

SEPARATE OPINION
OF JUDGE CANÇADO TRINDADE

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I. INTRODUCTION

1. I have concurred with my vote to the adoption by the International Court of Justice (ICJ) of its Order of today, 17 April 2013, whereby it decides to join the proceedings in the present case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* with the proceedings in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. The *ratio decidendi* in the present decision of the Court (paras. 19-23) is clear; yet, it touches on foundations which have not been examined or developed by the Court in the present Order, and to which I attach great importance. I feel thus obliged to leave on the records my reflections thereon, in support of my personal position on the matter.

2. I shall, first, address the issue of “implied” and “inherent powers”, so as to provide some precisions in respect of the exercise of the international judicial function. Secondly, I shall dwell upon the issue of the

Kompetenz Kompetenz/la compétence de la compétence, inherent to the exercise of the international judicial function. Thirdly, I shall review the sound administration of justice, and focus attention on jointers effected by the Hague Court (PCIJ and ICJ) *avant la lettre*. Fourthly, I shall consider what I perceive as the idea of justice guiding the sound administration of justice (*la bonne administration de la justice*). And fifthly, I shall examine the sound administration of justice (*la bonne administration de la justice*) and the procedural equality of the parties. The way will then be paved for the presentation, in the epilogue, of my brief final considerations.

3. It is not my intention, in the following consideration of these issues, to be exhaustive; I could hardly be so, writing this separate opinion, as I have been, under the merciless and unnecessary pressure of time. I do so, struggling stubbornly against time, moved by a sense of duty, and endeavouring to provide the reasoning which I can hardly find in the present Order in support of the decision taken. The *ratio decidendi*, yes, it is in the Order, but I cannot behold therein the *obiter dicta* supporting it. As I have concurred with the Court's decision in the present Order, I feel bound to take the care to elaborate on the foundations of the matter dealt with, the way I perceive and conceive them.

II. "IMPLIED" AND "INHERENT POWERS" REVISITED: SOME PRECISIONS

4. May I begin by making a brief incursion, for a specific purpose, into the law of international organizations, which — may I observe *in passim* — marks its discreet presence in the present Order (paras. 1-2 and 5). With the rise of international organizations, the conceptions of "inherent powers" as well as "implied powers" took shape in that context, with the contribution of the case law of the ICJ. One year after the Advisory Opinion of the ICJ in respect of *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)* (of 20 July 1962), the doctrinal formulation of F. Seyersted (1963) found the light of the day¹, invoking the "inherent powers" of the UN, and seeking to demonstrate them, by means of an arguable analogy — which promptly attracted criticisms — with the legal position of States.

5. After all, the ICJ itself had clarified, in its celebrated *obiter dictum* in the Advisory Opinion on *Reparations for Injuries Suffered in the Service of the United Nations* (of 11 April 1949), that while the State is endowed with the totality of rights and duties recognized by international law, the rights and duties of an entity such as the UN ought to depend on the purposes and functions, specified or implicit in their constitutive docu-

¹ F. Seyersted, *Objective International Personality of Intergovernmental Organizations*, Copenhagen, 1963, pp. 28-29, 35-36, 40, 45-46.

ments and developed in practice². The ICJ thus espoused to the doctrine of “implied powers”³, surely distinct from that of “inherent powers”, inspired in an analogy with comparative constitutional law.

6. While the doctrinal construction of “implied powers” was intended to set up limits to powers transcending the letter of constitutive charters — limits found in the purposes and functions of the international organization at issue⁴ — the doctrinal construction of “inherent powers”, quite distinctly, was intended to assert the powers of the juridical person at issue for the accomplishment of its goals, as provided for in its constitutive charter. The point I wish here to make is that the same expression — “inherent powers” — has at times been invoked in respect of the operation of international judicial entities; yet, though the expression is the same, its rationale and connotation are different, when it comes to be employed by reference to international tribunals. Another precision is here called for, for a proper understanding of the operation of these latter. Understanding and operation go hand in hand: *ad intelligendum et ad agendum*.

