

DISSENTING OPINION
OF JUDGE *AD HOC* DUGARD

Order of 2011 prohibits members of Guardabarranco Environment Movement (hereinafter GEM) from visiting disputed territory as they qualify as civilian personnel — Presence of GEM in disputed territory is contrary to object and purpose of Order of 2011 — Access of GEM to disputed territory poses risk of irreparable prejudice to Costa Rica.

1. In 2011 after Nicaragua's armed forces had entered and occupied the Isla Portillos (henceforth disputed territory), the Court found that Costa Rica's claim to sovereignty over the territory was plausible but ordered that both Nicaragua and Costa Rica should refrain from sending to, or maintaining in the disputed territory "any personnel, whether civilian, police or security" (*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 (1)). The Court's intention was to clear the disputed territory of any persons that might exacerbate the dispute and interfere with the ultimate finding of the Court on the merits. This explains why the personnel of both Parties were ordered to keep out of the disputed territory, despite the fact that Costa Rica's claim to sovereignty had been adjudged "plausible" (*ibid.*, p. 20, para. 59). This also explains why only Costa Rica's civilian personnel charged with the protection of the environment were permitted to enter the disputed territory, and then only under very strict conditions (*ibid.*, p. 27, para. 86 (2)). Someone had to ensure that the environment was protected pending the settlement of the dispute and the Court had no alternative but to allocate this task to Costa Rica because it alone had been adjudged to have a plausible title to the territory; and it alone was accountable for the environmental protection of the disputed territory under the Ramsar Convention. The Court's third provisional measure calling on Parties to "refrain from *any* action which might aggravate or extend the dispute before the Court" (*ibid.*, p. 27, para. 86 (3); emphasis added), should be construed as emphasizing that the disputed territory was to be cleared of all persons except those specifically authorized to be there. While the present Order expresses "concerns" that "the presence of organized groups of Nicaraguan nationals in the disputed area carries the risk of incidents which might aggravate the present dispute" (see paragraph 37 of the Order), it fails to modify its Order of 8 March 2011 to make it clear that the presence of such organized groups in the disputed territory is incompatible with this Order. The failure to clarify this matter may result in further incursions by organized groups of

Nicaraguan nationals into the disputed territory with consequent irreparable prejudice to Costa Rica. For this reason, I dissent from the Order of the Court.

2. In its present Application Costa Rica asks the Court to modify its Order on provisional measures of 2011 to make it clear that *all* persons, other than environmental officials of Costa Rica specially authorized by the Order of 2011 to enter the disputed territory, are to be prevented by both Parties from accessing the disputed territory, in order to prevent irreparable harm being caused to both persons and the environment, pending the Court's determination on the merits. It may be that such an Order is unnecessary, at least as far as it concerns the activities of environmental youth groups supported by either Government, on the ground that such groups are already prohibited from accessing the territory in terms of the 2011 Order. However, in order to clarify this issue, Costa Rica seeks a modification of the 2011 Order.

3. Before examining Costa Rica's Application under Article 76 of the Rules of the Court to modify the Order of 2011, it is necessary to consider the question whether the prohibition imposed on both Parties by the first provisional measure ordered in 2011 requiring them to "refrain from sending to, or maintaining in the disputed territory, including the *caño*, any personnel, whether civilian, police or security" applies to the Guardabarranco Environment Movement (hereinafter GEM). Strictly, this is a matter for determination on the merits of the case. However, as Costa Rica's Application for modification of the Order is essentially a request for clarification and interpretation of the scope of the Order of 2011 it is necessary to examine this issue at this stage. Furthermore, as Costa Rica's Application aims to ensure that irreparable prejudice is not caused to Costa Rica's plausible right to the disputed territory by the incursion of members of GEM pending a decision on the merits, it is impossible to avoid consideration of this matter as it is essential to a decision on the modification of the existing provisional measures.

4. The answer to the question whether the members of GEM are covered by the Order of 2011 depends on the meaning to be attached to the term "personnel". In the present Order, the Court does not examine the meaning of the term "personnel" but seems to assume that the term "personnel" applies to government employees, because in 2011 Costa Rica complained only about the presence of the army, and possibly police (see paragraph 80 of the Order of 2011), and made no mention of the presence of private persons in the disputed territory (see paragraph 23 of the Order). The term "personnel" should, however, be given a broader meaning to include the members of the GEM for the following reasons.

