

DECLARATION OF JUDGE *AD HOC* GUILLAUME

[Translation]

1. In its Judgment of 16 December 2015, the Court found “that Nicaragua has the obligation to compensate Costa Rica for material damages caused by Nicaragua’s unlawful activities on Costa Rican territory” (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015 (II), p. 740, para. 229, subpara. (5) (a)). Since the Parties failed to reach an agreement on the amount of compensation due, “the question of compensation . . . will [now] be settled by the Court” (*ibid.*, p. 741, para. 229, subpara. (5) (b)).

2. Costa Rica assesses the material damage it has sustained at US\$6,711,685.26, while Nicaragua estimates it to be no more than US\$188,504. The Court rejected the majority of Costa Rica’s submissions and fixed US\$358,740.55 as the principal sum of the compensation due. I supported this assessment, but would like to clarify my views on certain points.

3. As noted by the Court, “Costa Rica claims compensation for two categories of damage” (Judgment, para. 36). First, it sought US\$2,880,745.82 for “quantifiable environmental damage caused by Nicaragua’s excavation of the first *caño* in 2010. . . and a further [eastern] *caño* in 2013” (*ibid.*). Second, it requested compensation of US\$3,828,031.14 for various expenses allegedly incurred as a result of Nicaragua’s unlawful activities.

4. On the latter point, my comments will be brief. On the former, they will be more detailed.

THE APPLICABLE LAW

5. Early in its Judgment, the Court recalled the relevant principles of the law of international responsibility, noting that “the breach of an engagement involves an obligation to make reparation” (*ibid.*, para. 29). According to the well-known dictum of the Permanent Court in the *Factory at Chorzów* case, reparation is intended to “wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed” (*Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 47). The International Law Commission stated in its Draft Articles on State Responsibility that “[f]ull reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction” (Art. 34). Whenever possible, however, restitution in kind should be preferred (*Factory at Chorzów, Merits, Judgment*

No. 13, 1928, *P.C.I.J., Series A, No. 17*, p. 47). If this form of reparation “is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction” (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *I.C.J. Reports 2010 (I)*, p. 103, para. 273; see also paragraph 31 of the Judgment).

6. In this case, neither Party contemplated restitution, i.e. the rehabilitation of the sites by Nicaragua. The Court’s task is thus limited to fixing the amount of compensation due to Costa Rica.

7. When ruling on a request for compensation,

“the Court [considers] whether an injury is established. It . . . then ‘ascertain[s] whether, and to what extent, the injury asserted by the Applicant is the consequence of wrongful conduct by the Respondent’, taking into account ‘whether there is a sufficiently direct and certain causal nexus between the wrongful act . . . and the injury suffered by the Applicant’ (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007 (I)*, pp. 233-234, para. 462). If the existence of injury and causation is established, the Court . . . then determine[s] the valuation.” (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, *I.C.J. Reports 2012 (I)*, p. 332, para. 14; see also paragraph 32 of the Judgment.)

8. The sole purpose of the compensation due is to make reparation for the injury suffered. It does not depend on the seriousness of the acts alleged. Consequently, and as recalled by the Court, “[c]ompensation should not . . . have a punitive or exemplary character” (Judgment, para. 31).

9. “[A]s a general rule”, and in accordance with extensive jurisprudence, “it is for the party which alleges a particular fact in support of its claims to prove the existence of that fact”. However, the Court does not exclude the possibility that, in certain cases, “this general rule . . . [has to] be applied flexibly”, in particular when the respondent “may be in a better position to establish certain facts” (*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, *I.C.J. Reports 2012 (I)*, p. 332, para. 15; see also paragraph 33 of the Judgment). This is not the case here, however, since it is in fact Costa Rica alone which has access to the disputed area, that area falling under its sovereignty. Thus, when examining each of the heads of damage alleged by the Applicant, the Court was right to seek to determine whether Costa Rica had established the existence of the damage, the causal link between the damage and Nicaragua’s unlawful activities and the cost of that damage.

10. Having set out these principles, it is necessary to examine Costa Rica’s submissions regarding the material damage sustained. I will divide these submissions into three categories:

(a) expenses which have been or will be incurred with a view to reducing environmental damage through appropriate work;

- (b) compensation due for damage which will remain in spite of such work;
- (c) certain ancillary expenses incurred between 2010 and 2015, *inter alia*, to visit, overfly and acquire satellite images of the sites.