III. KOMPETENZ KOMPETENZ/LA COMPÉTENCE DE LA COMPÉTENCE, INHERENT TO THE EXERCISE OF THE INTERNATIONAL JUDICIAL FUNCTION

7. International tribunals, to start with, are endowed with competence to resolve any controversy raised with regard to their own jurisdictions: this amounts to a basic principle of international procedural law⁵. As master of its own jurisdiction, the international tribunal concerned has the *compétence de la compétence* (*Kompetenz Kompetenz*). Such power of determination is inherent to every contemporary international tribunal, responding to an imperative of juridical security: it goes without saying that the determination of the scope of its own jurisdiction belongs to the international tribunal concerned, as it cannot be left in the hands, and at the mercy, of the contending parties. In any circumstances, the international tribunal concerned is master of its own jurisdiction⁶.

8. International tribunals, as courts of law, judicial entities, stand on a firmer ground than arbitral tribunals, in so far as the determination of

² *I.C.J. Reports 1949*, p. 180.

³ Cf. also, subsequently, its Advisory Opinion of 13 July 1954, on the *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, wherein the ICJ again dwelt on the doctrine of “implied powers”.

⁴ Thereby not attributing *carte blanche* to this latter; cf. Rahmatullah Khan, *Implied Powers of the United Nations*, Delhi/Bombay/Bangalore, Vikas Publishing, 1970, pp. 1-222.

⁵ IACtHR, case of *Hilaire, Benjamin and Constantine and Others v. Trinidad and Tobago* (preliminary objections, judgment of 1 September 2001), separate opinion of Judge A. A. Cançado Trindade, paras. 2 and 15.

⁶ IACtHR, case of *Barrios Altos v. Peru* (judgment of 14 March 2001), concurring opinion of Judge A. A. Cançado Trindade, para. 2.

their competence is concerned. They are the guardians and masters of their own respective jurisdiction (*jurisdiction, jus dicere*, the prerogative or power to declare the law). In this way, they discard permissive practices (remnant of international arbitrations of the past), and preserve the integrity of their own jurisdiction. Contending parties, on their turn, are bound to comply with their conventional obligations (of a substantive as well as of a procedural nature), so as to secure to the conventional provisions at issue their proper effects in their respective domestic legal orders. This also corresponds to a general principle of law — *ut res magis valeat quam pereat* —, widely known as the principle of effectiveness (of *effet utile*)⁷.

9. The *compétence de la compétence* (*Kompetenz Kompetenz*) of international tribunals extends to the interpretation of the provisions of their respective jurisdictional instruments, as well as to the determination of the nature of the controversy at issue and the characterization of its factual context; moreover, the prerogative of international tribunals to determine their own jurisdiction starts at the time they are seized of the disputes at issue⁸. The ICJ itself stated, six decades ago, in its Judgment (of 18 November 1953), in the *Nottebohm* case, that the *compétence de la compétence*

“assumes particular force when the international tribunal is no longer an arbitral tribunal constituted by virtue of a special agreement between the parties for the purpose of adjudicating on a particular dispute, but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation and is (...) the principal judicial organ of the United Nations” (*Nottebohm (Liechtenstein v. Guatemala)*, *Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 119).

IV. THE SOUND ADMINISTRATION OF JUSTICE, AND JOINDERS *AVANT LA LETTRE*

10. Thus, keeping these precisions in mind, may I briefly recall that the ICJ developed its practice on joinder of proceedings well before the institute of *joinder* was enshrined, in 1978, into the Rules of Court (Article 47)⁹.

⁷ For examples of the preservation, by contemporary international tribunals, of the integrity of their own jurisdiction, cf. A. A. Cançado Trindade, *El Ejercicio de la Función Judicial Internacional — Memorias de la Corte Interamericana de Derechos Humanos*, 2nd ed., Belo Horizonte/Brazil, Edit. Del Rey, 2013, pp. 5-10, 29-52, 145-149 and 215.

