

DECLARATION OF JUDGE *AD HOC* GUILLAUME

[Translation]

*Activities of the two States on disputed territory — Protection of the environment — Need for co-operation between Costa Rica and Nicaragua.*

1. In its Order of 8 March 2011 the Court requested both Nicaragua and Costa Rica to refrain from “sending to, or maintaining in the disputed territory . . . any personnel, whether civilian, police or security”. Considering these measures insufficient, in May 2013 Costa Rica complained of the presence on that territory of Nicaraguan nationals belonging to the Guardabarranco Movement and of the activities of those nationals. By Order of 16 July 2013, the Court rejected Costa Rica’s request for provisional measures. The Court, however, noted the presence in the area of organized groups of Nicaraguan nationals, which “carrie[d] the risk of incidents which might aggravate” the dispute, and expressed “its concerns in this regard”.

2. Since then, these organized groups have remained in the disputed territory. Furthermore, two *caños* have been dug in the area under the direction of Mr. Pastora, “the Government Delegate for the Dredging Works”, which risk altering the course of San Juan River. In addition, a Nicaraguan military encampment has been established on a beach which, *prima facie*, appears to be part of the disputed territory. It is in these circumstances that Costa Rica has submitted a new request for provisional measures to the Court.

3. In response to this request, the Court has reaffirmed the measures indicated by it in 2011. It has further instructed Nicaragua to cease any dredging and other activities in the disputed territory. It has requested it to fill in the trench across the beach potentially connecting the eastern *caño* with the sea. It has ordered Nicaragua to remove its personnel from the area and, in particular, to evacuate the military encampment close to the end of the eastern *caño*. Expressing regret at the fact that Nicaragua has not acted on the concerns expressed by it in July 2013, the Court has further ordered that any private persons under Nicaragua’s jurisdiction or control, such as members of the Guardabarranco Movement, leave the area. I have supported these various measures unanimously adopted by the Court, for they were the inevitable consequences of the activities conducted, tolerated or encouraged by Nicaragua in the disputed territory. My only regret is that the Court has not also directed certain of these measures at Costa Rica, and expressed the wish that it too should refrain in the future from any activities in the disputed territory other than those provided for in point 2 (E) of the Order.

4. That point provides as follows:

“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; in taking these measures, Costa Rica shall avoid any adverse effects on the San Juan River.”

5. I have been unable to concur with this last provisional measure, which seems to me to be both of disputable utility and difficult to implement, for the following reasons.

6. It will be recalled that in 2011, when a first, larger *caño* was being dug, the Court found that the disputed territory was part of an international wetland of international importance, designated as such by Costa Rica under the Ramsar Convention of 2 February 1971. The Court, having asked itself whether the existence of the *caño* risked causing irreparable damage to the protected environment, found that this was not the case and accordingly refrained from indicating provisional measures designed to prevent such risks. The Court has adopted a similar attitude in the present proceedings, and I agree with this.

7. However, in its Order of 8 March 2011, the Court nonetheless felt that “civilian personnel charged with the protection of the environment” should be able to visit the disputed territory, but only in so far as was necessary to avoid irreparable prejudice in the future. To that end, the Court decided that:

“Costa Rica may dispatch civilian personnel charged with the protection of the environment to the disputed territory, including the *caño*, but only in so far as it is necessary to avoid irreparable prejudice being caused to the part of the wetland where that territory is situated; Costa Rica shall consult with the Secretariat of the Ramsar Convention in regard to these actions, give Nicaragua prior notice of them and use its best endeavours to find common solutions with Nicaragua in this respect” (*I.C.J. Reports 2011 (I)*, p. 27, par. 86 (2)).

8. I had pointed out at the time that it seemed to me very unlikely that the digging of the *caño* could cause irreparable prejudice to the environment. The San Juan River carries abundant sediment, which has a natural tendency to be deposited in the channels of its delta. It accordingly appeared to me that the *caño* would easily fill itself in again, and that its natural vegetation would spontaneously regenerate. The visits conducted since then by Costa Rica’s personnel and the documentation produced by Nicaragua at the hearing of 17 October 2013 confirmed the view that I had expressed at the time. I consider that the same applies *a fortiori* to the

two new small *caños* once measures have been taken to prevent them from communicating with the sea.

9. I had also made it clear in 2011 that it would have been preferable, for the reasons which I gave at the time, to have inspections of the area carried out by the two States jointly. The same provision should have been made in the present proceedings.

10. Finally, I note that in 2011 the Court had authorized the dispatch of Costa Rican personnel charged with assessing the situation. Today the Court states that Costa Rica may take appropriate measures related to the two new *caños*, if these prove “necessary to prevent irreparable prejudice to the environment of the disputed territory”. It is clear that the adoption of such measures must, as implied in the 2011 Order, be preceded by an assessment of the situation, and it is to be regretted that the Court has not expressly so stated.

*(Signed)* Gilbert GUILLAUME.

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