont présentes. Car dans cette affaire, nous sommes déjà confrontés — vous êtes confrontés Mesdames et Messieurs les juges — à des manquements graves à vos décisions, lesquels ont dû motiver l'adoption d'une deuxième ordonnance en indication de mesures conservatoires. Je me réfère en particulier à la construction des deux nouveaux *caños* en 2013 et à la présence militaire nicaraguayenne sur le «territoire contesté». Mais je me réfère également au mépris exprimé par le Nicaragua pour les droits costa-riciens de libre navigation tels que vous les avez interprétés dans votre arrêt de 2009.

20. Face à ces manquements constants, la présomption selon laquelle les Etats s'acquittent de bonne foi de leurs obligations internationales n'est plus suffisante. Monsieur le président, Mesdames et Messieurs les juges, le Costa Rica n'a aucune envie d'avoir à revenir régulièrement à votre prétoire afin de faire respecter ses droits violés par le Nicaragua. Si vous deviez trouver une affaire où le besoin d'offrir des garanties de non-répétition s'avère véritablement nécessaire, c'est précisément celle-ci. La preuve est déjà faite que les simples déclarations ne sont pas suffisantes. Un arrêt et des ordonnances de votre Cour ayant force obligatoire ne l'ont pas été. S'il est bien reconnu — y compris par votre Cour — que les garanties de non-répétition sont un outil disponible

¹⁴⁷ *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, arrêt, C.I.J. Recueil 2009, p. 267, par. 150.

¹⁴⁸ *Ibid.*

dans le domaine de la responsabilité, on ne peut pas faire d'elles un instrument qui ne peut jamais être appliqué. Il y va non seulement du respect dû aux autres Etats, mais également du respect dû à votre Cour.

F. Le Nicaragua doit supporter les frais de procédure concernant les deuxièmes mesures conservatoires

21. Je passe maintenant à la question des frais de procédure. Monsieur le président, Mesdames et Messieurs de la Cour, le Costa Rica reconnaît naturellement que, selon la règle générale établie par l'article 64 de votre Statut, chaque partie supporte ses frais de procédure. Cependant, ce même article vous donne la possibilité d'en décider autrement. L'article 97 de votre Règlement envisage explicitement une décision selon laquelle les frais de procédure de l'une des parties seront entièrement ou partiellement supportés par l'autre. La Cour a rappelé cette possibilité par exemple dans l'affaire *Diallo*, mentionnant que «le libellé de l'article 64 laisse entendre que certaines circonstances pourraient justifier qu'elle adjuge des frais à l'une ou l'autre des parties»¹⁴⁹. Nous estimons que dans la présente affaire il existe des raisons sérieuses pour imposer au Nicaragua le paiement au moins partiel des frais de procédure costa-riciens.

22. Nous vous prions en effet d'ordonner que le Nicaragua supporte les frais de la procédure incidente de 2013 que motiva l'indication des nouvelles mesures conservatoires. Nous savons que jusqu'à présent votre Cour n'a jamais encore utilisé ce pouvoir qui vous est conféré. Toutefois, s'il existe une circonstance exceptionnelle dans laquelle cette possibilité doit être employée, c'est bien dans cette affaire. Ceci ne découle pas seulement de la violation flagrante des premières mesures conservatoires ; cela résulte également de la procédure que le Costa Rica s'est vu forcé de suivre. En effet, la première réaction du Nicaragua face aux protestations costa-riciennes a été d'attribuer la construction des deux nouveaux *caños* à l'arrivée de la saison des pluies¹⁵⁰. Avant le début des

¹⁴⁹ *Ahmadou Sadio Diallo (République de Guinée c. République démocratique du Congo), indemnisation, arrêt, C.I.J. Recueil 2012 (I), p. 344, par. 60. Voir aussi Demande de réformation du jugement n° 158 du Tribunal administratif des Nations Unies, avis consultatif, C.I.J. Recueil 1973, p. 212, par. 98 ; ibid., opinion dissidente du juge Ammoun, p. 248-251 ; Jugement n° 2867 du Tribunal administratif de l'Organisation internationale du Travail sur requête contre le Fonds international de développement agricole, avis consultatif, déclaration du juge Greenwood, C.I.J. Recueil 2012 (I), p. 96, par. 5.*

¹⁵⁰ Demande en indication de nouvelles mesures conservatoires du Costa Rica, 24 septembre 2013, annexe 5, note diplomatique adressée à M. Enrique Castillo Barrantes, ministre des Affaires étrangères et des cultes du Costa Rica, par M. Samuel López, ministre des Affaires étrangères du Nicaragua, 18 septembre 2013, réf. MRE/DM/521/09/13, pièce jointe PM-5. Voir aussi CR 2013/24, p. 18, par. 12 (Crawford).

audiences, le Costa Rica a même proposé au Nicaragua d'accepter que la Cour rende, avec le consentement des deux Etats, une ordonnance indiquant les mesures sollicitées par le Costa Rica en vue d'éviter le déroulement de la procédure incidente et de faire l'économie du temps et des ressources financières exigées par la tenue d'audiences¹⁵¹.