⁸ I. F. I. Shihata, *The Power of the International Court to Determine Its Own Jurisdiction*, The Hague, Martinus Nijhoff, 1965, pp. 1-304.

⁹ Article 47 of the Rules of Court provides that:

“The Court may at any time direct that the proceedings in two or more cases be joined. It may also direct that the written or oral proceedings, including the calling of witnesses, be in common; or the Court may, without effecting any formal joinder, direct common action in any of these respects.”

By then, the Court counted only on a very general provision of its Statute, on its prerogative to deliver Orders for the conduct of the case at issue (Article 48). References can be made to its decisions on joinders in the *South West African* cases (1961), and the *North Sea Continental Shelf* cases (1968)¹⁰. The joinders effected by the ICJ on those occasions transcended the letter of its *interna corporis*. The Court was guided by its awareness of the sound administration of justice.

11. These two decisions of the ICJ were preceded by three other decisions of its predecessor, the PCIJ, in the cases of *Certain German Interests in Polish Upper Silesia* (1926), the *Legal Status of the South-Eastern Territory of Greenland* (1932), and the *Appeals from Certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (1932). Thus, both the PCIJ and the ICJ ordered the joinder of proceedings *avant la lettre*, despite the absence of an express provision on it in their *interna corporis*. They ordered the joinder as a measure of judicial administration, so as to secure *the sound administration of justice (la bonne administration de la justice)*, well before the institute of joinder was at last inserted, and found its place, in the 1978 ICJ's Rules of Court.

12. In the course of the proceedings, the Court may be faced with a situation which requires from it a decision (at procedural level), even if it does not squarely fit into its *interna corporis*. This has often happened in practice — and the aforementioned decisions are not exhaustive. As early as in 1937, G. Morelli perspicaciously pondered that “[s]ettling a legal dispute means substituting certainty for uncertainty regarding the existing legal situation”¹¹. And he added, in his sharp criticism of State voluntarism, that the generation of legal effects cannot be subsumed under the “will” of States, or under what they agree upon *inter se*; legal effects of the international *corpus juris* stand “above the will of States” (“*au-dessus de la volonté des Etats*”)¹².

V. THE IDEA OF JUSTICE GUIDING THE SOUND ADMINISTRATION OF JUSTICE (*LA BONNE ADMINISTRATION DE LA JUSTICE*)

13. In recent times, much discussion has taken place as to whether the sound administration of justice (*la bonne administration de la justice*) is a maxim or a principle, or whether such a distinction is immaterial¹³. Be

¹⁰ Yet, in the *Fisheries Jurisdiction* cases (1972) and the *Nuclear Test* cases (1973), however, the ICJ decided not to join the proceedings.

¹¹ G. Morelli, “La théorie générale du procès international”, 61 *Recueil des cours de l'Académie de droit international de La Haye* (1937), p. 260 [translation by the Registry].

¹² *Ibid.*, p. 263.

¹³ Cf., *inter alia*, e.g., R. Kolb, “Les maximes juridiques en droit international public: questions historiques et théoriques”, 32 *Revue belge de droit international* (1999), pp. 407-434; A. Lelarge, “L'émergence d'un principe de bonne administration de la justice internationale dans la jurisprudence internationale antérieure à 1945”, 27 *L'observateur des Nations Unies* (2009), pp. 23-51.

that as it may, if it flourished as a maxim, this latter clearly gave expression to a principle. The proper exercise of the international judicial function requires the blend of logic and experience (*la sagesse et l'expérience*), deeply-rooted in legal thinking (of comparative domestic law and of international law). Such blend of logic and experience seeks to secure the sound administration of justice. Positivists try in vain to subsume this latter under the *interna corporis* of the international tribunal at issue, in their well-known incapacity to explain anything that transcends the regulatory texts.