SITE RESTORATION EXPENSES

11. Let us first examine the expenses which may have been or may be incurred by Costa Rica to rehabilitate the sites.

12. Here, Costa Rica seeks reimbursement of US\$195,671.02 for expenses incurred in constructing a dyke across the 2013 eastern *caño* to prevent it from connecting the San Juan River to the sea. Nicaragua assesses the reimbursable expenses under this head at US\$153,517. The Court awarded US\$185,414.56 (Judgment, para. 146). Although I find this assessment generous, I cannot object to it.

13. Second, Costa Rica seeks US\$54,925.69 for replacing the soil removed from the *caños*. The Court was right to reject this claim (*ibid.*, para. 87). The *caños* have in fact largely refilled and revegetated naturally. It is therefore hard to see why almost 10,000 cubic metres of earth should now be emptied into them, at the risk of destroying the vegetation that has already regrown there. Moreover, the Secretariat of the Ramsar Convention did not recommend such restoration.

14. This leaves Costa Rica's claim for compensation in the amount of US\$2,708.39 for the "restoration of the wetland". This would clearly be welcome, and Costa Rica's claim is thus justified in principle. I would note, however, that the Applicant provides no details of the work it intends to carry out to that end or of the timescale for that work. Although I share the majority opinion of the Court on this point (*ibid.*) I would like to express here my hope that this work will actually be planned and carried out.

COMPENSATION FOR LASTING ENVIRONMENTAL DAMAGE

15. Compensation for the construction of the dyke and for the restoration of the wetland could not make full reparation for the environmental damage caused to Costa Rican territory. Costa Rica assesses the lasting damage resulting from the excavation of the first *caño* in 2010 at US\$2,148,820.82, and the lasting damage resulting from the excavation of the 2013 eastern *caño*, at US\$674,290.92, namely US\$2,823,111.74 in total. It claims nothing in respect of the western *caño* excavated in 2013.

Using a different method of assessment, Nicaragua estimates this damage at no more than US\$34,987. Nicaragua's experts add, however, that

if Costa Rica's method of assessment were to be applied, and the errors corrected, the amount of compensation due would increase to US\$84,296.

The Court awarded US\$120,000 to Costa Rica under this head (Judgment, para. 86).

16. Before I examine the Parties' arguments in detail, it is important to recall that the first *caño* excavated in 2010 was intended to connect the San Juan River to Harbor Head Lagoon. It was just over 1 km long and no more than 15 m wide, and two-thirds of it was excavated on grazing land. However, the works undertaken by Nicaragua did lead to the felling of trees of various sizes across an area of some two and a half hectares in total.

The eastern *caño* excavated in 2013 — far shorter than the first — was intended to connect the San Juan River to the sea, but the excavation work was stopped before the connection could be made; as we have seen, a dyke was then built to avoid any risk of the river connecting with the ocean.

Finally, the San Juan River is known to carry large amounts of sediment, which have led to a considerable extension of its delta. In the absence of any clearing activities, that sediment has accumulated in the *caños*, which have become obstructed by natural means. The satellite images show that the two areas are now completely revegetated.

These circumstances should be borne in mind when examining the Parties' submissions.

17. Costa Rica contends that Nicaragua's unlawful activities have caused the following ecosystem goods and services to be lost:

- (a) standing timber;
- (b) other raw materials;
- (c) gas regulation;
- (d) natural hazards mitigation;
- (e) soil formation and erosion control; and
- (f) biodiversity, in terms of habitat and nursery.

18. Costa Rica evaluates the loss connected with these various goods and services by referring to values obtained for other locations in the existing documentation and applying these values to this case. It thus adopts what is generally known as a "benefits transfer" approach. However, it uses a different method to assess the loss of standing timber, relying on the local market price.

19. Nicaragua does not deny that these various types of damage are compensable, but states that some of them do not exist and that the method adopted by Costa Rica to assess others is flawed. It adds that the Applicant has made some serious errors in the application of its own method of assessment.

For its part, Nicaragua proposes evaluating the damage sustained by determining the overall "replacement costs", i.e. the "price that would

have to be paid to preserve an equivalent area until the services provided by the impacted area have recovered”.