5. First, the term "personnel" may be interpreted as applying to persons forming part of an organization employed in some service. *The Free*

Dictionary [Online] defines personnel as “the body of persons employed by or active in an organization, business or service”. The *Concise Oxford Dictionary* defines personnel as a “body of persons engaged in some public service”. GEM is clearly an organization employed in the service of protecting the environment of what it perceives to be Nicaraguan territory. Its members could therefore be described as constituting “any civilian personnel” falling within the prohibition contained in the first provisional measure in the Order of 2011.

6. It may be argued that the fact the Order requires each Party to refrain from sending “any personnel, whether civilian, *police or security*” into the disputed territory indicates that the civilian personnel should at least be employed in the service of Nicaragua — although there is no suggestion that this employment should take the form of work for remuneration. However, on the facts before the Court, it is clear that GEM and its members are engaged in a public service on behalf of Nicaragua.

7. The precise nature of GEM is not clear. It appears to have a dual purpose: the protection of the environment and the defence of the homeland of Nicaragua. According to an article by Tim Rogers in the *Nicaragua Dispatch* of 26 September 2012, the authenticity of which has not been challenged by Nicaragua, Oscar Garcia, a forestry engineer with the Ministry of Environment and Natural Resources, described GEM as being “about creating ecological awareness, building nationalism and defence of the homeland”. It is common cause that there is a close connection between GEM and the Sandinista Youth, the youth movement of the governing party of Nicaragua. Furthermore, Nicaragua has not denied that members of GEM have placed Nicaraguan flags in the disputed territory and that they fly Nicaraguan flags on their missions into the disputed territory. It may be true, as asserted by Nicaragua that GEM does not act under the direction or control of Nicaragua. Moreover it is unnecessary to decide at this stage whether the acts of GEM may be attributed to Nicaragua, as this is an issue for determination on the merits. This does not, however, detract from the fact that GEM is a nationalistic youth movement, linked with the Sandinista Youth, which is concerned both with protecting the environment of the disputed territory and with asserting that it is Nicaraguan territory. The line between toleration of the presence of GEM in the disputed territory on the part of Nicaragua and sponsorship of their presence is very thin. That Nicaragua’s support for GEM goes beyond mere toleration is clear from the letter of Samuel Santos López of the Nicaraguan Foreign Ministry in which he “sees with great pleasure” the work of youth groups in the disputed territory. The Court’s description of GEM in its Order as “organized groups of persons” (see paragraph 25 of the Order) and “organized groups of Nicaraguan nationals” (see paragraph 37 of the Order) fails to capture the true nature of GEM as a nationalistic youth movement, with ties to the governing Sandinista Party of Nicaragua. Although GEM may not be

an organized group of paid Nicaraguan officials, it surely qualifies as a body of persons employed by or active in an organization engaged in furthering the objects and interests of the Nicaraguan Government. In short, it constitutes “civilian personnel” within the meaning of the first provisional measure in the Court’s Order of 2011.

8. Although the activities of GEM appear to fall within the terms of the Order of 2011, Nicaragua denies that this is the case. Costa Rica has accordingly sought to have this Order modified in order to make it clear that these activities are covered. In doing so, it argues that if the activities of GEM do not fall within the letter of the Order of 2011, they are contrary to the object and purpose of the Order.

9. The object and purpose of the Order of 2011 was to keep all unauthorized persons, whether nationals of Nicaragua or Costa Rica, out of the disputed territory pending the determination of the merits of the case. The first provisional measure referred to “any personnel” of the Parties, perhaps suggesting government officials only (although this interpretation is challenged above, paras. 4-7), because in 2010-2011 only Nicaraguan Government officials and military had entered the territory and the entry of private persons into the territory was not considered by either Costa Rica or the Court (see paragraphs 23 and 25 of the Order). But the intention of the Order to keep all unauthorized persons out of the disputed territory was made clear by the second provisional measure which provided that only Costa Rican civilian personnel charged with the protection of the environment of the disputed territory — might enter the territory — subject to strict conditions. There was no suggestion that such “civilian personnel” were to be in the paid employment of the Costa Rican Government: presumably environmentalists attached to environmental NGO’s might be selected for this purpose. But it is clear that Costa Rica was barred from dispatching student activist environmentalists into the disputed territory in large numbers. By necessary implication Costa Rica’s equivalent of GEM was prohibited from accessing the disputed territory to carry out activities to protect the environment of the territory, despite the fact that Costa Rica’s title to the territory had been adjudged “plausible”. It is therefore simply not possible to interpret provisional measures 1 to 3 of the Order of 2011 as allowing private persons belonging to an organization of either Costa Rica or Nicaragua to access the disputed territory, whether such persons were motivated by a concern for the environment or not. *A fortiori* it prohibited nationalistic youth movements committed to protecting the environment and the national interest of either Party from accessing the territory.