14. I have already referred to joinders effected by the ICJ *avant la lettre*, despite the absence of an express provision regulating the matter, and before the institute of joinder was inserted into the Rules of Court (cf. *supra*). In my understanding, the Court did not do so pursuant to an “implied power” ensuing from the regulatory texts, but rather, and more precisely, pursuant to an “inherent power”, proper to the exercise of the international judicial function. It is an “inherent power” of the international tribunal concerned to see to it that the procedure functions properly, so that justice is done and is seen to be done. It is an “inherent power” of an international tribunal such as the ICJ to see to it that the procedure operates in a balanced way, ensuring procedural equality and the guarantees of due process, so as to preserve the integrity of its judicial function.

15. The sound administration of justice enables the international tribunal at issue to tackle questions of procedure even if these latter have “escaped” the regulations of its *interna corporis*. It is, in my perception, the idea of an objective justice that, ultimately, guides the sound administration of justice (*la bonne administration de la justice*), in the line of jus-naturalist thinking. The proper pursuit of justice is in conformity with the general principles of law. With the reassuring evolution and expansion of judicial settlement in recent decades, there has been, not surprisingly, an increasing recourse to the maxim *la bonne administration de la justice* — which gives expression to a general principle of law, captured by human conscience¹⁴.

16. Writing at the time of the emergence and consolidation of judicial settlement of international disputes, M. Bourquin pondered that many international controversies pertained to a disagreement, not as to the interpretation or application of positive law (*jus positum*), but rather as to the value of that law. Accordingly, the exercise of the international judicial function is not — cannot be — limited to a simple application of positive law in the *cas d'espèce*; there is a certain element of creativity

¹⁴ On human conscience — the universal juridical conscience — as the ultimate material source of international law, cf. A. A. Cançado Trindade, *International Law for Humankind — Towards a New Jus Gentium*, 1st ed., Leiden/The Hague, Martinus Nijhoff/The Hague Academy of International Law, 2010, Chap. VI, pp. 139-161.

inherent to it, and there are always “superior principles of justice” to be kept in mind¹⁵.

17. The proper handling of international procedure is thus endowed with particular relevance. After all, we are here confronted with common sense, which often appears to be the least common of all senses. As to such proper handling of international procedure, for the sake of the realization of justice, M. Bourquin deemed it fit to warn that

“The quality of procedures is undoubtedly a factor which must be taken into account. The right procedure helps resolve any difficulties. The wrong procedure, on the other hand, does more harm than good. However, a mechanism, even one that is exceptionally well designed, cannot of itself suffice to resolve such an issue. What is required above all here is a certain mindset, one from which we seem, unfortunately, to be far removed. What is required is calm reason; in other words, that simple yet rare thing called common sense.”¹⁶

18. An international tribunal such as the ICJ has the “inherent power” to take *motu proprio* the measures necessary to secure the sound administration of justice. In doing so, *ex officio*, the Court is exercising its *compétence de la compétence*, a prerogative which is “essentially inherent in its judicial function”¹⁷. International legal procedure has a specificity and a dynamics of its own, and general principles of law applicable therein are not to be assumed to be identical, in operation, to those sedimented in national legal systems¹⁸. Positivists, anyway, do not feel at ease with general principles of law; they thus keep on trying, repetitiously and in vain, to minimize their presence and relevance.

VI. THE SOUND ADMINISTRATION OF JUSTICE AND THE PROCEDURAL EQUALITY OF THE PARTIES

19. The sound administration of justice (*la bonne administration de la justice*) is not an isolated illustration of the kind — of the incidence and relevance of a general principle. Other such examples could be recalled,

¹⁵ M. Bourquin, “Stabilité et mouvement dans l’ordre juridique international”, 64 *Recueil des cours de l’Académie de droit international de La Haye* (1938), pp. 371, 408 and 422.

¹⁶ *Ibid.*, p. 472.