Le Nicaragua a rejeté cette offre et a à son tour, le même jour, demandé des mesures conservatoires dans l'affaire relative à la *Construction d'une route*¹⁵². Le Nicaragua a finalement reconnu les faits qui ont motivé l'indication de vos mesures conservatoires¹⁵³, et votre Cour a indiqué les mesures demandées par le Costa Rica et même plus¹⁵⁴. De toute évidence, il s'agit d'une procédure qui aurait dû et pu être évitée mais que le Nicaragua a sans justification aucune imposée au Costa Rica et à votre Cour.

23. Pour ces raisons, il serait de toute justice et équité d'imposer au Nicaragua le paiement au moins des frais de la procédure incidente de 2013. J'ajouterai par ailleurs que cette demande du Costa Rica ne surprendra pas la Partie défenderesse. Le Nicaragua a, en effet, demandé à votre Cour d'imposer aux Etats-Unis d'Amérique les frais de toute la procédure introduite par lui contre cet Etat, invoquant comme fondement les dommages moraux subis par l'action des Etat-Unis¹⁵⁵.

G. Les déclarations demandées par le Nicaragua doivent être rejetées

24. Avant de terminer, quelques mots, Monsieur le président, sur les conclusions du Nicaragua. Je vais limiter mes commentaires à certains points des conclusions du contre-mémoire¹⁵⁶.

25. Nos amis de l'autre côté de la barre ont de la suite dans les idées. En fait, les déclarations que le Nicaragua vous demande de faire aux points iii) et iv) du *petitum* 2) sont

¹⁵¹ Lettre du Costa Rica au greffier du 11 octobre 2013. CR 2013/24, p. 11 (le président de la Cour).

¹⁵² CR 2013/24, p. 11 (le président de la Cour).

¹⁵³ CR 2013/27, p. 17, par. 39 (Reichler). *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua); Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), mesures conservatoires, ordonnance du 22 novembre 2013, C.I.J. Recueil 2013, p. 364, par. 45.*

¹⁵⁴ *Certaines activités menées par le Nicaragua dans la région frontalière (Costa Rica c. Nicaragua); Construction d'une route au Costa Rica le long du fleuve San Juan (Nicaragua c. Costa Rica), mesures conservatoires, ordonnance du 22 novembre 2013, C.I.J. Recueil 2013, p. 369-370, par. 59.*

¹⁵⁵ *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), MN (réparation), 29 mars 1988, par. 489.*

¹⁵⁶ *Certaines activités*, CMN, p. 455-456.

pratiquement identiques à celles demandées dans l'affaire des *Droits de navigation et droits connexes*. Il s'agit d'une déclaration affirmant que le Nicaragua a le droit d'effectuer des travaux en vue d'améliorer la navigation du San Juan, incluant le dragage du fleuve, ainsi que de restaurer le débit du fleuve tel qu'il existait en 1858. A juste titre, vous avez déjà refusé d'inclure ces demandes dans votre arrêt de 2009¹⁵⁷. Les mêmes considérations que nous avons formulées à l'époque, et auxquelles vous avez fait droit, s'imposent aujourd'hui. Peut-être serait-il utile de rappeler au Nicaragua la valeur de la chose jugée ? Ces questions ont même déjà été réglées par la sentence *Cleveland* de 1888¹⁵⁸. Il n'en demeure pas moins que l'insistance du Nicaragua quant à son prétendu droit de porter atteinte au débit du fleuve Colorado est tout à fait préoccupante.

26. Quant au point v) du *petitum* 2), à savoir que votre Cour déclare que les seuls droits du Costa Rica sur le fleuve San Juan sont ceux qui découlent du traité de 1858, tels qu'interprétés par les sentences *Cleveland* et *Alexander*, il est à la fois erroné et irrecevable. En fait, il constitue une nouvelle preuve du mépris que montre le Nicaragua à l'égard de votre arrêt du 9 juillet 2009. En effet, vous avez explicitement reconnu un droit costa-ricien qui ne découle pas du traité de 1858 et des interprétations arbitrales : il s'agit du droit coutumier de pêche à des fins de subsistance¹⁵⁹. Les interprétations judiciaires de 1916 de la Cour centraméricaine de justice et de votre propre Cour de 2009 doivent aussi être également mentionnées, ce que le Nicaragua s'abstient de faire. Quoiqu'il en soit, une telle déclaration, même formulée correctement, ne saurait être recevable, vu son caractère totalement abstrait. Si la Cour estimait toutefois nécessaire de formuler une telle déclaration relative aux droits des deux Parties, il faudrait bien entendu la formuler de manière complète, de telle sorte que les droits et les interprétations que le Nicaragua a ignorés dans son *petitum* y soient inclus.