10. It is necessary next to consider whether Costa Rica's request for modifications of the Order of 2011 complies with the requirements for an order for provisional measures.

11. The Court has found that the presence of organized groups of persons in the disputed territory which was not contemplated in 2011, constitutes "a change in the situation within the meaning of Article 76 of the Rules of the Court, upon which Costa Rica may be entitled to rely in support of its request for the modification of the said Order" (see paragraph 25 of the Order). The Court has found it unnecessary to reconsider the requirements that the rights asserted by Costa Rica should at least be plausible and that there should be a link between the rights which form the subject of the proceedings before the Court and the provisional measures being sought (*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)*, pp. 19-21, paras. 58-62).

12. The Court has found that Costa Rica has failed to show that the presence of GEM in the disputed territory constitutes a real and imminent risk of irreparable prejudice to Costa Rica's rights to territorial sovereignty over the disputed territory or to the preservation of the environment of the territory (see paragraph 35 of the Order). I disagree with the Court's finding.

13. My disagreement with the Court relates to its assessment of the nature of GEM and the risk it poses to Costa Rica's rights in the disputed territory. As I have shown above (para. 7), GEM is not a body of young environmentalists *sans frontières*, concerned solely with the preservation of the environment. Instead it is a nationalistic youth movement, linked to the Sandinista Youth Movement, committed to both the protection of the environment and the defence of the homeland of Nicaragua. With the support and encouragement of the Government of Nicaragua, it sees the Nicaraguan homeland as including the disputed territory. It is not a small group of studious environmentalists who make serious visits to the disputed territory to study the environment in a scientific manner. It is not clear how many have visited the disputed territory over the past years, but over 6,000 have carried out activities in the region of the San Juan River. Nicaragua does not deny the figure of 6,000 but explains that this number of GEM members have visited the San Juan River region, comprising both Nicaraguan territory and the disputed territory. Members of GEM do not travel in small groups. Instead they travel in large groups, waving the Nicaraguan flag, as befits a nationalistic movement. Fortunately, Costa Rica has neither encouraged nor allowed its youth to behave in a similar fashion. Had Costa Rica which, unlike Nicaragua, has demonstrated a plausible right to territorial title of the disputed territory, done so there would in all probability have been clashes between rival environmentalist groups in the disputed territory.

14. In my opinion, the presence of GEM in the disputed territory is a recipe for disaster. History is replete with instances of violence committed by youth movements committed to a national cause. These historical precedents cannot be ignored. There is a real risk of personal injury and damage to the environment. This arises from the likelihood of future harm based on the reasonable prospect that the present situation, if allowed to continue, will escalate. Moreover the matter is urgent. Unable to send its army or officials into the disputed territory by reason of the Order of 8 March 2011, the Government of Nicaragua has resorted to the stratagem of employing a surrogate force comprising young nationalistic environmentalists to carry out this task. The Court's expression of "concerns" (see paragraph 37 of the Order), falling short of serious concerns, is a gentle rebuke of this stratagem that fails to grasp the gravity of the situation.

15. In these circumstances I believe that the Court should have acceded to Costa Rica's request for modification of the Order of 2011 to make it clear that the presence of GEM or similar bodies, belonging to either Nicaragua or Costa Rica, is contrary to the Order of 8 March 2011. Such a modification would send out a message to both Parties that they are required to police access to the disputed territory and to prevent groups of private persons, whether they be environmentalists or not, from entering the disputed territory. This would be in line with a broad interpretation of the first provisional measure in the Order of 8 March 2011 and the object and purpose of the Order of 8 March 2011. Moreover it would accord with the third provisional measure calling on both Parties to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve".

(Signed) John DUGARD.