20. International law does not impose the use of any particular method for evaluating damage. It should be noted, however, that the United Nations Compensation Commission, founded in the aftermath of Iraq’s invasion of Kuwait, adopted the approach favoured by Nicaragua. It may also be noted that this same approach was adopted in United States legislation, in the Oil Pollution Act, and in the European Union’s Environmental Liability Directive. That said, it is for the Court to determine the amount of compensation due by conducting the most accurate assessment possible, leaving aside quibbles over methodology.

21. A careful examination of the Parties’ calculations leads me to believe that, in fact, each of these approaches carries serious risks of error.

22. I will begin with Costa Rica’s calculations. The first head of alleged damage concerns the trees felled during the excavation of the *caños*. Costa Rica estimates that 50 per cent of this timber could have been sold immediately, and uses the market rate to calculate its value. It then asserts that half of the trees’ annual growth could also have been utilized. The sum of these two values is US\$19,558.64 for the 2010 *caño* and US\$1,970.35 for the 2013 eastern *caño*, amounting to US\$21,528.99 for the first year. Believing that it will take at least 50 years for the trees to recover naturally, and applying a discount rate of 4 per cent, Costa Rica ultimately seeks US\$462,490 in compensation under this head.

23. This calculation raises three problems of varying importance:

- (a) First, it should be noted that this assessment is not intended to determine the environmental damage caused by the trees’ disappearance (on account of their possible role in the absorption of carbon, for example). The only thing at issue here, as Costa Rica itself has observed, is the damage resulting from the disappearance of “timber” belonging to it. One might be surprised to see Costa Rica seeking reparation for such damage, when the trees in question were part of a protected wetland in which any kind of forest exploitation is prohibited. Even in the absence of action on Nicaragua’s part, this timber would never have been sold and Costa Rica would not have profited from it. Consequently, the clearing carried out by Nicaragua did not deprive Costa Rica of any income-generating capital. Costa Rica’s claim on this point thus raises a serious problem. The Court acknowledged this in refusing to use this method of calculation (Judgment, paras. 76 and 78-79).
- (b) Second, in my view, Costa Rica makes a mistake in basing its calculation on the notion that the trees could have been cut and sold each year for 50 years. In reality, once they have been cut and sold, the trees take some time to regrow. They cannot be re-cut and re-sold

every year for 49 years. The damage resulting from the timber's disappearance is not incurred on an annual basis.

Furthermore, Costa Rica does little to contest this in its Reply on the question of compensation, and merely states that, in terms of national accounting, the value of the felled trees will be lost from the nation's assets for 50 years (subject to its gradual recovery). The Court was rightly unconvinced by this reasoning. After they have been felled, the trees cease to be part of the nation's assets. Once paid, the compensation will in turn form part of the assets and the accounts will be in order.

(c) In addition to these fundamental observations, I would point out that certain other aspects of the Applicant's calculations are open to challenge.

Costa Rica's count includes a number of trees measuring over 10 cm in diameter. It estimates the average age of these trees to be 115 years for the 2010 *caño*. This calculation is questionable: there can be no doubt that the age of the trees in this *caño* has been unduly inflated, since Costa Rica's experts failed to take account of the youngest specimens when calculating the trees' average age. Moreover, it seems to me that those experts believed themselves able to identify trees older than the very soil in which they were said to have grown. The trees in the 2013 eastern *caño* were clearly younger. On these bases, Costa Rica fixes the recovery period for the forest at 50 years. Nicaragua's experts accept a period of 20 to 30 years. The truth is probably somewhere between the two.

Furthermore, account must be taken of the fact that this recovery will be gradual. Costa Rica claims in its Reply on the question of compensation that the 4 per cent discount rate takes this into consideration. But that is not correct: the discount rate should aim to take account of the fact that, instead of receiving compensation each year throughout the entire recovery period, Costa Rica will receive a single payment in 2018 corresponding to the current value of those annual instalments.

After correcting some of these errors by Costa Rica, Nicaragua's experts, applying the Applicant's own method, conclude that the amount of compensation due here should be no more than US\$30,175. This figure is a little low, but it gives an approximate idea of the damage sustained under this head.

24. Continuing my examination of the heads of damage claimed by Costa Rica, I now turn to the other raw materials (fibre and energy) that were lost. Costa Rica evaluates the damage resulting from the loss of these raw materials at US\$832.20 for the first year. It then bases its calculation on the assumption that it will take 50 years for the raw materials to recover, applies a discount rate of 4 per cent and, ultimately, requests compensation in the amount of US\$17,877.