Conclusions

27. Pour résumer, Monsieur le président, Mesdames et Messieurs les juges, le Costa Rica vous priera de dire et juger que le Nicaragua a violé les obligations internationales découlant du

¹⁵⁷ *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, arrêt, C.I.J. Recueil 2009, p. 269, par. 155.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, p. 266, par. 141.

traité de 1858, de la Charte des Nations Unies et de celle de l'OEA et du droit international coutumier, quant au respect de la souveraineté et l'intégrité territoriales du Costa Rica, des droits de libre navigation et autres, ainsi que vos ordonnances en indication de mesures conservatoires. Le demandeur vous priera également d'établir l'obligation de réparer les préjudices matériels et moraux subis par le Costa Rica, sous la forme d'une réparation pécuniaire, d'une restitution sous la forme de l'abrogation des dispositions réglementaires nicaraguayennes contraires aux droits de navigation et de la satisfaction pour les préjudices moraux, sous des formes allant au-delà de la simple constatation et que votre Cour jugera les plus appropriées.

28. Monsieur le président, le Costa Rica est prêt pour répondre à la question posée hier par le juge Greenwood. Si vous le voulez bien, je vous prie de donner la parole à mon collègue M^c Wordsworth.

Le PRESIDENT : Bien, je donne la parole à M. Wordsworth.

Mr. WORDSWORTH: Thank you, Mr. President. In view of my reference yesterday to Common Article 2 of the 1949 Geneva Conventions, Judge Greenwood referred to the Fourth Geneva Convention and asked whether Costa Rica alleges that there is — or at some relevant time has been — a state of armed conflict between itself and Nicaragua. The question is naturally understood as confined solely to the current case, and specifically to Nicaragua's military action of October 2010 through January 2011, on which I made submissions yesterday — the complete wording of the question is at page 72 of yesterday's transcript.

Costa Rica considers that Nicaragua's acts in that period are correctly regarded as contrary to the prohibition relating to use of force, found in Article 2 (4) of the United Nations Charter and Article 22 of the OAS Charter, and also as military occupation. However, Costa Rica does not consider that the acts resulted in an armed conflict between itself and Nicaragua, as Costa Rica carefully avoided engaging in any armed confrontation.

The reference made yesterday to Common Article 2 of the Geneva Conventions was in the context of Costa Rica's position that Nicaragua's action violated Article 21 of the OAS Charter, which provides, *inter alia*, that the territory of a State "may not be the object, even temporarily, of

military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever”.

Costa Rica has made reference to Common Article 2 to support the position that, as a matter of characterization, Nicaragua’s armed incursion and presence in Isla Portillos qualifies as military occupation, recalling from Common Article 2 that there is no requirement that an occupation be met by armed resistance. The reference is to paragraph 2 of Article 2, which of course provides that the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

The 1958 Pictet Commentary on the paragraph 2 of Article 2 of the Fourth Geneva Convention, at pages 21 to 22 contains some relevant comment as to the possibility of there being occupation without hostilities. And I would refer the Court to that. But it is to be emphasized that Costa Rica has not put forward a case that is dependent on the applicability of the Fourth Geneva Convention per se.

Thank you, Mr. President.

Le PRESIDENT : Merci, Monsieur Wordsworth. Je vais maintenant donner la parole à M.le juge Bennouna qui souhaite poser une question au Costa Rica.

M. le juge BENNOUNA : Je vous remercie, Monsieur le président.

Monsieur le président, ma question s’adresse au Costa Rica à la suite de la plaidoirie de Mme Catherine Del Mar intitulée «*Violations of Costa Rica’s navigational Rights*» [Violations du droit de navigation du Costa Rica].

Ma question est la suivante : est-ce que le Costa Rica attend de la Cour qu’elle se prononce sur la compatibilité avec l’arrêt de la Cour de 2009 sur le droit de navigation des réglementations édictées par le Nicaragua pour la mise en œuvre de cet arrêt ? Et si c’était le cas, le Costa Rica peut-il préciser le lien de cette question avec l’objet du différend ? Je vous remercie, Monsieur le président.

Le PRESIDENT : Merci, Monsieur le juge Bennouna. Le Costa Rica est prié de répondre à la question lors de son second tour de plaidoiries en la présente affaire.

La Cour se réunira de nouveau demain après-midi de 16 h 30 à 18 heures pour entendre le début du premier tour de plaidoiries du Nicaragua.

Je vous remercie. L'audience est levée.

L'audience est levée à 11 h 30.