¹⁷ M. Kawano, “The Administration of Justice by the International Court of Justice and the Parties”, *Multiculturalism and International Law — Essays in Honour of Edward McWhinney* (eds. Sienho Yee and J.-Y. Morin), Leiden, Martinus Nijhoff, 2009, pp. 298-299, and cf. pp. 286 and 293-294.

¹⁸ A word of caution has been uttered as to such an analogy; cf., e.g., H. von Mangoldt, “La comparaison des systèmes de droit comme moyen d’élaboration de la procédure des tribunaux internationaux”, 40 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1980), pp. 554-572.

such as, *inter alia*, that of the maxim *audiatur et altera pars* (or *audi alteram partem*), which gave expression to the general principle of law providing for *procedural equality* between the contending parties in the course of judicial proceedings¹⁹. Another principle, of international procedural law, is that of *jura novit curia*: originated in Roman law (civil procedure, as from the seventeenth century), it acknowledges the freedom and autonomy of the judge in searching for and determining the law applicable to a given dispute, without being restrained by the arguments of the parties. The examples abound.

20. In my perception, the presence of the idea of justice, guiding the sound administration of justice, is ineluctable. Not seldom the text of the Court's *interna corporis* does not suffice; in order to impart justice, in circumstances of this kind, an international tribunal such as the ICJ is guided by the *prima principia*. To attempt to offer a definition of the sound administration of justice that would encompass all possible situations that could arise would be far too pretentious, and fruitless. An endless diversity of situations may be faced by the ICJ, leading it — in its pursuit of the realization of justice — to deem it fit to have recourse to the principle of the sound administration of justice (*la bonne administration de la justice*); this general principle, in sum, finds application in the most diverse circumstances.

21. Moving from the general to the particular, the incidence or application of this general principle has enabled international tribunals to secure the *procedural equality* of the contending parties. The ICJ has, on successive occasions, expressed its concern as to the need to secure such procedural equality. Thus, in its most recent Advisory Opinion, of 1 February 2012, on the *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, the ICJ insisted on “the right to equality in the proceedings” (*I.C.J. Reports 2012 (I)*, p. 24, para. 30), on “the principle of equality before the Court” as “a central aspect of the good administration of justice” (*ibid.*, pp. 25 and 29, paras. 35 and 44), on “equality of access” to justice (*ibid.*, pp. 26-27, 29 and 31, paras. 37, 39, 43 and 48), on “the concept of equality before courts and tribunals” (*ibid.*, pp. 26-27, paras. 38 and 40), on the guarantee of “equal access and equality of arms” (*ibid.*, p. 27, para. 39), on “the principle of equality in the proceedings before the Court, required by its inherent judicial character and by the good administration of justice” (*ibid.*, p. 30, para. 47).

22. In my separate opinion (*ibid.*, pp. 81-93, paras. 82-118) appended to this recent Advisory Opinion of the ICJ of 2012, I have dwelt in depth upon the imperative of securing the equality of the parties in the international legal process. Earlier on, the Court itself related the “principle of procedural fairness” to the “sound administration of justice” (case con-

¹⁹ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London, Stevens, 1953, p. 291.

cerning the *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, *Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 325, para. 116). Almost two decades earlier, the ICJ stated that “the equality of the parties to the dispute must remain the basic principle for the Court” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits, Judgment, I.C.J. Reports 1986*, p. 26, para. 31). The ICJ again stressed the relevance of “the principle of equality of the parties” in its Advisory Opinion of 20 July 1982, regarding an *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal (I.C.J. Reports 1982*, pp. 338-340 and 365-366, paras. 29-32 and 79).

23. Three decades earlier, the ICJ had again relied upon that principle in its Advisory Opinion of 23 October 1956 on *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco (I.C.J. Reports 1956*, pp. 85-86); on that occasion, the Court stated, in a rather clumsy way, that the “principle of equality of the parties follows from the requirements of good administration of justice” (*ibid.*, p. 86). The Court, in my understanding, would have been more precise had it stated that the principle of equality of the parties *orients* or *guides* the requirements of good administration of justice. Principles (*prima principia*) stand higher than rules or requirements, and orient them.