I have serious doubts about the evaluation of this damage. We have seen no proof that the vegetation cut back to the ground by Nicaragua was used locally for its fibres (to make baskets, for example) or as fuel, or that it could be used to provide such services. Moreover, the alleged damage is assessed using the benefits transfer approach, on the basis of unclear criteria. The 50-year period is particularly unjustified, since the vegetation in question recovers over a far shorter period than is needed for tree regrowth, as recognized by the Court (Judgment, paras. 76 and 82).

That vegetation nonetheless helped maintain the ecosystem in that wetland which is protected under the Ramsar Convention. Compensation is due on this account.

25. A more difficult question is that of gas regulation and air quality. Costa Rica assesses the corresponding damage over one year at US\$43,641.24. Then, allowing for a recovery period of 50 years and applying a discount rate of 4 per cent, it requests compensation in the amount of US\$937,509.

Costa Rica is probably entitled to compensation on this account, but its calculation contains a number of errors:

- (a) That calculation is made using the benefits transfer approach using a base value of almost US\$15,000 per hectare, a value taken from the thesis of a Costa Rican student, who adopts a figure considerably higher than those usually applied.
- (b) Costa Rica uses this figure for both the eastern *caño* excavated in 2013 and the one excavated in 2010, even though it is undisputed that the vegetation in these areas was very different.
- (c) More serious still, by applying the figure for the first year to the entire 50-year-recovery period, its assessment is incorrect. A distinction must be made between:
 - the site's existing carbon stock, which was diminished by the destruction of the vegetation (which should be counted only once); and
 - the reduction in the site's annual carbon sequestration in the future.

Account must also be taken of the fact that, as the trees and vegetation recover, greater quantities of carbon will gradually be sequestered. This phenomenon could even occur quite quickly, since young, growing trees sequester more carbon than those which have reached maturity.

Nicaragua's experts re-calculated the amount of compensation due using the method advocated by Costa Rica, applying the per-hectare value put forward by the Applicant, and correcting only the errors made. The figure they arrived at was US\$47,778, which is much more realistic in my view.

26. Finally, it is not in dispute that the *caños'* excavation has harmed

the biodiversity of the wetland protected under the Ramsar Convention. Compensation is due on this account. However, it is difficult to assess this harm, because Costa Rica provides only scant information about the situation before 2010 and 2013, about the impact of the work undertaken by Nicaragua and about the planned restoration measures (see paragraph 14 above).

27. I will not dwell on the last two heads of damage invoked by Costa Rica: in my view, this damage has not been established and there is thus no need for any calculations to be made.

- (a) The Court found that Costa Rica had failed to demonstrate that the work carried out by Nicaragua had impaired the ability of the area in question to mitigate natural hazards such as earthquakes or flooding (Judgment, para. 74). I agree with this finding. Moreover, and assuming that such hazards did emerge following the excavation of the *caños*, the measures taken and the natural development of the area have caused them to disappear. There is, in particular, no longer any risk of coastal erosion or salt-water intrusion in the river due to the construction of a dyke across the 2013 eastern *caño*, a fact which appears to be corroborated by the Report of the Ramsar Advisory Mission No. 77 of August 2014.
- (b) As noted by the Court (*ibid.*), the same is true for soil formation and erosion control. Moreover, Costa Rica does not dispute that the *caños* are being refilled naturally. It simply claims that there is a difference between the soil carried by the river and the soil which was removed. However, Costa Rica has failed to prove that this difference, assuming it to be established, is having noticeable effects on the environment.

In short, if one uses Costa Rica's method of assessment, after the necessary corrections have been made to it, a figure in the order of US\$85,000 is reached, as noted by the Court (*ibid.*, para. 84).

28. I find the method used by Nicaragua to be more satisfactory in principle, although it is not easy to determine the replacement cost in this instance. Nicaragua does so by referring to Costa Rica's forest protection scheme, under which compensation of US\$309 per hectare is paid each year to forest owners who agree to take protective or preventive measures to enable their forests to continue providing environmental services to society and to safeguard them for future generations. Applying this figure to the 6.19 hectares damaged over a period of 30 years and using a discount rate of 4 per cent, Nicaragua's experts estimate the replacement cost to be no more than US\$34,987. This approach is no better than the one employed by Costa Rica. Indeed, like the Court (Judgment, para. 77), I doubt that the sums paid by Costa Rica to encourage landowners to protect their forests correspond exactly to the damage suffered by the environment in the protected wetland.