VII. EPILOGUE: FINAL CONSIDERATIONS

24. In its Order of joinder of the proceedings in the present case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* with those in the case concerning *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, the ICJ has taken into due account that

“The two cases here concerned involve the same Parties and relate to the area where the common border between them runs along the right bank of the San Juan River.

Both cases are based on facts relating to works being carried out in, along, or in close proximity to the San Juan River, namely the dredging of the river by Nicaragua and the construction of a road along its right bank by Costa Rica. Both sets of proceedings are about the effect of the aforementioned works on the local environment and on the free navigation on, and access to, the San Juan River. In this regard, both Parties refer to the risk of sedimentation of the San Juan River.

In the present case and in the *Nicaragua v. Costa Rica* case, the Parties make reference, in addition, to the harmful environmental effect of the works in and along the San Juan River on the fragile fluvial ecosystem (including protected nature preserves in and along the river).

In both cases, the Parties refer to violations of the 1858 Treaty of Limits, the Cleveland Award, the Alexander Awards and the Ramsar Convention.

A decision to join the proceedings will allow the Court to address simultaneously the totality of the various interrelated and contested issues raised by the Parties. (. . .)” (Paras. 19-23.)

25. Such is the *ratio decidendi* of the present decision of the Court. Its foundations lie in the realm of principles, as I have endeavoured to demonstrate in the present separate opinion. The *Kompetenz Kompetenz/la compétence de la compétence* of an international tribunal such as the ICJ is inherent to its exercise of the international judicial function. The ICJ and its predecessor, the PCIJ, have both effected joinders *avant la lettre*, even in the absence (before 1978) of a provision to that effect in their *interna corporis*. The idea of justice guides the sound administration of justice, as manifested, e.g., in decisions aiming at securing the *procedural equality* of the contending parties.

26. General principles of law have always marked presence in the pursuit of the realization of justice. In my understanding, they comprise not only those principles acknowledged in national legal systems²⁰, but likewise the general principles of international law. They have been repeatedly reaffirmed, time and time again, and — even if regrettably neglected by segments of contemporary legal doctrine — they retain their full validity in our days. An international tribunal like the ICJ has consistently had recourse to them in its *jurisprudence constante*. Despite the characteristic attitude of legal positivism to attempt, in vain, to minimize their role, the truth remains that, without principles, there is no legal system at all, at either national or international level.

27. General principles of law inform and conform the norms and rules of legal systems. In my understanding, sedimented along the years, general principles of law form the *substratum* of the national and international legal orders, they are indispensable (forming the *jus necessarium*, going well beyond the mere *jus voluntarium*), and they give expression to the idea of an *objective* justice (proper of jusnaturalist thinking), of universal scope. Last but not least, it is the general principles of law that inspire the interpretation and application of legal norms, and also the law-making process itself²¹. In the present case concerning *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicara-*

²⁰ Cf. H. Mosler, “To What Extent Does the Variety of Legal Systems of the World Influence the Application of the General Principles of Law within the Meaning of Article 38 (1) (c) of the Statute of the International Court of Justice”, *International Law and the Grotian Heritage* (Hague Colloquium of 1983), The Hague, T. M. C. Asser Instituut, 1985, pp. 173-185.

²¹ A. A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, *op. cit. supra* note 14, Chap. III, pp. 85-121, esp. pp. 90-92.

gua), the ICJ has relied on the provision on joinder of Article 47 of the Rules of Court, and has significantly acknowledged that the joinder it has effected was in accordance with the principle of the sound administration of justice (*la bonne administration de la justice*)²².

(Signed) Antônio Augusto CAÑADO TRINDADE.

²² Paras. 18 and 24.