29. In sum, I find it difficult to reach a completely accurate evaluation of the damage in this instance. In such a situation, the amount of damages should not be determined by mere speculation or guess. Evidence of the extent of the damage must be shown; however, it may be shown as a matter of just and reasonable inference, even though the result would be only approximate (see paragraph 35 of the Judgment). In the present circumstances, the Court was right to retain some elements of Costa Rica's assessment, as corrected by Nicaragua (Judgment, para. 86), and to award compensation of US\$120,000, a figure which, given the uncertainties inherent in assessing this type of damage, I was able to support.

THE ANCILLARY EXPENSES INCURRED BETWEEN 2010 AND 2015

30. In addition, Costa Rica seeks US\$80,926.45 in compensation for expenses incurred between October 2010 and March 2011 while attempting to verify the nature and scope of Nicaragua's unlawful activities on the disputed territory (overflights, first UNITAR/UNOSAT report, salaries, satellite images). The Court found that the amount of compensation payable under this head was US\$21,647.20 (*ibid.*, para. 106). In my view, this assessment is justified.

31. Lastly, Costa Rica seeks compensation of US\$3,551,433.67 for expenses incurred for monitoring the disputed territory between March 2011 and December 2015. The Court only awarded Costa Rica compensation in the amount of US\$28,970.40 for overflights, the purchase of satellite images and the second UNITAR/UNOSAT report (*ibid.*, para. 131).

32. I agree with this assessment. In my view, the Court was right, in particular, to refuse to reimburse Costa Rica for various police expenses incurred by it. Costa Rica claimed to have established two police posts close to the disputed territory in order to carry out its obligations under the Order on the indication of provisional measures of 8 March 2011 (*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. 6). However, the first police post at Laguna de Agua Dulce had already been set up in December 2010. Furthermore, the Outgoing Report of Costa Rica's Minister of Public Security, covering the period between May 2010 and April 2011, states that Costa Rica has launched a programme to protect both its northern and southern land boundaries, involving the re-establishment of a border police force at 45 outposts.

The establishment of the police posts was therefore part of a policy by Costa Rica to defend its territory in a general way. They were not set up to respond to the concerns expressed by the Court in paragraph 78 of its Order of 8 March 2011, encouraging the Parties to co-operate in order to

prevent the development of criminal activity in the disputed territory (*I.C.J. Reports 2011 (I)*, p. 25).

Thus, Costa Rica fails to establish that the creation of the police posts was a clear and direct consequence of the unlawful activities of which Nicaragua is accused. As the Court found (Judgment, para. 127), these expenses are not compensable.

33. In any event, the corresponding personnel expenses could not be compensated, since salaries would have been paid to those concerned even if Nicaragua had not acted. In fact, it is clear from statements made by Costa Rica's then Minister of Public Security, Mr. Mario Zamora Cordero, that the police deployed at Isla Portillos were simply officers who had been reassigned. The special border police unit was formed, according to the same minister, "by taking human and financial resources from other operational structures of the police". Costa Rica does not claim to have paid special allowances or overtime to the officers in question. Those officers simply received their regular salaries. Their reassignment did not generate any additional expenses for Costa Rica. In accordance with the jurisprudence of the United Nations Compensation Committee, founded in the aftermath of Iraq's invasion of Kuwait — jurisprudence which I believe should be upheld — no compensation is payable to Costa Rica under this head.

34. The same conclusions must be reached, for the same reasons, with regard to the equipping of the biological station and the remuneration of the officers assigned to that station, such as the salaries of the Costa Rican coast guards and pilots.

PRE-JUDGMENT INTEREST

35. With this case, the Court has, for the first time, awarded pre-judgment interest to the Applicant, taking the opportunity to explain that "pre-judgment interest may be awarded if full reparation for injury caused by an internationally wrongful act so requires" (Judgment, para. 151). In this instance, the Court refused to grant such interest on the amount awarded in compensation for the damage caused to the environment, that sum already making full reparation for that damage. It did however award pre-judgment interest on the expenses incurred by Costa Rica with a view, *inter alia*, to preventing further harm. In my view, this is a sensible solution, which is justified by the specific circumstances of the case and leaves room in the future for assessments to vary from case to case.

(Signed) Gilbert GUILLAUME.
